REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CONSTITUTIONAL PETITION NO. 15 OF 2012

SAAKA SAAKA COMMUNITY INTERNALLY

DISPLACED PERSONS GROUP….....PETITIONER

VERSUS

THE MINISTRY OF STATE FOR SPECIAL PROGRAMMES…….1ST RESPONDENT

ATTORNEY GENERAL…….....2ND RESPONDENT

JUDGMENT

1. The petitioner claims that the State has violated its members' constitutional rights and guarantees enshrined in Articles 27, 28 and 43 of the Constitution of Kenya 2010. The members claim that the State has breached their rights to freedom from discrimination, privacy and human dignity. The state has also failed to secure their social and economic rights.
2. The petitioner describes itself as a *self-help group* registered under the Ministry of Gender, Children and Social Development. The membership of the petitioner encompasses persons who claim to be victims of the post-election violence that exploded in parts of Kenya following the disputed presidential elections of 2007. The members aver that they were displaced from their homes between December 2007 and early 2008.
3. The petition is expressed to be brought under Article 22(2) of the Constitution. The petition is dated 4th December 2012. The petitioner claims that whereas the State compensated and resettled other internally displaced persons, it has failed to do so for its members. The petitioner contends that the conduct of the Government of Kenya as demonstrated by the two respondents amounts to discrimination contrary to the provisions of article 27 of the Constitution.
4. The petitioner submitted that under Article 43 of the Constitution, its members are entitled to economic and social rights including the highest attainable standard of health care; accessible and adequate housing; and, to reasonable sanitation. Due to failure by the State to compensate or resettle the members, they have been deprived of those social and economic rights. The petitioner claims that the members have been forced to live in appalling conditions without basic needs or privacy. They aver that that in turn has compromised their health and reproductive rights.
5. The petitioner cites Article 2 of the Constitution for the proposition that the conduct of the respondents has breached principle 6 (6) and 28 of the *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.*

6. Those matters are buttressed by two depositions: the supporting affidavit of Samson Mambili, the chairman of the petitioner, sworn on 4th December 2012; and, a further affidavit of the same deponent sworn on 19th December 2013. The petitioner prays for declarations that its members' rights under Articles 27, 28 and 43 were violated by the State; and, a further declaration that the State has breached the international instruments I set out above. In the end the petitioner craves an order to compel the respondents to resettle the petitioner's members forthwith; or, to provide funds towards their resettlement; and, general damages and costs.
7. The petition is contested by the respondents. There is a detailed replying affidavit sworn by Amb. Binsai Chepsongol on 9th December 2013. He avers that following the 2007 post-election violence, the Government of the Republic of Kenya, under the then Ministry of Special Programmes, established the Department of Mitigation and Resettlement. Subsequently, a board was formed styled as the National Humanitarian Fund Board through Legal Notice No. 1038 of 15th February 2008. Its objective was to resettle post-election violence victims. He deposed that the Government's assistance was not discriminatory and was focused on the 350,000 internally displaced persons in the tented camps.
8. The respondents averred further that the Government made *ex-gratia* payment in the sum of Kshs. 10,000 for *start-up* and *reconstruction* of burnt up or destroyed houses to 168,023 internally displaced people at a cost of Kshs. 1,680,230,000. That sum was paid out to the heads of affected families to meet their basic household needs. In addition, the Government paid a further *ex-gratia* amount of Kshs 25,000 for reconstruction of basic housing to 37,843 internally displaced persons whose houses were burnt or destroyed. That amounted to a further Kshs. 946,075,000.
9. The respondents deny discriminating against the petitioner's members or violating their rights. On the contrary, they assert that the claimants are not genuine internally displaced people. The respondents averred that a majority of the internally displaced persons returned to their homes. In that regard the respondents stated that from their data, 30,953 of those persons constructed houses on their own lands after the payment. A total of 6,978 households, who had been paid both the *start-up* and *reconstruction* funds, formed twenty self-help groups and purchased land in either the Rift Valley or Central Province measuring 340.7 acres.

10. Regarding the claims of discrimination, Amb. Binsai Chepsongol deposed at paragraphs 20 and 21 of the replying affidavit as follows-

> *"20…..in respect to the petitioner, the petitioner had submitted a list containing a total of 34 alleged members to the Regional Coordinator North Rift which names were subjected to the profiled IDP data base and, out of the 34 members only 14 members qualified for recognition as IDPs, as having registered themselves before the 31/12/2008 deadline while 20 members were not registered.*
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> *"21…..it was further discovered that the Petitioner was registered on 28/12/2009 a year after the deadline as per the certificate of registration and hence was not recognized and did not qualify for either land allocation or start up or reconstruction funding".*

11. In a synopsis, the case for the State is that the petition is incurably defective and incompetent; that the petitioner lacks legal capacity to bring these proceedings; that the petitioner's members are not genuine internally displaced persons; and, finally that the state has not violated their rights, breached the Constitution or contravened any international treaty or instrument. The state prays that the petition be dismissed.
12. On 10th June 2014 all the parties agreed that the petition be determined by written submissions. The petitioner's submissions are dated 6th October 2014; those of the respondents are dated 19th August 2014; I have considered the petition, depositions and rival submissions.

14. Article 27 (4) of the Constitution prohibits the State from discriminating directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language

or birth. To benefit from this provision, the petitioner has to demonstrate that its members were unpretentious internally displaced persons; and, that other persons who suffered similar fate received assistance from the State.

15. The petitioner was only registered on 28th December 2009 under the Ministry of Gender, Children and Social Development under registration no. UG/SS/REG/113452/2008. That is clear from the certificate marked "*B*" in the supporting affidavit. That was well after the cut-off date set by the Ministry. I agree that the cut-off date was not a statutory limitation that would invalidate the petitioner's claim. But for reasons I will detail shortly, I do not think the cut-off date was unreasonable or arbitrary.
16. The petitioner seems to be a fluctuating group of persons. The petition states the members are 34. The State submitted that only 14 of the members were found to be *bona fide* displaced persons. At paragraph 5 of the further affidavit of Samson Mambili, the group expands to 51 Members. That is the number in the constitution of the group marked "*C*" annexed to the deposition. I have also seen a letter dated 16th April 2012 annexed to the same affidavit. In it, the 1st respondent's North Rift Coordinator states that the group "comprises of fifty one households". At paragraph 5 of the affidavit of Mambili that I referred to, he deposes as follows-

> *"5. That the 1st respondent's Department of Mitigation & Resettlement confirmed that the 51 members of the petitioner who the Provincial Administration through the District Commissioner had confirmed were indeed internally displaced person and a letter to that effect was written."*

17. That fortifies my view that the true status and numbers of the persons encompassing the petitioner was fluid or fluctuating. It is not lost on me that the resettlement or compensation exercise could not remain open-ended. Either the petitioners were displaced by the post-election violence or they were not. From a legal standpoint, by assisting the displaced population, the State did not *ipso facto* admit *liability* for the claims by the petitioner. The payments were described as *ex gratia*. I am satisfied that the State made reasonable efforts to identify, assist and resettle *bona fide* displaced persons. In a matter of that magnitude, it is possible that genuine claimants may have been left out of the loop. But in the present case, there were specific inquiries on the members of the petitioner. Only 14 were found to be genuine internally displaced persons.
18. When I interrogate the petition further, the petitioner's motivation seems to be either monetary compensation or resettlement on land from the State. The petitioner takes up cudgels on the State for having paid some other displaced persons the sum of Kshs. 35,000 and leaving out its members. That is why the petitioner pleads discrimination. This is evident from the averment at paragraph 9 of the petition where it is pleaded-

> *"The petitioner states that the Government of Kenya had paid a sum of Kshs. 35,000 from the fund towards other persons who are recognized internally displaced persons and who suffered the same fate as the petitioner's members but refused to pay the said sum to the petitioner's members."*

19. The onus of proof fell squarely on the petitioner to show they were genuine claimants who were discriminated by the State in the exercise. The key question is whether the State has violated the rights of the petitioner. Although there are generalized allegations of violations in the petition, there is no clear cut evidence in the supporting affidavit or further affidavit that either the 1st or 2nd respondents were *responsible* for the forceful eviction or displacement of the petitioner's members, or that they failed to *prevent* the violation.
20. In particular I am not satisfied that the petitioners followed all the procedures for registration of internally displaced persons before the cut-off date or at all; or, that they qualified for the funding from the government. I am also not able to say from the evidence that the remainder of the members of the petitioner were internally displaced persons. Critical evidence such as where they were living before being uprooted by the post-election violence is missing in the petition. There is no evidence either of destruction of their homes.
21. In a matter of this nature, it is not enough to state that as a result of the 2007 post-election

violence, they were displaced. This is more the reason because the displacement is contested by the respondents. Some of the violations the subject matter of the petition may as well stop at the door-steps of private citizens. The respondents are categorical that the petitioners' claims are spurious or counterfeit. So that purely from an evidential standpoint, the petitioners have been unable, on a preponderance of the evidence, to reach the threshold for grant of the reliefs sought in the petition. I commiserate with the petitioner. But granted the evidence and the law, I cannot say that the petitioner has proved that the State violated its rights under Articles 27, 28 and 43 of the Constitution or breached its obligations under the international agreements cited by the petitioners.

22. That finding would be sufficient to dispose of the petition. But I am minded to comment on the *locus* of the petitioner. The respondents have submitted that the petitioner lacks standing to sue in its *name*. Under Article 260 of the Constitution, a *person* is defined to include *a company, association or other body of persons whether incorporated or unincorporated*. Article 258 of the Constitution on the other hand provides that *every person* has the *right* to institute legal *proceedings* claiming that the Constitution has been contravened or threatened with violation. There is a fairly identical provision in Article 22 dealing with enforcement of the Bill of Rights. The petitioner was registered as a self-help group on 28th December 2009 by the Ministry of Gender, Children and Social Development. That fact is common ground. It is thus beyond dispute that the petitioner is an *unincorporated association.* To that extent, it is entitled to bring a constitutional petition.

23. However, it can only bring the proceedings *through* its registered officials. The reason is simple: the petitioner is not a distinct *legal person* independent of its members. It cannot then maintain an action in its name or be sued as such. See *Kituo cha Sheria vs John Ndirangu Kariuki and another* Nairobi, High Court petition 8 of 2013 [2013] eKLR. In *Kipsiwo Community Self Help Group v Attorney General & 6 others* t Eldoret, High Court E&L Petition 9 of 2013 (unreported) the court was confronted with a similar problem. Munyao J delivered himself as follows-

> *"It would seem therefore, from a reading of Article 22 and the definition provided in Article 260, that a company, association or other body of persons whether incorporated or unincorporated, may institute proceedings asserting a violation of a right in the Bill of Rights.*
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> *I think the issue is not really whether unincorporated entities may commence action but the manner in which unincorporated entities may commence proceedings. A number of individuals may come together and form an identifiable group. They can bring action as the group, but it does not mean that the group is now vested with legal capacity to sue and to be sued. In such instance, the members of the group have to bring action in their own names, as members of the group, or a few can bring action on behalf of the other members of the group, in the nature of a representative action. Unincorporated entities have no legal capacity and cannot therefore sue in their own names. They can however sue through an entity with legal capacity. Just because the Constitution allows unincorporated bodies to sue, does not vest such bodies with legal capacity and such bodies do not become persons in law, and cannot be the litigants or sue in their own standing. They still have to use the agency of a person recognized in law as having capacity to sue and to be sued."*

24. I have then reached the conclusion that quite apart from the merits of the petition the petitioner has no legal standing to institute the present proceedings in its own *name*. The action is thus incurably defective and incompetent. I have already found that the petitioner has failed to discharge the onus of proof that the respondents have violated any of its rights under the Constitution or the international instruments cited by the petitioner. It follows as a corollary that the Court cannot issue any of the declarations or reliefs sought in the petition.

25. The upshot is that the entire petition is devoid of merit. It is hereby dismissed. Considering the nature of this petition; the circumstances of the petitioners; and, in the interests of justice, I order that each party shall bear its own costs.

It is so ordered.

DATED, SIGNED and DELIVERED at ELDORET this 31st day of October 2014.

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open Court in the presence of:-

Mr……. for the petitioner instructed by Wambua Kigamwa & Company Advocates.

Mr……for the respondents instructed by the Hon. Attorney General.

Mr. J. Kemboi, Court clerk.