



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

ORIGINATING SUMMONS NO. 221 OF 2012

PAUL K. WAWERU 1ST APPLICANT

MOSES G. BORO 2ND APPLICANT

STEPHEN KARIUKI KAGWI 3RD APPLICANT

JULIUS WAKABA NJOGU 4TH APPLICANT

GRACE NJERI MUIYORO 5TH APPLICANT

VERSUS

HON. ATTORNEY GENERAL 1ST RESPONDENT

**THE PERMANENT SECRETARY IN CHARGE OF THE
MINISTRY OF STATE**

FOR SPECIAL PROGRAMMES 2ND RESPONDENT

**THE PERMANENT SECRETARY IN CHARGE OF THE
MINISTRY OF INTERNAL**

**SECURITY & PROVINCIAL ADMINISTRATION 3RD
RESPONDENT**

JUDGMENT

The Applicants herein **PAUL K. WAWERU AND 4 OTHERS** have filed this Originating Summons dated 19th June, 2012 under Article 22 of the Constitution of Kenya. They allege that their rights guaranteed by the Constitution were infringed during the 2007/2008 post-election violence. In their application they seek a total of 18 declarations. However the prayers as drafted also include the grounds upon which the application is premised. My own careful perusal of the declarations sought reveal that the applicants are in actual fact seeking the following declarations

“(a) that it was the obligation of the State to prevent the occurrence of the 2007/2008 post election violence and further the State was obliged to provide the applicants with security

- (b) *that the State breached its obligation to guarantee the applicants' rights to property, housing and socio-economic rights such as food and health;*
- (c) *that the applicants be compensated for the loss they incurred during the skirmishes including houses, livestock, crops, granaries, personal effects and other assets;*
- (d) *that the applicants be awarded Ksh 250,000 general damages for the pain, distress and economic hardships they have suffered and a further Ksh 300,000/= for disruption of their lifestyle and subjecting them to trauma and difficult living conditions;*
- (e) *that the applicants be awarded 3 acres of land for settlement or in lieu not less than Ksh 700,000/= to purchase the same;*
- (f) *that the applicants be recognized as internally displaced persons and be compensated within 30 days from the date of the judgment of the court; and*
- (g) *that the 1st Respondent be compelled to present in parliament a bill for compensation of the 2007/2008 post-election violence victims within 90 days of the judgment of the court and before the 2012/2013 general elections”.*

BACKGROUND

The Applicants are all members of the '**Nyandarua South IDP's Self Help Group**' and they have filed this application on their own behalf and on behalf of 1,445 other members of the Group. The applicants in their statement allege that they are victims of the 2007/2008 post-election violence. They claim that as a result of that violence they were forcefully ejected from their homes in Uasin Gishu County and were forced to relocate to Nyandarua South in Nyandarua County where they continue to reside to date.

It is the Applicants contention that the Kenya Government failed to accord them security and protection, which led to their being subjected to the post-election violence which resulted in loss of their property, and loved ones and subjected them all to great suffering. Counsel for the Applicants submitted that the State as the guardian of the Constitution and protector of the fundamental rights of all citizens, ought to have prevented the occurrence of the 2007/2008 post-election violence by use of the mechanisms available to it *e.g* intelligence and security agents like police.

The applicants are also aggrieved that the 1st and 2nd Respondents have failed/refused to recognise them as internally displaced persons. Therefore they have not been compensated like the other IDP's.

According to the **IDP STATUS BRIEF** a report issued by the Office of the President indicated that as at 3rd March 2010, the government had established a resettlement fund for all persons affected by the post-election violence. This fund catered for the replacement of basic household goods and funds to enable IDP's to start their lives a fresh. Since the applicants have been denied recognition as victims they have not benefited from this resettlement fund. They therefore seek a declaration that they are internally displaced persons and also seek orders for their compensation resettlement.

The Application was opposed. The Hon. Attorney General appeared for the three Respondents through the learned State Counsel **MR. KURUI**. The Respondents filed a Replying Affidavit dated 19th November, 2014 sworn by **MR. JOSEPH MACHARIA**, the Ag. Director Mitigation Resettlement in the Directorate of Special Programmes within the Ministry of Devolution. In his affidavit the Ag. Director averred that the government has in its possession a comprehensive data base of all persons who were genuine victims of the 2007/2008 post-election violence. He further averred that the government has put in place a framework and a comprehensive formula to compensate all such victims by way of monetary compensation. Those victims who managed to organize themselves into self-help groups were assisted by

the government to identify land for resettlement and would be relocated and resettled on land which was purchased using the monies they had received as compensation. The deponent also averred that the government had to be very careful in identifying genuine victims as many fictitious claims for compensation had been made by persons pretending to be victims of the post-election violence. Consequently mechanisms were put in place to determine who were genuine IDP's and to weed out the imposters. Using this mechanism the 1,445 members of the Applicants self help group were vetted. Only 312 were found to be genuine IDP's who were entitled to compensation.

ANALYSIS AND DETERMINATION

The application herein was headed as an '**Originating Summons**' but was drafted as a '**Chamber Summons**'. However, this suit is effectively a Constitutional Petition as the application alleges the violation of the following rights by the Respondents

- i. ***Right to equality and freedom from discrimination guaranteed by Article 27 of the Constitution***
- ii. ***Right to Human dignity guaranteed by Article 28 of the Constitution***
- iii. ***Right to freedom of movement and residence guaranteed by Article 39 of the Constitution***
- iv. ***Right to Property guaranteed by Article 40.***

It is now well established that lapses in procedure ought not hinder the determination of the underlying dispute. Article 159(2) (d) of the Constitution exhorts courts to "**administer justice without undue regard to procedural technicalities**". Therefore notwithstanding the procedural lapses this court will consider and determine the issues raised by the applicants.

As stated earlier the application before court is in effect a constitutional petition. That being the case it must meet the minimum threshold for a constitutional petition. In **ANARITA KARIMI NJERU –VS- THE REPUBLIC (1976 -1980) KRR 1272** the court held that where a person is seeking redress from the High Court for an alleged violation of his constitutional rights, he must set out with a reasonable degree of precision that of which he complains, the provisions said to have been infringed and the manner of that infringement. This principle was restated by the Court of Appeal in the case of **MUMO MATEMU –VS- TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE AND 5 OTHERS [2013] eKLR** where the court held that the pleadings in a constitutional petition must contain sufficient particulars to enable the other party understand the case against him and respond to it. It must also state with specificity the reliefs being sought from the court.

The first limb of the applicants claim was that the State has a positive obligation to provide security to all citizens. The applicants allege that the State failed to honour this obligation towards them by failing to prevent the occurrence of 2007/2008 post election violence. As such they argue the State should be held accountable for their loss and suffering as a result of that violence.

There can be no doubt that the Constitution does place upon the state an obligation to protect all citizens from violent acts which could lead to a violation of their rights. In the case of **CHARLES MURIGU MURIITHI & 2 OTHERS –VS- ATTORNEY GENERAL 2015 eKLR**, the court held as follows

“it is therefore our finding that the State through its security agencies, including the Police, has a positive obligation and duty to facilitate and create a peaceful environment in which rights enshrined in the Constitution, including the right to security of the person and to property, would be freely and fully enjoyed by persons within its jurisdiction”.

However, the State will only be held liable for actions of non-state actors where it is shown that it breached its duty of care. There must be culpability on the part of State agents for liability to ensue.

In the same **CHARLES MURIGU MURIITHI** case the court went on to hold that

“The State’s duty to protect those rights would only be activated if it is demonstrated that the police or other State agencies had prior information that a section of the members of the public

in a certain area, or specific individuals, were in danger of being subjected to acts of violence against their person or property and that the police, negligently or deliberately, failed to act on such information leading to a violation of the rights protected under the Constitution”.

In order to prove this claim therefore the applicants must show that the state with full knowledge of the imminence of the post-election clashes, failed to exercise due care to prevent the violence that occurred. This was not established. The applicants failed to show that the State being fully aware that their rights were under threat negligently and/or recklessly failed to take requisite measures to protect them. The 2007/2008 post election violence was in many ways spontaneous, and took many in the country by surprise. Even with the resources available to it the State cannot be said to have been aware in advance just how widespread and how destructive the violence would be. The Respondents cannot in this case be held liable for the actions of non-state actors without proof of culpability. The applicants' prayer for a declaration that the State failed to safeguard the security of the applicants cannot be allowed. It follows that their claim for compensation for their resultant losses also cannot be allowed.

The second limb of the applicants' claim was that they did not receive similar compensation like other victims of the post-election violence. This claim is premised upon Article 27 of the Constitution of Kenya which guarantees the right to equality and freedom from discrimination.

In order to prove a claim under this limb the applicants' must prove **firstly** that they were in actual fact victims of the post-election violence, **secondly** that other IDP's in comparable situations received compensation from the State and **thirdly** that they were unfairly and unjustifiably excluded.

In the Replying Affidavit filed on 9th December 2014 the Ag. Director stated that several persons lodged fraudulent claims seeking compensation from the government after the programme for compensating victims was announced. The government therefore had to put into place a reliable mechanism to establish with certainty who were genuine IDP's and who were merely impostors seeking self-enrichment. Using this mechanism all 1,445 applicants' were vetted. Only 312 were found to be genuine victims. The vetting conducted by the State established that out of the 1,445

- a. ***3 did not have national identity cards***
- b. ***The names of 40 persons had been repeated in the list***
- c. ***18 persons shared the same identity cards***
- d. ***Only 446 members of the Self Help Group were listed in the data base held by the Ministry of Special Programmes***
- e. ***Out of the 446 above 117 persons had already been compensated***
- f. ***Only 312 were genuine internally displaced persons who were entitled to monetary compensation.***

The report of this vetting and the findings thereto was annexed to the replying affidavit. These findings of this vetting exercise have not been challenged and/or controverted by the applicants. Those who were found not to be genuine victims have not adduced evidence to dispute this vetting report. Therefore it is clear that not all the 1,445 persons named in the application were genuine IDP's and not all would be entitled to compensation. I therefore find that only the 312 persons named in the report annexed to the replying affidavit as genuine victims are entitled to be compensated. The claim of the others for compensation from the State is hereby dismissed.

The final issue for determination relates to the nature of compensation that should be awarded to these 312 applicants. In their application, the applicants sought to be awarded 2 acres of land each, or in lieu Ksh 700,000/= each to enable them purchase parcels of land for their resettlement. However, the Respondents countered this by stating that there already exists a framework for the compensation of genuine claimants as set up by the Directorate of Special Programmes. Since there already exists a criteria for compensation and payment of genuine victims, I would not be inclined to order payment of a specific amounts as monetary compensation in this case. The applicants have not demonstrated why they should not be compensated in the same manner as other victims, in accordance with the government framework. I direct that the 312 persons found after vetting to be genuine victims of the 2007/2008 post election

violence shall be compensated in a similar manner as all other victims.

In conclusion based on the foregoing I find that

- i. *The 312 applicants as listed in the report attached to the Respondents replying affidavit are victims of the 2007/2008 post-election violence who were entitled to compensation but have not yet been compensated.*
- ii. *The 2nd Respondent shall compensate the applicants stated in (a) above in the same manner as it did for other internally displaced person within 90 days from the date of this judgment.*
- iii. *Each party to bear it own costs*

Dated in Nakuru this 24th day of June, 2016.

Maureen. A. Odera

Judge