



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: OKWENGU, MUSINGA & SICHALE, J.J.A.)

CIVIL APPLICATION NO. 150 OF 2020

BETWEEN

DAVID KIPTUM YATOR & 23 OTHERS.....APPLICANTS

AND

HON. ATTORNEY GENERAL & 14 OTHERS.....RESPONDENTS

*(Being an appeal from the judgment of the Environment and Land Court*

*at Eldoret (Kibunja, J.) delivered on 13<sup>th</sup> May, 2020 in ELC Petition No.*

*15 of 2013 (Consolidated With ELC Petition No. 3 of 2018))*

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RULING OF THE COURT

[1] On 13th May, 2020, the Environment and Land Court (ELC) delivered a judgment in which it dismissed two consolidated petitions that had been filed by the applicants against the respondents. In the petitions, the applicants had challenged the forceful and illegal eviction of members of the Sengwer indigenous community from Embobut forest in Cherangany hills, contending that it is their ancestral land. The applicants sought, *inter alia*, interpretation under Article 63(2)(d) of the Constitution, as read with the Community Land Act, 2016, that the Embobut forest is community land of the Sengwer community.

[2] The applicants, who are aggrieved by the dismissal of their petitions, acting on their own behalf and as representatives of the Sengwer Community of Embobut forest, have now moved this Court under Rule 5(2)(b) of the Court's Rules, seeking in the main, a conservatory order suspending forceful eviction of the applicants by the respondents from Embobut forest, pending the hearing and determination of their intended appeal.

[3] Under Rule 5(2)(b) of the Court's Rules, this Court has powers to issue orders of injunction pending the hearing of an appeal, provided an applicant has satisfied the Court that he has an arguable appeal, and that if the order of injunction is not granted, the appeal will be rendered nugatory. (See Stanley Kang'ethe Kinyanjui vs Tony Keter & 5 Others [2013] eKLR).

[4] The applicants have a memorandum of appeal in which they raise several issues, including the status of Embobut forest under Article 62(1)(g); whether the Sengwer community lawfully held, managed and used Embobut forest under Article 63(2)(d)(i) of the Constitution as read with Article 40 of the Constitution, and Article 14 of the African Charter on Human and People's Rights; whether there was violation of the rights of the Sengwer community; and whether there was an agreement entered into by the Sengwer community to vacate the forest and acquire alternative settlement in consideration of a payment of Kshs. 400,000. We are satisfied that these are arguable and not frivolous issues.

[5] As regards the nugatory aspect, it is not disputed that the Sengwer community are hunters and gatherers who have been living mainly in the forest. There is a dispute as to whether members of the community are currently lawfully residing in the forest as it is alleged that money was paid out in 2015 for them to move out, and that those in occupation are there illegally. These are issues that will obviously be determined at the hearing of the appeal. It suffices that for those who may be legally in the forest, the appeal will be rendered nugatory if they are evicted before the appeal is determined.

[6] We do therefore grant the applicants' motion to the extent of issuing a conservatory order that pending the hearing and determination of the appeal, the status quo in Embobut forest as of today do remain in force, which means that those who are in occupation of forest land as of

today, should not be evicted, but no new persons should be allowed to occupy forest land. Costs of the application shall be in the appeal.

**Dated and Delivered at Nairobi this 19<sup>th</sup> day of March, 2021.**

**HANNAH OKWENGU**

.....

**JUDGE OF APPEAL**

**D. K. MUSINGA**

.....

**JUDGE OF APPEAL**

**F. SICHALE**

.....

**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

**DEPUTY REGISTRAR**