



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L PETITION NO. 1 OF 2014

Formerly NRB Constitutional Petition NO. 596 of 2013

IN THE MATTER OF AN APPLICATION FOR ENFORCEMENT OF FUNDAMENTAL RIGHTS UNDER ARTICLE 20, 21, 22 AND 27, 28, 56 (b) OF THE CONSTITUTION OF KENYA

IN THE MATTER OF AN APPLICATION BY 1941 KIPKURERE FOREST EVICTEES SEEKING TO BE COMPENSATED TO BENEFIT FROM KSH.400,000 SET ASIDE BY THE GOVERNMENT FOR EACH EVICTEE

BETWEEN

**JACKSON AGUI AND 1941 OTHERS.....PETITIONERS/
APPLICANTS**

VERSUS

**THE CABINET SECRETARY MINISTRY OF DEVOLUTION & PLANNING.....1ST
RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL OF THE REPUBLIC OF KENYA.....2ND
RESPONDENT**

(Suit commenced by way of Originating Summons seeking protection of fundamental rights and freedoms; proper procedure being a Petition and not an Originating Summons; Suit alleging that the Government has wrongly profiled persons as being evictees of Kipkurere forest due for compensation; petitioners asserting that they are the proper evictees; Application brought by way of chamber summons seeking to stop payments of money to the Government list of evictees and for an order of fresh profiling; whether chamber summons is the proper procedure for the application; proper procedure being a Notice of Motion; the money sought to be stopped having been paid out already; prayer therefore overtaken by events; other prayer for fresh profiling being the main prayer in the petition; not prudent to be granted at an interlocutory stage; application dismissed)

RULING

1. This suit has been filed by 1,942 petitioners and as drawn seeks the following prayers :-

(i) That the honorable court be pleased to certify this application urgent and hear the same ex parte initially due to the said urgency.

(ii) That there be a declaration that the petitioners (sic) fundamental rights and freedom (sic) as enshrined under article 20, 21, 22 and 27 of the constitution of Kenya have been contravened and

infringed by both the 1st and 2nd respondents by not using due process of law in identifying genuine evictees of kipkurere forest entitled to be compensated by the government and discriminating against the petitioners by not listing them as genuine evictees of Kipkurere forest due for compensation.

(iii) That this honorable court be pleased to issue an order of interim injunction restraining the Cabinet Secretary Ministry of Devolution and Planning by herself, her agents or howsoever from releasing any money of compensation (sic) to any of the persons purported to be identified by the Government through letter dated 13th November 2013 as evictees of Kipkurere forest pending the hearing and determination of this application.

(iv) That the honorable court be pleased to direct the cabinet secretary in the Ministry of Devolution and Planning and Honourable Attorney General 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 court's (sic) further direction.

2. Briefly, it is the case of the applicants (whom I will deem as petitioners) that the Government sought to compensate persons evicted from Kipkurere forest. A list of persons said to be the evictees of the forest was drawn by the Government and each person in the list was to be compensated by the sum of Kshs. 400,000/=. The petitioners contend that the persons in the Government list are not the genuine evictees and it is them (the petitioners) who actually ought to be compensated as they are the genuine evictees.

3. The suit itself was filed on 19 December 2013, not by way of a petition, but by way of an Originating Summons, said to have been taken out pursuant to the provisions of Article 20, 21, 22 and 27 of the Constitution. That to me is not the proper procedure of instituting a constitutional petition as provided by The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. Rules 4 (1) and 10 (1) thereof provide as follows :-

4. (1) Where any right or fundamental freedom provided for in the Constitution is allegedly denied, violated or infringed or threatened, a person so affected or likely to be affected, may make an application to the High Court in accordance to these rules.

10. (1) An application under rule 4 shall be made by way of a petition as set out in Form A in the Schedule with such alterations as may be necessary.

(2) The petition shall disclose the following—

(a) the petitioner's name and address;

(b) the facts relied upon;

(c) the constitutional provision violated;

(d) the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;

(e) details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;

(f) the petition shall be signed by the petitioner or the advocate of the petitioner; and

(g) the relief sought by the petitioner.

4. It will be discerned from the above, that an application seeking redress or enforcement of fundamental rights and freedoms, needs to be brought by way of a Petition and not an Originating Summons. I will nevertheless deem this suit as having been commenced in the proper manner.

5. Contemporaneously with the filing of the Originating Summons (now deemed as the Petition), the petitioners filed an application said to be a "Chamber Summons" under Articles 20, 21, 22, and 27 of the Constitution of Kenya. It is an application seeking the following orders :-

1. *That this application be certified urgent and be heard ex parte in the first instance.*

2. *That this honorable court be pleased to issue an order of interim injunction restraining the Cabinet Secretary Ministry of Devolution and Planning by herself, her agents or howsoever from releasing any money including kshs. 400,000/= of compensation to any of the persons purported to be identified as evictees of Kipkurere forest pending the hearing and determination of this application.*

3. *The Honourable court be pleased to direct the Cabinet Secretary in the Ministry of Devolution and Planning and the Attorney General to appoint an independent Task Force to supervise the profiling and vetting of genuine evictees of Kipkurere forest for compensation which report of the task force must be filed in court for court's further direction.*

6. I have a little problem with the drafting and description of the application as being a "Chamber Summons" application, for the Rules do not provide for a Chamber Summons application, but an application by way of Notice of Motion. This is covered in Rules 23 and 24 which give the court power to issue interim or conservatory orders, and provide for the procedure thereof; these two provisions *inter alia* state as follows :-

23. (1) *Despite any provision to the contrary, a Judge before whom a petition under rule 4 is presented shall hear and determine an application for conservatory or interim orders.*

24. (1) *An application under rule 23 may be made by way of notice of motion or by informal documentation.*

7. Nonetheless, I will still consider the prayers in the application as they are drawn, and will construe the "Chamber Summons" to be a "Notice of Motion", without undue regard to the technicality of the terms "Chamber Summons" and "Notice of Motion".

8. The application is supported by the affidavit of Joseph Agui who has *inter alia* deponed that the process of profiling the list of evictees was marred by corruption and nepotism and that it is the petitioners who are the genuine evictees. It is also deponed that if the payment of the monies is not stopped, the Government stands to lose over Kshs. 1.4 billion in the process.

9. The application first came before me on 24 January 2014. At that point in time, it was stated by counsel for the petitioners, that the Government has not yet paid any person in its list of evictees. I therefore made an order to stop payments of the monies to any of the stated evictees, pending the *inter-partes* hearing of the application. I also made an order that the persons said to be in the Government list be enjoined as interested parties to these proceedings.

10. On 5 February 2014, the State filed a Replying Affidavit through Joseph Macharia, its Acting Deputy Director Mitigation and Resettlement, Directorate of Special Programmes, in the Ministry of Devolution and Planning. It is averred that the prayer seeking to stop payments has been overtaken by events as on 23 January 2014, the Ministry directed the National Bank of Kenya to pay the evictees the money that was in its account. It is averred that they were served with the court order stopping payments on 27 January 2014, after the money had been released to the individual accounts of the evictees. On the other prayer, it is averred that the government properly vetted and profiled all persons who appeared to have an interest in Kipkurere forest and it is averred that an order directing the Cabinet Secretary to appoint an independent task force, would be an exercise in futility as this had already been done properly.

11. The interested parties on their part, filed a Notice of Preliminary Objection and two replying affidavits

of Stephen Bor and Joseph Kiptarus both sworn on 3 February 2014. In the Preliminary Objection, it is *inter alia* averred that there is no petition filed to warrant any orders. It is also stated that the Chamber Summons application of 19 December 2013, which is the application before me, is incompetent as the orders sought therein are similar to the final orders, and therefore the same cannot be granted at an interlocutory stage. It is said that this will dispose of the suit without a full trial. It is also stated that the said application has been overtaken by events. In the replying affidavits, it is said that the money in issue is already in the individual accounts of the interested parties. It is also stated that the interested parties were properly profiled by the Government and that the petitioners are impostors. It is contended that Jackson Agui himself, comes from Chereber Farm, where he is settled.

12. The application was argued before me *inter-partes* on 27 February 2014. Mr. Melly for the petitioners asked for the orders to be granted, whereas Mr. Wabwire for the State and Mr. Kibii for the interested parties, argued that the orders ought not to be granted.

13. One of the key arguments of Mr. Wabwire, was that the money has already been released and therefore, the order seeking to stop payments has been overtaken by events. It was said that the money was paid to National Bank of Kenya Ltd who then disbursed the money to the individual accounts of the evictees in the Government list, who had opened their individual accounts with the same bank.

14. I thought it necessary to confirm if this is the position and I directed the Chief Executive of the National Bank of Kenya Ltd to swear an affidavit, or have an appropriate officer swear an affidavit, to shed light on the whereabouts of the monies in issue.

15. An affidavit sworn by Robert Ngugi Kibaara, the Executive Director, Retail & Business Banking, was eventually filed on 6 March 2014. In that affidavit, it was averred that on 23 January 2014, the Bank was instructed by the 1st respondent to debit its IDPs Resettlement Fund Account and credit the individual accounts of 1,190 evictees of Kipkurere Forest cleared by the Government. It was stated that on diverse dates between 27 and 29 January 2014, the Bank credited the accounts of 1,055 persons in the list, but was unable to credit the accounts of 132 persons for various reasons. These reasons were stated to be that the bank details did not match the details of the 1st respondent; failure to open accounts with the bank; and the directive by the 1st respondent that the beneficiaries do present themselves to the bank but the unpaid persons had not done so.

16. I was not satisfied with the affidavit, as it did not have the names of the individual persons, and the exact dates when the accounts were credited. I therefore directed that another affidavit be filed to provide these details. A further affidavit, again sworn by Mr. Kibaara, was filed on 25 March 2013. This affidavit gave details of the names, account numbers, dates when the accounts were opened, and when payments to the individual accounts was made. I have seen from the affidavit, that all the accounts of the interested parties, were opened on 20 September 2013. Most of the accounts were credited with the sum of Kshs. 400,000/= on 24 January 2014 and the rest were credited with an equivalent sum on 27 January 2014.

17. It appears to me that the order in the application, seeking to stop payment of the monies, into the individual accounts of the interested parties, has been overtaken by events since the money has already been credited into the individual accounts of the interested parties. It is probable that by the time the order stopping payment (which I issued on 24 January 2014), was served on the respondents on 27 January 2014, the monies had already been paid to the interested parties, save for the 132 accounts which have not been credited for the various reasons described above. It will be seen that about 90% of the money has already been disbursed and I do not see the significance of stopping the other 10%.

18. I am therefore unable to grant the order stopping payment of the monies to the interested parties, as that prayer has already been overtaken by events.

19. The other prayer seeks an order to have the Ministry of Devolution and Planning do a fresh profiling of the evictees. I note that the said prayer is similar to what the petition itself seeks. If I am to grant this prayer, then I will have allowed the petition without first having it heard and determined on its merits. To me, that prayer is not an interlocutory prayer, but a final prayer, which in the circumstances of this case

will not be prudent to give, without hearing the petition on its merits. The petitioners will have an opportunity to argue their petition and if they succeed, then the order sought, will be granted.

20. In the same vein, I am unable to delve into whether the petitioners, or Jackson Agui himself, are impostors, an issue raised by the interested parties. That again, will have to await the petition itself. The other arguments in the preliminary objection had raised issues of technicalities of procedures, which I had mentioned and cured, so nothing turns out on these issues.

21. For the above reasons, I am unable to allow the prayer for fresh profiling at this stage of the proceedings. That as I have stated, will be the issue to be argued in the petition.

22. It will be observed that I have declined to grant the two main prayers in the Chamber Summons application of 19th December 2013. The same is therefore hereby dismissed, but I make no orders as to costs.

DATED AND DELIVERED AT ELDORET THIS 23RD DAY OF APRIL 2014

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Delivered in open court in the presence of:

Mr. E.K. Melly present for the petitioners.

Mr. J.M. Ngumbi of the state Law office present for the Respondents.

Miss J.J. Kiptanui present holding brief for Mr. Kibii for interested parties.