Republic v Cabinet Secretary Ministry of Interior & Co-ordination of National Government & 4 others; Osman (Exparte Applicant) (Judicial Review E006 of 2024) [2025] KEHC 5529 (KLR) (30 April 2025) (Judgment)

Neutral citation: [2025] KEHC 5529 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

JUDICIAL REVIEW E006 OF 2024

JN ONYIEGO, J

APRIL 30, 2025

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW UNDER SECTION 8 AND 9 OF THE LAW REFORM ACT, CHAPTER 26 OF LAWS OF KENYA AND ORDER 53 OF THE CIVIL PROCEDURE RULES.

IN THE MATTER OF GAZETTE NOTICE NO. 15341 VOL. CXXVI – NO. 203 ON THE ESTABLISHMENT OF ADMINISTRATIVE UNITS.

IN THE MATTER OF FAIR ADMINISTRATIVE ACTIONS ACT (NO. 4 OF 2015)

IN THE MATTER OF: AN APPLICATION BY MOHAMED OSMAN FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS

IN THE MATTER OF ARTICLES 10 AND 47 OF THE CONSTITUTION OF KENYA

BETWEEN

REPUBLIC ..... APPLICANT

AND

HON CABINET SECRETARY MINISTRY OF INTERIOR & CO-ORDINATION OF NATIONAL GOVERNMENT ..... 1ST RESPONDENT

HON ATTORNEY GENERAL ..... 2ND RESPONDENT

REGIONAL COMMISSIONER NORTH EASTERN ..... 3RD RESPONDENT

COUNTY COMMISSIONER - MANDERA COUNTY ..... 4TH RESPONDENT

DEPUTY COUNTY COMMISSIONER - MANDERA EAST SUB-COUNTY ..... 5TH RESPONDENT

AND

MOHAMED OSMAN ..... EXPARTE APPLICANT

JUDGMENT

1. These Judicial review proceedings herein were initiated on 04.12.2024 under certificate of urgency, by way of an ex parte chamber summons of even date seeking for the following orders.

    a. Spent.

    b. Spent.

    c. Spent.

    d. A declaration that the 1st respondent's decision contained in Gazette Notice No. 15341 Vol. CXXVI No. 203 of 22.11.2024 is a violation of the applicant's constitutional right to fair administrative action and access to justice as guaranteed under articles 10 and 47 of *the constitution* and the provisions of section 4(1), (2) and (3) of the Fair Administrative Act 2015 and that the respondents should not proceed to conduct any interviews or recruitment of administrators to the said established Koromey Location and Dariqa Upper Sub – Location in Mandera East Sub – County in Mandera County.

    e. That the leave so granted to the applicant do operate as a stay of the decision of the 1st respondent contained in Gazette Notice No. 15341 Vol. CXXVI No. 203 of 22.11.2024 of 22.11.2024 establishing additional administrative units that is, Koromey Location and Dariqa Upper Sub – Location in Mandera East Sub – County in Mandera County.

    f. That costs of this application be provided for.

2. The proceedings were filed contemporaneously with a notice of motion dated 04.12.2024, subject of this ruling seeking for orders:

    i. That this Honourable Court be pleased to grant the applicant orders of certiorari quashing the decision of the 1st respondent contained in Gazette Notice No. 15341 Vol. CXXVI No. 203 of 22.11.2024 establishing the proposed administrative units that is Koromey Location and Dariqa Upper Sub – Location in Mandera East Sub – County in Mandera County.

    ii. That this Honourable Court be pleased to grant the applicant orders of prohibition prohibiting the respondents from conducting interviews and recruitment for the new administrators for the newly established administrative units of Koromey Location and Dariqa Upper Sub – Location in Mandera East Sub – County in Mandera County contained in Gazette Notice No. 15341 Vol. CXXVI No. 203 of 22.11.2024.

    iii. That costs of this application be provided for.

3. The applicant's case is hinged on the fact that he is a resident of Mandera East Sub County in Mandera County and that vide a Gazette Notice No. 15341 Vol. CXXVI – No. 203 of 22.11.2024, the 1st respondent purported to create additional administrative units in Mandera East Sub County, namely: Koromey Location and Dariqa Upper Sub Location. It was his case that the process of arriving at the decision to establish the additional units was not subjected to public participation as provided in the law.

4. That the establishment of the units was done without public participation. Additionally, that the locations established favoured certain communities while other locals were denied an opportunity to be appointed as administrators. That the same has affected the peaceful co-existence of the communities

of Mandera East Sub County in Mandera County. It was contended that the act by the 1st respondent in establishing the impugned units was not only irregular but also unconstitutional. To that end, this court was urged to grant the orders sought.

5. The application is supported by an affidavit sworn by Mohamed Osman deposing that being a farmer, businessman and elder of the area, he is conversant with the history of the residents of Mandera East Sub – County in Mandera County. He averred that by Gazette Notice No. 15341 Vol. CXXVI – No. 203 of 22.11.2024, the 1st respondent established Koromey Location and Dariqa Upper Sub Location in Mandera East Sub – County in Mandera County without involving the residents of Mandera East Sub – County in Mandera County.

6. In opposing the application, the respondents filed a replying affidavit sworn by Kepha Onyiso on 13.03.2025 who deposed that, he is a state counsel seconded to the Legal Unit in the Ministry of Interior and National Administration. He averred that prior to the gazettement of the subject administrative units, public participation was carried out. That the exercise followed all the necessary procedures and complied with the applicable legal frameworks to ensure that the communities in these locations had the opportunity to participate and express their views on the matter at hand.

7. He annexed a report allegedly forwarded to him by the 5th respondent indicating that public participation was carried out on 22.06.2024 for Koromey Location and Dariqa Upper Sub – location. The report detailed an account of the public participation process which included information on the meetings held, the attendance, signatures and feedback received from the local community. He averred that having reviewed the said report, he was satisfied that the same was not only accurate but also reflected the participation and input from the Koromey community.

8. He further averred that from the report, it was outright that the Principal Secretary Internal Security and National Administration had complied with the provisions governing the need for public participation as evidenced in the report. To that end, this court was urged to dismiss the application herein as the same was devoid of merit.

9. The suit was canvassed by way of written submissions.

10. The petitioner in his submissions dated 10.02.2025 urged that there was no communication whatsoever inviting members of the public for public participation prior to the establishment of the new administrative units namely: Koromey Location and Dariqa Upper Sub – location. That there was no evidence adduced by the respondents demonstrating on how the creation of the new administrative units was arrived at.

11. It was submitted that the creation of the new units as proposed favoured certain sections of the community to the exclusion of others, a fact that is likely to cause tension when the said units become functional. It was deposed that the residents of Mandera being predominantly pastoralists, the creation of the units will affect them economically if their land is unilaterally excised to pave way for the creation of the proposed administrative posts.

12. That the allegation that the new units will bring services closer to the people is hollow as only the locals know better the kind of services they need and how the local administrative units if need be, are to be demarcated. The applicant relied inter alia on the case of Kiambu County Government & 3 Others vs Robert Gakuru & Others [2017] eKLR to express the proposition that the issue of public participation is of immense significance considering the primacy it has been given in the supreme law of the country...that *the constitution* in article 10 binds all state organs, state officers, public officers and all persons in the discharge of public functions, highlights public participation as one of the ideals and aspirations of our democratic nation.

13. This court was therefore urged to find that the creation of the units was in violation of the law and the same ought to be quashed to allow public participation by the people of Mandera.

14. The respondents on the other hand in their submissions dated 17.03.202 identified two issues for determination as follows.:

    i. Whether proper participation was conducted on the creation of the new administrative units of Koromey Location and Dariqa Upper Sub – location.

    ii. Whether the applicant is entitled to the reliefs sought.

15. On the first issue, the court was referred to the principles underpinning public participation as set out in the case of Commission for the Implementation of *the constitution* vs Parliament of Kenya & Another [2013] eKLR where it was held that; what matters at the end of the day is proof of a reasonable opportunity being afforded to the members of the public and any interested parties to know about the issues and to have an adequate say. That without prejudice to the foregoing, the respondents demonstrated that public participation was conducted by providing this Court with the report and minutes conducted on 22.06.2024 at Koromey location by the 5th respondent. That the report provides a detailed account of the public participation process and includes information on the meetings held, the attendance, the signatures and the feedback received from the local community.

16. In the same breadth, the respondents relied on the case of Kaps Parking Limited & Another [2021] eKLR where it was held that;

> " the manner in which public participation is carried out depends on the matter at hand. That there is no straight jacket application of the principle of citizen participation. However, any mode of undertaking public participation which may be adopted by a public entity must favour the following basic parameters. First, the public be accorded reasonable access to the information which they are called upon to give their views on...secondly, the people be sensitized or be made to understand what they are called upon to consider and give their views on...third, the public must be accorded reasonable time to interrogate the information and to come up with its views and fourth, there must be a defined manner in which the public or stakeholders will tender their responses on the matter".

17. That from the report provided by the 5th respondent, it was clear that there cannot be any element of doubt that public participation wasn't conducted. That the report confirmed that indeed public participation conducted at Koromey location met both the qualitative and quantitative tests as enshrined in *the constitution*.

18. On the issue whether the applicant deserves the prayers herein, it was submitted that, the decision to create new units passed the constitutional and statutory tests of lawfulness, reasonableness and procedural fairness and therefore, the applicant did not show that the decision by the respondent was unlawful. This court was therefore urged to weigh the competing interests and dismiss the application for lack of merit.

19. I have considered the notice of motion together with the response and the submissions by both parties. In my view the key issue for determination is whether the prayers sought herein can issue.

20. The application herein is challenging the administrative action undertaken by the respondents in creating administrative units without conducting any public participation. Ordinarily, judicial review proceedings are filed under order 53 of the civil procedure rules and Sections 8 & 9 of the *law reform*

Act. Such an application is normally geared towards challenging the process on account of illegality, irrationality and procedural impropriety rather than the merit aspect.

21. However, case law post 2010 constitutional dispensation have held that a court can issue judicial review orders when the aspect of merit is brought to question. See Praxidis Namani Saisi & 7 Others vs DPP & 2 Others SC Petition No. 39 of 2019, where it was held that the scope of judicial review orders has been widened under the new constitution from process based judicial review to merit based judicial review.

22. In the English case of Council of Civil Service Unions vs Minister for the Civil Service (1985) A.C. 374,410 Lord Diplock set out the three heads which he described as "the grounds upon which administrative action is subject to control by judicial review". These grounds are illegality, irrationality and procedural impropriety. While discussing susceptibility of administrative actions to judicial review and, in the process defining these grounds, the learned judge stated as follows:

> " My Lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should for that reason only be immune from judicial review. Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety." That is not to say that further development on a case by case basis may not in course of time add further grounds...".

23. These grounds of illegality, irrationality and procedural impropriety are ordinarily regarded as the traditional grounds for judicial review. The court will intervene and may, in exercise of its discretion, grant the remedy for judicial review if any of them is proved to exist. But the foregoing is by no means exhaustive as was stated by Lord Diplock.

24. In the instant case, the applicant averred that vide a Gazette Notice No. 15341 Vol. CXXVI – No. 203 of 22.11.2024, the 1st respondent purported to create additional administrative units in Mandera East Sub County, namely: Koromey Location and Dariqa Upper Sub Location. It was his case that the process of arriving at the decision to establish the additional units was not subjected to public participation as provided in the law. In the same breadth, he urged that the units established favoured certain communities while other locals were denied an opportunity to be appointed as administrators.

25. According to the respondents, the averments were far from the truth as it was urged that indeed public participation was carried out as is required. Infact, it was urged that the same met both the qualitative and quantitative tests as enshrined in *the constitution*. The respondent further annexed a report by the 5th respondent detailing how public participation process was conducted. The information on the meetings held, the attendance, the signatures and the feedback received from the local community.

26. It is important to note that at this stage, more so after the respondents provided the report by the 5th respondent, it was mete for the applicant to controvert the same by way of evidence and not simply by allegations as alleged in his submissions. Of importance to note is the fact that the applicant was not pleased by the fact that the alleged units created by the 1st respondent favoured certain communities while other locals were denied an opportunity to be appointed as administrators.

27. I must however state that public participation does not mean inclusion of everybody in decision making nor does it require accounting for numbers with mathematical precision. What is material is what an ordinary person would reasonably add his voice into and conclude that it was sufficient or

adequate in the circumstances. From what the respondent tendered as evidence of public participation, I am persuaded that public participation took place.

28. In an attempt to answer the three grounds of illegality, irrationality and procedural impropriety as enumerated by Lord Diplock, it was incumbent upon the applicant to prove his allegations. The applicant should have controverted the averments made in the respondent's response.

29. It is trite that he who alleges must prove. The same is aptly captured under Sections 107(1), (2) and 109 of the *Evidence Act*, Cap. 80 of the Laws of Kenya which deals with the burden of proof. They state as here under: -Sections 107(1) and (2):

    1. Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

    2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

30. Section 109 on proof of particular fact stipulates that the burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

31. The foregoing provisions bring out what is referred to as the legal burden of proof. That burden remains on the person making the claims throughout the case.

32. In the case of Hellen Wangari Wangechi vs Carumera Muthini Gathua [2005] eKLR, as cited by the learned counsel for the respondents, Mativo J. (as he was) stated that:

> " Whether one likes it or not, the legal burden of proof is consciously, or unconsciously the test applied when coming to a decision in any particular case. The fact was succinctly put forth by Rajah JA in Britestone PTE Ltd v Smith & Associates Far East Ltd [2007] 4SLR (R) 855 at 59: 'The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him."

33. Since the burden of proving the existence of creation of the said units without public participation and the allegations that the 1st respondent favoured certain communities while other locals were denied an opportunity to be appointed as administrators, the applicant ought to have provided this court with evidence supporting his allegations. Noting that he did not shift the evidentiary burden as was expected of him. In a nut shell, it is my finding that the suit herein is in want of merit and as such, I dismiss it with no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 30TH DAY OF APRIL 2025

J. N. ONYIEGO

JUDGE