



Case Number:	Petition 4 of 2014
Date Delivered:	11 Mar 2016
Case Class:	Civil
Court:	High Court at Nyeri
Case Action:	Judgment
Judge:	Jairus Ngaah
Citation:	Sammy Ndung'u & 5 others v Governor, Laikipia County [2016] eKLR
Advocates:	-
Case Summary:	<p><b><u>The extent to which citizens could exercise their sovereign power indirectly and directly through their electorates in the law making process</u></b></p> <p><b>Sammy Ndung'u &amp; 5 Others V Governor, Laikipia County &amp; 2 Others</b></p> <p><b>Petition No. 4 Of 2014</b></p> <p><b>High Court of Kenya</b></p> <p><b>At Nyeri</b></p> <p><b>Ngaah Jairus J</b></p> <p><b>March 11, 2016</b></p> <p><b>Reported By Njeri Githang'a &amp; Winnie Matiri</b></p> <p><b>Brief Facts</b></p> <p>On February 12, 2014, the County Assembly of Laikipia moved, debated and passed a motion to the effect that the seat of the executive Government of Laikipia County Government and</p>

the County Assembly be relocated to Rumuruti with satellite offices at Doldol, Nanyuki and Nyahururu.

The petitioners alleged that their rights were violated because the County Government's budget for the 2013/2014 financial year was not sufficient to acquire land to construct new offices, roads, residential houses for the executive officers in Rumuruti Township when a substantial sum of money had already been set aside for the same purposes at Nanyuki.

They also contended that the County Government could not decentralise its functions and services unless it was practicable to do so and it was not practicable for the Respondents to undertake that venture without involving members of the public who were meant to benefit from that decentralisation.

The Petitioners' argued that the Assembly could not deliberate on such issues as relocation of the seats of the Executive or the County Assembly without involving members of the public and to the extent that they ignored them, they violated the national values and principles of governance set out in article 10 of Constitution of Kenya, 2010 and the right to public information guaranteed under article 35 (3) of the Constitution.

### **Issues**

- I. What were the principles of public participation in the County Government processes?
- II. The extent to which citizens could exercise their sovereign power indirectly and directly through their electorates in the law making process.
- III. Whether a petitioner in a Constitutional petition had to show injury personally suffered as a result of an alleged violation.

**Constitutional Law-** national values and principles- what were the principles of public participation in the County Government processes- the extent to which citizens could

*exercise their sovereign power indirectly and directly through their electorates in the law making process- Constitution of Kenya, 2010, article 10 and article 1(2); County Governments Act section 87*

**Constitutional Law**-Constitutional petitions-drafting principles-whether a petitioner should show how he was injured by an alleged violation of the Constitution- Constitution of Kenya, 2010, article 258

### **Relevant provisions of the law**

**The County Governments Act**, sections;

Part VIII – Citizen Participation

*87. Principles of citizen participation in counties  
Citizen participation in county governments shall be based upon the following*

*principles—*

*(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; 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.*

*91. Establishment of modalities and platforms for citizen participation*

*The county government shall facilitate the establishment of structures for citizen*

*participation including—*

*(a) information communication technology based platforms;*

*(b) town hall meetings;*

*(c) budget preparation and validation fora;*

*(d) notice boards: announcing jobs, appointments, procurement, awards and other important announcements of public interest;*

*(e) development project sites;*

*(f) avenues for the participation of peoples' representatives including but not limited to members of the National Assembly and Senate; or*

*(g) establishment of citizen fora at county and decentralized units.*

*115. Public participation in county planning*

*(1) Public participation in the county planning processes shall be mandatory and be facilitated through—*

*(a) mechanisms provided for in Part VIII of this Act; and*

*(b) provision to the public of clear and unambiguous information on any matter under consideration in the planning process, including—*

*(i) clear strategic environmental assessments;*

*(ii) clear environmental impact assessment reports;*

*(iii) expected development outcomes; and*

*(iv) development options and their cost implications.*

*(2) Each county assembly shall develop laws and regulations giving effect to the requirement for effective citizen participation in development planning and performance management within the county and such laws and guidelines shall adhere to minimum national requirements.*

**Held**

1. The participation of members of the public in the law making process was grounded in the Constitution that bestowed the sovereign power to the people of Kenya. According to article 1 of the Constitution, that power could only be exercised in accordance with the Constitution and in particular the people might choose to exercise it themselves or through their democratically elected representatives. In the latter case, the elected representatives, regardless of whether they were members of the Senate, the National Assembly or the County Assembly, exercised the sovereign power as delegates; the source of that power remained with the people who had, through a democratic process, delegated that power to state organs which in that case included County Assemblies.
2. As donees of the sovereign power, the County Assemblies were, as were the rest of the state organs, accountable to the donors of that power- the people. The Constitution placed the people at the center of the various state organs' affairs. There was a raft of provisions that went to underscore the point that 'we the people'

ranked highest in the pecking order of sovereign power. The Constitution embraced the principle of inclusivity and reserved space for the participation of people in the enactment of laws that were bound to affect them either directly or indirectly.

3. Under article 10 (1) and (2) (a) of the Constitution of Kenya, 2010 every state organ including County Assemblies were bound by national values and principles of governance amongst which democracy and participation of the people were recognised as necessary tenets.
4. Article 118 of the Constitution of Kenya, 2010 enjoined both the Senate and the National Assembly to conduct its business or proceedings in an open manner and in particular, open to the public. They were required to facilitate public participation and involvement in the legislative and other business of both the Senate and National Assembly and their respective Committees.
5. A similar provision was encroached in article 196(1) of the Constitution of Kenya, 2010 which provided that a county assembly should conduct its business in an open manner, and hold its sittings and those of its committees in public and should facilitate public participation and involvement in the legislative and other business of the assembly and its committees.
6. Much as the people elected representatives to whom they delegated their sovereign power to legislate, they still retained some role in the legislative process and other businesses of both the Parliament and County Assemblies; to the extent that they had a say in the affairs of the state organs, they could not be ignored in the organs' legislative agenda and their legislative products that, as matter of course, included the laws and such resolutions as the one sought to be impugned in the Petition.
7. The County Governments Act (the Act) gave the extent and the manner of public participation in governance at the County

Government level. The most pertinent parts in that Act were sections 87, 91 and 115.

8. Section 87 of the Act set forth the principles that informed the participation of the people in the County Government's affairs. Section 91 of that Act prescribed the infrastructure through which the objective of public participation in the County Government affairs could be achieved. It established modalities and platforms for citizen participation. The County Government was required to facilitate the establishment of structures for citizen participation.
9. In consideration of section 87 alongside section 91 of the Act, where a question arose, as it had risen in the petition, whether the citizen or citizens participated in the formulation and implementation of policies, laws or development projects, it behooved the County Government and the relevant institutions created under it to demonstrate that those citizens had timely access to information, data, documents and other information relevant or related to the formulation and implementation of the policy at hand. Those institutions must go further and demonstrate that they had established modalities and platforms for public participation as prescribed by section 91 of the Act; it was assumed that it was through such mechanisms that the citizenry accesses information or data or documents and generally participated in the formulation and implementation of policies and laws.
10. The impugned County Assembly resolution of February 12, 2014 was by and large a policy, not only relocated County Government of Laikipia headquarters but also dispersed or decentralised the Government's functions and services. That resolution found a legal backing in section 48 of the Act which provided for, among other things, decentralisation of functions and provision of services of the County Government. It entailed development of both physical and social infrastructure that should be budgeted for

and funded. In light of that, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents attached to their replying affidavit a document showing that up to Kshs 56,000,000/= was allocated by the Transition Authority to the County Government of Laikipia for purposes of construction County headquarters.

11. The implementation of that project was long-term and would be subject to the Public Procurement and Disposals Act Cap 412A. Anytime a County Government had its agenda such as grand development plans for the County, it was called upon to invite public participation in its plans so that its willingness to comply with procurement laws, which it was bound to comply with in any event, was not enough. Section 115 of the County Governments Act was categorical in that respect and left no room for doubt on the role of members of the public in such plans. The section provided for mechanisms through which public participation in the county planning processes could be facilitated.
12. The participation of people in governance at both levels of the Government had been institutionalized. The people's participation in formulation and implementation of policies and generally in the law making process was mandatory and any state organ ignoring them did so at the risk of violating the Constitution itself and violating the Constitutional rights of those who had been sidestepped.
13. Article 1(2) of the Constitution of Kenya, 2010 the people had the discretion to exercise their sovereign power either directly or through their democratically elected representatives. However, the discretion on how to exercise their sovereign power inhered in the people themselves and not in their elected representatives. It followed that the latter would not be heard to say, that the participation of the people in the legislative process was assumed by their elected representatives. If that were the case then articles 118(1) (b) and 196(1) (b) of the Constitution of Kenya, 2010 which made it mandatory for the legislative organs both



of the National and County Government to facilitate public participation and involvement in the legislative process and other business of the respective assemblies would be rendered superfluous. Section 87, 91 and 115 of the County Governments Act which all embraced that concept of public participation and detailed the ways and means of how it was to be actualised in practice would also be futile and of no consequence.

14. The Constitution of Kenya 2010 and the County Governments Act in which the concept of public participation had been encapsulated were not respectively promulgated and enacted in vain; the true intention of the people of Kenya and the legislature which was mirrored in the referenced provisions in those legal instruments should be given full effect. In the instant case therefore, the people of Laikipia County did not publicly participate in the process that culminated in the County Assembly's resolution of February 12, 2014 through the Members of the County Assembly, as there was no evidence whatsoever given that the committee referred to by the member of the County Assembly ever existed and that it took into account the views of the members of the public on the relocation of the County seats.
15. Members of the public did not participate in the decision to relocate the seats of the Executive and County Assembly of the County Government of Laikipia as captured in the Assembly's resolution of February 12, 2014. That meant that the resolution was in violation of articles 1(2), 10(2) (a), and 196 (1) (b) of the Constitution. Sections 87, 91 and 115 of the County Governments Act were also breached in arriving at the resolution. The Respondents failed to demonstrate that they complied, and if so, how they complied with those Constitutional and statutory provisions.
16. The notion that whenever there was failure by an organ of government or public

authority or public officer to comply with the law that entailed contravention of some human right or fundamental freedom guaranteed to individuals by the chapters of the Constitution was fallacious, the mere allegation that a human right fundamental freedom of the applicant had been or was likely to be contravened was not of itself sufficient to entitle the applicant to invoke the jurisdiction of the Court if it was apparent that the allegation was frivolous or vexatious or an abuse of the process of the Court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for the unlawful administrative action which involved no contravention of any human right or fundamental freedom.

17. In the instant case however, the Petitioner's case was not simply that the Government did not comply with the law; neither was it a *mere* allegation that a human right or fundamental freedom of the Petitioners had been or was likely to be contravened. It could not be said that their petition was frivolous or vexatious or it was an abuse of the process of the Court and that it was meant to avoid applying in the normal way the appropriate judicial remedy. That was a case in which it had been clearly demonstrated that the Respondents contravened particular provisions of the Constitution and the statute and if that was so, there was no better way that they could have approached the Court than through a petition as was stipulated in article 258(1) Constitution of Kenya, 2010 on enforcement of the Constitution. It provided that every person had the right to institute court proceedings, claiming that the Constitution had been contravened, or was threatened with contravention.
18. The Court was clothed with the jurisdiction to determine whether any law was inconsistent with or in contravention of the Constitution, it also had the authority to determine whether anything said to be done under the authority of the

Constitution or any law was inconsistent with, or in contravention of the Constitution as in article 165 (3) (d) (i) (ii). Article 258 (1) as read with article 165 of the Constitution of Kenya, 2010 casted upon the Court the gallant duty to watch over and protect the Constitution.

19. The Petitioners might not have demonstrated the injury they might have personally suffered as a result of the decision taken by the Respondents but except for some of the provisions in the Constitution which they cited without showing how they were violated, they set out with a reasonable degree of precision that of which they complained about, the provisions in the Constitution said to be infringed, and the manner in which they were alleged to have been infringed. The Constitution had been contravened in some particular respects and that the resultant resolution of the County Assembly of Laikipia dated February 12, 2014 purported to have been made under the authority of the Constitution was in fact inconsistent with and in contravention of that same Constitution and was, therefore, null and void.

*Petition allowed, parties to bear their own costs*

## **Cases**

### ***East Africa;***

1. *Anarita Karimi v Attorney General* (No 1) [1979] KLR 154 – (Mentioned)
2. *Gakuru, Robert N & others v Governor, Kiambu County* Petition No 532 of 2013 – (Explained)
3. *Karua, Martha v Radio Africa Ltd t/a Kiss FM station & 2 others* Miscellaneous Application No 1382 of 2003 (OS) – (Mentioned)
4. *Muiruri, Peter Nganga v Credit Bank Ltd & another* Civil Application 288 of 1998 – (Mentioned)
5. *Musembi, Samson Vati v Makueni County*

	<p><i>Assembly &amp; 2 others</i> Constitutional Petition No 18 of 2014 – (Explained)</p> <p>6. <i>Nairobi Metropolitan PSV Saccos Union Limited &amp; 25 others v County of Nairobi Government &amp; 3 others</i> Petition No 486 of 2013 – (Explained)</p> <p>7. <i>Sanghani Investment Ltd v Officer in Charge, Nairobi Remand &amp; Allocation Prison</i> Miscellaneous Application No 99 of 2006 – (Mentioned)</p> <p><b>South Africa</b></p> <p>1. <i>Doctors for Life International v Speakers of the National Assembly &amp; others</i> ZACC 11; 2006 (12) BCLR 1399(CC) 2006(6) SA 416 (CC) – (Mentioned)</p> <p>2. <i>Minister of Health v New Clicks South Africa (Pty) Ltd</i> (2006) (2) SA 311 – (Explained)</p> <p><b>Trinidad and Tobago</b></p> <p>1. <i>Attorney General of Trinidad and Tobago</i> (1980) AC 265 – (Agreed)</p> <p><b>Statutes</b></p> <p><b>East Africa;</b></p> <p>1. Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Constitution of Kenya, 2010 Sub Leg) rule 10 - (Interpreted)</p> <p>2. Constitution of Kenya 2010 articles 1,(2); 10(1)(2)(a); 27; 35(1),(3); 47(1); 48; 56(a); 87; 91; 115; 118,(1)(b); 165(3)(d)(i)(ii); 174; 176(2); 177(1)(a); 196(1)(b); 220(2); 201; 203; 207; 258(1) – (Interpreted)</p> <p>3. County Governments Act, 2012 (Act No 17 of 2012) sections 9,(1)(b); 87; 91; 115 - (Interpreted)</p> <p>4. Public Procurement and Disposals Act (cap 412A) In general</p> <p><b>Advocates:</b> None Mentioned</p>
Court Division:	Civil
History Magistrates:	-

County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	Petition allowed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**PETITION NO. 4 OF 2014**

**SAMMY NDUNG'U & 5 OTHERS .....PETITIONERS**

**VERSUS**

**GOVERNOR, LAIKIPIA COUNTY.....1<sup>ST</sup> RESPONDENT**

**COUNTY ASSEMBLY OF LAIKIPIA.....2<sup>ND</sup> RESPONDENT**

**HON. ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

In a constitutional petition dated 25<sup>th</sup> March, 2014 and filed in this court on the same date, the petitioners petitioned this honourable Court for the following prayers:-

a. A declaration that the proceedings of the Laikipia County Assembly of the 12<sup>th</sup> February, 2014 proposing and passing a motion to have seats of the County Assembly and Executive Government of Laikipia moved from Nanyuki to Rumuruti, breached the Petitioner's constitutional rights under articles 10 (2), 27, 35, 47(1), 48, 56(a) and 174 of the Constitution of Kenya 2010 and were null and void for all intents and purposes.

b. An order of Judicial Review of certiorari to remove into this honourable Court and quash the resolution of the 2<sup>nd</sup> respondent dated 12<sup>th</sup> February, 2014 purporting to approve the relocation of two seats of the County Government of Laikipia to Rumuruti.

c. An order of Judicial Review of mandamus to remove into this Honourable Court and compel the respondents to restart the process of debating the issue of relocation of two seats of the County Government of Laikipia in a more inclusive and participatory process by all people of Laikipia County.

d. Costs of the petition.

e. Or such other order(s) as this Honourable Court shall deem fit to grant.

The petition was supported by a brief, four-paragraphed affidavit sworn by the 1<sup>st</sup> petitioner on 25<sup>th</sup> March, 2014.

As far as I understand the petition, the petitioners' grievances stem from the proceedings of the County Assembly of Laikipia of 12<sup>th</sup> February, 2014 in which members of the County Assembly moved, debated and passed a motion to the effect that the seat of the executive Government of Laikipia County Government and the County Assembly would be relocated to Rumuruti with satellite offices at Doldol, Nanyuki and Nyahururu.

The petitioners were aggrieved that the respondents purported to vote and move two seats of the County Government from the headquarters of Laikipia County to a different town on the assumption that there is going to be improvement of access roads to the new headquarters in the near future.

The petitioners alleged that their rights were violated because the County Government's budget for the 2013/2014 financial year was not sufficient to acquire land to construct new offices, roads, residential houses for the executive officers in Rumuruti Township when a substantial sum of money has already been set aside for the same purposes at Nanyuki.

According to the petitioners, the County Government cannot decentralise its functions and services unless it is practicable to do so and to them it is not practicable for the respondents to undertake this venture without involving members of the public who are meant to benefit from this decentralisation.

It is the petitioners' case they could not deliberate on such issues as relocation of the seats of the Executive or the County Assembly without involving members of the public and to the extent that they ignored them, they violated the national values and principles of governance set out in **article 10** of the Constitution and the right to public information guaranteed under **article 35 (3)** of the Constitution.

The Speaker of the County Assembly of Laikipia Mr Patrick Mariru swore a replying affidavit on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> respondents opposing the petitioners' petition. In that affidavit, Mr Mariru set out the stages through which a motion goes before it attains the force of law. He swore that under Standing Order No 47 of the Laikipia County Standing Orders, a motion is tabled in the County Assembly when it is brought to the attention of the House through a Notice of Motion.

A resolution of the House would be forwarded by the Speaker of the County Assembly to the Governor of the County for his assent; the resolution is published in the County gazette and Kenya gazette before it is passed.

The County Assembly is mandated to approve the budget and the expenditure of County Government in accordance with **article 207** of the **Constitution**; it also legislates, in accordance with **articles 220(2), 201** and **203** of the **Constitution**. Following these functions, so Mr Mariru swore, the budget of the County Government of Laikipia was tabled and debated by the County Assembly on 25<sup>th</sup> and 26<sup>th</sup> June, 2013; the budgetary allocation for the financial year 2013/2014 did not include the budgetary allocations for relocation of the County Executive offices as well as the County Assembly seat from Nanyuki town to

Rumuruti town.

According to the County budget approved for the financial year 2013/2014, the sum of **Kshs 7,692,642/=** was set aside for the refurbishment of residential and non-residential buildings.

Mr Mariru swore that the relocation of County Executive offices from Nanyuki town to Rumuruti was a long-term plan and that the relevant motion was tabled before the House in accordance with **Standing Order No. 47** of the County's Standing Orders. According to that motion, the seat of the Executive Government and the County Assembly were to be relocated to Rumuruti with 'outlet executive offices' in Doldol, Nanyuki and Nyahururu towns.

The motion, according to Mr Mariru, was moved, debated and passed in accordance with the Standing Orders of the County Assembly; it was his position that members of the public participated in the deliberation of this motion through their elected representatives. In any event, Members of the County Assembly did involve the public by picking their minds, ideas and opinions during the deliberations before the motion was tabled in the County Assembly in accordance with **Section 9 of the County Governments Act**.

Despite the passing of the motion, the implementation of the resolution to relocate would still be subject to Public Procurement and Disposals Act whose requirements include, among other things, advertisement for tenders for the construction of the physical infrastructure.

It was the 1<sup>st</sup> and 2<sup>nd</sup> respondents' case that the relocation of County Executive offices will not prejudice the petitioners in any way and that they will still access the offices once the resolution has been implemented.

There does not appear to have been any appearance on part of the 3<sup>rd</sup> respondent; however, apart from the 1<sup>st</sup> and 2<sup>nd</sup> respondents, forty six other persons applied to be joined to the petition as interested parties. They described themselves as residents of Laikipia West and North sub counties in Laikipia County and the decision in this petition was bound to affect them. In their application they said that they had a direct interest in this petition as they are entitled to services offered by the County Government of Laikipia. The record shows that they were admitted in the proceedings on 9<sup>th</sup> June, 2014. Apart from the grounds of objection which they filed against the application for conservatory orders they did not file any response to the petition.

Parties agreed to have the petition determined on the basis of written submissions; following their consent, directions were issued by this Court accordingly and except for the 3<sup>rd</sup> respondent, the rest of the parties, including the interested parties filed and exchanged their written submissions to which I have had due regard in this judgment.

It is worth noting at the outset that though the petitioners cited as many as seventeen different articles of the Constitution in its petition, only **articles article 10** and **article 35 (3)** are indicated in the body of the petition itself as having been violated. Article 10 is alleged to have been breached because the respondents are said to have ignored the national values and principles of governance set out in that article by debating and voting to approve the relocation of the seat of the Executive Government and County Assembly of Laikipia from Nanyuki to Rumuruti without involving members of the public.

**Article 35(3) of the Constitution** is alleged to have been violated on almost similar grounds except that here, it is alleged that the public was not informed of the decision to move offices or the seats of the Executive Government and County Assembly.



In some of the other articles of the Constitution which have been invoked, the petitioners have simply set out what those articles provide without stating in what manner they have been breached by the respondents or either of them. The interested parties appear to have taken issue with this omission, and quite correctly in my view, because it is now trite that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to have been infringed. (**See Anarita Karimi versus Attorney General (1979) KLR 154 (No.1) at page 156**).

Coming back to **article 10** of the Constitution, counsel for the petitioners submitted that the need for public participation did not envisage a situation where the participation is exercised by their elected representatives; to the contrary, the need for public participation was meant to curb the excesses of such representatives whenever they are tempted to exercise arbitrarily the powers donated to them by the electorate. Counsel relied on the decision of **Odunga, J in Nairobi High Court Petition No. 532 of 2013, Robert N. Gakuru & Others versus The Governor, Kiambu County**. In that case the learned judge held participation in the law making process requires concrete measures to be taken including sufficient notification and information about the law in issue and genuine opportunity to participate.

Also cited by the petitioners' counsel was the decision in **Nairobi High Court Petition No. 486 of 2013, Nairobi Metropolitan PSV Saccos Union Limited & 25 Others versus County of Nairobi Government & 3 Others**. In this case the Court (Lenaola, J) held that the making of county laws by members of the County Assembly was an essential part of public participation; how this is achieved, according to the learned judge, does not matter except that it must be shown that the public was accorded some reasonable level of participation. He cited with approval Sachs J in **Minister of Health versus New Clicks South Africa (Pty) Ltd (2006) (2) SA 311** where it was held that the forms of facilitating an appropriate degree of participation in the law-making process are capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issue and to have an adequate say. More importantly what is reasonable will always be dependent on the circumstances of each case.

According to the petitioners' counsel, the respondents did not provide any evidence to demonstrate that members of the public had participated in the deliberations and the resolution to move the County Executive and Assembly seats from one town to another.

Counsel also submitted that if the movement of seats was meant to decentralise the functions of the County Government, then the intended decentralisation of services did not meet the threshold prescribed in **article 176 (2)** of the **Constitution**. The petitioners' case was that it did not make economic sense for the respondents to set aside the sum of Kshs 7,692,642/= in the 2013/2014 financial year for purposes of refurbishment of residential and non-residential buildings within Nanyuki town and at the same time build new similar houses, apparently in a different town or towns.

It was also reiterated on behalf of the petitioners that while the seats of the County Government and County Assembly of Laikipia may be moved in the long run, it is necessary to consult members of the public and the County Assembly as currently constituted cannot take it upon itself to make this vital decision on their behalf.

Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents submitted that the resolution to move the seat of the Executive Government and the County Assembly to Rumuruti with what they referred to as 'outlet executive offices' in Doldol, Nanyuki and Nyahururu was tabled before the County Assembly, exhaustively debated and passed in accordance with the law. Counsel invoked **article 177(1) (a)** of the Constitution to

submit that Members of the County Assembly who necessarily participated in this debate and passed the impugned resolution represent the interests of the electorate in their County; it follows that all the resolutions, including the resolution in issue, passed by the County Assembly are deemed to be the will of the residents and the electorate of the Laikipia County. This is further captured by **section 9(1) (b)** of the **County Governments Act** which defines the role of the Members of County Assembly to include presenting views, opinions and proposals of the electorate to the County Assembly.

The respondents acknowledged in their submissions that public participation is key to administration and governance and in recognition of this vital requirement **article 196 (1) (b)** of the **Constitution** enjoins every County Assembly to facilitate public participation and involvement in the legislative and other business of the assembly and its committees. They further admitted that under **article 35(1) (a)** of the Constitution every citizen has a right to access to information held by the state. Citing the decision in **Doctors for Life International vs Speakers of the National Assembly & Others (CCT12/05 (2006) ZACC 11; 2006 (12) BCLR 1399(CC) 2006(6) SA 416 (CC)** in which modes of public participation was defined to include direct participation and indirect participation through elected representatives, it was submitted on behalf of the respondents that the public did indeed participate in various fora on relocation of the County headquarters prior to adoption of the resolution of 12<sup>th</sup> February, 2014 to move the seats of the Executive Government and the County Assembly.

As far as compliance with **article 35** of the Constitution is concerned, it was submitted that the proceedings in the County Assembly are contained in the Hansard which is a public document that is accessible and available to members of the public upon payment of the requisite fees.

On their part, the interested parties' counsel submitted that the petition did not disclose any violation of the Constitution; counsel cited **rule 10** of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** which require the disclosure of the constitutional provision violated or threatened with violation be cited and the nature of injury caused or likely to be caused to the petitioner or any other person in whose name the petition has been instituted. According to the interested parties no particulars of any injury caused or were likely to be caused were given in the petition; in particular, it was not shown how the petitioners were going to suffer by reason of the relocation of the County headquarters of the County of Laikipia. Counsel relied on the decisions in **Martha Karua vs Radio Africa Ltd t/a Kiss F.M station & 2 Others (2006) eKLR 1; High Court Misc. App No. 1382 of 2003 (OS)**, **Peter Nganga Muiruri vs Credit Bank Ltd & Another** and **Harrikson vs Attorney General of Trinidad and Tobago (1980) AC 265** for the proposition that not every allegation of breach of the Constitution entitles one to a remedy without, as is alleged to be the case here, the disclosure of how one has suffered or is likely to suffer as a result of the alleged violation or threatened violation.

In any event so counsel urged, the petitioners were seeking judicial review orders which are discretionary remedies; such orders have been held not to be available even in deserving cases and in this regard counsel relied on the decision in **Sanghani Investment Ltd vs Officer in Charge, Nairobi Remand & Allocation Prison (2007) eKLR**.

On the question of public participation counsel for the interested parties submitted that under **article 1 (2)** of the **Constitution**, the sovereignty of the people may be exercised either directly or through their democratically elected representatives and in the instant case the impugned decision was taken by a committee of the whole house which, as I understood counsel to imply, constitute the representatives of the electorate. The decision of the committee could not be challenged unless it was proved that in adopting the decision, the committee exceeded its powers under the Constitution or under the **County Governments Act**; without such a proof this Court lacks jurisdiction to interfere with legislative functions

of the County Assembly, so counsel argued. Counsel cited the decision in **Samson Vati Musembi vs Makueni County Assembly & 2 Others (2014) eKLR** in which the Court (Muriithi, J) emphasised the need to be cautious of the doctrine of separation of powers between the Legislature and the Judiciary; the Judiciary must respect the legislative mandate of the Legislature while the latter should respect the adjudicative role of the former.

Finally, it was submitted on behalf of the interested parties that the decision to relocate seats of the County Government and County Assembly was informed by **article 176(2)** of the Constitution which enjoins every County Government to decentralise its functions and services to the extent that is efficient and practicable.

The notion of public participation in the legislative process is one central question in this petition; the question is whether the public generally and the petitioners in particular participated or were even accorded opportunity to participate in the in the deliberations that led to the resolution to relocate the seat of the executive arm of the County Government of Laikipia and its County Assembly from Nanyuki to Rumuruti. It is apparent from the submissions by the petitioners on the one hand, and the respondents and the interested parties on the other hand, that public participation was indeed a necessary step in the deliberations and the ultimate resolution to move the executive and assembly seats from one town to another. Their only point of departure, as far as I understand them, is the form or manner which this participation took or, to be fair to the petitioners, is alleged to have taken; the respondents and interested parties contend that the members of the public, who in this case include the petitioners, participated in this process through their elected representatives, an allegation that the petitioners vehemently denied. The petitioners insisted that they could not cede their power to decide on such an important issue to the Members of County Assembly of Laikipia, even in their representative capacity. If anything, so they urged, their right to participate in the legislative process of the County Assembly was meant to restrain their elected representatives from making such far reaching decisions as relocation of executive and county executive seats without their involvement.

The consensus amongst the contestants that the participation of members of the public in the law making process is no doubt grounded in the Constitution that bestows the sovereign power to the people of Kenya; according to **article 1** of the Constitution, that power can only be exercised in accordance with the Constitution and in particular the people may choose to exercise it themselves or through their democratically elected representatives. In the latter case, the elected representatives, regardless of whether they are members of the Senate, the National Assembly or the County Assembly, exercise the sovereign power as delegates; the source of that power remains the people who have, through a democratic process, delegated that power to state organs which in this case include County Assemblies.

As donees of the sovereign power, the County Assemblies are, as are the rest of the state organs, accountable to the donors of this power- the people. As if to emphasise the peoples' sovereign power, the Constitution places the people at the centre of the various state organs' affairs; for instance, on issues to do with the legislature and the legislative process, there is a raft of provisions that go to underscore the point that 'we the people' rank highest in the pecking order of sovereign power. The Constitution embraces the principle of inclusivity and reserves space for the participation of people in the enactment of laws that are bound to affect them either directly or indirectly. It is apt at this point to look at some of the provisions in Constitution that provide for this space.

Under **article 10 (1) and (2) (a)** of the **Constitution**, every state organ including County Assemblies are bound by national values and principles of governance amongst which democracy and participation of the people are recognised as necessary tenets.

**Article 118** of the Constitution enjoins both the Senate and the National Assembly to conduct its business or proceedings in an open manner and in particular, open to the public; more to the point at hand, they are required to facilitate public participation and involvement in the legislative and other business of both the Senate and National Assembly and their respective Committees.

There is a similar provision for the County Assemblies; this is found in **article 196** of the **Constitution** which provides:-

**196. (1) A county assembly shall—**

**(a) conduct its business in an open manner, and hold its sittings and those of its committees, in public; and**

**(b) facilitate public participation and involvement in the legislative and other business of the assembly and its committees.**

**(2) A county assembly may not exclude the public, or any media, from any sitting unless in exceptional circumstances the speaker has determined that there are justifiable reasons for doing so.**

**(3) Parliament shall enact legislation providing for the powers, privileges and immunities of county assemblies, their committees and members.**

It is thus clear that much as the people have elected representatives to whom they have delegated their sovereign power to legislate, they still retain some role in the legislative process and other businesses of both the Parliament and County Assemblies; to the extent that they have a say in the affairs of these state organs, they cannot be ignored in these organs' legislative agenda and their legislative products that would, as matter of course, include the laws and such resolutions as the one sought to be impugned in this petition.

The **County Government Act** goes further and details the extent and the manner of public participation in governance at the County Government level; in this regard the most pertinent parts in that Act are **sections 87, 91 and 115**. **Section 87** provides as follows:-

#### **PART VIII – CITIZEN PARTICIPATION**

**87. Principles of citizen participation in counties** *Citizen participation in county governments shall be based upon the following*

*principles—*

**(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; 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.**

Parts **(a)** and **(b)** are more pertinent to the question at hand.

While **section 87** of the Act sets forth the principles that inform the participation of the people in the County Government's affairs, **section 91** of that Act prescribes the infrastructure through which the objective of public participation in the County Government affairs can be achieved; it states:-

**91. Establishment of modalities and platforms for citizen participation**

**The county government shall facilitate the establishment of structures for citizen participation including—**

**(a) information communication technology based platforms;**

**(b) town hall meetings;**

**(c) budget preparation and validation fora;**

**(d) notice boards: announcing jobs, appointments, procurement, awards and other important announcements of public interest;**

**(e) development project sites;**

**(f) avenues for the participation of peoples' representatives including but not limited to members of the National Assembly and Senate; or**

**(g) establishment of citizen fora at county and decentralized units.**

When one considers **section 87** alongside **section 91** of the **Act**, it is reasonable to conclude that where a question arises, as it has risen in this petition, whether the citizen or citizens participated in the formulation and implementation of policies, laws or development projects, it behoves the County Government and the relevant institutions created under it to demonstrate that those citizens had timely access to information, data, documents and other information relevant or related to the formulation and implementation of the policy at hand. These institutions must go further and demonstrate that they have established modalities and platforms for public participation as prescribed by **section 91** of the Act; it is

assumed that it is through such mechanisms that the citizenry accesses information or data or documents and generally participate in the formulation and implementation of policies and laws.

The impugned County Assembly resolution of 12<sup>th</sup> February, 2014 was by and large a policy to not only relocate County Government of Laikipia headquarters but also to disperse or decentralise the government's functions and services. For avoidance of doubt the resolution was formulated as follows:-

***Noting the reality and prospects of devolution to our county and therefore the need to open up every part of our county; noting that his excellency the governor has already appointed eight executive committee members and other officers, noting that all these officers will need other office spaces, appreciating that there is already a crisis of offices as the executive committee members have no offices and this is hampering their operations, recognising that the former municipal council building of Nanyuki is exclusively set aside for the County Assembly and cannot house the executive arm of the County Government, this county assembly resolves that the seat of the executive arm of the government and the county assembly shall be in Rumuruti without(sic) outlet executive offices in Doldol, Nanyuki and Nyahururu and urges the county government to prioritise upgrading of all roads connecting to Doldol, Nanyuki and Rumuruti to ease communication between the hubs.***

No doubt the resolution to 'open up the county' and possibly decentralise the functions and services of the County Government was a noble idea; it finds a legal backing in **section 48** of the Act which provides for, among other things, decentralisation of functions and provision of services of the County Government.

It is apparent in the resolution that the decentralisation of functions and services of the County Government of Laikipia would necessarily entail development of both physical and social infrastructure that must be budgeted for and funded; as matter of fact, the 1<sup>st</sup> and 2<sup>nd</sup> respondents attached to their replying affidavit a document showing that up to **Kshs 56,000,000/=** was allocated by the Transition Authority to the County Government of Laikipia for purposes of construction County headquarters.

The 1<sup>st</sup> and 2<sup>nd</sup> respondents swore, and their counsel submitted, that the implementation of this project is long-term and will be subject to the **Public Procurement and Disposals Act Cap 412A**. This may as well be so and I have not seen anything in the material before me to suggest the contrary; however, whenever a County Government has as its agenda such grand development plans for the County, it is once again called upon to invite public participation in its plans so that its willingness to comply with procurement laws, which it is bound to comply with in any event, is not enough. **Section 115** of the County Governments Act is categorical in this respect and leaves no room for doubt on the role of members of the public in such plans; it states:-

#### **115. Public participation in county planning**

***(1) Public participation in the county planning processes shall be mandatory and be facilitated through—***

***(a) mechanisms provided for in Part VIII of this Act; and***

***(b) provision to the public of clear and unambiguous information on any matter under consideration in the planning process, including—***

***(i) clear strategic environmental assessments;***

*(ii) clear environmental impact assessment reports;*

*(iii) expected development outcomes; and*

*(iv) development options and their cost implications.*

**(2) Each county assembly shall develop laws and regulations giving effect to the requirement for effective citizen participation in development planning and performance management within the county and such laws and guidelines shall adhere to minimum national requirements.**

It therefore follows that considering the provisions I have made reference to both in the Constitution and in the County Governments Act, the participation of people in governance at both levels of the Government has been institutionalised; the people's participation in formulation and implementation of policies and generally in the law making process is now mandatory and any state organ ignoring them does so at the risk of violating the constitution itself and violating the constitutional rights of those who have been sidestepped. This point has been reiterated in **Nairobi Metropolitan PSV Saccos Union Limited & 25 Others versus County of Nairobi Government & 3 Others** and **Robert N. Gakuru & Others versus The Governor, Kiambu County** and in **Minister of Health versus New Clicks South Africa (Pty) Ltd** cases to which reference has been made earlier in this judgment.

Turning back to the petition at hand, my understanding of the respondents' answer to this question is that first, Members of the County Assembly are elected representatives of the people and as such whatever decision they come to represent that of the electorate; as far as I understand them, the people participate in the legislative process through their elected representatives.

The respondents may be right to some extent because under **article 1(2)** of the **Constitution** the people have the discretion to exercise their sovereign power either directly or through their democratically elected representatives; however, it is important to note that, according to this provision of the Constitution, the discretion on how to exercise their sovereign power inheres in the people themselves and not in their elected representatives. It follows that the latter will not be heard to say, as the respondents have urged, that the participation of the people in the legislative process is assumed by their elected representatives. If that were the case then **articles 118(1) (b) and 196(1) (b)** of the Constitution which make it mandatory for the legislative organs both of the National and County Government to facilitate public participation and involvement in the legislative process and other business of the respective assemblies would be rendered superfluous. **Section 87, 91 and 115** of the **County Government Act** which all embrace this concept of public participation and detail the ways and means of how it is to be actualised in practice would also be futile and of no consequence. This obviously cannot have been the intention of the people of Kenya when they adopted the Constitution as their supreme law; neither can it have been the intention of the legislature when it enacted the County Government Act. Suffice it to say that the Constitution of Kenya 2010 and the County Government Act in which the concept of public participation has been encapsulated were not respectively promulgated and enacted in vain; the true intention of the people of Kenya and the legislature which is mirrored in the referenced provisions in these legal instruments must be given full effect. The short answer to the respondents' argument is therefore that I do accept for a moment that the people of Laikipia County are deemed to have publicly participated in the process that culminated in the County Assembly's resolution of 12<sup>th</sup> February, 2014 through the Members of the County Assembly.

I also heard the respondents say that the public was taken on board in the resolution of 12<sup>th</sup> February, 2014 because, according to one member of the County Assembly who contributed to the debate on motion preceding the impugned resolution, some Committee in Laikipia County had agreed that

Rumuruti was a more central place for the location of the County Headquarters. This is what he said in the debate:-

***Mr Speaker, there was a committee in Laikipia County which was set to go for public participation and inquire on where we should put County Headquarter and being a leader in Olmoran for over 15 years, I was among the delegation who (sic) went to Mutara and we found that Mutara had only 40 acres. We proceeded to Rumuruti and all of us agreed that Rumuruti is more expansive and it is growing and it is a central place.***

No evidence whatsoever was given that the committee referred to by the member of the County Assembly ever existed; more importantly, there was no evidence that even if there was such a committee, it took into account the views of the members of the public on the relocation of the County seats.

In the final analysis, it can be concluded, and safely so, that members of the public did not participate in the decision to relocate the seats of the Executive and County Assembly of the County Government of Laikipia as captured in the Assembly's resolution of 12<sup>th</sup> February, 2014. This therefore means that the resolution was in violation of **articles 1(2), 10(2) (a), and 196 (1) (b)** of the **Constitution**. It also means that in coming to this decision, the respondents breached **sections 87, 91 and 115** of the County Government Act. Looked at from a reverse angle, the respondents have not demonstrated that they complied, and if so, how they complied with these constitutional and statutory provisions.

The next issue that came out clearly in the interested parties' submissions' is that even if the Constitution was violated, the petitioners did not show how they were possibly injured by the alleged violation. Counsel cited Lord Diplock's pronouncement in **Harrikson versus Attorney General of Trinidad & Tobago (1980) AC 265** in which the learned judge said:-

***The notion that whenever there is failure by an organ of government or public authority or public officer to comply with the law this entails contravention of some human right or fundamental freedom guaranteed to individuals by the chapters of the constitution is fallacious...the mere allegation that a human right fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for the unlawful administrative action which involves no contravention of any human right or fundamental freedom.***

I agree with Lord Diplock's reasoning but in the same breath I do not think the petitioner's case is simply that the government did not comply with the law; neither is it a *mere* allegation that a human right or fundamental freedom of the petitioners has been or is likely to be contravened. It cannot also be said that their petition is frivolous or vexatious or it is an abuse of the process of the court that is meant to avoid applying in the normal way the appropriate judicial remedy. Theirs, in my humble view, is a case in which it has been clearly demonstrated that the respondents contravened particular provisions of the Constitution and the statute and if that be so, there is no better way that they could approach this Court than through a petition such as this. If any authority is needed for this view, then one need not look any further than **article 258(1) Constitution** on enforcement of the Constitution. This article provides as follows:-

***258. (1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.***



Where proceedings have been instituted as contemplated under this article, as indeed they have been instituted, this Court is clothed with the jurisdiction to, among others, determine whether any law, or any legislative act for that matter, is inconsistent with or in contravention of the Constitution; it has also the authority, to determine whether anything said to be done under the authority of the Constitution or any law is inconsistent with, or in contravention of the Constitution. **(See article 165 (3) (d) (i) (ii))**. In very simple terms, **article 258 (1)** as read with **article 165** of the Constitution casts upon this Court the gallant duty to watch over and protect the Constitution.

The petitioners may not have demonstrated the injury they might have personally suffered as a result of the decision taken by the respondents but I am persuaded that, except for some of the provisions in the Constitution which they cited without showing how they were violated, they set out with a reasonable degree of precision that of which they complained about, the provisions in the constitution said to be infringed, and the manner in which they are alleged to have been infringed. I am satisfied that they have made out a case for a declaration that the Constitution has been contravened in some particular respects and that the resultant resolution of the County Assembly of Laikipia dated 12<sup>th</sup> February, 2014 purported to have been made under the authority of the Constitution is in fact inconsistent with and in contravention of that same Constitution and is, therefore, null and void; I will allow the petition to that extent only. Parties will bear their own costs.

**Signed, dated and delivered in open court this 11<sup>th</sup> day of March, 2016**

Ngaah Jairus

**JUDGE**



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