



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

CONSTITUTIONAL PETITION NO. 1 OF 2014

(FORMERLY PETITION NO. 596 OF 2013)

JACKSON AGUI AND 1941 OTHERS.....PETITIONERS

VERSUS

THE CABINET SECRETARY,

MINISTRY OF DEVELOPMENT AND PLANNING.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

This suit was commenced by way of originating summons, instead of petition seeking protection of fundamental rights and freedoms alleging that the Government has wrongly profiled persons as being evictees of Kipkurere forest due for compensation. The petitioners assert that they are proper evictees and seek for a declaration that the petitioners fundamental rights and freedoms as enshrined under Articles 20, 21, 22, and 27 of the Constitution of Kenya have been violated and infringed upon by the 1st and 2nd respondents by not using due process of law in identifying genuine forest evictees of Kipkurere forest entitled for compensation by the government and discriminating against the petitioners by not listing them as genuine evictees of Kipkurere forest due for compensation.

The petitioners further seek for an order that the Respondents be directed to appoint an independent task force to supervise the profiling and vetting of genuine evictees of Kipkurere forest which report of the task force be filed in court for further directions.

The petition brought by way of Originating Summons is supported by the affidavit of *Jackson Agui* who states that on 11th day of August, 2013, the Ministry of Devolution and Planning sent their officer in charge of monitoring and evaluation to the chief's office of Ol-Lainguse location in Uasin Gishu County. The said officer Mr. Macharia came with a list which list he purported to be exhaustive of the evictees of Kipkurere Forest who were due for compensation. However, when Mr. Macharia read the list, none of the petitioners was in the said list. Most of the names read to them by Mr. Macharia on 11th day of August, 2013 are relatives of most of the Senior government officers leaving the poor petitioners to suffer. Immediately the said list was read to them, some of the officers from the Department of special programmers in conjunction with the area chief, Mr. Samuel Kibiwott Bittok advised those whose names were appearing in the said list to open bank accounts with National Bank of Kenya.

He claims that the said opening of the bank account was in respect of depositing Kshs.400,000/= to the account of each of the said persons in respect of the compensation process which was being undertaken by the government. On the 17th September, 2013 officers from National Bank went to the chief's office,

Ol-Lainguse location where they opened bank account for the purported evictees leaving the petitioners out. That they sought the help of the government by visiting various government agencies with a view of getting the said list and the reason why they were not part of the said list which list they had refused to hand over to them.

The petitioners feared being left out of the compensation process and again in the spirit of public interest, instructed their lawyers to file a petition ordering the Attorney General and the Cabinet Secretary, Ministry of Devolution and Planning to publish and provide the list of evictees from Kipkurere forest whom the Government is planning to compensate hence petition No. 491 of 2013 by way of originating summons was filed on 9th October, 2013 which petition inter-alia sought for list of evictees which the Government had identified to compensate. That for interest of justice, the court vide order dated 17th October 2013, restrained the Cabinet Secretary, Ministry of Devolution and Planning from releasing any monies of compensation to any of the evictees of Kipkurere forest.

Upon filing the said petition No. 491 of 2013, a group of 1192 members applied to be listed as interested parties. They attached the list of the said 1192 members and appointed Joseph Kiptarus Songok and Stephen K. Bor to sign and represent them in court. That in paragraph 10 of the affidavit of Joseph Kiptarus Songok, he deponed that the Government did not participate in the preparation of the list at all, the only thing they did was vetting after he presented them with the names and an official came all the way from the Ministry of Special Programme and physically checked out the people at the camp and verified the names.” **and in** paragraph 6 of the affidavit of Stephen Bor, he deponed that he is the one who prepared the list of the genuine people from Ogiek community who were evicted from the forest.

On the 6th day of December, 2013, the Attorney General vide letter dated 15th November, 2013 supplied their counsel with the list of the forest evictees (1192 members) whom the government was going to compensate. They went through the said list and found that it was one and the same list of 1192 members whom were interested parties in petition No. 491 of 2013 whose deponents were Stephen Bor and Joseph Kiptarus Songok who stated that they are the ones who prepared the list and then handed over to a Government official, a Mr. Macharia which list the petitioners claim was released through unfair process where most of the genuine evictees were not included. That the said process was marred with corruption and nepotism where for instance the assistant chief, Ol-Lainguse (Mr. Agui Biwott, Stephen Bor, chief Languse (Samuel Bitok) and Daniel Tarus have listed their families and relatives and that at no time did the government involve the petitioners in any process of profiling or vetting of any of the evictees.

That it is their humble prayer that the Cabinet Secretary, Ministry of Devolution and Planning do set up an independent task force which will profile, identify, vet evictees and hand over the genuine list to the Ministry so that the same can be compensated.

The respondent filed a replying affidavit sworn by Joseph Macharia, a Deputy Director, Mitigation and Resettlement Directorate of Special Programmes in the Ministry of Devolution and Planning.

That from the onset, he states that prayer 1 of the application and the originating summons has been overtaken by events. On 9.12.2013, the orders in Constitutional Petition No. 491 of 2013 that had been stopping the Ministry from paying the evictees lapsed and on 19.12.2013, the petition was marked as settled hence paving way for the Ministry to release funds to the evictees.

That on 23.1.2014, the Ministry directed the National Bank of Kenya to pay the evictees the money that was in its account and that on 27.1.2014, a court order was served directing the Ministry to stop the payments. According to Macharia by the time the court order was served, the money had already been released to the individual accounts of the evictees. The state counsel advised the National Bank to proceed with the payment after learning that the funds had already been released to individual accounts.

That they came up with the list of forest evictees to be compensated after a thorough vetting and profiling of all the persons who appeared to have an interest in Kipkurere forest. That therefore, issue of directing the Cabinet Secretary to appoint an independent Task Force to do the vetting and profiling will be an exercise in futility as that was already done with the results as indicated. That the government having

invested a lot in the team that went on the ground to do the profiling it will be a waste of public funds to as the same to be re-done. That the petitioners are out to disrupt an otherwise noble exercise that was done overboard out of their greediness for money. The petitioners filed their submissions whilst the respondents did not.

In his oral submissions, **Mr. Melly learned counsel for the petitioners** submits that the petitioners were left out in the vetting process which was characterized by nepotism, corruption and lack of awareness. The process was done secretly and that the provisional administration left the petitioners out. The petitioners pray that the respondent should be directed to form an independent Task Force and that all the evictees be compensated.

Mr. Kuria, learned State Counsel for the respondents argued that this being a representative suit, the authority to sue should have been signed by all parties. The petitioners did not sign the authority and therefore, the originating summons is incompetent. The respondent argue that the petitioners are challenging an administrative process and therefore ought to have filed a judicial review application. The petitioners do not demonstrate which right was breached and therefore, they are not entitled to orders sought.

I have considered the petition and do find the following issues ripe for deliberation.

1. ***Whether the suit is a non-starter being brought as an originating summons and not petition.***
2. ***Whether the suit is fatally defective for being brought without the authority to sue signed by all parties.***
3. ***Whether the petitioners have demonstrated that their rights have been violated.***

On the first issue, I do find that these proceedings are brought under Article 22 of the Constitution which provides that;

“22. (1) 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.

(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 or 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.***

(3) The Chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy the criteria that-

- (a) the rights of standing provided for in clause (2) are fully facilitated;***
- (b) formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation;***
- (c) no fee may be charged for commencing the proceedings;***
- (d) the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities; and***

(e) an organization or individual with particular expertise may, with the leave of the court, appear as a friend of the court.

4. The absence of rules contemplated in clause (3) does not limit the right of any person to commence court proceedings under this Article, and to have the matter heard and determined by a court.”

The import of this article is that one does not need to comply with the provisions of the Civil Procedure Act for the commencement of a matter under Article 22 of the Constitution of Kenya. Moreover that the court should not put undue regard to procedural technicalities such as the mode of a petitioner coming to court for redress. I do find that the petitioners are properly before court for redress and that they have demonstrated sufficient interest.

Article 258 of the Constitution provides that;

“258. (1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.

(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 or 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.”]**

Article 260 of the Constitution defines a person to include a company, association, or other body of persons whether incorporate or unincorporated.

In view of the foregoing provisions of the Constitution, it appears that any person may file a petition for redress of constitutional rights. such persons may be incorporated or unincorporated in the instant case the petitioners are persons who are alleged to have been evicted from the forest and therefore, they have a common case and therefore, there is no need for each member of the group to sign authority to sue. Moreover, the provisions of the Civil Procedure Act and Rules do not apply to petitions filed under the foregoing provisions of the constitution.

The second issue is whether the suit is a non-starter for being brought as an originating summons and not as a petition. The suit was filed on 20.12.2013 by way of an originating summons and not a petition as envisaged by the provision of Article 20, 21, 22, 27 of the Constitution. I do find that the procedure adopted by the petitioners is contrary to the provisions of **The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Mutunga Rules) which were gazetted through Legal Notice No. 117 of 28 June 2013 .**

Rule 4(1) provides that where any right or fundamental freedom provided for in the constitution is allegedly denied,violated or infringed or threatened, a person so affected, May make an application to the High court in accordance to the rules.

Rule 10(1) provides that an application under rule 4 shall be by way of petition as set out in Form A in the schedule with such alterations as may be necessary.

Despite the foregoing, this court finds that, in the interest of justice and in view of the provisions of **Article 22 (3) d of the Constitution of Kenya**, while observing rules of natural justice the court shall not be unreasonably restricted by procedural technicalities, and in view of **Article 159 of the Constitution**, the court should not put undue regard on procedure but should endeavour to find substantive justice and

therefore the originating summons) should be considered on merit for substantive justice..

On the 3rd issue, **WHETHER THE PETITIONERS HAVE DEMONSTRATED THAT THEIR RIGHTS HAVE BEEN VIOLATED.** I do find that the petitioners are complaining about a vetting and profiling process done by the Government of Kenya in respect of the evictees of the forest. In the celebrated case of **Annaritta Karim Ufair Vs Attorney General (1979) KLR 54**, it was held that the petitioner should specifically set out the provisions in the Bill of Rights that have been alleged violated and provide for the particulars of the alleged violation and provide the particulars of which respondents have allegedly violated the rights.

The petition herein is grounded on Articles 20, 21, 22, 27, 28, 56 (b) of the Constitution of Kenya.

I have gone through the originating summons and do find that the petitioners seem to claim that their rights to equality and freedom from discrimination have been breached. The petitioners have not brought out clearly how the state has discriminated against them as they have not demonstrated that the persons in the list supplied and compensated were not forest evictees. Conversely the have not demonstrated that they were the genuine forest evictees. The list of the person to be compensated was prepared with the supervision of the former provincial administration who were guided by the chiefs of the area. Moreover the petitioners have not demonstraed through affidavit or otherwise that they were treated in a manner that violated their human dignity. I do find that there is no precision in the claim by the petitioners and that the petitioners have not demonstrated how their rights have been violated.

The upshot of the above is that the originating summons is dismissed with no order as to costs.

DATED AND DELIVERED AT ELDORET THIS 6TH DAY OF NOVEMBER, 2015.

ANTONY OMBWAYO

JUDGE