



**REPUBLIC OF KENYA  
IN THE HIGH COURT**

**AT BUNGOMA  
PETITION NO.26 OF 2010**

**THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF  
FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT  
PRACTICE AND PROCEDURE RULES, 2006**

**AND**

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

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND  
FREEDOMS UNDER SECTION 75 (1 & 2) OF THE CONSTITUTION OF KENYA**

**ISAYA WANYONY**

**WINCELAUS TABANI**

**WAKHUNGU**

**NGICHABE MASIBO**

**KAITA bringing this**

**Petition for and on behalf of the Kiboroo Squatters Association.....APPLICANTS**

**AND**

**AGRICULTURAL DEVELOPMENT CORPORATION.....1ST  
RESPONDENT**

**THE COMMISSIONER OF LANDS.....2ND  
RESPONDENT**

**DIRECTOR LAND ADJUDICATION AND SETTLEMENT.....3RD  
RESPONDENT**

**COMMISSIONER OF POLICE.....4TH  
RESPONDENT**

**THE HON. ATTORNEY GENERAL.....5TH  
RESPONDENT**

## RULING

The 1st Respondent, Agricultural Development Corporation in its preliminary objection notice dated 20/5/2010 urged the court to strike out the application of the Applicants dated 20/03/2010 on ground that it is fatally defective for non-compliance with the law. Mr. Kiarie for the Respondent argued that the application brought pursuant to the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006 cannot be filed by the Applicants on behalf of other people since it is contrary to section 84 of the Constitution. This petition is brought by the Applicants on behalf of Kiboroa Hills residents.

The application dated 20/04/2010 seeks to stay several criminal cases before Kitale Court involving several accused persons. Mr. Kiarie argued that the application is also misplaced since it does not comply with the laid down procedure. It is only the accused persons or their counsel who can initiate the process from the trial court with a view of a reference to the High Court.

Mrs Leting who appeared for the 2nd, 3rd and 4th Respondents associated herself with the submissions of the 1st Respondent. Mr. Mokuia for the Applicants vehemently opposed the application on grounds that the issue of locus standi is secondary and ought not to deny the Applicants the right of audience before the court. He referred to article 22 of the new Constitution which provision allows other people to file petitions on behalf of others. Article (2) (d) overrules denying parties justice due to technicalities.

This application is brought under section 84 (1) of the old Constitution which was in force until the 27/8/2010 when the current Constitution was promulgated. The section deals with enforcement of protective provisions and provides:

“Subject to subsection (6), if a person alleges that any of the provisions of sections 70 to 83 (inclusive) has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if another person alleges a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available. That person (or that other person) may apply to the High Court for redress.”

The section refers to violation of rights provided for under sections 70 to 83. Subsection 6 empowers the Chief Justice to make rules for implementation of the constitutional provisions. The rules were made and gazetted through gazette no.6 of the 17th February 2006 and are known as the Constitution of Kenya (Supervisory Jurisdiction and Protection of fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006.

The Petition was filed in court on 10/3/2010 by Isaya Wanyonyi, Wincelaus Taban Wakhungu and Ngichabe Masibo Kaita on behalf of the Kiboroa Squatters Association against the four Respondents. The provisions of section 84(1) are that the party aggrieved files the petition on his own behalf either personally or through a lawyer. It is only a person who has been detained who can have another person file the petition on his behalf. There is no evidence that the Petitioners and the residents of Kiboroa Squatters Association have been detained. I was referred to some decisions by the parties who have made my work easier. In the case of ALPHONSE MWANGEMI MUNGA & 10 OTHERS –VS- AFRICAN SAFARI CLUB LIMITED [2008] e KLR NAIROBI HIGH COURT PETITION NO.564 OF 2004, eleven Petitioners filed a petition on their own behalf and on behalf of 367 other employees of the Respondent seeking for several declarations regarding their constitutional rights and employment rights. It was held by Justices Nyamu and Wendoh that:

“The right to move the Constitutional Court under section 84 for redress is of a personal (individual) nature and there is only one exception to that provision ..... that Petitioners are detained.”

In the case of NJOYA & 6 OTHERS –VRS- ATTORNEY GENERAL HIGH COURT OF KENYA NAIROBI MISC. CIVIL APPLICATION NO.82 OF 2004 Justice Wendo made similar observations that

personal interest in the matter ought to be established where individual rights are concerned.

It was argued by the Petitioners' counsel Mr. Mokuia that the issue of locus standi is resolved by article 22 of the current Constitution which allows parties to file petitions in court on behalf of others. Mr. Mokuia referred the court to the case of ALBERT RUTURI arguing that constitutional rights must be separated from statutory rights. This follows that the parties pursuing constitutional rights must not be denied justice on the issue of locus standi.

Article 22 (1) provides:

“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.”

Subsection (2) d provides:  
“In addition to a person acting in their own interest, court proceedings in clause (1) may be instituted by-

(d) an association acting in the interest of one or more of its members.”

This petition was filed before the current constitution was promulgated. The law applicable is therefore, the old constitution which by virtue of section 84(1) requires that a person institutes petitions for violation of his individual rights on his own behalf. The transitional clause (19) in the sixth schedule of the current constitution provides:

“Until the Chief Justice makes the rules contemplated by Article 22, the Rules for the enforcement of the fundamental rights and freedoms under section 84(6) of the former Constitution shall continue in force with the alterations, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with Article 22.”

The Chief Justice has not gazetted any rules for the implementation of the Article 22 and the existing rules made under section 84 (6) of the old Constitution is still in force.

The provisions of the rules where a person alleges a violation is that one shall file a petition following the provisions of the rules which prescribe the procedure to be followed. The Petitioners in their application dated 20/4/2010 seek for stay of several criminal cases in Kitale Court. The rules provide that such a procedure shall be initiated by the accused person before the trial court. The presiding magistrate shall frame the issues and refer the case to the High Court for interpretation on the substantial question of law on the alleged violation of rights of the accused. This is the correct procedure which the Petitioners herein should follow.

If the Petitioners want redress from any court of law, their pleadings must be in order and in compliance with the law. The three Petitioners have no authority to file this petition on behalf of the Kiborua Hills Association.

The petition is therefore not properly before the court for non-compliance with the rules. It is therefore incompetent and it is hereby struck out with costs to the respondents.

F. N. MUCHEMI  
JUDGE

Ruling dated and delivered on the 30th day of November 2010 in the presence of Mr. Makokha for Applicants and Mr. Kiarie for the Respondents.

F. N. MUCHEMI  
JUDGE