



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.170 OF 2011

BETWEEN

PATRICK CHEGE KINUTHIA.....1ST PETITIONER
JOSEPH KAIRU MBUGUA.....2ND PETITIONER
DUNCAN KAMAU MURAYA.....3RD PETITIONER

(Being Chairman, Secretary General and Treasurer respectively, suing for and on behalf of themselves and 36,000 members of the Human Resettlement Disaster Care Welfare Organization)

AND

THE ATTORNEY GENERALRESPONDENT

JUDGMENT

Introduction

1. The Petition before me emanates from the events and alleged effects of the 1992-1998 tribal clashes experienced in various parts Kenya.
2. The Petitioners are officials of the Human Resettlement Disaster Care (HUREDICA) Welfare Organization, a society registered under the provisions of the **Societies Act**, with an alleged membership of approximately Thirty Six Thousand (36,000) people all of whom are alleged victims of the tribal clashes that were experienced in Kenya in the period aforesaid. The Petitioners have filed this Petition on their own behalf and on behalf of their members seeking reparations for their alleged personal suffering, lost lands and for their resettlement in new parcels of land.

Factual background

3. According to the Petitioners, HUREDICA Welfare Organization has a total of seventeen (17) branches spread all over the Country. The branches, its number of members and losses suffered have been stated to be as follows;

NAME OF THE BRANCH	NUMBER	LOSSES SUFFERED IN

		OF MEMBERS	KSHS.
1.	MOLO	8,196	4,568,021,155.20
2.	NAROK/ENOSOPUKIA	6,635	5,174,385,767.00
3.	NJORO	4,057	1,841,341,658.00
4.	TRANS-NZOIA/BUNGOMA/ MT.ELGON	1,813	3,907,937,427.00
5.	UASIN-GISHU/BURNT FOREST	3,006	1,855,061,669.00
6.	UASIN-GISHU/TURBO	2,740	1,772,305,742.00
7.	NAROK/OLOKURTO	2,602	1,660,525,490.00
8	NAROK/KISII	255	467,498,508.00
9	TRANSMARA/GUCHA	1,246	3,751,460,706.00
10.	NAKURU MUNICIPALITY/BARUT/MWARIK I	594	3,302,012,376.00
11.	LAIKIPIA/OLMORAN	1,103	488,525,150.00
12.	OLENGURUONE/CHAPAKUNDI	1,195	1,273,433,405.00
13.	KERICHO/LONDIANI	1,281	656,988,449.00
14.	MBOGOINI/SUBUKIA	446	171,445,307.00
15.	SOUTH NANDI	378	361,363,834.00
16.	NYANDO/MITEITEI	476	166,959,431.00
17.	MOMBASA/LIKONI	165	90,445,860.00
	TOTAL	36,099	31,509,872,916.70

4. In their Petition dated 2nd August 2011, they claim the above sum of Kshs.31,509,872,912.70 as compensation for losses incurred by various claimants from the 17 branches of the Petitioners' organization. As proof thereof, each claimant filled in a separate form that indicates the approximate loss individually suffered. I will say something about those forms later in the judgment.

5. It was also their contention in the Petition that State agents, servants, officers and/or employees organized rallies that instigated tribal violence which led to loss of life, property, investments and mass displacement of populations on various days during the period preceding both the 1992 and 1997 General Elections and thereafter.

6. Further, it was their case that prior to the period of 1992-1998, the claimants were resident in various parts of the Country and had carried out extensive development in their farms in particular by putting up homesteads, businesses and engaging in farming activities which were adversely affected as a result of the instigation of ethnic based violence. They alleged that the areas that were hardest hit by the violence included Molo, Narok/Enoosupukia, Njoro, Trans-Nzoia, Bungoma, Mt Elgon, Uasin Gishu/Burnt Forest, Turbo, Narok/Olokurto , Kisii, Gucha, Nakuru Municipality, Baruti/Mwariki, Laikipia, Olmorani, Ole Nguruone/Chapakundi, Kericho, Londiani, Mbogoini/Subukia, South Nandi, Nyando, Miteitei, Mombasa/Likoni. The Petitioners alleged that in these areas their houses were burnt down, crops destroyed, animals killed, relatives were killed and they were also forced to flee due to fear of their lives. They also stated that they sustained serious bodily injuries and it is their case therefore that their constitutional rights and those of their members, especially in the Rift Valley region, were grossly violated by the then one party Government under the leadership of President Daniel Arap Moi who victimized them on the basis that they were ‘outsiders’ from regions that favoured multi-party democracy.
7. It was also their case that their members’ properties were illegally seized and homesteads destroyed as a result of violence instigated by State agents contrary to their constitutional right to own property and live anywhere within the Republic of Kenya. It was therefore their position that their fundamental right to own property under **Section 75** of the **Repealed Constitution** had been violated by the aforesaid actions.
8. It was their further contention that they were tortured and seriously injured and they hold the State liable for the said suffering as the State had deliberately failed to give them protection.
9. In addition, that their constitutional rights were grossly violated by the State during the said period due to discrimination on the basis of their ethnic origin and that for that reason they were forced to leave their homesteads and farms which were later taken over by local communities.
10. It was the Petitioners’ other contention that the political regimes after 1997 have ignored their pleas for resettlement and compensation despite several verbal pronouncements by State officers that their plight would be looked into. Further, that despite various recommendations of Commissions established by the State namely; the Akiwumi Commission of Inquiry into Tribal Clashes and the Kiluki Parliamentary Commission, the State has failed to implement the reports of the said Commissions.
11. In their Petition, they therefore seek the following orders;
 - “(a) A declaration that its members’ fundamental rights and freedoms were contravened and grossly violated by the Respondent’s officers, servants and or agents who incited their local communities to incite the Petitioners.***
 - (b) A declaration that the Petitioner’s members are entitled to payment of damages and compensation for the violations of their fundamental rights and freedoms under the aforementioned provisions of the Constitution.***
 - (c) General damages to the tune of Kshs.31,509,872,916.70 as computed in the register that has the list of members and an inventory of the losses suffered by each annexed to the supporting affidavit of this Petition.***
 - (d) Any further orders, writs, directions as this Honourable Court may consider appropriate.***
 - (e) The Respondent be ordered to bear the costs of this Petition.”***

The Petitioners’ Case

12. The Petitioners' case was as stipulated in their Petition dated 2nd August 2011, Supporting Affidavit sworn by Joseph Kairu Mbugua on the same date and submissions made on their behalf by their Advocates, Mr. Okindo and his senior, Mr. Rumba Kinuthia. Mr. Kairu Mbugua also gave oral evidence in support thereof.
13. In his oral testimony in Court, Mr. Joseph Kairu Mbugua who testified on behalf of the Petitioners relied on his Affidavit and added that the State was involved in the tribal clashes aforesaid because the private prosecution proceedings he had instituted against the persons who incited local communities to violence were terminated by the Respondent by entering the writ of *nolle prosequi*. He also stated that the culprits who were arrested and presented to Court to face charges of assault, murder and being in possession of dangerous weapons readily pleaded guilty and lenient fines in the range of Kshs.1,500 and thereabouts, were imposed upon them despite the offences committed being serious.
14. He stated that the Society has kept a register of all the persons who were affected by the clashes and he produced it in evidence as exhibit **JKM-2**. He stated that the register of claims comprises each claimant's claim and tabulates their losses which are reflected in the register. He also testified that the Society is unable to produce receipts or documents in support of each of the individual claims' because they were either burnt or lost during the clashes.
15. As to how the Petitioner Society identified the alleged victims of tribal clashes, he testified that each of its branches had a process of identifying them through their respective representatives and that they also ensured that each victim had witnesses who corroborated what he had lost. Further, that each claimant had a clear document indicating how much each of them had lost. He stated further that only genuine victims were registered as such and in evidence he produced **Exhibit 1-6** of six sacks containing forms detailing what each of the claimants allegedly owned prior to the clashes and the loss each allegedly suffered.
16. On his part, Mr. Mbugua stated that he was claiming Kshs.2.275 Million and that he had arrived at the figure based on a quantification that he had personally made. He claimed that he had 30 acres of land at Olokurto Land Adjudication Section being Land Parcel No.500 and that he had many properties on that land. He however added that he neither had the title deed to that land nor receipts for its purchase because he had left them behind when he fled the clashes.
17. He also admitted in cross-examination that some of the claimants had made similar claims to ownership of lands and other properties without authentication items but stated that each of them had the right to own what they owned.
18. In his submissions, learned Counsel Mr. Okindo for the Petitioners submitted that by fact of the claimants being Kenyan citizens, they had a right to own property, conduct business and engage in any productive investments in any part of the Country and that their right to own property as provided under **Section 75** of the **Repealed Constitution** was violated by State agents who incited and/or instigated tribal animosity which culminated in tribal clashes the consequence of which was that the Petitioners' properties were destroyed while others were forcefully evicted from their farms.
19. It was his further contention that the Petitioners' relatives lost their lives as a result of the violence while others were seriously tortured and injured in violation of the provisions of **Section 74** of the **Repealed Constitution**.
20. Mr. Okindo also submitted that the Respondent had a constitutional duty to guarantee the Petitioners' security and assure them of due protection of the law which duty the Respondent had failed to discharge and thereby violated the provisions of **Section 70** of the **Repealed Constitution**.
21. He further claimed that the State under the leadership of President Daniel Arap Moi and a number

of his Ministers and Assistant Ministers victimized communities residing within the Rift Valley Province but not of Kalenjin origin by terming them as outsiders. The Petitioners' fundamental rights were thereby breached by the one party regime led by retired President Moi who allegedly orchestrated forcible evictions of the Petitioners from the Rift Valley Province for the mere reason that they were perceived to be opposed to the one party State ideologies thus violating the Petitioners' right to protection against discrimination as enshrined in **Section 82** of the **Repealed Constitution**.

22. It was Mr. Okindo's other submission that the State, in the period 1992-1998 and to date, has failed to respect and uphold the Petitioners dignity because it has left them to their continued suffering and without a place to call home.

23. Mr. Kinuthia, learned Counsel, while referring to various international instruments on human rights, urged the Court to grant the prayers sought in the Petition and in addition to grant an order of mandamus to compel the Government to work on modalities to resettle the Claimants in their respective parcels of land where they had been evicted from and that they be provided with State security.

Respondent's case

24. The Respondent, the Attorney General, opposed the Petition through a Notice of Preliminary Objection and Grounds of Opposition dated 14th December 2011. He raised the following points of law by way of objection to the Petition;

“(1) That human rights are distinct and enforceable to every individual independently and cannot be claimed together and amorphously.

(2) That the Petitioners are individuals with distinct violation claims and each claim ought to be pursued individually and be distinguished.

(3) That human rights cannot be claimed in an omnibus manner and there is a limitation to a representative claim on individual rights violation claims.”

The Grounds of Opposition were as follows;

“(1) That no basis has been put before Court for the assessment of damages.

(2) That this Court cannot make an assessment of damages suffered by a Petitioner without any documentary evidence on loss of property or otherwise being tendered before it.

(3) That this Court cannot award damages to a party not before the Court and no evidence tendered to suggest the extent of the damages.

(4) That in view of paragraph 1, 2 and 3 above, this suit is an abuse of the Court of justice process and should be dismissed.

(5) That the Petitioners have brought this suit as a petition to avoid filing a civil suit which would be declared out of time.

(6) That the Petitioners have brought this suit on behalf of an unknown number of claimants whose individuality is unknown thus the suit is untenable.

(7) That in view of paragraph 6 above, the Petitioner's claim to be representing approximately 36,000, [claimants] which figure cannot be confirmed neither the place of domicile of the alleged members.

(8) That in the dispensation of constitutional matters the Court should only proceed where there exists clear uncontroverted evidence of a denial of a right unlike in this suit where the alleged Petitioners identity, extent of damage and the particular right Infringed of an individual is not indicated. (sic)

(9) That there is no evidence to suggest the parties who allegedly suffered have given instructions to Patrick Chege Kinuthia to swear the Affidavit on their behalf.

(11) That this Petition offends the prerequisites set out in the case of Alago vs Haco Industries Limited.

(12) That the Petitioners have misled the Court that the deaths of the various persons whose certificates are attached were results of Post-Election Violence which fact is not correct; whereby some of the deceased's death were because of stroke, anaemia, old age and diabetes, and further not all cardio pulmonary arrests can be attributed to violence."

25.Mr. Moimbo who represented the Attorney General did not call any witness but filed written submissions dated 14th December 2012, which can be summarized as follows;

26.Firstly, that human rights are inherent, distinct and can only be presented by the one who suffered them and an individual who claims that he had been denied a right ought to present the rights individually to the Court. In that regard he claimed that Patrick Kinuthia Chege cannot purport that he comprehends the atrocities suffered by another individual merely because he is a member of his welfare association. He contended further that it would be impossible for him to allege that he understands the individual and specific rights of 36,000 persons who allegedly suffered during the tribal clashes and that the Petition is therefore untenable as it has been brought on behalf of an unknown number of claimants whose individuality is unknown. He also claimed that, at the very least, each of the claimants ought to have filed his own affidavit so that the Court can comprehend their respective alleged claims of violations of fundamental rights violation.

27.Secondly, that no basis had laid before the Court for the assessment of damages. He contended in that regard that damages in law are not awarded arbitrarily but are based on certain figures, formulas and parameters and the Court cannot make an assessment of damages suffered by a Petitioner without any documentary evidence on the alleged losses suffered and that a Petitioner must prove a violation of fundamental right before any damages can be awarded. He relied on the cases of Matiba vs Attorney General HC MISC Applic No.666 of 1990, Kenya Bus Service Ltd & 2 Others vs Attorney General & Others (2005) e KLR and Cyprian Kubai vs Stanley Kanyonga Mwenga HC Misc Applic No.612 of 2002 to make the point that it was not enough to claim an infringement of a fundamental right and freedom without particularizing the details and the manner of infringement. That every claimant's right ought therefore to have been specified and demonstrated with reasonable particularity and similarly the constitutional rights which had been violated, in what manner and by whom, especially where such a claimant has the benefit of a legal Counsel, ought to have been clearly specified.

28.Thirdly, there are other forums that can be used to solve the Petitioners' grievance and he suggested the Truth, Justice and Reconciliation Commission, which was established by an Act of Parliament to deal with historical injustices, as a proper body to address and grant relief to the Petitioners.

29.He therefore urged the Court not to grant the orders sought in the Petition on the basis that the Petitioners have failed to prove their case to the required threshold in constitutional litigation.

Determination

30.Having considered the Petition, the Affidavit on record, oral testimony and the submissions made

on behalf of the parties, I am of the view that two issues emerge for determination. Firstly, whether the Petitioners' rights have been violated by the Respondent's officers, servants and or agents. To address that issue I must interrogate the evidence placed before me and if I find that the facts as pleaded do not amount to or constitute a contravention of the alleged provisions of the Repealed Constitution, then the matter would end there and the Petition would have to be dismissed. But if I were to find that the facts before me amount to or constitute a violation of any of the constitutional provisions relied on by the Petitioners, then I will move to the last stage, namely the remedy which the Petitioners would be entitled to, i.e. the appropriate remedy in the circumstances.

31. In that context, the Petition before me is premised on the allegation of violation of the right to security and protection of the law under **Section 70** of the **Repealed Constitution**, right to life under **Section 71** of the same Constitution, right to property under **75** thereof, protection against torture under **Section 74** and protection against discrimination as was enshrined in **Section 82** of the **Repealed Constitution**. It was the contention of the Petitioners in this regard that State agents organized rallies that instigated tribal violence which led to loss of life, property, investments and mass displacement of huge populations during the period preceding the 1992 and 1997 General Elections thus violating the fundamental rights of the Petitioners and those of their members. In answer, the Respondent did not file any Affidavits on the factual issues raised in the Petition but Mr. Moimbo acting for him presented issues of law and procedure in opposition to the Petition.
32. With the above background in mind, I will move to the next stage and determine whether the facts as pleaded disclose a violation or contravention of the Repealed Constitution as alleged and whether any remedy can be granted to the Petitioners. Before doing so, I must address the requisite threshold of proof in this matter.

Standard of Proof

33. In the above regard, I recall that at paragraphs 4 to 9 of his Affidavit, Patrick Kairu Mbugua stated as follows;

“(4) That my fundamental rights and freedoms and that of my Co-Petitioners herein were contravened and grossly violated by the State agents, servants, officers and/or employees who organized rallies and instigated tribal violence which led to loss of life, property, investments and mass displacement of population on various days during the period preceding both the 1992 and 1997 elections and thereafter.

(5) That myself and my Co-Petitioners together with the other members of HUREDICA Welfare organization prior to the period of 1992 - 1998 were resident in various parts of the Country in which we had carried out development in our farms, had heavily invested in putting up homesteads and business which were adversely affected as a result of the Respondent's Officer's conduct in instigating ethnic based violence.

(6) That the areas that were hard hit by the violence include:- Molo, Narok/Enoosupukia, Njoro, Trans-Nzoia, Bungoma, Mt Elgon, Uasin Gishu/Burnt Forest, Turbo, Narok/Olorkurto, Kisii, Gucha, Nakuru Municipality, Baruti/Mwariki, Laikipia, Olmorani, Ole Nguruon/Chapakundi, Kericho/Londiani, Mbogoini/Subukia, South Nandi, Nyando, Miteitei, Mombasa/Likoni. The members of HUREDICA Welfare Organisation in these areas had their houses burnt down, crops destroyed, animals killed, their relatives were killed and they were also forced to flee due to fear for their lives.

(7) That their constitutional rights were grossly violated by the then one Party Government under the leadership of the former President Moi who victimized them on the basis that they were “outsiders” from regions that favoured multi-party democracy as opposed to one Party Rule.

(8) That their properties were illegally seized and homesteads destroyed as a result of violence instigated by State agents contrary to their constitutional right to own property and live anywhere within the Republic of Kenya. To this end, they contend that their fundamental rights and freedoms under Section 75 of the former Constitution and by extension Article 40 of the Constitution of Kenya as read with Articles 6 and 7 of the Constitution of Kenya 2010 were grossly violated.

(9) That their relatives lost their lives, others were maimed, tortured and seriously injured and they hold the State solely responsible for the said suffering as it failed to give them protection. (Annexed hereto and marked JKM-3 are sample copies of Death Certificates to demonstrate his assertions)."

34. I have carefully perused the Petition, the evidence as orally tendered, the sacks of evidence presented and I am left with the following questions;

i. Who are the agents, servants, employees and officers of the State who committed all the acts complained of by the Petitioners? The Petitioners and their witnesses failed to address this fundamental question at all.

ii. What is the probative value of the findings and recommendations of the Reports of the Akiwumi Commission and the Kiliku Parliamentary Committee with regard to the matters in contention in the present Petition? Again the Petitioners merely submitted the two Reports and left them to the mercy of the Court without stating their evidential value and connecting that value to the complaints made in the Petition.

35. It must be remembered that the Kenyan State is organized into different arms and organs which exercise sovereign power on behalf of the people of Kenya. It would clearly therefore be absurd for any party to generalize the acts of the State without specifically stating which arm or organ of the State is responsible for those acts. That is the gist of cases such as, *Annarita Karimi Njeru vs Republic (1976-1980) 1 KLR 14, Matiba vs Attorney General (supra)* and *Kenya Bus Services Ltd & 2 Others vs Attorney General & 2 Others (2005) e KLR*. In stating so, the importance of particularizing the details of the manner of infringement was explained by Khamoni J in *Cyprian Kubai vs Stanley Kanyonga Mwenda (supra)* as follows;

"An applicant moving the Court by virtue of Sections 60, 65 and 84 of the Constitution must be precise and to the point not only in relation to the Section but also to the subsection and where applicable and the paragraph of the subparagraph of the Section out of 71 to 83 allegedly contravened plus relevant acts of that contravention so that the Respondent knows the nature and extent of the case to respond [and] to enable the Respondent prepare accordingly and also to know the extent and nature of the case it is handling ..."

36. I am in agreement with the learned judge and the above principle has recently been restated in the case of *Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 Others, Civil Appeal No. 290 of 2012* in the following words;

"However, our analysis cannot end at that level of generality. It was the High Court's observation that the petition before it was not the "epitome of precise, comprehensive, or elegant drafting." Yet the principle in *Anarita Karimi Njeru (supra)* underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of the constitution and the overriding objective principle under section 1A and 1B of the Civil Procedure Act (Cap 21) and Section 3A and 3B of the Appellate Jurisdiction Act (Cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that

regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle.”

37. In addition to the above, in **Chaudhari & Chatuverdi’s Law of Fundamental Rights, Delhi Law House** at page 15, the learned authors in addressing the test for adjudging the constitutionality of State action stated that the touchstone of fundamental rights “**is the immediate action of the State on the fundamental rights of the complainant. This immediate effect is a matter of practical proof and is wide enough to include both the elements of directness and inevitableness”.** (Emphasis added)

This test was meticulously noticed and accepted by Bhagwati J. in **Smt. Maneka Gandhi vs Union of India A.I.R. 1978 S.C.597 (at pp.632 – 635)**.

Applying the above principles to the present circumstances, where is the proof of all the allegations made in the Petition to enable this Court make firm findings of State liability for the alleged breaches of the Petitioners’ fundamental rights and freedoms? To answer that question, I must address each of the alleged violations as presented by the Petitioners.

Violation of the Right to Property

38. The Petitioners claimed that during the tribal clashes of 1992 -1998 and the period thereafter, they were residents in various parts of Kenya and that they carried out various development in their farms by putting up homesteads, businesses and farming activities which were adversely affected as a result of the Respondent’s officers actions of instigating ethnic based violence. They claimed that their houses were thereafter burnt down, crops destroyed, animals killed and they were forced to flee due to fear of their lives as a result of the said violence instigated by State agents. It was their contention therefore that their right to own property under **Section 75 of the Repealed Constitution** was violated by the said persons and actions.

39. The right to own property was provided for under **Section 75 of the Repealed Constitution** as follows;

(1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied –

a. the taking of possession or acquisition is necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of property so as to promote the public benefit; and

b. the necessity therefore is such as to afford reasonable justification for the causing of hardship that may result to any person having an interest in or right over the property; and

c. Provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation.

(2) Every person having an interest or right in or over property which is compulsorily taken possession of or whose interest in or right over any property is compulsorily acquired shall have a right of direct access to the High Court for –

a. the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right, and the amount of any compensation to which he is entitled; and

b. The purpose of obtaining prompt payment of that compensation:

Provided that if Parliament so provides in relation to paragraph (a) the right of access shall be by way of appeal (exercisable as of right at the instance of the person having the right or interest in the property) from a tribunal or authority, other than the High Court, having jurisdiction under any law to determine that matter.

(3) The Chief Justice may make rules with respect to the practice and procedure of the High Court or any other tribunal or authority in relation to the jurisdiction conferred on the High Court by subsection (2) or exercisable by the other tribunal or authority for the purposes of that subsection (including rules with respect to the time within which applications or appeals to the High Court or applications to the other tribunal or authority may be brought.)

40. In a nutshell and to paraphrase it, **Section 75** of the **Repealed Constitution** above protected all persons against deprivation of property without compensation. In particular, it provided for the circumstances in which property could be compulsorily acquired for public purposes and it afforded protection to citizens by requiring that an individual deprived of property in such circumstances had a right to be paid adequate compensation and the acquisition had in any event to be subjected to due process.

41. In interpreting the normative content of the right to property as was enshrined in **Section 75**, this Court in **Charles Murithi & 2 Others vs Attorney General Petition No. 113 of 2009** stated as follows;

“Section 75 protected individual citizens from the deprivation of their property by the State without being offered adequate compensation. The Constitution must have been intended to be read in such a way as to mean and to be limited to breaches committed by the Government against private individuals or known private individuals who can be pursued for compensation in civil suits. The protection accorded to a citizen’s right to compensation and due process in the event of compulsory acquisition of land was meant to be a weapon to prevent abuse of power or use of it as a weapon of oppression by the State. The provision’s sole intention was therefore to prohibit the State from depriving an individual of his property without paying adequate compensation.”

42. I reiterate the same sentiments in the instant Petition and looking at the Petition before me, none of the Petitioners has claimed that his property was compulsorily acquired. Their claim is premised on the allegation that their properties were destroyed out of the violence instigated by State agents, servants and employees.

43. It is obvious therefore that the Petitioners’ claims do not relate to compulsory acquisition but to alleged destruction of property during the tribal clashes which they allege was perpetuated by the State and/or State agents. This Court was not given and does not have details or particulars of how the said State agents instigated the alleged violence nor does it have the particulars of the responsible State agents. Were they Police Officers, Chiefs, District Officers, District Commissioners? Who? Did they perpetrate acts of commission or omission? I do not know.

44. The Petitioners’ also claim that their properties were destroyed and forcefully taken away. While PW1 in his testimony explained to the Court how the properties of the approximately 36,000 victims of tribal clashes were allegedly destroyed, he failed to produce sufficient evidence that those properties existed for each of the 36,000 claimants. He even admitted that in his own case, he did not have documents to show that he owned the 30 acres of land situated at Olokurto Adjudication Scheme. He explained however that he left the documents behind when he fled his home and like him, none of the 36,000 alleged victims of tribal clashes produced any evidence that they owned what they claimed. All I saw in the 6 sacks of evidence produced as Exhibit 1-6 were forms tabulating what each of the victims owned and the alleged values of those items.

45. I restate that PW1 testified to the effect that the title documents and or receipts of the victims properties were burnt in their homes but I fail to understand why they have not attempted to carry out official searches at the various lands' registries for all those years because the results of the official searches would have offered evidence that they were the registered owners of the land they claim they owned and from which they fled from. In the absence of such evidence, how is this Court supposed to believe them? A Court of law such as this one determines claims before it based on evidence before it and nothing else. As was stated by **Chaudhari & Chatuverdi** above, practical proof of a violation is essential before State action can be said to be in violation of the Bill of Rights. The Petitioners have failed that test and as such, I am satisfied that they have failed to prove that in the present Petition their right to property under **Section 75** of the **Repealed Constitution** had been violated by the Respondent as alleged. I will at the end of this judgment make orders to address that *lacunae* in evidence.

Violation of the Right to Life

46. The Petitioners claimed that their relatives were killed during the tribal clashes thus violating their right to life. **Section 71** of the **Repealed Constitution** protected the right to life in the following terms;

(1) No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence under the law of Kenya of which he has been convicted.

(2) Without prejudice to any liability for a contravention of any other law with respect to the use of force in those cases hereinafter mentioned, a person shall not be regarded as having been deprived of his life in contravention of this section if he dies as the result of the use of force to such an extent as is reasonably justifiable in the circumstances of the case –

a. for the defence of any person from violence or for the defence of property;

b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

c. for the purpose of suppressing a riot, insurrection or mutiny; or

(d) in order to prevent the commission by that person of a criminal offence, or if he dies as the result of a lawful act of war.

47. What evidence was tendered to prove that the above right was violated? In the Affidavit of PW1, he produced a bundle of death certificates marked as annexure "JKM 3" as evidence of loss of life. A random study of the said death certificates reveals the date of the death of a named deceased person, cause of death and age of such a person. For instance, as regards William Kariuki Waweru (deceased) it is stated that his cause of death was sudden stroke and he died on 25th April 1992 at the age of 67 years: Kariuki Muchema (deceased) had his cause of death recorded as cardiopulmonary arrest due to hypertensive stroke on 22nd September 1994 at the age of 58 years: Kihara Irungu Maina (deceased) had his cause of death recorded as cardio pulmonary arrest due to acute hemorrhage shock due to deep cut wounds on the neck and head due to homicide on 15th March 1992 at the age of 62 years: John Njoroge Gethi was said to have died of cardiopulmonary arrest due to multiple fractures due to subdural haemorrhage on 25th October 1996 at the age of 55 years: Peter Mwangi Karanje died on 26th January 1998 at the age of 38 years and his cause of death was stated as a victim of social unrest. In addition, some of the death certificates produced in evidence showed that the named deceased person had been killed by another person and others stated that he had died of severe burns.

48. Having studied all the death certificates submitted, I opine as follows;

Firstly, while it is evident that most of the deceased persons died during the period of tribal clashes as stated in the Petition, I also saw evidence that some died sometime after the alleged tribal clashes and for reasons other than homicide. I say so because I saw the death certificate of one Kahihia Kangathi who died on 20th March 2004 at the age of 70 years due to an asthmatic attack; Jackson Kimani Njoroge died on 3rd of March 2002 and he was allegedly murdered; Francis Lianda Mutsami died on 5th March 2003 and Aggrey Isadia Manyatta died on 21st July 2000 both due to anaemia. The question that must be asked is whether indeed these people who died years after the alleged period of tribal clashes were also victims of the said clashes. I can only conclude that not all deaths have not been connected in evidence to the tribal clashes at all. Further, the causes of the inconsistencies in that evidence cannot lead to any other conclusion than that some of the named persons were not killed as a result of the tribal clashes and those who may have been killed have no clear connection to the whole Petition as framed.

49. In saying so, I heard PW1 testify that all the deceased persons for whom death certificates were produced died out of causes associated with the tribal clashes. However, from the information contained in some certificates, some of the deceased's persons died of cardiopulmonary arrest due to sudden stroke, cardiopulmonary arrest due to hypertensive stroke, anaemia, severe burns and others were simply said to have been murdered. This Court is not in a position to relate the stated medical grounds of cause of death to the tribal clashes. The Petitioners completely neglected and/or failed to lead expert evidence on that nexus and which would have been of great value to the Court. In the absence of such evidence, this Court is unable to make a determination in respect of the causes of death and their connection to the tribal clashes.

50. Secondly, while the Petitioners relied heavily on the death certificates as proof of loss of life of their relatives, they failed to provide specific information as to their connection with them. It is not sufficient, in my view, for the Petitioners to produce death certificates as proof of loss of life in a matter which has approximately 36,000 Petitioners and leave it at that. The death certificates could have been for anyone in Kenya and the Petitioners ought to have provided particulars and information as to the relationship between the victims of the tribal clashes and the deceased persons. At the very least, I expected that connection and without it, the claim was rendered useless.

51. In the foregoing and given my reasoning above, I am unable to determine that the Petitioners have established loss of life of their relatives to warrant a firm finding under **Section 71** of the **Repealed Constitution**.

Violation of the Right to Protection from Discrimination

52. The Petitioners claimed that they were discriminated and victimized during the tribal clashes on the basis that they were 'outsiders' and were from regions that favoured multi-party democracy. Further, that they were discriminated against because they held different political opinions from that of the Government of the day led by retired President Daniel Arap Moi.

53. **Section 82 (2)** of the **Repealed Constitution** prohibited discrimination in the following manner;

“Subject to subsections (6), (8) and (9), no person shall be treated in a discriminatory manner by a person acting by virtue of any written law or in the performance of the functions of a public office or a public authority”.

54. The Court in **Peter K. Waweru vs Republic [2006]e KLR** defined discrimination as follows;

“...Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions whereby persons of one such description are subjected to...restrictions to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description...Discrimination also means unfair treatment or denial of normal

privileges to persons because of their race, age, sex...a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.”

In addition, the *United Nations Universal Declaration on Human Rights (UDHR)* provides at **Article 1** that;

“All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”

Article 7 of the **UDHR** further states that;

“All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”

Article 2 of the **African Charter on Human and People’s Rights** also stipulates that every individual is entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the Charter without distinction including on grounds of race, ethnic group, colour, or sex. **Article 28** goes further to state that;

“Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.”

55.I shall apply the law as set out above in addressing the allegations of violation of **Section 82** of the **Repealed Constitution**.

56.In that context, it is clear to my mind that **Section 82(2)** prohibited discrimination but limited it to a person acting in an official capacity and in exercise of State power. In the context of the dispute before me, the Petitioners claimed that they were victimized by virtue of their tribe and political opinion and that they were specifically victimised by State agents and employees. Once again the same question I posed earlier arises; which State agents or employees? How did they victimize the Petitioners? Against whom were the Petitioners discriminated? No answers were given at the hearing and in the case of *Pravin Bowry vs Ethics and Anti-Corruption Commission Petition No.309 of 2014* this Court expressed itself as follows;

“In my mind one can allege discrimination if in the ordinary circumstances he has been afforded some differential treatment or different standards have been applied as against him as opposed to another person of equal situation as him.”

The above statement was made in line with the holding in *Peter K. Waweru vs Republic (supra)*.

57.Where then is the evidence of discrimination when all the above particulars are missing and in that regard, I am unable to determine the allegation of discrimination and I am also not therefore satisfied that **Section 82** of the **Repealed Constitution** was violated.

Violation of the Right to Protection from torture and other cruel and degrading treatment

58.The Petitioners alleged that they were tortured and were seriously injured during the alleged torture and they hold the State liable for their pain and suffering.

59.In that regard **Section 74(1)** of the **Repealed Constitution** protected the right not to be subjected to torture and other cruel and degrading treatment in the following words;

“No person shall be subject to torture or to inhuman or degrading punishment or other treatment”.

60. The law on protection against torture and other degrading and inhuman treatment is clear that all those actions are prohibited under international human rights law. **Article 5** of the **United Nations Universal Declaration of Human Rights (“UDHR”)** states that **“No one shall be subjected to torture or to cruel, in-human or degrading treatment or punishment.”** Since the adoption of the UDHR on December 10, 1948, this provision has been reproduced in several other international human rights instruments. They include the **Convention Against Torture (CAT), The International Covenant on Civil and Political Rights (ICCPR), The European Convention on Human Rights (ECHR), The American Convention on Human Rights (AMCHR), the Inter-American Convention to Prevent and Punish Torture¹ and the African Charter on Human and Peoples Rights (Banjul Charter).**

61. From all the above instruments, one of the revered principles of law is that there can never be a justification for torture under any circumstances. But that fact notwithstanding, in the present case I am not satisfied that there is any evidence that the Petitioners were tortured in any way. I say so because once again I am in a situation where there are no facts in support of the allegation made by the Petitioners. The Petitioners merely blamed the State for their pain and suffering, but there is absolutely no evidence as to who tortured them. What were the circumstances of the alleged torture? Where? By whom? How? I have no evidence in answer to those questions.

62. In asking the above questions, I have seen photographs of people in a hospital produced as annexure “JKM 3” and which the Petitioners relied on as evidence of torture. I am not able to appreciate the evidentiary and probative value of those photographs at all. Whose images are in those photographs? When were they taken? Which hospital were they taken in? Who took them? What do they show? Without answers, I am not satisfied that the Petitioners have established to the required threshold that they were tortured and as such I do not find a violation of **Section 74(1)** of the **Repealed Constitution**.

Violation of other rights and freedoms

63. In their submissions, the Petitioners also claimed that their freedom of religion as provided for under **Section 78** of the **Repealed Constitution**, freedom of expression as provided for under **Section 79** of the **Repealed Constitution** and freedom of movement as provided for under **Section 81** of the **Repealed Constitution** were violated. They however failed to provide the facts in support of those allegations and the manner in which those rights were violated - See ***Annarita Karimi Njeru vs Republic (supra)***. Indeed, those issues were only raised in submissions and I will not belabor the point further. Suffice it to say that there is no proof of violations of any of the above rights.

Conclusion

64. This case raised fundamental issues relating to the tribal clashes prior to the 1992 and 1997 General Elections in Kenya. It has remained undetermined for four years and on every occasion that it was mentioned or heard, the Court was thronged with expectant litigants who claimed to have been victims of those clashes. Every day I saw and witnessed the obvious desperation apparent in their eyes.

65. I am certain that this judgment will only dampen their hopes but this Court operates not on the basis of sympathy but on clear principles of law including the requirement to examine pleadings, the evidence tendered and make findings based on the facts and the law as applied to those facts.

66. It is saddening therefore that a matter as serious as this one was predicated on shoddy pleadings, even shoddier evidence and was treated very casually by the Petitioners and Counsel. Perhaps the figure of 36,000 alleged victims and an even loftier figure of Kshs.31,509,872,916.70 as damages

for alleged losses blinded them to the reality that at the very least, credible evidence had to be tendered to support their lofty claims. In the end, they failed to do so and their Petition was dealt a death blow by their own actions.

67. What can any Court do in the circumstances but stick by its mandate and when a shoddy case is presented to it, do no more than tell the parties so.

68. How did the Petitioners expect that claims for alleged violations of fundamental rights in individual homes; in individual circumstances; at different places and at different time be properly proved by an omnibus Petition of 36,000 claims supported by no more than an Affidavit or two and six sackloads of documents hand-prepared by the claimants themselves? How did the Petitioners expect that those sackloads of self-help documents would meet the evidential threshold without any other documents in corroboration? How did the Petitioners expect that with inconsistencies abounding on say the causes of death in some death certificates, this Court would as a matter of course believe every one of them and grant them the billions they seek in compensation?

69. I prodded the Petitioners during these proceedings to rethink it and on 17th December, 2012, I granted them leave to amend the Petition and file Further Affidavits but they failed to do so. Perhaps that otherwise routine action would have saved the Petition but the chance to do so was lost and the Petition remained on shaky ground. I have therefore agonized on what orders to make since the Petition must be dismissed and I will shortly give the necessary orders to meet the ends of justice.

70. I should also say this; in **Kanshanshi Mine PLC vs Maini Joseph Mudimina & Others Appeal N.149/2010**, the Supreme Court of Zambia stated thus;

“A decision maker must not only be impartial between and independent of the parties, but also provide reasons or decision visibly demonstrating the work the decision-maker has been called upon to do. As part of procedural fairness, a decision maker must show he or she has grappled with the case, especially the evidence and arguments of the losing party. Only in this way can the decision maker disclose reasoning both informing the losing party why he or she has lost, and permitting a viewing body or appellate Court to assess the decision. A decision-maker who fails to grapple with the evidence and arguments of the losing side, and who instead adopts the submissions of the winning side, may have his or her impartiality called into question.”

71. I have tried to the best of my ability to meet the above test and it is all that any Court should do. My sympathies to the Petitioners aside, I have discharged my lawful duty.

72. Having so said and noting the nature of the matter before me and noting the limitations in the presentation of evidence as I have set out above, this is a Court of Justice and it is expected that no deserving litigant with a deserving case should ever walk away from the fountain of justice without the quenching of his thirst. From my reading of the Petition and the proceedings, although I will not grant the orders sought in the present Petition which was omnibus, octopus-like, dispirited and lacking in focus, **Article 23(3)** of the **Constitution** gives this Court the leeway to grant any appropriate order to meet the ends of justice.

73. In the event, while dismissing the present Petition, any of the 36,000 alleged victims is granted leave to bring an individual Petition with individual facts to be proved on their merits or otherwise in different proceedings.

74. As for costs, it is proper and just that each Party should bear its own costs.

75. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF AUGUST, 2015.

ISAAC LENAOLA

JUDGE

In the presence of:

Muriuki – Court clerk

Mr. Kinuthia for Petitioners

No appearance for Respondents

Order

Judgement duly delivered.

ISAAC LENAOLA

JUDGE

Further Order

Copies of judgment to be supplied. Leave to appeal is granted.

ISAAC LENAOLA

JUDGE