

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

PETITION NO.4 OF 2020

(AS CONSOLIDATED WITH NAIROBI H.C. PETITIONS NO.102,103,106,107,110 AND 111 OF 2020 & H.C. PETITION NO. 3 OF 2020)

IN THE MATTER OF: ARTICLE 1, 2, 2 (5), 3, 10, 20, 21, 23, 27, 35, 43, 47, 56,73, 81, 88, 89(5), 89 (6), 89 (12), 93 (1), 156, 159, 160, 165, 174, 188 (2), 202, 203, 215, 216, 217, 218, 232, 259 & 260 & PART 1 (11) & PART 2 (8) OF THE FOURTH SCHEDULE OF THE CONSITUTION OF KENYA, 2010.

IN THE MATTER OF: THE CONTRAVENTION OF ARTICLES 10, 27, 35, 47, 56, 73, 89, 188, 203 AND 216 OF THE CONSTITUTION OF KENYA, 2010.

IN THE MATTER OF: THE STATISTICS ACT NO. 4 OF 2006 AND THE CENSUS POPULATION ORDER 2018.

IN THE MATTER OF: THE STATISTICS AMENDEMENT ACT NO. 16 OF 2019.

IN THE MATTER OF: THE COUNTY GOVERNMENTS ACT, 2012.

IN THE MATTER OF: THE ACCESS TO INFORMATION ACT NO. 31 OF 2016.

IN THE MATTER OF: THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION ACT NO. 9 OF 2011.

IN THE MATTER OF: THE UNITED NATIONS PRINCIPLES AND RECOMMENDATIONS FOR POPULATION AND HOUSING CENSUS REVISION 3 OF 2017

IN THE MATTER OF: THE UNITED NATIONS GUIDELINES ON THE USE OF ELECTRONIC DATA COLLECTION TECHNOLOGIES IN POPULATION AND HOUSING CENSUS 2019

BETWEEN

HON. ABDULLAHI BASHIR SHEIKH.....1ST PETITIONER
HON. YUSUF ADAN HAJI.....2ND PETITIONER
HON. HASSAN KULOW MAALIM.....3RD PETITIONER
HON IBRAHIM ABDI MUDE.....4TH PETITIONER

| | |
|--|-----------------------------|
| HON. HASSAN OMAR MOHAMED MAALIM..... | 5 TH PETITIONER |
| HON. ADAN HAJI ALI..... | 6 TH PETITIONER |
| COUNTY GOVERNMENT OF MANDERA..... | 7 TH PETITIONER |
| ALI IBRAHIM ROBA – GOVERNOR MANDERA COUNTY..... | 8 TH PETITIONER |
| HON. ADAN KEYNAN WEHLIYE..... | 9 TH PETITIONER |
| HON. AHMED BASHANE GAAL..... | 10 TH PETITIONER |
| HON. RASHID KASSIM AMIN..... | 11 TH PETITIONER |
| HON AHMED KOLOSH MOHAMED..... | 12 TH PETITIONER |
| HON. AHMED ABDISALAN IBRAHIM..... | 13 TH PETITIONER |
| COUNTY GOVERNMENT OF WAJIR..... | 14 TH PETITIONER |
| HON. MOHAMED ABDI MOHAMUD, GOVERNOR WAJIR COUNTY..... | 15 TH PETITIONER |
| HON ABDI OMAR SHURIE..... | 16 TH PETITIONER |
| HON GARANE MOHAMED HIRE..... | 17 TH PETITIONER |
| HON. DUALE MOHAMED DAHIR..... | 18 TH PETITIONER |
| HON ADAN BARE DUALE..... | 19 TH PETITIONER |
| COUNTY GOVERNMENT OF GARISSA..... | 20 TH PETITIONER |
| ALI BUNLOW KORANE – GOVERNOR GARISSA COUNTY..... | 21 ST PETITIONER |
| ABDULLAHI MOHAMED KANYARE..... | 22 ND PETITIONER |
| ABDIKADIR MOHAMED HASSAN..... | 23 RD PETITIONER |
| BILLOW SALAT HASSAN..... | 24 TH PETITIONER |
| ABDI AHMED MADEY..... | 25 TH PETITIONER |

AND

| | |
|--|----------------------------|
| KENYA NATIONAL BUREAU OF STATISTICS..... | 1 ST RESPONDENT |
| NATIONAL TREASURY & NATIONAL PLANNING..... | 2 ND RESPONDENT |
| COMMISSION OF REVENUE ALLOCATION..... | 3 RD RESPONDENT |

JUDGMENT

1. The genesis of the consolidated petitions herein was the disputed outcome of August 2019 Kenya Population and Housing Census (Hereafter KP&HC) results in various constituencies within Mandera, Wajir and Garissa counties of North Eastern region formerly North Eastern Province. The petitioners mostly from the political class representing their constituents from their respective constituencies and counties in their capacities as elected members of parliament and governors, averred that the published KP&HC results as announced by the 1st respondent in November 2019 was not a true reflection of the actual enumerated population on the ground.
2. They therefore accused the 1st respondent of interfering with their population census results thus grossly adjusting the same downwards hence impacting negatively on their social, economic and political standing vis a vis other Kenyans who stand to gain because their census results were not manipulated or tempered with.
3. Aggrieved by the said results, Hon. Abdullah Bashir Sheikh, Hon. Yusuf Adan Haji, Hon. Hassan Kullow Maalim, Hon. Ibrahim Abdi Mude, Hon. Hassan Omar Mohamed Maalim, Hon. Adan Haji Ali (hereafter the 1st, 2nd, 3rd, 4th, 5th and 6th petitioners respectively), moved to Milimani High Court vide Petition No.102 of 2020 dated 09-03-2020 seeking various reliefs.
4. Equally, via Nairobi High Court Petition No. 103 of 2020 dated 09-03-2020, the County Government of Mandera and Ali Ibrahim Roba Governor Mandera County later substituted by Hon. DR. Ali Maalim Mohamud Deputy Governor Mandera County) (Hereafter the 7th and 8th Petitioners respectively) sought several orders in their endeavour to have the contested results nullified.
5. Further, through Nairobi High Court Petitions No. 106 of 2020 dated 12-03-2020, Hon. Adan Keynan Welhiye, Hon. Ahmed Bashane Gaal, Hon. Rashid Kassim Amin, Ahmed Kolosh Mohamed and Hon. Ahmed Abdisalan Ibrahim (hereafter the 9th, 10th, 11th, 12th and 13th Petitioners respectively) moved the court for a number of reliefs essentially seeking to quash the disputed published results.

6. Equally, the County Government of Wajir together with Hon. Mohamed Abdi Mohamud Governor Wajir County (hereafter the 14th and 15th Petitioners respectively) moved the High Court at Nairobi Milimani vide Petition No.107 of 2020 dated 09-003-2020 Seeking several prayers with a view to nullifying the impugned census results.
7. On the line was Hon. Abdi Omar Shulie, Hon. Garane Mohamed Hire, Hon. Duale Mohamed Dahir and Hon. Adan Bare Duale (hereafter the 16th, 17th, 18th and 19th petitioners respectively) vide petition No.110 of 2020 dated 12-03-2020 filed at Milimani High Court Nairobi sought various prayers aimed at overturning the said census results.
8. On the other hand, the County Government of Garissa together with Hon. Ali Bunow Korane Governor County Government of Garissa (hereafter the 20th and 21st petitioners respectively) petitioned the Milimani High Court vide petition No.111 of 2020 dated 12-03-2020 seeking several reliefs against the respondents with a view to declaring the population census results in their county a nullity.
9. Affected similarly, were Abdullahi Mohamed Kanyare, Abdikadir Mohamed Hassan, Billow Salat Hassan and Abdi Ahmed Madey (hereafter the 22nd, 23rd, 24th and 25th petitioners respectively) who vide Garissa High Court Petition NO. 3 OF 2020 dated 12-05-2020 sought almost similar orders like the other petitions. It is worth noting that they did not pursue their petition as they ceased appearing technically abandoning their petition
10. Subsequently, Petitions No. 102, 103, 106, 107, 110 and 111 were consolidated with Petition No. 102 of 2020 being the lead file. Realizing that Garissa High Court had the territorial jurisdiction to hear the dispute, the petitions as consolidated with Petition No. 102 of 2020 being the lead file were transferred to Garissa for hearing and determination. At the registry, Petition 102 of 2020 was given a new number which is Petition No. 4 of 2020. Petition 4 of 2020 was consequently consolidated with Garissa High Court Petition No. 3 of 2020 with the lead file being Petition No. 4 of 2020 which is the reference file in these proceedings.
11. In all these petitions, the respondents are common with the 1st respondent (KNBS) being a body established under Section 3 of the statistics Act of 2006 and charged

with the mandate of; collecting, analyzing and disseminating statistical data in Kenya; acts as a custodian of official statistics; conducting population and housing census after every 10 years, and such other census and surveys as the board may determine; maintain a comprehensive and reliable national social-economic data base and planning, authorizing, coordinating and supervising all official statistical programmes undertaken within the national statistical system.

12. The 2nd respondent is a creature of the Public Finance Management Act 2012 and therefore the line ministry responsible for national planning under which the 1st respondent falls.
13. The 3rd respondent is a commission created under Article 2015 & 216 of the constitution charged with the mandate to make recommendations governing equitable distribution or sharing of resources raised by the National Government.
14. The 4th respondent is a commission established under Article 88 (1) of the constitution with the power to conduct elections under Article 88(4) of the constitution and also has the mandate to undertake delimitation of boundaries for all constituencies and wards under Article 89 (12).
15. The 5th respondent is the Chief Government Legal Advisor and defender of public interest pursuant to Article 156 of the Constitution.

Petition No.102 of 2020 by the 1st -6th petitioners.

16. The petitioners under this petition basically sought their reliefs pursuant to several provisions of the constitution and other relevant statutory provisions as hereunder;
 - a) **A DECLARATION** that the results published by the 1st Respondent with respect to the **Mandera North, Mandera West, Banisa, Lafey, Mandera East and Mandera South sub-counties (constituencies)** in Mandera County did not reflect the correct enumerated population of the residents in these constituencies;
 - b) **A DECLARATION** that the publication and circulation of incorrect census results for **Mandera North, Mandera West, Banisa, Lafey, Mandera**

East and Mandera South sub-counties (constituencies) by the 1st Respondent in **November 2019** subvert **Article 35** of the Constitution;

- c) **A DECLARATION** that the 1st Respondent's decision to circulate the incorrect, manipulated, adjusted and/or altered figures for **Mandera North, Mandera West, Banisa, Lafey, Mandera East and Mandera South sub-counties (constituencies)** in Mandera County to any other organ of the Government, Constitutional Commissions, offices or organizations is a violation of **Article 10 and 73** of the Constitution and therefore null and void;
- d) An order of **MANDAMUS** directing the 1st Respondent to secure and avail all the mobile devices (tablets) used to enumerate and transmit results in **Mandera North, Mandera West, Banisa, Lafey, Mandera East and Mandera South sub-counties (constituencies)** for purposes of scrutiny and verification of results;
- e) An order of **MANDAMUS** directing the 1st Respondent to produce all the tablets and storage cards used in **Mandera North, Mandera West, Banisa, Lafey, Mandera East and Mandera South sub-counties (constituencies)** in Mandera County between **24th and 31st August 2019** for purposes of scrutiny;
- f) An Order of **MANDAMUS** directing the 1st Respondent to produce all the copies of the opening reports of all mobile devices (tablets) deployed in all enumeration areas in **Mandera North, Mandera West, Banisa, Lafey, Mandera East and Mandera South sub-counties (constituencies)** in Mandera County between **24th and 31st August 2019**;
- g) An order of **MANDAMUS** directing the 1st Respondent to produce all the copies of the Daily Transmission Reports for each mobile device (tablet) deployed in all Enumeration Areas in **Mandera North, Mandera West, Banisa, Lafey, Mandera East and Mandera South sub-counties (constituencies)** in Mandera County;

- h) An order of **CERTIORARI** removing to this Honourable Court to quash the results published in **volume 1** of the **2019 KPHC** with respect to **Mandera North, Mandera West, Banisa, Lafey, Mandera East and Mandera South sub-counties (constituencies)**
- i) An order of **MANDAMUS** directing and compelling the 1st Respondent to publish and circulate the correct results on the basis of the correct transmitted results from all the enumeration Areas in **Mandera North, Mandera West, Banisa, Lafey, Mandera East and Mandera South sub-counties (constituencies)** after court supervised scrutiny exercise.
- j) An order of **PROHIBITION** to issue prohibiting the 1st Respondent from circulating the incorrect, adjusted and/or altered figures for **Mandera North, Mandera West, Banisa, Lafey, Mandera East and Mandera South sub-counties (constituencies)** in Mandera County published in **November 2019** or any other figures other than the actual enumerated Population and Housing Census Results to the Independent Electoral and Boundaries Commission, the National Assembly, the Senate, The National Treasury or any other organ of the government, Constitutional Commissions, offices or organizations for purposes of delimitation of boundaries and for any other administrative intervention.
- k) An order of **PROHIBITION** to issue prohibiting the 3rd Respondent from relying on or in any way utilizing the incorrect census results under **Article 89** of the Constitution as published in volume 1 of the **2019 KPHC** or any other figures other than the actual enumerated population and Housing Census Results for **Mandera North, Mandera West, Banisa, Lafey, Mandera East and Mandera South sub-counties (constituencies)** in the County of Mandera for delimitation of boundaries.
- l) This honourable Court be pleased to issue any other appropriate orders, directions and reliefs as it may deem fit and just to defend, uphold and protect the Constitution.
- m) Costs of the Petition be borne by the 1st, 2nd and 4th Respondents in any event

17. The petition is supported by particulars stated on the face of it and averments contained in the affidavit sworn on 09-03-2020 by Hon. Abdullahi Bashir Sheikh. It was averred that the results for KP & HC conducted between 24th - 31st August 2019 was released in a rush on November 2019 without undertaking any post enumeration survey analysis, evaluation and verification of the results as recommended by the UN best practices. That the census report published in November 2019 was not based on the lowest enumeration units as provided under Section 48 of the County Governments Act in this case the wards hence an irregularity. He averred that the published results do not reflect the true enumerated population in the enumerated six constituencies within Mandera County.
18. It was deponed that the published result for Mandera west constituency was 98,000 instead of the actual population of 318,146 hence a reduction by 219,846; Banisa published result was 152,598 against the actual Population of 315,144 hence a shortfall of 162,546; Mandera South (Kotulo and Mandera Central), published population was 229,614 against the actual population of 416,384 hence a shortfall of 186,770; Lafey published result was 83,457 while the actual result was 205,434 thus a shortfall of 121,977; Mandera East published result was 159,638 against the actual result of 279,599 hence a difference of 119,961; Mandera North published result was 143,850 against the actual result of 238,041 hence a difference of 94,191. That in total, Mandera County affected areas published result was 867,457 against the actual population of 1,772,708 hence a whopping difference of 905,291.
19. Further, it was averred that census results released for Mandera County were from seven sub-counties while in law there were only six sub-counties. That results were released in accordance with sub-counties instead of the wards as the smallest administrative unit under the County Governments Act. They therefore urged for a scrutiny to be done in respect of the enumeration devices (tablets) used in the enumeration exercise to ascertain the true enumerated population. That there was no explanation given to justify why population in the affected areas reduced or dropped drastically for the last 10 years. He deposed that during the 2009 census, Mandera County population was 1,025,756 yet 10 years down the line, it has dropped to 867,457 amid improved standards of health and medical facilities, higher birthrates and lower infant and child mortality rate. His co-petitioners in their respective supporting affidavits deponed on similar grounds.

20. The court was given a comparative analysis of 2009 population census visa vis 2019 in the five constituencies as follows; Mandera West 2009 population was 161,701 against 98,300 in 2019 hence a negative difference of 63,401; Banisa, 2009 population was 158,074 while in 2019 it was 152,598 posting a negative difference of 5,476; Lafey, 2009 result was 109,856 while in 2019 it was 83,457 reflecting a negative difference of 26,399; Mandera East, 2009 result was 178,831 while in 2019 it was 159,638 marking a negative difference of 19,193; Mandera North, 2009 population was 169,675 leading to a downward difference of 25,825 and; Mandera South, 2009 population was 217,220 while in 2019 it was 229,614 making an increase in population growth by 12,394. Overall, it was deposed that the population for the affected constituencies in Mandera dropped from 995,357 in 2009 to 867,457 making a negative drop of 127,931 over a period of 10 years.
21. A further comparative analysis was drawn from 1969 to 2009 population census results showing an upward trend of population growth in North Eastern region as follows; 1969 -245,757; 1979-373,787;1989-371,391;1999-962,142 and 2009-2,310,757. It was deposed that there was no demographic justification for the drop in population when all indicators were in support of population growth. It was deposed that in 2014, the Kenya demographic and health survey ranked Mandera, Garissa and Wajir as counties with the highest fertility rate; most polygamous at 32%; had lowest knowledge in family planning at 3% against central at 73% and; that Mandera had the highest size of household.
22. Further deposition was to the effect that, during the KP & HC 2009, the government attempted to cancel results for 8 districts in North Eastern and Turkana on account that they wanted to do a repeat exercise as the alleged enumerated results did not reflect documented population dynamics. That later, the minister in-charge changed his position and came up with an arbitrary criterion of using projected figures which figures he forwarded to IEBC for purposes of boundary delimitation and creation of new electoral units. He averred that the attempted cancellation of the enumeration results and the purported use of projected results were quashed in judicial review case number 309 of 2010 where the court held that there was no justification for cancellation of the enumerated results. That the same was upheld by the Court of Appeal which confirmed that only published figures could be used in determining delimitation of boundaries and not projected figures.

23. It was averred that as a consequence of the courts' holding, the published enumerated results of 2009 have been used throughout in determining resource sharing, 2013 boundary delimitation and other statutory obligations.
24. In response to the consolidated petitions, the 1st respondent filed a replying affidavit sworn by Macdonald G. Obudho on 06-06-2022 in which he disputed the claim that the 2019 census for the affected areas was manipulated or interfered with. He further averred that the 2009 census results cannot be used to determine 2019 results and that the court cannot bar other bodies from utilizing published census results. He referred the court to the Court of Appeal decision in Civil Appeal No.64 of 2012 overturning a High Court decision where a similar situation arose leading to the High Court barring other departments from utilizing the projected or adjusted results in decision making.
25. It was averred that the census exercise was conducted in accordance with the relevant law under four categories inter alia: population by county and sub-county; population distribution by administrative units up to sub-location level; population distribution by age and sex and; population distribution by social economic characteristics.
26. In response to the claim that results were released in a rush, he referred the court to par.307 at page 137 of the UN principles and recommendations on population and housing censuses, revision 3 which recommends use of technology and release of such results as soon as possible to maximize on the usefulness of such data before diminishing. That the quick release of results was enabled by advanced technology deployed unlike the previous censuses.
27. On failure to conduct post enumeration evaluation, survey and verification, it was averred that under UN principles aforesaid, there are various techniques available or recommended in conducting post enumeration evaluation among them demographic technique which they applied to analyze and evaluate 2019 census data before release.
28. On the issue that the published results in the affected areas in all the three counties does not reflect the actual enumerated results, it was deposed that there was no evidence tendered to support the purported 'actual results enumerated'

nor was such data anchored in law. That it is only the 1st respondent which is the entity empowered to conduct population census in Kenya and therefore the sole custodian of such information. That the court has no mandate to usurp the mandate of the 1st respondent by substituting the published population figures with numbers that are questionable and whose sources are not known.

29. He dismissed the allegation that the population census for the three counties drastically reduced in 2019 as compared with 2009 census; it was deposed that; the enumerated and published population figures for Mandera in 2019 was 867,457 which was an increase of 248,491 persons from the 2009 census adjusted and published results; Wajir enumerated and published population figures 2019 were 781,263 reflecting an increase of 381,831 persons from 2009 census adjusted and published and; Garissa County in 2019 enumerated and published population was 841,353 reflecting an increase of 465,385 persons from 2009 adjusted and published results. That there were no irregularities or anomalies noticed during the census exercise.
30. On the allegation by some of the petitioners that the source of the alleged actual figures was from the elders, enumeration team and enumerators, he deposed that such officers were bound by the oath of secrecy hence had no authority to disclose any census information. That data from the enumerators was transmitted to the central server directly hence no room for interference during transmission. He deposed that during mapping exercise there were no technological challenges experienced in the transmission of results and if there was any due to internet interruption, it was taken care of through team leaders using Bluetooth who would then transmit the same to the central server. That in case of power interruption, enumerators had solar back up or power banks. He urged that use of technology was in line with best international practices hence no illegality committed.
31. On the justification for a possible low population growth, it was averred that the three counties have a tendency of high figures of out migration than in migration owing to insecurity issues and that high fertility and polygamy rate does not automatically justify population growth.
32. The deponent dismissed two expert reports prepared by Sammy Oyombe and Prof. Wafula as inconsequential as they were; not registered members of population Association of Kenya (PAK); not cartographers or GIS technicians nor

ICT experts. That their competence is doubtful and are not experts in the relevant field.

33. The second respondent filed a response to the petition dated 26-05-2022 through the firm of Nyaundi and Company Advocates denying the claim that the impugned results were at variance with the purported actual results and that the census in dispute was conducted in accordance with the law. That the purported actual results fronted by the petitioners have no legal basis and the source is unknown.
34. It was averred that the petitions herein do not meet the threshold of a constitutional petition hence full of speculation.
35. The 3rd respondent did file a response against the consolidated petitions vide a replying affidavit sworn by CPA James Katule on 07-06-ss 2022 thus expressing the 3rd respondent's mandate under the Constitution Article 215 and 2016 which basically entails recommending sharing and distribution of national resources. That the commission does use several parameters to determine and recommend to the senate on how to share resources and therefore not bound by the current population census figures. He urged the court to dismiss the petitions in their entirety.
36. The 4th respondent filed a replying affidavit sworn on 27-05-2022 by Chrispine Owiye Acting Director Legal and Public affairs of the 4th respondent. He basically elaborated on their mandate in conducting elections and undertaking delimitation of administrative boundaries and determination of electoral units. That the petitioners have not established how the 4th respondent has violated or likely to violate their constitutional rights.
37. The 5th respondent filed grounds of opposition challenging the petition and the application for scrutiny on grounds that; an order for scrutiny if issued would encroach to confidential information protected under Section 6 of the Access to Information Act; information sought and allegedly released to the petitioners by census officials was obtained illegally and; that Access to information is not absolute.
38. That the source of information on the alleged actual results is not legally provided and that the petition is based on speculation and conjecture. That the procedure

to access public information through the commission on administrative justice was not followed. It was averred that the petitioners have not exhausted the existing dispute resolution mechanism under Sections 14,22, and 23 of the access to information Act. That the court should not interfere with the authority of independent constitutionally provided bodies exercising their legitimate mandate. That the petition is frivolous and an abuse of the court process.

Petition number 103 of 2020 by the 7th - 8th petitioners

39. The petition herein dated 09-03-2020, is anchored on its particulars and further amplified by the affidavit in support sworn by Hon. Abdullah Bashir Sheikh Member of Parliament Mander North Constituency sworn on even date and Hon. Dr. Ali Maalim Mohamud Deputy Governor Mander County sworn on the same date. The petitioners prayed for similar reliefs as those sought by the 1st -6th petitioners but limited in application to Mander County. They also adopted similar grounds in support of their petition.
40. They averred that KP & HC results and published in respect of Mander County in the August 2019 census exercise were manipulated and drastically reduced by the 1st respondent without any justification. They reproduced the discrepancies between the published results and what they referred to as 'actual results' in the six Mander County constituencies (see para 18 above).
41. They further averred that in the 2009 census results, the minister in charge of census exercise attempted to adjust downwards results of three constituencies then Mander West, Mander Central and Mander East from the enumerated results of (319,775) (417, 294) and (288,687) to adjusted results of (191,721) (251,267) and (175,977) respectively. That both the High Court and Court of Appeal dismissed use of adjusted results in determining creation of electoral units and distribution of resources. They urged the court to allow the petition as prayed.
42. In response, similar responses as against the 1st -6th petitioners were adopted or applied.

Petition number 106 of 2020 by the 9th - 13th Petitioners.

43. The petition herein sought similar prayers like those in respect of the 1st -6th petitioners with the difference only being the affected Wajir County constituencies namely Eldas, Tarbaj, Wajir East, Wajir West and Wajir North Sub-Counties. In a nut shell, the prayers sought are;
- a) **A DECLARATION** that the results published by the 1st Respondent in Volume 1 and 2 of the 2019 Kenya Population and Housing Census with respect to **Eldas, Tarbaj, Wajir East, Wajir West and Wajir North sub-counties (constituencies)** in Wajir County did not reflect the correct enumerated population of the inhabitants of these constituencies;
 - b) **A DECLARATION** that the publication and circulation of inaccurate census results for **Eldas, Tarbaj, Wajir East, Wajir West and Wajir North sub-counties (constituencies)** in Wajir County by the 1st Respondent in **November 2019** subvert **Article 35** of the Constitution;
 - c) **A DECLARATION** that the 1st Respondent's decision to circulate the inaccurate, and altered figures for **Eldas, Tarbaj, Wajir East, Wajir West and Wajir North sub-counties (constituencies)** in Wajir County to any other organ of the Government, Constitutional Commissions, offices or organizations is a violation of **Article 10** and **73** of the Constitution and therefore null and void;
 - d) An order of **MANDAMUS** directing the 1st Respondent to secure and avail all the mobile devices (tables) used to enumerate and transmit results in **Eldas, Tarbaj, Wajir East, Wajir West and Wajir North sub-counties (constituencies)** in Wajir County for purposes of scrutiny and verification of results;
 - e) An order of **MANDAMUS** directing the 1st Respondent to produce all the tablets and storage cards and GPS coordinates used in **Eldas, Tarbaj, Wajir East, Wajir West and Wajir North sub-counties (constituencies)** in Wajir County between **24th** and **31st August 2019** for purposes of scrutiny;
 - f) An Order of **MANDAMUS** directing the 1st Respondent to produce all the copies of the opening reports of all mobile devices (tablets) deployed in all enumeration areas in **Eldas, Tarbaj, Wajir East, Wajir West and Wajir North sub-counties (constituencies)** in Wajir County between **24th** and **31st August 2019**;

- g) An order of **MANDAMUS** directing the 1st Respondent to produce all the copies of the Daily Transmission Reports for each mobile device (tablet) deployed in all Enumeration Areas in **Eldas, Tarbaj, Wajir East, Wajir west and Wajir North sub-counties (constituencies)** in Wajir County;
- h) An order of **CERTIORARI** removing to the High Court to quash the census results published in **volume 1 and 2 of the 2019 Kenya Population and Housing Census** with respect to **Eldas, Tarbaj, Wajir East, Wajir west and Wajir North sub-counties (constituencies)**
- i) An order of **MANDAMUS** compelling and directing the 1st Respondent to publish and circulate the correct results from all enumerated areas in Wajir County on the basis of the enumeration transmitted results after a Court supervised scrutiny exercise to the 2nd Respondent (National Treasury), the 3rd respondent (Independent Electoral and Boundaries Commission), the 4th Respondent (Commission on Revenue Allocation), the National Assembly, the Senate and all other organs of the government, Constitutional Commissions, Offices or organizations
- j) An order of **PROHIBITION** to issue prohibiting the 1st Respondent from circulating the inaccurate and/or altered figures for **Eldas, Tarbaj, Wajir East, Wajir west and Wajir North sub-counties (constituencies)** in Wajir County as published in Volume 1 and 2 of the 2019 Kenya Population and Housing Census Report to the Commission on Revenue Allocation, the Independent Electoral and Boundaries Commission, The National Assembly, the Senate, The National Treasury or any other organ of the government, Constitutional Commissions, Offices or organizations or any other figures other than the actual enumerated Population and Housing Census Results for the County of Wajir.
- k) An order of **PROHIBITION** do issue prohibiting the 4th Respondent from relying on the flawed, inaccurate and/or altered figures for **Eldas, Tarbaj, Wajir East, Wajir west and Wajir North sub-counties (constituencies)** in Wajir County published in **November 2019** or any other figures other than the actual enumerated Population and Housing Census Results for the County of Wajir for purposes of determination

of the shareable revenue and for any other administrative intervention whatsoever for the financial year 2019/2020 and the period thereafter.

- l) An Order of **PROHIBITION** do issue prohibiting the 3rd Respondent from relying on or in any way utilizing the flawed and/or inaccurate census results under Article 89 of the Constitution as published in Volume 1 and 2 of the 2019 KPHC or any other figures other than the actual enumerated Population and Housing Census results for the County of Wajir for the purpose of delimitation of boundaries
- m) This honourable Court be pleased to issue any other appropriate orders, directions and reliefs as it may deem fit and just to defend, uphold and protect the Constitution.
- n) Costs of the Petition be borne by the 1st, 2nd and 4th Respondents in any event

44. The petition is anchored on the grounds stated on the face of it and averments contained in the supporting affidavit sworn by Hon. Keynan Wehliye Member of Parliament Eldas constituency deposing that the 2019 census results for the named petitioners (Wajir County constituencies) were manipulated and reduced from the actual enumerated results. It was averred that similar interference took place in the census conducted 2009 in which the then minister in charge of population census purported to cancel results in eight districts within Garissa, Wajir, Mandera and Turkana counties.

45. That it took the hand of the court in Civil Misc. Application No.309 of 2010 and subsequently Civil Appeal no. 64 of 2012 to declare the minister's action unconstitutional hence upheld use of published census results and not the adjusted results for use in boundary delimitation. He averred that in view of the Court of Appeals' judgment, the enumerated and published results of the census of 2009 stood and therefore applied in determining electoral units in the affected areas.

46. That after the minister resorted to anew criteria referred to as 'smoothing', Garissa County population dropped from the enumerated population of 623,060 to the adjusted population of 375,968 thus a reduction by 247,092; Wajir enumerated population of 661,941 was adjusted to 399,432 thus a drop of - 262,509 and Mandera enumerated population adjusted to 618,966 dropped to

406,790. That as a consequence, the three North Eastern Counties' population reduced by 916,391 persons thus disadvantaging them economically as compared to western region where population was adjusted upwards.

47. That since 2009, the enumerated figures have been used as the primary source of data for resource sharing, delimitation of administrative and electoral boundaries by the 4th respondent and revenue allocation by the 3rd respondent.
48. That the Eldas constituency was split from Wajir West constituency during the 2012 boundary delimitation exercise. It was averred that during that time, the population for Wajir West was 91,145 and Eldas 80,805. That contrary to 2009 results, the enumerated population for Eldas in 2019 was 214,482 against the published population of 88,509 hence a drop of -125,973. That going by the enumerated population of 80,805 in the 2009 census and the 2019 report of 88,509, it will reflect a marginal increase in population of 7, 704 for Eldas.
49. It was averred that there was a huge discrepancy between the actual 2019 enumerated census result against the published figures. It was deposed that the actual 2019 enumerated population for Farbaj constituency was 271,856, Wajir West 207,362, Eldas 214,485, Wajir West 265,774, Wajir North(Buna & Wajir North in the report) 361,600, and Wajir South (Habaswein & Wajir South in the report) 290, 948 against their published population reflected as (57,232), (110,654), (88,509), (121,828), (112,092) and (290,948) translating to a drop in population by (-214,624), (-96,708), (-125,976), (-143,946), (-249,508) respectively hence accumulative drop in the listed constituencies in Wajir County at -830,762.
50. He gave a graphical demonstration showing the trend of population growth in Wajir County from 1989-1999, 1999-2009 and 2009-2019 as 9.6,7.3 and 1.8 respectively. That the population of Wajir County was 661,941 in 2009 and 10 years later, it went up marginally to 781,263 in 2019 yet no explanation was given for the catastrophic decline as opposed to other provinces in Kenya where the trend was upward increase.
51. It was alleged that although technology was deployed in conducting census exercise in the year 2019, there was no proper legal framework enacted by parliament to govern the exercise through use of technology nor was there public participation before the adoption of the alleged technology.

52. In response, the respondents save for the 22nd -25th petitioners relied on the responses proffered against the 1st -6th petitioners' petition.

Petition Number 107 of 2020 by the 14th -15th Petitioners.

53. The petitioners in this petition are the Wajir County Government and now the Deputy Governor Wajir County. Their prayers are similar to those advanced by the 9th-13th petitioners word by word. The petition is supported by an affidavit sworn on 09-03-2020 by Hon. Mohamed Abdi Mohamud then Governor Wajir County. He basically reiterated the grounds espoused by the 9th to 13th petitioners.

54. It was averred that according to the 2009 enumerated results, Tarba population was 111,846; Wajir East 112,572; Eldas 80,805; and Wajir west 91,143 while in 2019 published figures they were; 57,232; 110,654; 88,509 and 121,038 reflecting a drop of -54, 614; -1,918; +7,704 respectively. He deposed that there was no justification for the drastic drop hence the published figures have no correlation with the enumerated figures yet the 2014 demographic survey revealed that Wajir had the highest fertility rate in Kenya and had the highest household size due to polygamy.

55. The responses to the said petition are similar to those advanced against the consolidated petitions.

Petition Number 110 of 2020 by the 16th-19th Petitioners.

56. The petition herein is based on the grounds set out on the face of it and further supported by the averments contained in the affidavit in support sworn on 12-03-2020 by Hon. Abdi Omar Shulie member of Parliament Balambala constituency. On a larger degree, the grounds relied on are basically the same as those of the other petitioners. He contended that the trend of population growth for North Eastern since 1969 up to 2009 has been on an upward trajectory at the rate of between 7.48 and 9.5%. That the attempt by the minister in charge of census to cancel and adjust downwards enumerated results for 8 districts mostly in the three North Eastern counties in 2010 were in vain after the High Court and Court of Appeal quashed that decision thus recognizing the published enumerated results.

57. That the effect of the minister's purported adjustment of enumerated results downwards had the consequences of reducing the enumerated results of; Dujis constituency at 190,062 to 115,663; Lagdera 245,123 to 147, 117; Fafi 95,212 to 57,930 and; ijara 92,663 to 55,201 thus marking a drop in population by -74,399 (Dujis), -97,949(Lagdera), -37,282(Fafi) and -37,462(Ijara) respectively. That unless the court intervenes, the residents of Balambala, Lagdera, Dadaab and Garissa Township constituencies will suffer.

58. He contended that the Kenya Demographic survey of 2014 and the Kenya Integrated household Budget survey had found that the counties of North Eastern had the highest fertility rate hence not expected to drop but grow in population.

59. It was deponed that the 1st respondent did not undertake the requisite catagraphic mapping in Balambala Sub-County. That as a result, only 185 enumerators were deployed there to conduct census thus attracting a suit being petition number 334 of 2019 to compel the 1st respondent to deploy more enumerators which was done through a court order adding 60 more enumerators who failed to transmit necessary results due to inadequate training as time was not sufficient to train them.

60. Again the response to the petition was the same one advanced against the consolidated petitions already alluded to.

Petition number 111 of 2020 in respect to the 20th -21st Petitioners

61. The petition herein was lodged by the County Government of Garissa and the Governor Garissa County. The prayers therein are a replica of the prayers in respect of petition number 110 of 2020. The petition is supported by the affidavit of honourable Ali Bunow Korane then Governor Garissa County. The grounds advanced are similar.

62. The petitions herein were contemporaneously filed with accompanying notices of motion seeking conservatory orders as well as order for scrutiny. Vide a ruling dated 29-06-2020 the court declined to grant conservatory orders sought at that stage arguing that the petition was likely to be heard before the expressed fears would occur. On access to information, the court allowed conditional scrutiny while protecting or restricting access to information that would intrude to peoples'

private information. The court directed access to information only limited to figures enumerated in areas in issue and what central servers had captured from same areas but not any information on individuals that would be considered to as intrusion to privacy.

63. In particular, the court ordered that;

- a) The petitioners vide their appointed IT experts and under the supervision of this court via the Deputy Registrar of the court shall be allowed by the 1st respondent access to central servers and the tablets and or / devices which were used to collect data during the 2019 KPHC exercise between 24-08-2019 to 31-08-2019 for the areas in issue namely; Mandera west, Banisa, Lafey, Mandera East and Mandera North sub-counties; Garissa Township, Balambala, Lagdera and Dadaab Sub-counties; Eldas, Tarbaj, Wajir East, Wajir West and Wajir North sub-Counties(constituencies).
- b) The petitioners will appoint the IT experts either jointly (one for each county) in issue or as they may agree but not to exceed a maximum of 3 and will team up with the Deputy Registrar of this court in gathering the data (figures of people enumerated) in the devices/tablets and the 1st respondent central servers for the areas in issue (l) above in the next 30 days.
- c) A joint report by the petitioners' IT experts and this court Deputy Registrar on the exercise and figures gathered of people enumerated areas in issue as captured in tablets/devices and central servers accessed shall be filed within 30 days from the date of this ruling
- d) The 1st respondent will be at liberty to file report on the same data within the prescribed period above.
- e) There will be liberty to apply.

64. As a consequence of the said order, the Deputy Registrar did a report to the court dated 18-11-2021 explaining how they visited the 1st respondent's offices on 06-09-2021 in company of one IT expert from the petitioners and two from the respondents ready to conduct the scrutiny exercise. That they were granted access to a laptop purportedly connected to the central server of KNBS. That the laptop was to extract data from the central server using an application known as C.C pro downloader data.

65. That the first respondent merely printed published figures in respect of the affected areas in one page and handed it over to them. The Deputy Registrar stated that they were not granted access to the server, tablets or devices used to collect data by KNBS officers or clerks. That they were also not allowed access to the data logs of each tablet, devices used during the exercise of the affected areas. That despite persistent requests to access data that was collected by each of the devices in the affected areas, it was not possible.

66. The IT expert appointed by the petitioners in this case Sebie Abdulrahman Salim (PW1) filed a report dated 25-09-2021 also expressing dissatisfaction in the manner in which they were taken to a board room where they sat and KNBS took them through the process of extraction of data and displayed enumeration report. That there was no verification as to the source of the displayed report as they had no technical access to the information (server).

67. The report indicated that they had no access to the server nor the tablets or devices used in collecting data. He said that there were no data transmission logs from the tablets to the server; no acknowledgment from the server confirming that they had received the data from the tablets and server transmission access logs were not availed. In conclusion, the report stated that there was no evidence of the raw data that came from any of the devices to the server. The 1st respondent did maintain that they fully complied with the order for scrutiny. They contended that the tablets or devices used in collecting raw data were not available for scrutiny as they had been reconfigured and disposed of as per Mac Donald Obudho's affidavit sworn on 02-08-2021.

68. The above position notwithstanding, the matter proceeded to full trial.

HEARING
PETITIONERS' CASE

69. Pw1 Sebie Abdulrahman a computer (IT) expert engaged by the petitioners for scrutiny purposes adopted the content in his affidavit sworn on 32-03-22 and his scrutiny report dated 25-09-2021 asserting that they were not allowed to access the relevant information and devices as directed by the court. He reiterated the content contained in his report already alluded to herein above. He stated that

when they demanded to see the tablets/devices used to collect raw data, they were told the same had been reconfigured. He stated that their demand to be provided with times stamp to ascertain when data in the server was received was denied.

70. Pw2, Dr. Ali Mohamed the Deputy Governor Mandera County (8th Petitioner) adopted his affidavit sworn on 12-03-2020 as his evidence. He basically adopted the content in the 1st-8th petitioners' facts contained in the petition and the affidavits in support already alluded to herein above. He basically disputed the population census results 2019 as not reflecting a true and actual position on the ground. On cross examination by Mr. Nyamodi on the source of information regarding the alleged actual results, he said that they got the same from election officials and elders. On re-examination, he stated that they had no complaint against treasury.
71. Pw3 Ahmed Bashane member of Parliament Tarbaj constituency adopted the content contained in his affidavit in support sworn on 09-03-2020, replying affidavit sworn on 13-08-2020 and supplementary affidavit sworn on 31-08-2022. Basically, the content is similar to the affidavits in support of the 9th -15th petitioners' petitions already alluded to herein above. He stated that Tarbaj constituency was split in 2012 from Wajir East which had a population of 224,418 during the year 2009 census. That during the 2012 delimitation of boundaries, Tarbaj had a population of 111,846. He expressed surprise how it dropped from that figure to 57,232 during the 2019 census.
72. He expressed fear that his constituents are likely to suffer underfunding in resource allocation or even lose their constituency. On cross examination by Mr. Nyamodi, he maintained that Tarbaj's correct figure should be 271,856 as per the elders and census officials' result and not 57,232 as reflected in the KNBS published 2019 results. He however admitted that he did not have details of the elder's report.
73. Pw4 Abdi Shurie member of Parliament Balambala adopted his averments contained in the affidavit sworn on 12-03-2020 in support of his petition. He expressed concern that the population of Bambala which was split from Dujis constituency was the year 2009 around 93,000 persons and in 2019 it dropped to

32,357 people a figure that was not supported by any factors yet there was no catastrophe like war or hunger or epidemic.

RESPONDENTS' CASE.

74. Dr. MacDonald George Director General KNBS(RW-1) relied on his affidavit sworn on 06-06-2020 in reply to the petitions which content has been alluded to herein above. He took the court through census preparation. He told the court how efficiently technology was deployed in conducting 2019 KPHC. He explained how they visited various countries in bench marking before carrying out the census exercises. He stated that during the 2019 census, they did not do post census evaluation survey as it was expensive and that they had applied a different method.
75. It was his testimony that enumerators' role was to submit data but not to enumerate. That the elders' role was to accompany election officials but not to enumerate. He stated that during the 2009 census, figures in North-Eastern region were inflated leading to adjustment by smoothening. He claimed that the 2019 results were actual. It was further stated that in North-Eastern, out-migration was higher than in-migration hence the decrease in population. That child mortality rate was higher in the affected regions than other places.
76. In cross examination by Mr. Issa, the witness stated that there is no nexus between the 2009 census and 2019. On further cross examination, he stated that by the time scrutiny exercise began, they had already reconfigured the census devices/tablets. That they reconfigured the tablets from 03-10-20 to 21-12-2020. He however admitted that there was no court order permitting reconfiguration of tablets before scrutiny. He stated that authority to dispose census devices was granted on 12-05-2020 and that the court order came after the process had commenced. On cross examination, he conceded that the 1st respondent was served with the petition on 22-03-2020 and by then they had already configured the tablets.
77. The 2nd -5th respondents did not call any witness.
78. Upon close of the respondents' case, parties agreed to file submissions.

The 1st- 8th and 16th -21st Petitioners' submissions.

79. Through the firm of Issa and Company Advocates, the 1st - 8th and 16th - 21st petitioners filed their submissions dated 9th August 2024. The submissions are basically a replica of the petitioners' pleadings by way of the petitions herein filed, the affidavits in support and oral testimony by the witnesses. Learned counsel submitted on four issues namely;

- a) **Whether the results published by the 1st Respondent on 4th November 2019 are valid and whether they can be utilized by any other commission.**
- b) **Whether the respondent complied with the order of this honourable on scrutiny**
- c) **If there was non-compliance with the order for scrutiny, what is the effect of the non-compliance on the consolidated petitions.**
- d) **What remedies should this honourable court issue**

80. With regard to the 1st issue, counsel reiterated the averments contained in the testimonies of PW1-PW4. Counsel reproduced statistics in reference to the variation in population in the affected areas between 2009 and 2019. It was argued that the drastic drop in terms of population in the affected areas could not be justified bearing in mind that during the 2014 health survey, north eastern had the highest fertility rate, low rate in family planning; lower mortality rate, least knowledge in family planning and practiced the highest level of polygamy.

81. The court was taken through the litigation process emanating from the 2009 disputed census results in order to understand the reason for applying the 2009 census results as a baseline in determining the 2019 results and therefore the correct figures for the sake of sharing of resources, review of boundaries and other statutory requirements. In that regard, reference was made to the High Court Judicial Review Case No. 309 of 2010, Civil Appeal No.64 of 2012 and Constitutional Review No.514 of 2016 all of which upheld use of enumerated and published results of 2009 census and not adjusted results.

82. That deliberate disobedience to the aforesaid court decisions would disenfranchise the residents of the affected areas. Counsel contended that without the use of correct figures, the affected areas will lose out on their constitutional rights like political representation and resource sharing.

83. On the 2nd issue, counsel submitted that the disobedience of the court order for scrutiny to be conducted by accessing the 1st respondent's server and enumeration devices is critical. That despite service of the scrutiny application, the 1st respondent did not mention of the inability to provide the devices used nor was there disclosure at the time when the petitioners first requested for the supply of those gadgets. That the disclosure made by RW-1 in his replying affidavit of 02-08-21 that the tablets used in the census exercise had been disposed of does not justify disobedience as the order was made long before the purported disposal.
84. Learned counsel opined that there was no good reason given for disregarding the order for scrutiny and that the said order was not challenged on appeal.
85. Concerning the 3rd issue, touching on the consequences of non-compliance with the scrutiny order, counsel contended that the purpose of scrutiny was to enable the court verify the allegations made by parties. In that regard, reliance was based on the case of **Gideon Mwangangi Wambua & another vs IEBC & 2 others (2013) eKLR**. Counsel urged this court to make an adverse inference against the 1st respondent for failure to comply with the scrutiny order. In support of that submission, reference was made to the case of **Raila Odinga & another vs IEBC & 6 others (2017) e KLR**.
86. The court was urged to find that non-compliance with the court order by the 1st respondent implied that they were hiding the true position of the figures in 2019 census results and that published results were not the correct results.
87. The court was urged to find that non-compliance with the order amounted to subversion of the constitution and an act in breach of Article 10 and 73 of the constitution hence cancel the contested results.
88. On issue number four regarding the remedies applicable, counsel contended that they have made a case for grant of the prayers sought. That a structural interdict order to issue compelling the 1st respondent to first delete the 2019 KPHC published figures for the affected counties as prayed in the petition. That the new and corrected figures using the acceptable formula with the baseline being the enumerated figures of 2009 multiplied with the growth rate between 2009 and 2019 be submitted to the court for verification within 30 days.

The 9th -15th Petitioners' Submissions.

89. Through the firm of Sagana Biriq and Muganda Advocates, the 9th to 15th petitioners filed joint submissions dated 16-09-2024. It was submitted that the 2019 census results for the subject areas in North Eastern region was grossly suppressed with some areas dropping by more than 50% when compared with the 2009 enumerated and published results. It was counsel's submission that the 2009 census results for the affected areas was litigated upon and settled in law. That up to 2019, the only official statistical and population data used in the delimitation of administrative and electoral boundaries, resource sharing, planning and disaster management was the 2009 enumerated and published results.
90. Counsel submitted that the 2009 enumerated and published figures for Mandera, Wajir and Garissa County combined were 2,310,737. That the same numbers were used to create 7 constituencies in the region during the 2012 boundary delimitation exercise. Counsel opined that if the 2019 contested census results were to stand, 5 of those constituencies will most likely go. It was learned counsel's submission that whereas in the year 2009 the 1st respondent attempted to adjust figures through smoothening exercise, the same did not apply to 2019 disputed results hence proof of subversion of accountability.
91. It was submitted that failure by the 1st respondent to comply with the scrutiny order by the court to ascertain the true figures was an attempt to avoid accountability, transparency and openness hence invited the court to draw an adverse inference against the 1st respondent. In that regard, the court was referred to the supreme court holding in the case of **Raila Odinga v IEBC & 2 others, presidential election petition No.1 of 2017(supra)** where the court held that failure to comply with a lawful demand, leave alone a specific court order, leaves the court with no option but to draw an adverse inference against the party refusing to comply. Counsel contended that on that ground alone, the court has the power to cancel the 2019 published results and substitute the same with the actual enumerated figures presented by the petitioners.
92. The court was further referred to Civil Appeal No.64 of 2012 in which the Court of Appeal held that enumerated results are not the same as projected results and that the 1st respondent could not use projected or estimated results in the review of or delimitation of boundaries.

93. Counsel contended that; the 2019 published population figures based on wrong population baseline in the affected areas resulted to a decline that goes even below the figures presented in the year 2009; the results were a deviation from the UN principles and recommendations on census taking and population growth and; the accuracy of 2019 results does depend on the accuracy of the 2009 results.
94. It was contended that based on the enumerated and published figures of 2009, the 2013 and 2017 general elections were conducted and boundary delimitation 2012 done giving rise to; Wajir East and Tarbaj split out of Wajir East; Wajir West and Eldas split out of Wajir West; Garissa Township and Balambala split out of Dujis; Lagdera and Dadaab split from Lagdera; Mandera East and Lafey split out of Mandera East. That pursuant to the criteria set out on the creation of new constituencies under Article 89 (12) of the constitution, and based on the disputed 2019 census, Tarbaj, Eldas, Lagdera, Balambala and Lafey are likely to go owing to their suppressed population.
95. Learned counsel contended that it was not practically possible for the population to drop drastically over a period of 10 years yet there was public awareness and participation. That failure to do post enumeration evaluation as an international best practice was the contributing factor in releasing wrong figures. Further, population could not have drastically dropped without proof of any calamity like war, disease, famine or earthquake.
96. In conclusion, the court was invited to accept figures presented by the petitioners or in the alternative use the 2009 results as the baseline and apply the growth rate in the period 2009-2019. The 3rd option advanced was the use of the alleged admission of population growth in the three counties by 1,095,707 add to the total alleged actual enumerated figure presented by the petitioners at 2,310,757 making a total of 3,406,464 and then divide by among the three counties.
97. As stated earlier in this judgment, the 22nd -25th petitioners did not participate in these proceedings as they abandoned their claim midway.

1st respondent's submissions.

98. Through the firm of Nyamodi and company advocates, seven issues for determination were coined as follows;

- a) What is the petitioners' case as pleaded?
- b) Whether the petitioners have proved that the 1st Respondent has infringed their fundamental rights and freedoms?
- c) Whether this honourable court can grant remedies not specifically pleaded in the consolidated petitions?
- d) Whether the orders sought in the consolidated petitions are enforceable?
- e) Whether the petitioners are entitled to the prayers sought in the consolidated petitions
- f) Whether the 1st respondent complied with the order of this honourable court on scrutiny?

99. With regard to issue number one, Mr. Nyamodi contended that the petitioners' prayers were principally anchored on the positive outcome of the scrutiny exercise failure to which they will all collapse. That with the unsuccessful outcome of the scrutiny, the petitioners have achieved their goal hence cannot at this stage plead new prayers. In that regard, the court was referred to the holding in the case of **Galaxy paints company limited v Falcon Guards Limited court of Appeal case number 219 of 1998** where the court held that issues for determination flow from the pleadings and a court can only pronounce a judgment based on the pleaded issues.

100. Learned counsel urged that the 1st respondent having discharged its mandate, there is no petition pending.

101. On the question whether the petitioners have established that the 1st Respondent has infringed on their fundamental rights and freedom (issue number), counsel submitted that the petitioners had not established with a reasonable degree of precision the nature of the constitutional provision alleged to be breached and how pursuant to the threshold set out in the case of **Anarita Karimi Njeru vs Republic (1979) KLR**.

102. It was further urged that the petitioners have not discharged their burden by establishing how their constitutional rights have been violated. To buttress that submission, the court was referred to the holding in the case of **Hassan Ahmed Ibrahim v Kenya National Bureau of statistics & 2 others (2019) eKLR**. In that regard, the court was urged to dismiss the petitions.

103. As to whether this court can grant remedies not specifically pleaded in the consolidated petitions (issue number three), Mr. Nyamodi contended that parties are bound by their pleadings. In that regard, reliance was placed in the case of **Raila Amolo Odinga (supra)** where the court held that no party should be allowed to travel beyond its pleadings. Counsel submitted that the prayers introduced at para 85, 86, and 87 of the petitioners' submissions were not pleaded in the petition hence cannot issue. Counsel contended that a party cannot ask for a relief he has not prayed for. To buttress that ground, reference was made to the case of **Otieno, Ragot & company advocates vs National Bank of Kenya Limited (2020) e KLR**. To that end, counsel urged the court to disregard those prayers.

104. On the question Whether the orders sought in the consolidated petitions are enforceable (issue number four), counsel contended that it is trite that in any suit orders sought ought not issue in vain. He further contended that the devices sought for scrutiny having been disposed of by the time the scrutiny order was issued, it was not possible to scrutinize what did not exist. Counsel made reference to a chronology of events leading to the disposal of the enumeration devices which commenced on 03-06-2020 and ended on 21-12-2020.

105. In respect to issue number five, touching on the question whether the petitioners are entitled to the prayers sought, counsel urged that the alleged existence of actual enumeration results by elders who were not officials cannot be used as a basis to cancel census results. That there is no legal basis upon which such information not taken under oath of secrecy can be admitted as evidence. Counsel contended that use of projected results was internationally accepted hence nothing wrong in circulating the said figures to various departments for use. To buttress that position, reference was made to the holding in the case of **Republic v interim independent Boundaries Review Commission & 9 others; County Government of Mandera & another (interested parties); Exparte Minister of State for Planning, National Development and Vision 2030 & another (2016) eKLR**.

106. On the question of hurried processing of results, it was submitted that use of technology made work easier and saved time in line with the UN principles and recommendations. Similarly, it was urged that failure to conduct post enumeration evaluation was not fatal as a different approach approved by UN principles was used.
107. On the allegation that during the census exercise Mandera County had six sub-counties, reference was made to Gazette notice number No.5853 of 21-07-2017 which gazetted seven sub-counties in which Kotulo was gazetted adding onto the earlier six making them seven hence the census results were released in accordance with the smallest administrative unit which is a sub-location and not neo-political unit which is a ward.
108. Touching on allegations that fewer enumerators were deployed to Balambala constituency, counsel contended that the same increased by 60 more after the court intervened hence no time wasted. Concerning use of technology without approval from the public, counsel opined that there was no legal requirement for consultation of the public nor did its use affect the petitioners.
109. On the justification for reduced population, high infant mortality rate and out immigration exceeding in migration were cited as grounds for the decrease. On reliance on the 2009 results by the petitioners as a base line to determine 2019 results, counsel opined that it is not tenable to do so as the two are distinct.
110. In respect to issue number six on whether there was compliance with the scrutiny order, I find that the same has already been argued save for the submission that nobody cited the 1st respondent for contempt on account of disobedience. In conclusion, the court was urged to dismiss the petition with costs.
- 111. 2nd respondent's submissions.**
112. The 2nd respondent through the firm of Marende and Nyaundi advocates filed their submissions dated 16-09-2024 in which they submitted on two issues namely; whether the petitioners have established a basis for grant of the orders sought and; whether the petitions herein meet the threshold required of a constitutional petition.

113. Learned counsel submitted that the mandate to conduct census exercise in Kenya is bestowed upon the 1st respondent pursuant to Sections 3 and 17 of the Statistics Act and that 2019 KPHC was conducted in accordance with the law. That published results by the KNBS (1st respondent) is the only legitimate official census result and not the petitioners' purported 'actual enumerated result' which has no legal backing. That having failed to adduce any evidence that the results were manipulated, there cannot be any ground upon which the petitions can be anchored hence no justiciable claim against any of the respondents leave alone the 2nd respondent.

114. Concerning issue number two, counsel contended that the petition does not with a degree of reasonable precision establish the constitutional provisions violated or likely to be violated and in what manner. In that regard, reliance was placed in the case of **Anarita Karimi Njeru (supra) and Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others (2013) eKLR**.

115. The 3rd respondent did not file any submissions.

The 4th respondent's submissions

116. Through the firm of Mukele Moni and company advocates, the 4th respondent filed submissions dated 11-10-2020 submitting on two issues namely; whether the 4th respondent has the mandate to select the census results for the delimitation of boundaries; whether the petitioners have demonstrated that their right and/or fundamental freedom in the bill of rights have been denied, violated, infringed or is threatened to warrant the grant of the orders sought against the 4th respondent.

117. Concerning the 1st issue, counsel submitted that the mandate of the 4th respondent as spelt under Article 89(5)(6)(7) of the constitution is to review boundaries based on published census results by the 1st respondent. In that regard, the court was referred to the case of **Republic v Independent Electoral and Boundaries Commission & another Ex parte councilor Eliot Lidubwi Kihusa & 5 others (2012) eKLR**.

118. Touching on the second issue, learned counsel contended that there is no proof of any specific provision of the constitution violated by the 4th respondent to

warrant the orders sought. To support the assertion, reference was made in respect to the case of **Transafaris Sacco Limited & another vs Classic Luxury Shuttle & 2 others Constitution Petition No.591 of 2017(2019) eKLR**. In conclusion, counsel urged that the correctness of the census results is not the duty of the 4th respondent hence no case against the 4th respondent.

119. The 5th respondent did not file any submissions.

Rejoinder by the 1st respondent against the 9th-15 Petitioners' submissions.

120. In reference to the holding in the case of **Republic v Interim Independent Boundaries review commission & 9 others (supra)**, counsel contended that the court upheld the importance of projected figures. That each census begins with mapping exercise hence independent of the other. That use of demographic techniques is sufficient in place of post enumeration survey. That infant mortality rate and out migration contributed to the decrease in population in the affected areas.

Analysis and determination

121. Having considered the consolidated petitions herein, responses thereof, oral testimonies by various parties and rival submissions by their respective counsel, issues that are discernible for determination are;

- a) Whether the consolidated petitions herein meet the threshold of a constitutional petition
- b) Whether the release of 2019 Kenya Population and Housing Census (KPHC) was done in a rush
- c) Whether the deployment of technology during the KPHC enumeration exercise jeopardized the outcome of the results
- d) Whether the census results unofficially gathered by the petitioners through census officials and elders is legitimate and admissible
- e) Whether the order for access and scrutiny of the server and devices used in the 2019 enumeration process in the affected areas was complied with
- f) If there was non-compliance, what are the consequences

- g) Whether the census results published by the 1st respondent on 04-11-2019 are valid and therefore can be utilized by any other department
- h) What reliefs can this court grant
- i) Whether the reliefs if granted are enforceable
- j) Who bears the costs

Whether the consolidated petitions herein meet the threshold of a constitutional petition.

122. The consolidated petitions herein are common in nature. They arise from contested KPHC results which was a product of the census exercise undertaken between 24th to 31st August 2019. After the exercise, results were released in November 2019. Aggrieved by the results, leaders from the North eastern region contested the same arguing that their numbers had been interfered hence unexplained decrease. They drew a comparative analysis from what they had privately gathered referred to as the 'actual results' against the KNBS published results.

123. Below is a sample of the demonstrative table showing the alleged 'actual enumerated population' which statistics was allegedly obtained by the petitioners from enumerators and elders; the KNBS published figures and; the difference/variation between the two.

Table;

| Constituencies (Sub-counties) | Actual 2019 Enumerated population | KNBS 2019 Published Figures | Variance |
|--|-----------------------------------|-----------------------------|----------|
| Mandera West | 318,146 | 98,300 | -219,846 |
| Banisa | 315,144 | 152,598 | -162,546 |
| Mandera South (Kutulo and Mandera Central in the report) | 416,384 | 229,614 | -186,770 |
| Lafey | 205,434 | 83,457 | -121,977 |
| Mandera East | 279,599 | 159,638 | -119,961 |
| Mandera North | 238,041 | 143,850 | -94,191 |
| Total | 1,772,708 | 867,457 | -905,291 |

124. The petitioners went further to demonstrate that there was unexplained decrease in population growth in the affected areas between the 2009 census figures published by KNBS as compared to those released in 2019. See a sample of the table below.

Table.

| | KNBS 2009 Enumerated Population | KNBS 2019 Figures | Variance |
|---|------------------------------------|----------------------|----------|
| Mandera West | 161,701 | 98,300 | -63,401 |
| Banisa | 158,074 | 152,598 | -5,476 |
| Lafey | 109,856 | 83,457 | -26,399 |
| Mandera East | 178,831 | 159,638 | -19,193 |
| Mandera North | 169,675 | 143,850 | -25,825 |
| Mandera South (Mandera Central and Kutulo) | 217,220 | 229,614 | 12,394 |
| Total | 995,357 | 867,457 | -127,931 |

125. They also drew a comparative analysis with other provinces then to justify an upward trend of population growth in the affected regions from 1969 up to 2009. This was meant to justify their claim that there was something wrong with the 2019 KNBS published figures as there was no catastrophe reported in the region at the material time to explain the reason for the drastic drop in population in North-eastern region. See the table below.

Table;

| Province | 1969 | 1979 | 1989 | 1999 | 2009 |
|-------------|------------|------------|------------|------------|------------|
| Nairobi | 509,286 | 827,775 | 1,324,570 | 2,143,254 | 3,138,369 |
| Central | 1,675,647 | 2,345,833 | 3,111,255 | 3,724,159 | 4,383,743 |
| Coast | 944,082 | 1,342,794 | 1,825,034 | 2,487,264 | 3,325,307 |
| Eastern | 1,907,301 | 2,719,851 | 3,768,689 | 4,631,779 | 5,668,123 |
| N. Eastern | 245,757 | 373,787 | 371,391 | 962,143 | 2,310,575 |
| Nyanza | 2,122,045 | 2,643,956 | 3,507,160 | 4,392,196 | 5,442,711 |
| Rift Valley | 2,210,289 | 3,240,402 | 4,917,551 | 6,987,036 | 10,006,805 |
| Western | 1,328,298 | 1,832,663 | 2,622,397 | 3,358,776 | 4,334,282 |
| Kenya | 10,942,705 | 14,327,061 | 21,448,047 | 28,686,607 | 38,610,097 |

126. They claimed that their population was suppressed for ulterior motives thus disenfranchising them in terms of resource sharing nationally, boundary review hence creation of new constituencies and administrative units which is pegged on the population of the area and generally for planning purposes. On that ground, they alleged that after the results were released, they sought from the 1st respondent supply of the devices used to carry out the census exercise pursuant to Art. 35 of the constitution which provides for access to public information which was not supplied.

127. They also argued that unless the disputed results are corrected, they risk losing out during the delimitation exercise by the 4th respondent under Article 89 of the constitution and resource distribution by the 2nd and 3rd respondent pursuant to Article 215 and 216 of the constitution. They further alleged that the acts complained of amounted to discrimination under Article 27 of the Constitution.

128. According to the respondents, the allegations made by the petitioners do not meet the threshold of a constitutional petition. The threshold for a constitutional petition was ably discussed in the quite often quoted case of **Anarita Karimi (supra)** where the court set out the parameters as hereunder;

“we would, however, again stress that if a person is seeking redress from the high court on a matter which involves a reference to the constitution, it is important (if only to ensure that justice is done to his case) 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 be infringed”.

129. The principle espoused in **Anarita Karimi** has repeatedly been applied in a plethora of case law among them the case of **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others (supra)**.

130. It is worth noting however, that in interpreting the constitution a court should be guided by Article 259(1) which provides that the constitution must be interpreted in a manner that promotes its purpose, values and principles, advances the rule of law and the human rights and freedoms in the bill of rights and permits development of the law and contributes to good governance. It is therefore the

duty of the court to take a purposive approach in interpreting the constitution. See *Speaker of the Senate v Attorney General and 4 others* SCK Advisory opinion No.2 of 3 2013(2013) eKLR where the court held that;

“Kenya’s Constitution of 2010 is a transformative charter. Unlike the conventional ‘liberal’ Constitutions of the earlier decades which essentially sought the control and legitimization of public power, the avowed goal of today’s Constitution is to institute social change and reform, through values such as social justice, equality, devolution, human rights, rule of law, freedom and democracy. This is clear right from the preambular clause which premises the new Constitution on –

“RECOGNISING the aspiration of all Kenyan for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law.”

131. Similarly, in the case of *Centre of Rights Education and Awareness (CREAW) and Others v the Attorney General Nairobi Petition No 16 of 2011 [2011] eKLR* the court held that;

“In interpreting the Constitution, the letter and the spirit of the supreme law must be respected. Various Provisions of the Constitution must be read together to get a proper interpretation”.

132. Further, in the case of *Mercy Nyawade v Banking Fraud Investigations Department & 2 others (2017) e KLR* the supreme court had this to say;

“This court has on several occasions in the past pronounced upon the proper approach to constitutional construction embodying fundamental rights and protections. What is to be avoided is the imparting of a narrow, artificial, rigid and padantic interpretation; to be preferred is one which serves the interest of the constitution and best carries out its objects and promotes its purpose...”

133. The petitioners have approached this court on their own behalf and on behalf of their constituents pursuant to Article 22 (1) of the constitution which provides that every person has the right to institute court proceedings claiming

that a right or fundamental freedom in the bill of rights has been denied, violated or infringed, or is threatened. Article 22(2) further provides that court proceedings can be instituted on behalf of another person or group or class of persons or act in public interest. Article 23 provides for the remedies applicable in a constitutional reference as; declaration of rights, injunction, conservatory orders, compensation or judicial review (certiorari, mandamus and prohibition).

134. It is apparent from the information contained in the tables above that there was reasonable cause to petition for redress as there was prima facie, a probable cause that the petitioners' rights and those of their constituents were allegedly violated by the 1st respondent or were likely to be violated by the respondents in the course of discharging their duties making reference to the disputed results. This is because, use of the disputed results could lead to scrapping of some constituencies hence the need to get conservatory orders against the 4th respondent not to go ahead with delimitation before the petition is determined.

135. Equally, similar orders would ensure that resources are not shared out based on what was alleged to be erroneous figures. With a reasonable degree of precision, the petitioners have made the threshold espoused in Anarita Karimi case. The proof need not be with mathematical exactitude. In view of the allegations made against the respondents, it is a parent that the issues raised are weighty and of great public interest hence cannot casually be dismissed or wished away. To that extent, it is my finding that the consolidated petitions are properly before the court which clearly has the jurisdiction to hear and determine the same under Article 165(3) of the constitution.

Whether the release of 2019 Kenya Population and Housing Census (KPHC) was done in a rush

136. The petitioners argued that the rush in releasing census results within three months after the exercise without conducting post enumeration evaluation or survey as it was the norm in the past contributed to incorrect results. The 1st respondent through the testimony of RW-1 justified the release in time unlike previous censuses due to use of technology which made transmission of results faster and less expensive. That post enumeration process was not necessary as there were alternative demographic dynamics approved by the UN principles and

recommendations para.3.219 -3.220. It was also argued that it was not mandatory that a post enumeration survey be done.

137. The UN principles and recommendations paragraph 3.219 recognizes numerous methods as available to estimate the coverage and content error of censuses inter alia; simple techniques of quality assurance such as internal consistency checks; comparison of results with other data sources, including previous censuses, current household surveys and administrative records. Taking into account these recommendations and principles, and considering that the release of results was not only for North-Eastern but for the whole country, we cannot with certainty attribute incorrect results if any, with the short time within which they were released. This factor could not have affected a section of Kenya and not the rest of the country. If anything, technology is said to be an enabler towards efficiency hence cannot be dismissed on its face value. I do not find merit on that ground.

Whether the deployment of technology during the KPHC enumeration exercise jeopardized the outcome of the KPHC 2019 results

138. The petitioners blamed use of technology as a factor that contributed to incorrect results due to; lack of consultation or enactment of a proper legal framework. In response, RW1 Macdonald defended use of technology as the best tool in data collection in compliance with the UN principles and recommendations for population and housing censuses para.3.154-3.157(see page 1641-1642 of vol.4 of the 1st respondent's bundle of documents). A look at paragraph 3. 154 -3.162 of the said principles is purely on use of electronic gadgets like Mobile phones in sending messages; use of digital maps; electronic questionnaire.

139. From the above, it is clear that use of technology in conducting censuses is an internationally acceptable practice. There is nothing prohibiting use of technology in conducting census in Kenya. It is not fatal to use technology to conduct census. The claim that there was no network in some areas, RW1 explained on the measures taken such as use of pack up solar system or battery charger in case of power failure and use of blue tooth in case of network failure. One would wonder why technology challenges in north Eastern region yet there are several remote areas in Kenya. I do not find merit on this ground.

Whether the census results unofficially gathered by the petitioners through census officials and elders is legitimate and admissible

140. The main and most contentious issue in these consolidated petitions is what is referred to as 'actual enumerated population'. These are figures unofficially collected allegedly by the elders and official enumerators but without the authority of their employer the KNBS. Under Section 3 of the statistics Act, KNBS is the principal agency empowered to collect, analyze and disseminate statistical data in Kenya hence the sole custodian of such information. Section 18 of the same Act goes further to provide that anybody seeking to carry out any census or survey must seek approval from the KNBS. From the pleadings, there was no approval sought by anybody from KNBS to conduct a parallel census in the affected areas. Besides, RW1 in his testimony stated that census officials were bound by the oath of secrecy hence had no authority to disclose any information regarding census outcome or particulars to anybody.

141. In essence, there was no legal basis upon which such data was collected. It is not clear as to who sanctioned it. We were not given tangible evidence to prove the existence of such data or figures. We are only told that those figures exist but there whereabouts or where they are stored is unknown. Who has the records? None of the purported officials or elders testified. Basically the alleged 'actual population figures cannot be relied on in evidence as they are not authentic in law. To that extent, the court will not have a basis upon which to make reference to those figures against any other figures.

Whether the order for access and scrutiny of the server and devices used in the 2019 enumeration process in the affected areas was complied with

142. Having protested the 2019 census results announced by the 1st respondent and having sought an explanation on why their population had drastically dropped in vain, the petitioners filed their respective applications seeking conservatory orders and an order for scrutiny. From the demand letter dated 04-12-2019 (see 9th -15th petitioners' bundle of documents vol.2 at page 1093-1103) the petitioners expressed their dissatisfaction to the director General KNBS (1st respondent) regarding the conduct and interference with the census results in their affected areas.

143. In that particular demand letter, they sought for the supply of; all mobile devices used to enumerate and transmit results; copies of all serial numbers, make and specifications of each tablet employed in the enumeration exercise in Eldas sub-county; details of the company involved in the supply of the software and back up services for enumeration and analysis; copies of all test reports for each mobile device (tablet) deployed in all enumeration areas in Eldas Sub-County; copies of all reports of all mobile devices used; copies of all transmission reports for each mobile device deployed in enumeration areas in Eldas; copies of exit reports for each mobile device used; certificate of successful transmission; audit reports for each mobile device used; copies of Redo log files/ online transaction logs and recordings of all transactions into the data base during the census period; copies of all archives logs; copies of all back up data base; copies of all alert logs; results for each enumeration area within Eldas Sub-County, GPS coordinates collected during mapping; results of post enumeration survey.
144. In his letter dated 09-12-2019, the corporation secretary/ head of legal services KNBS on behalf of the Director General dismissed the request in the said demand letter terming it an illegal and unlawful demand which could not be honoured (see the said letter page 1104-1107 vol.2 of the 9th -15th petitioners' bundle of documents).
145. Having moved to court at different times seeking conservatory orders and order for scrutiny, Kariuki J delivered his ruling dated 29-06-2020 thus directing as follows.
- a) **The petitioners vide their appointed IT experts and under the supervision of this court via the Deputy Registrar of the court shall be allowed by the 1st respondent access to central servers and the tablets and or / devices which were used to collect data during the 2019 KPHC exercise between 24-08-2019 to 31-08-2019 for the areas in issue namely; Mandera west, Banisa, Lafey, Mandera East and Mandera North sub-counties; Garissa Township, Balambala, Lagdera and Dadaab Sub-counties; Eldas, Tarbaj, Wajir East, Wajir West and Wajir North sub-Counties(constituencies).**
 - b) **The petitioners will appoint the IT experts either jointly (one for each county) in issue or as they may agree but not to exceed a maximum of**

3 and will team up with the deputy Registrar of this court in gathering the data (figures of people enumerated) in the devices/tablets and the 1st respondent central servers for the areas in issue(i) above in the next 30 days.

- c) A joint report by the petitioners' IT experts and this court deputy registrar on the exercise and figures gathered of people enumerated areas in issue as captured in tablets/devices and central servers accessed shall be filed within 30 days from the date of this ruling
- d) The 1st respondent will be at liberty to file report on the same data within the prescribed period above.
- e) There will be liberty to apply.

146. Meanwhile, the 1st respondent filed an application dated 13-07-2020 seeking review of the ruling on grounds that the devices (tablets) earmarked for scrutiny had been disposed of and that part of the order was not implementable as it encroached on national security and individual persons' private information. The court in its ruling delivered on 28-10-2020 dismissed the application (see page 1152-1168 vol.2 of 9th-15th petitioners' bundle of documents).

147. The 1st respondent argued that the petitioners were granted access to the server, yet the report by pw1 and the Deputy Registrar reveals the opposite. By merely causing the scrutiny team to sit in the boardroom where there was no server and then print for them a one-page disputed census report which they already had is a high degree of disrespect to the court order.

148. Regarding non-availability of tablets and the claim that they had been disposed before the scrutiny order was made, that information was not relayed to the court when the 1st respondent filed their response to the scrutiny application yet they claimed that disposal of those gadgets used country wide took place between 03-06-2020 and 21-12-20.

149. Failure to disclose that those devices were not available during the time of scrutiny application is a clear indication that those gadgets were disposed of after the order was issued to defeat the purpose of the scrutiny exercise. In further contradicting himself, RW1 on his cross examination stated that they were served with the petition on 22-03-2020. He further stated that by the time they were

served, enumeration devices had been reconfigured. This is a contradiction with his testimony that disposal of those devices started on 03-06-2020 and concluded on 21-12-2020. Which version does he want us to believe?

150. In any event, those devices had been requested for much earlier before the petitions were filed. Due diligence required that those devices ought to have been preserved. Besides, there was no disposal certificate filed to show how they were disposed, by who, by whom and when. To make a blanket statement indicating the alleged pre-disposal processes does not help. In any event, what stopped the 1st respondent to allow the scrutiny team to access the server and pick the details in respect to the server as per order (i) and (i) of the scrutiny?

151. Regarding the question of intrusion to peoples' private information, the court was clear in its mind on that aspect and same was repeated in the ruling for review. Similar situation applies to the claim that the scrutiny order would have led to insecurity.

152. For easy of reference, I wish to reproduce verbatim part of the court's ruling in respect of the review application delivered on 28-10-2020;

“para 52- They have averred that the process of disposal of the tablets/gadgets commenced vide a board meeting of the 1st Respondent on 5th December, 2019. And proceeding through May and June, 2020. This ground in my view lacks merit as they were well aware that the gadgets were needed for scrutiny, and they ought to have at least taken measure as such.

para 53 – In respect to the ground of privacy or confidentiality of private data in possession of the 1st Respondent, it is apparent to me that the same was one of the issues that were alive before the court when the orders for scrutiny herein were being sought.

para 54 – I agree with the Respondents position that such issue was critically considered by this court in its ruling delivered on 29th June, 2020 and in issuing the impugned orders herein; it made orders to the effect that only summaries of the enumerated figures were to be revealed for scrutiny.

para 55 – However, the applicants are now alleging that the date in question is inseparable and therefore this court ought to review its decision. This court equally considered this issue, and in my view, it would be surprising that in undertaking the population census the 1st Respondent did not in its column for information include a column for summarized enumerated figures only minus the attachment of persona information. The respondents attached filed forms attests as much.

para 56 – On the final ground that the tablets/devices that were used had been disposed of and therefore impossible to enforce the orders as they are, this court notes that even though the applicant commenced the alleged disposal of the said tablets/devices during the pendency of this suit, it had an obligation to this court and the parties herein to disclose the unavailability of the same.

Para 57 – It matters not that there was no preservatory orders to bar their disposal or interference. it would appear to this court that the allegation now that the same devices were disposed is an afterthought. There is no demonstration via evidence of the delivery of the devices to the beneficiaries of the donation of the same devices. The court is expected to believe the applicants affidavit without more. This court is not inclined to do so.

para 58 – Nonetheless, the 1st Respondent avers that it transferred the data in the tablets to their central servers. If that be so, then why decline to show petitioners the enumerated figures via their IT experts as ordered by this court on 29/6/2020”?

153. From the above holding of the Hon. Justice Kariuki, it is apparent that the respondents in particular are trying to re-introduce or re-litigate on issues already addressed and settled.

154. The respondents’ claim that if there was disobedience to the orders the petitioners should have filed a contempt application is neither here nor there. To the contrary, they should have gone ahead to prosecute their intended appeal challenging the scrutiny order if indeed they were aggrieved.

155. It is not in dispute that upon visiting the KNBS premises ready for the exercise, the scrutiny team was not allowed nor enabled to access the server room nor were the tablets or enumeration devices availed. Instead, the deputy registrar and his team were taken to a board room where they were made to sit and had the KNBS officials print for them a copy of what they called published census figures which obviously was what was being contested.

156. Pw1 an IT expert engaged by the petitioners filed his report dated 25-09-2020 explaining how the scrutiny exercise was frustrated by the 1st respondent (see page 797-802 vol.2 of the 1st -8th and 16th -21st petitioners' bundle of documents). The deputy registrar also filed his report dated 18-11-2021 explaining that they were not allowed to access the server nor were the tablets availed (see page 803-804 of the 1st -8th and 16th -21st bundle of documents). In view of the holding above that the excuses given by the 1st respondent in not availing the devices does not hold water, the only conclusion to make is that there was non-compliance with the court order. Secondly, the claim that scrutiny exercise was conducted according to the court order is not correct.

157. For the above stated reasons, it is my finding that there was no scrutiny exercise conducted as per the court order and that the 1st respondent deliberately and willingly frustrated the process hence there was non-compliance.

What are the consequences of non-compliance of the scrutiny order by the 1st respondent?

158. The essence of conducting a scrutiny exercise cannot be gainsaid. Article 10 of the constitution does clearly underscore the importance of observing national values and principles of good governance among them; rule of law, equity, inclusiveness, equality, human rights, non-discrimination, transparency and accountability. Good governance and upholding the rule of law includes respecting court orders lest we plunge to anarchy through disobedience of such orders.

159. In the case of **Gideon Mwangangi Wambua (*supra*)**, the court emphasized **the essence of conducting scrutiny as follows;**

“the aim of conducting scrutiny and recount is not to enable the court unearth new evidence on the basis of which the petition could be sustained. Its aim is to assist the court to verify the allegations themselves but must be hinged on pleadings”

160. The objective in ordering for scrutiny was to verify the alleged discrepancy in the figures published which according to the petitioners were inordinately manipulated taking into account the prevailing factors like the 2009 census as the baseline; high fertility rate; low knowledge in family planning; high level of polygamy and consistent upward trend of population growth since independence besides their independent sources of information although not ascertainable.

161. It is trite that before a court can order for scrutiny, there must be sufficient reasons to justify such an order; See **Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 others (2014) eKLR** where the court said that an order for scrutiny must be grounded on sufficient grounds. Since the court had found that there were sufficient grounds to conduct a scrutiny which never happened, the inevitable consequence is to make an adverse inference against the 1st respondent for refusing the petitioners access to the server and enumeration devices thereby hiding the truth hence must suffer the consequences of their own disobedience. The fact that no contempt proceedings were preferred does not sanitize their disrespect of the court order.

162. In the case of **Raila Odinga & another v IEBC & 6 others (supra)** the court held as follows:

“279-It is clear from the above that IEBC in particular failed to allow access to two critical areas of their servers: ... In other words, our Order of scrutiny was a golden opportunity for IEBC to place before Court evidence to debunk the petitioners’ said claims if IEBC had nothing to hide, even before the Order was made, it would have itself readily provided access to its ICT logs and servers to disprove the petitioners’ claims. But what did IEBC do with it” It contumaciously disobeyed the Order in the critical areas.

"280- Where does this leave us" It is trite law that failure to comply with a lawful demand, leave alone a specific court order, leaves the court with no option but to draw an adverse inference against the party refusing to comply". In this case, IEBC's contumacious disobedience of this court's order of August 28, 2017 in critical areas leaves us with no option but to accept the petitioners' claims that either IEBC's IT system was infiltrated and compromised and the data therein interfered with or IEBC's officials themselves interfered with the data or simply refused to accept that it had bungled the whole transmission system and were unable to verify the data".

163. Having held that the 1st respondent's refusal to allow access to the server and the census devices attracts an adverse inference, it is my finding that the allegations made by the petitioners have not been debunked sufficiently.

Whether the census results published by the 1st respondent on 04-11-2019 are valid and therefore can be utilized by any other department.

164. The petitioners urged that the population census for north eastern region has been in an upward trend since independency up to 2009 when a dispute arose over alleged inflation of figures. For instance, in the 2009 enumerated population or published results by KNBS, Balambala had 93,029 while in 2019 it had 32, 257 reflecting a drop of -60,772; lagdera had 92,636 in 2009 while in 2019 it had 50,315 reflecting a drop of -42,321. Lafey had 109,856 in 2009 while in 2019 it had 83,457 reflecting a drop of -26,393; Tarbaj had a population of 111,846 while in 2019 it had 57,232 reflecting a drop of -54,614.

165. According to the petitioners, it was not possible for population to drop at such a high level over a period of 10 years yet no calamity nor catastrophe like war, famine, earthquake or disease occurred. Indeed, according to the 2014-2015 Kenya demographic health survey, it revealed that the three counties in north eastern

had the highest fertility rate, were most polygamous, early marriage and had the least knowledge in the use of family planning.

166. On the other hand, the 1st respondent argued that northeastern was affected with high insecurity, high infant mortality rate and out-migration which supersedes in-migration. However, one key question one needs to ask is, since independence why is it that there is higher level of insecurity when there is improved; communication and road network, literacy level thus reducing frequent movement due to formal settlement and children going to school, reduced banditry as compared to 60s and 70s hence improved security etc.

167. It is worth noting that the results of 2009 were a subject of litigation in 2010 when the minister for planning then issued a ministerial statement in parliament expressing his intention to cancel results from 8 districts whose population figures were purportedly inflated and that the census be repeated. The minister later purported to adjust those figures downwards through a process known as smoothing. The affected districts were; Lagdera, Wajir East, Mandera Central, Mandera West, Turkana central, Turkana North and Turkana South. The minister cited five reasons to justify the intended cancellation inter alia; the rate of increase was higher than the documented population dynamics considering the birth rate and death rate as well as the immigration trends; significant growth way above the projected figures.

168. This step was challenged through Judicial Review Misc. Civil Application No. 309 of 2010 Nairobi High Court...The decision was however quashed by the High Court. The court held that if there was any error committed by the KNBS, which was not established, the same could not be visited on the inhabitants who had no role in the commission of any irregularities. The court went further to state that the minister had no power donated to him to cancel census results and must be shown a red card for exceeding his authority.

169. Aggrieved by the said decision the AG appealed through civil appeal number 64 of 2012 where the court of appeal partly upheld the high court decision thereby holding that;

[48]...Thus enumerated results are not the same as projected results, the latter are a projection of the expected future population. The 1st respondent could not use estimated or projected population results in the review or delimitation of the constituency boundaries as this was contrary to the express provisions of the Constitution that required use of the number of inhabitants in a constituency, and use of the population quota based on that number, and this called for population census enumerated results and not estimated or projected figures. The contention that the data that was announced by the 1st appellant as the enumerated results of the 2009 census, was inaccurate and required verification, cannot hold because the 2nd appellant announced the results exactly one year after the date of the actual enumeration.

[49] This means that the 2nd appellant had one year to do the evaluation, analysis and verification of the enumerated census results. This period was enough for the 2nd appellant to subject the enumerated results for the eight districts to scrutiny, verification, further study and assessment, so that the enumerated results ought not to have been announced if there were such serious anomalies as to negate the enumerated results. The order of prohibition barring the 3rd respondent from using data other than the published 2009 Population and Housing Census Results in the determination of boundaries review and/or determination of new boundaries was thus proper within that context, and the learned judge cannot be faulted.

170. From the Court of Appeal decision, it is apparent that the court did approve the use of the enumerated results in boundary delimitation and for other departmental use. The court recognized the importance of projected results but cautioned that the same could not be used for purposes of delimitation.

171. From the pleadings, the 3rd respondent conceded that from 2013 up to 2019 they have been using enumerated results of 2009 to determine revenue sharing. Equally, the 4th respondent conceded that in 2013 electoral boundary delimitation exercise, they used 2009 enumerated census results which led to the creation of extra constituencies in North eastern region some of which risk extinction if the disputed 2019 enumerated results were to apply.

172. Having considered the drastic decrease or decimal increase in population in the affected areas and considering that the grounds advanced for the drastic decrease does not resonate with the trend in population growth in the same region, and further taking into account that the 1st respondent failed to allow scrutiny take place, I am left with no choice but to find that 2019 enumerated results for affected areas was incorrect and therefore not legitimate hence not suitable for use by any government department for purposes of executing their respective statutory or constitutional mandate.

What remedies can this court grant

173. As stated herein above, the petitioners in the consolidated petition sought almost common reliefs save for the differences in their constituency names. One such common prayer is an order declaring that the published KPHC results did not reflect the correct enumerated population of the affected areas. This relief is not achievable as the scrutiny exercise which would have assisted in verifying the results was frustrated by the first 1st respondent. Therefore, this court is not in apposition to state which was the correct census result.

174. The other common relief is the prayer for preservation of the devices used in the enumeration exercise of the impugned census. This prayer is spent as the order for the preservation of the devices used was made. As regards the order for scrutiny, the same is also spent as it was made but disobeyed. To that extent, that relief cannot apply as it was a temporary prayer.

175. Concerning the relief for a certiorari order to issue to quash the published results from volume 1 of the 2019 KPHC, Mr. Issa urged that the court to cancel the disputed results and then direct that the 2009 published results be used as the baseline multiply with the population growth between 2009 and 2019 and then

issue a structural interdict that the 1st respondent does comply within 30 days. Mr. Sagana and Biriq counsel for the 9th to 15th petitioners supported that prayer. However, Mr. Nyamodi urged that the prayer for structural interdict was not pleaded nor was it prayed for and that parties are bound by their own pleadings.

176. It is true that the prayer for a structural interdict to be made was not pleaded nor prayed for. However, the prayer to cancel the disputed census results is contained in the prayer for a certiorari order to quash the impugned results. As to the failure to specifically plead for a structural interdict order, the same is catered for in the omnibus prayer for the court to issue any other relief it may deem fit. Indeed, a court cannot issue an order in vain. See **Shimmers Plaza Limited vs National Bank of Kenya Limited (2015) eKLR** where the Court of Appeal emphasized that courts do not issue orders in vain and that court orders must be obeyed;

“We reiterate here that court orders must be obeyed. Parties against whom such orders are made cannot be allowed to thrash them with impunity. Obedience of court orders is not optional, rather, it is mandatory and a person does not choose whether to obey a court order or not...”

177. If the court finds that the census results as published do not reflect the true position on the ground or that it was not able to have the results verified through scrutiny and quashes the published results, what should follow next. This court cannot fold its hands and leave parties in a limbo. The court must in exercise of its constitutional mandate or inherent power issue orders that are appropriate to resolve the issue in controversy.

178. In the instant case, the 1st respondent frustrated the scrutiny exercise thus rendering execution of the scrutiny order useless. The people from the affected areas have a legitimate expectation to have their population properly ascertained. This has an impact on their social, economic and political benefits. The consequences of not knowing their proper population is so grave than even repeating the exercise. Population is everything in modern Kenya where social, economic and political rights are pegged on population (numbers).

179. Having held that the results were not verified through scrutiny, the inevitable consequence is to quash the published results hence cancel the same. What is the effect of cancelling the published results? Courts do not issue orders in vain. After issuing the order cancelling the results, the most appropriate thing to do is to repeat the exercise in the affected areas.

180. The next relief sought is to bar constitutional or statutory bodies from relying on the disputed results. When the 2009 results 8 districts were contested by the KNBS, the Court of Appeal in Civil Appeal number 64 of 2012 (*supra*) directed that the published results be used instead of the adjusted or projected results. In that case, the published results were contested by the KNBS who claimed that the figures were inflated. The same published results were subsequently used in boundary delimitation in 2013 and revenue sharing till 2019.

181. Nevertheless, after cancelling the results as stated herein above, some government departments or institutions must continue running. Considering that the 2009 published results have indisputably been used all along for purposes of those institutions dispensing their mandate, the same shall apply till the KNBS conducts fresh census in those areas. This court has no mandate to pronounce population for those areas as suggested by Mr. Issa and Biriq. With that direction, an order for prohibition against any government department or institution from utilizing the published results of 2019 census is inevitable.

Who should bear costs.

182. As general rule, costs follow the event. However, considering litigation of this nature where public interest is at stake, courts have always leaned on the holding that each party bears own costs. See **Jasbir Singh Rai v Tarcholan Singh Rai SC Petition 4 of 2012 (2014) eKLR** where the court held that public interest cases are exempted from the general rule that costs follow the event. In similar manner, I am inclined to order that each party bears own costs.

Whether the reliefs sought are enforceable.

183. The respondents argued that the reliefs sought are not enforceable. Under Article 23, there are various remedies outlined among them judicial review orders. In this case, I have already held that the order for certiorari, mandamus and prohibition are applicable and therefore enforceable.

Conclusion

184. Having analyzed the pleadings herein, the evidence tendered by the respective parties and their rival submissions, the inevitable conclusion to make is as follows;

- i) That the consolidated petition herein has with reasonable degree of precision met the threshold set out in the Anarita Karimi Njeru case on what a constitutional petition (reference entails).
- ii) That the 2019 KPHC results were released in accordance with the UN principles and recommendations on population census and therefore the same was not done in a rush.
- iii) That the deployment of technology during enumeration did not in any way jeopardize the outcome of the 2019 KPHC exercise in the three North Eastern counties.
- iv) That the census results referred to as 'actual population' unofficially gathered by the petitioners allegedly through the census officials and elders was not legitimate hence not admissible
- v) That the order for preservation of the 2019 enumeration devices and subsequent scrutiny of the census results in the affected areas was not complied with by the 1st respondent
- vi) That the consequence of disobedience of the order for preservation of the census devices and subsequent scrutiny exercise calls for the court to draw an adverse inference against the 1st respondent
- vii) That given all available circumstances including the upward trend of population growth in North Eastern since independence till 2009; high fertility rate; least knowledge in family planning; high level of polygamy and high level of public awareness, it was unlikely that population in those areas would have drastically dropped below what it was during the 2009 population census 10 years down the line
- viii) That in view of the disobedience of the court order for scrutiny to verify the truth on the disputed figures, the order that is commendable to the court is to quash the 2019 census results for the affected areas in the north eastern three counties (Mandera, Wajir and Garissa
- ix) That upon cancellation of the impugned results, a structural interdict order do issue for the KNBS (1st respondent) to conduct a fresh mini-

census exercise in the affected areas within a period of one year from the date of delivery of this judgment

- x) That during the pendency of the implementation of the mini-census exercise, the published census results of 2009 shall be utilized by any other government department and or institution among them the respondents during the implementation or execution of their duties or mandates
- xi) That when it comes to costs in public interest litigation, parties bear own costs.

Final disposal

185. Having arrived at the above conclusion, I must state that these proceedings and similar litigation in 2010 by the same communities has put the government and its citizens on a serious collision course. It has also exposed weaknesses in administrative structures especially the manner in which we preserve our data and the right to access the same as public information without undue hurdles.

186. In view of the above holding, the following orders shall issue.

- a) That an order of certiorari removing to this honourable court to quash the results published in volume 1 of the 2019 KPHC with respect to Mandera North, Mandera west, Banisa, Lafey, Mandera East and Mandera South sub-counties(constituencies) be and is hereby issued.
- b) That an order of certiorari removing to this honourable court to quash the results published in volume 1 of the 2019 KPHC with respect to Eldas Tarbaj, Wajir West, Wajir East and Wajir North subcounties(constituencies) be and is hereby issued.
- c) That an order of certiorari removing to this honourable court to quash the results published in volume 1 of the 2019 KPHC with respect to Balambala, Lagdera, dadaab and Garissa Township sub-counties(constituencies) be and is hereby issued.
- d) That the published results in Volume 1 of 2019 KPHC in respect of Mandera North, Mandera west, Banisa, Lafey, Mandera East and Mandera South sub-counties(constituencies)Eldas, Tarbaj, Wajir West,

Wajir East and Wajir North sub-counties (constituencies), Balambala, Lagdera, dadaab and Garissa Township sub-counties(constituencies) be and are hereby cancelled.

- e) That a structural interdict order be and is hereby issued directing the KNBS (1st respondent) to conduct a fresh mini-population census in respect to; Mandera North, Mandera west, Banisa, Lafey, Mandera East and Mandera sub-counties(constituencies) Eldas, Tarbaj, Wajir West, Wajir East and Wajir North sub-counties (constituencies), Balambala, Lagdera, dadaab and Garissa Township sub-counties(constituencies) within a period of one year from the date of delivery of this judgment.
- f) That an order of prohibition do and is hereby issued prohibiting the 2nd, 3rd and 4th respondents from relying on or in any other way from utilizing the disputed published 2019 KPHC results pursuant to Articles 215, 216 and 89 of the constitution in sharing and or determining boundary delimitation.
- g) That before a fresh mini-census exercise as directed above is conducted, the 2nd, 3rd, and 4th respondents shall continue to apply the published census results of 2009 in executing their respective mandates in respect to the affected areas or constituencies.
- h) That this being a public interest litigation, each party shall bear own costs

Dated, signed and delivered virtually this 28th day of January 202.


J. N. ONYIEGO

JUDGE