



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**CONSTITUTIONAL PETITION NO.56 OF 2009**

**IN THE MATTER OF SECTION 84(1) OF THE CONSTITUTION OF THE REPUBLIC OF  
KENYA**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND  
FREEDOMS**

**UNDER SECTIONS 75, 82, 74, 70 AND 71 OF THE CONSTITUTION**

**BETWEEN**

1. MUSA MOHAMMED DAGANE
2. IBRAHIM MOHAMMED DAGANE
3. NOOR HUSSEIN JITHAYE
4. SOMANE OLOW ALI
5. SIRAT MOHAMMED HIREY
6. ASLI HUSSEIN DOFIL
7. ABDULAHI AHMED ODOWA
8. SHIRE AHMED ODOWA
9. ABDULLAHI DAGANE ABDI
10. MOHAMMED ABDULAHI DAGANE
11. ABDI AHMED YUSUF
12. HASSAN AHMED YUSUF
13. AHMED YUSUF
14. HUSSEIN AHMEDEY
15. HUP GURE HAJ ALI
16. ALI SOYAN
17. ISMAIL HUSSEIN HIRI
18. ABDI YUSUF KASSIM
19. YAROI HURIYE
20. FATUMA DOL ABDI
21. KORYOW HASSAN ABDI
22. HUSSEIN MOHAMMED HIRIY
23. GABEY SALAT
24. FATUMA DUBO ODOWA
25. HARETHO NASIB
26. ALI ISMAIL BARAKI .....PETITIONERS

**VERSUS**

**THE HON. ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**  
**THE DISTRICT COMMISSIONER GARISSA DISTRICT.....2<sup>ND</sup> RESPONDENT**

**AND**

**THE KENYA NATIONAL COMMISSION OF HUMAN RIGHTS.....INTERESTED PARTY**

**THE BOARD OF GOVERNORS UMU SALAMA SECONDARY SCHOOL..... INTERESTED PARTY**

**RULING**

The matter before court is the Petition dated 16<sup>th</sup> November 2006 and seeks the following orders:

- 1. A declaration that the eviction of the Petitioners and their families from lands they initially occupied for purposes of construction of Hyuga Primary School, Umu Salama Girls Secondary School and NEP Technical college without any and or adequate compensation by the Government of Kenya violated their right to property as guaranteed under section 75 of the Constitution of Kenya.**
- 2. A declaration that the eviction notices issued to the applicants by the Second Respondent and the purported donation of the said parcel of land to Umu Salama Girls Secondary School in April 2003 contravened the Petitioners' rights to property protected by Section 75 of the Constitution.**
- 3. A declaration that the eviction notices issued on 12.08.2003 to the applicants violated the Petitioners' right to property as protected by Section 75 of the Constitution.**
- 4. A declaration that the eviction notices issued to the Petitioners in April and August 2003 are null and void and of no legal effect.**
- 5. A declaration that the donation of the land under the ownership and occupation of the Petitioners as at April 2003 to Umu Salama Girls Secondary School was null and void and did not confer any rights known to law to the said Umu Salama Girls Secondary School.**
- 6. A declaration that the Petitioners are still the bona fide lawful owners of all that parcel of land fenced and donated to Umu Salama Girls Secondary School by the 2<sup>nd</sup> Respondent and or his agents in or about July 2003.**
- 7. A declaration that the Petitioners are entitled to full and adequate compensation for all that land on which the following institutions stand: NEP Technical College, Hyuga Primary School, Umu Salama Girls Secondary School.**
- 8. A declaration that the demolition of the Petitioners houses conducted on August 15, 2003 by the 2<sup>nd</sup> Respondent violated the Petitioners' rights to property protected by Section 75 of the Constitution and the right to the security of the person and property guaranteed by Section 70 of the Constitution.**
- 9. A declaration that the abandonment of the Petitioners in the scorching daytime sun and freezing night colds subsequent upon the demolition of their property on 15.08.2003 was a violation**

**of their rights to the security of the persons as guaranteed by Section 70 of the Constitution, the right to life as protected by section 71 of the Constitution and the freedoms from torture, inhuman and degrading treatment as guaranteed by Section 74 of the Constitution.**

**10. A declaration that the treatment that the Petitioners and their families have been subjected to by the 2<sup>nd</sup> Respondent as described in the Petition constitutes discriminatory treatment contrary to section 82 of the Constitution.**

**11. An order compelling the Respondents to facilitate the resettlement of the Petitioners to the land from which they were evicted on 15.08.2003.**

**12. A direction that the provincial surveys officer surveys the land that was initially allocated to Garissa Village Polytechnic and furnishes the Honourable Court with a report as to the current beneficiaries of the grabbing of the said parcel of land.**

**13. A direction that this Honourable Court visits the locus in quo to ascertain the relative location of the land that the applicants were evicted from vis-à-vis the land they were disguised to have allocated themselves unlawfully from the village polytechnic.**

**14. In the alternative, a direction that the Kenya National Commission of Human Rights visits the locus in quo within such time as the court may direct and furnish the court with a report on the situation on the ground vis a vis the reasons advanced by the Government of the Republic of Kenya constituting the reasons why the Petitioners have been evicted from their lands in August 2003.**

**15. A declaration that the beating of the 24<sup>th</sup> and 25<sup>th</sup> Petitioners by the administration police and the subsequent detention and charging in the Magistrates court constituted violation of their rights to security of the person as guaranteed by section 79 of the Constitution and liberty as guaranteed by Section 72 of the Constitution.**

**16. A declaration that the 24<sup>th</sup> and 25<sup>th</sup> petitioners are entitled to compensation from the Government of the Republic of Kenya for the violation of their rights as enumerated at paragraph 11 above.**

**17. A direction that the 24<sup>th</sup> and 25<sup>th</sup> Petitioners do adduce *viva voce* evidence to give this court guidance on reasonable assessment of the compensation they are entitled to from the Government of Kenya by virtue of the actions of its agents, servants and or employees.**

**18. A direction that the Petitioners do adduce *viva voce* evidence to prove their losses of the personal property incurred during the forcible evictions for purposes of appropriate compensation being ordered.**

**19. A declaration that the detention of the 26<sup>th</sup> petitioner at Garissa Police Station after he had secured bail for the 24<sup>th</sup> and 25<sup>th</sup> Petitioners following their being charged in court was a violation of his right to liberty as guaranteed by section 72 of the Constitution.**

Or such other orders, writs and directions as this Honourable Court shall deem just and expedient.

The factual background is contained in the report of the Kenya National Commission of Human Rights which was made available to court on the court's initial direction in this matter. It is also contained in the supporting affidavit of one Ibrahim Mohammed Dagane. The petitioners are members and household

heads of the families of the Fot sub-clan within the Abduwak clan of the Somali speaking people within Garissa district of North Eastern Province of the Republic of Kenya. The applicants and others are the ordinary, local and historical indigenous habitants of Garissa District and that they have never been issued with the title documents to the land they occupy since immemorial. They claim that they are the rural, local and historical habitants of a particular area and they have a customary interest in the land which they were evicted from. They lay claim of a customary interest in land near Umu Salama Girls Secondary school among other parcels of land set out in prayer No.1 of this petition.

In 1981 they were evicted by the provincial administration from the land on which NEP Technical College currently stands. They claim that no compensation was offered in spite of historical claims to the said land. Again in 1984, they were evicted by the Provincial administration from the land in which Umu Salama Secondary school currently stands. No compensation was offered. In 1989, the Provincial Administration invaded the land occupied by the members of the Fot sub-clan in a move that was suspected to have been intended to give the said land to a private developer. There was no explanation given by the Provincial Administration as to why the petitioners were being evicted.

In April 2003 the petitioners received a notice from the District Commissioner Garissa District alleging to be issued in line with Government policy of repossessing public land taken over by private individuals. The notice ordered the applicants herein to vacate the Garissa village Polytechnic land within 14 days and look for a place for themselves.

It is the contention of the applicants that they were neither residing on the village polytechnic land nor had any member of the Fot sub clan historically claimed ownership or possession of the said land. The applicants protested the decision to the Ministry of Lands, the Ministry of Constitutional affairs and the Ministry of Internal Security and Provincial Administration. In July 2003, the 2<sup>nd</sup> respondent in company of administration police officers and other manual workers fenced off the land in which the petitioners were residents and in the process extended the boundaries of Umu Salama Secondary school.

It is contended that the 2<sup>nd</sup> respondent, in the company of administration police officers and armed with weapons invaded the land and pulled down all the houses owned by applicants. In the process, they also destroyed all the household items and left the petitioners and their families hapless, without food, shelter, clothing, water and any life support system. The applicants were left with no option and had to survive in the cold nights and scorching sun for several days. Later they were taken six kilometers away on some empty parcel of land where they were dumped and left.

It is the contention of the applicants that they were dumped in a place which has no access to education facilities, health, electricity, water, road network and other trading facilities that are essential for basic life support. They are largely peasants who cannot afford transport facilities to the nearest Garissa town to get their livelihood. They therefore seek the orders mentioned in this petition under my determination. The respondents and the two interested parties were served and they have not filed any papers in response to the allegations made in this proceeding. The question is whether the applicants are entitled to the orders sought.

I have considered all the documents filed by the applicants. I have also considered the able and the well reasoned submissions by **Mr. Ongoya** learned counsel for the petitioners. The petitioners have demonstrated that their land was taken away in a manner contrary to the Constitution and International convention against forceful eviction. It has also been demonstrated that they were evicted and relocated to an area which has no basic amenities. It is also clear that at the time of eviction the applicants lost valuable items which were destroyed during the course of forceful eviction by the respondents.

No doubt the State has a constitutional obligation towards the applicants. The State must provide services to the applicants in a sustainable manner to promote social and economic development and encourage the growth and the sustenance of basic rights. The State also must respect, protect, promote and fulfil the basic rights enshrined in our Constitution in order that there is no violation or encroachment on the said rights on any entity or organ of the State. By evicting the applicants from their ancestral home, the respondents engaged in acts and in a manner that is broadly at odds with the spirit and purpose of

constitutional obligations.

The term forceful eviction conveys a sense of arbitrariness, unreasonableness, unlawfulness and of illegality. It is also unfair since no alternative remedy is granted to the persons subjected to forceful eviction like applicants. It is a permanent or temporary removal against the will of individual families, and/or communities from the homes and/or land which they occupy without the provision of and access to appropriate forms of legal and other protection. Usually, it is not carried out in accordance with the law and in conformity with provisions of international covenants on human rights. The practice of forceful eviction is widespread and affects families together with their children in detrimental manner. Consequently the practice manifestly results in violation of civil and political rights, such as the right to life, the right to security to a person, the right to non interference with privacy, family and home and the right to peaceful enjoyment of possession. It is carried out in a crude and forceful manner that results in perpetual trauma and damage.

In this case, the applicants were not granted;

- (1) an opportunity for a genuine consultation
- (2) There was no adequate and reasonable notice prior to the scheduled date of eviction.
- (3) There was no information on the proposed eviction and no alternative land or housing was made available in reasonable time to all those affected.
- (4) There was no representation from an independent organization or representatives of the applicants during the forceful eviction to avoid casualties and claims of illegality and unlawfulness.
- (5) There is no evidence that the persons carrying out eviction were given proper instructions as to the manner and mode of eviction to avoid instances of misuse and abuse of power.
- (6) The eviction was carried out at a time when it was necessary to do so and when it was not safe in view of the families and the children who were evicted and in view of the fact that property was destroyed.
- (7) There was no provision of legal remedies or compensation that was made available to the applicants.
- (8) They were also not granted legal aid in order for them to seek legal redress from the court.
- (9) Lastly there is no evidence that their consent was sought and granted before the forceful eviction.

In my view eviction results in individuals being rendered homeless or vulnerable to violation of other human rights especially where the affected persons are unable to provide for himself and for his family.

In such circumstances the State must take all appropriate measures taking into consideration the available resources to ensure that adequate alternative housing, resettlement and/or access to basic amenities is available. I am therefore satisfied that the applicants were subjected to inhuman and degrading acts by the conduct of the respondents. Equally, I am, satisfied that they lost their land and properties in a manner contrary and in violation of the law. It is my decision that they are entitled to compensation and redress for their grievances. That can only be done upon hearing oral evidence of all the applicants and the necessary parties. In that regard, I grant the applicants the prayers sought in the application under my determination.

It is the duty of the court that will hear the oral evidence and after balancing the interests of the applicants and that of the respondents to give a just and fair compensation for the loss and suffering incurred by the applicants. That court will determine the exact amount payable to each of the applicants as a result of the forceful eviction which they were subjected to.

For now, I make a determination that the eviction subjected to applicants was in violation of the law and consequently the applicants suffered, loss and damages, which must be compensated for by the State.

Dated and signed at **Nairobi** this 15<sup>th</sup> day of November 2011

**M. WARSAME**  
**JUDGE**

Delivered at **Embu** this 16<sup>th</sup> day of November 2011

**H. ONG'UNDI**  
**JUDGE**

**In the presence of:**