



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

PETITION NO. 1 OF 2017

IN THE MATTER OF ARTICLES 2(6), 10(2)(b), 21(1), (3), 22(1), 23(1), 26(1), 27, 28, 29, 40(1 – 4), 42, 43, 44, 47, 56, 63(2)(d), (i) AND (ii) AND 258 OF THE CONSTITUTION

AND IN THE MATTER OF VARIOUS OTHER PROVISIONS OF DOMESTIC LAW AND INTERNATIONAL HUMAN RIGHTS LAW, INCLUDING THE AFRICAN CHARTER ON HUMAN AND PEOPLE’S RIGHTS 1981

BETWEEN

- PETER KITELO CHONGEIYWO 1ST PETITIONER**
- JOHNSON KIPSIRAT NGEYWO 2ND PETITIONER**
- SIMOTWO YEGO 3RD PETITIONER**
- LINET CHEPKWEMOI CHEPKELIEK 4TH PETITIONER**
- MOSES K. NDIEMA 5TH PETITIONER**
- SILAS TAKUR MASAI 6TH PETITIONER**
- COSMAS CHEMWOTEI MURUNGA 7TH PETITIONER**
- FRED NDIEMA MATEI 8TH PETITIONER**
- BENARD MASAI KAPCHELANGAT KAPTINGA 9TH PETITIONER**
- PATRICK NAIBEI KAPCHANGROTOK 10TH PETITIONER**
- SIMOTWO CHELOGOI YEGO**
- (Suing as representatives of the**
- NDOROBO/OGIEK COMMUNITY OF**
- CHEPKITALE, MT. ELGON) 11TH PETITIONER**

VERSUS

- ATTORNEY GENERAL1ST RESPONDENT**
- KENYA FOREST SERVICE (KFS) 2ND RESPONDENT**
- THE INSPECTOR GENERAL OF POLICE 3RD RESPONDENT**
- NATIONAL LAND COMMISSION4TH RESPONDENT**

AND

KENYA NATIONAL COMMISSION

ON HUMAN RIGHTS AMICUS CURIAE

RULING

What calls for my determination in this ruling is the Petitioners' Notice of Motion dated 18th December 2019 and filed herein on 30th December 2019. By that Notice of Motion, the Petitioners seek the main order that this Court certifies this matter as one raising substantial questions of law under **Article 165(4) of the Constitution** in order for the Chief Justice to constitute an enlarged bench of uneven number of Judges being not less than three (3) to hear and determine it.

I should at this stage point out that the 2nd Respondent had filed a similar application dated 22nd November 2017. That application was however withdrawn through a Notice of Withdrawal dated 9th December 2019 and filed in Court on the same day.

The said Notice of Motion is based on the grounds set out therein and also supported by the affidavit of **PETER KITELO CHONGEIYWO** the 1st Petitioner herein.

The gravamen of the application is that the Amended Petition dated 8th April 2019 and filed herein on 9th April 2019 raises substantial questions of law which are complex and novel. These include an interpretation of **Article 63(2)(d) of the Constitution** as to whether **CHEPKITALE** is classified as Community land which the Environment and Land Court is yet to consider. That whereas other Courts including the **AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS** have dealt with the rights of the **OGIEK COMMUNITY** over the **MAU FOREST**, this is a Public Interest Litigation dealing with the rights of indigenous and marginalized communities who dwell in the **MT ELGON FOREST** as well as the violation of their rights during forceful evictions. It also deals with the role of indigenous forest dwelling communities in environmental conservation and climate change and this Judgment will be felt beyond the Petitioners as there are other communities who face similar challenges.

From the record herein, I could not find any responses by the Respondents' to the Petitioners' Notice of Motion dated 18th December 2019. However, **MR GILBERT TARUS – STATE COUNSEL** filed submissions dated 20th January 2020 in opposition to the said application on behalf of the 1st and 3rd Respondents.

Clearly therefore, the Petitioners' Notice of Motion dated 18th December 2019 is un – opposed. **Order 51 Rule 14 (1) of the Civil Procedure Rules** states as follows: -

“Any respondent who wishes to oppose any application may file any one or a combination of the following documents: -

(a) A notice Preliminary Objection: and/or;

(b) Replying affidavit: and/or

(c) A statement of grounds of opposition.”

Although none of the Respondents have filed any responses to the Petitioners' application as provided by the provisions of **Order 51 Rule 14(1) of the Civil Procedure Rules**, the 1st and 3rd Respondents filed submissions dated 20th January 2020 in response to that application. Those submissions do not amount to a Preliminary Objection, replying affidavit or grounds of opposition as envisaged under the law by which a party can oppose an application. This is because, submissions are not evidence. In **DANIEL TOROITICH ARAP MOI .V. MWANGI STEPHEN & ANOTHER 2014 eKLR**, the Court of Appeal held as follows: -

“Submissions cannot take the place of evidence. The 1st Respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' “marketing language,” each side endeavouring to convince the Court that it's case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented.”

Notwithstanding the fact that the Petitioners' Notice of Motion dated 18th December 2019 is not opposed, this Court must not simply allow it as a matter of course. This is because, **Article 165(4) of the Constitution** upon which it is predicated reads as follows: -

“Any matter certified by the Court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of Judges, being not less than three, assigned by the Chief Justice.” Emphasis added.

Therefore, the decision as to whether or not a matter raises “..... Substantial question of law under clause (3) (b) or (d)” of the Constitution is a Judicial one which the Court seized of the application must consider and determine on the basis of the parties' pleadings.

Each case must therefore be considered on its own particular circumstances. As to what amounts to a substantial question of law, Courts in this country have adopted the guidelines in the Indian case of **CHUNILAL .V. MEHTA .V. CENTURY SPINNING AND MANUFACTURING CO AIR 1962 SC 1314**. These are: -

1. Whether, directly or indirectly, it affects substantial rights of the parties; or
2. Whether the question is of general public importance; or
3. Whether it is an open question in the sense that the issue has not been settled by pronouncement of the Supreme Court or the highest Court of the land, or
4. The issue is not free from difficulty; or
5. It calls for a discussion for alternative view.

In **NATIONAL SUPER ALLIANCE (NASA) KENYA .V. IEBC 2017 eKLR MATIVO J** after citing the Supreme Court of India decisions in the cases of **CHUNILAL MEHTA** (supra) and also the case of **HERO VINOTH .V. SESHAMMAL AIR 2006 SC 2234** rendered himself as follows:-

“In my view, the above considerations offer proper guidelines and an insight in determining whether or not a matter raises a substantial question of law for the purposes of Article 165(4) of the Constitution. The Court may also consider whether the matter is moot in the sense that the matter raises a novel point; whether the matter is complex; whether the matter by its nature requires a substantial amount of time to be disposed of; the effect of the prayers sought in the Petition and the level of Public interest generated by the Petition. These however are mere examples since the Article employs the word “includes.” Accordingly, the list cannot be exhaustive and the Courts are at liberty to expand the grounds as occasions demand.”

I am in full agreement with that exposition of what should guide the Court in considering such an application. The Constitution does not define the term *“a substantial question of law.”* Therefore, that decision is left to the discretion of the Court. It must be exercised judiciously and on sound basis. That is what I now propose to consider. In doing so, I shall be guided by previous precedents and by the issues raised in the Petition.

Under **Article 165(4) of the Constitution**, it is clear that for a matter to be referred to the Chief Justice for purposes of constituting a bench of more than one Judge, it must raise a substantial question of law under **clause (3)(b) or (d) of the Constitution**. These are: -

(b) Whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened, or;’

(d) A question respecting the interpretation of the Constitution including the determination of –

- (1) whether any law is inconsistent with or in contravention of the Constitution.**
- (2) Whether anything said to be done under the authority of the Constitution or of any law is inconsistent with or in contravention of the Constitution.**
- (3) Any matter relating to Constitutional powers of State organs in respect of County Governments and any matter relating to the Constitutional relationship between the levels of Government; and**
- (4) Any question relating to conflict of laws under Article 191; and**
- (5) Any other jurisdiction original or appellate conferred on it by legislation.**

In urging this Court to certify this Petition as raising substantial questions of law, Counsel for the Petitioners has submitted, inter alia, that the issues raised touch on the interpretation of the Community Land Act under **Article 63(2) (d) of the Constitution** and the rights of the indigenous forest dwelling Ogiek people as well as the protection of the environment. I am aware that the Court has previously had to deal with issues regarding the forcible eviction of the Ogiek Community from the Mau Forest in the case of **JOSEPH LETUYA & OTHERS .V. A – G & OTHERS 2014 eKLR**. However, this Petition involves the forced eviction of the Chepkitale Ogiek from **MT ELGON FOREST**. No two cases can ever be the same in all aspects.

The Petition is also anchored on a violation of the Petitioners’ rights under **Articles 26, 28, 29, 40, 42, 44 and 56 of the Constitution** and therefore raises questions on the Bill of Rights under Chapter four of the Constitution. Those are among the issues referred to in **Article 165 (3)(b) of the Constitution** to justify the certification of a matter as raising a substantial question of law.

The issues raised in this Petition not only affect the rights of the parties herein but also the larger Chepkitale Ogiek Community in the **MT ELGON FOREST**. They are therefore issues of general Public importance and great Public interest to merit a recommendation for hearing by an enlarged bench of Judges.

There is also the issue that the inclusion in the 3rd schedule pursuant to **Section 77(a) of the FOREST CONSERVATION AND MANAGEMENT ACT** of **MT ELGON FOREST** which is Community Land of the Ogiek of Chepkitale is a violation of Article 40 as read together with **Article 63 (2) (d) (11) of the Constitution**. Similarly, there is the prayer seeking the striking down as invalid that part of the

3rd schedule to the **FOREST CONSERVATION AND MANAGEMENT ACT** that purports to declare as Public forest the Community Land of the Ogiek of Chepkitale. The Court will have to consider, among others, the cultural rights of the Petitioners as against the duties and responsibilities of the Respondents under the Constitution and other relevant laws. There are issues that bring into focus the rights of the Petitioners to lay a claim to land in the forests as against the need to protect the environment for present and future generations. There will also be need to consider the decision of the **AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS** in **THE MATTER OF AFRICAN COMMISSION ON HUMAN & PEOPLES' RIGHTS .V REPUBLIC OF KENYA 2013 eKLR** a decision that was rendered on 15th March 2013.

In my view and having considered all the issues in this Petition, I am satisfied that it raises weighty issues of great public interest. It merits a determination by an expanded bench.

Accordingly, I therefore refer this Petition to the Honourable Chief Justice to empanel a bench of a three (3) Judges to hear and determine it in accordance with the provisions of **Article 165(4) of the constitution**.

No orders as to costs.

Boaz N. Olao.

J U D G E

27th May 2020.

Ruling dated, delivered and signed at Bungoma this 27th day of May 2020.

Boaz N. Olao.

J U D G E

27th May 2020.

This Ruling was due on 4th June 2020. However, in view of the measures restricting Court operations following the **COVID – 19** pandemic, and in light of the directions issued by the Honourable Chief Justice on 23rd April 2020, it is brought forward and delivered through electronic mail with notice to the parties.

Boaz N. Olao.

J U D G E

27th May 2020.