

# COMMUNICATION SUBMITTED TO THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS FOR AND ON BEHALF OF THE NUBIAN COMMUNITY IN KENYA

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## I. INTRODUCTION

The Institute for Human Rights and Development in Africa (IHRDA), Open Society Justice Initiative (OSJI) and the Center for Minority Rights Development hereby submit this communication under Article 55 of the African Charter on Human and Peoples' Rights against Kenya, a state party to the Charter, and its agents on behalf of the Nubian community in Kenya who have suffered unlawful discrimination by agents of the state of Kenya. These actions constitute violations of Articles 1, 2, 3, 5, 7 (1) (a), 12 (1), and (2), 13, 14, 15, 16, 17(1), 18 (1), (2) and (3) and 19 of the African Charter on Human and Peoples' Rights.

## II. FACTUAL BACKGROUND

The Nubians in Kenya number about 100,000 people.<sup>1</sup> They have lived in the Kibera slums in Nairobi, in Bondo, Kisumu, Kibos, Mumias, Meru, Isiolo, Mazaras

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<sup>1</sup> Open Society Initiative, *Nubians in Kenya Appeal for Their "Right to Existence"*, July 17, 2005 available at [http://www.soros.org/initiatives/osiea/news/nubians\\_20050630](http://www.soros.org/initiatives/osiea/news/nubians_20050630) . See also The East African Magazine, *Meet the Nubians, Kenya's Fifth Generation 'Foreigners'*, Monday, July 15, 2002, available at <http://www.nationaudio.com/News/EastAfrican/22072002/Features/Magazine2.html>

in Mombasa, Eldama Ravine, Tange- Kibigori, Sondu, Kapsabet, Migori and Kisii areas since their first arrival into Kenya in the early 1900s.<sup>2</sup>

The Nubians originally occupied the Nuba Mountains in Central Sudan. They were conscripted into the British army in the early 1900s when Sudan was under Anglo-Egyptian rule. They were forcefully recruited into the colonial British King's African Rifles and taken to various parts of the then British East Africa, including present-day Kenya, to assist the British mainly in their military expeditions and later in the First and Second World Wars.<sup>3</sup>

After their demobilization from the British King's African Rifles following the end of World War II, the Nubians requested the colonial government to repatriate them back to Sudan. The colonial government refused this request on the ground that such a proposal would not be acceptable to the Sudanese government--although Sudan was at that time a British colony. The Nubians were therefore left with no choice but to remain in Kenya.<sup>4</sup>

Unlike the Indian Railway workers who were granted British citizenship, the Nubians were left to settle in Kenya without any elaborate settlement scheme and were not granted British citizenship by the colonial government. Neither were their citizenship and other rights in Kenya settled upon Kenyan independence. Successive Kenyan governments have also not taken any concrete steps to address the Nubian situation.<sup>5</sup>

Thus, although the Nubians have lived in Kenya for more than a hundred years, longer than many other Kenyan communities, and they know no other home, they are still not considered Kenyan citizens. Most Nubians live as *de facto* stateless persons without adequate protection from national and international law. This is in spite of the fact that even though they qualify for citizenship under Chapter VI of the Kenyan constitution and are should therefore be able to be registered as such and issued with Kenyan passports and other identification documents.

The denial of their citizenship rights deprives the Nubians of all the consequential rights and benefits of citizenship. The Nubian community is subjected to the persistent denial of their civil, political, economic, social and cultural rights. The denial of citizenship has deprived them of access to employment and the right to vote and work in the formal sector. Most remain extremely poor. They suffer low levels of income, and poor health and nutrition, literacy and educational performance, and physical infrastructure.

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<sup>2</sup> See Maurice Odiambo Makoloo, Kenya: Minorities, Indigenous Peoples and Ethnic Diversity, page 16

<sup>3</sup> Ibid. See also The East African Magazine, op.cit and *A Cultural Profile of the Nubi People of Kenya* available at <http://www.geocities.com/orvillejenkins/profiles/nubi.html?200617>

<sup>4</sup> See Maurice Odiambo Makoloo, ibid

<sup>5</sup> Ibid

Furthermore, Kenyan Nubians often find themselves forcefully and arbitrarily expelled from lands they have occupied for decades, simply because they lack title to such lands. In almost all the areas where they live in Kenya, they live as squatters. They have attempted time and again to bring their plight to the attention of the Kenyan government but the government has routinely ignored them.<sup>6</sup> To date, they continue to be threatened with further displacements on the ground that they are not Kenyan citizens and are therefore not entitled to own land.

As set forth below, Kenya violates Articles 1, 2, 3, 5, 7 (1) (a), 12 (1), and (2), 13, 14, 15, 16, 17(1), 18 (1), (2) and (3) and 19 of the African Charter on Human and Peoples' Rights in denying rights guaranteed by the Charter through its systematic policy of discriminating against the Nubian community. Kenya must be held accountable for its actions in order to ensure protection of members of the Nubian community who have been victims of this discrimination and now live in perpetual fear of being persecuted.

### III. ADMISSIBILITY

Article 56 of the African Charter governs the admissibility of communications brought pursuant to Article 55 of the African Charter. It is submitted that this complaint fulfils all of the requirements stipulated in Article 56 and should therefore be declared admissible by the African Commission.

Article 56(5) establishes that that a communication should be sent after exhausting all local remedies, if any, unless it is obvious that this procedure is unduly prolonged. This rule of international law affords States the opportunity to correct a given situation internally before being subject to an international cause of action. As succinctly put by the International Court of Justice in the *Interhandel Case*<sup>7</sup>:

*The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law; the rule has been generally observed in cases in which a State has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law. Before resort may be had to an international court in such a situation, it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic law.*<sup>8</sup>

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<sup>6</sup> The East African Magazine, op. cit

<sup>7</sup> *Interhandel* (Switz. v. U.S.), 1959 I.C.J. 6 (General List: No. 34 Mar. 21).

<sup>8</sup> *Ibid* at Page 27

In this case local remedies are essentially nonexistent and such remedies as may exist are unduly prolonged.

A. *The serious and massive nature of the violations coupled with the lack of protection in Kenyan law for the rights violated amount to the non-existence of local remedies*

The Commission has consistently held, in *Sir Dawda K. Jawara v The Gambia* and *The Social and Economic Rights Action Center v Nigeria*, that such remedies as do exist at the domestic level must be 'available, effective and sufficient', such that "if the right is not well provided for, there cannot be effective remedies, or any remedies at all"<sup>9</sup>

This communication alleges violations of Articles 15, 16, 17, 18 and 19 by the Kenyan government. These articles guarantee economic, social and cultural rights as well as group rights. The Kenyan Constitution does not protect these rights; it only guarantees civil and political rights of the individual in sections 70-82. Therefore, legal remedies for violations of these rights of the Nubian community are not available in the courts in Kenya.

This communication is brought on behalf of 100,000 Nubians who have had their social, economic and political development seriously impaired by systematic, state-sponsored discrimination perpetrated over decades. Where there are a large number of individual victims, such remedies as might theoretically exist in the domestic courts are in reality unavailable. The African Commission has recognized this in numerous decisions,<sup>10</sup> specifically, stating:

*The Commission has never held the requirement of local remedies to apply literally in cases where it is impractical or undesirable for the complainant to seize the domestic courts in the case of each violation.*<sup>11</sup>

The Commission has taken judicial notice of the fact that domestic remedies are ineffective in circumstances in which multiple rights are violated simultaneously and the victims are numerous,<sup>12</sup> such that is impossible to make a complete

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<sup>9</sup> Communication 155/96, *The Social and Economic Rights Action Center for Economic and Social Rights v Nigeria*, paragraph 37

<sup>10</sup> While the African Commission uses the words 'serious' or 'massive' violations, the European system uses the concept of 'a practice'. Henry Onoria, *The African Commission on Human and People's Rights and the Exhaustion of Local Remedies under the African Charter*, *African Human Rights Law Journal* Volume 3 No.1 2003, page 1 at 16

<sup>11</sup> Communications 25/89, 47/90, 56/91, 100/93 (Joined) – Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Temoines de Jehovah/Zaire

<sup>12</sup> Frans Viljoen, *Admissibility under the African Charter*, *The African Charter on Human and Peoples' Rights- The System in Practice, 1986-2000*, edited by Malcolm Evans and Rachel Murray, pages 87-88

catalogue of the names of all the victims.<sup>13</sup> In such situations, as in the present one, it is impractical for each victim to present a claim before the domestic courts, which generally have no provision for hearing cases as a class.

The reason for the local remedies rule is to give notice to the state party. The Commission has also held that in situations of serious and massive violations, the state must already have ample, non-judicial notice of such violations.<sup>14</sup> Such notice must arise from the scale and scope of the violation and may also arise from international and national attention to the situation. Thus, in the *Sudan detention without trial case*<sup>15</sup>, the Commission observed that:

*Even where no domestic action has been brought by the alleged victims, the government has been sufficiently aware to the extent that it can be presumed to know the situation prevailing within its own territory as well as the content of its international obligations*<sup>16</sup>.

In the Nubian case, long before any judicial action, the Kenyan government was fully aware of the situation of the Nubians through the protests to the Kenyan government on numerous occasions.<sup>17</sup> The situation of the large number of Nubians living in Kibera, in Nairobi, even resulted in deaths in recent memory.<sup>18</sup> Whenever a human rights violation is alleged, the State has the obligation to promote and advance investigations through to the end. Thus, although the Kenyan government was given ample notice of the violations, it manifestly has done nothing to redress them. It is therefore submitted that the victims need not act further to exhaust local remedies, which are clearly not sufficient in the circumstances.

*B. The deliberate and systematic placement of numerous administrative obstacles to the hearing of the case, over a period of years, has made the procedure of exhausting local remedies unduly prolonged*

Article 56 (5) of the African Charter makes it clear that complainants need not exhaust local remedies if the procedure is “unduly prolonged.” Local remedies

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<sup>13</sup> Op. cit, paragraph 79

<sup>14</sup> *Zaire mass violations case, op. cit.* Just as like the victims of these violations, the Nubian community protested to the government on numerous occasions and had approached national courts but these actions failed to yield any results.

<sup>15</sup> Communications 48/90, 50/91, 52/91, 89/93, *Amnesty International, Comite Loosli Bachelard, Lawyers Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa/Sudan*

<sup>16</sup> Ibid, paragraph 33

<sup>17</sup> See the newspaper articles Plain Speaking, Sunday Post, April 26, 1936, Demolished, East African Standard, September 5, 1968, A History of Evictions at Kenya's Mother of Slums by Ismail Ramadhan, Daily Nation, December 7, 2001, Origins of the Kibera Land Row by Ismail Ramadhan, Daily Nation, April 10, 2004.

<sup>18</sup> See newspaper articles Brutal killings in Nairobi slum, BBC News, Tuesday, 4 December, 2001, 'Hundreds raped' in Kenya clashes, BBC News Thursday, 6 December, 2001, 16:22 GMT

are deemed unavailable where the procedure is unduly prolonged owing to the length of time taken before the domestic courts<sup>19</sup>. The Inter American system also has a similar exception to the exhaustion of local remedies rule. The Inter-American Commission has found a delay of three years and six months,<sup>20</sup> and of twenty months<sup>21</sup> after the institution of proceedings to be “undue delay”.

The Nubian community has made every effort to seek to resolve the position and seek a remedy through the proper domestic proceedings.<sup>22</sup> In 2002 the Nubian community, through the Kenyan Nubian Council of Elders instructed the Center for Minority Rights Development (CEMIRIDE) to take action against the Kenyan government for, *inter alia*, denial of citizenship and/or discrimination in the issuance of identity documents contrary to the Kenyan constitution and international and regional human rights standards binding on Kenya.

An action was commenced in the High Court of Kenya by way of an urgent application on 17<sup>th</sup> March 2003 seeking leave of court to file a representative constitutional application on behalf of the Nubian community. On the same day Justice George Mbiti of the High Court granted orders to enable Yunis Ali and 19 others to file a class action suit on behalf of the Nubian community.

On the same day, CEMIRIDE filed the substantive constitutional application in the High Court in Nairobi by way of an Originating Summons seeking *inter alia* a declaration that the Nubian Community in Kenya were Kenyan citizens under section 87 of the Kenyan Constitution and that the treatment meted against them was discriminatory and contrary to section 82 of the Constitution.

However, numerous procedural obstacles have been deliberately and systematically thrown up by the State. Despite appearing in court over dozen times in the intervening years, CEMIRIDE has never had a hearing on the merits of the case. One of the chief procedural obstacles thrown in the way of the case was on July 8<sup>th</sup> 2003, when Justice Daniel Aganyanya of the Nairobi High Court declined to transmit the file to the Chief Justice on the ground that there was need to ascertain the identity of the 100,000 applicants on whose behalf the application was filed. This was clearly onerous and inconsistent with the orders of representative action already obtained on 17<sup>th</sup> March 2003.

The plaintiffs then brought the case before Justice Kariuki, arguing that the order to produce 100,000 affidavits was unreasonable. Justice Kariuki agreed and fixed a date for hearing of the case on the merits on the 7<sup>th</sup> June 2004. However,

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<sup>19</sup> Communication 204/97, Mouvement Burkinabe des droits de l'Homme et des Peuples/ Burkina Faso, Fourteenth Annual Activity Report, paragraphs 4, 14 and 36

<sup>20</sup> Report 14/89, Case 9641 (Ecuador), 12 April 1989, Annual Report of the Inter-American Commission on Human Rights 1988-1989, OEA/Ser.LV/II/76, Doc. 10, 104-15

<sup>21</sup> Report 1a/88, Case 9755 (Chile), 12 September 1988, Annual Report of the Inter-American Commission on Human Rights, 1987-1988, OEA/Ser.LV/II/74, Doc. 10 rev.1, 132-9

<sup>22</sup> The full procedural history of the case is set out in the Affidavit of Verification deposed to by Abraham Korir Singoie, CEMIRIDE

when CEMIRIDE appeared before Justice Mugo for the case to be heard as scheduled, Justice Mugo declined to hear the application and referred it back to the duty judge for directions on grounds that there were contradictory orders in the file. Within fifteen months of filing, the case had been brought before five different judges, none of whom had proceeded with it.

CEMIRIDE wrote to the Chief Justice on 18<sup>th</sup> June, 2004 on what it considered to be a deliberate placement of administrative obstacles on the path of the expeditious determination of the application on behalf of the Nubian community but got no response. Several letters were subsequently dispatched to the Chief Justice on the same subject but no response has been received.

Thus, more than three years after CEMIRIDE instituted proceedings on behalf of the Nubian community, no bench has been constituted and no date has been fixed for a substantive hearing on the case. Such a delay is excessive and particularly serious given the large number of victims involved and the nature of the violations. Every day that the status of the Nubians remains unchanged and undefined causes further discrimination, deprivation, disenfranchisement and exclusion. Thus, the local remedies are unduly prolonged.<sup>23</sup>

Therefore, because local remedies are essentially non-existent and those that exist are unduly prolonged, the conditions of Article 56 (5) of the Charter are complied with and the communication is admissible.

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<sup>23</sup> This is in line with the Commission decision in Communication 39/90, Annette Pagnouille (on behalf of Abdoulaye Mazou)/ Cameroon, paragraph 13. In this case, the victim *inter alia* submitted petitions to the Cameroon Supreme Court and seized the Ministry of Justice for reinstatement in this position. See also *Report 1a/88, Case 9755 (Chile), 12 September 1988, Annual Report of the Inter-American Commission on Human Rights, 1987-1988, OEA/Ser.L/V/II/74, Doc. 10 rev.1, 132-9*