

The Nubian Community in Kenya / Kenya – Communication 317/06

Comments under Rule 112 relating to Implementation

17 February 2016

1. The following information is based principally on consultation with community leaders in January 2016, following notification of the decision; empirical research conducted in 2015 commissioned by the Open Society Justice Initiative examining the impact of discriminatory policies relating to the issuance of vital documents (birth certificates, national identity cards and passports) among Nubians in Kibera; and real-time data gathered through an ongoing community-based paralegal program supported by Namati and Open Society Justice Initiative and run by the Nubian Rights Forum, which provides clients in Kibera (primarily but not exclusively Nubian clients) with assistance in obtaining birth certificates, national identity cards, passports and death certificates.
2. We respectfully urge the Commission to appoint a rapporteur for this Communication under Rule 112 of the Rules of Procedure. We would invite the rapporteur to request further information from the Government of Kenya, to urge the government to address the concerns raised in this letter, and to report back to the Commission during its Ordinary Session and regularly thereafter. We would be pleased to continue to provide further information to the Commission, and to work closely with the rapporteur in engaging with the government of Kenya and other actors in the country on the Commission's recommendations.

Background and Summary of Recommendations

3. In its decision in the case, the Commission declared that the government of Kenya had violated a number of rights of the Nubian community, individually and collectively, under the African Charter on Human and Peoples' Rights, particularly in respect of the right to nationality (Article 5), to equality and non-discrimination (Articles 2 and 3) and to respect for property rights and protection against forced evictions (Article 14).
4. The Commission recommended that the government of Kenya should:
 - Establish objective, transparent and non-discriminatory criteria and procedures for determining Kenyan citizenship;
 - Recognize Nubian land rights over Kibera by taking measures to grant them security of tenure; and
 - Take measures to ensure that any evictions from Kibera are carried out in accordance with international human rights standards.
5. In the years leading to the Commission's decision, the government had taken a number of positive steps which indicated recognition of the underlying problems and which provided a basis to implement solutions to them. Kenya adopted a new Constitution in 2010 and a new Citizenship and Immigration Act in 2011. Both of these laws contain provisions that promote and protect equality in the acquisition of documentation of identity.¹ However, they leave persistent ambiguities (1) in the definition of citizenship, (2) in the means of proving citizenship by birth, and (3) in the application procedures and regulations for birth registration and identity documentation. The 2010 Constitution also contains important guarantees for the protection of community lands.² New

¹ See Annex 1: Kenyan Legal Provisions (excerpts).

² *Ibid.*

proposed legislation is currently before parliament on birth registration and identity documentation, community land, and land registration systems, providing an important opportunity to implement the *Nubian Community* decision with respect to both issues (discussed in more detail below).

6. While these developments are welcome, the government of Kenya has yet to take the necessary steps to implement the Commission's decision, and must take further urgent action to address the Commission's findings in two key areas: (A) discrimination in access to documentation of identity, including access to proof of citizenship, and (B) property rights and forced evictions.

A. Discrimination in Access to Documentation of Identity Persists

7. Selective, discriminatory vetting should be dismantled and replaced with a uniform identity documentation system that the government and the people of Kenya can trust. This requires proactive action by the Kenyan government to curb corruption, frame sensible and non-discriminatory laws and regulatory guidelines, and boost infrastructure and outreach to local government structures and communities. The government must take steps to repair the damaging implications of including vetting committees within the scope of counterterrorism and national security through recent amendments to its security laws.
8. Since the decision of the African Commission, Kenya has not made progress in addressing the Charter violations pertaining to discriminatory vetting. In neglecting to do so, it has failed to deliver on the promise of inclusive citizenship and equality embraced in the 2010 Constitution.
9. The Commission's decision focused extensively on the issue of vetting, deeming it a failure on Kenya's part to recognize the Nubians' legal status and a discriminatory impediment in the exercise of "transactions that are necessary to a dignified life" (at para. 168). The decision echoes a 2011 decision by the African Committee of Experts on the Rights and Welfare of the Child, which also found that vetting violated the human rights of Nubian children.³ In August 2015, the Kenyan Commission on Administrative Justice (a government body) also released a report based on its own independent research on the issuance of vital documents in Kenya, which included evidence of widespread discrimination and was heavily critical of vetting.⁴
10. Evidence from a community-based paralegal program operating in Kibera demonstrates that vetting remains a systematic practice in the case of Nubians.⁵ There have been no meaningful steps to improve these problems following the decision, and survey data from 2015 confirms the same "dramatic" disparity in subjection to vetting between Nubians and non-Nubians in Kibera.⁶
11. Government actions in the lead-up to the decision cast doubt on its willingness to take steps to address these issues. Despite mounting international and internal criticism, in

³ Annex 6: Open Society Foundations, Nubian Rights Forum & Namati, *Briefing to the African Committee of Experts on the Rights and Welfare of the Child: Implementation of Nubian Minors v. Kenya*, February 2014.

⁴ Annex 7: Commission on Administrative Justice, Office of the Ombudsman, *An Investigation Report on the Crisis of Acquiring Identification Documents in Kenya*, August 2015, at, e.g., xvii (Recommendation 9: "[T]he current system of vetting applicants is reported to be discriminatory and marred with corruption").

⁵ Annex 6: Open Society Foundations, Nubian Rights Forum & Namati, *Briefing to the African Committee of Experts on the Rights and Welfare of the Child: Implementation of Nubian Minors v. Kenya*, February 2014, at 5.

⁶ Annex 8: Ben Oppenheim and Brenna Marea Powell, *Legal Identity in the 2030 Agenda for Sustainable Development: Lessons from Kibera, Kenya*, October 2015, at 10.

2014 the Kenyan government backtracked significantly with the passage of the Security Laws (Amendments) Act. That law amended the Registration of Persons Act (1978), Section 8, purportedly to recognize the legitimacy of vetting committees, bringing issuance of citizenship-related documentation within the scope of counterterrorism measures.⁷ Previously, as was argued to the Commission in this case, Section 8 did not mention vetting committees at all. The amended language does nothing to contain the scope of discretion exercised by the committees or the executive power to establish them – it merely recognizes, in law, the executive’s prerogative as a matter of national security. This move conflates bureaucratic mandates such as registration and provision of documentation of identity with counterterrorism and criminal justice policy, exposing ethnic groups subject to vetting, like the Nubians, to further xenophobia, which now appears state-sanctioned. Such regressive steps, and the entrenching in legislation of bodies wielding discretionary power which has been shown to be exercised in a discriminatory manner, must be undone or reformed as part of the implementation of the Commission’s decision.

12. There are competing drafts of a new registration bill before parliament, which could provide an opportunity to redeem what is widely contended to be a broken identification system. This bill could clearly separate citizenship from documentation, and also separate documentation of citizenship (national identity cards) from counterterrorism policy. Civil society groups and communities are pressing for adoption of a framework that would apply uniformly to all Kenyans. Such a framework must include transparent guidelines where additional identification procedures would be triggered and robust due process rights including judicial review of denials.⁸
13. While Nubians are arbitrarily and disproportionately impacted by the Kenyan government’s current policies on issuance of documentation, those policies are also driven by another layer of administrative failure: the government does not trust its own registration and documentation systems due to widespread corruption.⁹ While Nubians face systematic discrimination in the way the system is structured with respect to their community, that structure is a symptom of a bigger problem that Kenya must address from a human rights framework, in line with its constitutional principles.
14. In resolving these implementation gaps, the government of Kenya should recognize in the Nubian community a vital, committed and innovative ally. It is no accident that Nubians have successfully acquired identity documentation at levels on par with other Kenyans, in spite of formidable, well-documented obstacles in the application processes.¹⁰ This statistic was achieved through determined and sustained intracommunity support, education and advocacy.¹¹ The government of Kenya should look to the Nubians for solutions to root causes of a dysfunctional registration and identification architecture – e.g. discrimination, infrastructural shortcomings,

⁷ Annex 1: Kenyan Legal Provisions (Security Laws (Amendments) Act 2014, Section 23).

⁸ This information is based on consultations undertaken during and after a field mission by Open Society Justice Initiative in January 2016.

⁹ See Annex 7: Commission on Administrative Justice, Office of the Ombudsman, *An Investigation Report on the Crisis of Acquiring Identification Documents in Kenya*, August 2015.

¹⁰ Annex 8: Ben Oppenheim and Brenna Marea Powell, *Legal Identity in the 2030 Agenda for Sustainable Development: Lessons from Kibera, Kenya* (October 2015).

¹¹ Annex 6: Open Society Foundations, Nubian Rights Forum & Namati, *Briefing to the African Committee of Experts on the Rights and Welfare of the Child: Implementation of Nubian Minors v. Kenya*, February 2014.

ineffective communication and outreach – rather than continuing to burden Nubians arbitrarily with procedures such as vetting committees.¹²

Remedial Steps for Documentation of Identity

15. There are a number of concrete steps which the Commission could encourage the government of Kenya to take to ensure the effective implementation of its decision with respect to documentation of identity, including citizenship:
16. *Outlaw Discriminatory Vetting.* Introduce legislation to effectively eliminate vetting committees based on actual or perceived personal characteristics such as ethnicity, race, religion, gender, national origin or membership in particular social groups. Publicize this change widely to front-line registration officials.
17. *New Registration Laws.* Adopt a new registration law, together with implementing regulations and policies, that is able to achieve the following:
 - Apply any processes for determining eligibility for national identity cards universally, based on limited, rational criteria, that prohibit discrimination.
 - Provide clear and transparent procedures for acquiring documentation.
 - Provide accessible, swift recourse to judicial review in cases of denial.
 - Delink acquisition of national identity cards from determination of citizenship.
 - Delink acquisition of national identity cards from counterterrorism policy through repeal of Section 23 of the Security Laws (Amendments) Act of 2014.
18. *Administrative Reform to Counter Corruption.* Reform administrative systems, infrastructure and human capacity to meet the demands of Kenya’s population and constitutional principles with respect to identification, registration and access to documentation of identity:
 - Work with communities, county and sub-county government to conduct effective outreach and education programs, including mobile registration and documentation exercises.
 - Where individuals lack sufficient supporting evidence to successfully register births and other vital events or apply for documentation, establish flexible processes to resolve such cases, with clear guidelines and shared burdens between applicant and government, with decisions subject to judicial review.

B. Ongoing Denial of Property Rights and Forced Evictions

19. The government must address the Nubian community’s ongoing vulnerability to encroachments on their community land in Kibera and to forced evictions by public and private actors, through adoption of temporary measures of protection, and ultimately adoption of a legislative framework that makes the promise of the 2010 Constitution’s community land provisions a reality. No legislation exists to date to (a) regulate recognition of community land ownership, (b) prevent evictions, or (c) permit registration of community land. The present construction of a road passing directly through portions of the Nubian village illustrates the immediacy and urgency of this issue, and the lack of forward progress in implementing the Commission’s decision. The Commission is urged to request that the Kenyan government halt further

¹² It should be noted that Nubians are not the only group in Kenya suffering arbitrary and discriminatory procedures. The Commission’s recommendation is framed in general terms and should be implemented in order to provide a solution for all similarly situated communities.

construction of the road and any other development projects in the area of the Nubian village until the community is granted security of tenure, under law, in Kibera.

20. The 2010 Constitution also provides a promising foundation for the recognition of community land rights in Kibera for the Nubian community, in order to meet the Commission's call for realization of security of tenure for Kenyan Nubians.¹³ Chapter 5, on land, introduces the ownership category of "community land" and requires the enactment of legislation to provide for its implementation and administration in practice. Article 63(4) prevents disposal or use of community land except under specific legislation establishing "the nature and extent of the rights of members of each community individually and collectively."¹⁴ However, as with the continued discrimination in access to documentation of identity, the government has not taken the necessary steps to realise this potential and to implement the Commission's decision in this regard. To the contrary, Kibera is being divided and sold every day, with consequential evictions.
21. The Kenyan government has not adopted implementing legislation to date, leaving the Constitution's provisions on community land ineffective to safeguard Nubians and other communities with special rights from public and private encroachments. Nor, despite the decision's recommendation to recognize Nubian land rights in Kibera by taking measures to grant them security of tenure, has the government acted to create a system for registering community titles. The negotiation and issuance of titles is an inadequate vehicle for protecting security of tenure unless the government takes steps to cure this gap.¹⁵ Similarly, the government does not provide any support for communities in negotiations to establish and register community land and no institutional framework exists to support community land governance, which in the case of Nubians in a densely populated informal settlement in the center of a massive city, will be incredibly complicated.
22. Rather than support the Nubian community in organizing and advocating for security of tenure in Kibera, the government initiated a process for granting title in 2012, but abruptly dropped the effort in late 2013. In August 2012, the government gazetted a Part Development Plan (PDP) setting out a proposed plot of 288 acres (a fraction of the original area of Kibera, which is over 4,000 acres).¹⁶ The community formed a task force and nominated trustees as a first step to administering the community land.¹⁷ The initiative became marred in political struggles, including between Kenya's Land Ministry and the National Land Commission.¹⁸

¹³ See, e.g., Yash Pal Ghai & Jill Cottrell Ghai, *Kenya's Constitution: An Instrument of Change* 77-78 (2011) (the Constitution "protects the legitimate interests of marginalized communities, like Nubians, forest people and pastoralists" through a new category of community land, updating and replacing the system of "trust land" held over from pre-independence).

¹⁴ Annex 1: Kenyan Legal Provisions (Kenyan Constitution (2010)). Article 63(3) also requires that unregistered community land must be held in trust by county governments on behalf of communities.

¹⁵ Annex 1: Kenyan Legal Provisions. The Kenya Land Registration Act of 2012 makes provision, in Section 8, for the development of a community land register, pending the adoption of a community lands act, which has not yet taken place.

¹⁶ Annex 4: Part Development Plan No. 42/32/2012/01 (photograph, not an official copy) and Kenya Gazette notice for Nubian Village in Kibera (1 August 2012).

¹⁷ Annex 3: Certificate of Incorporation: Kibra Nubian Community Land Trust and Kibra Nubian Community Land Trust Deed (30 September 2013, deposited with Registry of Documents 3 October 2013).

¹⁸ See, e.g. Daily Nation, "Nubians fear state will not give them Kibera land title," 13 June 2015, available at: <http://www.nation.co.ke/news/Nubians-fear-State-will-not-give-them-Kibera-land-title/-/1056/2751286/-/ipmowcz/-/index.html>.

23. The government has taken no steps to remedy or redress this situation since the Commission's decision. To the contrary, we seek in particular to draw the Commission's attention to an urgent and alarming illustration of the ongoing vulnerability of the Nubian community with respect to security of tenure. In January 2016, the government announced plans to commence construction in March 2016 of a bypass road cutting through the portion of Kibera that includes the Nubian village.¹⁹ The planned construction violates Article 63(4) of the Constitution – as described above, the community's rights have not been determined – and it is unclear whether the appropriate public consultations were undertaken prior to approval of the planned road.

Remedial Steps for Recognizing Nubian Land Rights in Kibera

24. There are a number of steps which the Commission could encourage the government of Kenya to take to ensure that the property rights of the Nubians are protected in line with the decision of the Commission.
25. *Temporary Assurances through an Administrative Directive.* With no legislative framework to prevent evictions or to implement the community land regime envisioned in the Constitution, it is unclear how secure any title granted to the Nubian community can be. For this reason, the Kenyan government should take steps to provide temporary assurances, for example through an administrative directive, that the community land, at least as defined in the 2012 PDP, cannot be subject to further encroachments and that no evictions may take place. This directive should be immediate, and should apply to the planned road construction set to commence in March 2016.
26. *Legislative Reform.* Once temporary protective measures are in place, the Kenyan government should ensure a permanent solution through recognizing Nubian community land rights in Kibera within the framework of the pending Community Land Bill (2015), potentially by incorporating a schedule addressing Nubian land rights. The government should then commence recognition and issuance of community title, and also provide practical and financial support to the community to encourage strong governance and ongoing administration of the community land.
27. *Security of tenure in Kibera and forced evictions.* The government should immediately halt construction of Ngong Road – Langata Link, which is scheduled to commence in March 2016, encroaching on the Nubian village in Kibera, and adopt temporary measures of protection against any encroachments until the nature and extent of the Nubian communities rights are determined and secured. The government should also ensure that the pending Land Laws (Amendment) Bill (2015), as adopted, includes robust protections against forced eviction, including respect for due process and resettlement in cases of lawful eviction.

Conclusion

28. We kindly request leave to continue to inform the Commission, through the Rapporteur appointed for this Communication, of important developments with respect to implementation of this case. We remain ready to assist should the Commission require any further information in the execution of its own ongoing monitoring of the *Nubian Community* decision.

¹⁹ See Annex 4: Part Development Plan No. 42/32/2012/01 (photograph, not an official copy) (indicating proposed road construction within the area of the Nubian village); Annex 2: Kenya Urban Roads Authority, "The Construction of Waiyaki Redhill Link Road and Ngong Road – Langata Link Awarded," News and Information, January 2016, available at: <http://kura.go.ke/the-construction-of-waiyaki-redhill-link-road-and-ngong-road-langata-link-awarded/> (accessed 16 February 2016).

29. We ask that the Commission continue to engage with the Kenyan Government to encourage it to take the specific measures set out above, in order to ensure the practical and effective implementation of the Commission's recommendations in this case.



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Enclosures:

- Annex 1 Kenyan Legal Provisions (excerpts from the Kenyan Constitution 2010 and relevant legislation)
- Annex 2 Kenya Urban Roads Authority, "The Construction of Waiyaki Redhiil Link Road and Ngong Road – Langata Link Awarded," News and Information, January 2016, available at: <http://kura.go.ke/the-construction-of-waiyaki-redhill-link-road-and-ngong-road-langata-link-awarded/> (accessed 16 February 2016)
- Annex 3 Certificate of Incorporation: Kibra Nubian Community Land Trust and Kibra Nubian Community Land Trust Deed (30 September 2013, deposited with Registry of Documents 3 October 2013)
- Annex 4 Part Development Plan No. 42/32/2012/01 (photograph, not an official copy) and Kenya Gazette notice for Nubian Village in Kibera (1 August 2012)
- Annex 5 Open Society Foundations, Nubian Rights Forum & Namati, *Briefing to the African Committee of Experts on the Rights and Welfare of the Child: Implementation of Nubian Minors v. Kenya*, February 2014
- Annex 6 Commission on Administrative Justice, Office of the Ombudsman, *An Investigation Report on the Crisis of Acquiring Identification Documents in Kenya*, August 2015
- Annex 7 Ben Oppenheim and Brenna Marea Powell, *Legal Identity in the 2030 Agenda for Sustainable Development: Lessons from Kibera, Kenya* (October 2015)