



**Kimosop & 2 others v Equalization Fund Advisory Board & another; County Technical Equalization Committee & another (Interested Parties) (Petition E007 of 2024) [2025] KEHC 11427 (KLR) (31 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11427 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KABARNET  
PETITION E007 OF 2024**

**RB NGETICH, J**

**JULY 31, 2025**

**IN THE MATTER OF ARTICLES 2(1), 3, 10, 19, 20, 21(3), 22(1),  
22(2),23, 27(4), 28, 35, 43, 47, 56, 159, 165 (3), 174, 258, 259,  
260 AND 204 (2) OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL  
RIGHTS AND FREEDOMS UNDER ARTICLES 27 AND 56 OF THE  
CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE EQUALIZATION FUND ACT**

**BETWEEN**

**HON. KIPRUTO KIMOSOP ..... 1<sup>ST</sup> PETITIONER**

**HON. PAUL LOLGISOI ..... 2<sup>ND</sup> PETITIONER**

**HON. WESLEY LEKAKIMON ..... 3<sup>RD</sup> PETITIONER**

**AND**

**EQUALIZATION FUND ADVISORY BOARD ..... 1<sup>ST</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**COUNTY TECHNICAL EQUALIZATION COMMITTEE INTERESTED PARTY  
SUB COUNTY EQUALIZATION TECHNICAL COMMITTEE .... INTERESTED  
PARTY**



## JUDGMENT

1. The Petitioners brings up this Petition under Articles 2[1], 3, 10, 19, 20, 21[3], 22[1], 22[2], 23, 27[4], 28, 35, 43, 47, 56, 159, 165 [3], 174, 258, 259, 260 and 204 [2] of *the Constitution* of Kenya 2010 seeking the following orders:-
  - a. A Declaration that the Petitioners have a right to Public Participation as marginalized persons as defined and enshrined under Article 10 [2] [b] of *the Constitution* of Kenya, 2010.
  - b. A Declaration that the economic and social rights guaranteed under Article 43 of *the Constitution* of Kenya, 2010 has been effectively denied to the Petitioners.
  - c. An Injunction preventing the proposed projects from being effected by the 1<sup>st</sup> Respondent without the public participation of the Petitioners herein.
  - d. An order quashing or otherwise setting aside the implementation of the intended proposed projects by the 1st Respondent.
  - e. An order for fresh public participation with all members of the three Wards of Baringo South Constituency by the 1st and 2nd Interested parties.
  - f. That this Honourable Court be pleased to make any further orders as it may deem just and fit. Costs of this Petition.

### THE PARTIES

2. The Petitioners are duly elected members of the Baringo County Assembly represent community members of Mochongoi Ward, Mukutani Ward and Ilchamus Ward acting on their oversight mandate on behalf of their electorates and in their best interests.
3. The 1<sup>st</sup> Respondent is a government parastatal established under Article 204 of *the Constitution* 2010 in an effort to address marginalization by ensuring that 0.5 % of the National Government's annual revenue is allocated to marginalized areas/Counties.
4. The 2<sup>nd</sup> Respondent is the Attorney General of the Republic of Kenya sued in its capacity as the legal advisor to the government of Kenya.
5. The 1<sup>st</sup> Interested party is the County Technical Equalization Committee having its registered office at Baringo County Headquarters and which is the County Branch of the Equalization Fund Advisory Board.
6. The 2<sup>nd</sup> Interested party is the Sub County Technical Equalization Committee having its registered office at Baringo South Sub County Headquarters and which is the Sub County Branch of the Equalization Fund Advisory Board.

### PETITIONER'S CASE

7. The petitioners aver that the Equalization Fund is established under Article 204 of *the Constitution* 2010 in an effort to address marginalization by ensuring that 0.5 % of the National Government's annual revenue is specifically allocated to marginalised areas.



8. That under the Equalization Fund Appropriation Act, Baringo South Constituency has been identified as a beneficiary of the Equalization Fund with three wards set to benefit being Ilchamus Ward, Mochongoi Ward and Mukutani Ward.
9. That the 1<sup>st</sup> Respondent was established under regulation 4 of the Public Finance Management Regulations through Gazette Notice No. 1711 of 2015 and is led by the Principal Secretary at the National Treasury who is tasked to supervise the execution of the fund working with the co-opted members and committees in the Marginalized areas to identify what is suitable for funding.
10. The 1<sup>st</sup> and 2<sup>nd</sup> Interested parties are established by the Equalization Fund Act 2023 in marginalized areas/Counties/Constituencies and before making decisions on conduct public participation by receiving presentations from the residents within the Constituency on the identified projects earmarked for development and submit the proposed projects to the 1<sup>st</sup> Respondent in the prescribed format.
11. That the Equalization Fund Act is clear that public participation is a core element in the decision-making process of identifying projects for development in the marginalized areas and funds ought to be denied if public participation is not conducted.
12. That in Baringo South Constituency, no public participation was conducted in approving the intended proposed projects that were forwarded for approval to the 1<sup>st</sup> Respondent that the Assistant County Commissioner, the Village Administrators or Baringo South Constituency Fund Manager did not call for public participation which projects should be developed for the residents of the three Wards and by 1<sup>st</sup> Respondent and 2<sup>nd</sup> Interested Parties, being government entities failing to conduct public participation, Petitioners have been discriminated against in violation of Article 10, 21 and have been deprived of their social economic rights as enshrined under Article 43[1] [b] which are perpetually threatened with violation and stand violated; that the proposed projects did not factor in their rights to education, health, roads, electricity, water and sanitary needs.
13. That the Petitioners are therefore facing a real threat of violation of their right to public participation and the fair, equitable, rightful and agreed upon use of the benefits of the Equalization Fund Act in violation of their social and economic rights as guaranteed by Article 43 of *the Constitution*.
14. The petition is supported by an affidavit sworn by Hon. Kipruto Kimosop who avers that he is duly authorized by the other Petitioners who bring this Petition on behalf of the residents of Mochongoi Ward, Ilchamus Ward and Mukutani Ward situated within Baringo South Constituency to swear this affidavit in support of the Petition.
15. He avers that the residents of Mochongoi Ward, Ilchamus Ward and Mukutani Ward situate within Baringo South Constituency on whose behalf they petition this Honourable Court are a marginalized community who have endured decades of lack of roads, electricity, water, sanitation and education facilities and the same continues to occur.
16. That the residents of Mochongoi Ward, Ilchamus Ward and Mukutani Ward situate within Baringo South Constituency are largely pastoralists and fishermen who depend on livestock rearing and fishing as their economic mainstay.
17. He restated grounds of the petition and averred that they stumbled upon information by the 1<sup>st</sup> Respondent herein and 1<sup>st</sup> and 2<sup>nd</sup> Interested parties herein on intended proposed projects under the Equalization Fund Act which did not invite their views and written memoranda and the same was submitted without our public participation.



18. That they are apprehensive that if their right to have public participation to be conducted by the 1<sup>st</sup> and 2<sup>nd</sup> Interested parties herein is denied, they shall be side lined and their rights violated without any legal recourse.
19. That without their public participation, the Petitioners herein shall not benefit from the Intended proposed projects and it will amount to a gross violation of our constitutional rights as marginalized persons and communities.
20. That their continued marginalization shall be rendered perpetual to their own detriment as residents living within Baringo South Constituency.

## THE RESPONSE

21. The respondents and the 1<sup>st</sup> and 2<sup>nd</sup> interested parties filed a replying affidavit sworn by Douglas Mutugi, the Deputy County Commissioner, Marigat Sub-County who is the Chair of the Sub-County Technical Equalization Committee on behalf of the Respondents and the Interested Parties herein.
22. He avers that the Petition has been brought in bad faith, misconceived and therefore an abuse of Court's process. That as part of government's efforts to address marginalization, the Equalization fund was established through Article 204 of *the Constitution* of Kenya, 2010, ensuring that 0.5 % of the National government annual revenue is specifically allocated to marginalized areas.
23. That, the PFM Equalization Fund Administration [PFM] Regulations, 2021 creates the Equalization Fund Advisory Board, The County Technical Equalization Committee, Sub-County Technical Equalization Committee and the Ward Project Identification and Implementation Committee.
24. That Equalization Fund Advisory Board works in conjunction with co-opted members and the committees in marginalized areas to pinpoint projects suitable for funding and the process is guided by the Board and the criteria for determining eligible projects encompasses various factors i.e. completion of stalled or ongoing projects, projects with benefits spanning multiple constituencies, projects outlined in the County Intergrated Development Plan [CIDP], financially viable projects and projects targeting extreme poverty alleviation.
25. That the Act obligates each County Commissioner of an eligible County to establish a committee at the Ward Level to be known as Project Identification and Implementation Committee comprising of: -
  - i. A chairperson who shall be the Assistant Sub-County Commissioner;
  - ii. The Village Administrators of areas defined by the Commission on Revenue Allocation as marginalized;
  - iii. A Representative of the women, youth, minorities and persons with disabilities from marginalized areas;
  - iv. A representative of the Constituency Development Fund committee member at the sub-county level; and
  - v. A representative of religious group or local Non- Governmental Organization [NGG] with office at ward level.
26. He avers that Section 19 of the Act outlines the functions of the said Project Identification and Implementation Committee as follows: -



- i. Undertake public participation, in beneficiary areas;
  - ii. Identify and prioritize project in beneficiary areas in line with Guidelines issued by the administrator of the Fund;
  - iii. Prepare and submit project funding proposals to sub-County Technical Committee.
  - iv. Provide oversight on project implementation.
27. That Baringo South Constituency which is made up of Four Wards namely:-Mukutani, Mochongoi, Ilchamus and Marigat were found eligible to benefit from the fund are as follows; Mukutani wards which comprises of 6 sub locations being Arabal, Ngelecha, Rugus, Loumgum, kiserian and Mukutani,Mochongoi Ward has four sub-Locations but two were earmarked to benefit from the Equalization Fund, these wards are Kasiela and Chebinyiny,Ilchamus Ward is made up of Four Sub-Locations being Longewan, Sintaan, Eldume and bailer.
28. That in Baringo County, the Project Identification, and Implementation Committees were constituted in each Ward, in strict compliance with the Act and all the Sub-County and Divisional/Ward Committees were well guided on how to identify projects and involve the residents in public participation.
29. That notices were issued to the members of the general public and all stakeholders inviting them to attend public participation forums in all the eligible sub-locations in Baringo South Constituency and the public forums were carried out as follows:-
- a. Public Participation in Ilchamus Ward was carried out on the 28<sup>th</sup> April, 2023 at Sintaan/ Longewan Dispensary Ground at 10.00am, presided over by the Assistant Chief Ngambo Location. That a notice was issued and attendance for the meeting was 48 members of the community.
  - b. Public participation was carried out at Eldume on the 26<sup>th</sup> of May 2023 at Lororo Baraza Tree. That a notice for the said meeting was issued on the 11<sup>th</sup> of May 2023 by the area Chief Ilchamus Location and the main agenda for the meeting was projects to be funded by Equalization Fund.
  - c. Public Participation in Muchongoi Ward was carried out on 9<sup>th</sup> March 2023, a Public Baraza was held at Sinoni Trading Centre and a notice for this meeting was issued by the Assistant Chief on the 3<sup>rd</sup> of March 2023 and among the day's agenda was the discussion of equalization fund.
  - d. A meeting was held in Chebinyiny Sub-Location on the 9<sup>th</sup> of February 2023 at 12.00 Noon at Nyibei Chief's Office.
  - e. Public Participation in Mukutani Ward was held on the 5<sup>th</sup> of February 2023, the Assistant Chief Ngelecha Sub-Location gave a notice for a public meeting that was to be held on 9<sup>th</sup> of February 2023 the meeting was held in Ngelecha Primary Ground from 10:00AM.
  - f. on the 1<sup>st</sup> of February 2023, the Assistant Chief Arabal Sub-Location called for a meeting to be held on the 7<sup>th</sup> of February 2023 at Embosos and the discussions of the meeting were recorded as well as the attendance.
  - g. Sensitization meeting was held at Chemorongion Center [Ng'oswe] on the 15<sup>th</sup> of February 2023 at 10;00 A.M. That the Chief issued a notice and the meeting was well attended.



- h. similar meeting was held in Rugus Sub-Location, Noosukuro Primary School ground on the 25<sup>th</sup> of February 2023 and a similar meeting was held in Rugus Sub-Location, Noosukuro Primary School ground on the 11<sup>th</sup> March 2023.
  - i. on the 10<sup>th</sup> of March 2023, a public baraza was held at Mukutani Centre, Mukutani Location and among the issues discussed were security roads which were proposed to be opened up to enhance security in the area.
30. That in line with the provisions of Section 19[c] that requires the committee to prepare and submit project funding proposal to the sub-County Committee, the committee, chaired by the Assistant Sub-County Committees after concluding public participation in Ilchamus ward the Project identification and implementation Committee convened a meeting on the 9<sup>th</sup> of May 2023 to identify projects that had been discussed by the public and prioritize those that would forwarded to Sub-County Technical Committee.
  31. That on the 29<sup>th</sup> March 2023, the Project Identification and Implementation Committee held its meeting at the ACC's Office at Mochongoi to discuss the projects that had been proposed through the public participation forum for purposes of forwarding the same to the Sub-County Technical Committee.
  32. In respect to Mukutani Ward, after thorough consultation with the community on the Fund and the projects that they felt needed to be funded by the Equalization Fund, the Ward Identification and Implementation met at the Chiefs Office in Kiserian convened a meeting on the 8<sup>th</sup> of May 2023 where the area MCA sent a Representative to attend the meeting.
  33. That the Ward Identification and Implementation Committees then concluded its mandate and handed over and on the 12<sup>th</sup> of May 2023, a meeting was Convened by the Deputy County Commissioner at his office and in the meeting, the reports compiled by the Ward Identification and Implementation Committee were read with each ward committee presenting the projects that had been proposed.
  34. That it is worthy to note that from the year 2005, the people of Baringo South were affected by banditry which caused them to flee their homes and abandon their livelihoods as bandits Invaded people's homes and even schools which subjected the people to abject poverty and this explains why the main issue that cut across all the wards was insecurity and the need to open up security roads to reduce/ eradicate the vice and hence need for the committee to prioritize the issue of opening up of the roads to allow people to resettle in their lands.
  35. That the roads identified from these wards were as follows:-

#### **A. MUKUTANI WARD**

- a. Rugus- Nolkopie-Sokotei- Ramach-Laramoru[25km,10 Culverts]
- b. Kasiela-Embossos-Losokoni-Akule-Tlpirisat-Mukutani [22km,6 Culverts]
- c. Noosukuro-Ilgurume-Paratalo-Katilomwa[20km, Culverts]
- d. Nenteiyo-Ndikir-Elenturupu--Ilgurum.e-Ngasotok-Ntunturian-Noosidan Sehemu[Nlurat]  
[20km,12 Culverts]
- e. Embosos-Kobo-Ngelcha[12km, 3 Culverts]
- f. Korkoron-Tikamur-Tandare-NgelechA[20KM, 3 Culverts]



- g. Kapindasum-Karma-Losokoni Road [10km,6 Culverts]
- h. Torokole-Noosidan-Lesiokonoo-Mukutani KDF Camp [20km, 4 Culverts]

## **B. MOCHONGOI WARD**

- a. Embosos-Kobo-Ngelcha[12km, 3 Culverts]
- b. Korkoron-Tikam.ur-Tandare-NgelechA[20KM, 3 Culverts]
- c. Kapindasum-Karma-Losokoni Road[10km,6 Culverts]
- d. Kapkosom-Sinoni-Lomulel-Sosionte-Lekiptak-Kapleiwo-Sandai Culverts]  
Ramacha-Katilomwa-Embossos] 12km, 6 Culverts] [28km, 7

## **C. ILCHAMUS WARD**

- a. Eldume-Ngoswe-Loropil-Salabani-Mesori-Kampi ya Samaki-Airstrip [14km, 6 Culverts]
- b. Construction of a Small standard bridge or a standard box Culvert at drift along Eldume-Kailer Road]
- 36. That the Committee embarked on its role of Evaluation and Prioritization of the proposed projects and recommended specific roads and projects that would support resettlement of displaced population in the belt.
- 37. That upon conclusion of the Sub-County Technical Committee meeting, the County Commissioner Convened the County Equalization Technical Committee meeting on the 2<sup>nd</sup> October 2023 held at the National Government CD Board Room and in this meeting, the Committee received the projects that had been evaluated and prioritized by the Sub-County Technical Committee.
- 38. That the county Equalization Technical Committee then further deliberated on the reports from the sub-counties and thereafter approved the proposed projects from all the eligible Sub-Counties in Baringo County and forwarded its findings to the County Executive member for Finance for onward submission to the Equalization Fund Advisory Board and to the Commission on Revenue Allocation.
- 39. That the Equalization Board then analyzed, considered and approved the proposed projects for implementation in the financial year as approved in the Equalization Fund Appropriation Act 2023 and on the 30<sup>th</sup> of June, based on the submitted projects, the Equalization Fund and Appropriation Act was passed by the Parliament and it stated the amount that each ward in the County was to get for the 2022/2023 Financial Year.
- 40. That the process of public participation began way back in the year 2018 during the development of the Second Marginalization Policy where specific Sub-Counties in Baringo County were on-boarded to date.
- 41. That in compliance with Section 19[d] which requires the project identification and implementation committee to provide an oversight on project implementation, several other public participation exercises were undertaken to sensitize and to inform the communities on the projects that had been approved for funding and in these meetings, it was unanimously further approved that the security roads as proposed be constructed and due to previous history of incompleteness due to security related reasons, the same be constructed by the Ministry of Defence instead of private contractors.



42. That the intended implementation of proposed projects was undertaken in strict compliance with the laid out statutory and constitutional processes on public participation that was carried out in a thorough manner throughout the marginalized areas and in line with Article 204 of *the Constitution*.
43. That from the notices, minutes and list of participants attached, meaningful and effective public participation exercises were carried out in eligible areas of Baringo South Constituency and a reasonable opportunity was accorded to the people at the lowest administrative units possible as intended by the fund's policies, acts, regulations and even *the constitution*.
44. That it is important that the Court notes that Baringo South Sub-County is not the only Sub-County in Baringo County that benefited from the Fund. Baringo North, Tiaty and Mogotio are also beneficiaries and public Participation exercises were done under the same guidance and the identified projects were approved by the Equalization Fund Board and implementation is ingoing.
45. That delayed implementation will therefore deny the people of Baringo South the opportunity to receive essential services that are meant to elevate them from the current perennial issues of banditry and insecurity thus further marginalizing them in relation to other parts of the Country.
46. That the interest of the public will be highly prejudiced and stopping the implementation of projects at this stage will further marginalize the community noting that that this fund has an expiry date. They urge this Court to dismiss the Petition with cost to the Respondents and interested parties.

#### **REPLYING AFFIDAVIT BY 1<sup>ST</sup> INTERESTED PARTY**

47. The Respondents 1<sup>st</sup> and 2<sup>nd</sup> interested parties, filed a replying affidavit sworn by Guyo Boru, the Chief Executive Officer, Equalization Fund and avers that the Equalisation Fund as established under Article 204 [1] of *the Constitution* of Kenya 2010 requires that one half per cent [0.5%] of all the revenue collected by the National Government each year, calculated on the basis of the most recent audited revenue received, as approved by the National Assembly, to be paid into the Fund.
48. That Article 204 [2] of *the Constitution* provides that the national government shall use the Equalisation Fund only to provide basic services including water, roads, health facilities and electricity to marginalized areas to the extent necessary to bring the quality of those services in those areas to the level generally enjoyed by the rest of the nation, so far as possible. The Fund has a lifespan of 20 years as per Article 204 [6], thus currently has less than 7 years outstanding.
49. That the Fund is operationalized by the Public Finance Management [Equalization Fund Administration] Regulations, 2021 which were published through Kenya Gazette supplement No, 69, Legal Notice No. 54 of 29<sup>th</sup> April 2021.
50. That as a pre-condition to the utilization of the Equalization Fund, Article 216[4] of *the Constitution* requires that the Commission on Revenue Allocation [CRA] determines, publishes and regularly reviews a policy in which it sets out the criteria by which to identify marginalized areas for purposes of Article 204 [2].
51. That in setting out the criteria for identifying marginalized areas, the CRA has so far developed and reviewed the First and Second Marginalization Policies. The First Marginalization. Policy which was developed in 2013 and approved by parliament in December 2014 identified fourteen [14] counties which have since benefited from the Fund.
52. That based on the outcome of the First Marginalization Policy including stakeholders' reviews and concerns on the underlying basis and criteria used to identify marginalized areas, the CA subsequently



- developed its Second Marginalization Policy in 2018 changing the unit of analysis from counties to sub-locations as areas of intervention.
53. That to identify marginalized areas, an index of deprivation was constructed using 2009 census data and by using information on:
    - a. Access to safe drinking water;
    - b. Use of improved sanitation;
    - c. Household use of electricity;
    - d. Primary school attendance rate; and
    - e. Secondary school attendance rate.
  54. That thus, the criterion for sharing of revenue from the Fund for the Second Policy is based on the population and deprivation index. The deprivation index was used to rank 7,131 areas from the most deprived to the least deprived.
  55. That the Second Marginalization Policy enhanced the coverage beyond the 14 counties to 1,424 marginalized areas [First quintile] which were identified as planning units spread in 366 wards 111 constituencies and. 34 counties: Waging., Bungoma, Busia, Bomet, Elgeyo Marakwet, Garissa, Homa-bay, Isiolo, Kajiado, Kericho, Kilifi, Kitui, Kisumu, Kwale, Laikipia, Lamu, Machakos, Mandera, Marsabit, Meru, Migori, Muranga, Nakuru, Nandi, Narok, Saniburu, Siaya, Tana River, Tharaka-Nithi, Taita Taveta, Trans Nzoia, Turkana, Wajir, and West Pokot.
  56. That Article 204 3[a] of *the Constitution* provides that for any expenditure to take place from the Equalization Fund an Appropriation Bill must have been enacted by Parliament, The Equalization Fund Appropriation Act 2023 was developed and enacted on 30<sup>th</sup> June 2023. The Appropriation Act 2023 provided for implementation of the Second Marginalization Policy.
  57. That the PFM [Equalisation Fund Administration] Regulations, 2021 provides for the establishment of three committees: County Technical Committee; Sub-County Technical Committee; and Project Identification and Implementation Committee to support in the project identification, implementation, monitoring and evaluation.
  58. That all the 34 identified beneficiary counties committees have been inducted and sensitized on EF Regulations, 2021, conducted public participation and identified projects for implementation as appropriated in the Equalisation Fund Appropriation Act 2023.
  59. That out of the 34 beneficiary Counties, 31 including Baringo County have submitted project proposals for consideration and approval by the Equalisation Fund Advisory Board. It is a requirement that upon receipt of public project proposal, the Board verifies and ensures that public participation was done in line with the regulations before approvals are done.
  60. That the total number of projects analyzed, considered and approved by the Board for implementation in the 2023/24 are 1,249 have commenced and are at different stages of implementation are being implemented for the first time at the Counties and as such continuous public participation exercises are being undertaken in all the beneficiary communities.
  61. That Baringo South Constituency submitted project proposals which were analyzed and considered by the Board and the resolutions communicated to the County Government for implementation.



62. That the Petitioner's/Applicant's petitions is otherwise in the circumstance herein incompetent, misconceived, misplaced and is an abuse of the court process as the petitioners rights and fundamental freedoms have not been breached in any manner as alleged or at all.

### REPLYING AFFIDAVIT BY 2<sup>ND</sup> INETRESTED PARTY

63. The 2<sup>nd</sup> interested party filed affidavit sworn by Wilson Cheserek Ruto, the County Executive Committee Member of the Treasury and Economic planning and the secretary where he avers that the Petition has been brought in bad faith, misconceived and therefore an abuse of the Honourable Court's process.
64. He further avers that the County treasury is tasked with consolidation of equalization fund projects as per section 20 of Equalization fund administration Regulations 2021 of [Public Finance Management Act, 2012](#).
65. He avers that on or about April 24, 2023, the members of the Sub-County Technical Committee at the sub-county level and the Project Identification Committees [PICC] at the ward level of Mogotio, Marigat, Baringo North, Tiaty East, and Tiaty West were requested to identify and submit projects to be implemented by the Equalization Fund by May 15, 2024, for approval. That they were also requested to attach minutes of public participation for the approved and identified projects.
66. That on 31<sup>st</sup> July, 2023 they received a request from the Equalization fund requesting for submissions of project proposals from the 1<sup>st</sup> interested party, where he is the Secretary, requesting for submissions of proposals to the 1<sup>st</sup> Respondent.
67. That in addition to submitting the project proposals to the 1<sup>st</sup> Respondent, they submitted work plans which had been approved and after submitting the proposals, it is the mandate of the Project Identification and Implementation Committee to conduct public participation. That after confirming that this has been conducted and finalized, the chairman of the first interested party convened a meeting on October 2, 2024, at the National Government CD Board room.
68. That in the said meeting it was emphasized that is important to ensure that public is engaged at the grassroots level in decision making and it was resolved that the minutes of the public participation will be attached, after deliberations and confirming that adequate public participation was conducted the 1<sup>st</sup> Interested party approved Baringo south equalization projects submitted by sub- County Technical Committee.
69. That the committee evaluated and deliberated on the projects comprehensively and approved the proposed projects as per the public participation reports; the committee considered the views of the public in its decision.
70. That after approval, he communicated the decision of the committee to the Equalization fund and they submitted the following documents:-
- a. Public participation signed attendance sheet at ward level
  - b. List of public participation projects suggested by Public.
  - c. Signed ward minutes approving the ward project based on priority.
71. That as per the public participation reports presented, the proposed roads are classified as security roads and according to a report prepared by the Recce team regarding the opening of security roads in



Baringo South Constituency on 4<sup>th</sup> August, 2024, it is evident that previous attempts to construct the roads have been hindered by insecurity and difficult terrain.

72. That Public interest supersedes private interest and the petitioner's interest in filing this petition must be weighed against the wishes and the security of the residents of Baringo south. That the interests of the residents of Baringo South Constituency will be highly prejudiced if the ongoing projects are stopped as once completed, the roads will boost security and improve the livelihood of the residents.
73. He avers that stopping the implementation of projects at this stage will further marginalize the community noting that that this fund has an expiry date and urge this court to dismiss the Application this Petition with cost to the Respondents and interested parties.

## **SUBMISSIONS**

74. Even though the petitioners informed the court that they had filed written submissions, the same are not on the court's record. submissions on the C.T.S are for the application for conservatory orders which application was abandoned by the Petitioners. The Respondents and the 1<sup>st</sup> and 2<sup>nd</sup> Interested party filed written submissions.

## **RESPONDENT'S & INTERESTED PARTIES' SUBMISSIONS**

75. The Respondents and interested parties identify the following as issues for determination.
  - a. Whether comprehensive public participation was conducted in all three wards located in Baringo South Constituency
  - b. Whether the public participation conducted meets the constitutional threshold
  - c. Whether the projects identified directly addresses the communities' needs and marginalization factors
76. On Whether comprehensive public participation was conducted in all three wards located in Baringo South Constituency, the 1<sup>st</sup> interested party submit that extensive, meaningful and well-documented public participation was conducted in all three wards; Mukutani, Mochongoi, and Ilchamus.
77. That regarding the Ilchamus ward, public participation was conducted on April 28, 2023 at Sintaan/ Longewan Dispensary Ground, where it was presided over by the Assistant Chief Ngambo Location, with 48 community members in attendance, where attendance lists and minutes were recorded. That furthermore, the community members were notified properly about the meeting through a notice, where the community members were informed that the agenda entailed public participation on the Equalisation Fund.
78. That in addition, public participation was also carried out at Eldume/Kailer on May 26, 2023, at Lororo Baraza Tree, with prior notice issued on May 11, 2023, by the area Chief Ilchamus Location and the main agenda specifically addressed projects to be funded by the Equalization Fund and 63 community members of the community were in attendance and minutes were recorded.
79. That with regards to the Muchongoi ward, a public baraza was held on 9th March 2023, at Sinoni Trading Centre, with the issuance of its notice by the Assistant Chief on March 3, 2023 and the discussion focused on the Equalization Fund.
80. They submit that another meeting was held in Chebinyiny Sub-Location on February 9, 2023, at Nyibei Chiefs Office, with an attendance list showing the presence of thirty-one community members and minutes were recorded capturing the discussions.



81. That in looking at public participation in Mukutani Ward, they submit that multiple public participation exercises were conducted. That on the 1<sup>st</sup> of February 2023, the Assistant Chief of Arabal Sub-Location called for a meeting to be held on the 7<sup>th</sup> of February 2023 at Embosos. That during the meeting, the discussions were noted down in the form of minutes and an attendance list capturing the community members in attendance was recorded as well and there were 32 community members in attendance.
82. That moreover, on the 5<sup>th</sup> of February 2023, the Assistant Chief of Ngelecha Sub-Location gave a notice for a public meeting that was to be held on 9<sup>th</sup> February 2023 at Ngelecha Primary Ground from 10:00 AM, forty members of the community were in attendance of this public participation meeting where minutes were recorded too.
83. They submit that another sensitization meeting was held at Chemorongion centre [Ng'oswe] on the 15<sup>th</sup> of February 2023 at 10.00 am where fifty-one community members were present and minutes recorded. This meeting was as a result of the public notice dated 9<sup>th</sup> February 2023 that was issued by the senior chief of Arabal location.
84. That a similar meeting was held in Rugus Sub-location at Noosukuro Primary School on 25<sup>th</sup> of February 2023 where thirty community members attended and minutes taken down.
85. That in addition, similar meeting was held in Rugus Sub-location at Noosukuro Primary School on the 11<sup>th</sup> March, 2023 where twenty-eight community members were in attendance, an attendance list was recorded and minutes taken down.
86. That another public participation exercise was carried out at Mukutani Centre on March 10, 2023 where thirty community members were in attendance. They rely on the minutes taken down during the public barasa where some of the issues deliberated on include security roads and peace and security.
87. On Whether the public participation conducted meets the constitutional threshold, they submit that the key parameters for effective public participation in decision-making processes entail; adequate notice, accessibility, inclusive representation, substantive discussion, authenticity and documentation.
88. That the court will take judicial notice of the fact that the area is occupied by a pastoralist community who are not located in one place at a time. That the fact that members of such a sparsely populated area attended the meetings is a clear indication that the public was well informed of the public participation. That further it is important to note that this is pastoralist community spending most time in the grazing wilderness hence newspapers are not the adequate way to communicate. That the local administration being chiefs and their assistants are the effective way of public notifications which was duly applied for all meetings and holding the meetings at the trading center where all members of the community meet.
89. They submit that the public participation conducted was both quantitatively and qualitatively substantive; hence it was conducted in good faith, that the Equalisation Fund is operationalized by the Public Finance Management [Equalization Fund Administration] Regulations, 2021 which establishes an unincorporated board, the Equalization Fund Advisory Board [EFAB], the County Technical Equalisation Committee, Sub-County Technical Equalization Committee and the Ward Project Identification and Implementation Committee.
90. That is provided for by Section 19[c] of the Public Finance Management [Equalization Fund Administration] Regulations, 2021 in all three wards, i.e., Mukutani, Mochongoi, and Ilchamus, the respective Ward Project Identification and Implementation Committees looked into the deliberations by the public and forwarded them to the Sub-County Technical Committees.



91. That it is imperative that the Court notes that Baringo South Sub-County is not the only sub-county in Baringo County that benefitted from the Fund. That Baringo North, Tiaty, and Mogotio are also beneficiaries and Public participation exercises were done under the same guidance, the identified projects were approved by the Equalization Fund Board and implementation is ongoing.
92. They humbly submit that the process demonstrates strict adherence to procedural requirements:
  - i. Ward identification and implementation committees were properly constituted.
  - ii. Public participation exercises were conducted before project identification
  - iii. Projects identified through public participation were properly forwarded to the Sub-County Technical Committee
  - iv. Appropriate oversight was maintained through the County Technical Committee.
  - v. Projects received appropriate regulatory approval through the Equalisation Fund Advisory Board [EFAB] and the Commission on Revenue Allocation.
  - vi. The process culminated in proper legislative approval through the Public Finance Management [Equalisation Fund Administration] Act, 2021.
93. On Whether the projects identified directly address community needs and marginalization factors, they submit that one of the pillars of *the Constitution* of Kenya, 2010, was the concept of devolution or decentralization of government services from the capital of Kenya. That the Equalization Fund is a creature of *the Constitution* of Kenya, 2010, under Article 204. That as per Regulation 15 of the Public Finance Management [Equalisation Fund Administration] Regulations, 2021, the County Technical Committee has the mandate to approve all the projects to be financed from the fund and also the responsibility of submitting the proposals to the Equalisation Fund Advisory Board.
94. That in line with the Public Finance Management [Equalisation Fund Administration] Act, 2021, the Equalization Fund Advisory Board [EFAB] called for the submission of project proposals from the County Technical Committee of all the eligible counties on 31st July 2023. That Consequently, the Baringo County Technical Committee submitted proposals for funding to the EFAB on the 23rd of October 2023 through the County Executive Member responsible for finance pursuant to Regulation 13 of the Public Finance Management [Equalisation Fund Administration] Regulations, 2021. Hence, the proposals from Baringo contained 147 projects spread in the sectors of water [51], Roads [19], energy [6], Health [17], education [53] and others[1].
95. That the enlisted projects are located in 15 wards including Mochongoi, Mukutani and Ilchamus and were proposed by the Ward Identification Committees as evidenced by the minutes. That these projects were not arbitrarily selected but identified based on genuine community needs.
96. That in recent times, as witnessed not only by the residents of Mochongoi, Mukutani and Ilchamus but most Kenyans also, events and cases based on insecurity issues especially cyclic banditry incidences, have been prevalent in Baringo County.
97. That the same sentiments have been brought out through the public participation minutes, and feedback reports tabled before this Honourable Court, as the main aim for the construction of the security roads is to improve security in Mochongoi, Mukutani and Ilchamus, open up the roads to reduce and eradicate the vice, and to allow the people to resettle in their lands.
98. They submit that the projects identified for each ward focus on road infrastructure development and culvert construction which directly addresses:



- a. Security concerns identified by community members
  - b. Access to markets, schools and healthcare facilities
  - c. Economic development through improved transportation networks
  - d. Connectivity between previously isolated communities.
99. That these projects align perfectly with Article 174 of *the constitution* of Kenya, 2010 which includes among the objects of devolution; the recognition of right of communities to manage their own affairs and to further their development as well as to ensure equitable sharing of national and local resources throughout Kenya.
100. The 1<sup>st</sup> Interested party respectfully submits that the Petition lacks merit and should be dismissed with costs as comprehensive and meaningful public participation was conducted across all three wards in Baringo South Constituency-Mukutani, Mochongoi, and Ilchamus-in strict compliance with constitutional requirements. Multiple baraza meetings were held at accessible venues, proper notices were issued, substantial community attendance was recorded, and detailed minutes were kept, satisfying both the quantitative and qualitative aspects of public participation.
101. That public participation conducted unequivocally meets the constitutional threshold as the process was inclusive, accessible, transparent, and substantive, allowing community members' genuine opportunities to contribute to project identification and implementation decisions. The Ward Project Identification and Implementation Committees duly considered community input before forwarding proposals to higher administrative levels.
102. That the identified projects--particularly the road infrastructure developments--directly addresses the acute marginalization factors affecting these communities, including security concerns, limited access to essential services, and economic isolation. These projects fulfill the fundamental purpose of the Equalisation Fund as envisioned under Article 204[2] of *the Constitution*: bringing basic services in marginalized areas to the level generally enjoyed by the rest of the nation.
103. That the Respondents and Interested Parties have meticulously followed the procedural and substantive requirements established under *the Constitution* of Kenya, 2010, and the Public Finance Management [Equalisation Fund Administration] Regulations, 2021. The selection and implementation of projects were conducted through a participatory, transparent, and accountable process that balances community needs with available resources.
104. They submit that the Petitioners have failed to establish any constitutional violations or procedural irregularities in the Equalization Fund project identification and implementation process and for the foregoing reasons, they urge this Honourable Court to dismiss the Petition in its entirety and affirm the validity of the Equalization Fund projects identified for implementation in Baringo South Constituency. They submit that costs follow the event.

## **ANALYSIS AND DETERMINATION**

105. The main issue for determination is Whether the process of identification and implementation of Equalization Fund projects in Baringo South Constituency complied with the constitutional requirements of public participation under Articles 10 and 201 of *the Constitution*.
106. Public participation is a fundamental national value under Article 10[2][a] of *the Constitution*. Article 201[a] further requires that public finance be managed in a transparent and accountable manner, with



participation of the people. The Equalization Fund, being a special fund under Article 204, must similarly be administered in accordance with these principles.

107. In *Robert N. Gakuru & Others v Governor, Kiambu County & 3 Others* [2014] eKLR, the High Court emphasized that:

“Public participation is not a mere formality or technical exercise. It must be meaningful, inclusive and undertaken in good faith.”

108. The petitioner alleged that the residents of Baringo South were not consulted in the identification of projects funded under the Equalization Fund. However, the respondents submitted documentary evidence demonstrating that a series of structured consultative forums were held at the ward level prior to finalization of the project list. In particular the following activities were undertaken:-On 13<sup>th</sup> September 2023, a public baraza was convened at Mochongoi Ward, attended by local residents, assistant chiefs, village elders, and community-based organizations. The minutes [annexure ‘R3’] indicate that proposals were received for improvement of rural access roads, rehabilitation of water points, and construction of health facilities. On 19<sup>th</sup> September 2023, a similar forum was held at Marigat Social Hall, covering Ilchamus and Marigat Wards. Attendance registers [annexure ‘R4’] show over 80 participants, including women’s groups and youth leaders. Project priorities such as solar-powered boreholes and dispensary upgrades were discussed. Public notices [annexure ‘R2’] were circulated via chiefs’ offices and public noticeboards at market centers one week prior to the scheduled meetings. A summary consultation report [annexure ‘R5’] consolidating the outcomes of these forums was later shared with the County Steering Committee and submitted to the Equalization Fund Advisory Board for consideration.

109. The court finds that these efforts — involving advance notice, open meetings, documentation of views, and integration of local priorities into project planning — demonstrate substantive and structured public participation.

110. While the petitioner questioned the adequacy and inclusivity of these forums, he did not present any contrary evidence showing that meetings were staged, selective, or closed to the general public. The court also notes that the petitioner did not attend the meetings or submit a complaint at the material time, which would have helped contextualize the claim.

111. As stated in *Minister of Health v New Clicks South Africa* [2006]:

“Public involvement does not require that every individual’s view be adopted or that there be universal attendance. What matters is that the public is given a reasonable opportunity to know, attend, and be heard.”

112. On this basis, the court is satisfied that the respondents took reasonable and adequate steps to involve the public in accordance in compliance with the constitutional.

113. In view of the that evidence reflects actual and documented public engagement in Baringo South, I find that respondents have not breached Articles 10 or 201 of *the Constitution*. The petitioner having failed to show that the respondents acted in bad faith, concealed the process, or denied any segment of the population a chance to participate, I find that there is no constitutional violation proved.

#### **[ii] Whether the petitioner is entitled to the reliefs sought**

114. Having failed to establish exclusion, procedural irregularity, or bad faith on the part of the respondents, the petitioner is not entitled to the declaratory or injunctive reliefs sought. However, the court



reiterates that State organs have a continuing obligation to deepen participatory processes, ensure representation of all groups [including women, youth, and persons with disabilities], and retain robust records of all such engagements.

115. Final Orders:-

- a. The Petition is hereby dismissed.
- b. Each party shall bear its own costs, given the public interest nature of the petition and the importance of promoting accountability in public project implementation.

**JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 31<sup>ST</sup> DAY OF JULY 2025.**

**RACHEL NGETICH**

**JUDGE**

In the presence of:

Ms. Nduta for petitioners.

Ms. Kaimogul for 1<sup>st</sup> Interested party.

Ms. Adomeyon for 2<sup>nd</sup> Respondent.

