



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

PETITION 45 OF 2012

JOHN MBUGUA

MOSES MUNGAI.....PETITIONERS

GRACE WANJA

(Suing as the officials of the Internally

Displaced Persons Association)

VERSUS

ATTORNEY GENERAL.....RESPONDENT

JUDGMENT

Before Court is the Petition dated 3/9/2012 in which the Petitioners through their officials JOHN MBUGUA, MOSES MUNGAI and GRACE WANJA are seeking the orders that

“(a) The Petitioners fundamental rights and freedoms more so as set out in Article 27 (Equity and freedom from discrimination) and Article 56 (Rights of Minorities and Marginalized groups) have been violated.

(b) The Petitioner is entitled to compensation and resettlement like other victims of displacement in other parts of the country who have been compensated and resettled and hence not to be discriminated against.

(c) That the Petitioner is entitled to recognition as duly registered under the Societies Act Chapter 108 Laws of Kenya and hence entitled to a supportive environment and economic empowerment; and

(d) The costs of this Petition be awarded to the Petitioners”

The Petitioners are the officials of The Internally Displaced Persons Association and have filed this Petition in that capacity. The Association is duly registered under The Societies Act Cap 108, Laws of Kenya and it is comprised of victims who have been displaced from various parts of the county. Its primary objective is to agitate for the rights of its members.

The Petitioners allege that though the Government through the Ministry of Special Programs has already

resettled and compensated some groups of displaced persons, they have been intentionally left out and neglected as the Government has failed to resettle and/or compensate the Petitioners and members of the Association. The Petitioners allege that the Ministry has therefore discriminated against them as a result of which they have undergone suffering. The Petitioners ask the court to intervene and direct the Respondent to recognize, financially support and include the association in all its activities affecting internally displaced persons.

The Respondent replied to the Petition by way of a Replying Affidavit sworn by **MR. JOSEPH MACHARIA** the Deputy Secretary, National Consultative Co-ordination Committee in the State Department of Devolution, Ministry of Devolution and Planning. He averred that after the 2007 post-election violence the Government established the National Humanitarian Advisory board and the Humanitarian Fund vide gazette notice No. 11 of 2008, whose function included determining the persons who were adversely affected by the post election violence, resettling the displaced persons and helping them replace household items that had been destroyed, and also included reconstruction of their homes and economic assistance to enable these victims restart their lives.

The Board determined that those who were willing to return to their homes would receive ex-gratia payment to help them start over. Those unwilling to return to their homes were to be resettled in government acquired land and then given cash payouts. By way of notices issued through the provincial administration the latter groups were asked to form and register Self Help Groups through which land would be allocated to them. These groups were all to be registered by 31st December, 2008.

A total of 20 such Self Groups comprising of 6,978 members were registered before this deadline of 31/12/2008. The Ministry of Settlement in consultation with the Kenya National Bureau of Statistics and the Ministry of State for provincial administration profiled all the applicants and then registered their names in a data base. Persons so registered were then either given land or funds to enable them purchase their own land.

The Respondent insists that all persons whose claims were submitted and who were found to be authentic claimants were duly compensated. The Petitioners association was registered two years after the deadline on 17th May, 2010, which the Respondents stated was a clear indication that their claim was an afterthought. The Respondent further argued that the Petitioners had failed to provide their names, identification card numbers and details of the areas from which they had been displaced to enable the Respondent check the data base to establish if they had already been compensated.

In their Further Affidavit the Petitioner stated that the Respondent had acknowledged the legality of the Petitioners' Association and agreed to work with them in order to achieve the objectives of the Association. The government has in its custody all relevant information pertaining to the Petitioners. The Petitioners also argued that they had applied to be registered on 8th April, 2008 well before the December deadline but their certificate was only issued on 17th May, 2010. The delay in issuing the certificate could only be attributed to government officials and the Petitioners could not be penalized for their lethargy.

The matter was disposed of by way of written submissions. The Petitioners duly filed their submissions dated 23/2/2015. They submitted that Article 27 of the Constitution guaranteed their right to equality and freedom from discrimination. Article 20(2) further provides that every person shall enjoy the rights and fundamental freedoms enshrined in the Bill of Rights.

The Petitioners submitted that they have ably demonstrated that there had been excluded from the benefits provided by the government to the victims of displacement and that some groups have been favoured by the Ministry of Special Programmes. As a result the Petitioners were marginalized and have become minorities whose needs have been ignored by the Respondent contrary to the provisions of Article 56 of the Constitution.

The Petitioners argued that there exists no justification for the preferential treatment accorded to other groups and submitted that the government should be compelled to provide their association with a supportive environment and economic empowerment to enable it attain its objectives.

The Respondents submissions were dated 3/12/2016. The Respondent maintained that the process for compensation and resettlement of all the victims of the post-election violence was open and transparent. All persons who were affected and who were living in the IDP Camps were duly compensated. The Respondent denied that any group of such displaced person was left out. It submitted finally that the Petitioners claims were not genuine and ought to be dismissed.

ANALYSIS

I have carefully perused and put into consideration the written submissions filed by both parties. I find that the following issues arise for determination.

- (1) Have the Petitioners rights under Articles 27 and 56 of the Constitution been infringed?
- (2) Are the Petitioners entitled to recognition by the State
- (3) Should the Internally Displaced Persons Association be recognized?

I will now proceed to deal with each issue individually.

- (1) **Have the Petitioners Rights to equality and freedom from discrimination been contravened.**

The onus is on the Petitioners to prove their case. They must at the very least articulate their case in such a manner as to enable the court discern what remedy it is that it being sought. Thus although it is not required that pleadings be drafted with mathematical precision, the pleadings must disclose with a reasonable degree of precision the complaint being raised by the Petitioner the provisions of the Constitution alleged to have been infringed and the nature of that infringement. As held by the courts in the cases of **ANARITA KARIMI NJERU Vs THE REPUBLIC (1976 0 1980) KLR** and in **MUMO MATEMU Vs TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE & 5 OTHERS [2013]eKLR**, the pleadings in such a Petition must contain sufficient particulars to enable the other party know the claim against them and prepare their defences, and to enable the court determine exactly what it is being called upon to adjudicate over as well as the orders being sought.

The Petition hereby does not meet this minimum threshold. The Petitioner in the first part of their petition have sought declarations that their rights against discrimination as minorities and members of marginalized communities under Articles 27 and 56 of the Constitution were infringed by the Government. It was alleged that these rights were infringed firstly by the failure of the Government to compensate the Petitioners as victims of displacement and secondly by failing to facilitate the Petitioners due to the disadvantages they have suffered.

Article 27 of the Constitution guarantees to all persons the right to equality and freedom from discrimination. All persons are created equal and none should receive preferential treatment. Discrimination is the preferential treatment accorded to persons in comparable positions on one or more of the grounds prohibited by the Constitution or on the basis of an unreasonable distinction and without any lawful justification. In **JOHN KIPLANGAT BARBET & 3 OTHERS Vs ATTORNEY GENERAL 7 4 OTHERS [2013]eKLR**, the court relied on the definition of discrimination given by the Committee of **'the International Convention on Civil and Political Rights'** in the General Comment18, Non-discrimination (Thirty- seventh session 1989) where the term discrimination was defined to imply

“Any distinction, exclusion, restriction, or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status and which has the purpose or effect of multiplying or impairing the recognition, enjoyment or exercise by all persons, on equal footing of all rights and freedoms”

Where there is a difference in treatment between persons who are in comparable situations which has no

objective or reasonable justification then Article 27 of the Constitution may be deemed to have been breached. The Petitioners therefore needed to show first, that they were displaced persons, secondly, that displaced persons under similar circumstances received compensation from the State, and thirdly that they were unfairly and unjustifiably excluded from enjoying that benefit.

The State did admit that it compensated persons who were displaced but it only compensated those who were displaced during the 2007/2008 post – election violence, who had been registered before 31st December, 2008. In the replying affidavit it was stated that the government has a comprehensive data base of all persons who were victims of the 2007/2008 post-election violence. It was incumbent upon the Petitioners to show that they fell within this category of persons.

The Petitioners brought this claim on the officials of the ‘**Internally Displaced Persons Association**’, and claimed that their membership included persons who had been displaced from various parts of the country. However no particulars of these members such as names, identity card numbers, where each person was displaced from, was provided to enable the Respondent verify their claims. As such it is not possible to determine the authenticity of the Petitioners claims nor is it possible to determine whether they had previously been compensated. It is not possible from the pleadings and documents filed in support to determine whether indeed the Petitioners constitutes a marginalized and minority group as contemplated by the constitution. It is also not possible to determine whether the Petitioners had already been provided for by the State. Thus I find that the Petitioners have failed to prove that their rights to equality and freedom against discrimination and their rights as a marginalized and minority group under Articles 56 and 27 have been infringed

2. Are the Petitioners entitled to Recognition by the State

The Petitioners association was duly registered under the Societies Act and they were issued with a registration certificate, therefore the Petitioners have already been recognized by the State as an association. The Petitioners have not demonstrated that they have in any way been curtailed and/or prevented from performing any of their functions.

It would seem that what the Petitioners are actually seeking is an order to compel the State to confer upon the association the status of a public body by way of mandamus in judicial review proceedings. The scope of his remedy was exhaustively set out in the case of **KENYA NATIONAL EXAMINATION COUNCIL Vs REPUBLIC Ex Parte GEOFFREY GATHENJI & 9 OTHERS (Supra)** citing an excerpt from ‘**Halsburys Laws of England, 4th edition Vol. 1 at Page 11 Paragraph 89**’ which states as follows

“The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end the justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing the right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual”.

At paragraph 90 headed ‘**the mandate**’ it is stated:

“The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons had failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed”.

For a court to compel a body to act it must be a public body whose mandate is to promote the rights of internally displaced person. The State would then be obliged to include the Petitioners Association when making decisions that touch on the plight of internally displaced persons and also to offer financial and other support to the association to enable it achieve its objectives.

Further in **MWAU Vs PRINCIPAL IMMIGRATION OFFICER 1983eKLR**, the court emphasized that the duty sought to be enforced must be specific and precisely defined and stated.

“Mandamus does not lie against a public officer as a matter of course, the courts are reluctant to direct a writ (sic) of mandamus against executive officers of a government unless some specific act or thing which the law requires to be done has been omitted. Courts should proceed with extreme caution for the granting of the writ which would result in interferences by the judicial department with the management of the executive department of the government. The courts will not intervene to compel action by an executive officer unless his duty to act is clearly established and plainly defined and the obligation to act is peremptory”

The Petitioners have not shown that the state was legally obligated to recognize them or obligated to confer upon their association the status of a public body. Nor have they established that there exists a public duty to act imposed on a body which it has refused to perform to the detriment of the affected party.

In **REPUBLIC Vs KENYA VISION 2030 DELIVERY BOARD & another Ex Parte ENG NOAH ABEKAH [2015]eKLR**, the Court held that such duty must be a mandatory duty to act and not optional or discretionary as follows

“Therefore, the fulcrum of an order of mandamus is that a statutory duty must be owed to an applicant and the public officer or public body, after being asked to perform the duty, has refused or failed to discharge that duty and there is no other adequate remedy. In matters involving exercise of judgment and discretion the public officer or public agency can only be directed to take action; it cannot direct in the manner or the particular way the discretion is to be exercised”

It has not been shown that the state had any obligation to provide financial support or to otherwise facilitate the association in the performance of its functions. The correspondence between the Petitioner’s and the Ministry of State for Special Programmes was limited only to acknowledging their status as an association and its objective. That correspondence could not be construed as creating any obligation for the State to recognize the association in the manner sought by the Petitioners. This prayer also fails.

Finally I find that this Petition has no merit and the same is hereby dismissed with costs.

Dated in Nakuru this 31st day of May, 2017.

Maureen A. Odero

Judge