



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**E & L PETITION NO. 6 OF 2013**

**JOSEPH M. KURUI AND 2 OTHERS**

**BENJAMIN R. ROTICH**

**JOHN K. KIMOSOP.....PETITIONERS**

**VERSUS**

**MINISTRY OF FORESTRY & WILDLIFE**

**MINISTRY OF STATE FOR SPECIAL PROGRAMMES**

**MINISTRY OF STATE FOR INTERNAL SECURITY & PROVINCIAL ADMINISTRATION**

**THE HON. ATTORNEY GENERAL.....RESPONDENTS**

**JUDGMENT**

**PETITIONER'S CASE**

Joseph M. Kurui, Benjamin R. Rotich and John K. Kimosop claim to squatters of Kipkunur/Kewabus Forest within the larger Embombut Forest area of Cherangani Water Tower, who bring this petition on their own behalf and on behalf of 259 others whose names and descriptions are annexed to the supporting affidavit annexed to this petition, who were excluded, omitted and or disregarded in the Government Resettlement of Squatters Programme for Marakwet East District undertaken in the year 2009, their addresses for purposes hereof is care of Ngigi Mbugua & Co. Advocates, Komora Centre 4<sup>th</sup> Floor, Room 408, Market Lane, P.O Box 5558-30100 ELDORET. The 1<sup>st</sup> Respondent is a Government Ministry tasked with the protection and development of Government Forests and Wildlife throughout the Republic of Kenya. Its address for service for purposes hereof is care of **TELEPOSTA TOWERS, KENYATTA AVENUE, P.O BOX 41394-00100 NAIROBI**. Service to be effected through the Petitioners Advocates Offices. The 2<sup>nd</sup> Respondent is a Government Ministry of the Republic of Kenya within the office of the President tasked with dealing with special needs like disasters, and resettlement of displaced persons among other things that may affect certain persons, groups and communities through Kenya. Its address for service is care of **COMCRAFT HOUSE, 5TH FLOOR, HAILESELASSIE AVENUE, P.O BOX 40213-00100 NAIROBI**. Service of summons shall be effected through the Petitioners Advocates offices. The 3<sup>rd</sup> Respondent is a Government department within the office of the President charged with homeland security and public administration with a presence in all administrative units of Kenya. Its address for service is care of **HARAMBEE HOUSE, HARAMBEE AVENUE, P.O BOX 30510-00100 NAIROBI**. Service of summons to be effected through the petitioners Advocates Offices. The 4<sup>th</sup> Respondent is the Attorney General who is the legal advisor and representative of all Government

departments in civil proceedings and is sued as such on behalf of all the three government departments listed above. His address for service for purposes hereof is care of SHEIRA HOUSE, P.O BOX 40112-00100 NAIROBI. Service of summons shall be effected through the Petitioners Advocates Offices.

The Petitioners claim to be squatters, occupiers and users of Kipkunur and Kewabus Forests within the larger Embobut Forest area of Cherangani Water Tower of Marakwet East District within Keiyo Marakwet County having lived there for successive generations from time in memorial to date. They entered the forest and were christened permit holders, landslide residents, Ndorobos, Land alienation victims, population pressure victims, land adjudication victims, opportunists, Displaced persons, Tax evaders, Land disputes and skirmishes victims by the successive governments from 1895 up to 2010. The Petitioners have since 1895 to 2010 established their homes in what has become known as Glades. They also keep livestock and practice subsistence farming but are without any official recognition or title to the various portions (Glades) under their occupation. Their occupation and utility support their livelihoods and those of their dependents. They are entirely dependent on the water tower for their survival.

In the year 2009 the Government through the first, second and third Respondents formed a task force to among other things; establish, identify and compile a list of genuine squatters inhabiting government forest within the Cherangani Water Tower, with a view to setting aside land and settling them there permanently and restoring, conserving and protecting the Embobut Forest and ecosystem.

The task force was led by the District Commissioners in charge of Marakwet East District, but with membership from the Ministry of Special Programs, Forestry and Wildlife and grass root leaders including the local member of Parliament. The petitioners as stakeholders were excluded from the task force, the deliberations and the final lists that were produced of the would-be beneficiaries of the settlement program. The Petitioners are now apprehensive that the lists compiled by the task force afore referred are being processed through the government to their exclusion, which makes them and their dependents candidates for omission, in an exercise that was meant to benefit them and guarantee their survival.

The Respondents' actions complained of in paragraph 8,9,10,11 & 12 above are unconstitutional and violate the petitions rights and freedoms as a people, persons and community that has lived side by side with the forest. The particulars of breach of the constitution are listed as:

- a) **Failing to incorporate the petitioners in the resettlement programme in their area.**
- b) **Ignoring their input in the process.**
- c) **Coming up with a list or lists that include bogus squatters.**
- d) **Failing to give reasons for the exclusion of the Petitioners either as stakeholders or a beneficiaries of the resettlement programme.**
- e) **Discriminating against the petitioners and others in the resettlement programme of their area.**
- f) **Failing to up hold equity, fairness and reasonableness in the discharge of an administrative function.**
- g) **Allowing themselves to be influenced by political expedience rather than core function of the task force.**
- h) **Engaging in systematic and forceful evictions of the Petitioners without giving them compensation or alternative settlement.**
- i) **Failing to engage the petitioners and their dependents in any conservation efforts in their area of settlement.**

It is the Petitioners prayer that the above acts and omissions constitute a serious threat to their constitutional rights to a dignified living, the right to be heard on matters affecting them, the right to fair administrative action and freedom from discrimination on account of their status and should be declared illegal and they be restrained from further evicting the petitioners or destroying the petitioners' settlement under the guise of conservation and resettlement. Further and without prejudice to the foregoing the petitioners pray that the respondents be restrained by way of permanent injunction from interfering with the petitioners' occupation and peaceful occupation of the two Glades of Kipkunur and Kewabus of the greater Embobut Forest area. The actions and omissions of the Respondents have occasioned the Petitioner loss and damage, which the Petitioners hold Respondents jointly and severally liable. Particulars of loss and damage.

- a) *Destruction by burning and demolition of 4,000 homesteads from 1963 to 2012.*
- b) *Loss of livestock estimated at about 10,000 cattle 15,000 goats and 9,000 sheep all valued at Kshs 100,000,000/=*
- c) *Psychological and physical devastation of people of all ages.*
- d) *Non-registration and profiling of newborns and those dead resulting in marginalization and exclusion from National development programmes.*
- e) *Servitude of entire population and reduced to hunter/gathering status for survival in danger of extinction.*

The petitioners pray for damages and amends they have suffered over the years. The petitioners pray that the court does order a thorough and exhaustive valuation of the property of the petitioners lost, destroyed and or confiscated by the Respondents and does order compensation thereof. The Petitioners specifically pray for orders that:

- i. *A declaration that the exclusion of the petitioners from the task force appointed by the 1<sup>st</sup> Respondent in 2009 was unconstitutional void abinitio and was without legal justification.*
- ii. *A declaration that the list of squatters compiled by the task force constituted in 2009 over the Embobut forest by the 1<sup>st</sup> Respondent excluded the petitioners.*
- iii. *An order prohibiting the Respondents jointly and severally from giving effects to the recommendations of the task force formed over Embobut forest in 2009.*
- iv. *Permanent injunction issue to restraint he Respondents from interfering with the petitioners' quiet enjoyment of the parcels of land under their occupation and utility within the Embobut Ecosystem.*
- v. *Damages for loss and damage of the Petitioners' property.*
- vi. *An order of mandamus compelling the Respondents to undertake an impartial all-inclusive inquiry into how to identify genuine and qualified squatters of Embobut forest, recommend resettlement of the same, restore, conserve, and protect the forest for the benefit of the current and future generations including petitioners.*
- vii. *Compensation to the petitioners for the physical and psychological loss suffered over the years under the guise of conservation.*
- viii. *Costs and any other order the court shall deem just to grant under the circumstances.*

The Petition is supported by the Affidavit of Joseph M. Kurui who states that he was authorized by other leaders of Kewabus Glade Government Displaced persons to file the petition and swear the affidavit. He

states that the list that Government task force on resettlement of squatters of Embobut Forest, has come up with is made of names unknown to the genuine squatters. That he and other genuine squatters whose names and identity card numbers are contained in the annexed list marked “JMK 1(a) – (h)” were omitted by the task force. That all efforts to get the Government officers tasked with the resettlement of squatters programme in the larger Marakwet sub-county have been met with disdain. That he understands that the skewed lists that omitted him and other squatters are about to be presented to the cabinet of the Republic for consideration and final approval.

That once the process is complete the lists of squatters now being processed by the Government will form the basis of who shall be the beneficiaries of the resettlement programme.

The Respondents are silent, discreet, unreasonable and discriminative in the whole process, which make him and the other omitted squatters fearful that the process has been hijacked and is now meant to permanently consign them to squalor status and that no explanation or justification has been communicated to them as to why they have been excluded. That neither him nor any of the other omitted squatters have been given an opportunity to state their case or show cause why they should be considered. That ultimately it is his desire that the whole process be recalled, reviewed and be restarted afresh in a consultative and all-inclusive manner to the benefit of all genuine and deserving persons.

**Mr. Ngigi Mbugua learned counsel** for the petitioners submits that the petitioners have filed this petition on their own behalf and on behalf of 259 others – described as squatters within Kewabus Glade of Embobut Forest of Cherangani Water Tower located in Marakwet East District of Elgeyo Marakwet County. The Petitioners main grievance is that they were excluded in the resettlement and compensation programme that were undertaken by the Respondents in their area, after initially being included and earmarked for compensation in the year 2009. The Petitioners contend that their exclusion from the list of those to be compensated was discriminatory and unfair since they were neither informed nor included in an open and transparent exercise. They were never told the reasons of their exclusion – The Petitioners base their case on various constitutional articles and the principles of Natural Justice. During the pendency of this petition the respondents amended their list of beneficiaries of the resettlement/compensation programme so as to include the Petitioners. This fact was communicated to court vide an application dated 29.1.2014. The remainder of the parties comprised in the list annexed to the petition deserve similar treatment to the rest of the squatters and their designated leaders who were included in the revised list of beneficiaries and they too deserve compensation of Kshs 400,000/- per household. There can be no justification of treating them differently from the rest of them. The court should order their fresh vetting and payment of all omitted households the sum of Kshs 988,000,00/- collectively or Kshs 400,000/- per household. The petitioners also deserve costs of this petition based on the award granted.

## **RESPONDENTS CASE**

The Hon. Attorney General filed grounds of opposition whose import is that the petitioners have no locus standi as the task force in issue was for Embobut forest only and the petitioners were not occupants of Embobut forest.

**Mr. Ngumbi learned counsel for the respondents submits** that this petition is an abuse of court process as the petitioners filed an application dated 29.1.2014 seeking to substitute parties and that 105 of the petitioners had been compensated. The judge declined to allow their application and advised them to file notices of withdrawal from the petition. The parties declined to do so and hence the court is not aware of who among the petitioners herein is still claiming compensation. He urges the court to dismiss the entire petition taking judicial notice of the fact that the petitioners who still have interest in this matter have not been clearly identified. It is his submission that the Embobut forest is a gazetted forest which has never been degazetted and hence the petitioners were residing in the forest illegally and compensation was not being given to the evictees a legal right but was being done on ex-gratia basis based on humanitarian grounds. It is his submission that the alleged loss and damage has not been proved as there are no experts’ reports such as valuation reports annexed to prove the same. It is his submission that the petition lacks merit and ought to be dismissed with costs as no authority has been annexed to the supporting affidavits

to enable the petitioners bring the petition on behalf of the 259 others.

## **DETERMINATION**

My duty in this case is to address the issue of fundamental rights and freedoms. Article 22 of the Constitution grants every person the right to move the High Court to enforce fundamental rights and freedoms contained in the Bill of Rights. These rights are very specific and a petitioner who comes before the court must set out with some level of particularity the specific right and how it is violated. This principle was established in *the case of Anarita Karimi Njeru v Republic (No. 1) [1979] 1 KLR 154* and augmented by the Court of Appeal in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance Civil Appeal No. 290 of 2012 [2013] eKLR*.

In every constitutional Case, the Court should try its best to understand the petitioner's case and discern what rights protected by the Bill of Rights has been violated. This is consistent with the Court's duty to promote access to justice. In this case the petitioners seems to say that they have been discriminated by being omitted from the list of genuine squatters to be resettled in their area and that the government came up with bogus squatters. This court finds that the petitioners have failed to demonstrate who was a bogus squatter and who was the genuine squatter however it is trite that a squatter is a squatter.

The Constitution of Kenya, 2010 confers upon every person in Kenya, the obligation to respect, uphold, protect and defend the Constitution of Kenya, and any attempt to establish a government otherwise than in compliance with this Constitution is unlawful (Article 3), and 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, (Articles 22(1) and 258 (1) & 2). In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by persons, acting in the public interest (Articles 22(2)(c) and 258(2)(c)).

Articles 22(1) & (2) and 258(1) & (2) of the Constitution 2010, thus confer upon any person the right to bring action in more than two instances firstly in the public interest, and secondly (where a breach of the Constitution is threatened in relation to a right or fundamental freedom.

The national values and principles of governance which bind all state organs, state officers, public officers and all persons whenever any of them makes or implements public policy decisions, and these national values and principles of governance include patriotism, national unity sharing and devolution of power, the rule of law, democracy and participation of the people, good governance integrity transparency and accountability (Article 10, (1)(2)).

Consequently, the Constitution of Kenya 2010, grants the individual much wide scope in terms of locus standi than Section 84(1) of the repealed Constitution. The comment in *Trusted Society of Human Rights Alliance Vs. Ag. & 2 Others [2012] eKLR* regarding the decision in *Anarita Karimi Njeru* is very relevant. The Judges said -

“We do not purport to overrule *Anarita Karimi Njeru* as we think it lays down an important rule of constitutional adjudication; a person claiming constitutional infringement must give sufficient notice of the violations to allow her adversary to adequately prepare her case and to save the court from embarrassment on issues that are not appropriately phrased as justiciable controversies. However, we are of the opinion that the proper test under the new Constitution is whether a Petition as stated raises issues which are too insubstantial and so attenuated that a court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged.

The test does not demand mathematical precision in drawing constitutional Petitions. Neither does it require talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against the Respondents in a constitutional petition are fashioned in a way that gives proper notice

to the Respondents about the nature of the claims being made so that they can adequately prepare their case.”

In other words, under the new Constitution, the Court is bound to inquire and determine matters on their merit, and where the matter in issue could be deciphered from the pleadings, then the court was bound to determine such matter even when the particulars of breach had not been specifically pleaded.

Emphasizing the point, the Court of Appeal in *MUMO VS. TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE & 5 OTHERS* (supra), said -

“Our commitment to the values of substantive justice, public participation, inclusiveness, transparency and accountability under Article 10 of the Constitution by necessity and logic broadens access to the courts. In this broader context, this court cannot fashion nor sanction an invitation to a judicial standard of locus standi that places hurdles on access to the courts, except only when such litigations is hypothetical abstract or is an abuse of the judicial process.” However, we must hasten to make it clear that the person who moves the court for judicial redress in cases of this kind must be acting bona fide with a view to vindicating the cause of justice. Where a person is acting for personal gain or private profit or out of political motivation or other oblique consideration, the court should not allow itself to be seized at the instance of such person and must reject the application at the threshold.”

In addition, Article 258(1) grants every person the right to institute court proceedings claiming that this constitution has been contravened, or is threatened with contravention. Court proceedings may also be instituted by any person acting in the public interest (Article 258(2)).

The petitioners claim is based on a claim of discrimination thus their names being omitted on the list of squatters. I have considered the petition, the supporting affidavit and grounds of opposition and do find that the petitioners have not demonstrated that they are the genuine squatters and that they have been discriminated by the government. Discrimination strikes at the very heart of being human. It is treating someone differently simply because of who they are or what they believe. We all have the right to be treated equally, regardless of our race, ethnicity, nationality, class, caste, religion, belief, sex, language, sexual orientation, gender identity, age, health or other status. The petitioners have not attempted to demonstrate that they have been treated differently despite being the genuine squatters which would mean those who are actually residing in the forest whilst imposters would be those not residing in the forest but occasionally pose as squatters to benefit themselves from the states programmes to settle squatters. The petitioners have not shown this court the list of those who were not paid and yet were not genuine squatters. The list of the left-out members of Kewabus Glade or branded displaced persons was prepared by the petitioners themselves and therefore it is difficult to ascertain whether the same is authentic. The petitioners have not demonstrated by evidence that they are residents of the Embobut forest. Moreover, this court finds that the petitioners even if they can be branded as genuine squatters, had no right to reside in the Gazetted forests and therefore cannot be compensated for being squatters in a Government forest. Particulars of loss and damage have been pleaded but no sufficient evidence has been availed to prove the same. Ultimately, the petition is dismissed with no order as to costs.

DATED AND DELIVERED AT ELDORET THIS 25<sup>TH</sup> DAY OF JANUARY, 2017.

A. OMBWAYO

JUDGE