



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

PETITION NUMBER 2 OF 2016

**IN THE MATTER OF SECTION ENFORCEMENT AND INTERPRETATION OF THE
CONSTITUTION OF KENYA AND**

ARTICLE 2,3,10,12,12,21,23,27,28,39,44,47,165

AND

**IN THE MATTER OF CONTRAVENTION AND OR APPREHENDED CONTRAVENTION OF
FUNDEMENTAL RIGHTS AND FREEDOMS**

FRANCIS CHEMWOR PSOMUKEN 1ST PETITIONER
REV. CHEMASWET PETER 2ND PETITIONER
LAWRENCE CHESHHARI MOKOSU 3RD PETITIONER
PAUL KIKONO ARAP MACHI 4TH PETITIONER
STEPHEN NYAPARA CHESEBE 5TH PETITIONER

VERSUS

THE CABINET SECRETARY 1ST RESPONDENT
INTERIOR AND CO-ORDINATION 2ND RESPONDENT
THE ATTORNEY GENERAL, COUNTY COMMISSIONER
TRANSZOIA COUNTY 3RD RESPONDENT

JUDGEMENT

The petitioners urge this court to make a declaration that:-

- a) the petitioners rights under Articles 12,21,22,23,27,28,29,39,44 and 47 of the Constitution of Kenya 2010, have been violated by the respondents.
- b) the members of the Elgon Masai (Sabaot) and Nandi communities that have just returned to Kenya are citizens of Kenya and

c) the court do issue a permanent injunction restraining the respondents, their servants, agents or anybody acting on their behalf from harassing, intimidating or arresting members of the Elgon Masai (Sabaot) and Nandi Communities that have returned to Trans Nzoia County.

d) They also pray for costs.

The petitioners' case is that the Elgon Masai (Sabaot) originally occupied the vast Trans Nzoia District in Kenya. In the year 1932 – 1949, about 200 families with about 5000 heads of cattle were moved by the then Trans Nzoia District Commissioner Mr. J. B. Liewelin to Sebei in Uganda. In Uganda the families faced various challenges and were forced to disperse to Teso, Busoga, Buganda, Bunyoro, Tororo, Ankole, Lango, Bugisu, Nakasongola, Masindi and Sebei regions. Challenges of cattle rustling, frequent change of regimes, hostile reception by the host community, questionable identity in the sense that the Uganda Constitution does not recognize the Elgon Masais and Nandis as one of the tribes of Uganda, forced some of them to return to Kenya in 1970s and bought farms that were left behind by the white settlers. Another group returned to Kenya in 1993 and settled in Kitale Settlement Scheme. In the recent past more than 600 members of the Elgon Masai and Nandi have come back to Kenya and joined their relatives at their ancestral land in Trans Nzoia County. Some of them have National Identification cards whereas others whose parents are Kenyans do not have.

The petitioners claim that the respondents without any colour of right and justifications have unlawfully embarked on an exercise of harassing, intimidating and arresting the aforesaid groups of the Elgon Masai (Sabaot) and Nandi communities on the grounds that they are aliens and are not Kenyans. Those arrested have been charged and have been subjected to harsh bail conditions. Following this, it is alleged by the petitioners that unless the respondents' unlawful actions are restrained by an order of this Honourable Court, the member of the Elgon Masai (Sabaot) and Nandi communities in Trans Nzoia will suffer irreparable loss.

The petition is opposed by the respondents by way of a replying affidavit sworn by one S. I. Matata. In paragraphs 3 to 8 he avers that:-

3. The police in the months of February and March 2016 while on their normal duties within Trans Nzoia County arrested a number of non-Kenyans from different nationalities who were found in Kenya unlawfully in contravention of the Kenya Citizenship and Immigration Act number 12 of 2011.

4. All the arrested persons were charged in court and their criminal cases are ongoing as of now.

5. Those affected are not only Elgon Masai (Sabaots) and Nandis but non-Kenyans who were found to be in Kenya illegally.

6. Their arrest by the police was in line with the police mandate of maintaining law and order and were not under direction of anybody; not even 1st respondent nor the 3rd respondent herein.

7. The accused persons have an opportunity to establish that they are Kenyans before the courts in which they are charged.

8. Criminal liability is to an individual and not a community and citizenship is acquired individually and not by a community, which makes the petition bad in law.

They hence urge this court to dismiss the petition with costs. If I am to summarize the basis of this petition by the petitioners, it is that they were subjected by police to unlawful arrest and unlawful trial, given that they are Kenyans. This particular issue is the subject of determination in the lower courts in which the petitioners have been charged. The duty to investigate crimes and to arrest the suspect is given

by the law to the police. The police were therefore within their lawful mandate when they arrested the petitioners and charged them. The office of the Director of Public Prosecutions is bestowed with the duty of prosecuting the suspects. The fact that the petitioners have been subjected to prosecution infers that the officer of the ODPP is of the consideration that there exists material evidence in support of the charge forming certainty that they have a prosecutable case. As was held in the case of ***George Joshua Okungu and Another versus The Chief Magistrate's Court Anti – Corruption Court at Nairobi and Another, Petition number 227 and 230 of 2009***, the constitutional discretion given to the ODPP ought not to be lightly interfered with especially if the evidence in his possession if true may well sustain a prosecution. The trial courts are better placed to consider the evidence and decide whether they are guilty or not. There is

also a process provided for an appeal where a party is dissatisfied with the case outcome. In case of malicious prosecution damages can be awarded in a civil suit. There is therefore complete avenues in which the petitioners' grievances can be better and adequately addressed.

In ***Kuria and 3 others versus Attorney General [2002]2 KLR 69***, the court held that:-

“A prerogative order is an order of serious nature and cannot and should not be granted lightly. It should only be granted where there is an abuse of the process of law, which will have the effect of stopping the prosecution already commenced. There should be concrete grounds for supposing that the continued prosecution of a criminal case manifests an abuse of the judicial procedure, much that the public interest would be best served by the staying of the prosecution.”

As was in the above stated case, in this case there is no evidence of malice, no evidence of unlawful actions, no evidence of excess or want of authority, no evidence of harassment or intimidation or even manipulation of court process to warrant making a finding that the petitioners are unlikely to get a fair trial in the lower court. They will be awarded a chance to provide the evidence they have to the effect that they are Kenyans. They have not been thrown out of Kenya or repatriated to Uganda. They should be at peace as they undergo the trial process to establish the truth about their citizenship status. I find no reasonable ground to interfere with the legal process the petitioners have been subjected to. The petition therefore fails with costs to the respondents.

STEPHEN GITHINJI

JUDGE

15.04.2016

Judgement read and signed in the open court in presence of Mrs. Chebet who is holding brief for Mr. Kuria for the Attorney General, County Commissioner Trans Nzoia.

STEPHEN GITHINJI

JUDGE

15.04.2016