

KENYA: GOING TO COURT TO PROTECT THE FORESTS

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Eldoret, Kenya

BACKGROUND

On 16 February 2001, Kenya's Environment Minister published in the official *Gazette*, legal notices of the government's intention to remove from protection over 167,000 acres of forests in thirteen forest reserves around the country. This is equivalent to 10% of Kenya's total remaining forest cover.

Twenty-eight days after the notices were issued, these forests would be cleared and the land allocated to private individuals. This would have been an ecological disaster, given that Kenya's forest cover is estimated to be only between 2-3% of the total land area of over 580,000 square kilometers. By international standards, such scant forest cover means that Kenya's environment can be classified as "critical." Some of the forests to be cut down were natural forests rich in biological diversity, with habitats for rare and endangered species of flora and fauna.

The government's legal notices violated the Environmental Management and Coordination Act of 1999 (EMCA), which is the primary environmental protection law in Kenya. The Act requires an environmental impact assessment (EIA) before a major change in land use or the clearing of forests. An EIA was required before such notices could be published. None was carried out.

The notices were received with public outrage throughout much of the country. In response, the Minister for Lands announced that the government's decision was final and that the forests needed to be cleared to settle the landless. The Greenbelt Movement and the Kenya Forests Working Group (KFWG), designed petition forms within these twenty-eight days, and collected thousands of signatures of persons opposed to the government's action. Professor Wangari Maathai, one of Kenya's environmentalists, presented the petition and the signatures to the environment minister. The petition was ignored.

Because clearing the forests was not in Kenya's best environmental interest, there was need for people to express their disapproval. It was important for environmental advocates to use all the available advocacy tools and strategies to prevail upon the government's decision.

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GOAL OF ADVOCACY

Our goal was to use all appropriate means to stop the planned removal of the forests. There were many tools for achieving this goal. These included lobbying, protests, demonstrations, mass media action, and going to court.

FORMING ALLIANCES

In environmental advocacy, you do not go it alone. I had to form some alliances and to decide with whom to form these alliances. There were various options at the local, national, and international levels. I chose all three.

At the local level, I mobilized a group of activists within Eldoret town and its environs. Our group comprised lobbyists from a local human rights organization, political activists, youth groups, and local churches. Since some of the targeted forests were in the region, it was easy to mobilize people.

INITIAL ADVOCACY EFFORTS

We called a press conference at which we launched our campaign to oppose the government's action. Our slogan was "Operation Save Our Forests." (Surprisingly, the government later adopted this slogan when demolishing illegal settlements in the forests.) The group carried out an extensive public campaign through posters, press releases, public meetings, and demonstrations. We also undertook research on forest issues. We consulted materials in the Moi University library. We also contacted experts at the Moi University Department of Forestry, the Forest Action Network, the Kenya Forests Working Group, and the United Nations Environment Programme, as well as individual retired government foresters. Because we did not have a forest expert in the group, this research was important to enable us to effectively counter arguments and data offered by the government in support of cutting the forests.

At the national level we contacted some respected environmentalists and scholars around the country whom we had known before. We reached them through telephone, fax, e-mail, and personal visits. While some did not respond, the majority did and was very supportive.

At the international level, we sent e-mails to reputable environmental groups and individuals. These included the International Union for Conservation of Nature, World Wildlife Fund, E-LAW (Environmental Law Alliance Worldwide), and the Environmental Law Institute, among others. This was one of the reasons why we built moral support for the case internationally.

DECIDING TO GO TO COURT

Despite our efforts and the efforts of other groups who were protesting, collecting signatures of objectors, petitioning the Minister, or issuing press releases, the Minister

did not revoke the controversial decision. These other tools of advocacy were not effective. My group decided that the best strategy was to go to court and challenge the government.

Being the only lawyer in the group, I offered free legal representation and identified two local people in whose names I would file the case. These persons however withdrew from the case after I had prepared all the papers in their names, and was ready to file them in court. I later learnt that they had been offered five acres of land each in the forests to be cut down.

We were in a dilemma, and there were only two days before the notices expired. Eventually I suggested, and the group agreed, that I file the case in my own name. This was to minimize the chance of manipulation, since we could now hardly trust just anybody on this crucial issue.

Two days before the expiration of the notices, I filed a case in the High Court of Kenya at Eldoret to prevent the government from clearing the forests. The court ordered the government not to cut the forests until it gave its decision.

The proceedings were historic. For instance, it must have been the first time in Kenya's history that a High Court judge held a public, open-air session outside the courtroom. The proceedings were attended by thousands of members of the public. The Judge noted that he decided to hear the case in open air because of the level of public interest the case had generated, and the number of groups who wanted to become parties in the case. He further noted that everyone had to be given a chance to listen to the arguments.

EXPERIENCES IN COURT

Intimidation

After filing the case, I was subjected to constant intimidation and harassment by state agents and civilians aligned with politicians. The government also sponsored some groups to join the case in support of cutting the forests, arguing that they were landless and needed land. I received several death threats from some people I knew and from strangers, some to my face, others by telephone.

Apart from these phone threats, my office telephone was tapped, and there were unusually frequent interruptions when the state intelligence listened into conversations. Strangers and unmarked vehicles started trailing me in the evenings while I drove home.

My car was broken into and my cell phone stolen by people I believe to be state security agents. This was a big blow because I had stored very important contacts on it.

Two days after we won the first round of the case, the police stormed my office and arrested me without good cause. I spent a day in police cells. Upon arrest I

instructed a friend of mine in our lobbying group to send an alert. He contacted E-LAW (US), who immediately sent out an international alert to which many people around the world responded angrily with protests to government officials.

My friend also informed local human rights and environmental activists. The following day these activists stormed the station where I was being held and demanded the reason for my arrest. A bitter exchange and commotion took place between the police and the activists. In light of this pressure and after serious consultations between the officer in charge of the station and his bosses, I was released without any charges being filed against me.

Costs

The state had an economic advantage over us in this case. Court fees in Kenya are very high for an ordinary citizen. The minimum initial filing fees in such cases are approximately Kenya shillings 8000 (about 100 U.S. dollars). This is very high in a country like Kenya, where over sixty percent of the people live in poverty.

Although expensive, the case was not funded by any individual or organization, not even the NGOs that support environmental conservation. As a result, I relied on my own finances. The “Forest Case” was a familiar item on my household budget every month end. I actually did not have enough financial resources for a case of this magnitude. As a result, most of the basic services in my modest law firm, such as telephone and fax, ceased due to the high bills incurred on this case.

In addition, the government is by law exempt from paying court fees. This means that the government incurs little or no expense in the litigation process and will often contest even the most obvious of cases.

Transfer of the judge

After the initial proceedings, the judge hearing this case was transferred from the case before she could deliver her judgement. This move, it is speculated, affected the outcome of the case. The new judge quickly dismissed the case and ordered me to pay the costs of the government.

Dealing with criticism

Not all the people I came into contact with supported my strategy. Even though most of them were sympathetic, others thought I was the author of my own troubles. Two arguments are notable in this respect. First, they wondered why I bothered with forests that do not belong to me. Second, they argued that as a lawyer, it was imprudent for me to file a case in my name and risk bearing costs in the event of the case being dismissed. These were the most trying moments in my career as a lawyer. I discovered it is easier, although by no means better, if you represent somebody else. It posed a real challenge to be in the position of attorney and litigant at the same time.

RESULTS AND CURRENT STATUS

The case was dismissed on a technicality after being in court for eight months. Litigation as a tool worked, however, because an injunction was in place while the case was pending. This prevented the government from cutting the forests during that period.

People received the ruling with shock and anger. I filed a notice of appeal, but was unable to follow through with it due to the costs of appeal. Other groups, however, filed three cases to prevent the government from cutting the forests. One such suit addressed just one of the forests, but the other two addressed all the forests. These cases are still pending before the High Court. In some of them, the government has been ordered not to cut the forests before the court makes its final decision. Thus, so far, litigation has proved effective and has protected the forests.

LESSONS LEARNED

A litigant has protection of the court in his or her pursuit of the case. In the course of trial I complained and went on record about harassment by state agents. The court issued a stern warning promising to order the arrest of the culprits if they persisted. The judge also directed the State Counsel to advise the government.

If successful, litigation can be a powerful tool of environmental advocacy. In a country where the judiciary is corrupt or operating at the whim of government officials, however, going to court is like chasing a rainbow. It should therefore be used as a last resort when all other tools have failed. For instance, because of the determination of the government to continue with its present policy, all of the different groups advocating on this matter ended up in court.

Advocacy groups that choose to go to court should be prepared for the worst and strive for the best. Litigation is a process in which you will not be in control. You are under the control of the judge, and you can only argue and try to persuade her.

When considering a court action, know your facts and the procedures well. Do not listen to skeptics or bow to intimidation. While you ought to be firm and courageous, when involved in a sensitive case against the state, you should consider the risks to your own safety.

Bearing in mind that the court can dismiss your case and order you to pay your opponent's costs, you should ensure you have adequate financial resources. Even if you have a good case, you should be prepared to appeal in the event you lose in the first instance.