



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT GARISSA**

**ELC CASE NO. 57 OF 2017**

**(Formerly No. 97 of 1996 (Meru))**

**IBRAHIM ALI HUSSEIN**

**ABDI ALI ABDI**

**MOHAMED HUSSEIN BAROW**

**HASSAN MOHAMMED YUSSUF.....PLAINTIFFS**

**IBRAHIM MOHAMED MAMA**

**MOHAMED ABDULLAHI MAALIM**

**(Suing for themselves and on behalf of the Ajuran community)**

**VERSUS**

**ATTORNEY GENERAL.....DEFENDANT**

**JUDGEMENT**

**BACKGROUND**

The plaintiffs had initially instituted this suit in Meru in 1995 as HCCC No. 97 of 1995 before being transferred to Garissa on 20/7/2017 for hearing and determination. The plaintiffs are suing on their own behalf and on behalf of the Ajuran Community claiming that their Constitutional rights and fundamental freedoms have been infringed. The plaintiffs further alleged that the Government of Kenya has consistently failed to provide any or any adequate safeguards against deprivation of lives and properties of their community by Degodia tribesmen originating from Wajir East and elsewhere. As a consequence, numerous members of their community have lost lives and properties. The plaintiffs further alleged that the government of Kenya has failed and/or neglected to protect their community's known ancestral grazing land from alienation, waste and damage by the Degodia people and through the provincial administration consistently treated their community in a discriminatory manner by refusing to appoint members of their community to positions of chiefs and Assistant Chiefs in four (4) divisions of Wajir District namely Buna, Bute, Giriftn and Hadado but instead appointed members of the Degodia community alone.

The plaintiffs also alleged that the government has unlawfully and consistently treated their community in a discriminatory manner by refusing or failing to issue national Identity cards to members of the Ajuran community despite their having attained the age of majority thereby curtailing their freedoms of movement and association. By reason of the aforesaid matters the plaintiffs sought the following orders:

- (i) A declaration that the plaintiffs rights enshrined in Section 70, 71, 80, 81 and 82 of the Constitution have been contravened.**
- (ii) A declaration that the plaintiffs are entitled to the compensation under Section 84 (2) of the Constitution for contravention of their fundamental rights.**
- (iii) An order that the defendant on behalf of the government accord protection to the plaintiffs rights in accordance with the Constitution.**

**(iv) An order that the plaintiffs be paid such compensation under prayer (ii) as this Honourable court will deem fit to grant in the circumstances.**

**(v) Costs of the suit plus interest.**

**(vi) Any other relief this court shall deem fit to grant.**

In a statement of defence filed on 14/5/96 the defendant denied the plaintiffs claim and puts them to strict proof thereof. In particular, the defendant stated that on or before the hearing of this suit, they will be raising a preliminary objection on a point of law that the suit herein does not lie as it has been brought in contravention of the provisions of Section 13 A of the Government Proceedings Act Cap.40 Laws of Kenya. Before the hearing of the suit, the plaintiffs filed their list of witnesses and their statements. The defence did not file any list of witnesses.

### **PLAINTIFFS CASE**

The plaintiffs who have filed this suit on behalf of the Ajuran Community claim that they are the indigenous occupants of Wajir since the pre-colonial period. They further state that they occupied areas such as Bute, Buna, Girifn and Hadado divisions until 1963 when they were systematically and gradually invaded and displaced by Degodia clan who raped their women killing many people and burning houses and properties such as camels, sheep and goats. The plaintiff also stated that the government failed to protect their ancestral grazing land from alteration, waste and damage by the invasion of the Degodia Community who deprived them their lives and livelihood.

The plaintiffs also argued that the government of Kenya through its Public Officers in the Provincial Administration discriminated them socially, economically and politically by refusing to include them proportionally in the government of their county even when they were qualified.

They averred that members from their clan were not appointed as chiefs and Assistant Chiefs and that the government intentionally appointed more Degodia who in turn frustrated their members and refused to issue many of them who had attained the age of majority with National Identity cards which negatively impacted on them. The 1<sup>st</sup> plaintiff who gave viva voce evidence also filed a list of maps indicating their tribal boundary, members of the Ajuran clan who were killed by the Degodia as well as photographs of many of their graves. The 1<sup>st</sup> plaintiff also gave the number of livestock taken away by the invaders while the government of Kenya turned blind eye. The plaintiffs further averred that the government of Kenya directly tortured and killed the Ajuran population through the Wagalla massacre where many Ajuran male members lost their lives.

### **DEFENDANTS CASE**

Save for the statement of defence, the defendants did not offer any evidence in defence of the plaintiffs claim.

### **APPLICABLE LAW**

- 1. The Evidence Act**
- 2. The Constitution**
- 3. CPA Cap. 21 Laws of Kenya.**

### **SUBMISSIONS BY THE PLAINTIFFS**

The plaintiffs who are represented by the firm of Dola Maganix Co. Advocates submitted that the plaintiffs have proved their claim to the required standard by demonstrating that their Constitutional rights and fundamental freedoms under Sections 70, 71, 78, 80, 81 and 82 of the old Constitution and Article 23 of the new Constitution of Kenya, 2010. The Learned Counsel relied on the following case in support of their case;

1. Joseph Letuya & Others –Vs- The Attorney General & Others, ELC Case No. 821 of 2012 (OS) (Unreported)

### **ANALYSIS AND DECISION**

The plaintiffs who have instituted this suit on behalf of the Ajuran community have sought numerous orders hinged on alleged violation of their Constitutional Rights and Fundamental Freedoms under the Constitution. Under Article 22 of the Constitution of Kenya 2010 states as follows:

**“22 (1) Every person has the right to institute court proceedings claiming that a right of fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.**

**(2) In addition to a person acting in their own interest, court proceedings under Clause (1) may be instituted by:**

- (a) a person acting on behalf of another person who cannot act in their own name;**

**(b) a person acting as a member of, or in the interest of, a group of class of persons;**

**(c) a person acting in the public interest; or**

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

The plaintiffs who have filed this representative suit on behalf of the Ajuran Sub-clan of the Somali Community alleged that the government has infringed their Constitutional rights and fundamental freedoms by failing to protect them from the invasion by Degodia sub-clan. The plaintiffs have not demonstrated by evidence when the alleged invasion was committed. It is not also indicated in the plaint when the alleged invasion took place. The plaintiffs have not also produced any evidence that they reported the alleged invasion to the law enforcement authorities.

Where an attack of any individual is done, the same should be reported to the police or any other law enforcement authorities who will then record in their Occurrence Book (OB) and thereafter pursue the perpetrators and charge them in court. There is no evidence produced that the plaintiffs made any report of invasion by the Degodia or any other criminal group(s). The plaintiffs have alleged that members of the Ajuran community were allegedly killed and property worth millions of shillings destroyed. However, no evidence was led to prove that reports were made and recorded in the Occurrence Book of the nearest police station or any other law enforcement authorities.

There is also no evidence of death certificate showing those who were allegedly killed in the alleged invasion and their names. The death certificate would also indicate when the alleged death occurred and the cause thereof. In the same vein, no evidence has been produced by any report of malicious damage by any individual to the police or any law enforcement authorities. When damage has been done to property a report is made to the nearest police station or any other law enforcement authorities where the perpetrators are pursued and brought to book by the law enforcement authorities.

Any individual who claims that his Constitutional rights and fundamental freedoms have been infringed, contravened, violated and/or threatened is obligated to prove such allegations to the required standard which is higher than that required in Civil cases but slightly lower than that required in Criminal cases. In this case, the 1<sup>st</sup> plaintiff alone testified while the other plaintiff including those who are being represented did not. The Bill of Rights under Article four of the Constitution belong to each individual and not a group of individuals.

Article 19 (3) (a) states as follows;

**“19 (3) (a) The rights and fundamental freedoms in the Bill of Rights;-**

**(a) Belong to each individual and are not granted by the state;....”**

It therefore follows that any individual who alleges that his Constitutional rights and fundamental freedoms under Chapter four of the Constitution of Kenya 2010 or any other rights or freedoms conferred by law must be proved to the required standard. No such evidence has been presented before this court. It has also been alleged that members of the Ajuran sub-clan of the Somali community have been discriminated from being employed as chiefs and assistant chiefs. Article 27 of the Constitution of Kenya 2010 prohibits discrimination by the state directly or indirectly against any person or any ground including ethnic or social origin. The plaintiffs have not demonstrated when and how the alleged discrimination was committed. They have not given the names of the chief from the Degodia sub-clan and the potential chiefs and sub-chiefs from the Ajuran sub-clan who were allegedly discriminated against.

Individuals in this country who seek employment or appointment in public office(s) are required to meet certain criteria including those provided for under the statute governing the office in question or Article 10 as read with chapter six of the Constitution of Kenya 2010.

The plaintiffs have not led any evidence showing that there were some individual persons from the Ajuran sub-clan who were qualified and were shortlisted for the two positions of chiefs and sub-chiefs but were not appointed due to their ethnic origin. No academic or professional documents were produced by the plaintiffs showing that any of their members from the Ajuran sub-clan of the Somali community were discriminated against in any appointments as chiefs or assistant chiefs.

I also find that the tribal map produced by the 1<sup>st</sup> plaintiff has no place in the present Kenya. Kenya belongs to all Kenyans irrespective of race colour age, cultural background or ethnicity and they are free to live in any place of their choice and the government has the obligation secure their protection. Suffice to say that the case cited by Mr. Indidis is distinguishable in that the government by then was allocating Man forest land to outsiders against the plaintiffs who have lived in the forest as their ancestral land since time immemorial. I therefore find that decision inapplicable to the circumstance of this case.

In the upshot this case fails for lack of material evidence and the same is hereby dismissed. I make no order as to costs.

**Read, Delivered and Signed in the open court this 30<sup>th</sup> day of July, 2018.**

Hon. Justice E. C. Cheronu

**ELC JUDGE**