



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

PETITION NO. 22 OF 2012

**IN THE MATTER OF SECTION 22(1) (2) (b) and 23(1) (3) (a) (d) AND ARTICLE 165 OF THE
CONSTITUTION**

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF RIGHTS TO EQUALITY AND
FREEDOM FROM DISCRIMINATION UNDER SECTION 27 (1) (2) AND (4) OF THE
CONSTITUTION AND PRINCIPLES OF NATURAL JUSTICE AND THE RULE OF LAW**

BETWEEN

**FRANCIS KARUMBA MUTURA WALLACE GITAU CHIRI (Suing on their behalf and on behalf
of other 23,374 internally displaced people.....PETITIONERS**

-VERSUS-

THE ATTORNEY GENERAL.....1ST RESPONDENT

**THE PERMANENT SECRETARY MINISTRY OF STATE FOR SPECIAL
PROGRAMMES.....2ND RESPONDENT**

RULING

1. The Petitioners allege that they are victims of the violence that occurred after the 1992 general elections. They have filed this petition on their own behalf and on behalf of 23,374 other persons who were displaced from their homes in Enosupukia, Narok during the tribal violence that occurred after the elections.
2. In their petition dated 29th March 2012, the Petitioners seek two prayers-

(a) a declaration that the Petitioners together with the other 23,374 people displaced after the 1992 general election are equal before the law and have equal protection and equal benefit of the law as the victims of the 2007 post election violence.

(b) an order that the State through the 2nd Respondent shall not discriminate directly or indirectly against the Petitioners by denying them the right to share in the budget allocation set aside for resettlement of the displaced people of the 2007 post election violence

and that the Petitioners be included in the resettlement programme for the said budget allocation or alternatively a supplementary budget/ /allocation be made to provide settlement for the Petitioners.

3. By a Notice of Preliminary Objection dated 22nd October 2014, the Respondents have asked this court to dismiss the Petition on the grounds that:

- (a) the Petition as drawn does not disclose any joint facts or material issues in common between the Petitioners and the victims of the 2007-2008 post election violence since they were not displaced together nor do they own property jointly. Consequently their expectations cannot lie together.
- (b) that the petitioners have not demonstrated that they have instructions to file this suit on behalf of any or all the 23,374 displaced persons.
- (c) the petitioners have not demonstrated any right to own property which should be protected by this court.
- (d) that a right is distinct and inherent and may therefore not be claimed together

RESPONDENTS' SUBMISSIONS

- 4. State Counsel submitted that the Petition is defective because the two Petitioners have not provided any proof that they are acting with the consent of the rest of the other 23,374 persons with whom they were allegedly displaced. In particular, Francis Karumba Mutura who swore the affidavit supporting the Petition, only alludes to the authority of the other petitioner and not the other claimants. The court cannot infer this consent.
- 5. State Counsel also argued that the Petition does not meet the threshold for a claim for alleged infringement of fundamental rights and freedoms as the Petitioners have not demonstrated any right that has been infringed by the State. They have not supplied material evidence to support their allegations. They have not provided documents of title to prove that they owned property in Enosupukia as alleged. They have also not proved that they were in fact unlawfully evicted as alleged, or photographs of the place where they were subsequently relocated and they have not demonstrated what they have been deprived of as a result of the unlawful evictions.
- 6. The Petitioners were also accused of material non-disclosure. Referring to paragraph 8 of the Petition wherein the Petitioners have referred to a budgetary speech by the Ministry of Finance, Counsel argued that they ought to have provided an extract of this speech.
- 7. In addition each of the claimants ought to have filed an affidavit stating the economic activity he was engaged in and further detailing what he/she lost so that the court can determine if the rights have been infringed. Without this evidence the court is unable to determine the truthfulness of the allegations in the Petition.
- 8. The Ministry was created for a special purpose, to see the implementation of the Government's programme of providing for the settlement of the victims of the 2007-2008 post election violence. The Petitioners do not fall into this group and cannot therefore claim any right under it. This Ministry has already exhausted the purpose for which it was created.
- 9. In summary Counsel submitted that the Petition is incurably defective. The evidence as provided by the Petitioners was insufficient and did not disclose any right that had been infringed by the Respondents.

PETITIONERS' SUBMISSIONS:

- 10. Counsel for the Petitioners argued that the Petitioners have *locus standi* to file the case under Article 22 of the Constitution. His view was that the evidence produced is sufficient to support the Petitioners' claim that they have been unfairly discriminated by the Government. Despite being recognised as victims of the violence, their plea to the 1st Respondent for help has been rejected.
- 11. He asked the court to disallow the Preliminary Objection and protect the rights of the Petitioners.

ISSUES FOR DETERMINATION

12. I have considered the rival submissions of Counsel. The issues for determination raised in the Preliminary Objection are whether the Petitioners have the requisite *locus standi* to file this petition and whether the Petition discloses a cause of action against the Respondent.

ANALYSIS:

WHETHER THE PETITIONERS HAVE LOCUS STANDI TO FILE THE PETITION

13. 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.

14. In Mumo Matemu V. Trusted Society for Human Rights Alliance & 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 with 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*.

15. The Petitioners were victims of the 1992 post election violence and have therefore filed this petition to protect their interest. They are also members of the Enusupukia Displaced Group which is registered with the Ministry of Gender, Sports Culture & Social Services and which comprises of another 23,374 persons who were affected by the violence.

16. They clearly have locus under **Article 22** to file this claim on their own behalf and as representatives of the group. Their locus is not ousted by the lack of consent they are members of the aggrieved group. It has not been demonstrated that they are acting under political motivations or have otherwise filed the petition in bad faith. Therefore I find and hold that this objection has no merit.

WHETHER THE PETITION DISCLOSES ANY CAUSE OF ACTION

17. The duty of a petitioner in a constitutional petition is to disclose, with reasonable precision, the right which he alleges has been infringed and the manner in which this right has been infringed.

18. This duty which was first stated by the Court of Appeal in Anarita Karimi Njeru V. The Republic, (1976-1980) KLR 1272, was restated by the same court in Trusted Society Of Human Rights Alliance V. AG. & 2 Others [2012] eKLR. The Judges said -

“We do not purport to overrule Anarita Karimi Njeru as we think it lays down an important rule of constitutional adjudication; a person claiming constitutional infringement must give sufficient notice of the violations to allow her adversary to adequately prepare her case and to save the court from embarrassment on issues that are not appropriately phrased as justiciable controversies. However we are of the opinion that the proper test under the new Constitution is whether a Petition as stated

raises issues which are too insubstantial and so attenuated that a court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged.

The test does not demand mathematical precision in drawing constitutional Petitions. Neither does it require talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against the Respondents in a constitutional petition are fashioned in a way that gives proper notice to the Respondents about the nature of the claims being made so that they can adequately prepare their case.”

19. The court should then determine at this juncture whether the Petitioner has stated which right he alleges has been infringed and the manner in which it has been infringed. The material should be sufficient to enable the Respondent understand and respond to the claim against it and the court is able to formulate the issues raised in the petition.
20. From the Petition it is clear that the crux of the Petitioners' claim is that their right to equality and freedom from discrimination under Article 27 of the Constitution that has been infringed. They allege that the State has done this by failing to include them in its plan to provide for persons affected by post election violence as they have done to the victims of the 2007-2008 post election violence. Therefore, it is my view that the Petition meets the threshold laid out in the Trusted Society Of Human Rights Alliance (supra).
21. The issues raised by State Counsel go to the merit of the Petition. The objections are that the Petitioners have not supplied sufficient evidence to support their allegations. State Counsel alleged that there was no evidence to prove that the Petitioners owned land from the area from which they were allegedly evicted, the nature of business which the Petitioners were engaged, that they have been relocated and that they were in fact victims of the post election violence.
22. These are questions of fact to be determined by the trial court which is best placed to weigh and analyse the evidence. The issues must be raised during the trial and not by way of a preliminary objection which should confine itself to pure points of law.

DETERMINATION

23. I find that the Petitioners have locus to bring the petition on their own behalf and on behalf of the other members of Enosupukia in Narok. I also find that the petition raises substantive questions which should be determined at a full hearing. I do not consider it to be frivolous or vexatious.
24. Accordingly, the Respondents' preliminary objection has no merit and it is hereby overruled with no order as to costs.

Dated, Signed and Delivered at Nakuru this 15th day of April, 2015.

A. MSHILA

JUDGE