

TANZANIA / JUDGMENT

african commission on human and peoples rights v republic of kenya kilel and others v kenya application no 0062012 2019 afchpr 43 28 november 2019

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AFRICAN UNION UNION AFRICAINE UNIÃO AFRICANA AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES APPLICATION FOR INTERVENTION BY KIPSANG KILEL AND OTHERS APPLICATION NO. 001/2019 IN THE MATTER OF AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS V REPUBLIC OF KENYA APPLICATION No. 006/2012 (REPARATIONS) ORDER 28 NOVEMBER 2019 TABLE OF CONTENTS I. BACKGROUND.....2 II. SUBJECT MATTER OF THE APPLICATION.....2 A. Facts of the matter.....2 B. The Applicants' prayers.....4 III. JURISDICTION.....4 IV. COSTS.....7 V. OPERATIVE PART.....8 i The Court composed of: Sylvain ORÉ, President, Rafaâ BEN ACHOUR, Ângelo V. MATUSSE, M-Thérèse MUKAMULISA, Suzanne MENGUE, Tujilane R. CHIZUMILA, Chafika BENSAOULA, Stella I. ANUKAM, Blaise TCHIKAYA, Imani D. ABOUD: Judges and Robert ENO, Registrar. In accordance with Article 22 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol") and Rule 8 (2) of the Rules of Court (hereinafter referred to as "the Rules"), Justice Ben KIOKO, Vice President of the Court and a national of Kenya, did not hear the Application. Application by Kipsang KILEL and others Represented by: Advocate Bore Peter KIPROTICH, Bore, Malanga & Company, Advocates For intervention in the matter of: AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS versus REPUBLIC OF KENYA after deliberation, renders the following Order: 1 I. BACKGROUND

1. On 26 May 2017, the Court delivered its judgment on the merits in an Application filed by the African Commission on Human and Peoples' Rights (hereinafter referred to as "the Commission") against the Republic of Kenya (hereinafter referred to as "the Respondent State").

2. In its judgment, the Court found that the Respondent State had violated Articles 1, 2, 8, 14, 17(2) and (3), 21 and 22 of the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter") in its relations with the Ogiek Community of the Greater Mau Forest. The Court reserved its determination of the claims for reparation and this aspect of the proceedings is still pending.
3. On 10 October 2019, the Court received an "application to intervene at the reparations stage" filed by Kipsang Kilel and others (hereinafter referred to as "the Applicants"), being members of the Ogiek community residing in the Tinet Settlement Scheme which is in South West Mau Forest. II. SUBJECT MATTER OF THE APPLICATION A. Facts of the matter
4. The Applicants allege that they are genuine members of the Ogiek Community who reside in the Tinet Settlement Scheme which is within the South West Mau Forest. It is the Applicants' further allegation that the Ogiek Community has lived in the Tinet area in the South-West Mau Forest since time immemorial.
5. The Applicants aver that the Tinet Settlement Scheme was established by the Respondent State for purposes of settling members of the Ogiek Community and 2 that in 2005 the Ogiek of Tinet Settlement Scheme were given title deeds to their parcels of land by the Respondent State.
6. The Applicants further aver that the commencement of Application No. 006/2012 before the Court has prejudiced them since one of the interim reliefs granted by the Court was to order the Respondent State to freeze any further transactions involving land in the Mau Forest. According to the Applicants, due to the interim relief ordered by the Court on 15 March 2013, they have been constrained since they cannot charge their land to lending institutions "in order to obtain finances to support their economic activities as well as their livelihood."
7. The Applicants also allege that the order for provisional measures issued by the Court and also the Judgment on the merits of 26 May 2017, were obtained fraudulently for the following reasons: "a) By concealment from the court of the material fact that members of the Ogiek of Tinet had in fact been settled by the government on the aforesaid settlement and that the government that already issued them with individual title deed in respect of their parcels of land.
b) By not disclosing to this honourable court that some members of the Ogiek community who were settled by the government in Tinet Settlement scheme opted to sell their parcels of land and moved the adjacent areas of Bararget, Mariosioni, Teret, Nessuit and Likia settlements.
c) That the present suit was filed by the aforesaid non-governmental organisations without the authority and blessings of the Ogiek of Tinet." [sic]

8. The Applicants also allege that they are “contented with their parcels of land whose Title Deeds were lawfully issued to them the government of Kenya in year 2005 and have absolutely no desire to convert the same to community land,” [sic] 3 B. The Applicants’ prayers
9. The Applicants pray the Court to order: “1. THAT this matter be certified as urgent and service be dispensed with in the first instance.
2. THAT this Honourable court be pleased to invoke its inherent jurisdiction and grant leave to the intended intervenors/applicants to intervene in the present suit being Application No. 006 of 2012.
3. THAT this Honourable court be pleased to make any other order and or give any directions as it may deem just and fair in the interest of justice.” III. JURISDICTION
10. Pursuant to Article 3(1) of the Protocol, the jurisdiction of the Court extends to “all cases and disputes submitted to it concerning the interpretation and application of the Charter [the] Protocol and any other relevant human rights instrument ratified by the States concerned.” Further, in terms of Rule 39 of the Rules , “[t]he Court shall conduct preliminary examination of its jurisdiction ...” .
11. The Court recalls that even where none of the Parties has raised any objection(s) to its jurisdiction, it is duty bound to examine whether or not it has jurisdiction in the particular matter.¹ In this regard, the Court recalls that jurisdiction has four dimensions and these are: personal (*ratione personae*), material (*ratione materiae*), temporal (*ratione temporis*) and territorial (*ratione loci*). 1 *Lohe Issa Konate v Burkina Faso* (merits) (2014) 1 AfCLR 314 § 30. 4
12. The Court notes that in respect of applications brought by individuals, its personal jurisdiction is governed by Articles 5(3) and 34(6) of the Protocol. Article 5(3) of the Protocol provides that: “The Court may entitle relevant Non-Governmental Organisations with observer status before the Commission, and individuals to institute cases directly before it, in accordance with article 34(6) of this Protocol.”
13. Article 34(6) of the Protocol is in the following terms: “At the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under article 5(3) of this Protocol. The Court shall not receive any petition under article 5(3) involving a State party which has not made such a declaration.”
14. The Court notes that a combined reading of Articles 5(3) and 34(6) of the Protocol requires it to assess personal jurisdiction from at least two perspectives and these are: firstly, from the angle of the respondent, that is, against what entities does the Protocol permit applications to be lodged; and, secondly, from the perspective of the applicant, that is to say, who is permitted to be an applicant before the Court.

15. In terms of personal jurisdiction from the perspective of the respondent, the Court notes that, generally, applications can only be filed against States that are parties to the Protocol. In the present case, the Court notes that the Respondent State is a party to the Protocol and that as a result of this the first perspective of its personal jurisdiction is established.
16. In terms of the second perspective to the Court's personal jurisdiction, the Court notes that the Application has been filed by individuals in a matter that involves a State that has not deposited the Declaration under Article 34(6) of the Protocol. While this would ordinarily have deprived the Court of its jurisdiction, the Court 5 finds that the present Application is not the genesis of the proceedings before it. The original action before the Court was commenced by the Commission, which is permitted under Article 5(1)(a) of the Protocol, to bring cases against States that have ratified the Protocol even where such States have not deposited the Declaration under Article 34(6) of the Protocol. The Court, therefore, confirms that the Respondent State is properly before this Court.
17. The above notwithstanding, the Court notes that the present Application is one for intervention. In this regard, the Court considers that it is important to look beyond Article 5(1) of the Protocol in order to determine whether the Applicants are properly before this Court. The Court notes that there are several provisions in the Protocol that deal with the question of intervention. Firstly, Article 5(2) of the Protocol provides as follows: "When a State Party has an interest in a case, it may submit a request to the Court to be permitted to join."
18. The Court also notes that Article 5(2) of the Protocol is reiterated in Rule 33(2) of the Rules which provides as follows: "In accordance with article 5(2) of the Protocol, a State Party which has an interest in a case may submit a request to the Court to be permitted to join in accordance with the procedure established in Rule 53 of these Rules."
19. The Court further notes that Rule 53 of the Rules provides as follows: "
 1. An application for leave to intervene, in accordance with article 5(2) of the Protocol shall be filed as soon as possible, and in any case, before the closure of written proceedings.
 2. The application shall state the names of the Applicant's representatives. It shall specify the case to which it relates, and shall set out:
 - a) The legal interest which, in the view of the State applying to intervene, has been affected;
 - b) The precise object of the intervention; and
 - c) The basis of the jurisdiction which, in the view of the State applying to intervene exists between it and the parties to the case. 6
 3. The application shall be accompanied by a list of the supporting documents attached thereto and shall be duly reasoned

4. Certified copies of the application for leave to intervene shall be communicated forthwith to the parties to the case, who shall be entitled to submit their written observations within a time-limit to be fixed by the Court, or by the President if the Court is not in session. The Registrar shall also transmit copies of the application to any other concerned entity mentioned in Rule 35 of these Rules.
5. If the Court rules that the application is admissible it shall fix a time within which the intervening State shall submit its written observations. Such observations shall be forwarded by the Registrar to the parties to the case, who shall be entitled to file written observations in reply within the timeframes fixed by the Court.
6. The intervening State shall be entitled, in the course of oral proceedings, if any, to present its submissions in respect of the subject of the intervention. ”
20. The Court notes that the provisions cited above are the only provisions dealing with intervention both in the Protocol and the Rules. The Court further notes that the totality of the provisions on intervention, both in the Rules and the Protocol, do not permit an individual(s) to intervene in on-going proceedings before it. 2 The Applicants, being individuals seeking to intervene in ongoing proceedings, are, therefore, not permitted by the Rules to intervene. For the preceding reason, the Court holds that it lacks personal jurisdiction to deal with the Application.
21. Since the Court has found that it lacks personal jurisdiction to entertain the Application, it does not consider it necessary to examine the other dimensions of jurisdiction and accordingly dismisses the Applicants’ Application for intervention. IV. COSTS 2 Application No. 006/2012, Order (Intervention) of 4/7/2019 In the Applications for intervention by Wilson Bargetuny Koimet and 119 others and Peter Kibiegion Rono and 1300 others, In the matter of the African Commission on Human and Peoples’ Rights v Kenya. 7
22. The Court recalls that in terms of Rule 30 of the Rules, “ unless otherwise decided by the Court, each party shall bear its own costs.” In the present case, the Court, decides that each party shall bear its own costs. V. OPERATIVE PART
23. For these reasons THE COURT By a majority of Nine (9) for, and One (1) against (Judge Bensaoula dissenting):
 - (i) Declares that it has no jurisdiction to consider the Application for intervention and accordingly dismisses it; On costs (ii) Orders that each party shall bear its own costs Signed: Sylvain ORÉ, President and Robert ENO, Registrar. In accordance with Article 28(7) of the Protocol and Rule 60(5) of the Rules, the dissenting opinion of Justice Bensaoula is attached to this Order. Done at Zanzibar, this 28 th Day of the month of November in the year Two Thousand and Nineteen, in English and French, the English text being authoritative. 8

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CASE PAGE <https://chat.esheria.ai/case-law/tanzania/kipsang-kilel-and-others-v-republic-of-kenya-intervention-tanzlii-2019>

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