



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO 147 OF 2005 (O S)

(Constitutional reference)

IN THE MATTER OF THE CONSTITUTION OF KENYA  
IN THE MATTER OF SECTION 84 OF THE CONSTITUTION OF KENYA  
AND

(Enforcement Of Fundamental Rights & Freedoms)

LAWI KINOTI M'MAGIRIN ..... 1ST PLAINTIFF

JULIUS M'MIMUNYA ..... 2ND PLAINTIFF

JAPHETH MUTWIRI ..... 3RD PLAINTIFF

SIMEON M'RIMBERE ..... 4TH PLAINTIFF

MARGARET JOHN ..... 5TH PLAINTIFF

CYRUS KANUU ..... 6TH PLAINTIFF

VERSUS

THE ATTORNEY GENERAL ..... DEFENDANT

RULING

On 9th February 2005 a Constitutional suit by way of an Originating Summons was commenced by six plaintiffs against the Attorney General under S 84 (1) 2 and (6) of the Constitution and under Rules 9 and 11 of the Constitution of Kenya (Protection of Fundamental rights and freedoms of the individual) Practice and Procedure Rules 2001.

The suit was also expressed to be brought under S 3A of the Civil Procedure Act and O 36 of the Civil Procedure Rules.

The Originating Summons alleged the contravention of fundamental rights and freedoms by the Government against the six individuals and seeks the following orders:-

1. A declaration that the plaintiffs' fundamental rights and freedoms under section 70(a) and c, 71(1), 74(1) and 2, 76(1), 81(1) and 82(2) and 3 have been and continue to be grossly contravened and violated by the Government through its agents including the Provincial Administration Police officers and Kenya Wildlife Personnel in Nyayo Scheme Blocks A, B and C (Kieni, Karuri and Kiriti) of Timau Division, Meru Central District.
2. A declaration that the Government is not entitled to evict and/or should not continue with or proceed any further with eviction of the plaintiffs and any resident of Nyayo Scheme Blocks A, B and C (Kieni, Karuri and Kiriti) of Timau Division Meru Central District.
3. General damages, exemplary damages on an aggravated scale under Section 84(2) of the Constitution of Kenya for the damage caused by the unconstitutional conduct of the Government through its agents including the Provincial Administration police officers and Kenya Wildlife Personnel in Nyayo scheme Blocks A, B and C (Kieni, Karuri and Kiriti) of Timau Division, Meru Central District for unlawful eviction of the plaintiffs invasion, destruction of their properties and gross violation of fundamental rights.
4. Any further orders writs, directions as this Constitutional court may deem appropriate.
5. Costs of this suit with interest at court rates.

Before directions could be taken concerning the hearing of the Constitutional suit five representatives of a bigger group consisting of 1088 persons a list of which has been availed to the court filed a chamber summons on 8th March 2005 seeking that the five named persons be joined in the main suit on behalf of the 1088 persons. The application is expressed to be grounded on Order 36 rule 12 of the Civil Procedure Rules and S 3A of the Civil Procedure Act.

The plaintiffs in the Originating Summons have opposed the application for joinder on the following grounds:-

1. That the Originating Summons is not a representative suit and is merely a claim on behalf of the six plaintiffs
2. That out of the 1088 people according to the District Commissioner affidavit who were squatting on the land in question 1088 moved out to another area known as Sirimon Scheme but 40 persons including the plaintiffs remained in the Nyayo Scheme. The plaintiff contends that moving them to Sirimon area which is an even deeper part of the forest and translocating them there does not solve the problem but only exposes them to a greater risk of eviction in future. They claim that the Ministry of Environment has written to the P C claiming that Sirimon scheme forms part of the forest and that the government was currently in the process of reclaiming all current and former forest areas including Sirimon forest.
3. JMM2 is a list of 1088 persons including 4 of the plaintiffs herein. The application therefore seeks to make 4 of the plaintiffs interested parties in the same cause or suit.
4. The interested parties do not state whether they wish to be joined in as plaintiffs or defendants.
5. There is no authority annexed allowing the five to act on behalf of the alleged 1088 persons.
6. The so called interested parties allege that they voluntarily moved out of Blocks A, B, C and settled at Sirimon and the title deeds are being processed. Therefore they were not evicted their properties were not destroyed and their fundamental rights were not violated and as a result they have no claim similar or remotely connected with that of the plaintiffs. There would be no need to join them in the suit. To grant leave to the applicants to be enjoined as parties would amount to what Lady Justice Aluoch in *KENYA BANKERS ASSOCIATION v MINISTER FOR FINANCE & ANOTHER* [2002] 1 KLR calls:

**“clogging the proceedings unnecessarily as their interests have already been taken care of:”**

They have confessed that their title deeds are being processed. On the basis of the affidavit evidence availed to the court by both applicants and the respondent in this particular application, the following facts emerge:-

- i. The applicants and the respondents do not have the same interest and each group is trying to articulate its own self interest peculiar to themselves. Neither can sue or defend on behalf of the other because there is no commonality of interest.
- ii. The applicants have not agreed that the facts as stated by the respondents are admitted by them.
- iii. The applicants claim to have left the area currently occupied by the respondents and are waiting for the issuance of title deeds in the area called Sirimon while on the other hand the respondents claim that there are being evicted, their properties destroyed and their fundamental rights violated.
- iv. On facts the parties have taken conflicting opposed positions. The applicants have not said what case if any they have against the Attorney General.
- v. The parties respective grievances do not share a common point of law or fact and their claims although at one point they appear to have lived in the same place appear to arise from different transactions or acts.

The prerequisites to the maintenance of a representative suit or class action are :-

- a) A sufficient numerosity of parties
- b) A commonality of issues
- c) A commonality of claims or defences
- d) A commonality of interest
- e) A sufficient nexus between the representatives and the class
- f) A defined ascertained or ascertainable group represented
- g) The good faith of the representative parties

If I may add the consent of the class to be represented is also a prerequisite, yet no consent of the 1088 persons has been demonstrated or exhibited in these proceedings.

A careful scrutiny of the facts outlined above vis a vis the prerequisites reveals:-

a) Yes the proposed interested parties being 1088 is sufficiently numerous but the five plaintiffs have alleged personal violation of their fundamental rights which contravention they must individually prove before relief is granted. On the other hand the proposed interested parties have not accepted any individual violation of rights and are only interested in the issuance of title deeds. Including them in the suit is more likely to introduce confusion than assisting the court in analyzing and determination of the real issues if any. They will be better off instituting their own suit with or without the assistance of their representatives.

b) There is no commonality of issues

- c) There is no commonality of claims or defence
- d) There is certainly no commonality of interest – both parties are pursuing their own special interests
- e) There is no nexus between the proposed representatives and the class no consent has been annexed from the class members
- f) Yes, the group is fairly defined but it also includes 4 plaintiffs without their consent. They cannot be forced into a group against their wish in any litigation and there would be no justification for it and more so in such serious matter as a Constitutional suit.
- g) The good faith of the representative parties is potentially lacking because they do not have the consent of the class – nor are they pursuing the same interest as the plaintiffs. In fact they appear to oppose the position taken by the plaintiffs and the intended joinder is likely to result in conflicting issues in the same suit. In other words the bona fides of the intended representatives appear to the court to be doubtful and their intention is to have the door open to them so as not to enjoy the party but to spoil the party. No civilized system of law can allow this state of affairs. The interested parties have all legal avenues open to them to pursue their particular interests while the plaintiffs pursue their claims herein. Their claim that the determination of the plaintiffs claim might be prejudicial to them is not borne out by any facts or law because any determination in the Originating Summons will only bind the parties to it and not third parties who have not been enjoined. In the circumstances the court accepts the respondents arguments and rejects the applicants arguments, principally for the following reasons:-

- 1) The reasons outlined a to (a)
- 2) Lack of common interest
- 3) The plaintiffs claim is by nature not a representative suit it is a Constitutional suit alleging specific contraventions against named individuals and there is no provision for joinder in such suits. S 84 demands allegations of specific contraventions of fundamental rights and freedoms. Although the term “person” under S 123 of the Constitution does include unincorporated bodies if such bodies were to allege contravention of their rights as a group their interests must be the same so as to maintain a single suit.
- 4) The reasons given for joinder are not valid and the bona fide of the applicants are doubtful.

For the above reasons the application for joinder is dismissed with costs to the respondents.

**DATED and delivered at Nairobi the 6th MAY 2005.**

**J G Nyamu**  
JUDGE