



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

PETITION NO. 24 OF 2015

IN THE MATTER OF ARTICLE 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

AND

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

AND

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

BETWEEN

PETER O. NYAKUNDI & 68 OTHERS PETITIONERS

AND

THE PRINCIPAL SECRETARY, STATE DEPARTMENT OF PLANNING, MINISTRY OF DEVOLUTION AND PLANNING... 1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL 2ND RESPONDENT

JUDGMENT

By way of Petition dated 7th May 2015, the Petitioners seek the following:-

“(a) A declaration that the Respondents actions are in violation of Articles 10 and 232 of the Constitution.

(b) A declaration that the Respondents have violated the Petitioners’ rights guaranteed under Article 27, 28, 29, 43 and 47 of the Constitution.

(c) An order that the Respondents produce copies of the level III Register of internally displaced person registered at Saw-Mill Camp – Molo and an account of the beneficiaries of the money and land allocated for the resettlement of the internally displaced persons.

(e) An order that the Respondent do pay Ksh 35,000/= and allocate 2¼ acres to each Petitioner

(f) An order that the Respondents do pay general damages to the Petitioners for violating their rights

(g) Costs of this Petition”

The Petition was supported by the Affidavit of one **PETER O. NYAKUNDI** sworn on 7th May, 2015 on behalf of the 68 other Petitioners named in the ‘**Authority to Plead**’ filed in court on the same date.

The Respondents through the Senior Litigation Counsel in Nakuru filed on 15/12/2015 Grounds of Opposition in response. The petition was disposed off by way of written submissions.

BRIEF FACTS

The Petitioners allege that they are all victims of the 2007/2008 post-election violence which saw them forcefully ejected from their homes in the then Kuresoi District, Rift Valley Province. They were all moved to the Saw Mill IDP Camp in Molo and were all registered as IDP’s by the Ministry of Special Programmes which was then under the Office of the President and by the Red Cross.

By way of Legal Notice No. 1038 of 2008 the Government created the National Humanitarian Fund Board under the Department of Mitigation and Resettlement. The objective of this Board was to resettle post-election violence victims. Each displaced person was to be given Ksh 10,000/= as start-up capital, Kshs 25,000/= for the reconstruction of homes and land measuring 2¼ acres each.

The Petitioners allege that out of the 278 registered internally displaced persons at the Saw Mill Molo Camp the Government selected only 209 who were resettled in accordance with this programme. The 68 Petitioners were for no apparent reason left out of that resettlement. Instead they were relocated to the Division Officers (now the sub-county officers) office at Keringet following the closure of the Saw Mill Camp on 13th May 2008 during operation dubbed ‘**Operation Rudi Nyumbani**’.

The Petitioners claim that the actions of the Respondents discriminated against them. They aver that they have made several attempts to follow up the matter with the Respondents to no avail. The Petitioners plead that the actions of the Respondents have condemned them to continue to live in deplorable conditions. They allege a violation of their Constitutional rights to Equality and Freedom under Article 27 of the Constitution, their rights to dignity under Article 28 of the constitution. They seek for orders to compel the 1st Respondent who is the Principal Secretary of State Department under which all resettlement programs fall to resettle them by paying them money and allocating land to all the Petitioners.

The Petitioners in their submissions filed on 17th December, 2015, submit that the State had an obligation to provide for all IDP’s and that IDP’s are entitled to enjoy the same rights and freedoms as all other citizens.

The Hon. Attorney General entered appearance for both Respondents and only filed the Grounds of Opposition dated 10/12/2015 in response to the Petition. No Replying Affidavit was filed by either Respondent.

For the Respondent it was argued that all IDP’s had been identified and compensated. They denied that there had been any discrimination in the resettlement process. It was argued that the Petitioners did prove that they were among the victims of the post-election violence or that they had been registered as such thus they had no valid claim.

The Respondents did not file any submissions despite being given ample time to do so.

DETERMINATION

I have considered the submissions filed on behalf of the Petitioners as well as the Grounds of Opposition filed by the Respondent and all other relevant material. The argument by the Respondent that the petition lacks competence and is filed by persons without locus do not in my view have any merit. The petitioners have clearly stated that they have filed this petition in their capacity as victims of the 2007/2008 post election violence. Annexed to the petition is an authority signed by 67 Petitioners authorizing '**Peter O. Nyakundi**' to swear affidavits on their behalf. Their claim is equally unambiguous. Primarily it is a claim against the state seeking to have it compelled to compensate and resettle them. They argue that 206 of the registered IDP's were compensated whilst the 68 of them were unjustly excluded and denied similar compensation.

The Petition is premised on Article 27 of the Constitution of Kenya 2010 which provides

“27 (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law”

The Petitioners claim is that they have been discriminated against by the Respondents in the implementation of the resettlement program. Discrimination was defined in the case **PETER K. WAWERU Vs REPUBLIC [2006] eKLR** as follows

“affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description. Blacks Law Dictionary (11th ed) defines ‘discrimination’ as hereunder:

..... In constitutional law the effect of a statute or established practice which confers particular privileges on a class arbitrarily selected from a large number of persons, all of whom stand in the same relation to the privileges granted and between them and those not favoured no reasonable distinction can be found.

.....’Unfair treatment or denial of normal privileges to person because of their race, age, sex nationality or religion. A failure to treat all person equally where no reasonable distinction can be found between those favoured and those not favoured.’ Baker Vs California Land title Company DC CAL 349 Supp 235, 238, 239.

Article 27 of the Constitution provides that all persons are equal under the law. All laws passed must apply to and benefit all persons whom they cover and must not be applied impartially. Preferential treatment accorded to certain persons in comparable situations, without any legal justifications amounts to discrimination. In this petition the petitioner must satisfy the court of three things.

- i. That they were in actual fact victims of the 2007/2008 post election violence.
- ii. That other IDP's in comparable situations as theirs received compensation from the Respondents
- iii. That there existed no legal and/or valid justification for their exclusion from compensation.

As stated earlier the Respondents did not file any Replying Affidavit to challenge and/or controvert the sworn averment by the Petitioners that they were victims of the post-election violence. Ground of Opposition which were filed are only deemed to address issues of law. They are general averments and cannot amount to a proper or valid denial of allegations made on oath. (see **MEREKA & CO. ADVOCATES Vs UNESCO CO. LTD 2015 eKLR, PROF OLAKA ONYANGO & 10 OTHERS Vs HON. ATTORNEY GENERAL CONSTITUTION PETITION NO. 8 OF 2014** and **ELIUD NYAUMA OMWOYO & 2 OTHERS -Vs KENYATTA UNIVERSITY**). The Respondents have

failed to refute specifically the allegations in the Petitioners sworn affidavit in support. Failure to file a Replying Affidavit can only mean that those facts are admitted. Therefore in the absence of any evidence to the contrary I find that the petitioners are indeed victims of the 2007/2008 post-election violence.

The Petitioners alleged that out of the 278 IDP's who were at the Saw Mill Mole Camp 206 were compensated and resettled but the 68 of them were unjustly excluded and still continue to live in squalor. The Respondents have countered that only registered IDP's were entitled to such compensation. The Petitioners contention is that they are registered IDP's. The record of who is or who is not registered is in the possession of the Respondents. In their Grounds of Opposition the Respondents did admit that they have compensated all registered IDP's through a programme set up by the State. If as the Respondent claim the Petitioners were not registered IDP's and were therefore not entitled to any compensation, then nothing would have been easier than to avail to this court the Register to prove that the 68 Petitioners were not so registered. The court is entitled to draw an adverse inference from the failure of the Respondents to avail this register which is in their exclusive possession. From the time this petition was filed in July 2015. The Respondents have been allowed several adjournments to enable them file their replies/submissions but this was never done.

The position is that the Petitioners have averred that they were registered IDP's. The Respondents despite having been given several chances have failed to disprove those averments. Based on the material placed before me I do find that the Petitioners were registered IDP's as they claimed.

From the Respondents own admission all registered IDP's from the Saw Mill Molo IDP Camp were granted compensation and were resettled by the State. No justification has been offered by the Respondents as to why they 68 Petitioners were left out of this resettlement program. As such I find that the Petitioners rights to fair and equal treatment under Article 27 of the Constitution have been infringed by the 1st Respondent in failing to accord to them the benefit they were entitled to as victims of the post-election violence without any reasonable cause or justification.

As admitted by both parties there already exists an establishment criteria for compensation and resettlement. The Petitioners are entitled to benefit through compensation in the same terms that the other 206 IDP's from Saw Mill Molo received.

In conclusion based on the foregoing I find that:-

- i. The Petitioners herein are victims of the 2007/2008 post-election violence who were entitled to compensation but have not yet been compensated.
- ii. The 1st Respondent shall compensate the petitioners in the same manner as it did for other internally displaced persons within 90 days for the date of this judgment.
- iii. The Petitioners are awarded the costs of this petition.

Dated in Nakuru this 30th day of September, 2016.

Maureen Odera

Judge