



**REPUBLIC OF KENYA**

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

**PETITION NO. 13 OF 2013**

**IN THE MATTER OF ARTICLES 2, 22, 23, 79, 156, 161(2), 173 AND 226 OF THE CONSTITUTION OF KENYA, 2010**

**BETWEEN**

**JAMES ROTICH**

**JOHN KOMEN**

**JAMES KOSIR CHELANG'A**

**ELIAS MAIYO KIPKORIR**

**RICHARD KIPKORE CHEBII (SUING ON BEHALF OF VICTIMS OF LANDSLIDE STAYING INEMBOBUT FOREST).....1ST PETITIONER**

**EDWARD KOSGEI CHESIRE (SUING ON BEHALF OF NDOROBOS STAYING IN EMBOBUT FOREST) ….....2ND PETITIONER**

**JOSEPH KANDA (SUING ON BEHALF OF PERMIT HOLDERS STAYING IN EMBOBUT FOREST).....3RD PETITIONER**

**AND**

**HON. DAVID KANGOGO…….....…….1ST RESPONDENT**

**TASKFORCE FOR RESTORATION OF EMBOBUT FOREST....2ND RESPONDENT**

**MINISTRY OF SPECIAL PROGRAMMES…...…….…….....3RD RESPONDENT**

**KENYA FOREST SERVICES……...……...…….....4TH RESPONDENT**

**ATTORNEY GENERAL……..…....….....….....5TH RESPONDENT**

**COUNTY GOVERNMENT OF ELGEYO MARAKWET….....6TH RESPONDENT**

**JUDGMENT**

***James Rotich*** and 4 Others are suing on behalf of the victims of landslide staying in Embobut Forest, whilst ***Edward Kosgei*** is suing on behalf of the Ndorobos staying in the Embobut Forest, whereas, ***Mr. Joseph Kanda*** is suing on behalf of the Permit holders of the Embobut Forest. They have sued the respondents claiming that the 2nd respondent was appointed by the Minister for Forestry and Wildlife to investigate, examine, identify genuine and qualified squatters in Embobut Forest and give recommendation to the Government of Kenya on lasting solution to restore, conserve and protect the Embobut forest. That the 2nd respondent did prepare and forward the Taskforce report to the Minister for Forestry and Wildlife on the 6th January, 2010.

The 1st petitioner and the 981 victims of the landslide staying in Embobut Forest were part of the report of the Taskforce. That the 2nd and 3rd Petitioners were also part of the Report of the Task force. The 2nd respondent made a recommendation that the squatters living in the gazetted forest to move out of the forest to pave way for restoration of the forest to former glory and that the government to find and provide alternative settlement for the deserving genuine and qualified squatters. The petitioners aver that they are permit holders, landslide victims and forest dwellers and the purpose of appointing the 2nd respondent was to register all *bonafide* persons living in the forest so that they could be compensated. That the 1st respondent on 27th September 2013, called chiefs from the entire Embobut Forest and asked them to supply him with names of people living in the forest.

The 1st respondent has without any consultation and in contravention of the recommendation of the 2nd respondent removed the names of some of the Petitioners and is now alleging that they are imposters. The County Commissioner of the 6th respondent has interfered with the findings of the 2nd respondent by preparing another list and reviewing the earlier list of the Taskforce thus removing some of the petitioners from the list of beneficiaries.

According to the petitioners, the 2nd respondent's action amount to interfering with the work of the 2nd respondent which identified the Petitioners as squatters and asked the Government to compensate them. The petitioners aver that it would be unfair, unjust and in breach of the rules of natural justice to remove any of the petitioners without affording them a hearing.

The petitioners aver that the 4th respondent is keen in implementing the findings of the 2nd respondent and it will cause the eviction of the Petitioners without any form of compensation. The government proceeded to compensate some of the landslide victims and the Petitioners were not compensated. The Petitioners pray for an order restraining the respondents from implementing the findings of the 2nd respondent using a list other than the one which the 2nd respondent handed over to the Ministry of Wildlife and Forestry. Furthermore, the respondent to be directed to avail an official list of the victims of the landslide staying in the Embobut Forest, the Ndorobos and Permit holders as per the findings of the 2nd respondent.

The petitioners further pray for an injunction against the respondents restraining them from deleting or removing the names of any of the Petitioners from the list of the 2nd respondent and a declaration that the Petitioners are *bonafide* genuine and qualified squatters of the Embobut Forest. An order directing the government through the Attorney General to compensate the Petitioners for being *bonafide* squatters. The petitioners pray for costs of this Petition.

The petition is supported by three affidavits. ***Edward Kosgei*** states on behalf of the Ndorobos that they were permitted to stay in Embobut Forest as the government proceeded to get them a place for resettlement and therefore, they still stay in the forest. He states that since the government maintains that no person is allowed to stay in the forest, a Taskforce was appointed by the Minister of Forestry and Wildlife in 2009 to investigate, examine, identify genuine and qualified squatters in Embobut Forest and give recommendations to Kenya Government lasting solution to restore, conserve and protect Embobut Forest. The Taskforce on the restoration of Embobut Forest filed its findings and presented a report to the

Minister of Forestry and Wildlife on 6th January, 2010 in which himself and the Ndorobos staying in Embobut Forest were part and parcel of the report of the Taskforce. That upon the report being forwarded to the Minister, it was realized that some names were repeated and others omitted and a harmonized register of the evictees was prepared and forwarded to the Minister.

That on 27th September 2013, their area MP, Honourable David Kangogo summoned chiefs from the entire Embobut Forest who assembled at the local CDF office to address the issue of resettlement and at the end of the meeting, their MP came out and announced to some of the petitioners who were assembled outside including him that the Ndorobos were not included in the list of the persons to be compensated although no consultation had been made. That on October 7th, 2013, he read an article in the Daily Nation entitled "Fake Squatters of Forest Squatter ready", which reported that the list of 900 imposters who had been illegally included by the Taskforce had been removed. That as a result of the forged list, the Government through the President purported to compensate some of the alleged victims and the petitioners were not compensated. To-date, no revised list has been presented to them for vetting as the same remains a tightly guarded secret that he and his co-petitioners are genuinely apprehensive that the clandestine list shall be released at the last minutes with no room for them to be heard.

The 1st respondent in cahoots with other individuals have attempted to alter the original list and removed some names of the petitioners. That the clandestine list is gross and brazen violation of their constitutional and legal rights.

***Mr. Elius Kimaiyo*** swore on behalf of the landslide victims stating that he has stayed in Embobut Forest since birth as his father had to stay in the forest because of the liabilities that affected Itum in 1961. When Itum became dangerous and inhabitable, his family moved to the forest and they were permitted to stay in Embobut Forest as the government proceeds to get them a place for resettlement and therefore, they still stay in the forest. He states that since the government maintains that no person is allowed to stay in the forest, a Taskforce was appointed by the Minister of Forestry and Wildlife in 2009 to investigate, examine, identify genuine and qualified squatters in Embobut Forest and give recommendations to Kenya Government lasting solution to restore, conserve and protect Embobut Forest.

The Taskforce on the restoration of Embobut Forest filed its findings and presented a report to the Minister of Forestry and Wildlife on 6th January, 2010 in which the Ndorobos staying in Embobut Forest were part and parcel of the report of the Taskforce. That upon the report being forwarded to the Minister, it was realized that some names were repeated and others omitted and a harmonized register of the evictees was prepared and forwarded to the Minister.

That on 27th September 2013, their area MP, Honourable David Kangogo summoned chiefs from the entire Embobut Forest who assembled at the local CDF office to address the issue of resettlement and at the end of the meeting, their MP came out and announced to some of the petitioners who were assembled outside including him that the Ndorobos were not included in the list of the persons to be compensated although no consultation had been made. That on October 7th, 2013, he read an article in the Daily Nation entitled "Fake Squatters of Forest Squatter ready", which repeated that the list of 900 imposters who had been illegally included by the Taskforce had been removed. That as a result of the forged list, the Government through the President purported to compensate some of the alleged victims and the petitioners were not compensated.

That to-date, no revised list has presented to them for vetting as the same remains a tightly guarded secret that he and his co-petitioners are genuinely apprehensive that the clandestine list shall be released at the last minutes with no room for them to be heard. The 1st respondent in cahoots with other individuals have attempted to alter the original list and removed some names of the petitioners. That the clandestine list is gross and brazen violation of their constitutional and legal rights.

***Mr. Joseph Kanda*** on behalf of Permit holders states that they were allowed to stay in the forest as the government promised to get them a place for resettlement and that the Taskforce on the restoration of Embobut Forest filed its findings and presented a report to the Minister of Forestry and Wildlife on 6th

January, 2010 in which himself and the Ndorobos staying in Embobut Forest were part and parcel of the report of the Taskforce. That upon the report being forwarded to the Minister, it was realized that some names were repeated and others omitted and a harmonized register of the evictees was prepared and forwarded to the Minister.

That on 27th September 2013, their area MP, Honourable David Kangogo summoned chiefs from the entire Embobut Forest who assembled at the local CDF office to address the issue of resettlement and at the end of the meeting, their MP came out and announced to some of the petitioners who were assembled outside including him that the Ndorobos were not included in the list of the persons to be compensated although no consultation had been made. That on October 7th, 2013, read an article in the Daily Nation entitled "Fake Squatters of Forest Squatter ready", which repeated that the list of 900 imposters who had been illegally included by the Taskforce had been removed and that as a result of the forged list, the Government through the President purported to compensate some of the alleged victims and the petitioners were not compensated. That to-date, no revised list has presented to them for vetting as the same remains a tightly guarded secret that he and his co-petitioners are genuinely apprehensive that the clandestine list shall be released at the last minutes with no room for them to be heard. That the 1st respondent in cahoots with other individuals have attempted to alter the original list and removed some names of the petitioners. That the clandestine list is gross and brazen violation of their constitutional and legal rights.

The petitioners filed supplementary affidavits in response to the replying affidavits of the 4th respondent. The gist of the affidavits is that their constitutional and human rights as genuine squatters of the Embobut Forest have been violated and/or infringed upon and that they no longer live in the forest as they were evicted and therefore, their constitution rights have been violated.

The petitioners aver that the recommendation of the Taskforce's Committee held on 23.6.2012 at Chesoi District Commissioner's Board room, which was forwarded to the Minister for Forestry and Wildlife on 6.1.2010 that led to the non-inclusion of his co-petitioners and himself hence necessitating the suit. He alleges that the filtering and verification process of the squatters was done in a questionable, unlawful, discriminating and unconstitutional manner that led to the exclusion of the names of his co-petitions and himself.

**RESPONSE BY THE 1ST RESPONDENT**

The 1st respondent states that the Further Amended Petition if frivolous, scandalous, misconceived, raises no cause of action against him and the court ought to out-rightly have his name struck off from the petition. That being the Member of Parliament for the affected constituency, the petitioners have included his name in this petition in order to make him a party to the suit in their ill motivated attempt to smear and place his name and reputation in disrepute that he is not concerned with the welfare of my constituents.

The petition clearly indicates the list of persons identified as victims of the eviction process in Embobut forest was compiled and submitted by the 2nd Respondent of which he was not a member nor had the power to direct/influence in their mandate. The petitioners' own documents/evidence also show that the harmonized register of the Embobut forest was also compiled by the 2nd Respondent making the allegations that he altered the list unsubstantiated and untrue.

That none of the petitioners have provided any evidence to show that he has altered the list of evictees prepared by the 2nd Respondent by removing the petitioner's names and alleging they are squatters and that none of the prayers sought by the petitioners in the petition are capable of enforcement against him and the petitioners are clearly using his inclusion in the suit as an avenue by the petitioners to settle their own scores emanating out of the spite and malice and the court ought not to allow it's honourable process to be abused as is currently being done by the petitioners. The orders sought can only be enforced against the government or its departments, ministries and arms and not an individual like me hence the inclusion of his name in the suit is a misjoinder and ought to be struck out. The process of resettlement and eviction can only be done by the government through any of its arms/structures and not himself as an individual

hence the petitioners haven't established any prima facie case against him.

***REPLY BY THE 4TH RESPONDENT***

The ***4th respondent filed*** a response to the petitioners stating that the petitioners have failed to state their geographical position or grid reference in the exposed Embobut Forest hence it is invisible to locate them. Moreover, that the orders sought are in essence prerogative orders hence they would have filed judicial review application and that an injunction cannot be issued against the Government of Kenya. According to the 4th respondent, the petition offends the constitution of Kenya, 2010 and the policy and laws governing Environmental Management and Condition and principles of environmental management and sustainable development.

In a nutshell, the 4th respondent states that Embobut Forest is a gazetted and protected forest located in Elgeyo Marakwet County and having been declared a state forest vide Proclamation No. 26 of 1954. The 4th respondent has further deponed in affidavit that James Rotich, John Komen, James K. Chelang'a and Richard Kipkore Chebii and Joseph Kanda were paid on ex-gratia basis to move out of the forest vide Legal Notice No. 174 of 20th May, 1964 and therefore, neither the executive nor the honourable court may empower any person or group of persons to occupy it or reside therein as by so doing the court will not be only preventing an illegality but will also be usurping the powers granted to National Land Commission by the Constitution and legislation.

***THE RESPONSE BY 2ND 3RD AND 5TH RESPONDENTS***

The gist of the replying affidavit filed by the Attorney General the 5th respondent, deponed by Arthur Osiya, a resident of Iten, Elgeyo Marakwet County is that the petitioner does not disclose any cause of action based on the constitution to warrant grant of the orders sought. That in answer to paragraphs 1 of the petition, he has been advised by the counsel and which advise he conscientiously believes to be correct that the petitioners do not have any authority to institute these proceedings on behalf of the alleged undisclosed landslide victims, Ndorobos or Permit holders living in Embobut forest in Elgeyo Marakwet County or at all or at all and puts the petitioners to strict proof. The 2nd respondent is not a legal body with capacity to sue or be sued and is non-suited and the joinder is bad in law and the respondent ought to be removed from these proceedings as no legal liability can attach to it.

He admits that the government through the Ministry of Wildlife and Forestry in the year 2009 did set a Taskforce known as the Taskforce on Embobut Forest Restoration but deny that the recommendations made by the said Taskforce have or had any legal force to bind the government of the Republic of Kenya or at all and puts the petitioners to strict proof. That he makes full reference and reiterates the contents in the affidavit of Joseph Macharia, Ag. Director of Mitigation and Resettlement, Ministry of Devolution and Planning sworn and filed on 3.3.2014 in relation to Environment and Land Court Petition No. 15 of 2013 (Formerly Eldoret HCPT No. 6 of 2013) David Kiptum Yator, Luka Toroitich Kiraton, Joseph Cheptorus (Suing as Leaders of the Sengwer Community Vs The Honourable Attorney General, Kenya Forest Services, Zonal Forest Manager, Marakwet District, The District commissioner, Marakwet East District, National Land Commission.

That he is aware and confirm that, a 2nd phase exercise was subsequently undertaken by the Taskforce after the submission of the Taskforce report to the then Ministry of Special Programmes in the year 2012 arising out of numerous complaints on squatters omitted in the initial stage as quite a number did not have any form of identification with a view to a further filtering and verification of the all occupants with identity cards.

That arising out of this phase, his office through the District Commissioner, Marakwet Ease; on 23.6.2012 submitted what is identified as the "Harmonized Registers" and confirms from the records that the Taskforce consulted widely with the area inhabitants/squatters living in the glades and it was verified and confirmed that although the petitioners had initially been registered in the original report, the petitioners were actually living on lower side of the forest and had never settled in the upper side of the forest as

squatters and therefore, did not merit and qualify for the resettlement nor for payment of the ex-gratia payments.

That he further clarifies and states that the Embobut Forest is divided across by the Chesoi-Maroo Road and in view of the positioning of the road, the forest area is identified as either the upper side or the lower side and that while the lower side of the forest is extensively and densely inhabited and there is no longer any evidence of the forest, the upper is the area where the remaining forest comprising of approximately 5,000 Ha is inhabited by the squatters. The Government policy since the inception of the Taskforce was to relocate/remove all the squatters living on the upper side of the forest while a decision/solution on the permanently inhabited lower side was to be made as has not up-to the present been made.

He therefore confirms that the first phase by the Taskforce was to register and verify for relocation all the squatters living on the upper side of the forest. The petitioners were as a result of the verification found to be on the lower side which as at present, no decision has been made to relocate the inhabitants.

That it was further discovered that the alleged petitioners had migrated from their homes and resettled on the forest areas for the main purpose of economic exploitation of forest by cultivating/growing potatoes at large scale, and rearing of cattle and sheep for commercial purposes in addition to engaging in illegal logging of both indigenous and exotic species of forest products. That in view of the full participation by all the stakeholders and the profiling, verification and filtering voluntarily agreed in all the meetings held, he is advised by the counsel and which advise he conscientiously believe to be correct that the issue of the alleged eviction of the petitioners does not arise.

That he further confirms that the status of the petitioners to-date is that they are still living on the lower side of the forest overlooking the Kerio Valley that was not affected by the phase one resettlement/relocation. Both the area member of parliament and the county senator and others are also residing on this lower side.

He denies that the petitioners are permit holders, landslide and forest dwellers. That he further states that as per the report of the Taskforce in Exhibit AO-1, there had been agreed criteria by the Taskforce as early as year 2009 which criteria guided the Taskforce in the verification of the squatters living in the forest.

He confirms having called for the meeting alluded to which meeting was to deliberate on phased out relocations/exits and modalities of payment of cash to buy land elsewhere only for those squatters identified and profiled by the Task force and whose names had been submitted by his office to the Principal Secretary, Ministry of Devolution and Planning and was a culmination of a series of consultative meetings/forums held involving the communities living within the area, the Government representatives from his office, the Ministry of Devolution and Planning, Task force members and local area representatives including the Senator, Members of Parliament, Members of the County Assembly, Local Area Chiefs. He therefore, deny the meeting was or had been called by the 1st respondent.

He further confirms that the meeting had been called by his office through the District Commissioner, Marakwet East with the full knowledge and participation of the local leaders to lay out the road map for the implementation of the agreed final Task force report recommendations made in September, 2013 on gradual phased out relocation of the people who had been squatting or living in the Embobut forest.

That he states that subsequently after the report by the expanded Task force, new complaints on missing names of genuine squatters were made to the Task force necessitating the Task force to have several meetings in October 2013, for a final verification of the squatters which meetings were attended by the local area representatives (MPs and MCAs) and after the profiling of all names, a total of 995 genuine people living in the forest was captured. That he states that arising out of the profiling and the capture of the 995 names of genuine people living in the forest; the names of the landslide victims were subsequently removed by the expanded Task force and replaced with the names of the 995 genuine squatters with the full knowledge of the petitioners.

That he is not aware of the 6th respondent's alleged interference with the findings of the 2nd respondent's findings. He therefore denies paragraphs 15 and 16 of the petition.

He states that the final verified list for resettlement and payment of Embobut Forest Squatters has now been partially implemented by the Ministry of Devolution and Planning leaving a total of 152 number of squatters unpaid. That in the light of the facts which have been disclosed above, he beseechs the court to decline to issue the declaration orders sought by the petitioner.

***REPLY BY THE 6TH RESPONDENT***

John Ondego, on behalf of the Elgeyo Marakwet County, ***the 6th respondent,*** being the County Secretary states that the petitioner does not disclose any cause of action against the 6th respondent as the alleged County Commissioner is not an employee of the 6th respondent but that of the National Government. According to the 6th respondent, the duty to resettle people is in the National Government and not the County Government and that the exercise of resettling squatters in Embobut Forest was carried out by the National Land Commission and not the 6th respondent hence there is no cause of action against the 6th respondent.

**SUBMISSIONS BY PETITIONER**

The petitioners, through Mr. Openda, learned counsel submits that the court has jurisdiction to entertain the dispute herein by virtue of Section 13(2) of the Environment and Land Court Act, Article 162(2) of the Constitution. This jurisdiction is justified by the special issue of the Kenya Gazette Notice No. 5178 which provides for the overriding objective of the court and Article 159 of the Constitution read with Section 1A and 1B of the Civil Procedure Act, Cap 21 Laws of Kenya. In a nutshell, the petitioners' claim against the 1st respondent, Mr. Bowen Kangongo is that he announced that the landslide victims were not included in the list of persons to be compensated despite the fact that there was no consultation and therefore, interfered with the list prepared by the Taskforce for the restoration of the Embobut forest. However, there were some landslide victims who were compensated. Therefore, the list was doctored to benefit certain persons.

Against the 2nd respondent, the petitioners submit that the Taskforce had a constitutional duty to ensure that only its findings would be implemented by the government by finding alternative settlement of the squatters. According to the petitioners, the Taskforce watched as the petitioners' rights were violated through irregular compensation that left them out.

It is argued that the 3rd respondent did a shoddy job and conspired with the 2nd respondent to interfere with the list for selfish gains. The 4th respondent is alleged to have totally disregarded a court order and evicted the petitioners by torching their house thus rendering them homeless and consigned them to caves while others found home by the roadside and were left at the mercy of good Samaritans.

The petitioners argue that the Attorney General has miserably failed on the duty under Article 156 of the Constitution to protect and promote rule of law and defend public interest. The Attorney General failed to advise the respondents not to engage in acts of discrimination.

On the issue of compensation, the petitioners argue that they are entitled to compensation as to the amount given to the forest evictees being Kshs.400,000/=. The rationale behind compensation is that Permit holders were given permits to occupy the forest as well as entering grazing rights. However, since they were to leave the forest for purposes of conservation, then there is need to find alternative settlement for them. Similarly, the Ndorobos know no other home apart from the forest, they should be compensated for being evicted from the forest. Same applies to the landslide victims.

**SUBMISSIONS BY 1ST RESPONDENT**

The 1st respondent represented by Mr. Mburu Maina, learned counsel, submits that the petitioners have not established any cause of action against the him. No evidence has been tendered in court to demonstrate how he violated the petitioners' rights. There is no evidence that he altered any list of evictions and deleted the names of the petitioners. He submits that the orders sought are enforceable against the executive/administrative arm of the government to which the 1st respondent is not a member.

**SUBMISSIONS BY 2ND, 3RD AND 5TH RESPONDENTS**

Mr. Odongo, learned State Counsel submits that the petitioner is a non-starter and incompetent for want of compliance with Order 1, Rule 8 and 13 of the Civil Procedure Rules as there is nothing on record donating authority to one or one of the petitioners herein to appear, plead, sign or swear on behalf of the others. The Attorney General further argues that the Taskforce is not an entity known in law in Kenya at all. It is not recognized by either the constitution or any other Kenyan law and therefore, the petition against it is misconceived, untenable, null ab initio.

Moreover, that even if the Taskforce is an entity, the rights of the Taskforce are mere recognition and that the government cannot be compelled to implement the recommendations. On this point, the Attorney General submits further that the Taskforce ceased to exist upon delivering its mandate hence no suit can be entertained against it being a non-existent entity. Lastly, that the recommendation did not have the force of law hence the court cannot compel the government to implement the recommendations and that the 3rd and 5th respondents do not have any duty to implement the recommendations.The Attorney General submits that no constitutional question has been disclosed and proved as the amended petition does not disclose any pleading of constitution rights having been violated.

The Attorney General submits that the petitioners failed to prove that they are the genuine squatters residing in the upper part of the forest. The respondents demonstrated that all genuine squatters are compensated and resettled.

On compensation, the Attorney General argues that the forest in issue is a gazetted state forest and therefore, the petitioners did not acquire any legitimate interest therein and therefore, the petitioners are not entitled to compensation. Lastly, the Attorney General faults the petitioners for failing to entertain the National Land Commission under Article 67 of the Constitution.

**SUBMISSIONS BY 4TH RESPONDENT**

Professor Sifuna, learned counsel for the 4th respondent submits that the petitioners have no capacity to bring this action and that they have no cause of action. Their grievances are not justiciable as they have no legal basis. The 4th respondent argues further that the recommendations of a Taskforce are mere recommendations that are not enforceable through litigation as they have no force of law nor are they binding on any of the respondents hence the petition is not properly founded.

The 4th respondent further argues that the petitioners have been compensated and settled as a list obtained by KFS, Marakwet Zonal Manager, Mr. Nyaswabu from Kenya Commercial Bank, Kapsowar Branch and signed by the Branch Manager, Mr. Samwel C. Bett, which was annexed to the replying affidavit of Solomon Mibey listed herein reveals that some of the petitioners received Kshs.400,000 token. They include one James Rotich, John Komen, James K. Chelang'a, Richard Kipkore and Joseph Kanda.

The 4th respondent further submits that the petitioners have not submitted to the court material to enable it determine who is the genuine squatter and who is the imposter. On compensation, he submits that there is absolutely no legal right or legal basis to justify a court to order the government or an entity in charge of forests to pay compensation to persons who have invaded, encroached or occupied a protected gazette state forests such as Embobut.

**SUBMISSIONS BY 6TH RESPONDENT**

The 6th respondent submits that the County Commissioner is an employee of the National Government and not County government and therefore, all compensation against the County Government are not properly founded as the alleged contravenor was not an employee of the County Government. Moreover, that the duty to resettle people does not fall on County Government but on National Government. Therefore, the petitioner does not disclose any cause of action against the 6th respondent and should be dismissed.

**DETERMINATION**

One of the issue that arises on the onset is the issue of ***locus standi*** and whether this is a representative suit. Article 22 of the constitution of Kenya 2010 provides that every person has the right to institute court proceedings claiming a right or fundamental freedom in the Bill of Rights, has been denied, violated or infringed or threatened. Sub-Article 2 provides that in addition to a person acting in their own interest, the cause under clause (1) may be instituted by a person acting on behalf of another who consent in their own name. Moreover, the same can be instituted by a person acting as a member of, or in the interest of a group or class of persons. The same can be instituted by a person acting in public interest or an association working in the interest of one or more members.

The petitioners herein claim to be genuine occupants of Embobut forest and were irregularly not considered for compensation although they were part and parcel of the larger group that was profiled to receive compensation from the government of Kenya. I do find that the petitioners fit the threshold and that they have the locus standi to commence this petition.

> **I am of the understanding that Article 22(1) and (2) of the Constitution has expanded the ambit of locus standi in matters of enforcement of fundamental rights and freedoms. A spiritual interpretation of Articles 22 and 258, in the spirit of the constitution 2010, in my view confers upon any person the right to bring action in more than two instances firstly in the public interest, and secondly, where breach of the Constitution is threatened in relation to a right or fundamental freedom. Where one purports to enforce the rights of another, it is in my view that there must be a nexus between the parties and that in this petition, the petitioners have demonstrated that they represent forest dwellers, landslide victims and permit holders.**

**In the case of KENYA BANKERS ASSOCIATION & OTHERS VS. MINISTER FOR FINANCE [2002] 1KLR 61**, the court considered the issue of standing and declared: -

> **"As regards a general principle relating to this type of public interest litigation, we wish to state, that what gives locus standi is a minimal personal interest and such an interest gives a person standing even though it is quite clear that he would not be more affected than any other member of the population."**

On the question of litigation protecting the constitutionality protected right of citizens, the court said: -

> **"In our very considered opinion … like in human rights cases, public interest litigation, including law suits challenging the constitutionality of an Act of Parliament, the procedural trappings and restrictions, the pre-conditions of being an aggrieved person and other similar technical objections cannot bar the jurisdiction of the court, or let justice bleed at the altar of technicality. This court has vast powers under section 60 of the Constitution of Kenya, to do justice without technical restrictions and restraints, and procedures and reliefs have to be moulded according to the facts and circumstances of each case and each situation."**

And at page 75 said: -

> **"Our legal system is intended to give effective remedies and reliefs whenever the Constitution of Kenya is threatened with violation. We state a firm conviction, that as a part of reasonable, fair and just procedure to uphold the constitutional guarantees, the right of**

**access to justice entails a liberal approach to the question of locus standi. Accordingly, in constitutional questions, human rights cases, public interest litigation and class actions, the ordinary Anglo-Saxon jurisprudence, that an action can be brought only by a person to whom legal injury is caused, must be departed from."**

Section 60 of the repealed Constitution of Kenya, has effectively been replaced by Article 159(d) of the Constitution of the Second Republic, which expressly mandates the court to do justice to all without regard to either status or procedural technicalities. In addition, Articles 22 and 258 and no less Articles 3 and 48 of the Constitution, grant every person not only access to courts, but also the right to protect, defend and uphold the Constitution. I do find that the petitioners have locus standi as the constitution recognizes the right to bring an action or challenge a decision by a person on his own behalf or on behalf of another person or other persons whose right(s) has or have been allegedly violated.

On whether the issues of this court are justiciable, it has been observed that the justiciability dogma and all principles under it are part of our Constitutional law and jurisprudence. The court in **John Harun Mwau & 3 Others –v- AG & 2 others HCCP No. 65 of 2011** (unreported) stated as follows:

***"We also agree with the submissions of Prof. Ghai that this Court should not deal with hypothetical and academic issues. In our view, it is correct to state that the jurisdiction to interpret the constitution conferred under Article 165(3) (d) does not exist in a vacuum and it is not exercised independently in the absence of a real dispute. It is exercised in the context of a dispute or controversy."***

Later in **Hon. Martin Nyaga Wambora –v- Speaker of County Assembly of Embu and 5 Others HCCP No. 3 of 2014**, the court observed as follows:

***"It is clear from the above definition that whether a matter before a Court is justiciable or not depends on the facts and circumstances of each particular case but the Court must first satisfy itself that it has jurisdiction to entertain the matter before it can resolve the issue of justiciability.'***

In **Coalition for Reform and Democracy (CORD) & 2 Others -v- Republic of Kenya & Another HCCP 628 of 2014 [2015] eKLR,** the court cited the case of **Patrick Ouma Onyango & 12 Others –v- AG & 2 Others** Misc. Appl. No. 677 of 2005 wherein the court had endorsed the doctrine of justiciability as stated by Lawrence H. Tribe in his treatise American Constitutional Law, 2nd Ed. Page 92 as follows:

***'In order for a claim to be justiciable as an article III matter, it must "present a real and substantial controversy which unequivocally calls for adjudication of the rights asserted." In part, the extent to which there is a 'real and substantial controversy is determined under the doctrine of standing' by an examination of the sufficiency of the stake of the person making the claim, to ensure the litigant has suffered an actual injury which is fairly traceable to challenged action and likely to be redressed by the judicial relief requested. The substantiality of the controversy is also in part a feature of the controversy itself-an aspect of 'the appropriateness of the issues for judicial decision...and the actual hardship of denying litigants the relief sought. Examination of the contours of the controversy is regarded as necessary to ensure that courts do not overstep their constitutional authority by issuing advisory opinions. The ban on advisory opinion is further articulated and reinforced by judicial consideration of two supplementary doctrines: that of 'ripeness' which requires that the factual claims underlying the litigation be concretely presented and not based on speculative future contigencies and of 'mootness' which reflects the complementary concern of ensuring that the passage of time or succession of events has not destroyed the previously live nature of the controversy. Finally, related to the nature of the controversy is the 'political question' doctrine, barring decision of certain disputes best suited to resolution by other governmental actors'.***

Finally, much earlier in **Jesse Kamau & 25 Others –v- Attorney General Misc. Application 890 of 2004**, the court dedicated a great part of the judgment to the doctrine of justiciability and rendered itself

as follows:

***"B. THE POLITICAL QUESTION, JUSTICIABILITY, RIPENESS AND MOOTNESS***

***On Ripeness pp 80 - 81 Tribe says: "In some cases the constitutional ripeness of the issues presented depends more upon a specific contingency needed to establish a concrete controversy than upon the general development or underlying facts. For example litigants alleging that a government action has effected an unconstitutional "taking" without just compensation" are normally obliged to exhaust all avenues for obtaining compensation before the issue is deemed ripe"….Still even in situations where an allegedly injurious event is certain to occur, (a court) may delay resolution of constitutional question until a time closer to the actual occurrence of the disputed event when a better factual record might be available". Essentially, the complaints and the allegations or questions raised by the Applicants in the Originating Summons are anchored in Section 66 of the Constitution. It is this section which is being challenged and impugned. It is the Section to be declared discriminatory, unconstitutional, inconsistent with the Constitution, null and void and of no effect. It is the Section sought to be expunged… In the case of Anarita Karimi Njeru vs the Republic (No 1 [1979] KLR 154 the court's attention was drawn to a text and commentary on the Constitution of India where the author says: - "In the United States, it has been established that constitutional questions must be raised "reasonably" that is at the earliest practicable moment. As a result of this rule, a constitutional right may be forfeited in a criminal as well as civil case by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." … Mr. Orengo also referred the court to the discussion of the doctrine of the political question and justiciability in American Constitutional Law by Laurence H. Tribe. The views expressed are both appropriate for consideration and are persuasive. Professor Tyler summarizes the constitutional view of the doctrine of the political question as grounded in the assumption that there are constitutional questions which are inherently non-justiciable and that these practical questions, it is said concern matters as to which departments of government, other than the courts or perhaps, the electorate as a whole must have the final say, that with respect to these matters, the judiciary does not define constitutional limits… On the question of Ripeness (of issues for adjudication) and the courts' competence to issue declaratory orders, Hon. Orengo submitted that the issue at hand must not only be ripe for determination but must also not be either academic or hypothetical. He referred us to the excerpts from the case of Blackburn vs Attorney – General and Justice Ringera's remarks in the Njoya case that one of "the most fundamental aspects of the court's jurisdiction is that we are not an academic forum and we do not act in vain does indeed resonate in line with authorities and legal texts." The court cannot be subjected to proceedings where the questions for determination are abstract and hypothetical. Stamp LJ in Blackburn vs Attorney General (supra) states at p.138 3 h J"It is the duty of this court in proper cases to interpret those laws when made; but it is no part of this court's function or duty to make declarations in general regarding the powers of Parliament, more particularly where the circumstances in which the court is asked to intervene are partly hypothetical".***

***In Matalinga and Others vs Attorney General [1972] E.A. 578 Simpson J held: Before a declaration can be granted there must be a real and not a theoretical question in which the person raising it must have a real interest and there must be someone with present interest in supporting it." In the Matalinga case, the Plaintiffs (representatives of an unincorporated association) had sued the Attorney General for a declaration that certain government employees must be treated equally on the grounds that they were being discriminated against, and for an order that the Director of Personnel review and rectify salary structures. The court considered several authorities and discussed the question whether there was a justiciable dispute in the case. It was said that even in a case where a rule gave the court a wide discretion, it cannot still make justiciable disputes which are not justiciable. It was also contended that the jurisdiction to give a declaratory judgment must be exercised "sparingly" with great care and jealously and "with extreme caution."*** (Emphasis added)

In **Hon. Kanini Kega –v- Okoa Kenya Movement & 6 Others HCCP No. 427 of 2014** the court expressed itself as follows:

> "***Therefore, whether or not an issue is justiciable will depend on the legal principles surrounding the particular act done as discernible from the legal instruments appurtenant to the said action. As was held in the above case, when the law proceeds to impose on the executive legally prescribed duties and responsibilities, the performance of which depends upon the enhancing or handling of public interest, the political officers of the executive must act consistent and according to the laws of the land and since the performance of certain duties and responsibilities is dependent upon individual rights and responsibilities, there is a duty to act consistently with and according to the law. If public officers fail to so act, and their failure harms the interests of the public and rights of individual citizens, their actions and omissions are subject to judicial review***."

It is clear from a review of the above case law that there is now a legal path and jurisprudence within our system on the justiciability. There is a practice with clear arguments as well precedent that courts and judges are not to arbitrate on theories. The court ought not to determine issues which are not yet ready for determination or is only of academic interest having been overtaken by events. The court ought not to engage in premature adjudication of matters through either the doctrine of ripeness or of avoidance. It must not decide on what the future holds either. It is however to be noted that the court retains the discretion to determine whether on the circumstances of any matter before it still ought to be determined. This court finds that the petitioners' claim is that the Minister for Wildlife and Forestry having appreciated the need to conserve the expansive Embobut forest appointed a Taskforce for the restoration of the forest. The Taskforce was chaired by one Joseph Kisangat who was the District Commission among others. The Taskforce terms of reference were to enquire and determine the categories of squatters affected by eviction and vacating those with genuine right for alternative settlement and to collect and collate through public *barazas* and other sources the number and categories of vetted genuine squatters to be presented to the government to be considered for alternative settlement. The genuine squatters were established as permit holders, landslide victims and forest dwellers. I do find that the issue as to whether the petitioners were genuine squatters who were discriminated by the 2nd respondent is justiciable and therefore, the petitioners are properly before this court for determination of their rights especially violation of their freedom from torture, discrimination, cruel, inhuman and degrading treatment and human dignity contrary to Articles 22, 25 and 28 of the Constitution of Kenya 2010.

On the question raised as to whether there is a cause of action against the 6th respondent, this court finds that the 6th respondent is the County Government of Uasin Gishu. There is no allegation against the County Government of Uasin Gishu. The only allegation against the government of Kenya is a claim against the County Commissioner. The County Commissioner is an employee of the National Government and not County Government. Article 156 of the Constitution provides that the National Government and County Government are distinct and interdependent and therefore, I do find that is not proper in law to sue the County Government for the wrongs committed by the National government. I agree with R. M. Wafula that the 6th respondent has no control as regards the actions and/or omissions of the County Commissioner. Settlement and or resettlement of persons is not the responsibility of the National Government. The protection and/or conservation of the Embobut forest squatters falls under the provisions of the National Government. Eviction of persons living in the forest falls within the mandate of the National Government and not County Government. Ultimately, I do find that the 6th respondent was improperly sued. On whether the 2nd respondent can be sued, I do find that a Taskforce has no capacity to be sued and has no legal definition either in the constitution or any written law. It is a creature of the executive and therefore, the person to be sued is the person who creates the Taskforce. Moreover, a court cannot compel the executive to implement the recommendation of Taskforce as the implementation of the recommendations is discretionary.

On whether the petitioners have proved the allegations that their rights were violated by the respondents, I do find that the allegations against the 1st respondent were not proved. There is no iota of evidence that he violated the petitioners' rights by altering the list of evictees and deleted the names of the petitioners.

Moreover, the 1st respondent was not a member of the Taskforce and therefore, he is not properly sued as the decision impugned was made by the Taskforce for the restoration of Embobut forest. I do find that the evidence on record does not disclose a cause of action against the 1st respondent as there is no evidence that the 1st respondent violated the petitioners' rights. Obviously, the 1st respondent is not an arm of the government despite the fact that he is a member of Parliament. He has no control of the chiefs, Assistant Chiefs and the Police. The petition against him is misplaced.

Have the petitioners proved that their rights have been violated by the other respondents? This court has already found that the petitioners have not established any cause of action against the 1st and 6th respondents and that the 2nd respondent has no legal status to be sued. The claim against the 3rd, 4th and 5th respondents has not been proved as there is no evidence that the petitioners' names were on the list and that the same were removed. The petitioners ought to have shown the two lists, one where they were included, and the other where they were not included. Moreover, the petitioners have not established that they were the genuine squatters living in the forest. Furthermore, the petitioners have not demonstrated how their rights to food, dignity and shelter have been violated.

On compensation, this court finds that since the petitioners have failed to prove that their rights were violated, the issue of compensation cannot succeed. The act of the government compensating persons who have illegally entered the forest is a state philanthropy and therefore the court cannot make an order compelling the government to pay. Moreover, it has been demonstrated that some of the petitioners were paid by the government. Ultimately, the petition is dismissed with no order as to costs.

**DATED AND DELIVERED AT ELDORET THIS 13TH DAY OF JULY, 2017.**

**A. OMBWAYO**

**JUDGE**