

**Lemeiguran and ors v Attorney General of Kenya and ors, First instance (by way of Originating Summons), Misc Civil App No 305 of 2004; ILDC 698 (KE 2006); (2006) eKLR 18 December 2006**

<b>Parties:</b>	Rangal Lemeiguran and ors Attorney General of Kenya, Electoral Commission of Kenya, Constitution of Kenya Review Commission
<b>Date of Decision:</b>	18 December 2006
<b>Jurisdiction/Arbitral Institution/Court:</b>	Kenya, High Court
<b>Judges/Arbitrators:</b>	J G Nyamu; M J Anyara Emukule
<b>Procedural Stage:</b>	First instance (by way of Originating Summons)
<b>OUP Reference:</b>	ILDC 698 (KE 2006)

**Subject(s):** Human rights – Individuals and non-state actors

**Keyword(s):** Democracy – Human rights, civil and political rights – Human rights, right to non-discrimination – Indigenous peoples – Minorities, rights

**Core Issue(s)**

1. Whether the IL Chamus were an indigenous people.
2. Whether the IL Chamus' rights to political participation and representation, to choose a candidate of their choice, and freedom of conscience and expression were violated by the Kenyan Government.

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**Facts**

F1 The IL Chamus people brought this application before the High Court of Kenya against the government of Kenya alleging violations of their rights to political representation, to choose a candidate of their choice, freedom of conscience, and freedom of expression.

F2 The IL Chamus people (also known as the *Njemps*), a small and distinct group with a distinct history and language, numbering 25,000–30,000 persons and living around the shores of Lake Baringo, were part of the Baringo Central Constituency, one of 210 constituencies in the country. They argued that they were an indigenous people and that a member of their community had never and could never represent them in Parliament because the demarcation of the constituency boundaries in the Baringo Central Constituency made them a perpetual minority. Consequently, the IL Chamus contended that this demarcation violated their fundamental rights.

F3 The IL Chamus further contended that the Baringo Central Constituency should be divided into two separate constituencies, taking into account the appropriate demographic and numerical considerations and all powers set out in Section 42 of the Constitution, (Kenya), so as to prevent the electoral, political, social, and economic marginalization of the IL Chamus from continuing.

F4 Further, the IL Chamus contended that they fell within the purview of Section 33 of the Constitution, which provided that political parties in proportion to their parliamentary strength shall nominate an additional 12 persons to Parliament to represent 'special interest' groups. The IL Chamus therefore argued that they constituted such a special interest group and that one of their members should therefore be nominated as a way of implementing the constitutional machinery for the representation and protection of marginalized groups. They advocated for the need to have their voice in Parliament to protect their interests, and to safeguard their own cultural values, traditions, social patterns, and territorial identity.

F5 The government of Kenya argued that the application was frivolous, vexatious, an abuse of court process, and that it lacked merit in law and fact because the IL Chamus people were not an indigenous people but a Maasai clan.

The government further argued that the IL Chamus did not constitute a special interest group envisaged in Section 33 of the Constitution and were not entitled to representation as they were a mere clan of a larger ethnicity that was already well represented in Parliament. The government further argued that the current delimitation of the Baringo Central Constituency took into account the special interests of the IL Chamus.

F6 The IL Chamus sought a declaration that:

- (a) They had been denied the fundamental right of representation in the National Assembly, freedom of expression, and freedom of conscience;
- (b) The demarcation of the Baringo Central Constituency failed to consider that the IL Chamus constituted a special interest group for the mandatory provisions of Section 33 of the Constitution of Kenya and hence failed to represent and protect the minorities;
- (c) The Electoral Commission of Kenya at its next boundary review adequately take into account the requirements set out in Sections 33 and 42 of the Constitution of Kenya to prevent the marginalization of the IL Chamus from continuing; and

Alternatively, they sought that the Baringo Central Constituency be divided by the next Boundary Commission into two separate constituencies taking into account the requirements set out in Section 42 of the Constitution of Kenya that included demographic and numerical considerations and the need to ensure adequate representation of sparsely-populated rural areas, population trends, and community of interest so as to prevent the present electoral marginalization of the IL Chamus from continuing.

## Held

H1 Many international instruments, including the Convention Concerning Indigenous and Tribal Peoples in Independent Countries, Convention No 169, 2 International Labour Conventions and Recommendations 1919–1991 p 1436, entered into force 5 September 1991 ('ILO Convention 169'); Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities, Resolution 47/135, UN General Assembly, 1992; Draft Declaration on the Rights of Indigenous Peoples, UN Doc E/CN.4/Sub.2/1994/2/Add.1, UN Economic and Social Council, Commission on Human Rights, 1994; General Comment No 23 (Article 27): Rights of Minorities, UN Doc CCPR/C/21/Rev.1/Add.5, UN Human Rights Committee, 1994 ('General Comment No 23'); and the Framework Convention for the Protection of National Minorities (1 February 1995) CETS No 157, entered into force 1 February 1998, provided that every citizen shall have the right and opportunity to take part in the conduct of public affairs, and protect the rights of persons belonging to minorities. (paragraph 26)

H2 The IL Chamus people are a unique cohesive homogenous group and a culturally distinct minority having all the attributes of the internationally recognized indigenous peoples. They qualified as indigenous peoples under the definition of the International Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 171, entered into force 23 March 1976 ('ICCPR'). (paragraph 100)

H3 Minorities under modern law should include non-citizens as well. This was supported by General Comment No 23, especially paragraphs 5.1 and 5.2, which clearly state that Article 27 of the ICCPR should not be confined only to citizens. (paragraph 102)

H4 The IL Chamus community constituted a special interest group as contemplated by the mandatory purposes of Section 33 of the Kenyan Constitution. (paragraph 152)

H5 The IL Chamus people had the right to influence the formulation and implementation of public policy, and to be represented by people belonging to the same social cultural and economic context as themselves. This holding had the backing of the African Charter on Human and Peoples' Rights (26 June 1981) OAU Doc CAB/LEG/67/3 rev.5; 1520 UNTS 217; 21 ILM 58 (1982), entered into force 21 October 1986 and other instruments. (paragraph 112)

H6 The Electoral Commission had a duty to protect minority interests, the principle of 'one man, one vote' notwithstanding. The Electoral Commission was not supposed to submerge minority groups in drawing boundaries. Gerrymandering in the drawing of constituency lines resulting in the dilution of the voting power of a minority or other group was not permissible. (paragraph 146)

H7 For a political system to be truly democratic, it had to allow minorities a voice of their own, to articulate their distinct concerns and seek redress. Participation was a lifeline of democracy. It was a clear constitutional recognition of a minority's rights to participate in the state's political process and to influence state policies. (paragraph 112)

H8 The IL Chamus' rights to exist, be treated without discrimination, preserve their cultural identity, have freedom of conscience, freedom of association, and participate in public life had been violated (see ILO Convention 169. (paragraph 104)

H9 The Electoral Commission of Kenya was directed to take into account all the requirements set out in Section 42 of the Constitution of Kenya at its next Boundary Review and, in particular, to ensure adequate representation of sparsely-populated rural areas, population trends, and community interests, including those of minorities and especially those of the IL Chamus of the Baringo Central Constituency. (paragraph 152)

**Date of Report:** 07 February 2008

**Reporter(s):** Korir Sing'oei, Innocent Maja

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## Analysis

A1 This was a critical judgment and it is exemplary in the protection of minority groups, in particular indigenous people, and in relation to political participation in Africa.

A2 Minorities are predominantly marginalized and their human rights frequently and systematically violated in much of Africa. Minorities and indigenous peoples are poorer, participate less in decision-making, and experience disproportionate rights abuses.

A3 It is interesting to note that, notwithstanding the fact that no African state had ratified ILO Convention 169, and that many African states had disputed the concepts of minorities and indigenous peoples, the High Court was bold enough to do two things, namely: first, accepting the criteria of identifying indigenous people, as enshrined in ILO Convention 169; and second, defining minorities.

A4 It is instructive that in its *obiter dictum* the High Court went further, holding that these definitions were deficient in confining the definition with regard to citizens. The court derived its inspiration and support from General Comment No 23, especially paragraphs 5.1 and 5.2 (see H2). The court boldly observed that under modern and forward-looking jurisprudence the concept of minorities should include non-citizens as well. (paragraph 102)

A5 This was a well-reasoned and progressive judgment. It confirmed the court's role of protecting minorities in a democratic society, a role that was articulated in *S v Makwanyane*, 1995 (3) SA 391; ILDC 647 (ZA 1995), 6 June 1995, in which the Constitutional Court of South Africa held that

'The very reason for ... vesting the power of judicial review of all legislation in the courts was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalized people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us, that all of us can be secure that our own rights will be protected.'

A6 The present case established that, for a political system to be truly democratic, it has to allow minorities a voice of their own, to articulate their distinct concerns, and seek redress, and thereby lay a sure base for deliberative democracy. The case further demonstrates that participation is a lifeline of democracy, enabling minorities to participate in the state's political process and to influence state policies.

**Date of Analysis:** 07 February 2008

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## Other decisions cited in the full text of this decision:

Kenya national courts

*Zola and anor v Ralli Brothers Limited and anor*, [1969] EA 691

*Kisya Investments Limited v Attorney General*, HCCC No 2832, 1990

*Chelashaw v Republic*, Misc Criminal Appeal No 93 (Nairobi), 2003

*Paul Imison v Attorney General*, HC Misc App No 1604 (Nairobi), 2003

*Njoya and ors v Attorney General and ors*, [2004] 194

South Africa national courts

*S v Makwanyane*, 1995 (3) SA 391; ILDC 647 (ZA 1995), 6 June 1995

United Kingdom national courts

*Chester Field PLC v Secretary of State*, (1998) JPC 568

*R v Lord Saville ex parte A and ors*, [1999] 4 All ER 860

*Boyce and anor v R (Barbados)*, [2004] UKPC 32

United States national courts

*Marbury v Madison*, 1 Cranch 137, 1803

*Gomillion v Lightfoot*, 364 US 339, 1960

*Reynolds v Simms*, 377 US 533; 12 LEd 506, 1964

*Wesberry v Sanders*, 376 US 481, 1964

**Instruments cited in the full text of this decision:**

International Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 171, entered into force 23 March 1976, Article 27

African Charter on Human and Peoples' Rights (26 June 1981) OAU Doc CAB/LEG/67/3 rev.5; 1520 UNTS 217; 21 ILM 58 (1982), entered into force 21 October 1986, Articles 19, 22

Promotion, Protection and Restoration of Human Rights at the National, Regional and International Levels, UN Doc E/CN.4/Sub.2/1985/31, UN Economic and Social Council, 1985

Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Conference for Security and Cooperation in Europe, 29 June 1990

Convention Concerning Indigenous and Tribal Peoples in Independent Countries, Convention No 169, 2 International Labour Conventions and Recommendations 1919–1991 p 1436, entered into force 5 September 1991, Articles 1, 2, 3, 6, 7(1), 61(b)

Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities, Resolution 47/135, UN General Assembly, 1992

Draft Declaration on the Rights of Indigenous Peoples, UN Doc E/CN.4/Sub.2/1994/2/Add.1, UN Economic and Social Council, Commission on Human Rights, 1994, Article 25

General Comment No 23 (Article 27): Rights of Minorities, UN Doc CCPR/C/21/Rev.1/Add.5, UN Human Rights Committee, 1994, paragraphs 5.1, 5.2

Framework Convention for the Protection of National Minorities (1 February 1995) CETS No 157, entered into force 1 February 1998

Constitution, (Kenya), Articles 1, 1A, 3, 33, 41, 42, 43, 65, 70, 78, 79, 80, 82, 83, 84, 123