



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

PETITION NO. 15 OF 2013

DAVID KIPTUM YATOR.....1ST PETITIONER

LUKA TOROITICH KIRATON.....2ND PETITIONER

JOSEPH CHETORU

(Suing on their behalf and on behalf of

The Sengwer Community in Embobut Forest).....3RD PETITIONER

AND

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

THE KENYA FOREST SERVICE.....2ND RESPONDENT

ZONAL FOREST MANAGER

(MARAkwET DISTRICT).....3RD RESPONDENT

THE DISTRICT COMMISSIONER

(MARAkwET EAST DISTRICT).....4TH RESPONDENT

THE NATIONAL LAND COMMISSION.....5TH RESPONDENT

AND

KATIBA INSTITUTE.....INTERESTED PARTY

RULING

On the 16.11.2018, the Petitioners filed an application seeking orders that they be granted leave to amend Petition No. Environment & Land Court No. 15 of 2013 and that the same be heard on priority basis. The application was based on grounds that on 29th May 2018, the applicants filed a notice of change of advocates and a new advocate came on record to represent them.

That it is in the interests of justice that the applicants be allowed to amend the petition in order to address critical issues that will be raised in the amended petition, which issues arose from new developments during the pendency of this suit and which the applicants were advised to address by their new advocate on record.

That it would be in the interests of justice to allow the amendment of the petition in order to fully and comprehensively resolve the issues that go to the root cause of the concerns the petitioners have raised in this case. That the petitioners are proposing to amend the petition in order to address the following issues:

- (i) The violation of rights under Articles 11, 26, 28, 29, 40, 42, 47 and 56 of the Constitution visited upon members of the Sengwer Community of Embobut forest through forceful and illegal eviction, even as there were stay orders in force.

(ii) The respondents' violation of the right to property of the members of the petitioners and the Sengwer Community of Embobut forest in regard to their community land protected under Article 40 as read together with inter alia Articles 63(2)(d) and 2(6) of the Constitution; and

(iii) Breach of duty by the respondents to observe the principle of rule of law and to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights contrary to Articles 10 and 21(1) of the Constitution.

That should the application be allowed; the petitioners undertake in the interest of justice to abide strictly by time limits given by court in furtherance to the expeditious hearing of the matter. That no prejudice whatsoever shall be occasioned to the respondents should this application be allowed.

The 2nd and 3rd respondents opposed the application on grounds the application was brought in bad faith, it is motivated and meant to sabotage the court. The court had already given direction on how to proceed with the matter. Petitioners had already filed the submissions save the petitioners.

Moreover, that the grounds given by the petitioners for amendment were trivial. The 1st respondent filed grounds of opposition stating that the petition was full of falsehoods, misrepresentation, inconsistent and unsupported conclusion.

Most importantly, the 1st respondent raised an issue of law that the application was res-sub-judice and an abuse of the process of court in view of Eldoret Environment and Land Petition No. 3 of 2018, Elias Kibiwott Kimaiyo and Others Vs Attorney General and Others which is pending in court. It is argued that the petitioners are changing the cause of action.

When the application came for hearing, Mr. Odongo, State Counsel strongly submitted that the petitioners are changing the cause of action in the middle of the game as they are now called upon to respond to a new cause of action. Moreover, that Petition No. 3 of 2018 was pending before this court. The Petitioners are Elias Kibiwott Kimaiyo and 20 Others acting as representatives of Sengwer Community living at Cherangwany Hills and that we do not have more than one Sengwer Community. The Petitioners are the same as the Petitioners in Petition No. 3 of 2016 and seeks the same issues. In essence, Mr. Odongo learned state counsel argued that the amendment was sought to introduce matters pending before this court in Petition No. 3 of 2018.

Mr. Lempaa learned counsel for the petitioners argued that he was not aware of Petition No. 3 of 2018. Mr. Lempaa applied that in that case, the Petitions to be consolidated or heard simultaneously. Mr. Lempaa abandoned the application for amendment and applied for consolidation. Mr. Odongo does not oppose the application for consolidation. Professor Wafula learned counsel for the 2nd and 3rd respondents oppose the application for consolidation on grounds that this application is an abuse of the process of court. Moreover, that the conduct of the petitioners suggests that their sole intent is to delay the case.

M/s Kinama for the Interested Party and holding brief for Mr. Waikwa for the petitioners in Petition no 3 of 2018 argues that the discretion to consolidate matter lies with the court. The petitioners were not aware of the No. 3 of 2018. In her view, the matters should be consolidated.

I have considered the application for consolidation and do find that the same is merited as the parties are the same, the subject matter is the same and revolves on the violation of human rights.

Rule 17 of the Constitution of Kenya (protection of rights and fundamental freedoms) Practice and Procedure Rules, 2013 provides that the court may on its own motion or by application by any party consolidate several petitions on such terms as it deems just.

I do direct that the two matters to be consolidated. Proceedings to be conducted in Petition No. 3 of 2013. The Petitioners and Interested Parties to file supplementary affidavits with submissions within 30 days of this order together with an interested party expert report. The respondents at liberty to file further affidavits and supplementary submissions within 30 days of service. Matter to proceed by way of affidavits as opposed to viva voce evidence. Highlighting of submissions on 24th September 2019. Orders accordingly.

Dated and delivered at Eldoret this 22nd May, 2019.

A. OMBWAYO

JUDGE