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AFRICAN UNION		UNION AFRICAINE
الاتحاد الأفريقي		UNIÃO AFRICANA

AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS
COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

IN THE APPLICATIONS FOR INTERVENTION BY WILSON BARNGETUNY KOIMET AND 119 OTHERS

AND

PETER KIBIEGON RONO AND 1300 OTHERS

IN THE MATTER OF

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

V

REPUBLIC OF KENYA

APPLICATION No. 006/2012

ORDER

(INTERVENTION)

4 JULY 2019

AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS
The Registrar
LE GREFFIER
ARUSHA TANZANIA
COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

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The Court composed of: Rafaâ BEN ACHOUR, Ângelo V. MATUSSE, M-Thérèse MUKAMULISA, Suzanne MENGUE, Tujilane R. CHIZUMILA, Chafika BENSAOULA, Stella I. ANUKAM, 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.

In the Applications by:

i. Wilson Barngetuny KOIMET and 119 others, being residents of Amalo, Ambuseket and Cheptuech

ii. Peter Kibiegon RONO and 1300 others, being residents of Sigotik, Nessuit, Ngongongeri, Kapsita and Marioshoni

Represented by:

Advocate Bore Peter KIPROTICH, Bore, Malanga & Company, Advocates

Advocate Geoffrey Korir KIPNGETICH, Geoffrey Kipngetich & 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:

I. BRIEF BACKGOUND

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. The matter is currently under deliberation by the Court.

3. On 16 April 2019, the Court received two Applications: 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 Kibiegon Rono and 1300 others, being residents of Sigotik, Nessuit, Ngongongeri, Kapsita and Marioshoni also being locations within the

Respondent State. (hereinafter these individuals will collectively be referred to as "the Applicants").

4. Given that the two Applications deal with the same subject matter and are requesting similar reliefs, to wit, whether the Applicants can be allowed to intervene in the present case, the Court holds that it will deal with both Applications at the same time.

II. SUBJECT MATTER OF THE APPLICATIONS

A. Facts of the matter

5. In the Application filed by Wilson Barngetuny Koimet and 119 others, the Applicants aver that they are the registered owners of land in Amalo, Ambusket and Cheptuech since 1958. It is their further averment that their lands fall within the Greater Mau Forest Complex, which was the subject matter of the case between the Applicant and the Respondent State.

6. In the Application filed by Peter Kibiegon Rono and 1300 others, the Applicants state that they are residents and legal owners of parcels of land in Sigotik, Nessuit, Ngongongeri, Kapsita and Marioshoni. They further state that their lands are part of the land that formed the dispute between the Applicant and the Respondent State before this Court.

7. In both Applications, the Applicants raise the following issues:

   i. The Court's Judgment of 27 May 2017 is likely to affect their interests as owners of land within the Greater Mau Forest Complex even though it was delivered without according any of them an opportunity to be heard.
   ii. Members of the Ogiek Community misled the Court and obtained the Judgment of 27 May 2017 through fraud and concealment of material facts,

for example, that some members of the Ogiek Community have over the years sold their land to non-Ogiek, including the intended intervenors.

iii. The Court's Judgment on merits has disadvantaged and prejudiced them since the Court made findings without according them an opportunity to be heard.

iv. The Court's Judgment on reparations is likely to irreparably and fundamentally violate their rights, especially if it is made without hearing them.

v. It is in the interests of justice to allow the Applicants to join the present case since this would enable them to protect their rights.

B. The Applicants' prayers

8. 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 enjoin the applicants herein as interested parties in this matter.
>
> 3. THAT this Honourable court be pleased to make any order and or give any directions as it may deem just and fair in the interests of justice."

9. The Court observes that although there are two Applications, the reliefs sought by the Applicants are framed exactly as reproduced above in both Applications.

III. ADMISSIBILITY OF THE APPLICATIONS

10. The Court notes that the issue for determination is whether or not the Applicants' claims are admissible. In resolving this issue the Court must determine whether or not the Charter, the Protocol, the Rules and other applicable rules permit the granting of the prayers made by the Applicants.

11. The Court observes that 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."

12. The Court 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."

13. 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.
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. "

14. From the totality of the above provisions, it is clear 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. Additionally, it is also clear that even where States are permitted to intervene in on-going proceedings, this has to be done before the close of pleadings – Rule 53(1) of the Rules.

15. The Court wishes to observe that the genesis of the case between the Commission and the Respondent State lies in an Application that was filed before it on 12 July 2012. Before that, a communication had been lodged before the Commission on 14 November 2009. As earlier pointed out, the Court's judgment on merits was delivered on 26 May 2017. From the time the judgment on the merits was delivered, to the time the Applicants lodged their Applications for intervention, a period of one (1) year and eleven (11) months elapsed. It is also notable that a period of six (6) years and eight (8) months elapsed between the time the case was filed before the Court to the filing of the Applications for intervention. The Court takes judicial notice of the fact that the litigation between the Commission and the Respondent State has continued to generate media attention within the Respondent State such that its subsistence can safely be assumed to be common knowledge, at least within the Respondent State particularly in the areas where the present Applicants reside. Against this background, the Applicants have not proffered any explanation for the delay in filing their Applications.

16. Consequently, the Court, bearing in mind the provisions of the Protocol and the Rules, holds that there is no basis for admitting the Applications for intervention and accordingly dismisses them.

IV. COSTS

17. 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

18. For these reasons

THE COURT

By a majority of Nine (9) for, and One (1) against (Judge Bensaoula dissenting):

(i) *Declares* that the Applications are inadmissible;

On costs

(ii) *Orders* that each party shall bear its own costs

Signed:

Rafaâ BEN ACHOUR, (Dean of Judges);

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 Arusha, this 4th Day of the month of July in the year Two Thousand and Nineteen, in English and French, the English text being authoritative.