



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

PETITION NO. 4 OF 2014

(FORMERLY ELDORET PETITION NO. 12 OF 2013)

IN THE MATTER ALLEGED CONTRAVENTION OF RIGHTS OR FUNDAMENTAL FREEDOMS UNDER ARTICLES 19, 27(1) TO (7), 40, 42, 47, 48 AND 50(1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013 MADE PURSUANT TO ARTICLE 22(3) AS READ WITH ARTICLE 23 AND ARTICLE 165(3) (B) OF THE CONSTITUTION OF KENYA

SIMION KIPROTICH.....1ST PETITIONER

FRANCIS KUTOI CHANG'WONY.....2ND PETITIONER

KATABAN THOMAS KIPROTICH.....3RD PETITIONER

(ACTING AS MEMBERS OFFK OR IN THE INTEREST OF A GROUP

OF CLASS OF PERSONS NAMELY KASUKUT CLAN)

VERSUS

THE PRINCIPAL SECRETARY,

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

MINISTRY OF INTERIOR AND CO-ORDINATION OF

NATIONAL GOVERNMENT.....2ND RESPONDENT

PRINCIPAL SECRETARY, MINISTRY OF ENVIRONMENT, WATER AND

NATURAL RESOURCES.....3RD RESPONDENT

COUNTY COMMISSIONER,

ELGEYO MARAKWET COUNTY.....4TH RESPONDENT

THE DISTRICT COMMISSIONER, MARAKWET EAST...5TH RESPONDENT

JUDGMENT

PETITIONERS' CASE

1. **Simion Kiprotich, Francis Kutoi Chang'wony, Kataban Thomas Kiprotich, acting as members of or in the interest of a group of class of persons namely Kasukut clan (*hereinafter referred to the petitioners*)** filed amended petition on the 28.5.2014 stating that they are the genuine Embobut Forest evictees and internally displaced persons (IDPs) who have been omitted, ignored, aggrieved and affected by the respondents' harmonized registers of Embobut Forest evictees.

2. They further claim that the respondents' harmonized registers of Embobut Forest evictees (IDPs) are full of errors, discrepancies, inaccuracies, omissions, confusions, wrong information, misleading information and other problems in terms of names of deceased persons, entries of names of same persons, inflation of the number of persons in the registers, national identity cards, serial numbers, waiting National Identity Card numbers, clans for compensation in the registers, classification/categorization of evictees (IDPs), corrupt and malicious acts, genuine and ingenuine evictees (IDPs).

3. The harmonized registers of Embobut evictees (IDPs) came to the knowledge of the petitioners on 11.9.2013, 14.9.2013, 16.9.2013, 23.9.2013, and/or in September, 2013 when the petitioners learned of the missing or omission of the petitioners in the harmonized registers through the respondents. The petitioners have not been captured in and/or have been omitted from the harmonized registers of the Embobut Forest evictees (IDPs). The petitioners are at least 364 persons in number or in population.

4. According to the petitioners, the area location chief in a letter dated 3.10.2011 wrote on the injustice against the petitioners. The petitioners' neighbours namely Kapkut clan persons and Kamoluche clan persons which had land disputes with the petitioners on 3.10.1998 and 12.7.2001 respectively are also in the harmonized registers of Embobut Forest Evictees (IDPs) in which the petitioners who won the land disputes have been discriminated against and not been considered as genuine evictees (IDPs).

5. Since time immemorial, the petitioners have been Embobut Forest dwellers and bordering or sharing common border with the five or so clans in the respondents harmonized registers of evictees (IDPs) for compensation by the respondents.

6. The respondents' registers of Embobut Forest Evictees (IDPs) have discriminated against, omitted, ignored, left out, failed to capture and not considered the petitioners as genuine evictees (IDPs).

7. The respondents' selection, membership and work in arriving at the harmonized registers of Embobut Forest evictees (IDPs) was not representative of the people on the ground, had people with vested interests, took place in boardroom meetings, used partial and discriminatory criteria, used diversionary classifications or categorizations of people into permit holder, landslide victims and forest dwellers as opposed to the actual facts on the ground, enabled individuals to benefit more at the expense of others including the petitioners, lacked all-inclusiveness.

8. The respondents did not give and have not given the petitioners an opportunity to be heard, considered and listened to in the petitioners' case.

9. The conflict between the petitioners and the respondents arising from the Embobut Forest and the petitioners ancestral land in the Forest can be sorted out once and for all by the inclusion of, and/or not by the exclusion of, the petitioners in the respondents' registers of Embobut Forest Evictees (IDPs).

10. The nature of injury caused or likely to be caused to the petitioners is described as the use of the respondents' harmonized registers of the Embobut Forest evictees or internally displaced persons as the basis of the respondents' compensation of the genuine forest evictees/internally displaced persons in the absence or to the exclusion of the petitioners amounts to contravention of the petitioners' rights or fundamental freedoms under Article 19, 27(1) to (7), 40, 47, 48 and 50(1) of the Constitution of Kenya.

11. The Supremacy of the Constitution of Kenya in the issue of the Embobut Forest evictees or internally displaced persons shall not prevail in the case of the petitioners should the respondents exclude the petitioners who are genuine forest evictees (IDPs) in the respondents' registers of Embobut forest evictees.

12. The on-going programmes of the respondents to compensate and resettle the Embobut Forest evictees or internally displaced persons (IDPs) have caused the exclusion or are likely to exclude the petitioners as genuine forest evictees (IDPs).

13. The petitioners pray for orders that the respondents' harmonized registers of Embobut Forest or internally displaced persons the subject-matter of the respondents' letter dated 23rd June, 2012 that came into the knowledge of the petitioners through the respondents in September, 2013 be quashed forthwith as unconstitutional.

14. The petitioners be declared genuine Embobut Forest evictees or internally displaced persons with the rights to be compensated and resettled by the respondents in accordance with the Constitution of Kenya.

15. Such other orders be granted as this Honourable Court shall deem just in favour of the petitioners. The petitioners pray for Costs.

THE 1ST RESPONDENTS CASE

16. The 1st – 5th respondents' response through Samuel Joseph Otieno, the County Commissioner, Elgeyo Marakwet County under the Ministry of Interior and Co-ordination of National Government is that he is aware of the supremacy of the constitution of the Kenya, 2010 and that as a public officer, he is bound to the values and principles set out in the Constitution.

17. That he is advised by counsel and which advise he verily and conscientiously believe to be correct that the petition does not disclose any cause of action founded on the Constitution to warrant the grant of any declaration orders by the court.

18. That in answer to the descriptive part of the petition, he denies that the petitioners are members of a group of 364 persons identified as Kasukut clan in Embobut Forest of Marakwet District in Elgeyo Marakwet County or that the petitioners have any capacity to commence these proceedings or at all.

19. That he admits and it is now within his knowledge and a matter in the public domain that the Government through the Ministry of Wildlife and Forestry in the year 2009 did set a Task force known as the Task Force on Embobut Forest Restoration but deny that the petitioners are genuine squatters who were living in the Embobut Forest as members of Kasukut clan as alleged and put the petitioners to strict proof.

20. That he is aware and confirms that, a 2nd phase exercise was subsequently undertaken by the Taskforce after the submission of the Task force report to the then Ministry of Special Programmes in the year 2012 arising out of numerous complaints on squatters omitted in the initial stage as quite a number did not have any form of identification with a view to a further filtering and verification of the all occupants with identity cards.

21. That arising out of this phase, his office through the District Commissioner, Marakwet East; on 23.6.2012 submitted to the 1st respondent what is identified as the **“Harmonized Registers”**. That he further confirms from the records that the Task Force consulted widely with the area inhabitants/squatters living in the glades.

22. That he also confirms that prior to the screening and the identification exercise, the Ministry had carried out sensitization forums where the local people were involved. He further confirms from the records that at the inception of the renewed undertaking and subsequent thereto, the respective local area communities including the squatters were all involved in the consultations as well as the local area representatives/leaders who were directly involved in the expanded Task force including the Elgeyo Marakwet County Senator.

23. That in view of the full participation by all the stakeholders and the profiling, verification and filtering voluntarily agreed in all the meetings held, he is advised by the counsel and which advice he conscientiously believe to be correct that the issue of the alleged non-inclusion of the petitioners does not arise.

24. He further confirms that the squatters were identified after several consultative meetings by the Task force and thereafter, the harmonized registers of Embobut Forest Evictees beneficiaries prepared and submitted to the then Ministry of Special Programmes by the District Commissioner, Marakwet District on 25.6.2012 and therefore, it is not true that the Task force carried out a haphazard, erroneous and misguided identification of the genuine squatters which fact is borne by the willingness by the Task force to carry out further verifications and that the final verified list for resettlement and payment of Embobut Forest Squatters has now

been fully implemented by the Ministry of Devolution and Planning.

25. The respondent believes that the petitioners were never genuine squatters living in Embobut forest and therefore the order sought to quash the harmonized registers is not available following the implementation of the registers by the mode of compensating those identified in the registers as genuine Embobut squatters. Alternatively, there is nothing to stay as the harmonized registers have been implemented.

INTERESTED PARTY'S CASE

26. The interested party, Kenya Forest Service filed a replying affidavit sworn by Solomon Mibey stating that the orders the petitioners are seeking in their petition are misconceived, ambiguous, vague and incapable of compliance hence the petition is for dismissal. As a Forester, he knows for a fact that the petitioners have in their pleadings, for instance, failed to state their geographical grid reference in the expansive Embobut forest hence it is impossible to establish that they have ever resided in the said forest. The petitioners have not proved that they resided in the Embobut Forest and neither have they given any details of the alleged occupation.

27. He has further been informed by their advocate and which information he verily believes to be true, that the orders sought by the petitioners in this petition are in essence prerogative orders and the petition is essentially a judicial review application and which should have been brought in accordance with the Law Reform Act and the Civil Procedure Rules; and that while this honourable court has jurisdiction to issue prerogative orders in an appropriate proceedings, this jurisdiction is fettered and it cannot in the present proceedings issue such orders.

28. The petitioners have in their petition not established that they were entitled to compensation and neither have they stated what it is they were to be compensated for. That residing in a gazette forest is illegal and prohibited by statute hence cannot give rise to any legitimate expectation on the part of such occupants and whereas, the government on humanitarian grounds made some ex gratia payments to identified squatters to help them start life elsewhere; those payments were on purely humanitarian grounds and purely ex gratia and could neither give rise to a legitimate expectation nor a right of entitlement therefore and cannot form the basis of a claim of right through the courts as attempted by the petitioners.

29. Their advocate has informed him and which information he verily believes to be true, that this honourable court lacks the legal basis and jurisdiction to order for the compensation or resettlement of the petitioners. That while the petitioners feel aggrieved, their purported grievance is not justiciable and neither can it warrant the intervention of a court of law.

30. Their advocate has also informed him and which information he verily believes to be true that the petition is so poorly and slovenly drawn that it discloses no justiciable claim and is merely an abuse of the process of court.

PETITIONERS' RESPONSE

31. The petitioners filed a supplementary affidavit sworn by Simon Kiprotich Kilimo denying the alleges by Mr. Otieno and Mr. Mibey in their replying affidavits. Further, the petitioners state that they are residents of Embobut Forest Kaptirbai Glade geographical grid where the areas identified include Kokwotilebei, Kokwo Matia and Kokwo Kibon as per the naming and names of Kasukut clan/families the petitioners in this matter.

32. They are asking for compensation like any other genuine squatters of Embobut Forest through the Task Force Committee whose humanitarian assistance and ex-gratia payments to start life elsewhere excluded or discriminated against the petitioners as the Embobut Forest evictees.

33. They were not in the Embobut Forest illegally for they were there as a community since time immemorial and aver that the government gazette Embobut Forest in 2010 when the Kasukut clan the petitioners had resided and known the Forest as their only home and land since time immemorial.

34. They further state that there were no payments on either humanitarian grounds or ex gratia basis made to the petitioners who were not among the forest evicted compensated and/or who were excluded and add that the interested party and its counsel's pieces of information are premature, discriminative, biased, lacked proper research and consultation and/or are based on rumors and

hearsay.

35. They attended the consultative and filtering meetings with the petitioners' area chiefs, assistant chiefs, sub-county commissioners and the Task force committees whose administrative action excluded or discriminated against the Kasukut clan, the petitioners,

PETITIONERS' SUBMISSION

36. The petitioners submit that human rights and fundamental freedoms of the petitioners have not been recognized and protected as purposed by the Constitution of Kenya, 2010 preserving the dignity of individuals and communities and in promoting social justice and realization of the potential of all human beings (Article 19(1) (2) (3).

37. The petitioners both men and women have the right to equal protection and equal benefit of the law and the right to equal treatment including the right to equal opportunities in political, economic, cultural and social spheres without any discrimination either directly or indirectly (Article 27 (1) to (7).

38. The petitioners have the right either individually or in association with others to acquire and own part of Kenya where either the State or any person is not permitted to arbitrarily deprive the petitioners of property of any description or otherwise and on the basis of any grounds of discrimination (Article 40). Compensation to the petitioners was not considered after the respondents deprived the petitioners are entitled to compensation as petitioners and occupants in good faith of the petitioners' ancestral land which was not unlawfully acquired by the petitioners (Article 40).

39. The petitioners have a right to clean and healthy environment and have obligations to fulfill in protecting or relation to the environment namely the Embobut Forest (Article 42).

40. The petitioners' right to expeditious, efficient, lawful, reasonable and procedurally fair administrative action was adversely affected or denied by the respondents and the interested party who did not give reasons for such administrative action that excluded the petitioners upto September, 2013 and October, 2013 (Article 47 (1) to (3).

41. The respondents and the interest party denied the petitioners access to justice in the administrative action of the respondents and the interested party (Article 48). The petitioners' right to have the petitioners' dispute with the respondents and the interested party resolved by the application of the law was exercised in September, 2013 and October, 2013 when the actions of the respondents and the interested party came to the knowledge of the petitioners (Article 50 (1).

42. The petitioners are entitled to the reliefs, orders of declaration and for compensation or as sought in the petition and Notice of Motion before this court which has the jurisdiction to grant the petitioners the relief or orders sought as prayed (Article 23(1) to (3).

43. The petitioners' rights or fundamental freedoms cannot be limited by the respondents and the interested party in an open and democratic Kenya Society based on human dignity, equality and freedom (Article 24(1) to (5).

44. The petitioners submit that this court has the jurisdiction to hear and determine the petitioners' petition and Notice of Motion on the question of or the dispute relating to the environment and the use and occupation of and title to land.

RESPONDENTS' SUBMISSIONS

45. The respondents filed submissions whose *gravamen* is that the petition does not meet the threshold of a representative suit. The respondents argue that a representative suit should be filed pursuant to Order 1, Rule 8 and 13 of the Civil Procedure Rules. The respondents further argue that Minutes of a meeting cannot be construed as an authority known in law. The respondents contend that the petitioners ought to have sworn their own independent affidavits. If they permitted on of them to plead and swear on their behalf, it was mandatory that they execute and file authority alongside the pleadings.

46. The respondents further argue that the petitioners have not disclosed and proved a constitutional question. They have not demonstrated how the alleged provision of the constitution have been violated. The respondents argue that the profiling of genuine

forest dwellers was open participatory and consultative and that the petitioners failed to prove that they were discriminated under Article 27 of the Constitution. That they failed to prove why they did not attend the Task force sessions and in particular, the one of October, 2013, where a final list was generated.

47. On the issue of the letter dated 23.6.2012 and whether the same can be quashed, the respondent argues that the said letter was not a decision hence an order of certiorari cannot issue. Moreover, that the remedy of judicial review is decremental and can be rejected even where grounds exist. The prayer for certiorari according to the respondents should be rejected on grounds:

i. Firstly, the order is directed against a letter dated 23.6.2012 which is not a decision per se, capable of being reviewed through an order of court.

ii. Secondly, even if the order was directed against the harmonized registers enclosed in the said letter, the said registers did not form a final document for implementation. On the contrary, it was replaced by subsequent reports and registers which have not been impugned.

iii. Thirdly, if the order seeks challenge a decision of the Task Force on Embobut Forest, the said Task Force is not a party to these proceedings. The respondents cannot be penalized for the acts or omissions, if any, of the Task Force.

iv. Fourth, in view of the manner in which the Task Force conducted its affairs which was not only open but also inclusive, participatory and transparent the petitioners may have acquiesced into the alleged irregularity.

v. The final report on Embobut Forest Evictees was compiled and implemented accordingly where over Kshs.1.5 billion was paid by exchequer to all the affected families to meet their basic household needs.

vi. If the petitioners' intention was to quash the report that led to the payment of over Kshs.1.5 billion, what becomes of the money paid out on the basis of the report'' Will such an order be in the public interest'' Is it an efficacious remedy in the circumstances of this case''

viii. On compensation, the respondents argue that the petitioners did not prove that they were dwellers in the forest and therefore, they cannot be declared genuine squatters of Embobut Forest and therefore, are not entitled to compensation. The Attorney General on behalf of the respondents further submits that Article 28 of the Constitution protects every person's interest, dignity it does not however compel the government to allocate land to any squatter or persons. Similarly, Article 43 of the Constitution on social justice, equality, equity and prevention of inhuman, cruel and degrading fraudulent are not meant to be used to demand land allocation from the government.

SUBMISSIONS BY THE INTERESTED PARTY

49. The interested party on his part, argues that the petitioners' claim is not justiciable as the issues raised are mere moral lamentation that are not accepted in law. The petitioners should have pursued their grievances administratively or politically through political leadership.

50. The interested party argues that Embobut forest is a gazette and protected state forest vide proclamation No. 26 of 1984 and having been thereafter declared a central forest vide land notice No. 174 of 20.3.1964 residing in the said forest is illegal and cannot give rise to any legitimate expectation.

51. The Interested Party further argues that the petitioners have failed to prove their claim as they have failed to prove that they occupy the forest. Moreover, that they have failed to prove that they belong to the Kasugut clan. They have failed to prove the existence of the clan.

52. According to the Interested party, the evidence adduced is inadmissible and that the orders sought cannot be granted. Moreover, the Interested party argues that there is no legal basis for compensation and resettlement. Lastly, the interested party argues that there is no jurisprudence for the quashing of the remedies.

ANALYSIS AND DETERMINATION

53. I have considered the petition, responses, rival submissions and do find the issues raised by the petitioners are *non-justiciable*. Justiciability refers to the types of matters that the courts can adjudicate. To be justiciable, the court must not be offering advisory opinion, the petitioners must have standing and the issues must be ripe for determination. The question this court ought to answer is whether the dispute is based on a political question or a legal question and to do so, I need to revisit the prayers sought by the petitioners thus;

i. The petitioners pray for orders that the respondents' harmonized registers of Embobut Forest or internally displaced persons the subject-matter of the respondents' letter dated 23rd June, 2012 that came into the knowledge of the petitioners through the respondents in September, 2013 be quashed forthwith as unconstitutional.

ii. The petitioners be declared genuine Embobut Forest evictees or internally displaced persons with the rights to be compensated and resettled by the respondents in accordance with the Constitution of Kenya.

iii. Such other orders be granted as this Honourable Court shall deem just in favour of the petitioners. The petitioners pray for Costs.

liv. I do find that the harmonization of the register of the Embobut forest evictees or the internally displaced persons was a political question and not a legal question as dwelling in the forest is illegal and any decision to either compensate or resettle the forest dwellers is a politically motivated decision and therefore, attempting to find the legality of the said register is wading into matters that are not justiciable. Moreover, the question of the genuine Embobut forest evictees or internally displaced persons is a political question as opposed to a legal question as dwelling in the forest is an illegality and therefore the genuineness of an illegal forest dweller is non-justiciable.

lv. The petitioners have brought this suit acting as members of or in the interest of a group or clan of persons namely Kasugut clan. The petition is brought under the provisions of the constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 made pursuant to Article 22(3) as ready with Article 23 and Article 165(3) of the Constitution of Kenya, 2010. The Civil Procedure Rules do not apply to proceedings under the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Protection Rules, 2013.

lvi. Article 22(1) of the Constitution of Kenya gives every person 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 threatened. Article 22(2) provides that in addition to a person acting in their own interest, court proceedings under clause 1 may be instituted by a person acting on behalf of another person who cannot act in their own name, a person acting as a member of, or in the interest of a group or class of persons, a person acting in the public interest or an association acting in the interest of one or more of its members.

lvii. Article 260 that provides for interpretation defines a person to include a company, association or other body of persons whether incorporated or unincorporated.

lviii. Considering all these provisions of the Constitution and in the spirit of the Constitution of Kenya, 2010, to present its purposes, values and principles and the advance of the rule of law and human rights and the fundamental freedoms in the Bill of Rights, for development of law and good governance, I do find that there was no requirement that the members of Kasugut clan signs a form of representative. The petitioners were in court properly pursuant to the provisions of Article 22(b) and (c) of the Constitution of Kenya, 2010.

lix. The petitioners rely on Article 19(1), (2) and (3) of the Constitution of Kenya, 2010 which is part of the general provisions relating to the Bill of Rights. Moreover, the petitioners claim that Article 27(1) to (7), 40, 47 and 48 and 50(1) of the Constitution have been violated. Article 27 provides for equality and freedom from discrimination. The Article presupposes that there is equality of every person before law and equal protection and equal benefit of law, which includes the full and equal enjoyment of all rights and fundamental freedoms.

lx. I have already held that the issue of the genuineness of the register of all evictees is not justiciable as the harmonized register was for the purpose of compensating those who were in illegal occupation of the forest and that the petitioners have not demonstrated

that they were part of those who illegally occupied the forest and therefore, the issue of equality before the law does not arise. The benefit sought by the petitioners is not a legal benefit because they were occupying the forest illegally and that no person should benefit from an illegality.

Ixi. Article 40 which provides for the protection of right to property does not arise as the petitioners were not claiming to be land owners but claiming to be genuine evictees of the Embobut forest. It appears that the petitioners are claiming that the persons compensated were imposters while genuine evictees were not compensated. The petitioners have not demonstrated that their property rights as envisaged by Article 40 of the Constitution were violated.

Ixii. On fair administrative action and the right to be heard, it is the court finding that since the act of profiling the evictees of the Embobut forest was not a dispute that was being resolved by the application of law but by a political solution, the same cannot be said to be a constitution issue. Ultimately, I do find that the petitioner has not established that any of the constitutional provisions cited have been violated.

Ixiii. The Judicial Review order of certiorari can be issued where a body of persons or a creature of statute acts beyond its jurisdiction as provided by statute, or falls into procedural improprieties or acts in an irrational manner. The body acts without jurisdiction when it has no mandate to act in the manner it has acted. The said body acts beyond its jurisdiction when it acts beyond or outside its mandate. This issue has not been clearly brought out by the petitioners. On procedural impropriety, the court finds that the petitioners have not demonstrated that the respondent failed to give them an opportunity to be heard and that the rules of natural justice were not complied with. The respondent has informed the court that there was public participation in the process of preparing the register that is under contest. I do not find any ground for quashing the register.

Ixiv. On compensation, this court finds that the petitioners if at all were occupying the forest, were there illegality in contravention of the Forest Act. This court cannot order for compensation in view of an illegality.

Ixv. Ultimately, the petition is found without substance as the petitioners have raised non-justiciable issues and have not even demonstrated that they were in the occupation of the forest albeit illegally and therefore no evidence of violation of rights. The same is dismissed with no order as to costs as the petitioners were prosecuting the petition in public interest.

Dated and delivered at Eldoret this 9th day of February, 2018.

A. OMBWAYO

JUDGE



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