



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA**

**CONSTITUTIONAL PETITION NO. 1 OF 2017**

PETER KITELO CHONGEIYWO ..... 1<sup>ST</sup> PETITIONER  
JOHNSON KIPSIRAT NGEYWO ..... 2<sup>ND</sup> PETITIONER  
SIMOTWO YEGO ..... 3<sup>RD</sup> PETITIONER  
LINET CHEPKWEMOI CHEPKIELEK ..... 4<sup>TH</sup> PETITIONER  
MOSES K. NDIEMA ..... 5<sup>TH</sup> PETITIONER  
SILUS TAKUR MASAI ..... 6<sup>TH</sup> PETITIONER  
COSMAS CHEMWOTEI MURUNGA ..... 7<sup>TH</sup> PETITIONER  
FRED NDIEMA MATEI ..... 8<sup>TH</sup> PETITIONER  
BENARD MASAI KAPCHELANGAT KAPTINGA ..... 9<sup>TH</sup> PETITIONER  
PATRICK NAIBEI ..... 10<sup>TH</sup> PETITIONER  
SIMOTWO CHELOGOI YEGO ..... 11<sup>TH</sup> PETITIONER  
(SUING AS REPRESENTATIVES OF NDOROBO/  
OGIEK COMMUNITY OF CHEPKITALE, MT. ELGON)

**VERSUS**

ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT  
THE KENYA FOREST SERVICE (KFS) ..... 2<sup>ND</sup> RESPONDENT  
THE INSPETOR GENERAL OF POLICE ..... 3<sup>RD</sup> RESPONDENT  
NATIONAL LAND COMMISSION ..... 4<sup>TH</sup> RESPONDENT

**RULING**

When this Petition came up for hearing on 25<sup>th</sup> June 2018, the Court was informed that there are two applications pending in the file. These two applications are the 2<sup>nd</sup> Respondent's Notice of Motion dated 22<sup>nd</sup> November 2017 and filed on 20<sup>th</sup> December 2017 seeking the main prayer that this Court makes a finding that this Petition raises substantial questions of law envisaged under **Article 165(3)(d)(i)** as read with **Article 165(4)** of the Constitution of Kenya and order that this Petition be placed before the Chief Justice to constitute an uneven bench of not less than three Judge of the Environment and Land Court to hear and determine it and that pending that empanelment, there be a stay of further proceedings in this Petition.

The second application is the Petitioner's Notice of Motion dated 16<sup>th</sup> February 2018 and filed on the same day seeking the main prayer that

leave be granted to amend the Petition.

When this Petition was mentioned on 11<sup>th</sup> July 2018 for directions, Counsel could not agree on which of the two applications should be canvassed first. While **Prof. Sifuna** for the 2<sup>nd</sup> Respondent was of the view that the application dated 22<sup>nd</sup> November 2017 be canvassed first, **Mr. Waikwa** for the Petitioners urged the Court to first dispense with the application dated 16<sup>th</sup> February 2018.

**Ms. Asoyong** appearing for the *Amicus Curiae* left it to the Court to decide while **Mr. Were** for the 1<sup>st</sup> and 3<sup>rd</sup> Respondents submitted that both applications be canvassed simultaneously. This ruling is therefore in response as to which of the two applications should be canvassed first.

The Petition herein seeks various remedies with regard to what the Petitioners consider to be a violation of their Constitutional rights following their forced evictions from the forest in Mt. Elgon. It is clear that like any other pleading, a Petition is amenable to amendment which is the main prayer being sought in the application dated 16<sup>th</sup> February 2018. I need not go further than that because right now, that application is not being canvassed.

Having considered the opposing stands taken by Counsel in this matter, I take the view that it is preferable that the application dated 16<sup>th</sup> February 2018, though filed later, be canvassed first. This is because it is the Petition and the remedies being sought therein that will form the basis of any subsequent orders that this Court may be called upon to determine. Indeed it is only after the proposed amendments being sought that this Court will be better equipped to decide whether or not substantial Constitutional issues have been raised to warrant placing this file before the Chief Justice to empanel a Bench of un-even number of Judges to determine this Petition. No prejudice will be caused to the Respondents and other parties if the application to amend is heard and determined first. **Prof. Sifuna** was of the view that if this Court hears and disallows the application dated 16<sup>th</sup> February 2018, time will have been wasted. Further, that the application dated 22<sup>nd</sup> February 2017 is based on the Constitution itself and should prevail over the application dated 16<sup>th</sup> February 2018. I do not share that view. I am of the opinion that Justice will best be served if the Petitioners are given time to place all their grievances before the Court for its determination as that will assist it in hearing the Petition expeditiously. Time may be spent but it will be in the interest of justice. Time spent in the pursuit of justice is not wasted time.

In the circumstances, I direct that the Petitioner's application dated 16<sup>th</sup> February 2018 be canvassed first. The parties may now agree on how that application shall be canvassed. It is so ordered.

**BOAZ N. OLAO**

**JUDGE**

**27<sup>TH</sup> SEPTEMBER 2018**

**Ruling dated, delivered and signed in open Court this 27<sup>th</sup> day of September, 2018 at Bungoma.**

Ms. Natwati for Ms. Ruto for 5<sup>th</sup> Respondent present

Mr. Waigwa for Petitioner Absent

Prof. Sifuna for 2<sup>nd</sup> Respondent Absent

Ms. Ashyoa for Amicus Curiae – absent

M/s. Were for 1<sup>st</sup> and 3<sup>rd</sup> Respondents – Absent

**COURT:** Since the other Counsel are absent, the Petitioner can take a date in the registry during which directions can be taken as to the hearing of the application dated 16<sup>th</sup> February, 2018.

**BOAZ N. OLAO**

**JUDGE**

**27<sup>TH</sup> SEPTEMBER, 2018**