



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CONST. PETITION NO. 2 OF 2018

IN THE MATTER OF ARTICLES 2,3,6,10,19,21,22,23,25,26,27,28,29,35,40,43,47,48,50, 165,186 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 27(1) & (2), 28,29 (C) & (D) 43 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF UNITED NATIONS GUIDING PRINCIPLES OF INTERNAL DISPLACEMENT AND ARTICLE 4(1), (F) OF THE GREAT LAKES PROTOCOL ON PROTECTION AND ASSISTANCE OF INTERNALLY DISPLACED PERSONS

BETWEEN

JOSEPH KIBIWOT MELLY.....1ST PETITIONER
BETTY JEROTICH BARGOIYET.....2ND PETITIONER
SAMMY LIMO.....3RD PETITIONER
JOSEPH KIPKOCEH KIRUI.....4TH PETITIONER
ELIAS KIPTOO RUTO.....5TH PETITIONER
SUSAN NJERI KATHEGE.....6TH PETITIONER
SUSAN WAITHERA.....7TH PETITIONER
LYDIA MORAA.....8TH PETITIONER
PETER MPGENDI MARANGA.....9TH PETITIONER
JAMES OYAGI OURO.....10TH PETITIONER
HELLEN BOCHABERI.....11TH PETITIONER
SAMUEL KIRWA.....12TH PETITIONER
ANDREW KAREMI KINGORI.....13TH PETITIONER
EDWARD KAMAU KARANJA.....14TH PETITIONER
FLORENCE WANGOI KIARIE.....15TH PETITIONER

VERSUS

THE MINISTRY OF INTERIOR AND

COORDINATION OF NATIONAL GOVERNMENT.....1ST RESPONDENT

THE HONORABLE ATTORNEY GENERAL.....2ND RESPONDENT

AND

COUNTY COMMISSIONER NANDI COUNTY.....1RD PARTY

COUNTY COORDINATOR, NANDI COUNTY

INTERGRATED IDPs PROGRAMME.....2RD PARTY

EQUITY BANK, KAPSABET BRANCH.....3RD PARTY

RULING

The Petitioners in this matter filed the application dated 12th April 2018 seeking for orders that:-

(a) This court be pleased to grant leave to the petitioners to issue third party notice to County Commissioner, Nandi County; County Coordinator Integrated IDPs Programme Nandi County and the Manager Equity Bank Kapsabet Branch; the administrative officer responsible for the verification of persons named in the list of beneficiaries of the IDPs disbursement; the administrative officer responsible for the compilation of the list of beneficiaries of the IDPs disbursement and the finance institution and the officer responsible for the actual disbursement of the Compensation funds respectively.

(b) The honorable court issues interim orders for stay of payment of any disbursement by the government of Kenya which is currently being made to a discreet list of persons alleged to be genuine 2007/2008 post –election violence victims from Nandi County through Equity Bank, Kapsabet Branch pending the hearing and determination of this application.

(c) That this honorable court be pleased to issue an order that the respondents produce copies of registers of internally displaced persons registered at Nandi County and an account of the beneficiaries of money and any land allocated for the resettlement of the internally displaced persons from Nandi County.

(d) The honorable court be pleased to compel the respondents to make public the list of persons it has earmarked for compensation in Nandi County.

The application is founded on the ground that the intended 3rd parties bears an obligation towards the applicants in respect to a right to fair treatment and a right to be included as beneficiaries in the list of intended persons to be compensated.

The application is further supported by an affidavit sworn by *Joseph Kibiwott Melly* that disbursements for compensation are in progress to the detriment of the petitioners who are rightly supposed to be included in the list of IDPs for purposes of compensation. He alleges that the list which was prepared by one of the leaders included the names of people who were not affected by the post-election violence, leaving out the petitioners who lost their loved ones and whose properties were destroyed.

The application is opposed by the 1st and 2nd Respondents and the 1st and 2nd third parties on the grounds that the procedures and transactions relating to the identification, management, profiling and reimbursement of the internally displaced persons is captured in the prevention, protection and assistance to the Internally Displaced Persons and the Affected Communities Act No. 56 of 2012 which creates the office of the National Consultative Co-ordination Committee on internally displaced persons (NCCC) which is mandated with overseeing all issues relating to internally displaced persons.

It is only NCCC that can profile a list of IDPS on behalf of the government and thus disowns any list created by purported IDPS or group of association. They further allege that several of the petitioners in the applicant's lists have already received payments and/or do not appear in the list of IDPS within Nandi County but they fall within the list of IDPS in Uasin Gishu County and are awaiting approval from NCCC for payment. The individuals who were never captured and profiled in 2007/2008 Post Election Violence Government list held within the custody of NCCC are thus not eligible beneficiaries.

The 3rd and 4th third parties also oppose the application on grounds that they have no role in determining who is to benefit from the Kitty set out by the government to assist internally displaced persons but only do remit payments from the kitty in accordance with the instructions issued to them by the government through its relevant personnel. They leave the matter to the directions of the court and or the government.

This court has identified issues for determination as follows:-

- (1) Whether the petitioner have the requisite locus standi to bring up this petition.
- (2) Whether the petition discloses a cause of action against the Respondents.

On the first issue, the legal standing to institute a claim for enforcement of the Bill of Rights is provided for by *Article 22 of the Constitution* as follows:-

22 (1) 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.

(2) In addition to a person acting in their own interest, court proceedings under Clause (1) may be instituted by –

(a) a person acting on behalf of another person who cannot act in their own name;

(b) a person acting as a member of, or in the interest of, a group or class of persons;

(c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its members.

In *Mumo Matemu –vs- Trusted Society for Human Rights Alliance and 5 others (2013) eKLR*, the court held that the stringent requirements of establishing an interest in the matter in order to have locus standi have been done away by this provision. Any person may therefore file a claim on their own behalf or on behalf of other persons as long as they are acting bona fide.

The duty of a petitioner in a constitutional petition is to disclose, with reasonable precision the right he alleges has been infringed and the manner in which this right has been infringed. This duty was acknowledged by the court of appeal in *Anarita Karimi Njeru –vs- The Republic, (1976-1980) KLR 1272* and was restated by the same court in the case of *Trusted*

Society of Human Rights Alliance –vs- AG and 2 others (2012) eKLR.

Given the foregoing, it is clear that the applicants have locus standi to bring up this constitutional petition. The court should next determine whether the petitioners have stated which right was infringed and the manner in which it has been infringed. The presented material should be sufficient to enable the Respondent understand and respond to the claim and for the court to formulate the issues raised in the petition.

The petition herein is vivid that the crux of the petitioner’s claim is that their right to equality and freedom from discrimination under Article 27 of the Constitution has been infringed. They allege the respondents have done this by failing to include them in list of IDPs as they have done for other victims of the 2007-2008 post-election violence.

Internally Displaced persons and Affected Communities Act No. 56 of 2012 defines an “internally displaced person” as a person or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, large scale development projects, situations of generalized violence, violation of human rights or natural or human made disasters, and who have not crossed an internationally recognized state border.

I have gone through the supporting affidavit of *Joseph Kibiwott Melly* and save for stating that he is one of the representative of internally displaced persons from Nandi County, he does not bring the petitioners within the legal definition of who an internally displaced person is. The petitioners may have been affected by the 2007-2008 post-election violence, but the question is, did they flee or leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effect of armed conflict? It is easy for anyone to regard himself as an IDP but whoever does so has an obligation to bring himself within the legal definition of it in order to make a legal claim as such. In this application, the petitioners have not done so.

Section 12 establishes National Consultative Coordination Committee on internally Displaced persons. Under *Section 13*, the functions of the committee include:-

(d)ensure the registration of all internally displaced persons in order to maintain a national data-base of such persons which registration shall commence and conclude within thirty days of the occurrence of internal displacement.

Part (iii) shows the said register is only for reasons of ascertaining the identification, profile, conditions and numbers of internally displaced persons for the sole purpose of protection and assistance in accordance with *Article 3(4) of the protocol*;

The petitioners’ problems if they are genuine IDPs arises out of failure to register them as such. They themselves are not mandated by law or by anyone to declare who is a genuine IDP and who is not. Their problem cannot be cured by stopping payment and assistance of the already identified IDPs, but by their inclusion in the register.

The committee mandated with such function is National Consultative Co-ordination Committee on Internally Displaced Persons. The petitioners herein lost it when they sued every government body or organization which had something to do with IDPs. They even overstretched by seeking leave to issue third party notice to an organization like Equity Bank. They should simply have brought the petition against the committee, seeking their recognition and registration as IDPs. The register should close 30 days of the occurrence of internal displacement. They are out of time and without a player to reopen the register or to extend time their prayers in the petition can be of little assistance if any. It is on this grounds that I find the petition bad in law, a waste of court’s time and is accordingly dismissed.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 30th day of October, 2018.

In the presence of:-

- (1) Mr. Kuria for the Respondent
- (2) Petitioners who are in person
- (3) Mr. Mwelem- Court Assistant