

African Commission on Human and Peoples' Rights v Kenya (review) (2019) 3 AfCLR 419

Application for review by Wilson Barngetuny Koimet and 119 others of the order of 4 July 2019 in the matter of *African Commission on Human and Peoples' Rights v Republic of Kenya*, Application 006/2012 (reparations)

Order, 11 November 2019. Done in English and French, the English text being authoritative.

Judges: BEN ACHOUR, MATUSSE, MUKAMULISA, MENGUE, CHIZUMILA, BENSOUOLA, ANUKAM, ABOUD

Recused under Article 22: KIOKO

The Court had in a merits judgment held that Kenya had violated the Charter in relation to the Ogiek Community. The Applicants' application to intervene in relation to the reparations hearings was declared inadmissible by the Court. In this Application, the Court dismissed the request for review of the inadmissibility order as the Applicants had not presented any new evidence.

Review (new evidence, 15)

I. Brief background

1. On 26 May 2017, the Court delivered its judgment on 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"). 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.
2. The Court reserved its determination on reparations while permitting the parties to file submissions on reparations. The parties have filed their submissions on reparations and pleadings were closed on 20 September 2018.
3. On 16 April 2019, the Court received two Applications for intervention: the first Application was filed by Wilson Barngetuny Koimet and 119 others, being residents of Amalo, Ambusket and Cheptuech in the Respondent State and the second Application was filed by Peter Kibiegono Rono and 1300 others, being residents of Sigotik, Nessuit, Ngongonger, Kapsita and Marioshoni also

being locations within the Respondent State.

4. On 4 July 2019 the Court delivered an Order in which it dismissed the two applications for being inadmissible.

II. Subject matter of the Application

A. Facts of the matter

5. On 29 August 2019, Wilson Barngetuny Koimet and 119 others, (hereinafter referred to as “the Applicants”) filed an Application for Review of the Court’s Order of 4 July 2019.
6. The Applicants raise two grounds in support of their Application: firstly, that “this honourable court erred in law and in fact by dismissing the intended intervenors application on the basis of delay in filing the application for intervention.” Secondly, that “this honourable court erred in law and in fact by allowing itself to be handicapped by procedural technicalities by holding that neither the Protocol nor the Rules provide a mechanism permitting a third party, which is not a state party, to intervene in on-going proceedings.”

B. The Applicants’ prayers

7. The Applicants pray the Court for orders:
 1. THAT this honourable court be pleased to review and/or set aside its ruling dated 4th July 2019.
 2. THAT this honourable court be pleased to grant leave to the applicants herein to intervene in the present suit as interested parties.
 3. THAT this honourable court be pleased to grant any other order it may deem just in the administration of justice.”

III. On the request for review of the Court’s order

8. The Court notes the power to review its own decisions stems from Article 28 of the Protocol which power is further explained in Rule 67 of the Rules.
9. The Court recalls that Article 28(3) of the Protocol provides as follows:

“Without prejudice to sub-article 2 above, the Court may review its decision in the light of new evidence under conditions to be set out in the Rules of Procedure.”
10. The Court further recalls that Rule 67, in so far as is material,

provides as follows:

- "1. Pursuant to article 28(3) of the Protocol, a party may apply to the Court to review its judgment in the event of the discovery of evidence, which was not within the knowledge of the party at the time the judgment was delivered. Such application shall be filed within six (6) months after that party acquired knowledge of the evidence so discovered.

2. The application shall specify the judgment in respect of which revision is requested, contain the information necessary to show that the conditions laid down in sub-rule 1 of this Rule have been met, and shall be accompanied by a copy of all relevant supporting documents. The application as well as the supporting documents shall be filed in the Registry."
11. A combined reading of Article 28(3) of the Protocol and Rule 67 of the Rules confirms that in an application for review, the Applicant must demonstrate "the discovery of evidence, which was not within the knowledge of the party at the time the judgment was delivered."¹ It is also clear, from Article 28(3), that an application for review cannot be used to undermine the principle of finality of judgment which is enshrined in Article 28(2) of the Protocol.²
12. As previously confirmed by the Court, the onus is on the applicant to demonstrate, in his application, the discovery of new evidence of which he had no knowledge of at the time of the Court's judgment and the exact time when he came to know of this evidence.³ The application for review itself, must be filed within six (6) months of the time when the Applicant obtained such evidence.
13. The Court observes that the Application for Review is supported by an affidavit sworn by Wilson Barngetuny Koimet, ostensibly on behalf of all the Applicants. The affidavit, and the Applicants' arguments, the Court further observes, revolve around two grounds. These two grounds, the Court recalls, relate to the alleged error by the Court in respect of its finding as to the time it took the Applicants to file for intervention and also the allegation that the Court erred by "handicapping" itself with technicalities in

1 Rule 67(1) and *Urban Mkandawire v Malawi* (review and interpretation) (2014) AfCLR 299 para 12.

2 Art 28(2) of the Protocol Provides as follows: The judgment of the Court decided by majority shall be final and not subject to appeal." See, also *Urban Mkandawire v Malawi*, *supra*, para 14.

3 Application 002/2018. Judgment of 4 July 2019 (Review), *Thobias Mang'ara Mango and Shukurani Masegenya Mango v United Republic of Tanzania* para 13 and Application 001/2018. Judgment 4 July 2019 (Review) *Rutabingwa Chrysanthe v Republic of Rwanda* para 14.

its disposal of the Applicant's request for intervention.

14. The Court notes that in paragraph thirteen (13) of the affidavit sworn by Wilson Barngetuny Koimet, the Applicants allege that they are bringing before it evidence to prove that the three land sections forming part of the Olenguruone are not part of the Mau Forest Complex. Attached to this affidavit are, among other things, the following: a map of the Mau Forest Complex allegedly obtained from the Kenya Forest Service, a letter dated 15 March 2012 from the Chief Land Registrar to the District Land Registrar, Nakuru, various letters obtained from the Kenya National Archives dating back to 1941; and a research paper submitted to the University of Nairobi in 2009.
15. It is the above referred to evidence that the Applicants submit in support of their Application for Review. The Court, focusing on the evidence submitted by the Applicants, observes that the Applicants have not demonstrated that this evidence was not within their knowledge at the time the Court delivered its Order of 4 July 2019. Neither have the Applicants demonstrated that their Application for Review was filed within six (6) months of them becoming aware of the existence of this evidence. As a matter of fact, the Court notes that the "new" evidence is generically similar to the evidence that the Applicants filed before the Court in their Application for intervention. The Applicants have, therefore, failed to fulfil the requirements in Rule 67(1) of the Rules.
16. The Court also notes that the Applicants have questioned the fact that the Court, allegedly, disposed of the Application for intervention without hearing them. The Applicants aver that this is a violation of Article 7 of the African Charter on Human and Peoples' Rights. In this regard, the Court notes that Rule 27(1) of the Rules provides that "[t]he procedure before the Court shall consist of written, and if necessary, oral proceedings". Evidently, the Court is not obliged to hold public hearings in each and every application. The absence of a public hearing, however, does not mean that a party's case has not been heard. The Court merely disposes of any such application on the basis of the written pleadings. Additionally, the Court also observes that under Rule 38 of the Rules, it has been given the power to dismiss non-meritorious applications without having to summon the parties for a hearing. The Court, therefore, does not find any merit in the Applicants' contention on this point.
17. In view of the reasons outlined hereinbefore, the Court finds the Application for Review inadmissible and accordingly dismisses it.

IV. Costs

18. 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

19. For these reasons

The Court,

Unanimously:

- i. *Declares* that the information submitted by the Applicants does not constitute new “evidence”;
- ii. *Dismisses* the Application for Review.

On costs

- iii. *Orders* that each party shall bear its own costs