



**Kombwayo & 17 others v County Government of Migori & 2 others; County Assembly of Migori & another (Interested Parties) (Constitutional Petition E004 of 2021) [2024] KEHC 17041 (KLR) (28 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 17041 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT MIGORI**  
**CONSTITUTIONAL PETITION E004 OF 2021**  
**RPV WENDOH, J**  
**MAY 28, 2024**  
**IN THE MATTER OF ARTICLES**  
**1,2,3,6,10,19,20,21,22,23,27,35,42,47,70,89,165,201,227,176,258**  
**AND 259 OF THE CONSTITUTION**  
**AND**  
**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF THE**  
**CONSTITUTION**  
**AND**  
**IN THE MATTER OF SECTIONS 3, 6A, 33, 48, 87, 104, AND 115 OF**  
**THE COUNTY GOVERNMENT ACT 2012**  
**AND**  
**IN THE MATTER OF SECTIONS 3 AND 102 OF THE PUBLIC**  
**FINANCE MANAGEMENT ACT**  
**AND**  
**IN THE MATTER OF THE PRINCIPLE OF PUBLIC PARTICIPATION IN THE**  
**PLANS TO RELOCATE THE COUNTY HEADQUARTERS OF MIGORI**  
**COUNTY FROM MIGORI TOWN, SUNA EAST SUB-COUNTY, SUNA**  
**CENTRAL WARD TO THE PROPOSED NEW LOCATION**  
  
**BETWEEN**  
**WILSON OMONDI KOMBWAYO & 17 OTHERS & 17 OTHERS & 17**  
**OTHERS ..... PETITIONER**



AND

COUNTY GOVERNMENT OF MIGORI ..... 1<sup>ST</sup> RESPONDENT  
GOVERNOR, COUNTY GOVERNMENT OF MIGORI ..... 2<sup>ND</sup> RESPONDENT  
COUNTY SECRETARY, COUNTY GOVERNMENT OF MIGORI .... 3<sup>RD</sup>  
RESPONDENT

AND

COUNTY ASSEMBLY OF MIGORI ..... INTERESTED PARTY  
MASHIN CONSTRUCTION COMPANY LIMITED ..... INTERESTED PARTY

### JUDGMENT

1. By a Petition dated 10/5/2021, the Petitioners, Wilson Omondi Kombwayo and 17 others, seek the following orders: -
  - a. A Declaration be and is hereby made that the Respondents have violated the provisions of Articles 10,35,42,47,70,201 and 227 of the Constitution of Kenya 2010 and the guiding principles in section 3 of the Public Finance Act.
  - b. A Declaration be and is hereby made that the proposed construction of Migori County Headquarters as advertised and accepted through the tender No. CGM/EXEC/008/2020 – 2021 and negotiation No. 843093 violated section 6A of the County Government Act and Articles 10 and 35 of the Constitution of Kenya, 2010 and is therefore null and void.
  - c. A Declaration be and is hereby made that the decision to relocate the County Headquarters of Migori County from Migori Urban area to the undisclosed location and/or any other place in the county is devoid of the principles of public participation, is illegal, unconstitutional, null and void.
  - d. An Order of Certiorari be and is hereby issued quashing the decisions of the 1<sup>st</sup> Respondent contained in the letter dated 10<sup>th</sup> March, 2021 accepting the application and/or bid of Mashin Construction Company Limited for the proposed construction of the county government of Migori headquarters, tender No. CGM/EXEC/008/2020 – 2021 and negotiation No. 843093, at an evaluated sum of Four hundred and ninety seven million, eight hundred and twenty six thousand, seven hundred and forty shillings (497,826,740).
  - e. An Order of Mandamus be and is hereby issued against the Respondents compelling them to forthwith and permanently stop the ongoing tendering process for the proposed construction of the Migori County Government Headquarters tender No. CGM/EXEC/008/2020 – 2021 and negotiation No. 843093
  - f. An Order of Prohibition be and is hereby issued restraining the Respondents from signing any contract for the proposed construction of the County Government of Migori headquarters on the basis of the impugned tender No. CGM/EXEC/008/2020 – 2021 and negotiation No. 843093 and prohibiting any further engagements on the process of relocating the county headquarters against the laid down statutory provisions.



- g. An Order be and is hereby issued that the acceptance of the application by Mashin Construction Company Limited for the proposed construction of the Migori County Government headquarters is illegal, null and void ab initio and therefore of no effect.
  - h. A Declaratory Order that the Migori County headquarters remains in Migori Urban area where the county government offices are presently contained and/or put up unless otherwise lawfully transferred.
  - i. An Order of compensation by way of general damages to the Petitioners herein for the violation and threats to their rights under Articles 35,42 and 47 of the Constitution of Kenya, 2010.
  - j. Costs of the Petition be borne by the Respondents.
2. The Petition is premised on the 78 grounds in the body of Petition and the Supporting Affidavit of the 1<sup>st</sup> Petitioner sworn on 10/5/2021 and a Supplementary Affidavit sworn on the 16/07/2021, on his own behalf and on behalf of his co-petitioners. The Petitioner avers that the Migori County Government has its headquarters at Migori town within Suna East Constituency and which has been lawfully operational since the inception of the Migori County Government; that all the operations of the County Government have always been undertaken from the said offices; that they were shocked to find out that there was a tender advertisement for the proposed construction of the Migori county government headquarters which neither disclosed the proposed location nor had any resolution passed/approved by the Migori County Assembly to relocate or transfer the Headquarters.
  3. Subsequently, the Respondents awarded the tender to the 2<sup>nd</sup> Interested Party vide tender No. CGM/EXEC/008/2020 – 2021 and negotiation No. 843093; without clarifying some of the key issues; that the bid was accepted at Kshs. 497,826,740/=without a budgetary allocation for the same and any form of public participation especially where such colossal sums are set to be utilized. Filed simultaneously with the Petition is the Notice of Motion dated 10/5/2021 which sought conservatory orders. The Petitioners appeared before the court on 2/6/2021 under certificate of urgency having served the Respondent who did not appear. The court granted a conservatory order in terms of prayer2 staying the letter dated 10<sup>th</sup> March 2021 accepting or awarding the tender CUM/EXCC/088/2020-21 to the 2<sup>nd</sup> interested party for Construction of Migori County Government Headquarters.
  4. However, sometimes on 07/06/2021, the Respondents unlawfully and in breach of the interim orders proceeded to identify a site measuring approx. 16.65Acres at Nyanchabu, Suna West Sub-County and are in the process of preparing the site for construction of the County headquarters, which is expected to accommodate all the County Government departments.
  5. The Petitioners aver that the Respondents have violated the principles of public participation under Articles 10 and 201 of the Constitution as read with sections 6A, 30, 87, 104 and 115 of the County Government Act, sections 3 and 102 of the Public Finance Management Act which provides for openness and accountability in all financial matters. Further, that no impact assessment has been carried out by the relevant body on the effects of the said proposed construction.
  6. Neither the Respondents nor the Interested Parties filed a response to the Petition despite being duly served with the same and being granted an opportunity to respond to the same. The Petition will therefore be deemed to be unopposed.
  7. The Petition was canvassed by way of written submissions, the Petitioners filed their submissions dated 14/01/2024 together with authorities.



## Petitioners Submissions

8. Counsel submitted that no evidence had been adduced by the Respondents or the Interested Parties to demonstrate that a resolution was passed by at least two-thirds of the members of the Migori County Assembly to relocate/ transfer the headquarters before issuing the advert or commencing construction. This, the Petitioner's maintained, was contrary to the outlined provisions of section 6A of the County Assembly Act and is therefore null and void.
9. Further, it was the petitioners' submission that the Respondents violated the principles of public participation guaranteed under Article 10 and 201 of the *Constitution* and sections 6A, 30, 87, 104 and 115 of the County Government Act by failing to involve the residents of Migori County, particularly the residents of Nyanchabu, where the new headquarters are intended to be moved. The Respondents had an obligation to facilitate public participation before the decision was arrived at. He relied on the cases of Robert N. Gakuru & Others vs Kiambu County Government & 3 Others [2014] eKLR in expressing the importance of public participation.
10. It was also submitted that the Respondents disregarded the national values and principles of good governance enshrined under Article 10 of the *Constitution* in making or implementing public policy decisions; that there has been wilful violation and utter non-commitment to upholding the said principles. It was further submitted that there has not been a prudent and responsible use of public resources as stipulated under Article 201 of the *Constitution* as read with sections 3 and 102 of the *Public Finance Management Act* which provides for openness and accountability including public participation in all financial matters. The construction of the proposed county headquarters has a budget estimate of Kshs. 497,826,740/- without transparent justification or public participation is a major affront to the constitutional dictates on fiscal management and responsible utilization of public resources; that the Respondents circumvented the involvement of the County Assembly in the decision to relocate the county headquarters.
11. That the rights of the petitioners to information as guaranteed under Article 35 of the *Constitution* was violated by the Respondents by deliberately failing to disclose the proposed location of the new county headquarters. The said location was only disclosed after the award of the tender to the 2<sup>nd</sup> Interested Party. Further, there was no environmental impact assessment for the said location.
12. Counsel also submitted that Articles 42 and 47 were violated by the Respondent since due process and statutory provisions were not followed in the attempt to relocate the county headquarters contrary to the rule of law.
13. Neither the Respondents nor the Interested Parties filed any submissions and the petitioners' case thus deemed uncontroverted / unchallenged.

## Analysis and Determination

14. I have looked at the Petition dated 10/5/2021, the Affidavit in Support and the Annexures thereto and the Petitioners submissions in their totality. It is my considered view that the following issues arise for determination as follows:-
  - a. Whether the Respondent complied with the due process of law before advertising the tender for construction of the county government headquarters.
  - b. Whether there was adequate and sufficient public participation
  - c. Whether the petitioners are entitled to the reliefs sought in the Petition.



### **Whether the Respondents complied with the due process of law before advertising the tender for construction of the county government headquarters**

15. The Petition herein is primarily centred on the issue of public participation and the non-compliance with the statutory provisions enshrined in the Constitution, the County Government Act and the Public Finance Management Act.
16. It is the Petitioners' claim that the Respondents did not strictly comply with the laid down procedures as outlined in Article 10, 35, 42, 47, 70, 201 and 227 of the Constitution, sections 6A, 30, 87, 104 and 115 of the County Government Act and sections 3 and 102 of the Public Finance Management Act. Before proceeding to advertise the tender for the construction of the new county headquarters. As a result of the said violation, the petitioners maintained that the entire process was illegal, unconstitutional, null and void and consequently urged the court to grant the orders sought in the petition.
17. Section 6A of the County Government Act on the location of county governments provides as follows -
  1. Each of the county governments shall be located in the respective physical location set out in the Third Schedule.
  2. A County Assembly may, by a resolution supported by at least two-thirds of the members of the County Assembly and with the approval of Parliament, transfer the headquarters of the county government from the physical location specified in the Third Schedule to such other physical location as it may consider appropriate.
  3. A County Assembly shall, before passing a resolution under subsection (2), facilitate public participation.
18. The section above outlines two conditions as a prerequisite before the headquarter of a County Government can be transferred from the physical location specified in the Third Schedule;
  - a. A resolution supported by at least two-thirds of the members of the County Assembly;
  - b. There has to be approval of the Parliament;
  - c. Public participation.
19. It is evident that the Respondents did not comply with the above prerequisites. There is no proof that a resolution was passed by the Migori County Assembly supported by two-thirds of the members of county assembly, and no proof that the said resolution was approved by the National Assembly.
20. The consequence for the non-compliance with the outlined statutory procedure therefore makes the entire exercise null and void ab initio.

### **Whether there was adequate and sufficient public participation**

21. Public participation is a Constitutional imperative aimed at ensuring that views of the citizens have to be taken into account before any decision affecting the public is taken. Article 201 (a) of the Constitution guarantees the need for public participation in public finance matters and provides as follows: -
  201. The following principles shall guide all aspects of public finance in the Republic—



- (a) there shall be openness and accountability, including public participation in financial matters;
22. Section 207 of the *Public Finance Management Act* also provides for a participatory governance and emphasizes the need for public participation. Section 87 of the County Government Act also provides for the principles of citizen participation in Counties. It states as follows: -
- a. timely access to information, data, documents, and other information relevant or related to policy formulation and implementation;
  - b. reasonable access to the process of formulating and implementing policies, laws, and regulations, including the approval of development proposals, projects and budgets, the granting of permits and the establishment of specific performance standards;
  - c. protection and promotion of the interest and rights of minorities, marginalized groups and communities and their access to relevant information;
  - d. legal standing to interested or affected persons, organizations, and where pertinent, communities, to appeal from or, review decisions, or redress grievances, with particular emphasis on persons and traditionally marginalized communities, including women, the youth, and disadvantaged communities;
  - e. reasonable balance in the roles and obligations of county governments and non-state actors in decision-making processes to promote shared responsibility and partnership, and to provide complementary authority and oversight;
  - f. promotion of public-private partnerships, such as joint committees, technical teams, and citizen commissions, to encourage direct dialogue and concerted action on sustainable development; and
  - g. recognition and promotion of the reciprocal roles of non-state actors' participation and governmental facilitation and oversight.
23. There is no proof that the said principles on public participation as outlined in the *Constitution* and County Government Act were complied with it is the petitioners' contention that the tender was advertised without disclosing the proposed location for the transfer of the headquarter and was only made known after the tender was accepted by the 2<sup>nd</sup> Interested Party. This crucial information on the proposed development was not made readily available.
24. What amounts to effective and adequate public participation has not been defined by either the *Constitution* or statutes. However, courts have over the years attempted to explain what amounts to effective, reasonable and appropriate degree of public participation. In the case of *Khelef Khalifa & 2 others versus Independent Electoral and Boundaries Commission* and another [2017] eKLR, the court was of the view that to attain the principle of public participation in a decision making process, the following parameters are required;
- a) There must be evidence of inclusivity that is to say that all stakeholders or those affected by an administrative policy, or law must be given an opportunity to express or ventilate their view well aware of what is at stake.
  - b) The affected people must be given sufficient notice of the nature of the decision to be made and when the consultations will be held. The information must be disseminated through public



barazas, churches, mosques, print and electronic media and other avenues to ensure that the information reaches the targeted audience.

- c) The government agency or a public officer in charge of the programme of public participation must of essence take into account the participation of the governed in quantitative as well as qualitative way. In other words, the engagement must be meaningful and done in good faith rather than a mere formality.
  - d) Public participation calls for innovation and some level of malleability depending on the nature of subject matter for example culture, geographical issues, logistical constraints etc. The test to be applied is effectiveness and efficiency. The question to be asked is, is the mechanism effective in achieving sufficient public participation.
  - e) Public participation does not mean that everyone must give their views on the issue at hand as to attain such a standard at times can be impractical. A public participation exercise must however show intentional inclusivity and diversity. A programme of public participation cannot disregard bona fide major stakeholders otherwise the program would be ineffective and illegal. Those mostly affected by the policy must have a bigger say in that policy, legislation or action and their views must be sought, taken into account. In other words, the view of the major stakeholders must be captured through minutes or any other proof that shows that their view were captured and had a bearing in the final decision.
  - f) Public participation is not a public relations exercise. It must be meaningful and done in good faith.
25. Guided by the above decision, it is not in dispute that there was no public participation despite the Constitution and the Statutes strictly providing for the same. There is no demonstration that the parameters of effective public participation outlined above was carried out or complied with. Despite the colossal amounts involved in the proposed construction, of Kshs. 497,826,714 there was no citizen involvement and engagement. Consequently, any action undertaken including the tender advertisement of the proposed transfer and construction of the Migori County Headquarters without the involvement of the public and residents of Migori County through public participation is unconstitutional, null and void.

### **Whether the petitioners are entitled to the reliefs sought in the Petition**

26. As held earlier in the above judgment, Khelef case (supra), it is evident that the Respondents failed to strictly comply with the due process of law as outlined under the mentioned sections if the Constitution, the County Government Act and Public Finance Management Act and further, failed to conduct public participation as a prerequisite before proceeding.
27. It is my considered view that the petitioners have sufficiently demonstrated that their rights have been violated and/or is threatened to be violated with specificity as held in the leading case of Anarita Karimi Njeru.
28. In view of the foregoing, it is the finding of this court that the petitioners having established and proved a violation of their rights and therefore entitled to the reliefs sought.
29. In the premises, I find that the Petition dated 10/5/2021 is merited and is hereby allowed in the following terms: -



- i. A Declaration is hereby made that the Respondents have violated the provisions of Articles 10,35,42,47,70,201 and 227 of the Constitution of Kenya 2010 and the guiding principles in section 3 of the Public Finance Act.
- ii. A Declaration is hereby made that the proposed construction of Migori County Headquarters as advertised and accepted through the tender No. CGM/EXEC/008/2020 – 2021 and negotiation No. 843093 violated section 6A of the County Government Act and Articles 10 and 35 of the Constitution of Kenya, 2010 and is therefore null and void.
- iii. A Declaration is hereby made that the decision to relocate the County Headquarters of Migori County from Migori Urban area to the undisclosed location and/or any other place in the county is devoid of the principles of public participation is illegal, unconstitutional, null and void.
- iv. An Order of Certiorari is hereby issued quashing the decisions of the 1<sup>st</sup> Respondent contained in the letter dated 10<sup>th</sup> March, 2021 accepting the application and/or bid of Mashin Construction Company Limited for the proposed construction of the county government of Migori headquarters, tender No. CGM/EXEC/008/2020 – 2021 and negotiation No. 843093, at an evaluated sum of Four hundred and ninety seven million, eight hundred and twenty six thousand, seven hundred and forty shillings (497,826,740).
- v. An Order of Mandamus is hereby issued against the Respondents compelling them to forthwith and permanently stop the ongoing tendering process for the proposed construction of the Migori County Government Headquarters Tender No. CGM/EXEC/008/2020 – 2021 and negotiation No. 843093
- vi. An Order of Prohibition is hereby issued restraining the Respondents from signing any contract for the proposed construction of the County Government of Migori headquarters on the basis of the impugned tender No. CGM/EXEC/008/2020 – 2021 and negotiation No. 843093 and prohibiting any further engagements on the process of relocating the county headquarters against the laid down statutory provisions.
- vii. An Order be and is hereby issued that the acceptance of the application by Mashin Construction Company Limited for the proposed construction of the Migori County Government headquarters is illegal, null and void ab initio and therefore of no effect.
- viii. A Declaratory Order is hereby issued that the Migori County headquarters remains in Migori Urban area where the county government offices are presently contained and/or put up unless otherwise lawfully transferred.
- ix. Costs of the Petition be borne by the Respondents.

**DATED, DELIVERED AND SIGNED AT MIGORI THIS 28<sup>TH</sup> DAY OF MAY 2024**

**R. WENDO**

**JUDGE**

Judgment delivered in the presence of:-

No appearance for the Appellant

No appearance for the 1<sup>st</sup> Respondent

No appearance for the 2<sup>nd</sup> Respondent.



