



REPUBLIC OF KENYA



**Atambo & 13 others (Suing as officials of Kisii County Marginalized IDPs Self Help Group)
v Cabinet Secretary Ministry of Interior And Coordination of National Government &
another; Kenya National Human Rights and Equality Commission (Interested Party)
(Constitutional Petition E024 of 2011) [2025] KEHC 9786 (KLR) (25 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 9786 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CONSTITUTIONAL PETITION E024 OF 2011**

TA ODERA, J

JUNE 25, 2025

BETWEEN

**SILVANUS ATAMBO 1ST PETITIONER
ANTHONY OUKO ONDIMU 2ND PETITIONER
DAMARIS KEMUNTO MAKORI 3RD PETITIONER
STEPHEN NYARIKI SAMWEL 4TH PETITIONER
TABITHA GESARE MAUTIA 5TH PETITIONER
SABINA KEMUNTO MARONGA 6TH PETITIONER
SIMON BOSIRE NYANGENYO 7TH PETITIONER
CALLEN MOSOMI SUNDA 8TH PETITIONER
SAMSON MBOYA NYAKUNDI 9TH PETITIONER
JOHNSON OBOKO GISEMBA 10TH PETITIONER
GLADYS MONYANGI MAEBA 11TH PETITIONER
JOASH ORINA MAGETO 12TH PETITIONER
WILLIAM JOHN OBIERO 13TH PETITIONER
CHRISTINE MONYANGI ATOSI 14TH PETITIONER
SUING AS OFFICIALS OF KISII COUNTY MARGINALIZED IDPS SELF HELP
GROUP**

AND



**THE CABINET SECRETARY MINISTRY OF INTERIOR AND
COORDINATION OF NATIONAL GOVERNMENT 1ST RESPONDENT**

THE HON ATTORNEY GENERAL 2ND RESPONDENT

AND

**KENYA NATIONAL HUMAN RIGHTS AND EQUALITY
COMMISSION INTERESTED PARTY**

JUDGMENT

Introduction

1. The petitioners filed the amended petition dated 20.11.23 alleging that the State has violated its members' constitutional rights and guarantees enshrined in Articles 27, 28 and 43 of the Constitution of Kenya 2010. The members claim that the State has breached their rights to freedom from discrimination, privacy and human dignity. The state has also breached the international instruments on protection and assistance of internally displaced persons.
2. The petitioners describe themselves as officials of Kisii County Marginalized IDPs Self Help group, a self-help group registered under the Ministry of Gender, Children and Social Development on 7th October, 2012. The membership of the group encompasses a total of 1,213 persons who claim to be victims of the post-election violence that exploded in parts of Kenya following the disputed presidential elections of 2007. The members aver that they were displaced from their homes in different parts of the country between December 2007 and early 2008.
3. The petition is brought under Article 22(2) of the Constitution. The petition is dated 6th December 2021. The petitioners claim that whereas the State compensated and resettled other internally displaced persons, it has failed to do the same for their 1,312 members. The petitioners contend that the said conduct of the Government of Kenya as demonstrated by the respondents amounts to direct and indirect discrimination contrary to the provisions of article 27 of the Constitution.
4. They also contend that the respondents used one James Evans Misati, as the link between the Gusii IDPs and the Special Programme department yet the said James was not an IDP. They claimed further that there was a fraud of Kshs 55 million which monies were disbursed to Gusii IDP but there was fraud in relation to the same but it has not been investigated by Ethics and Anti-Corruption Commission (EACC) and Kenya National Commission on Human rights (KNCHR) and the Commission for Administration Justice.
5. They Also claim that the commission paid out Kshs 400,000 to IDPs in other regions namely Rift Valley but had not done the same for the Gusii IDPs thereby subjecting them to a discriminatory treatment. They also claimed that some members Gusii IDPs have not been paid Kshs 10,000 notwithstanding the fact that the registers containing their names had been submitted to the respondents and had some strangers were paid yet they were not IDPs.
6. They demand for the payment of Kshs 10,000/=, Kshs 25,000/= for resettlement and Kshs 400,000/= which according to them had been paid to other IDPs from Central and Rift Valley Provinces but not paid to the Kisii IDPs.
7. The petitioners submitted that under Article 43 of the Constitution, its members are entitled to economic and social rights including the highest attainable standard of health care; accessible and



adequate housing; and, to reasonable sanitation. Due to failure by the State to compensate or resettle the members, they have been deprived of those social and economic rights. The petitioners claim that the members have been forced to live in appalling conditions without basic needs or privacy. They aver that that in turn has compromised their health and reproductive rights.

8. Those matters are buttressed by the supporting affidavit of Silvanus Atambo Mokono the Chairperson of self-help group, sworn on 6.12.21.
9. The petitioners thus pray for declarations that its members' rights under Articles 27, 28 and 43 were violated by the State; and, a further declaration that the State has breached the international instruments on protection and assistance to internally displaced persons. In the end the petitioner craves an order to compel the respondents to resettle the petitioner's members forthwith; or, to provide funds towards their resettlement; and, general damages and costs.
10. In response the Respondents through the Honorable Attorney General filed a preliminary objection dated 16th July, 2022 which was based on the grounds that the Petition is *res judicata* and *sub judice* and that the Petition as framed does not meet the threshold of a pure constitutional Petition as was announced in the case of *Anarita Karimi Njeru v Republic* (1976-1980) KLR 1272 and restated in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance and 5 others* (2013) eKLR.
11. The parties agreed that the petition be determined by written submissions. The petitioner's submissions are dated 20th March 2025 while those of the respondents are dated 23rd October 2024; I have considered the petition, depositions and rival submissions.

Analysis and Determination

12. Upon considering the Petition, depositions, the rival submissions and the authorities cited by the parties, I note that the issues requiring my determination are as follows:
 - a. Whether the petition is *res judicata*
 - b. Whether the Petition meets threshold of a constitutional petition

Whether the petition is *res judicata*

13. The doctrine of *res judicata* is provided for in Section 7 of the *Civil Procedure Act*. Its object is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgement between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit. Section 7 lays down five conditions which, when co-existent, will bar a subsequent suit. The conditions are:-
 - i. the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit;
 - ii. the former suit must have been between the same parties or parties claiming under them;
 - iii. the parties must have litigated under the same title in the former suit; (iv) the court which decided the former suit must have been competent to try the subsequent suit; and
 - iv. the matter in issue must have been heard and finally decided in the former suit. (See *Lotta v Tanaki* (2003) 2 EA 556-).
14. The Respondents contend that there are several cases filed by the petitioners over the same subject matter for the same purposes. They have listed the 6 cases they claim raise similar issues and against the same parties which have been heard and determined by courts of competent Jurisdiction.



- a. Kisii Constitution Petition number 7 of 2015, between the *Patron of Internally Displaced Persons & Steering Committee v The Cabinet Secretary Ministry of Devolution and Planning of National Government.*
 - b. Nairobi Petition Number 81 of 2019 between the *Patron Gusii Regional IDPs Steering Committee and IDPs Fraternity v County Commissioner Nyamira, KCB Bank and James Evans Misati.*
 - c. Kisii Constitutional petition number 2 of 2022 between the *Patron IDPs Gusii Regional Steering Committee Kisii & Nyamira reverent Brethren Nemwel Momanyi v Egesa FM Radio Programmer Kisii & another, the Managing Director Royal Media Citizen (Third party)*
 - d. Kisii constitutional petition number 2 of 2022 formally Nairobi Constitutional Petition Number E167 of 2021 between *Gusii Regional IDPs Steering Committee and IDPs Fraternity v Cabinet Secretary Ministry of Interior co-ordination of National Government and Principal Secretary Ministry of interior and Interior co-ordination of National Government*
 - e. Kisii constitutional petition number 1 of 2022 formally Nairobi Constitutional Petition Number E141 of 2021 between *Gusii Regional IDPs Steering Committee and IDPs Fraternity v Cabinet Secretary Ministry of Interior co-ordination of National Government and Principal Secretary Ministry of interior and Interior co-ordination of National Government*
15. The Respondents contended that the main subject matter in all the Petitions is an allegation of violation of Petitioners rights and claim for compensation as internally displaced persons within Kisii Region. The respondent averred that the Petitioners in the said petitions are the same but litigating under different titles or through different entities, the respondents are the same save for addition of other respondents as result of reorganization of Government. They contend that all the above Petitions have been heard and determined by courts of competent Jurisdiction vide their Judgments dated 26th January, 2016, 3rd February, 2022 and 18th June 2024 and that the said Judgments have not been Appeal against or reviewed. They Claim that the Petitioner have freshly filed this Petition, raising the issue of violation of their rights as internally displaced persons within Gusii Region seeking to be resettled and or be compensated. They argued that the Petitioners have been litigating over the same issue for 14 years and the courts have pronounced over issue and thus there has to be finality to litigation.
 16. The Petitioners through the replying affidavit of Silvanus Atambo sworn on 24th August, 2022 and their written submissions dated the same day claim that the Petitioners in this suit are different from the Petitioner in the previous Petitions wherein the Petitioner was the Patron Gusii Regional IDPs Steering Committee and IDPs Fraternity. They argue that there is no evidence that Kisii County Marginalized IDPs Self Help Group or its officials, the Petitioners herein were litigating under the Patron Gusii Regional IDPs Steering Committee and IDPs Fraternity. They also claim that the Respondents are different in this Petition and Petitions 1 and Petitions 6 of 2022.
 17. I have taken my time to review all the Judgements of the court in the matters that the Respondents highlighted in order to determine whether in deed the Parties are indeed similar, the subject matter is the same and whether indeed the issues raised in the Petition were determined by court of competent Jurisdiction.
 18. I have gone through the Judgment of my Sister Okwany J in Kisii Constitution Petition number 7 of 2015, between the Patron of Internally Displaced Persons & Steering Committee v The Cabinet Secretary Ministry of Devolution and Planning of National Government. I have noted with surprise that allegations that the learned Judge outlined at paragraph 3 of her Judgement several allegations as



forming the background of the Petition which word for word without change of even a comma been reflected at paragraphs 10 to 16 of this Petition as well as 9 to 15 of the supporting Affidavit of Silvanus Atambo.

19. For clarity the Learned Judge outlined allegation as follows; That there was direct and indirect discrimination by the government of the internally displaced people in Gusii and that the respondent used one James Evans Misali as a link between the Gusii IDPs and the Special Programmes Department yet the said James Evans Misati was not an IDP. That there were allegations of fraud of Kshs 55 million which monies were disbursed by the government to be paid to the Gusii IDPs which allegations had not been investigated by Ethics and Anti-corruption Commission (EACC), Kenya National Commission of Human Rights Displaced Persons & Kisii Steering Committee v Cabinet Secretary, Ministry of Devolution & Planning of National Government [2(KNCHR) and the Commission on Administrative Justice (CAJ)]. That the Respondent paid Kshs 400, 000/= to IDPs in other regions, namely Rift Valley and Central Provinces, but had not done the same for the Gusii IDPs thereby subjecting them to discriminatory treatment. That the rights, fundamental freedom on general provisions of the Bill of Rights of Gusii IDPs fraternity have been denied, violated, infringed or threatened by the government. That the Gusii IDPs had not been paid Kshs 10,000/= notwithstanding the fact that the registers containing the names of the said IDPs had been submitted to the respondent. The Petitioner demanded the payment of Kshs 10,000/=, Kshs 25,000/= for resettlement and Kshs 400,000/= which according to the Petitioner had been paid to other IDPs from Central and Rift Valley Provinces but not paid to the Kisii IDPs. The Petition also sought for the protection of the sovereignty of the Gusii IDPs in order to secure the observance of democratic values and principles of the Constitution.
20. As if that is not enough the prayers sought in this Application are strikingly similar to the prayers sought in this Application. In as much the Petitioners have claimed that they represent a different entity from the Petitioner who filed Petition 7 of 2015 it is outright that they are all based similar subject which is a claim for compensation and resettlement of IDPs from Gusii region and against the same parties only in this case they have introduced the 2nd Respondent and the 2 interested Parties.
21. Further I have perused the documents especially annexure SMA-3. The same has a letter of Complaint by Gusii IDPs Fraternity Steering Committee, the Petitioner in Petitions in all the Petitions the Respondent has listed. In the said letter the name Silvanus Atambo and Mr. Anthony Ouko Ondimu who are 1st and 2nd Petitioners in this Petition are listed as Co-coordinator and Assistant Secretary of the said Petitioner. I have also seen the letter dated 23.4.24 annexed by the said Petitioner addressed to PS Devolution seeking investigation of Kshs 55 million purportedly paid to the 1st interested party. Further they have equally attached a letter dated 9th October, 2013 letter sent the PS devolution written by the very Petitioner requesting the ministry help the IDPs within the Gusii fraternity get Kshs 400,000. One wonders with how with the said evidence the Petitioners still claim that they are different from the Petitioners in Petition No 7 of 2015 and that the cause of action in both petitions are different.
22. In Petition number 7 of 2015 and this Petition both Petitioners are seeking a declaration that the state violated IDPs within Gusii Region under Article 27, 28 and 43 of IDPs. The Petitioners in the both Petitions the Petitioners prayed for compensation and/or resettlement of IDPs within Gusii Region. Lady Justice Okwany in her Judgment delivered on 26th January, 2016 noted several discrepancies in the Petition and went on find that the same to be incurably defective and devoid of merit and dismissed it with costs to the Respondents. It would appear like the Respondent wanted to cure the discrepancies the Lady Justice Okwany had noted in their Petition. In any event in paragraph 53 of the said judgment the learned Judge held that “The above findings notwithstanding, this court is still minded to establish if there is indeed, violation of rights as alleged. As I have already stated earlier in this judgment, the



Petitioner's claim that IDPs from other regions were given better treatment by the government was not founded on any hard evidence or substantiated. The Respondent's replying affidavit on the other hand provided a detailed breakdown and profiles of all IDPs regardless of their ethnicity or regions of origin. The fact that the Respondent's averments in the replying affidavit were not rebutted by the Petitioner shows that the payments were purely based on respective classifications of the IDPs which classification was rational. In any event, the Respondent stated the reasons why some claimants from Gusii land were not paid when they claims were found to be fraudulent.

23. The other petitions listed by the respondent in their submissions as stated herein above also relate to the same subject matter and are between the same parties herein or parties claiming under them, the petitions have been heard and determined by courts of competent jurisdiction. No appeal has been filed against them are rightly submitted by the Hon. Attorney General.
24. From the foregoing, the petition herein is thus *res judicata*.
25. It is trite law that jurisdiction is everything and without it the court must pen down as was held in the case of Nyarangi, J.A. in *The Owners of Motor Vessel Lilian "S" v. Caltex Oil Kenya Ltd.* [1989] KLR. This court thus lacks jurisdiction to hear and determine this petition. It is thus dismissed. Each party to bear its own costs.

T.A ODERA

JUDGE

25.6.25

DELIVERED VIRTUALLY VIA TEAMS PLATFORM ON THIS 25TH DAY OF JUNE 2025 IN THE PRESENCE OF:

Orangi for Petitioners

N/A for the Respondents

Court Assistant - Kipchirchir

