Chongeiywo & 10 others (Suing as representatives of the Ndorobo/Ogiek Community of Chepkitale, Mt. Elgon) v Attorney General & 4 others; Kenya National Commission on Human Rights (Amicus Curiae) (Environment and Land Petition 1 of 2017) [2022] KEELC 13783 (KLR) (19 October 2022) (Judgment)

Neutral citation: [2022] KEELC 13783 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ENVIRONMENT AND LAND PETITION 1 OF 2017

BN OLAO, SM KIBUNJA & NA MATHEKA, JJ

OCTOBER 19, 2022

IN THE MATTER OF ARTICLES 2 (6), 10(2)(B), 21(1), 23(1), 26(1), 27, 28, 29, 40 (1-4), 42, 43, 44, 47, 56, 63(2)(D), (I) AND (II) AND 258 OF THE CONSTITUTION

AND

IN THE MATTER OF VARIOUS OTHER PROVISIONS OF DOMESTIC LAW AND INTERNATIONAL HUMAN RIGHTS LAW, INCLUDING THE AFRICAN CHARTER ON HUMAN AND PEOPLE'S RIGHTS 1981

BETWEEN

PETER KITELO CHONGEIYWO ..... 1ST PETITIONER

JOHNSON KIPSIRAT NGEYWO ..... 2ND PETITIONER

SIMOTWO YEGO ..... 3RD PETITIONER

LINET CHEPKWEMOI CHEPKELIEK ..... 4TH PETITIONER

MOSES K NDIEMA ..... 5TH PETITIONER

SILAS TAKUR MASAI ..... 6TH PETITIONER

COSMAS CHEMWOTEI MURUNGA ..... 7TH PETITIONER

FRED NDIEMA MATEI ..... 8TH PETITIONER

BENARD MASAI KAPCHELANGAT KAPTINGA ..... 9TH PETITIONER

PATRICK NAIBEI KAPCHANGROTOK ..... 10TH PETITIONER

SIMOTWO CHELOGOI YEGO ..... 11TH PETITIONER

SUING AS REPRESENTATIVES OF THE NDOROBO/OGIEK COMMUNITY OF CHEPKITALE, MT. ELGON

AND

ATTORNEY GENERAL ..... 1ST RESPONDENT

KENYA FOREST SERVICE (KFS) ..... 2ND RESPONDENT

THE INSPECTOR GENERAL OF POLICE ..... 3RD RESPONDENT

NATIONAL LAND COMMISSION ..... 4TH RESPONDENT

KENYA WILDLIFE SERVICE (KWS) ..... 5TH RESPONDENT

AND

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS ... AMICUS CURIAE

The need to preserve the ecosystem took priority over claims by communities on ownership and use of community land.

Reported by John Ribia

Constitutional Law *– constitutionality of statutory provisions – constitutionality of section 77 of the Forest Conservation and Management Act, Act No 34 of 2016 - whether section 77 of the Forest Conservation and Management Act and the Third Schedule to the Act which listed Mt Elgon Forest as a public forest were inconsistent with article 63(2)(d)(ii) of the Constitution that provided that community land included ancestral land.*

Constitutional Law *– fundamental rights and freedoms – right to property – right to life - right to a clean and healthy environment - classification of land – community land – claim to community land that had been proclaimed as a protected public forest - whether land previously occupied by hunter gatherer communities could be listed as public forests – whether the right to a clean and healthy environment and the need to preserve the ecosystem took priority over claims by communities on ownership and use of community land – whether eviction of a hunter gather community from its ancestral land after compensation and after the community had changed their occupation could be said to be a violation of the right to life and right to property of the members of the community - Constitution of Kenya, 2010, articles 26, 40, 63(2)(d)(ii) and 70; Forest Conservation and Management Act, Act No 34 of 2016, section 34, 37, 64 and 77.*

Brief facts

The petitioners claimed Mt Elgon Forest as their ancestral land, which they claimed to have occupied traditionally as a hunter-gather community, and they prayed for the court to find that the forest was their community land as defined by article 63(2)(d)(ii) of the Constitution. The petitioners contended that the Forest Conservation and Management Act (FCMA) was unconstitutional to the extent that it listed Mt Elgon Forest as a public forest. The petitioners contended that since the promulgation of the Constitution, the FCMA should have been enacted to conform to the Constitution. It was the petitioners' claim that the Act contravened the petitioners' rights to property and their rights as community landholders.

The petitioners' claim to the forest was opposed by the respondents on the grounds that the claims were inconsistent with article 62(1)(g) of the Constitution that classified Government forests as public land. Further to that, the FCMA 2016 had gazetted Mt Elgon as a public forest.

Issues

i. Whether land previously occupied by hunter gatherer communities could be listed as public forests.

ii. Whether section 77 of the Forest Conservation and Management Act and the Third Schedule to the Act which listed Mt Elgon Forest as a public forest were inconsistent with article 63(2)(d)(ii) of the Constitution that provided that community land included ancestral land.

iii. Whether the eviction of a hunter-gatherer community from its ancestral land after compensation and after the community had changed its occupation could be said to be a violation of the rights to life and right to property of the members of the community.

iv. Whether the right to a clean and healthy environment and the need to preserve the ecosystem took priority over claims by communities on ownership and use of community land.

v. What was the applicability of the principle of eminent domain?

vi. What law was applicable in Kenya with respect to the eviction and displacement of persons?

Relevant provisions of the Law

Constitution of Kenya, 2010

Article 63 - Community land

(2) Community land consists of —

(d) land that is—

(ii) ancestral lands and lands traditionally occupied by hunter-gatherer communities;

Forest Conservation and Management Act, Act No 34 of 2016

Section - Savings

Notwithstanding the repeal of the Forests Act, (No. 3 of 2005)—

(a) any land which immediately before the commencement of this Act, was gazetted or registered as a forest reserve as set out in the Third Schedule to this Act, or under any other relevant law shall be deemed to be a public forest under this Act;

(b) the land in paragraph (a) shall not include government settlement schemes already registered before the commencement of this Act; and

(c) any licence, contract or agreement issued under the repealed Act shall remain in force as if it were a licence, contract, or agreement issued under this Act:

Provided that where the licence, contract or agreement in force immediately before the commencement of this Act relates to activities now outlawed under this Act, shall cease upon commencement of this Act;

(d) all participatory forest management plans shall be revised to be in conformity with the provisions of this Act;

(e) subsidiary legislation made in accordance with the Forest Act, (No 3 of 2005), and still in force on the date of the commencement of this Act, shall remain in force until they are revoked in accordance with the provisions of this Act;

(f) a person who immediately before the commencement of this Act was an employee of the Service under the repealed Act, shall continue to hold or act in that office as if appointed to that position under this Act, and all benefits accruing to employees under the repealed Act shall continue accruing to them under this Act;

(g) members of the Board who immediately before the commencement of this Act were appointed as Board members of the Service under the repealed Act, shall continue to hold and act as Board members as if appointed to that position under this Act, for a period not exceeding one year.

Held

1. Jurisdiction was everything and without it the court had to down its tools. Article 162(2)(b) of the Constitution established and conferred the Environment and Land Court (ELC) with the same status as the High Court and with the jurisdiction to hear and determine disputes relating to the environment and the use and occupation of, and title to land. The petitioners claimed that Mt Elgon forest was their community land that the evictions carried out by the respondents violated their constitutional right to a clean and healthy environment. The court had jurisdiction conferred by articles 162(2)(b) and 165(3)(d) of the Constitution and sections 13 and 21 of the Environment and Land Court Act to hear and determine the petition. The petitioners were well within their rights to file the instant claim in the ELC.
2. The petition made reference to the particular provisions of the Constitution alleged to have been infringed in the heading. The petitioners had precisely set out the particulars of the alleged breaches

and violations of their Constitutional rights and freedoms. In setting out their claim, the petitioners had met the constitutional threshold.

3. The first port of call when interpreting a statute was the plain language deployed by the Legislature while drafting the statute. Where the words of a statute were plain, precise and unambiguous, the intention of the Legislature was to be gathered from the language of the statute itself and no external aid was admissible to construe those words. The object of the court in interpreting legislation was to give effect so far as the language permitted to the intention of the Legislature.
4. The Forest Conservation and Management Act (FCMA) was enacted in 2016 and the objective of the Act was to give effect to article 69 of the Constitution with regard to forest resources; to provide for the development and sustainable management, including conservation and rational utilization of all forest resources for the socio-economic development of the country and for connected purposes. The wording of the objective was clear and required no effort to ascertain either the purposes of the legislation or the intention of the Legislature.
5. The burden of establishing that an Act of Parliament or a provision was unconstitutional for either reason was on the petitioners and the burden had to be discharged to the required standard. The burden of proof in constitutional matters was on a balance of probabilities.
6. Article 69 of the Constitution obligated the State to ensure sustainable exploitation, utilisation, management, and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits *inter alia*. The FCMA was specifically enacted as an aid to achieve that functionality by the State. The State would have abrogated its constitutional duty to its citizens if it failed to protect the environment.
7. There was no inconsistency between the provisions of the FCMA with the Constitution. There was no ambiguity noted in the language of the statute in relation to the Constitution. The petitioners' contention that section 77 as well as the third schedule of the FCMA violated their rights under article 40 of the Constitution and ran contrary to article 10 of the Constitution was without merit. All that the Legislature intended in enacting the Act was to give effect to article 69 of the Constitution. The petitioners had no rights in the forest to be protected by article 40 since no violation had been proved to the satisfaction of the court. The FCMA accorded with the Constitution.
8. Under article 40(3) and 24 of the Constitution a right or fundamental freedom could be limited by law reasonably and justifiably. The State was empowered with the eminent domain to acquire land required for public use. The principle of eminent domain was a common law concept that allowed the State to have proprietary rights. In the instant case, forests sat on what the petitioners claimed was ancestral lands. The declaration of an area such as Mount Elgon as a forest, or a national park was facilitated by the existence and exercise of the power of eminent domain.
9. Mt Elgon Forest was gazetted on April 30, 1932 under Proclamation No 44. Mt Elgon Forest became a protected area under the management of the Kenya Forest Service (KFS) and the petitioners could only access the forest with the express consent of the KFS for whatever reasons. Section 8 of the FCMA however obligated the KFS to *inter alia*; receive and consider applications for licenses or permits in relation to forest resources or management of forests or any other relevant matter and in consultation with relevant stakeholders, develop programs for tourism and for recreational and ceremonial use of public forests.
10. The gazettement of Mt Elgon Forest as a public forest effectively extinguished the Ogiek's claim to the forest. It may be true that the Ogiek Community initially occupied the forest as a hunter-gatherer community. They had since abandoned the practice of hunting due to modernization. The claim that they had cultural sites and shrines in the forest as well as gather honey and vegetables from the forest did not qualify the land as community land. Even if the forest was a gazetted public forest, the petitioners could still access the forest for purposes of extracting herbs and ceremonial use by procuring

the necessary permissions and or licences from the relevant authorities. The petitioners acknowledged being aware of that fact on cross-examination.

11. The enactment of the Community Land Act (2016) brought clarity on what entailed community land. Section 7 of the Act gave conditions that had to be met for land to be deemed community land. The petitioners had not demonstrated that any of the steps had been undertaken.
12. The Government compensated the Ogiek community for the alienation of their land in Mt. Elgon. The petitioners had not adduced any evidence that showed that either the land in question had been de-gazetted or the process of gazettement was flawed under the respondents' watch and or supervision for which the respondents ought to be held to account. The suit land was a protected public forest within the meaning of article 62(1)(g) of Constitution.
13. Mt. Elgon Forest was gazetted as a State forest in 1932. The petitioners were settled in Chepyuk Settlement Scheme by the Government. Before the eviction of June 20, 2016 the County Commissioner, Bungoma issued a verbal notice asking the occupants of the forest to vacate. From the petition and the oral testimonies, the petitioners wished to be allowed to occupy the forest and retain their parcels in the Chepyuk Settlement Scheme created by the Government. If that was allowed, the petitioners would have unjustifiably enriched themselves at the expense of the natural resource preservation initiated by the Government. That would also set a dangerous precedent and a threat to the ecosystem.
14. The guidelines that the State should observe while evicting people, from public land included; compensation, the requirement of adequate notice before eviction, the observance of human conditions during eviction and the provision of alternative land for settlement. The UN Guidelines on Evictions, were an aid in fashioning appropriate reliefs during evictions and they filled the *lacuna* as to how the Government ought to carry out evictions.
15. The UN Basic Principles and Guidelines on Development and Development Based Eviction and Displacement (2007), provided guidance that States should adapt in ensuring that development-based and in the instant case, conservation based evictions were not undertaken in contravention of existing international human rights standards and violation of human rights. The Guidelines *inter alia* placed an obligation on the State to ensure that evictions only occurred in exceptional circumstances and that any eviction had to be authorized by law; carried out in accordance with international human rights law; were undertaken solely for purposes of promoting the general welfare and that they ensured full and fair compensation and rehabilitation of those affected. The protection accorded by those procedural requirements applied to all vulnerable persons and affected groups irrespective of whether they hold title to the home and property under domestic law.
16. It was not very clear, the manner in which the eviction took place in order for the court to make a determination whether the petitioners' dignity was respected or not. The petitioners did not produce any evidence from the lawfully established authorities like the Police or a Government valuer to quantify the loss occasioned to the Chepkitale Ogiek during the eviction exercise. The position that it would be impossible to keep hives in the forest unless they lived in the forest was wrong and unfounded.
17. Chepkitale National Reserve was an ecologically sensitive area that was found within Mt. Elgon Forest, it was a home to wild animals including the elephants. During migration season, elephants used Chepkitale National Reserve as a wildlife corridor. Increased human activity in Chepkitale National Reserve would destabilize the ecological balance posing a threat to the wildlife and plant species. Management of natural resources lay with the Government.
18. Article 69 of the Constitution provided for the obligations of the State in respect of the environment. The Environmental Management and Co-ordination Act, 1999 (EMCA) defined sustainable development as development that met the needs of the present generation without compromising the ability of future generations to meet their needs by maintaining the carrying capacity of the supporting ecosystems. The decreasing forest cover was aggravated by an abated environmental destruction of trees

for charcoal burning. It was the responsibility of the ELC to provide a conducive environment for the enjoyment of constitutionally enshrined rights. It was of utmost importance that the ELC jealously protects the environment to ensure that posterity had a chance at enjoying their constitutionally enshrined rights. The need to preserve the ecosystem took priority over the claims by the Ogiek.

19. Although the petitioners claimed proprietary rights over the suit land by dint of article 63(2)(d)(ii) of the Constitution (ancestral rights), their claim failed since the suit land fell within the provision of article 62(1)(g) of the Constitution (public land). Noting the fact that Chepkitale National Reserve was gazetted in the year 2000, it had to be treated as being public land and should be handled in accordance with the Wildlife Conservation and Management Act, 2013, and the FCMA, 2016. According to section 2 of the Wildlife Conservation and Management Act 2013, a national reserve meant an area of community land declared to be a National Reserve under the Act or under any other applicable written law. The characteristics outlined in section 35 of the Wildlife Conservation and Management Act 2013, had to be in place before a parcel of land was declared a national reserve.

20. Chepkitale National Reserve was a gazetted national reserve, and the law provided the procedure for revocation of public forests in section 34 of the FCMA 2016 and section 37 of the Wildlife Conservation and Management Act, 2013. An executive petition was filed regarding the variation of the boundaries of Mt. Elgon Forest Reserve.

21. The executive petition was tabled in Parliament on July 5, 2018, under article 119(1) of the Constitution and Standing Order No. 225(2)(b) of the National Assembly Standing Orders. The petition sought the de-gazettement of Chepyuk phase II and III. A report was prepared by the Departmental Committee on Environment and Natural Resources confirming that the de-gazettement of Chepyuk phase II and III was approved. During the aforementioned process in Parliament, a representative of the residents of Chepkitale disagreed with the assertion made by the executive in the executive petition that Chepyuk phase II and III were intended to be in exchange for Chepkitale National Reserve. The representative stated that the Chepkitale Ogiek were not ready to discuss the exchange of their ancestral land for the allocation of land in Chepyuk phase II and III. It was illogical for the Chepkitale Ogiek to suggest that their participation was only limited to their entitlement to be allocated land in Chepyuk Settlement Scheme. It was also illogical for the Chepkitale Ogiek to assert that their allocation of land in Chepyuk Settlement Scheme did not affect their entitlement to claim their ancestral land, which was gazetted as Chepkitale National Reserve.

22. The petition sought to have Chepkitale National Reserve de-gazetted so that the petitioners could get a second bite at the cherry on the grounds that their ancestors had been in occupation of the suit land since time immemorial. The petitioners were attempting to approbate and reprobate. The doctrine of approbation and reprobation required for its foundation the inconsistency of conduct, as where a man, having accepted a benefit given to him by a judgment, could not allege the invalidity of the judgment which conferred the benefit.

23. The petitioners' occupation of Chepkitale National Reserve amounted to prohibited activities in forests under section 64 of the FCMA.

24. The petitioners had not adduced adequate evidence to support a finding that their eviction from the forest was forceful or that the eviction violated their rights. Their claim that eviction from the suit land threatened their enjoyment of the right to life was unsustainable. By the time the eviction of June 20, 2016 was carried out, the petitioners had already been allocated alternative land over the years and they had adequate time to establish their homes and engage in activities to support their lives.

25. A party should not be allowed to benefit from their illegal actions. Natural resources were not infinite, and the unsustainable utilization of natural resources undermined human existence. Forests played a major role in reducing the carbon footprint, which resulted in adverse climate changes resulting from the depletion of the ozone layer.

Petition dismissed.

Orders

No order as to costs.

Citations

Cases

Kenya

1. *Anarita Karimi Njeru v Republic* Criminal Appeal 4 of 1979; [1979] KECA 12 (KLR);(1976-80) 1 KLR 1272 - (Explained)
2. *Attorney General v Sunderji Trading As "crystal Ice Cream"* Civil Application 20 of 1984; [1986] KECA 3 (KLR) - (Explained)
3. *Attorney-General & another v Katiba Institute & 7 others* Civil Application E365 & E368 of 2021; [2021] KECA 166 (KLR) - (Consolidated) - (Explained)
4. *Ayuma, Satrose 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefit Scheme & 3 others* Petition 65 of 2010; [2011] KEHC 3992 (KLR) - (Followed)
5. *Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others* Civil Appeal 51 & 58 of 2016; [2018] KECA 27 (KLR) - (Followed)
6. *Council of Governors & 6 others v Senate* Petition 413 of 2014; [2015] KEHC 6967 (KLR) - (Followed)
7. *County Government of Nyeri & another v Ndungu* Civil Appeal 2 of 2015; [2015] KECA 1011 (KLR) - (Followed)
8. *Engineers Boards of Kenya v Jesse Waweru Wahome & 5 others* Civil Appeal 240 of 2013; [2015] KECA 1 (KLR) - (Explained)
9. *In the Matter of the Interim Independent Electoral Commission (Applicant)* Constitutional Application 2 of 2011; [2011] KESC 1 (KLR); [2011] 2 KLR 32 - (Followed)
10. *June Seventeenth Enterprises Ltd (Suing on its own behalf & on behalf of & in the interest of 223 other persons being former inhabitants of KPA Maasai Village Embakasi within Nairobi) v Kenya Airports Authority & 4 others* Petition 356 of 2013; [2014] KEHC 6784 (KLR) - (Explained)
11. *Kaptipin , James & 43 Others v Director Forest &2 others* Constitutional Petition 6 of 2012; [2014] KEHC 1107 (KLR) - (Explained)
12. *Katiba Institute & another v Attorny General & another* Constitutional Petition 209 of 2016; [2017] KEHC 4648 (KLR) - (Explained)
13. *Kemai & 9 others v Attorney General & 3 others* (2006) 1 KLR (E&L) 326 - (Followed)
14. *Kenya Civil Aviation Authority v WK & 2 others* Civil Appeal 252 of 2012; [2019] KECA 400 (KLR) - (Explained)
15. *Kenya National Chamber of Commerce & Industry -KNCCI (Muranga Chapter) & 2 others v Delmonte Kenya Limited & 3 others; County Government of Kiambu (interested Party)* Environment & Land Case 86 of 2018; [2020] KEELC 2258 (KLR) - (Explained)
16. *Kiptum, David Yator & 23 others v Attorney General & 15 others* Environment and Land Petition 15 of 2013 (Formerly Eldoret High Court Petition 6 of 2013 & Petition 3 of 2018 (Consolidated); [2020] KEELC 3961 (KLR) - (Explained)
17. *Law Society of Kenya v Attorney General & Central Organisation of Trade Unions* Petition 4 of 2019; [2019] KESC 16 (KLR) - (Followed)
18. *Law Society of Kenya v Kenya Revenue Authority & another* Petition 39 of 2017; [2017] KEHC 8539 (KLR) - (Explained)
19. *Letuya, Joseph & 21 others v Attorney General & 5 others* ELC Civil Suit 821 of 2012; [2014] KEHC 6421 (KLR) - (Explained)
20. *Lewa , Mtana v Kahindi Ngala Mwagandi* Civil Appeal 56 of 2014; [2015] KECA 532 (KLR) - (Explained)
21. *Macharia & another v Kenya Commercial Bank Limited & 2 others* Application 2 of 2011; [2012] KESC 8 (KLR); [2012] 3 KLR 199 - (Followed)

22. *Malenya, Kelly v Attorney General & another; Council of Governors (Interested Party)* Petition 32 of 2017; [2019] KEHC 7007 (KLR) - (Explained)
23. *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* Petition 3 of 2018; [2021] KESC 34 (KLR) - (Followed)
24. *Mumo, Matemu v Trusted Society of Human Rights Alliance & 5 others* Civil Appeal 290 of 2012; [2013] KECA 445 (KLR) - (Explained)
25. *Munkasio, Parkire Stephen & 14 others (suing on their own behalf and behalf of their families and all the members of the Maasai Community Living on Land Reference No 8396 (ir 11977) situated in Kedong) v Kedong Ranch Limited & 8 others* Petition 57 of 2014; [2015] KEHC 2531 (KLR) - (Explained)
26. *Munya v Kithinji & 2 others* Application 5 of 2014; [2014] KESC 30 (KLR) - (Explained)
27. *Musembi , William & 13 others v Moi Educational Centre Co Ltd & 3 others* Application EO19 of 2021; [2022] KESC 19 (KLR) - (Followed)
28. *Ngaiwa , Mark v Minister of State, Internal Security and Provincial Administrative & another* Petition 4 of 2011; [2011] KEHC 3869 (KLR) - (Explained)
29. *Ole Tauta, Ledidi & others v Attorney General & 2 others* Constitutional Petition 47 of 2010; [2015] KEHC 7241 (KLR) - (Explained)
30. *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* Civil Appeal 50 of 1989; [1989] KECA 48 (KLR); [1989] KLR 1 - (Followed)
31. *Republic v Kenya Revenue Authority & 3 others ex parte Five Forty Aviation Limited* Judicial Review 420 of 2012; [2015] KEHC 6947 (KLR) - (Explained)
32. *Republic v Institute of Certified Public Secretaries of Kenya ex-parte Mundia Njeru Geteria* Miscellaneous Civil Case 322 of 2008; [2010] KEHC 4103 (KLR) - (Followed)
33. *Republic v Kenya Revenue Authority & anor ex parte Krones Lcs Centre East Africa Ltd* Miscellaneous Civil Suit 299 of 2010; [2012] KEHC 4692 (KLR) - (Explained)
34. *Republic v Principal Secretary Ministry of Health & Public Procurement Administrative Review Board Ex parte Apex Communication Limited Trading as Apex Porter Novelli* Miscellaneous Civil Application 126 of 2014; [2015] KEHC 6935 (KLR) - (Explained)
35. *Royal Media Service Ltd v Attorney General & 2 others* Civil Application Nai 44 of 2013; [2013] KECA 546 (KLR) - (Explained)
36. *Wambega, Henry & 733 others v Attorney General & 9 others* Constitutional Petition 2 of 2018; [2020] KEELC 824 (KLR) - (Explained)
37. *Yator, David Kiptum & 23 others v Attorney General & 4 others (As Consolidated with Elias Kibiwott & others v Kenya Forest Service & Katiba Institute* Civil Application 150 of 2020; [2021] KECA 874 (KLR) - (Explained)

Tanzania

Ndyanabo v Attorney-General of Tanzania [2001] EA 495 - (Applied)

Uganda

Olum and another v Attorney General (1995-1998) 1 EA 258 - (Explained)

South Africa

1. *Alexkor Ltd & another v Richtersveld Community and others* [2003] ZACC 18; 2004 (5) SA 460 ; 2003 (12) BCLR 1301 - (Explained)
2. *Minister of Health & others v Treatment Action Campaign & others* (CCT8/02) [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC) (5 July 2002) - (Followed)

India

1. *Hamdard Dawakhana v Union of India Air* 1960 AIR 554; 1960 SCR (2) 671 - (Explained)
2. *Reserve Bank of India v Peerless General Finance and Investment Co Ltd & others* 1987 AIR 1023; 1987 SCR (2) 1 - (Explained)

United States

Aurelio Cal in his own behalf and on behalf of the Maya Village of Santa Cruz and Basilio Teul, Higinio Teul, Marcelina Cal Teul and Susano Canti v The Attorney General of Belize and The Minister of Natural Resources and Environment Claim Nos 171 & 172 of 2007 (Consolidated) - (Explained)

Canada

1. *Calder v British Columbia (AG)* [1973] SCR 313 - (Explained)
2. *Delgamuukw v British Columbia* [1997] 3 SCR 1010 - (Explained)
3. *Nation v British Columbia* [2014] 2 SCR 257 - (Explained)
4. *Queen v Big M Drug Mart Ltd* [1985] 1 SCR 295 - (Explained)

Malaysia

Kerajaan Negeri Selangor v Sagong bin Tasi 19 September 2005 - (Explained)

Australia

Mabo v Queensland (No 2) [1992] HCA 23; (1992) 175 CLR 1 - (Followed)

Regional Court

1. *Africa Commission on Human and Peoples' Rights v Republic of Kenya* Application 006 of 2012; [2022] ACHPR 1 (KLR) - (Explained)
2. *Mayagna (Sumo) Awas Tingni Community v Nicaragua* Petition Nos 11, 577 - (Explained)
3. *Saramaka People v Suriname* Judgment of November 28, 2007 - (Explained)
4. *Shwabe and Mg v Germany* Application Nos 8080/08 & 8577/80 - (Explained)

Chile

Diaguita v Goldcorps (7 October 2014) - (Explained)

Guatemala

Mataques'cuintla v Guatemala Constitutional Court of Guatemala (December 2013) - (Explained)

Statutes

Kenya

1. Community Land Act (cap 287) sections 4, 7 - (Interpreted)
2. Constitution of Kenya, 2010 articles 1(1); 2(6); 10(2)(b); 19(2)(3)(b); 20; 21(1);22; 23(1)(3); 24; 26(1); 27(4); 28; 29; 40(2)(b)(3)(b)(i)(ii); 42; 43; 44; 47; 49; 56; 61; 62(1)(g)(2)(b)(d)(ii); 63(2)(d)(ii); 67(2)(e); 69(1); 119; 159(2)(a)(b)(e); 162(2)(b); 165(3)(b)(d)(e); 245; 248; 259(1)(3); 260; Sixth Schedule section 7(1); Chapter 5, 15 - (Interpreted)
3. Environment and Land Court Act (cap 8D) sections 13(1)(2)(d)(7); 21 - (Interpreted)
4. Environmental Management and Co-ordination Act (cap 387) In general - (Cited)
5. Evidence Act (cap 80) sections 48, 107, 108 - (Interpreted)
6. Forest Act, 2005 (Repealed) (cap 385) sections 52, 64 - (Interpreted)
7. Forest Conservation and Management Act (cap 385) sections 7, 8, 34, 64, 77(a); Schedule third - (Interpreted)
8. Land (Allocation of Public Land) Regulations, 2017 (cap 280 Sub Leg) regulations 63-69 - (Interpreted)
9. Land Act, 2012 (cap 280) section 152A-I - (Interpreted)
10. Limitations of Actions Act (cap 22) section 7 - (Interpreted)
11. National Land Commission Act (cap 281) section 15(3)(b) - (Interpreted)
12. Wildlife Conservation and Management Act (cap 376) sections 6, 37 - (Interpreted)

Australia

Native Title Act, 1993 In general - (Cited)

Instruments

1. African Commission on Human and Peoples' Rights, 1987 paragraph 4
2. C169 - Indigenous and Tribal Peoples Convention, 1989 (No 169) articles 6, 15(2)
3. Declaration on the Rights of Indigenous Persons, 2007 articles 1, 2, 8(2)(a)(b); 10, 26
4. International Convention on Elimination of all forms of Racial Discrimination (ICERD), 1965 article 5(d)
5. International Covenant on Civil and Political Rights (ICCPR), 1966
6. International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966

Advocates

Mr Lempaa for the petitioner

Mr Juma for the 1st respondent

Prof Sifuna for the 2nd respondent

Mr Juma for the 3rd respondent

Mr Juma h/b for *Ms Oduor* for the 5th respondent

Ms Asoyong for the *amicus curiae*

JUDGMENT

Introduction

1. The Judgement was due for delivery on the December 9, 2021. This date had been fixed on the basis that this bench would be facilitated in good time but it was not until June 2022 that the bench was facilitated to caucus, hence the reason for the delay which is regretted.

2. The petitioners are Kenyan citizens who belong to the Ndorobo/Ogiek Community of Chepkitale, Mt Elgon and are also leaders of the Ogiek Community in Mt Elgon. They bring this petition as a representative action on behalf of the members of the Mt Elgon's Ogiek and in public interest.

3. The 1st respondent, the Attorney General, is the Principal Legal adviser of the National Government of Kenya.

4. The 2nd respondent, the Kenya Forest Services (KFS), is a public body created by section 7 of the *Forest Conservation and Management Act* No 34 of 2016 (FCMA).

5. The 3rd respondent is the Inspector General of Police established under article 245 of the *Constitution*.

6. The 4th respondent, the National Land Commission (NLC), is an independent Commission established under articles 67 and 248 of the *Constitution of Kenya*.

7. The 5th respondent, the Kenya Wildlife Services (KWS), is a public body created by section 6 of the Kenya *Wildlife Conservation Management Act* No 47 of 2013 (KWCMA).

8. Kenya National Commission on Human Rights (KNCHR), is an independent Commission within the meaning of chapter 15 of the *Constitution* and appeared as *amicus curie* in the Petition.

Pleadings

9. The petitioners seek for the following reliefs through their amended petition dated the April 8, 2019:-

    a. A declaration that the burning of houses, destruction of property and eviction of Ogiek of Chepkitale on diverse dates including June 20, 2016 was a violation of the petitioners' rights under articles 26,28,29,40,42,44 and 56 of the *Constitution*.

b. A declaration that the actions of the 2nd respondent (the Kenya Forest Service) in burning houses and destroying the property of the Ogiek of Chepkitale was a violation of its values and principles of governance under article 10, especially because it was inimical to the values of human rights, rule of law, good governance and protection of minorities and marginalized group. It is also a violation of article 21(1) to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.

c. A declaration that the acts of the respondents (especially the 2nd respondent herein), is a violation of the right to property of the Ogiek with regard to their right to their community land, protected under article 63(2)(d)(ii) of the *Constitution*.

d. A declaration that the inclusion in the 3rd schedule pursuant to section 77(a) of the *Forest Conservation and Management Act* of Mt Elgon Forest, which is community land of the Ogiek of Chepkitale, is a violation of article 40 as read together with article 63(2)(d)(ii) of the *Constitution*.

e. An order striking down and or declaring as invalid that part of the 3rd schedule to the *Forest Conservation and Management Act* that purports to declare as public forests the community land of the Ogiek of Chepkitale.

f. An order of permanent injunction restraining the respondents or their agents from interfering with the quiet enjoyment of life by the Ogiek of Chepkitale through either, harassment, burning and destruction of their houses and property through evictions or threats of evictions.

g. An order for compensation for the actual loss suffered by members of the Ogiek of Chepkitale, whose houses were burned or property destroyed for an amount to be fixed by this honourable court.

h. Costs of this petition to be specifically fixed by this court.

10. The 1St and 3rd respondents filed grounds of opposition dated the May 9, 2019 in response to the amended petition.

11. The 2nd respondent filed the replying affidavit sworn by Dennis Kerengo on August 25, 2017, and the preliminary objection dated the March 19, 2018 in opposition to the said petition.

12. The 5th respondent filed a reply dated June 3, 2019 to the amended petition.

Petitioners' Case

13. In support of the petitioners' case, Peter Kitelo Chongeiywo, Johnson Kipsirat Ngeywo, Johnson Cheprot Takur, and Liz Alden Willy testified as PW1 to PW4 respectively.

14. PW1 adopted the depositions in his affidavits sworn on the March 14, 2017, September 27, 2017, April 8, 2019 and October 14, 2019 as his evidence in chief. That he is a member of the Ogiek Community, that in the past was identified as a hunter- gatherer people, but who are currently known for cattle keeping, bee keeping, gathering vegetables and other food stuffs from the forests. That their members are trained in conservation, do not burn trees for charcoal, work with conservation agencies who have been allowing the Ogiek Community to graze their cattle and goats and to collect honey in the forests. According to PW1, the Mt Elgon forest reserve was gazetted in 1932, but the Ogiek Community is claiming a part of portions of the said forest that were degazetted in 1939. PW1 testified that he was born in 1973 and during his lifetime, the Ogiek have been evicted from their ancestral land on six (6) occasions. That in 1979 the Forest Department and the police evicted the Ogiek people from the

forest, while at the same time, the community members were being attacked from the Ugandan side. During cross examination, PW 1 confirmed that the Ogiek participate in activities that are helpful to conserve the forest. That they have traditional houses within the forest and they do not conduct agricultural activities in Chepkitale. He affirmed that it is not necessary for the Ogiek to live in the forest to practice their cultural activities there. Although the Ogiek have no ownership documents, they have proprietary interest in the forest since they have been living in it since time immemorial. That the map he produced as exhibit was prepared by Laban Kiprotich, after numerous public meetings and shows the outer boundaries of the Ogiek Community land before the coming of the Colonialists. That the said map can be interpreted by people who are familiar with the area to ascertain where the land in issue is situated. That further, the list of losses was prepared by Laban Kiprotich, Fred Kiberia and himself. He confirmed that his national identity card indicates that he comes from Bungoma County, Mt Elgon District, Kapsiro Division, Imia Location, Chepyuk Sub- Location. That his parents carry out farming on a five (5) acres farm in Chepyuk Settlement Scheme which used to be part of Mt Elgon Forest, but it was hived off and allocated to members of the Ogiek. The Ogiek people who were allocated land in the said settlement cleared the forest cover, and started planting crops like maize and Irish potatoes, but do not keep cattle. That PW1 lives in Nairobi with his family, but the Ogiek people at Chepyuk Settlement Scheme, live there in timber walled houses. That though PW1 could not ascertain whether all the petitioners were allocated land in the Chepyuk Settlement Scheme, he stated that all the other petitioners live in Mt Elgon Forest. That some of the people allocated land in Chepyuk Settlement Scheme, were not from the Ogiek Community. It was the evidence of PW1 that some members of the Ogiek Community reside in Mau Forest, and others in Mt Elgon Forest. That Mt Elgon Forest is part of the Ogiek ancestral land, and as such it should revert to the Ogiek Community, the same way the Native Reserves were converted to trust land for the Community. That in 2015, he lodged an objection to the 1932 gazettement of Mt Elgon as a forest reserve. That he is aware that before degazettement of an area, a report must be prepared by the National Land Commission (NLC) to advise the Government on the way forward, and such a report is then discussed by Parliament before a decision is arrived at. The Ogiek had lodged a complaint with the NLC before filing the instant suit, and that they had also filed case No 109 of 2008, contesting the gazettement of Chepkitale Game Reserve. The application to degazette is still pending, but it became necessary for thepetitioners to file the instant petition after their eviction. PW1 testified that the land in issue in this petition has not been lawfully registered as is required of Community land, and that if the court allows this petition, the Chepkitale land will not be cleared and subdivided for purposes of issuance of individual titles, as was done in the Chepyuk Settlement Scheme. Chepkitale Game Reserve should not have been gazetted as a Forest in the year 2000, since a portion of the land is Community land belonging to the Ogiek. PW1 stated that he is able to discern the difference between the Ogiek people, and the non-Ogiek by their identifiable distinct observable features that are characteristic of the Ogiek. That the petitioners sued the KWS for participating in the eviction, even though he did not personally see it's officers evicting people or torching houses. During re-examination, PW1 stated that the Ogiek are organized in clans, speak their own language and their existence can be traced to Chepkitale. The Ogiek consider Mt Elgon Forest to be their home and a place that takes care of them, and therefore, they have a duty to protect it in a way that is not destructive to the ecosystem. The Ogiek of Chepkitale keep cattle, but they do not practice hunting and maize crop farming, as they wish to conserve the forest for posterity. The Ogiek have built semi-permanent structures in Chepkitale by choice, and also because of the various evictions. That during the visit to the forest, the court was shown the school with children in attendance and the dispensary, and observed how the community was using the land in the forest. If the Mt Elgon land is given to the Ogiek, it will be communally owned to ensure its use is sustainable, and in accordance with the Ogiek cultural practices. That although the Ogiek people in Chepkitale area are approximately 6,000 in number, there are about 20,000 members of the Ogiek Community in Trans Nzoia, Chepyuk and Chepkitale in Mt

Elgon Forest, Bungoma County. That the Chepyuk Settlement Scheme was started in 1950 by the Colonial Government, but after independence other communities developed an interest in the land in Mt Elgon. PW1 testified that his national identity card indicates that Chepyuk is his sub-location because the Ogiek have no administrative area of their own. PW1 stated that Chepyuk Settlement Scheme is yet to be degazetted, and therefore title deeds are yet to be issued. That there is a difference between the Mau Ogiek who are members of the Ogiek Welfare, and the Chepkitale Ogiek, who are the petitioners herein. The Chepkitale Ogiek know that the name Ndorobo is used to refer to very poor people who have no cattle. PW1 stated that after the 2010 Constitution, the Ogiek Community made a petition to the Government, and participated in meetings organized by the relevant Ministry and NLC touching on their claim for land, but while the matter was still pending resolution, the evictions took place prompting the Ogiek to file this Petition incourt. The Ogiek's decision to come to court was necessitated by the fact that, the NLC determined that their claim was contested.

15. PW2 adopted his affidavit sworn on the April 8, 2019, and testified that he was born in 1950 at Chepkitale, Labot Area, and that in 1968, the Ogiek were evicted from Chepkitale by KWS. That in the subsequent eviction of 1979, KWS were not involved, while the eviction in 1982 involved KFS, the Police and KWS. That the evictions of 1979, 1995 and 2016 were conducted by KFS. He testified that in 1971 the Ogiek were given land in Chepyuk Settlement Scheme, and that they returned to Chepkitale in 1981, but the Police drove them away in 1982. That in 2016 the Police evicted the Ogiek, torched their houses, Schools, dispensary and other public utilities. The Ogiek people vote at Labot Primary School, and they graze their livestock and conduct their cultural rites in the forest where their boys are circumcised. During cross examination, PW2 stated that his first eviction experience was in 1968. That before the colonialists came, every Community had their own area, and the Ogiek were residing in Trans Nzoia County. That although the Ogiek were traditionally hunters and gatherers, they keep cattle, and collect vegetables and honey from the forest. The Ogiek do not cut trees from the forest, but use fallen ones to build their homes. PW2 testified that he was wearing a brown shawl on top of his clothes to prove that he is an Ogiek, even though his identity card shows that he is from Kapsiro Division. It is not possible to keep beehives in the forest while residing outside the forest. There are approximately 5,000 to 6,000 Ogiek people at Chepkitale forest. He testified that he has four (4) wives and they occupy a large portion of land in Chepkitale. Their 30 children live on a five (5) acres farm at Chepyuk Settlement Scheme, that he was given in 1971, but his parents were buried at Chepkitale, and not at Chepyuk. That some of the petitioners were also allocated land in Chepyuk Settlement Scheme. The Ogieks' ancestral land ought to be gazetted as a community forest, so as to give the Ogiek rights over it, as the community is willing to work with Government agencies, including the KWS in conservation efforts. During re-examination, PW2 stated that his identity card does not capture his tribe, but it shows that he is from Mount Elgon District, and not Mount Elgon Forest. The Ogiek could not report the evictions to the Government as it was the perpetrator. The Ogiek people do not conduct crop farming, and had substituted hunting with keeping sheep which they purchased from the Bukusu and the Pokot.

16. PW3 adopted the depositions in his affidavits sworn on the April 8, 2019 and May 26, 2021. He testified that he was born in 1953 at Chepkitale Labot, and that the schools that were started by the Ogiek community at Chepkitale have since become public schools, where pupils sit for their Kenya Certificate of Primary Education (KCPE). That among the Ogiek, when a mother brings forth twins, she is required to stay at home for two (2) months, following which she is taken through a special cleansing rite in the forest, before being allowed to rejoin the society. After circumcision, young boys are taken to the circumcision site in the forest. It was his testimony that he had witnessed the 1979 eviction, after which the Ogiek stayed away from the forest for about two (2) years before returning back into the forest. That in 1988, the Ogiek were evicted from the forest again. That he was not

affected by the 2016 eviction, and his house was not burnt. PW3 testified that the evictions were conducted by people armed with guns and dressed in uniform. During cross examination, PW3 stated that he attended Labot Primary School from 1959, but he had no certificates to produce before the court. That there are five (5) public schools in Chepkitale, and the Ministry of Education can confirm this fact. That from the time when the Ogiek people stopped living in caves, they started constructing houses using fallen trees, and some trees cut from the forest. That most Ogiek people keep cattle or sheep, grow crops like maize and they gather fruits and vegetables from the forest. That in Chepkitale, PW3 grows maize and he has ten (10) heads of cattle and some sheep. It was his testimony that he was not aware that KFS does not allow goats in the forest. There are thirty-two (32) Ogiek clans, and each clan has a chairman. That twenty-eight (28) chairmen of the Ogiek clans had attended a meeting where it was agreed that the petitioners would approach the court on behalf of the Ogiek Community. The attendance of the other four (4) chairmen of the Ogiek clans, could however not be secured when the aforesaid meeting was held. The chairmen whose names appear at numbers 5, 6, 15, 16, 20, 21, 22, 23, 25 and 27 of their list were allocated land at Chepyuk settlement scheme, while six (6) of the chairmen on the list have no land at the said scheme. That after the 1979 eviction, PW3 was given five (5) acres of land in Chepyuk Settlement Scheme in 1989. The allocation of Phase I at Chepyuk Settlement Scheme took place between 1971 to 1974, and the Government gave out 3,686 hectares. Phase II was in the 1980s to 1989 and the Government gave out 3,568 hectares. Phase III was allocated in 1993 to 2006 and the Government gave out 496 hectares. That though the land allocated during the three phases was given by the Government free, the Ogiek are still entitled to the land in Chepkitale. That the details on his identity card issued in 1996 are accurate, and show that he is from Kapsiro Division of Mt Elgon district, Emia Location, Chepyuk sub-location. That Chepkitale National Reserve or Chepkitale Forest is Ogiek ancestral land, and not a public forest, and therefore, their eviction was unwarranted. He testified that although the Ogiek Community work with KWS in conservation and protecting animals, they have sued KWS because it took their land forcefully, and has also prevented the Ogiek from grazing their animals in some areas of the forest. That in 1971, the Government had promised to give the land in Chepyuk Settlement Scheme to the Ogiek, but they brought other communities like the Soi, and settled them alongside the Ogiek who only occupy half of the land, and no titles to the said land have been issued. The witness indicated that none of his family members was allocated land in Chepyuk Settlement Scheme, yet the land in the scheme should have been allotted to the Ogiek Community members only. That following the eviction, the affected Ogiek Community members, had to seek alternative accommodation, and the Government sold their cattle in the process. That some people who are not from the Ogiek Community engage in forest-shamba farming with KFS's permission at Chepkitale, but the Ogiek only keep animals. PW3 stated that he had no certificates to show that he went to Labot Primary School within Chepkitale forest, as his certificates got lost during the evictions. That the Ogiek are only seeking for their land and protection.

17. PW4 adopted the contents of her affidavit sworn on the July 19, 2019, as her evidence in chief. It was her testimony that she has a Doctorate in customary land tenure in Africa, and in the last forty (40) years, she has worked in about twenty (20) countries in Asia and Africa in the area of community-based land rights. In Kenya, she has worked with the Ogiek of Elgon, Sengwer, Ogiek of Mau and the Yaku of Mukogondo Forest, Laikipia, to secure their property rights. That she was also an external consultant for the Land Chapter in the *Constitution 2010*, the National Land Policy, the Njonjo Commission and the Community Land Act. She testified that it is important for communities to have secure title in land in order to secure conservation. That in Africa, Tanzania is leading in acknowledging that community land ownership or security, enhances conservation. That the Ogiek have the capacity to conserve and manage the land resources given to them, so long they have secure title in land. The hunter-gatherers tend to go back to the environment in which they have been living in for generations, even if they are made to relocate. The hunter-gathers can allocate each other responsibilities over specific areas

tied to their social organization without harming the ecosystem. The hunter gatherers, and pastoralist have a specific commitment to conservation. That they protect the forests and tend to expand their conservation and protection mandate as they draw more benefits from the forest than the Government. That the forest protected areas are usually community land areas, and they are better managed and conserved when the communities work or cooperate with the Government. It was her testimony that the recognition of the land rights of hunter-gatherer communities is important, and that once the forest is community owned, the community will manage and conserve it, while the Government offers technical support, as is done in South Africa. The witness supports the recognition of land ownership rights advanced by the Ogiek, adding that the public agencies concerned can set up conditions on the Ogieks' settlement and conservation of the resources within the forest. During cross examination PW4 stated that she participated in meetings with the Ogiek Community leaders, visited their habitat, was shown their boundaries and the specific uses for certain areas within the forest. She also testified that she has researched on forest conservation elsewhere outside Kenya, and has written extensively on how forest conservation affects Kenya. The witness confirmed that she was aware of the procedure to be followed to convert a public forest into a community forest, even though it is not set out in the Community Land Act. She indicated that the conversion process is very difficult for the community to follow as it requires approval from various public agencies and Parliament. That she supports the allocation of public forest land to Communities in appropriate cases like the instant one, where she is convinced that the conservation of the Mt Elgon Forest can be better achieved when it is managed by the Ogiek Community for intergenerational benefits. It was her testimony that the petitioners herein are gatherers of vegetables, fruits and honey from the forests. That the Ogiek Community, like many other hunter gatherer communities, has transformed and embraced other economic activities in place of hunting, which has since become outlawed. That like the San Community of Botswana, the Ogiek Community has a good relationship with the environment, and as such they are seeking the protection of their land. PW4 testified that she is aware that the Ogiek were given land at the Chepyuk Settlement Scheme with the hope that they would be assimilated into the neighbouring communities. That she is aware Kenya had started Participatory Forest Management in 2005 with the establishment of Community Forest Associations. That the Ogiek know each other well, even though they do not have a Community Forest Association, which in her view would not serve their interest because they live in the forests. That she is aware that the Ogiek are still in the process of collecting the required details to enable them to apply to have the Mt Elgon public forest registered as a community forest under the Community Land Act. That it was unfortunate that the Community Land Act does not outline how the forest communities' rights will be guaranteed under the law, which in the view of PW4, should be the basis for it to be amended through Parliament. The witness stated that in her view, the Ogiek were right to come to court because their approach through the NLC had not gone far, and they are unlikely to get their land rights recognized and registered through the NLC. It was her testimony that Mt Elgon is one of the five Water Tower Ecosystems in Kenya, and as a forest ecosystem, it is fragile and cannot accommodate cultivation. That though Mt Elgon water tower is important for biodiversity, she has no doubts the Ogiek Community will protect the forest better than when it is under the public entities. That she had testified in the Arusha African Court of Justice and she argued for aboriginal rights of the Mau to be allowed to reside at the Mau forest. She also told the court that she was familiar with the decision of the African Court on the Ogiek case, and is aware the court directed the Kenya Government and Ogiek to agree on settlement for the wrongful eviction. That she is aware that the Mt Elgon Ogiek were settled at Chepyuk Settlement Scheme, where they were given small portions of land, from what forms part of the Ogiek ancestral land. That some the said Ogiek have taken up farming in Chepyuk Settlement Scheme, but that does not stop them from requiring the use of the forest for their rites. That the Ogiek Community are willing to work with the government in conservation efforts, and they can also adopt new economic activities. PW4 stated that

she is aware the Forest Act outlaws people living in gazetted forests, and that there are no registered community forests in Kenya. During re-examination, PW4 stated that the intergenerational principle of equity ensures future generations are not disadvantaged in the natural resources. That although she is not an environmental conservation specialist, she understands the Ogiek's sustainable development and ecosystems roles. That to her, the Mau Ogiek and the Mt Elgon Ogiek are the same and share the Kalenjin language. That participatory Forest Management or Community Forest Management are general terms on co-management and use of the forest. The Community Forest Management is the Kenyan version of the Participatory Forest Management. The Ogiek as owners of the forest land, do not need the Community Forest Management which is useful to those living next to the forests, as opposed to those living in the forest. The inclusion of Community Forest Management Models after the 2010 Constitution appear to indicate that the Government was not ready to acknowledge forest people, like the Ogiek. PW 4 testified that articles 63 and 61 of the *Constitution* recognize that land in Kenya belongs to the community, and that article 63(5) of the *Constitution* has been fulfilled through the enactment of the Community Land Act. That the Community Land Act does not contain specific provisions for forest people, like the hunters-gatherers who live within forests, which have been converted into public forests. The Ogiek and other forest people, should have been acknowledged as the communities with rights within the forests, by providing a process of registering such forests into community forests. That she is aware community land is not recognized until after registration, which in her opinion, is unconstitutional. That as *Constitution* has already recognized community land, all that is left to be done is the lodging of an application for registration of existing community land. That even though the Ogiek had started farming instead of hunting and gathering, they can still be referred to as a hunter-gatherer community. That it is unconstitutional to make a community change their social economic activities, except in situations where they do so willingly.

Respondents' Case

2nd Respondent's case

18. Laura Yego, the head of Legal Services at KFS, testified as DW1, adopting the contents of her statement dated the June 4, 2021 and the depositions in the affidavit sworn by Dennis Kerengo on the August 25, 2017 in reply to the Petition, as her evidence in chief. During cross examination DW1 stated that KFS observes good governance practices, including public participation, human rights, dignity and protection of the marginalized. That she had received reports from KFS Officers in Bungoma and Mt Elgon that the forest occupation by the Ogiek poses a threat to the forest and its conservation, even though she had no documentary evidence in court to confirm it. It was her evidence that the petitioners have failed to prove that they are members of a forest community, or indigenous people, or a hunter-gatherer community. That the mandate of KFS under section 8 of the FCMA includes eviction of illegal occupants from forests as part of forest protection, and that mandate is carried out in a humane way. She confirmed that eviction notices of not less than 21 days were issued before the eviction was carried out, even though no copies have been furnished to the court. That though the hunter-gatherer communities are mentioned in the *Constitution 2010*, it was not recognized in the *FCMA*. The witness testified that she is not aware that there are public schools within the forest. That the identity cards of PW1 to PW3 indicated that they were born outside the forest. The Kenyan national identity does not indicate from which community one comes from, or to which community one belongs to. That further, the physical appearance of one does not show where a person comes from. That she was familiar with the Ndung'u Land Commission report, but was not aware that the said report had found that the Chepyuk Settlement Scheme was meant for the Sabaot Community, and that the excision of about 8000 acres of forest land was illegal, and a recipe to environmental degradation. It was her testimony that the allotments at Chepyuk Settlement Scheme were meant to remove the

Ogiek community members from the forest, so as to stop further environmental degradation. That she was aware of the Shamba system that is only allowed in plantation forests, but not in natural forests. She added that she was however not aware how many acres in Mt Elgon forest were under the Shamba system. During re-examination, DW1 stated that the petitioners had not proved that the Ogiek community members are hunters and gatherers or their eviction allegations. To DW1, the National Land Policy is not a law, but a policy that is to be effectuated through relevant laws being enacted. That the Ndung'u Land Commission report is also not a provision of the law, but a taskforce report containing recommendations. That the petitioners' claim should have been presented before the NLC or Parliament, since they have the mandate to have the land degazetted under the Forest Conservation and Coordination Act, which powers the court does not possess. That KFS has not received any complaints of dissatisfaction from the petitioners on how the Shamba system outside the natural forest areas of Mt Elgon is operated. That the *Constitution of Kenya* and Statutes, including the FCMA, have not named any community in Kenya that is hunter-gatherer. That further, KFS does not use violence or force in eviction. That before the evictions complained of herein, seven (7) days sensitization Barazas were held in the area, followed with the twenty-one (21) days' notice. DW1 testified that the Chepyuk Settlement Scheme was done in three phases, all totalling to over 11,000 acres, in settling the people who had issues with encroachment into the forest, and each was given five (5) acres. That none of the petitioners had acknowledged in their affidavits that they had been allocated land at the Chepyuk Settlement Scheme, that falls within the Mt Elgon forest.

5th Respondent's case

19. Catherine Wambani, Assistant Director KWS, Western Conservation Area, testified as DW2, and adopted her statement dated the June 3, 2021 as her evidence in chief. DW2 briefed the court on the functions of KWS that include providing security for protection of flora and fauna in their habitat, research, veterinary services for the animals, management of relationship between human beings and wildlife, education outreach programs, and partnerships with the National and County Governments. That Chepkitale National Reserve, Bungoma County is a protected area, that is managed by the County Government of Bungoma, with KWS providing technical support. That the Western Conservation Office that she is in charge of, covers Trans Nzoia, Bungoma and nine (9) other counties. That in Bungoma County, KWS works with one hundred and three (103) scouts in elephant protection, and that some of those scouts are from the Ogiek Community. During cross examination, DW2 stated that biodiversity involves the people, flora and fauna. That as an officer of KWS, she is qualified to testify on matters that happened in the area before she took over, even though she could not give a factual explanation of what happened in 2016 in Mt Elgon. That the KWS's protection role requires it to manage the relationship between the people and animals, by ensuring that the wild animals do not cause damage to people's properties. That there are dangerous animals in Mt Elgon, including the elephants and others whose interactions with people could lead to injuries, loss of life and damage to crops, livestock and structures on their path or range. That elephants do not know the boundaries between Mt Elgon National Park and Chepkitale National Reserve, as they traverse through the whole of Mt Elgon forest, which forest goes up to Uganda. That Chepkitale National Reserve is a protected area and any human habitation thereon will interfere with the elephants' movements. It was her testimony that she is not aware of any people or community living within Chepkitale National Reserve, but is aware that limited activities may be allowed in a National reserve so long as such activities are beneficial to conservation. That the KWCA allows participatory wildlife management and partnership programs, especially with adjacent communities. That hunting in Kenya, even for subsistence, is prohibited in both the protected and unprotected areas.

20. Judith Akinyi Adipo, a Land Officer with KWS, testified as DW 3, and adopted her statement dated the June 4, 2021 as her evidence in chief. It was her testimony that among the functions of KWS is to protect, manage and conserve all the protected areas, which include Chepkitale National Reserve that is managed by Bungoma County, with technical support from KWS. During cross examination, DW3 informed the court that National Reserves are not Community lands. That she does not have factual details of what happened on June 20, 2016 in Mt Elgon, Bungoma County. She acknowledged that there are public schools within Chepkitale National Reserve, but added that KWS does not get involved in the management of schools. That she was aware that the Government establishes public schools in areas with community habitation. That some of those schools within National Reserves were established by KWS to assist the communities around the area as part of KWS' corporate social responsibility. That before an area is declared a National Reserve, the Community or County identifies the area, and submits a request to KWS for gazettement. That in confirming whether the area is viable for gazettement, KWS conducts research to confirm the existence of diversity in the recommended area. That an ecological report is then prepared, and the County engages the community, after which an Environmental Impact Assessment (EIA) is prepared and a certificate issued. Thereafter, an aerial survey is conducted, and once approved by the Director of Surveys, the approvals are obtained and gazettement follows. That the process takes not less than one year to completion. The witness informed the court that she is not aware of any forceful eviction in Mt Elgon Forest on the June 20, 2016 and if such an eviction would have happened, KWS would have been briefed by the regional office.

21. The 4th respondent, the NLC, did not participate nor file any pleadings in response to the petition. The 1ST and 3rd respondents did not call any witnesses.

22. After the parties closed their respective cases, the learned counsel for the petitioners', the 1sT and 3rd respondents, 2nd respondent and 5th respondents, filed their respective submissions. The *amicus curiae* filed their brief on the September 30, 2021.

Petitioners' Submissions

23. The learned counsel for the petitioners filed their submissions on the September 8, 2021. They submitted that according to the Ogiek Community, 'Chepkitale' is a traditional word that refers to the Ogiek Community's traditional lands. Chepkitale now consists of the following protected areas established by the pre-colonial and independence Governments: Mt Elgon Forest, Mt Elgon National Park and Chepkitale National Reserve.

24. The petitioners are members of the Ogiek Community of Chepkitale in Mt Elgon. They are a marginalized community of hunter-gatherers who self-identify as an indigenous people.

25. On or about March 24, 2016, the County Commissioner of Bungoma gave notice to the Ogiek Community of Chepkitale to leave the forest. The community tried approaching the County commissioner to stop the evictions, but on June 20, 2016, the 2nd, 3rd and 5th respondents committed violent and forced evictions on the Ogiek living in Kapsang and Etapei villages in Mt Elgon forest.

26. On March 14, 2017, the petitioners filed their petition under certificate of urgency, seeking for conservatory orders. The court conducted a site visit on September 27, 2017, accompanied by counsel for the petitioners, the 2nd respondent, and the *amicus curiae*. After the site visit, the court issued orders that the status quo at the time of site visit be maintained pending hearing and determination of the petition.

27. In addressing whether this court has the jurisdiction to determine this matter, the petitioners submitted that the issues raised in this petition cannot be determined by Parliament or the NLC.

28. The petitioners cited the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others(*2012) eKLR, and submitted that the jurisdiction of the Environment and Land Court flows from article 162(2)(b) of the *Constitution*, as read with section 13(1) and (2) of the *Environment and Land Court Act*, 2011. Article 162(2)(b) of the *Constitution* mandates Parliament to establish courts with the status of the High Court to hear and determine disputes relating to the environment, the use and occupation of land, and title to land. Section 13(2) of the Environmrnt and Land Court Act provides that, in the exercise of its jurisdiction under article 162(2)(b), this court has the power to hear and determine the following disputes: -

    (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

    (b) relating to land administration and management;

    (c) relating to public, private and community land and contracts, choses in action of other instruments granting any enforceable interests in land; and (c) any other dispute relating to environment and land.

29. The questions presented for determination relate to the interpretation of what community land is, and any other dispute relating to environment and land, as the area in dispute is also a protected area with environmental significance. These questions fall squarely within the jurisdiction of the Environment and Land Court under article 162(2)(b) of the *Constitution*, as read with section 13(2) of the *Environment and Land Court Act*.

30. The petitioners submitted that Mt Elgon Forest is their community land underarticles 63(2)(d)(ii) and 40 of the *Constitution*. Article 63(2)(d)(ii) states that the community lands are "ancestral lands" and "lands traditionally occupied by hunter-gatherer communities."

31. Article 260 of the *Constitution* refers to hunter-gatherer communities when it defines a marginalized community to include- "(c) an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy."

32. Counsel referred to the testimonies of PW1 to PW4 and submitted that the Ogiek Community traditionally occupied Chepkitale forest, which is known as their ancestral land.

33. The petitioners cited article 259(1) and (3) of the *Constitution* which provides for the interpretation of the *Constitution*, and they submitted that the Supreme Court has also provided guidance concerning the holistic, purposive and harmonization theories of interpretation of the *Constitution*, which are different from the principles of statutory interpretation. The petitioners cited the case of *Gatirau Peter Munya v IEBC and others* (2014) eKLR, paragraph 232 in support of their submissions.

34. From the reading of article 63(2)(d)(ii) of the *Constitution*, the fact that the 2010 *Constitution* included the term "hunter-gatherer" communities even though laws had banned the hunting of wild animals, means that hunter-gatherers do not cease to exist at the stroke of a legislator's pen. Article 63(2)(d)(ii) recognizes that these communities continued to exist on the effective date, notwithstanding the hunting ban and occasional removal from their traditionally occupied ancestral lands. Article 63(2)(d)(ii) would otherwise have served no purpose.

35. The petitioners submit that the word "lawful" does not appear in article 63(2)(d)(ii) thus its omission can only have been deliberate per the legal maxim expression unius est exclusio alterius. Even if one could argue that the occupation of hunter-gatherer communities was not recognised in law previously, the *Constitution* now recognizes occupation as lawful because it is community land. Article 63(2)(d)(ii)

can and should therefore be construed to apply to all traditional lands occupied by present or former hunter-gatherer communities.

36. The petitioners aver that a historical analysis of state policy documents before the promulgation of the 2010 Constitution, illustrated the problems the hunter-gatherer communities faced due to laws and government practices that sought to take away their lands. In *Joseph Letuya and others v Attorney-general and others* (2014) eKLR, the court had to determine whether Mau forest was the community land of the Ogiek hunter-gatherer indigenous community. The court held at page 12 that article 63(2)(d) is "to be given effect to in and by an Act of Parliament which is yet to be enacted, and once enacted this is the law that will probably eventually settle the issue of the property rights of the Ogiek Community in the Mau and other forests in which they claim ancestral rights."

37. The Community Land Act was enacted in 2016 as "an Act of Parliament to give effect to article 63(5) of the *Constitution*; to provide for the recognition, protection and registration of community land rights; management and administration of community land; to provide for the role of county governments in relation to unregistered community land and for connected purposes."

38. Part II of the Act is titled "Recognition, Protection and Registration". Section 4 under this part provides for the ownership and tenure system of community land. The *Community Land Act* establishes procedures for registering community land and imposes duties on various state organs.

39. Government forests are classified as public land under article 62(1)(g) and not (a), (c), (d) or (e), and are therefore not subject to the article 63(2) proviso. It follows that if the land on which a government forest is situated comes within one of the categories listed in article 63(2)(a) to (d) inclusive, it will not become public land under article 62(1)(g), but is instead community land underarticle 63(2) because it is not subject to the proviso.

40. The interpretation of article 40 of the *Constitution* protects the community's right to property in Mt Elgon Forest. In considering an application under article 40 of the Bill of Rights, this court is called upon to adopt the interpretation that most favours the enforcement of fundamental rights or freedoms. The above was summarized in the Court of Appeal case of *Mtana Lewa v Kahindi Ngala Mwagandi* [2015] eKLR.

41. The petitioners advanced an alternative argument placing reliance on the doctrine of native title. They submitted that if the court were to find in favour of the respondents' argument that Mt Elgon Forest is public land, it is still subject to article 40, and therefore to the pre-existing rights of the Ogiek Community, which constitute an interest in or right over that land. Article 40 applies to "any interest in or right over property of any description". This formula is expressed in extremely broad terms and includes an interest in or right over land to which the title is vested in the State.

42. The doctrine of native title is founded on the following principles:-

    i. A mere change in sovereignty is not to be presumed to disturb the rights of private owners.

    ii. Only the Legislature can interfere with property rights, and even then, only if it expresses its intention to do so in clear and plain terms. It must use equally clear language if it wants to delegate this power to the Executive.

43. Both principles apply to former British colonies and protectorates and are the basis of the doctrine of native title, which holds that the pre-existing rights of native peoples are deemed to have continued under British rule and after independence unless, and until they have been expressly extinguished. The only alternative would have been to hold that pre-existing rights should have legal effect only if they were expressly recognized by the colonial authorities. See *Mabo v Queensland (No 2)* (1992) 175 CLR

1, where the High Court of Australia reviewed all the authorities and concluded that previous denials of native title had been based on a mistaken application of the common law. A true analysis of the law showed that: -

i. The colonization of a territory did not extinguish pre-existing rights and interests held by the inhabitants of that territory according to their own law and custom.

ii. Those rights and interests give rise to a *sui generis* title which is protected by the common law as a burden on the radical title of the Crown.

iii. This native title doctrine can be extinguished by laws or executive grants, but only if there is a plain and clear intention to do so. The onus is on those who allege the extinguishment to show when and how it occurred.

44. The Ogiek of Chepkitale are entitled to the protection of the native title doctrine for the following reasons: -

i. They occupied and used the Forest land for many years prior to 1895, and had by then acquired customary rights over it.

ii. These rights survived the establishment of the Protectorate in that year, and the formation of the Colony in 1920.

iii. Although the aforementioned rights could have been extinguished by the Commissioner of the Protectorate or the Governor or Legislative Council of the Colony, they were not in fact extinguished.

iv. Their rights now constitute an interest in or right over property protected by article 40.

45. The petitioners submitted that there was no extinguishment of the rights of the Ogiek during the colonial period. The list of forests first appeared in the Forest Ordinances. The said list was carried over into independence, and when the 2010 Constitution came into effect the list was contained in section 52 of the *Forest Act* 2005. But if section 64 of the *Forest Act* 2005 had extinguished the pre-existing rights of the Ogiek, it could only have done so in breach of article 40(2)(b) or 40(3)(b). In addition, case law in other common law jurisdictions shows that on a proper construction, section 64 of the Forest Act does not extinguish pre-existing rights, and nor did its statutory predecessors.

46. Article 40(2)(b) prohibits Parliament from restricting "in any way" the enjoyment of "any" right under article 40 on the basis of any of the grounds specified in article 27(4).

47. If section 64 of the *Forest Act* 2005 extinguished pre-existing rights, this would have constituted a deprivation of an interest in or right over property of any description for the purposes of article 40(3)(b). The 2016 Act would have therefore, had to provide for the prompt payment of just compensation to members of the Ogiek Community, and have allowed them a right of access to the courts under articles 23 and 40(3)(b)(i) and (ii) of the *Constitution*. The Act does not satisfy either of these requirements.

48. Kenyan courts have usually found against claims based on native title, because they have not been properly informed of the legal principles and case law summarized above. Even where the Mabo case (*supra*) has been cited, the court did not consider the key conclusions reached in that decision, and in several instances, the evidence has been plainly inadequate. One of these was *Kemai and others v. Attorney General and 3 others* (2006) 1 KLR (E&L) 326 where the High Court dismissed a claim to aboriginal rights in the East Mau Forest because "nothing was placed before us by way of early history to give (the Ogiek) an ancestry in this particular land."

49. The court should follow the Commonwealth authorities cited and the common law principles they have identified. It should reject any notion that the Ogiek have somehow become trespassers in their own lands.

50. If the State now wishes to extinguish the Ogiek's interest in or right over the land presently included in the Mt Elgon Forest, it may only do so in accordance witharticle 40(3) of the *Constitution*.

51. The petitioners have suffered forced evictions at the hands of the 2nd respondents (KFS), the 5th respondents (KWS), and the Kenya Police Service (3rd respondent) many times. More recently, the petitioners state that in June 2016, a forceful eviction was conducted, after a verbal notice was issued by the Bungoma County Commissioner, by the 2nd, 3rd and 5th respondents, during which houses were burned, household property destroyed, and people injured in their ancestral lands in Kapsang and Etapei villages, within Mt Elgon forest. In addition, the County Commissioner and other Government agencies continue to threaten the community with further evictions.

52. The aforementioned forceful eviction was a violation of articles 28, 29(c) and (f), 43,44 and 56 of the*Constitution* relating to the right to human dignity, the right to freedom and security of the person, which includes the right not to be subjected to any form of violence from either public or private sources and the right not to be treated in a cruel, inhuman or degrading manner, the right to adequate and accessible housing, right to culture and the rights of minorities and marginalised groups.

53. The previous and current forced evictions of the Chepkitale Ogiek of Mt Elgon and the burning of their homes by the respondents have no basis in law, and are therefore *ultra vires* and amount to unlawful, unconstitutional, and criminal acts.

54. In determining whether these rights were violated, this court is guided by articles 19 and 20 of the *Constitution*. article 19(2) provides that the purpose of recognizing and protecting human rights and fundamental freedoms is, in part, to preserve the human dignity of individuals and communities. Article 19(3)(b) states that the rights and freedoms in the Bill of Rights do not exclude other rights and freedoms not in the Bill of Rights, but conferred by law.

55. In *Satrose Ayuma and others v Registered Trustees of the Kenya Railways Staff Retirement Benefit Scheme and 3 others* (2015) eKLR the High Court held that the eviction of groups of people, rendering them homeless was a violation of their right to human dignity.

56. Counsel referred to a list outlining the names of community members, their identification numbers, and the houses and structures burned during the 20th June 2016 evictions that is attached to the affidavit of PW1 dated September 27, 2017, and submitted that the respondents did not challenge its contents in their replying affidavits.

57. Counsel further submitted that, article 43(1)(b) of the *Constitution* enshrines the right to adequate and accessible housing. In *Mitu-bell Welfare Society v Kenya Airports Authority & 2 others; Initiative For Strategic Litigation In Africa (Amicus Curiae)* (2021) eKLR, the Supreme Court held at paragraph 149 that the right to housing "accrues to every individual or family, by virtue of being a citizen of this country." In addition, the court held at paragraph 153 that "the right to housing in its base form (shelter) need not be predicated upon "title to land". The Supreme Court affirmed the High Court's reliance on UN Guidelines on Evictions General Comment No 7, which drew from the International Convention on Economic, Social and Cultural Rights (ICESCR), and the *International Convention on Civil and Political Rights* (ICCPR), since these documents set out the minimum requirements before an eviction takes place.

58. The right to accessible and adequate housing of this indigenous Mt Elgon Ogiek hunter-gatherer community is linked to the legal security of tenure to their ancestral land, as well as the land's accessibility, location and cultural adequacy.

59. The petitioners submitted that the forced evictions by the respondents were a violation of the right to culture protected under article 44, as read with article 1(1) of the *Constitution*. There was a violation of the Chepkitale Ogieks' right to cultural life when they were evicted from the Mt Elgon Forest without being consulted.

60. The eviction of the Ogiek of Chepkitale in Mt Elgon by the 2nd, 3rd and 5th respondents violated their rights as a minority and marginalised group. This is because the state is retrogressing by failing to adhere to its duty to provide affirmative action in support of the culture and practices of this group and respect them, instead the respondents are performing actions (evictions) that violate their rights.

61. In conclusion, the forceful evictions were a violation of articles 28, 29, 43, 44, 49 and 56 of the *Constitution*.

62. In the alternative, if the court were to agree with the respondents and find that Mt Elgon Forest is public land, it is still subject to the rights of the Chepkitale Ogiek under articles 43 and 44 of the *Constitution* and the evictions were carried out in breach of *Constitution*.

63. At the time of the evictions, all members of the Ogiek Community resident in the forest, had the following rights that ought to have been protected whether or not they had any lawful right to be in the forest: -

    i. The right to housing in their respective settlements in the Forest by virtue of article 43(1)(b) of the *Constitution* and their long occupation of the Forest.

    ii. The right to be free from hunger, and to have adequate food of acceptable quality, pursuant to article 43(1)(c).

    iii. The right to enjoy their culture together with other members of their community under article 44.

64. The evidence confirms that at the time of the evictions: -

    i. The only housing available to the Community was in the settlements which its members had from time to time erected for themselves in the forest.

    ii. In the absence of Government support, the only way in which the Community could avoid hunger and/or have adequate food of acceptable quality was to exploit the resources of the forest as they had done in the past;

    iii. Community members engaged in cultural practices together and, for that purpose, made use of cultural sites in the forest.

65. The petitioners argued that the Community members could therefore have been lawfully removed from the forest only if at the date of their removal there had been reasonable grounds to believe the following: -

    i. That the sustainable utilization of the Forest and its resources necessitated their removal.

    ii. That suitable alternative housing and means of subsistence would be available to them outside the Forest; and

iii. That suitable arrangements had also been made to enable them to continue to follow cultural practices together and, if necessary, to have reasonable access to their cultural sites in the Forest.

66. Since none of these conditions had been satisfied when the evictions took place, the evictions were conducted in breach of the rights of the Community.

67. The gazettement of Mt Elgon Forest through the third schedule of the FCMA, 2016 as a public forest is a violation of the right to property of the Ogiek of Chepkitale contrary to article 40 as read together with article 63(2)(d)(ii) of the *Constitution*.

68. The third schedule of the FCMA lists Gazetted Public Forests and includes at No. 91, Mt Elgon Forest. The Petitioners submit that this is an error since Mt Elgon Forest is not a public forest, but is community land belonging to the Ogiek of Chepkitale.

69. The listing of Mt Elgon forest as a public forest, pursuant to section 77 of FCMA, even after the passing of the 2010 Constitution is unconstitutional to the extent that it failed to exclude forests that are found on community land, such as the ancestral lands of hunter-gatherer communities, that are classified as such under article 63(2)(d)(ii) of the *Constitution*.

70. Before determining the constitutionality of a statutory provision, the court must consider certain principles set out in the case of *Law Society of Kenya v Attorney General & another* (2019) eKLR where the Supreme Court held at paragraph 36 that it is a court's function to test ordinary legislation against the governing yardstick — the *Constitution* — and the following principles must guide it: -

The first principle at paragraph 37 is that;

i. "there is a general but rebuttable presumption that a statutory provision is consistent with the *Constitution*. The party that alleges inconsistency has the burden of proving such a contention. In construing whether statutory provisions offend the *Constitution*, courts must therefore subject the same to an objective inquiry as to whether they conform with the *Constitution*."

(See also *Ndynabo v Attorney-General of Tanzania* (2001) EA 495).

ii. "The second principle at paragraph 38 is that the determination of the purpose and effect of such a statutory provision bears in mind what the provision is directed or aimed at and whether the intention of the drafters can be discerned with clarity."

71. That section 77(a) of FCMA, read with the third schedule of the Act, was put in place after the *Forest Act* of 2005 was repealed, in order to transfer the list of public forests that were listed in the 2005 Act into the 2016 FCMA. This provision was introduced after the 2010 Constitution was promulgated, but failed to address the shortcomings of the *Forest Act 2005*, such as a failure to consider that forests in the 2005 Act were now ancestral lands of hunter-gatherer communities, hence categorised as community land. The 2005 Forest Act had not benefited from the National Land Policy 2009, which at paragraph 3.6.6 recognized how historically, the colonial government marginalized hunter-gatherers and made them lose access to their lands through gazzettement of their habitats as forests.

72. When the 2010 *Constitution* was passed, the sixth schedule, section 7(1) provided a transitional mechanism as follows: -

> " all law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution."

This provision was meant to cure any laws which were inconsistent with the *Constitution*. As of August 27, 2010, the *Forest Act*, 2005 was to be construed in a manner to bring it in conformity with the *Constitution*.

73. However, when the 2005 Act was repealed, the 2016 Act, which was intended to align forest conservation and management issues with the *Constitution* and other related policies, carried over provisions that had unconstitutional effects. From a reading of the Act, the specific purpose of section 77 was to ensure that any land that was gazetted or registered as a forest under the 2005 Act and before the enactment of the 2016 Act, would retain that status. The purpose of this provision is not unconstitutional.

74. This gazzettement contravenes the provisions of article 40(2)(b) of the *Constitution* on the following grounds: -

    i. Article 40(2)(b) prohibits Parliament from restricting "in any way" the enjoyment of rights under the article based on of the grounds specified inarticle 27(4).

    ii. The Ogiek have a right in or interest over the Forest under the article by virtue of an interpretation of article 40 and the Doctrine of Native title.

    iii. The prohibitions imposed by section 64 of the 2016 Act are undoubtedly restrictions for purposes of article 40(2)(b) of the *Constitution* because the rules set out in section 64 apply to everyone in the same way, but have a far worse effect on the Ogiek and other hunter-gatherer communities than they do on others, and therefore indirectly discriminate against them.

    iv. These prohibitions are not permissible because they are based on indirect discrimination against the Ogiek and are therefore caught by article 27(4). This prohibits indirect discrimination on grounds including ethnic origin.

75. The petitioners cited the case of *Engineers Boards of Kenya v Jesse Waweru Wahome & 5 others* (2015) eKLR on the holistic approach to interpretation. The petitioners have shown that, section 64 of the *FCMA*, as well as the third schedule, which lists Mt Elgon Forest as a public forest, have limited several of their rights. The respondents specifically argue that the petitioners have limited rights under articles 26, 28, 29, 40, 42, 44 and 56 of the *Constitution*. Under article 24 of the *Constitution*, any actions or legislative measures that limit these rights must meet the three-part test summarised in article 24, that is; (i) must be provided by law; (ii) must pursue a legitimate aim; and (iii) must be necessary in an open and democratic society.

76. The petitioners cited the case of *Mtana Lewa v Kahindi Ngala Mwagandi* (2015) eKLR and submitted that in this case, the 2nd respondent has relied on section 64 of the *FCMA*, 2016 and the listing of Mt Elgon Forest as a public forest under the Act, as the law limiting the rights of the petitioners. The aforementioned statutory provisions are unconstitutional. If the court finds these provisions to be unconstitutional, then there will be no law and no need to undertake the article 24 analysis.

77. There is no presumption of unconstitutionality of statutes that limit fundamental rights and freedoms. Article 24(3) of the *Constitution* provides that the State has the burden of justifying the limitation of the rights. This justification must be in the form of evidence. In this instance, although the respondents claim that the provisions are to ensure the conservation of the forest, they have failed to provide evidence of how the petitioners are degrading the forest.

78. The petitioners cite the case of *Shwabe And Mg v Germany* No 8080/08 ECHR (fifth section), by the European Court on Human Rights to address the last limb of article 24. Article 24(1) requires

a proportionality analysis that takes into account: (a)the nature of the right, whether the right is one that would warrant a limitation; (b) whether the objective of limitation is justifiable and whether the limitation is rationally connected to the purpose; (c) whether the nature and extent of the limitation is acceptable; (d) that the enjoyment of rights by the individual does not prejudice the rights of others; and (e) that the adopted limitation on the enjoyment of the right is the least restrictive possible.

79. The petitioners submit that the respondents have not met the above requirements in the following ways: (i) the limitation is not rationally connected with the purpose, and (ii) the adopted limitation of the right is not the least restrictive means possible.

80. The petitioners submit that the limitations are not rationally connected to their purpose. PW4 testified that every aspect of the lives of hunter-gatherer communities such as the Ogiek are centered on their land, and that the recognition of community property is vital to conservation. She opined that hunter-gatherer systems are sustainable and geared towards conserving and sustaining the environment. She produced evidence that scientists appreciate the role that community-owned forests play in climate change mitigation. PW1, in his affidavit sworn on April 8, 2019 at paragraph 20, showed that the community had drafted and passed their community sustainability by-laws (marked as PKC 8). DW3 confirmed that many members of the Ogiek Community are scouts in favour of conservation and they work hand in hand with the 5th respondent.

81. The petitioners submit that a least restrictive means of achieving the purpose existed, but the same was disregarded, and that the respondents claims undermine the *FCMA, 2016*, which recognizes the role community forests can play in forest management.

82. A forceful eviction is excessive and violent. It is therefore an unacceptable way to limit rights in an open and democratic society. The actions of the respondents are contrary to the national values and principles in article 10 and the State's duties and obligations in article 21 of the *Constitution*.

83. Article 10 of the *Constitution* provides for the national values and principles of governance, which must guide all State officers when they interpret and apply the *Constitution*, law and policies. The critical national values and principles that the respondents did not adhere to by carrying out the evictions are the rule of law, participation of the people, human dignity, human rights, non-discrimination, protection of the marginalised, integrity and accountability.

84. This court has the powers under article 23 of *Constitution* and section 13(7) of the the *Environment and Land Court Act* to issue appropriate remedies to address the violation of rights and illegalities related to land. Article 23 of the *Constitution* authorizes Courts to provide appropriate remedies to uphold and enforce the Bill of Rights. Article 23(3) provides a non-exhaustive list of appropriate reliefs which the court may issue in proceedings brought under article 22 of the *Constitution*. These remedies include (a) declaration of rights; (b) an injunction; (c) conservatory orders; (d) a declaration of invalidity of any law that violates a right or freedom and is not justified under article 24; (e) an order for compensation; and (f) an order for judicial review.

85. The petitioners cited the case of *June Seventeenth Enterprises Ltd (suing on Its own behalf & on behalf of & In the interest of 223 other Persons being former inhabitants of Kpa Maasai Village Embakasi Within Nairobi) v Kenya Airports Authority & 4 others* [2014] eKLR where the High Court held at paragraph 41 that the court's discretion to issue an appropriate remedy under article 23(3) is dependent on the facts of each case,

> "the remedy must be tailor made to vindicate the right and to fulfil the promise of the *Constitution*."

86. The petitioners submit that in this case, the court can fashion the appropriate remedies for the violation of rights, even if the said remedies were not pleaded, including: -

i. Orders that in light of the respondents' violation and threat to violation of the petitioners rights under article 28, 29, 43 and 44 of the *Constitution*, the Kenya National Commission on Human Rights, the National Gender and Equality Commission and any relevant independent commission undertakes investigations relating to:

a. The illegal and forceful evictions undertaken against the members of the Ogiek Community of Chepkitale from their land and the extent of loss and damage incurred and whether, prior to their exclusion, suitable alternative arrangements had been made to protect their rights.

b. The legal and/or administrative framework necessary to be put in place to secure the constitutional rights of the Ogiek community in Chepkitale, including their socio-economic rights, right to property, their right to dignity and security of the person, cultural and religious rights within Mt Elgon Forest.

c. The Kenya National Commission on Human Rights, the National Gender and Equality Commission and any relevant independent commission to file a report in court within 120 days of the judgment.

ii. Unless and until (a), (b) and (c) are satisfied by the court, the respondents have no lawful right to prevent, obstruct or otherwise impede the continued occupation of the forest by members of the Ogiek Community, nor prevent, obstruct or otherwise impede the return of those members who had been illegally evicted, or thereafter to evict them without following section 152 A-I of the *Land Act*, 2012, regulations 63-69 of the *Land Regulation*s, 2017 as well as the Guidelines on Evictions under United Nations General Comment.

iii. On the issue of costs, the petitioners pray that the respondents bears the costs due to their unlawful actions against them.

1st and 3rd Respondents' Submissions

87. In response the 1st and 3rd respondents submitted that Mt Elgon Forest is public land as defined in article 62(1)(g) of the *Constitution* and is not ancestral or community land as defined in article 63(2)(d)(ii) of the *Constitution*. - *David Kiptum Yator & 23 others v Attorney General & 4 others (As Consolidated with Elias Kibiwott & others v Kenya Forest Service & Katiba Institute* (2020) eKLR.

88. The petitioners' claim of native title due to previous occupation of land that has since been gazetted as a forest is not sustainable - *Henry Wambega & 733 others v Attorney General & 9 others* (2020) eKLR.

89. The petitioners have not proved any proprietary rights requiring the protection availed in article 40 of the *Constitution* therefore they are not entitled to the court's protection. Courts only enforces rights that are codified in respect to individuals and if the rights are in respect to land and environment, such rights must have crystalized to the individual - *Joseph Letuya & 21 others v Attorney General & 5 others* (2014) eKLR.

90. The inclusion of Mt Elgon Forest in the 3rd schedule pursuant to section 77(a) of the FCMA does not violate article 40 and 63(2)(d)(ii) of the *Constitution* since Chepkitale / Mt Elgon Forest is a gazetted forest under the FCMA, 2016.

91. The petitioners are not entitled to the reliefs sought for the following reasons: -

a. To grant the petitioners the reliefs sought would result in a violation ofarticle 69(1) of *Constitution* that places an obligation on the state to conserve the environment and natural resources and to achieve and maintain a tree cover of at least 10% of the land area in Kenya;

b. Mt Elgon Forest is public land, an important environmental resource, a water catchment area, wildlife habitat, biodiversity, thus the public good supersedes any claim by individuals or community;

c. any other determination would be of mischievous consequences for the country, and might lead to prodigious vexatious litigation, and, perhaps to interminable lawsuits - *Francis Kemai & 9 others v. Ag & 3 others* (2006) 1KLR (E&L) 326;

d. human habitation of the forest by the Ogiek /Ndorobo will have severe negative impact on the Mt Elgon Forest ecosystem; and

e. from cross examination of PW2 and PW3 it was revealed that the Ogiek have alternative land in Chepyuk Settlement Scheme in which they have established homes.

92. The petitioners and the Ogiek Community can still access the forest, practice their gatherer culture without necessarily residing in the forest as is provided for under the FCMA, 2016.

2ND Respondent's Submissions

93. Learned counsel for the 2nd respondent submitted that the petitioners have failed to prove their claims in this Petition yet it is trite law that he who alleges must prove his claim in terms of sections 107 and 108 of the *Evidence Act* chapter 80 of Laws of Kenya. In *Anarita Karimi v AG* (1976-80) 1 KLR 1272 the court held that the burden of proof in constitutional rights litigation require that the grievant must prove with particularity the manner of the alleged violations and cite the particular constitutional provisions infringed as pleaded in their pleadings.

94. The court ought to disregard the evidence of PW4, (Dr Liz Willy Alden), for the following reasons: -

a. Her academic expertise and experience is in disciplines that are neither relevant nor germane to the issues in this petition;

b. She was not able to unequivocally tell the court whether the petitioners and the Ogiek Community are still a hunter-gatherer community practicing the hunter-gatherer lifestyle;

c. Her testimony was not objective as is envisioned of an expert in section 48 of the *Evidence Act*.

95. The petitioners' claim herein is inconsistent with *the Constitution of Kenya 2010*, the FCMA of 2016, the *Environmental Management and Co-ordination Act* (EMCA) of 1999, the Forest Policy, the National Land Policy, as well as the Fundamental Principles of Environmental Management and Sustainable Development. The aforesaid claim is illegal, unconstitutional and resulting from a selective interpretation of the *Constitution* and it contravenes the Latin maxim ex turpi causa non oritur actio (no court will lend its aid to a man who founds his cause of action upon an immoral or illegal act) - *Royal Media Service Ltd v AG & 2 others* (2013) eKLR wherein the case of *AG v Sunderji Trading As "crystal Ice Cream"* (1986) KLR 67 was cited with approval.

96. The petitioners' desire to occupy or reside in a gazetted forest cannot be classified as a right or a legitimate expectation. Their intended illegal actions cannot be the subject of a legitimate expectation. Learned counsel referred to the following cases: -

i. *Republic v Kenya Revenue Authority & 3 others ex parte Five Forty Aviation Limited* (2015) eKLR

ii. *Republic v Kenya Revenue Authority & anor ex parte Krones Lcs Centre East Africa Ltd* (2012) eKLR

iii. *Republic v Principal Secretary Ministry of Health & anor ex parte Apex Communication Limited T/a Apex Porter Novelli* (2015) eKLR

97. To admit the petitioners', claim amounts to a violation of section 64 of the *FCMA 2016* which prohibits erection of buildings or homes on state forests and it also prohibits persons from engaging in any activities in a gazetted forest between the hour of 7PM to 6am. The petitioners failed to prove that an eviction took place on June 20, 2016.

98. The 2nd respondent relied on the following cases in support of their submission that the petitioners' claim ought to be dismissed:

a. *Francis Kemai & 9 others v Attorney General of Kenya & others* (2006) 1 KLR (E&L) 326

b. *Joseph Letuya & 21 others v. Attorney General & 5 others* (2014) eKLR

c. *James Kaptipin & 43 others v. The Director of Forest & 2 others* (2014) eKLR

d. *David Kiptum Yator & others v. Attorney General & 4 others (as Consolidated With Elias Kibiwott & others v. Kenya Forest Service & others & Katiba Institute As interested party* (2020) eKLR

99. The 2nd respondent distinguished ACHPR Application No. 006 of 2012 *African Commission on Human and Peoples' Rights v Republic of Kenya* relied upon in the petitioners' claim.

100. The petitioners' claim should not succeed since it is brought under the provisions of article 63(2) of the *Constitution* of Kenya together with the *Community Land Act* No 27 of 2016 which was enacted to operationalize the aforementioned article. The petitioners have failed to establish that they followed the procedure for registration of the land in issue in this petition in the manner prescribed by the Act thus their claim must fail. The 2nd respondent submitted that the petition herein ought to be dismissed and the costs be borne by the petitioners.

5TH Respondent's Submissions

101. In their submissions dated September 29, 2021 the 5th respondent's submitted that this court is not the best forum to address the issues presented in the petition for the following reasons: -

a. The National Land Commission established under article 67 of the *Constitution* of Kenya is mandated to initiate investigations on its own initiative or on a complaint into present or historical land injustices and recommend appropriate redress.

b. The petitioners' claim before this court is time barred by dint of section 7 of the *Limitations of Actions Act* - *Kenya National Chamber of Commerce & Industry -KNCCI (Muranga Chapter) & 2 others v Delmonte Kenya Limited & 3 others; County Government of Kiambu (interested Party)* (2020) eKLR but such claims can be admitted before the National Land Commission on the strength of section 15 of the *National Land Commission Act* - Ledidi ole Tauta & others v The AG & 2 others (2015) eKLR.

102. The petitioners did not prove that they are from the Ogiek Community in spite of their attempt to rely on their dress code, bee keeping and gathering. The petitioners did not prove that the suit land is community land since Mt Elgon is a state gazetted forest and Chepkitale is a gazetted National Reserve. As there has been no degazettement of the aforesaid forest and national reserve to permit human habitation, the petitioners' claim must fail.

103. The 5th respondents were wrongly enjoined in the instant suit since the Petitioners had no claim against them.

104. The petitioners have not demonstrated how the 5th respondents violated their rights under articles 26, 28, 29, 40, 43, 44, & 56 of the *Constitution* according to the principles as set out in *Anarita Karimi Njeru v The Republic* (1976-1980) KLR 1272. The petitioners are not entitled to the prayers sought since they failed to prove their claim in its entirety thus the petition herein should be dismissed with costs to the respondents.

Amicus Curiae's Brief

105. The learned counsel Ms Asayong for the *Amicus curiae* in their brief submitted that this court has jurisdiction on the strength of article 159(2)(a)(b)(e) and article 21 of *Constitution* to hear the instant petition.

106. The following are the characteristics of indigenous people according to Amnesty International:

a. There is a historical link with those who inhabited a country or region at the time when people of different cultures or ethnic origins arrived;

b. They have a strong link to territories and surrounding natural resources

c. They have distinct social, economic or political systems;

d. They have a distinct language, culture and beliefs;

e. They are marginalised and discriminated against by the state;

f. They maintain and develop their ancestral environment and systems as distinct peoples.

107. The following International Statutes provide safeguards for the rights of indigenous people:

i. Articles 1,2, 8(2)(a) & (b) & 10 of the *United Nations Declaration on the Rights of Indigenous Persons*, 2007.

ii. Article 5(d) of the International Convention on the Elimination of All Forms of Racial Discrimination.

iii. Article 15(2) of the United Nations International Labour Organization Convention (No 169) (1989) on Indigenous and Tribal Peoples.

iv. Article 5(c) of the Racial Discrimination Convention.

108. The following decisions by International Courts support the protection and promotion of the rights of the indigenous:

i. The Canadian Supreme Court In *Nation v British Columbia* (26 June 2014, SCC 44, Docket No 3498662614), held that Aboriginal title to lands could be established by proof of a history of regular and exclusive use.

ii. The Constitutional Court of Guatemala (December 2013), in *Mataques'cuintla v Guatemala,* held that under ILO Convention 169 the Government was required to obtain the peoples' consent before it could proceed to permit a mining operation by a private corporation to begin production.

iii. The Supreme Court of Belize (2007), in a case involving Maya land tenure, issued an order that the State and its corporate collaborators must abstain from any action which would interfere with the existence or enjoyment of Maya property without their informed consent.

iv. The Inter-American Court of Human Rights, in *Saramaka People v Suriname* adjudicated a claim by the Saramaka people against the Government of Suriname alleging that logging and mining concessions granted by Suriname on communal property traditionally occupied or used by the Saramaka people threatened their physical and cultural survival.

109. The following International Statutes and decisions by International Courts define what entails informed consent:The ILO Indigenous and Tribal Peoples Convention (169) in article 6, requires that indigenous and tribal peoples must be consulted on issues that affect them.The Supreme Court of Chile, in *Diaguita v Goldcorps* (7 October 2014), applying state and international law, halted the development of a gold and copper mine owned by a Canadian corporation until the indigenous peoples were properly consulted. Guidelines that ought to have been followed in consulting the indigenous people include:

a. good faith negotiations;

b. the State must determine the impact on the people concerned;

c. to set forth the manner of the consultation;

d. assure participation by the indigenous peoples and other citizens;

e. make a good faith effort to obtain free, prior, and informed consent of the people;

f. the consultation must be in accordance with the peoples' customs and traditions ("El Morro Mine Halted by Chile Supreme Court)

110. The following precedents are in support of indigenous persons' rights;

i. *'Calder', Canada*, 1973- In their verdict, the judges of the Supreme Court recognized the existence of Aboriginal rights to land for the first time;

ii. *'Mabo', Australia*, 1992- the High Court recognised the existence of 'native title' for the first time and overthrew the concept of 'terra nullius', the legal fiction that the land had been unoccupied when the British colonisers arrived;

iii. *Delgarnuukw', Canada*, 1997- the Supreme Court stated that native people have a constitutional right to own their ancestral lands and to use their ancestral land almost entirely as they wish. The court confirmed that indigenous people continued to own their lands unless the government had explicitly 'extinguished' their ownership, and also emphasised the importance of oral history as evidence of indigenous peoples' long ownership of their territories;

iv. *'Awas Tingni', Nicaragua*, 2001- The court affirmed the existence of indigenous peoples' collective rights to their land, resources, and environment, and declared that the community's

rights were violated by the government granting the concession without either consulting with the community or obtaining its consent;

v. '*Richtersveld*', South Africa, 2003- The country's highest court, the Constitutional Court, ruled that the Nama people had both communal land ownership and mineral:' rights over their territory. Furthermore, the failure to respect indigenous peoples' land ownership under their own traditional law, even if it is unwritten, amounts to 'racial discrimination ';

vi. '*Bukit Tampoi*', Malaysia, 2005- The Temuan people of Bukit Tampoi village in Malaysia fought a ten-year court battle to stop their land from being used for the construction of a road link to a new airport. The authorities had claimed that the Temuans and other 'Orang Asli' or 'first peoples' were merely tenants on state land and therefore not entitled to any compensation. Malaysia's Court of Appeal affirmed the Temuan's rights to ownership of their land, and ordered the payment of substantial compensation.

111. This honorable court as a custodian of human rights should seek to adopt an interpretation that most favours the enforcement of the rights and fundamental freedoms that form the subject of the petition herein in accordance with article 20(3)(b) of the *Constitution*.

Issues for Determination

112. The following issues stand out for determination by the court:

a. Whether the court has jurisdiction to hear and determine the amended petition.

b. Whether the petitioners have met the constitutional threshold for a constitutional petition.

c. Whether section 77 and the third schedule of the *Forest Conservation and Management Act* is inconsistent with article 63(2)(d)(ii) of the *Constitution*.

d. Whether Mt Elgon forest is the ancestral land of the petitioners and form Community land within the meaning ofarticle 63(2)(d)(ii) of the *Constitution*.

e. Whether the eviction of the petitioners violated their constitutional rights and freedoms.

Whether the court has jurisdiction to hear and determine the amended petition

113. It is trite that jurisdiction is everything and without it the court must down its tools. These are the famous words of Nyarangi, JA in the often cited case *The Owners of Motor Vessel Lilian "s" v Caltex Oil (kenya) Ltd* (1989) KLR 1 at page 14:

> " Jurisdiction is everything. Without it, a court has no power to take one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending the evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

114. The Supreme Court of Kenya in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* (2012) eKLR held as follows:

> " A court's jurisdiction flows from either the *Constitution* or legislation or both. Thus, a court can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law..."

115. The issue in contention in this matter is whether the NLC is the proper forum to handle the petitioners' claims relating to historical land injustices by dint of article 67(2) of the *Constitution* to the exclusion of the Environment and Land Court (ELC).

116. Before this court addresses itself to the aforementioned contention it is worth noting that the members of the Ogiek Community had lodged a complaint with the NLC under claim No NLC/HLI/198/2018. However, no documentary evidence was tendered before the court to confirm the nature of the complaint and its status during the hearing of this petition.

The Court of Appeal in *Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others* (2018) eKLR held as follows:

> "On the question whether a court should await investigation and recommendation by the NLC before it can entertain a claim founded on historical injustice, it is our considered view that a court has jurisdiction to hear and determine any claim relating to historical injustice whether or not the NLC is seised of the matter. Our conviction stems from our reading of article 67(2)(e) of th *Constitution*. The Article provides that the NLC can investigate "present or historical" land injustices. We lay emphasis on the word "present." If the NLC had initial and exclusive mandate, it would mean that all present cases on land injustices can only be handled by the NLC and not courts of law. This would *prima facie* render the Environment and Land Courts redundant. We do not think this was intended to be so. Our view is fortified by section 15(3)(b) of the *National Land Commission Act* which permit the Environment and Land Court to deal with historical injustice claims capable of being addressed through the ordinary court system.

Further, there is nothing in the 2010 *Constitution* or in the *National Land Commission Act* ousting the jurisdiction of the High Court or barring a person from presenting a petition before a court in relation to a claim founded on historical injustice."

Similarly, *In The Matter of Interim Independent Electoral Commission* (2011) eKLR, it was held;

> "..... jurisdiction flows from the law, and the recipient-court is to apply the same, with any limitations embodied therein. Such a court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity."

117. Therespondent's main contention on this point is twofold; firstly, that the jurisdiction to determine the issues raised in the instant petition is a preserve of the NLC under article 67 of the *Constitution* and secondly; that the petitioners ought to have petitioned Parliament under article 119 of the *Constitution*. We find it imperative to set out the two articles alluded to;

> "67.
>
> (1) There is established the National Land Commission.
>
> (2) The functions of the National Land Commission are—
>
> a. to manage public land on behalf of the national and county governments;
>
> b. to recommend a national land policy to the national government;

c. to advise the national government on a comprehensive programme for the registration of title in land throughout Kenya;

d. to conduct research related to land and the use of natural resources, and make recommendations to appropriate authorities;

e. to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress;

f. to encourage the application of traditional dispute resolution mechanisms in land conflicts;

g. to assess tax on land and premiums on immovable property in any area designated by law; and

h. to monitor and have oversight responsibilities over land use planning throughout the country"

119(1) "Every person has a right to petition Parliament to consider any matter within its authority, including to enact, amend or repeal any legislation."

The NLC has further functions donated under section 5 the NLC Act. These additional functions are;

a. "on behalf of, and with the consent of the national and county governments, alienate public land;

b. monitor the registration of all rights and interests in land;

c. ensure that public land and land under the management of designated state agencies are sustainably managed for their intended purpose and for future generations;

d. develop and maintain an effective land information management system at national and county levels;

e. manage and administer all unregistered trust land and unregistered community land on behalf of the county government; and

f. develop and encourage alternative dispute resolution mechanisms in land dispute handling and management."

The petitioners have made reference to the jurisdiction of this court as donated by section 13(2) of the *Environment and Land Court Act* (ELCA). Sub-section 7 thereof provides the orders that may be granted by the court to include declaratory orders *inter alia*. It is clear the petitioners herein seek declaratory orders, declaration of invalidity of a section of an Act of Parliament as well as injunctive orders. these prayers fall squarely within the orders that may be granted by the court.

118. On the issue of whether the court can entertain the petition despite the fact that the matter is within the mandate of the NLC and parliament, the South African Constitutional Court In *Minister of Health & others v Treatment Action Campaign & others* (2002)5 LRC 216, held;

> "The primary duty of courts is to the *Constitution* and the law, which they must apply impartially and without fear, favour or prejudice. The *Constitution* requires the state to respect, protect, promote, and fulfil the rights in the Bill of Rights. Where state policy is challenged as inconsistent with the *Constitution*, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the *Constitution* to say so. In so far as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the *Constitution* itself."

Closer home, in *Council of Governors & 6 others v Senate* (2015) eKLR Lenaola, Ngugi and Odunga JJ held;

> "We are duly guided and this court vested with the power to interpret the *Constitution* and to safeguard, protect and promote its provisions as provided for under article 165(3) of the *Constitution*, has the duty and obligation to intervene in actions of other arms of Government and State Organs where it is alleged or demonstrated that the *Constitution* has either been violated or threatened with violation. In that regard, the petition before us alleges a violation of the *Constitution* and violation of the *Constitution* by the respondent and in the circumstances, it is our finding that the doctrine of separation of power does not inhibit this court's jurisdiction to address the petitioner's grievances so long as they stem out of alleged violations of the *Constitution*. In fact the invitation to do so is most welcome as that is one of the core mandates of this ourt."

The other preliminary point raised by the 5th respondent is that the action is contrary to section 7 of the *Limitations of Actions Act* cap 22 which provides;

> "An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person."

119. In view of the foregoing, we turn to consider the issue at hand, which calls for the analysis of article 162(2)(b) of the *Constitution* that establishes and confers this court with jurisdiction: "Parliament shall establish courts with the same status of the High Court to hear and determine disputes relating to - the environment and the use and occupation of, and title to land." Parliament then enacted *Environment and Land Court Act* No 19 of 2011to give effect to article 162(2)(b) of the *Constitution*. The jurisdiction of the court is set out at section 13 of the *ELC Act* as follows: -

> 'In exercise of its jurisdiction under article 162(2)(b) of the *Constitution*, the court shall have power to hear and determine disputes—
>
> 2.
>
> (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
>
> (b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.

3. Nothing in this Act shall preclude the court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedoms relating to a clean and healthy environment under articles 42, 69 and 70 of the *Constitution*"

120. The petitioners claim Mt Elgon forest is their community land, within the meaning of article 62(2)(d)(ii), which is directly within the jurisdiction of this court as seen from section 13(2)(d) of the *ELC Act*. The petitioners' further claim that the evictions carried out by the Respondents violated their constitutional right to a clean and healthy environment. This issue is also rightfully before this court which derives its jurisdiction from section 13(3) of the *ELC Act*. We emphasis that this court has been further clothed with jurisdiction by section 21 of the *ELC Act,* to exercise the jurisdiction under article 165(3)(b), (d) and (e) of the *Constitution* which are: -

b) "jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened,

d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

i. the question whether any law is inconsistent with or in contravention of this Constitution;

ii. the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

iii. any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

iv. a question relating to conflict of laws under article 191; and

e. any other jurisdiction, original or appellate, conferred on it by legislation."

From a plain and ordinary interpretation of the law and precedents analyzed, we find that the court has jurisdiction conferred by articles 162(2)(b) and, 165(3)(d) of the *Constitution* and sections 13 and 21 of ELC Act to hear and determine the petition. This court finds that the petitioners were well within their rights to file their claim in court which is vested with the requisite jurisdiction to hear and determine this matter.

Whether the petitioners have met the threshold for a constitutional petition

121. The 1st, 2nd,3rd and 5th respondents have submitted that the petition herein does not meet the precision threshold set out in *Anarita Karimi Njeru v The Attorney General* supra where the court held: -

> " We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the *Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed."

Further in, *Katiba Institute & another v Attorny General & another* (2017) eKLR, where it was stated that;

> " Where a petitioner approaches the court underarticle 165(3) of the *Constitution* challenging constitutionality of a statutory provision, as opposed to mere enactment, amendment or repeal of a legislation, the court has the mandate to deal with the question. This petition challenges constitutionality of the impugned provisions. Our determination is based on article 165(3) of the *Constitution*, which empowers the court to hear any question respecting the interpretation of this constitution including the determination of (a) the question whether any law is inconsistent with or in contravention of this Constitution; and, (b) the question whether anything said to be done under the authority of this constitution or of any law is inconsistent with, or in contravention of, this Constitution. Citizens still have a remedy in article 119 of the *Constitution* to petition parliament for enactment, amendment or repeal of the impugned statues. Recourse to this court is not limited by availability of another remedy."

In the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* (2013) eKLR the court made the following observation;

> " We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point..."

122. We have perused the amended petition and find that it made reference to the particular provisions of the *Constitution* alleged to have been infringed in the heading namely, articles 2(6), 10(2)(b), 21(1), 23(1), 26(1), 27, 28, 29, 40(1-4), 42, 43, 44, 47, 56, 63(2)(d), (i) and (ii) and 258 of the *Constitution*. And further from paragraph 28 to 52 of the amended petition, the petitioners have precisely set out the particulars of the alleged breaches and violations of their constitutional rights and freedoms. In view of the foregoing, this court is satisfied that the petitioners have met the constitutional threshold and this court shall proceed to consider the petition it on its merits.

Whether section 77 of the *Forest Conservation and Management Act* and the third schedule is inconsistent with article 63(2)(d)(ii) of the *Constitution*.

123. The petitioners lay claim to Mt Elgon Forest as their ancestral land, which they have occupied traditionally as a hunter-gather community, and they pray for the court to find that the forest is their community land as defined by article 63(2)(d)(ii) of the *Constitution*. Their claim to the forest has been fiercely opposed by the respondents. The 2nd respondent submitted that the claim is inconsistent with article 62(1)(g) of *Constitution*, that classifies Government forests as public land. Further to that, the FCMA 2016 has gazetted Mt Elgon as a public forest. Counsel for the 2nd respondent submitted that the forest is state protected, set aside for forestry development and conservation and cannot be claimed by the petitioners. Counsel for the 1st and 3rd respondents argued that Mt Elgon is a gazetted forest. Mr Tarus referred to *David Kiptum Yator & 23 others v Attorney General & 4 others supra*, where the court held that gazettement of the said forest as a public forest put it under the ownership, management and control of the government to be managed and controlled in accordance with FCMA, 2016 which prohibits habitation of gazetted public forests. Further such forests cannot be community land in terms of article 63(2) of the *Constitution* and section 2 of the Community Land Act, and that the forest has not been registered as community land. The 5th respondent supported the position of the other respondents and submitted that Mt Elgon forest and Chepkitale area are both gazetted public forests and National Reserve and are not community land.

124. Land in Kenya is classified by article 61 as public, community and private. The classification goes further to designate what constitutes the three classification of land in Kenya. In this case the issues are about public and community land. Article 62 provides for public land: -

(1) Public land is—

a. land which at the effective date was alienated government land as defined by an Act of Parliament in force at the effective date;

b. land lawfully held, used or occupied by any State organ, except any such land that is occupied by the State organ as lessee under a private lease;

c. land transferred to the State by way of sale, reversion or surrender;

d. land in respect of which no individual or community ownership can be established by any legal process;

e. land in respect of which no heir can be identified by any legal process;

f. all minerals and mineral oils as defined by law;

g. government forests other than forests to which article 63(2)(d)(i) applies, government game reserves, water catchment areas, national parks, government animal sanctuaries, and specially protected areas;

h. all roads and thoroughfares provided for by an Act of Parliament;

i. all rivers, lakes and other water bodies as defined by an Act of Parliament;

j. the territorial sea, the exclusive economic zone and the sea bed;

k. the continental shelf;

l. all land between the high and low water marks;

m. any land not classified as private or community land under this Constitution; and

n. any other land declared to be public land by an Act of Parliament—

(i) in force at the effective date; or

(ii) enacted after the effective date.

(2) Public land shall vest in and be held by a county government in trust for the people resident in the county, and shall be administered on their behalf by the National Land Commission, if it is classified under—

a. clause (1)(a), (c), (d) or (e); and

b. clause (1)(b), other than land held, used or occupied by a national State organ.

(2) Public land classified under clause (1)(f) to (m) shall vest in and be held by the national government in trust for the people of Kenya and shall be administered on their behalf by the National Land Commission.

(3) Public land shall not be disposed of or otherwise used except in terms of an Act of Parliament specifying the nature and terms of that disposal or use."

Community land has been provided for under article 63 of the *Constitution* which provides as follows: -

" 63(1) Community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest.

(2) Community land consists of—

a. land lawfully registered in the name of group representatives under the provisions of any law;

b. land lawfully transferred to a specific community by any process of law;

c. any other land declared to be community land by an Act of Parliament; and

d. land that is—

i. lawfully held, managed or used by specific communities as community forests, grazing areas or shrines;

ii. ancestral lands and lands traditionally occupied by hunter-gatherer communities; or

iii. lawfully held as trust land by the county governments, but not including any public land held in trust by the county government under article 62(2).

(3) Any unregistered community land shall be held in trust by county governments on behalf of the communities for which it is held.

(4) Community land shall not be disposed of or otherwise used except in terms of legislation specifying the nature and extent of the rights of members of each community individually and collectively.

(5) Parliament shall enact legislation to give effect to this Article."

The petitioners contend that the *FCMA* is unconstitutional to the extent that it lists Mt Elgon Forest as a public forest. Under the third schedule of the said Act, the forest is listed as number 91 pursuant to the provisions of section 77(a) of the Act which provides;

"77 Not withstanding the repeal of the Forests Act, 2005-

a. any land which immediately before the commencement of this Act, was gazetted or registered as a forest reserve as set out in the third schedule to this Act, or under any other relevant law shall be deemed to be a public forest under this Act"

The petitioners' contention is that since the promulgation of the *Constitution* in 2010, the FCMA should have been enacted to conform with the *Constitution*. That as it stands, the Act contravenes the petitioners' rights under article 40 as read with article 63(2)(d)(ii) of the *Constitution*. Reliance has been placed in the cases of *Law Society of Kenya v The Ag & another* (2019) eKLR, *Ndynabo v A g Tanzania* (2001) EA 495, *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* (2014) eKLR, *Olum and another v AG* (1995-1998) 1 EA 258, the *Queen v Big M Drug Mart Ltd* (1986) LRC 332, which authorities outline the principles of constitutional interpretation.

125. The first port of call when interpreting a statute is the plain language deployed by the legislature while drafting the statute. On this Mativo J in *Law Society of Kenya v Kenya Revenue Authority & another* (2017) eKLR while quoting from the Indian Supreme Court's decision of *Reserve Bank of India v Peerless General Finance and Investment Co Ltd and others* (1987) 1 SCC 424 observed;

"Where the words of a statute are plain, precise and unambiguous, the intention of the Legislature is to be gathered from the language of the statute itself and no external aid is admissible to construe those words. It is only where a statute is not exhaustive or where its language is ambiguous, uncertain, clouded or susceptible of more than one meaning or shades of meaning that the external aid may be looked into for the purpose of ascertaining the object which the Legislature had in view in using the words in question."

In *Hamdard Dawakhana v Union of India* (1960) AIR 554 it was held that:

"In examining the constitutionality of a statute it must be assumed the Legislature understands and appreciates the needs of the people and the law it enacts are directed to problems which are made manifest by experience and the elected representatives assembled in a Legislature enacts laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is therefore in favour of the constitutionality of an enactment."

The Court of Appeal in *Kenya Civil Aviation Authority v Wk & 2 others* (2019) eKLR citing with approval the decisions in *Ndynabo* (*supra*) and *Mark Ngaiwa v Minister of State, Internal Security and Provincial Administrative & another* (2011) eKLR held;

> "..... because there is always a general presumption that every Act of Parliament is constitutional. Courts should therefore presume a statute or statutory provision to be constitutional unless the contrary is established, and it is the duty of the person who alleges that a statute or statutory provision is unconstitutional to prove such unconstitutionality.

In *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* *supra*, while addressing the issue of interpretation of a statute observed:

> "The object of the court in interpreting legislation is to give effect so far as the language permits to the intention of the legislature. If the language proves to be ambiguous I can see no sound reason not to consult Hansard to see if there is a clear statement of the meaning that the words were intended to carry. The days have long passed when courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted."

While analyzing how to determine the intention of a statute, the Court of Appeal in *County Government of Nyeri & anor v Cecilia Wangechi Ndungu* (2015) eKLR held that:

> "Interpretation of any document ultimately involves identifying the intention of Parliament, the drafter, or the parties. That intention must be determined by reference to the precise words used, their particular documentary and factual context, and, where identifiable, their aim and purpose. To that extent, almost every issue of interpretation is unique in terms of the nature of the various factors involved. However, that does not mean that the court has a completely free hand when it comes to interpreting documents; that would be inconsistent with the rule of law, and with the need for as much certainty and predictability as can be attained, bearing in mind that each case must be resolved by reference to its particular factors."

It is not in doubt that the *FCMA* was enacted in 2016 and the objective of the Act therein as stated is;

> "An Act of Parliament to give effect to article 69 of the *Constitution* with regard to forest resources; to provide for the development and sustainable management, including conservation and rational utilization of all forest resources for the socio-economic development of the country and for connected purposes."

126. The wording of the objective is clear and requires no effort to ascertain either the purposes of the legislation or the intention of the legislature. All that the petitioners beseech the court is to make a declaration that the specific part declaring Mt Elgon Forest a public forest is unconstitutional. From our jurisprudence, the burden of establishing that the Act or a provision therein, is unconstitutional for either reason rests on the Petitioners which burden must be discharged to the required standard. The burden of proof in constitutional matters has been stated to be on a balance of probabilities.

127. Article 69 obligates the state to ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the

accruing benefits inter alia. It is therefore evident that the *FCMA* was specifically enacted as an aid to achieve this functionality by the state. The state will have abrogated its constitutional duty to its citizens if it fails to protect the environment. Having considered the principles underpinning statutory interpretation as discussed above, this court comes to the inevitable conclusion that there is no inconsistency between the provisions of the *FCMA* with the *Constitution*. There is no ambiguity noted in the language of the statute in relation to the *Constitution*. The petitioners' contention that the provisions of section 77 as well as the third schedule of the *FCMA* violates their rights under article 40 and runs contrary to article 10 of the *Constitution* is without merit. All that the legislature intended in enacting the Act was to give effect to article 69 of the *Constitution*. The petitioners have no rights in the forest to be protected by article 40 since no violation has been proved to the satisfaction of the court and we therefore hold that the *FCMA* accords with the *Constitution*.

Whether Mt Elgon forest is the ancestral land of the petitioners and form community land within the meaning of article 63(2)(d)(ii) of the *Constitution*.

128. The petitioners claim to have traditionally occupied Chepkitale, Mt Elgon as their ancestral land. In specific they claim to be living in and around Kapsang and Etapei in the Mt Elgon Forest. PW1 in his supporting affidavit claimed the whole of Mt Elgon Forest forms part of the ancestral lands of Ogiek before the gazettement of 1932 that turned the forest into a protected area. That the petitioners have been evicted from their ancestral lands numerous times by subsequent Governments, but they keep returning. Mr Lempaa, counsel for the petitioners, submitted that Chepkitale, Mt Elgon Forest is the petitioners' community land within the meaning of article 63(2)(d) (ii) of the *Constitution*. The respondents opposed the petitioners claim, and stated that Mt Elgon forest is public land within the meaning of article 62(1)(g), which includes government forests as public land. The 1st and 3rd respondents submitted that article 62(1)(g) demonstrated that Mt Elgon is a public land that was gazetted as a public forest before the promulgation of the *Constitution* in 2010. Professor Sifuna, counsel for the 2nd respondent maintained that the petitioners' claim is inconsistent with the article 62(1)(g) of the *Constitution*, and that the protected forest is under the control of the state hence cannot be said to be the traditional lands of the petitioners. The 5th respondent while sharing the same sentiments, argued that the petitioners have failed to prove that the forest is community land. It was further submitted that Mt Elgon Forest is a water catchment area cutting across two counties and countries, Trans Nzioia and Bungoma, Kenya and Uganda, and cannot be available for occupation by the petitioners. Before the court we have two related articles of the *Constitution*, on one hand we have article 62(1)(g) that states;

62.

(1) "public land is –

g. government forests other than forests to which article 63(2)(d)(i) applies, government game reserves, water catchment areas, national parks, government animal sanctuaries and specific protected areas,"

On the other hand, we have article 63(2) that states;

63(2) "Community land consists of-

(d) land that is-

(ii) ancestral lands and lands traditionally occupied by hunter-gather communities."

The questions that begs to be answered by this court is whether Mt Elgon forest is public land under article 62 (1)(g) or community land underarticle 63(2)(d)(ii).

129. Under article 40(3) and 24 of *Constitution* a right or fundamental freedom may be limited by law in a reasonable and justifiable way. The State is empowered with an "Eminent Domain" to acquire land required for public use. The Principle of Eminent Domain is a common law concept that allows the state to have proprietary rights to, in this case, forests that sits on what the petitioners' claim is ancestral lands. The declaration of an area such as Mount Elgon as a forest, or a national park is facilitated by the existence and exercise of the power of Eminent Domain.

In the *African Commission (Mau Ogiek Case)* the African Court analyzed article 26 of the UN General Assembly Declaration 61/295 on the Rights of Indigenous Peoples. The article provided for the right of indigenous people to own, use and develop lands which they traditionally owned or occupied. The court held that:

> "It follows in particular fromarticle 26(2) of the Declaration that the rights that can be recognized for indigenous peoples/communities on their ancestral lands are variable and do not necessarily entail the right of ownership in its classical meaning, including the right to dispose thereof (*abusus*). Without excluding the right to property in the traditional sense, this provision places greater emphasis on the rights of possession, occupation, use/utilization of land...However article 14 envisages the possibility where a right to property including land may be restricted provided that such restriction is in the public interest and is also necessary and proportional."

Article 63(2) of the *Constitution* defines community land as land consisting of—

a. "land lawfully registered in the name of group representatives under the provisions of any law;

b. land lawfully transferred to a specific community by any process of law;

c. any other land declared to be community land by an Act of Parliament; and

d. land that is—

   (i) lawfully held, managed or used by specific communities as community forests, grazing areas or shrines;

   (ii) ancestral lands and lands traditionally occupied by hunter-gatherer communities; or

   (iii) lawfully held as trust land by the county governments, but not including any public land held in trust by the county government under article 62(2)."

Section 2 of the Community Land Act, 2016 has since been declared unconstitutional by EC Mwita J in *Kelly Malenya v Attorney General & another; Council of Governors (Interested Party)* (2019) eKLR for failing the constitutional test due to ambiguity. As such, the definition under the *Constitution* remains the proper definition of what entails community land. The petitioners' contention on this issue is that Mt Elgon forest is their ancestral land and therefore community land by dint of article 63(2)(d)(ii) of the *Constitution*.

130. The respondents on their part contend that Mt Elgon Forest is public land within the meaning of article 62(1)(g) which defines public land. The article provides;

> " Government forests other than forests to which article 63(2)(d)(i) applies, government game reserves, water catchment areas, national parks, government animal sanctuaries, and specially protected areas;"

There are several decisions of the superior courts that have been cited by the parties. In *Ledidi Ole Tauta & others v Attorney General & 2 others* (2015) eKLR, Nyamweya J (as she then was), Ougo and Mutungi JJ, held;

> " At the time of instituting the present petition, the petitioners knew, and were aware that Ngong Hills Forest was a gazetted State forest...exclusively under the management of the Kenya Forest Service...Government forests are classified under the *Constitution* as public land...
>
> To conclude, this court notes that Ngong Hills Forest has not been degazetted as such, and its boundaries have not been varied to make it available for alienation to the petitioners. In our view, the petitioners ought to have petitioned the Minister through the Kenya Forest Service Board to consider whether any basis existed to have Ngong Hills Forest degazetted to accommodate their interests. The Forest Act provides a procedure, and mechanism for community participation in forest management under section 46 but does not make provision for individualized ownership of land that had been brought under the operation of the Act. We also note that the petitioners' claim to the land is predicated on what the petitioners claim were historical injustices visited on the community by the colonial masters who required that they move out of what they claim were ancestral lands to pave way for white settlement. We do not think the court would be the right forum for the petitioners to ventilate their claim which is founded on historical injustices."

In the case of *Joseph Letuya & 21 others v Attorney General & 5 others* (2014) eKLR, Nyamweya J (as she then was), held:

> " The process of conferring legal and equitable property rights in land under Kenyan law is settled, and is dependent upon formal processes of allocation or transfer, and consequent registration of title, or of certain transactions that confer beneficial interests in land in the absence of a legal title of ownership. The process of allocation of forest land is further governed by the Forest Act that requires a process of excision of forest land before such land can be allocated. The applicants did not bring evidence of such processes of allocation of title to land located in the Mau Forest and solely relied on their long occupation of the same."

In *Parkire Stephen Munkasio & 14 others (suing on their own behalf and behalf of their families and all the members of the Maasai Community living on land reference No 8396 (ir 11977) situated IN Kedong) v Kedong Ranch Limited & 8 others* (2015) eKLR, Munyao J, held;

> " The petitioners made arguments that this land forms part of the Maasai community land. I am afraid that it does not. The land is private land in the hands of Kedong Ranch. In fact, it became private land way back in 1950, and has remained so all along. It matters not that the petitioners believe that the land was their ancestral land. In fact, it is immaterial whether the land was at one point or another the ancestral land of the Maasai, or the ancestral land

of the petitioners. The land is now private land, as provided by our Constitution which is the Supreme law of this country."

In *David Kiptum Yator & 23 others v Attorney General & 15 others supra* it was held;

> " That the only difference being in the names and description of some of the parties, and suit lands. That the decisions however, clearly show that the position taken by the petitioners herein that Embobut Forest is community land for reasons that it has been their ancestral land has no basis. That the findings in the above cases supports the Respondents' position that pursuant to Embobut Forest having been proclaimed a forest reserve in 1954, and gazetted a central forest in 1964, then it forms part of public land as defined by article 62(1)(g) of the *Constitution* of Kenya, 2010, which is the Supreme law of Kenya.
>
> That further to the finding in (b) above that Embobut Forest is public land, the court finds that the Petitioners herein have not tendered any evidence to show or suggest that the said land had been legally, and procedurally degazetted as a protected forest or procedurally and legally alienated to them as the Sengwer community or petitioners."

131. The above authorities bear lots of semblance with the instant petition to the extent that the claim is based on ancestral occupation of the subject land. There is evidence that the Mt Elgon Forest was gazetted on April 30, 1932 under Proclamation No 44. With this proclamation, it is our finding that Mt Elgon Forest became a protected area under the management of the KFS and the petitioners could only access the forest with the express consent of the KFS for whatever reasons. Section 8 of the FCMA however obligates the KFS to *inter alia*; receive and consider applications for licenses or permits in relation to forest resources or management of forests or any other relevant matter and in consultation with relevant stakeholders, develop programs for tourism and for recreational and ceremonial use of public forests. The gazettement of Mt Elgon Forest as a public forest effectively extinguished the Ogiek's claim to the forest. It may be true that the Ogiek Community initially occupied the forest as a hunter-gatherer community. The petitioners' witnesses confirmed that they have since abandoned the practice of hunting due to modernization. The claim that they have cultural sites and shrines in the forest as well as gather honey and vegetable from the forest does not qualify the land as Community land taking into account the legal provisions stated above. It is therefore clear that even if the forest is a gazetted public forest, the petitioners can still access the forest for purposes of extracting herbs and ceremonial use by procuring the necessary permissions and or licences from the relevant authorities. The petitioners indeed acknowledged being aware of this fact on cross-examination.

132. The enactment of the *Community Land Act* in 2016 brought out clarity on what entails Community land. The Act gives conditions that must be met for land to be deemed community land. Under section 7, the procedure of registering Community land is provided thus;

> "(1) A community claiming an interest in or right over community land shall be registered in accordance with the provisions of this section.
>
> (2) The community land registrar shall by notice in at least one newspaper of nationwide circulation and a radio station of nationwide coverage, invite all members of the community with some communal interest to a public meeting for the purpose of electing the members of the community land management committee.
>
> (3) The notice shall also be given to the national county administrators and county government administrators in the area where the community land is located.

(4) The community land registrar may use all available means of communication including electronic media to reach the community members.

(5) The community shall elect between seven and fifteen members from among themselves to be the members of the community land management committee as provided in section 15, who shall come up with a comprehensive register of communal interest holders.

(6) The community land management committee shall come up with the name of the community and shall submit the name, register of members, minutes of the meeting and the rules and regulations of the committee to the Registrar for registration."

In this case, the petitioners have not demonstrated that any of the above steps have been undertake. Indeed, not even the first step was shown to have been taken as a quest by the community to have their rights legally recognized.

133. PW1 to PW3 confirmed in their oral testimony before court that they were all resettled and allocated 5 Acres each of land in Chepyuk Settlement Scheme by the Government. PW1 stated that the Settlement Scheme was created in 1950 so the Ogiek could plant their cereals since the climate in Mt Elgon was unfavourable. This is confirmation that the Government compensated them for their land alienated in Mt Elgon. The petitioners have not adduced any evidence that show that either the land in question has been de-gazetted or the process of gazettement was flawed under the respondents' watch and or supervision for which the respondents ought to be held to account. As such, this court finds that the suit land is a protected public forest within the meaning of article 62(1)(g) of *Constitution*.

134. The petitioners introduced an alternative contention based on the Doctrine of Native title in which they argue that even if the land is now a gazetted state forest, the petitioners' rights as original inhabitants have not been extinguished by such enactment and or gazettement. In support of this contention, Mr Lempaa, counsel has cited several authorities out of our jurisdiction. The leading authority on the topic being the case of Mabo v Queensland (*supra*). This case was instituted by Eddie Mabo on behalf of the Murray Islanders over the Murray Islands in the Torres Strait. By a majority decision of that court, it was held;

> "……the common law of this country recognizes a form of native title which, in the cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants, in accordance with their laws or customs, to their traditional lands and that, subject to the effect of some particular Crown leases, the land entitlement of the Murray Islanders in accordance with their laws or customs is preserved, as native title, under the law of Queensland. The main difference between those members of the court who constitute the majority is that, subject to the operation of the Racial Discrimination Act 1975 (Cth), neither of us nor Brennan J agrees with the conclusion to be drawn from the judgments of Deane, Toohey and Gaudron JJ that, at least in the absence of clear and unambiguous statutory provision to the contrary, extinguishment of native title by the Crown by inconsistent grant is wrongful and gives rise to a claim for compensatory damages. We note that the judgment of Dawson J supports the conclusion of Brennan J and ourselves on that aspect of the case since his Honour considers that native title, where it exists, is a form of permissive occupancy at the will of the Crown."

What followed this decision was the enactment of the *Native Title Act* 1993 which attempted to codify the implications of the decision and set out a legislative regime under which Australia's Indigenous people could seek recognition of their native title rights.

135. The petitioners have referred the court to the National Land Policy published in August 2009. We note that that this report was published before the promulgation of the *Constitution* in 2010 and the enactment of the *Land Act, 2012*. This policy paper must have motivated the dedication of a whole of chapter 5 in the *Constitution* to the emotive issue of land and environment. article 60 thereof states the general principles while article 69 provides for the obligations in respect of the environment.

136. Having analyzed this issue extensively alongside the authorities, it is common ground that; Mt Elgon Forest was gazetted as a state forest in 1932. The petitioners were settled in Chepyuk Settlement Scheme by the Government. Before the eviction of June 20, 2016the County Commissioner, Bungoma issued a verbal notice asking the occupants of the forest to vacate. It is instructive to point out that from the Petition and the oral testimonies that the Petitioners wish to be allowed to occupy the forest and retain their parcels in the Chepyuk Settlement Scheme created by the Government. If this is allowed, the petitioners would have unjustifiably enriched themselves at the expense of the natural resource preservation initiated by the government. In our view this would also set a dangerous precedent and a threat to the ecosystem.

Whether the eviction of the petitioners violated their constitutional rights and freedoms

137. The *UN Committee on Economic, Social and Cultural Right*s (CESCR), which monitors the implementation of the International Covenant on Economic, Social and Cultural Rights by its States parties, defined forceful evictions as

> "the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection. The prohibition on forced evictions does not, however, apply to evictions carried out by force in accordance with the law and in conformity with the provisions of the International Covenants on Human Rights." This definition was adopted by the African Commission on Human and Peoples' Rights (the Commission).

In 1993, the *UN Commission on Human Rights* indicated that forced evictions are gross violation of human rights. Paragraph 4 of General Comment No 7 emphasizes the interrelationship and interdependency that exists among all human rights; and that forced evictions may result to the violation of civil and political rights such as the right to life, the right to security of the person, the right to non-interference with privacy, family and home and the right to the peaceful enjoyment of possession. In this case, the petitioners claim that their rights and fundamental freedoms to life, human dignity, freedom and security of the person, property, clean and healthy environment, economic and social rights, culture and affirmative action guaranteed by article 26, 28, 29, 40, 42, 44 and 56 of *Constitution* respectively were violated by the Respondents during the forceful evictions.

138. The respondents have denied any infringement of the petitioners' rights during the evictions, and insisted that the evictions were conducted in a humane manner in accordance with the laid down procedure of evicting persons illegally occupying the forest. As held, the rights of the petitioners over the suit land were extinguished, after the forest was converted into a Government forest under the management of the 2nd respondent. More so, PW1, PW2, and PW3 admitted in cross examination that

they were allocated land by the State in Chepyuk Settlement Scheme, Phase I, II and III, where some of them currently reside.

The Supreme Court in *William Musembi & 13 others v Moi Educational Centre Co Ltd & 3 others* (2021) eKLR has held that constitutional rights that are founded on the right to property do not extend to property that has been unlawfully acquired. The court stated;

> "With regard to the claims instituted by the petitioner against the respondents, and particularly on the violation of their rights as pronounced under articles 28, 29, 43, 53 and 57 of the *Constitution*, the constitutional rights they allege to have been violated are founded on the right to property ownership and entitlement, which is provided for under article 40(1)(a) & (b) of the *Constitution*.... These constitutional rights as guaranteed under the cited provisions are only in relation to property that has been legally acquired, and does not extend to property that has been unlawfully acquired. In that regard, article 40(6) of the *Constitution* is instructive and provides that "The rights under this article do not extend to any property that has been found to have been unlawfully acquired".

The High Court in *Joseph Letuya & 21 others v Attorney General & 5 others* *supra* held that the Mau Ogiek had not acquired property rights in the Mau, which was found to be a government forest. The court stated that;

> "I find that I must agree with the 1st, 2nd, 3rd, 4th and 6th respondents arguments. The process of conferring legal and equitable property rights in land under Kenyan Law is settled, it is dependent upon formal processes of allocation or transfer and consequent registration of title, or of certain transactions that confer beneficial interest in land in the absence of a legal title of ownership. The process of allocation of forest land is further governed by the Forest Act that requires a process of excision of forest land before such land can be allocated. The applicants did not bring evidence of such processes of allocation of title to land allocated in the Mau forest and solely relied on their long occupation of the same. In addition under law, forest land being government land cannot be subject to prescriptive rights arising from adverse possession. This court cannot therefore in the circumstances find that they have accrued any property rights in the Mau forest that can be subject to the application of section 75 of the old Constitution or article 40 of the current Constitution."

The Supreme Court in *Mitu-bell Welfare Society vKenya Airport Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* *supra*, was faced with the question of how to guarantee the rights of persons who finds it almost impossible to mount a claim of a right to housing, even when faced with the grim possibility of eviction. The court held that: -

> "This scenario has inevitably led to the emergence of the so called "informal settlements", an expression that describes a habitation by the "landless". In their struggle to survive, many Kenyans do occupy empty spaces and erect shelters thereupon, from within which, they eke their daily living. Some of these settlements sprout upon private land, while others grow on public land. It is these "settlers" together with their families who face the permanent threat of eviction either by the private owners or State agencies. The private owners will raise 'the sword of title', while the State agencies will raise 'the shield of public interest'. So where does this leave the right to housing guaranteed by article 43 of the *Constitution*?
>
> While we are in agreement with the submission to the effect that, an illegal occupation of private land, cannot create prescriptive rights over that land in favour of the occupants, we don't think the same can be said of an "illegal occupation" of public land. To the contrary,

we are of the considered opinion, that where the landless occupy public land and establish homes thereon, they acquire not title to the land, but a protectable right to housing over the same. Why, one may wonder, should the illegal occupation of public land give rise to the right to shelter, or to any right at all? The retired Constitution did not create a specific category of land known as "public land". Instead, the *Constitution* recognized what is referred to as "un-alienated government land". The radical title to this land was vested in the president, who through the Commissioner of Lands, could alienate it, almost at will. The consequences of this legal regime have been adequately recorded for posterity elsewhere. The 2010 Constitution has radically transformed land tenure in this country by declaring that all land in Kenya belongs the people of Kenya collectively as a nation, communities and individuals. It also now creates a specific category of land known as public land. Therefore, every individual as part of the collectivity of the Kenyan nation has an interest, however indescribable, however unrecognizable, or however transient, in public land.

The right to housing over public land crystallizes by virtue of a long period of occupation by people who have established homes and raised families on the land. This right derives from the principle of equitable access to land under article 60(1)(a) of the *Constitution*. Faced with an eviction on grounds of public interest, such potential evictees have a right to petition the court for protection. The protection, need not necessarily be in the form of an order restraining the State agency from evicting the occupants, given the fact that, the eviction may be entirely justifiable in the public interest. But, under article 23(3) of the *Constitution*, the court may craft orders aimed at protecting that right, such as compensation, the requirement of adequate notice before eviction, the observance of humane conditions during eviction (UN Guidelines), the provision of alternative land for settlement, etc.

The right to housing in its base form (shelter) need not be predicated upon "title to land". Indeed, it is the inability of many citizens to acquire private title to land, that condemns them to the indignity of "informal settlement". Where the Government fails to provide accessible and adequate housing to all the people, the very least it must do, is to protect the rights and dignity of those in the informal settlements. The courts are there to ensure that such protection is realized, otherwise these citizens, must forever, wander the corners of their country, in the grim reality of "the wretched of the earth".

139. In *Mitu-bell* (*supra*), the Supreme Court, clarified on the guidelines that the State should observe while evicting people, from public land. They include; compensation, the requirement of adequate notice before eviction, the observance of human conditions during eviction and the provision of alternative land for settlement. The Supreme Court, determined that the UN Guidelines on Evictions, were an aid in fashioning appropriate reliefs during evictions and they fill the existing lacuna as to how the government ought to carry out evictions.

The Supreme Court, reaffirmed its decision in *Mitubell* (*supra*), in the case of *William Musembi & 13 others v Moi Educational Centre Co. Ltd & 3 others* (*supra*), where it held that:

In *Satrose Ayuma*, (*supra*), the High Court laid out certain principles that an evicting party must comply with. The court, in doing so, applied international principles of law later clarified by this court in Mitubell, (*supra*), and which were crystalized as law in section 152(A) – (H) of the *Land Act*. We reiterate that these principles were applicable to the eviction of the petitioners as a matter of obligation by the State under international law as provided for in articles 2(5) and 2(6) of the *Constitution*.

The principles include the duty to give notice in writing; to carry out the eviction in a manner that respects the dignity, right to life and security of those affected; to protect the rights of women, the elderly, children and persons with disabilities and the duty to give the affected persons the first priority

to demolish and salvage their property. These principles flow from UN Guidelines on Evictions: General Comment No.7 which in *Mitubell*, we stated, are "intended to breathe life into the Right to Dignity and Right to Housing under the ICCPR and ICESCR respectively".

The UN Basic Principles and Guidelines on Development and Development Based Eviction and Displacement (2007), provide guidance that States should adapt in ensuring that development-based and in this case, conservation based evictions are not undertaken in contravention of existing international human rights standards and violation of human rights. Lenaola J (as he then was), discussed the UN Guidelines in details in *Satrose Ayuma & 11 others v Registered Trustees of The Kenya Railways Staff Retirement Benefits Scheme & 3 others*(*supra*). He held that:

"The Guidelines *inter-alia* place an obligation on the State to ensure that evictions only occur in exceptional circumstances and that any eviction must be authorized by law; carried out in accordance with international human rights law; are undertaken solely for purposes of promoting the general welfare and that they ensure full and fair compensation and rehabilitation of those affected. The protection accorded by these procedural requirements applies to all vulnerable persons and affected groups irrespective of whether they hold title to the home and property under domestic law.

The Guidelines also articulate the steps that States should take prior to taking any decision to initiate an eviction; that the relevant authority should demonstrate that the eviction is unavoidable and is consistent with international human rights commitments; that any decision relating to evictions should be announced in writing in the local language to all individuals concerned sufficiently in advance stating the justification for the decision; that alternatives and where no alternatives exist, all measures taken and foreseen to minimize the adverse effect of evictions; that due eviction notice should allow and enable those subject to the eviction to take an inventory so as to assess the value of their properties that may be damaged during evictions and most importantly that evictions should not result in individuals being rendered homeless or vulnerable to other human rights violations. Finally, that there must be resettlement measures in place before evictions can be undertaken.

The Guidelines go further to lay down the conditions to be undertaken during evictions as follows; that there must be mandatory presence of Governmental officials or their representatives on site during eviction; that neutral observers should be allowed access to ensure compliance with international human rights principles; that evictions should not be carried out in a manner that violates the dignity and human rights to life and security of those affected; that evictions must not take place at night, in bad weather, during festivals or religious holidays, prior to elections, during or just prior to school exams and at all times the State must take measures to ensure that no one is subjected to indiscriminate attacks.

The UN Guidelines in addition provide what ought to happen after the eviction; that the person responsible must provide just compensation for any damage incurred during eviction and sufficient alternative accommodation and must do so immediately upon evictions. At the very minimum, the State must ensure that the evicted persons have access to essential food, water and sanitation, basic shelter, appropriate clothing, education for children and childcare facilities.

These important guidelines have been adopted by the African Commission on Human and Peoples Rights and in its 48th Ordinary Session it adopted the Principles and guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and People's Rights. Accordingly, the African position on the right to housing can be understood from the African Commission on Human and Peoples' *Rights case of The Social Economic Rights Centre & Centre for*

Economic and Social Rights v Nigeria, Com No155/96 (2001). In the judgment, the Commission stated that;

> "Individuals should not be evicted from their homes nor have their homes demolished by public or private parties without judicial oversight. Such protection should include providing for adequate procedural safeguards as well as a proper consideration by the courts of whether the eviction or demolition is just and equitable in the light of all relevant circumstances. Among the factors a court should consider before authorizing forced evictions or demolitions is the impact on vulnerable and disadvantaged groups. A court should be reluctant to grant an eviction or demolition order against relatively settled occupiers without proper consideration or the possibility of alternative accommodation being provided. Forced evictions and demolitions of people's homes should always be measures of last resort with all other reasonable alternatives being explored, including mediation between the affected community, the landowners and the relevant housing authorities"

140. The petitioners have alleged that their eviction from Chepkitale National Reserve resulted in the violation of the following constitutionally enshrined rights: right to life (article 26), human dignity (article 28), freedom and security of the person (article 29), the protection of right to property (article 40), environment (article 42), Language and culture (article 44) and minorities and marginalised groups (article 56). The petitioners main grievance is the fact that they keep being unlawfully evicted from the Chepkitale National Reserve resulting in the violation of their constitutionally enshrined rights. This Court shall proceed to make a determination whether indeed evictions took place and the lawfulness or otherwise of the aforementioned evictions. The petitioners testified that they have been evicted from Chepkitale National Reserve on numerous occasions in the past but they keep going back to the forest. They also testified that they decided to approach this court to make a declaration of their rights following an eviction exercise in 2016.

141. The 1st and 3rd respondents in paragraph 20 of their written submissions acknowledged that an eviction took place while in paragraph 21, they submitted the petitioners failed to adduce documentary evidence of any injury and or evidence of destruction of property prepared by the relevant authorities.

The 2nd respondent's witness DW1 made reference to the issuance of an eviction notice and the holding of public barazas for seven (7) days during the subsistence of the twenty-one (21) days eviction notice.

In *David Kiptum Yator & 23 others v Attorney General & 15 others* (*supra*) the court held that in the absence of any evidence of any death, injury or damage to property having been documented with the appropriate Government agencies at the County or National level, then the court finds that the petitioners' claims remain without proof as they have failed to discharge the duty placed upon them by section 107 of the *Evidence Act* chapter 80 Laws of Kenya.

142. Having established that the petitioners were evicted, this court must then make a determination as to the legality or otherwise of the eviction. It is unfortunate that it is not very clear, the manner in which the eviction took place in order for this court to make a determination whether the petitioners' dignity was upheld or not. It is also unfortunate that the petitioners did not produce any evidence from the lawfully established authorities like the Police or a Government valuer to quantify the loss occasioned to the Chepkitale Ogiek during the eviction exercise.

143. During cross examination PW 2 stated that it would be impossible to keep hives in the forest unless they live in the forest. This court find this view to be wrong and unfounded.

In *Francis Kemai & 9 others v. Attorney General & 3 others* (supra) page 326 the court made the following observation which captures the views that this court holds on the issue of being able to reasonably enjoy the benefits of the forest without needing to live in the forest:

> " ...To say that to be evicted from the forest is to be deprived of the means to livelihood because then there will be no place from which to collect honey or where to cultivate and get wild game, etc, is to miss the point. You do not have to own a forest to hunt in it. You do not have to own a forest to harvest honey from it. You do not have to own a forest to gather fruits from it. This is like to say, that to climb Mount Kenya you must own it; to fish in our territorial waters of the Indian Ocean you must dwell on, and own the Indian Ocean; to drink water from the weeping stone of Kakamega you must own that stone; to have access to the scenic caves of Mount Elgon you must own that mountain. But as we all know, those who fish in Lake Victoria do not own and reside on the Lake; they come from afar and near: just as those who may wish to exploit the natural resources of the Tinet Forest do not have to reside in the forest, and they may come from far away districts or from nearby. We know that those who exploit the proverbial Meru Oak from Mount Kenya forests do not necessarily dwell on that mountain in those forests. Those who enjoy the honey of Tharaka do not necessarily own the shrubs and wild flowers and wildbees which manufacture it; nor do we who enjoy that honey own the lands where it is sourced. There is no reason why the Ogiek should be the only favoured community to own and exploit at source the sources of our natural resources, a privilege not enjoyed or extended to other Kenyans. No; they are not being deprived of their means of livelihood and a right to life. Like every other Kenyan, they are being told not to dwell on a means of livelihood preserved and protected for all others in the Republic; but they can, like other Kenyans, still eke out a livelihood out of the same forest area by observing permit and licensing laws like everyone else does or may do. The applicants can obtain permits and licences to enter the forest and engage in some permissible and permitted life-supporting economic activity there."

144. Chepkitale National Reserve is an ecologically sensitive area that is found within Mt Elgon Forest, it is a home to wild animals including the Elephants. During migration season, Elephants use Chepkitale National Reserve as a wildlife corridor. Increased human activity in Chepkitale National Reserve would destabilize the ecological balance posing a threat to the wildlife and plant species. Management of natural resources lie with the Government. Article 69 of the *Constitution* provides for the obligations of the State in respect of the environment. Article 69 provides thus:

> " The State shall—
>
> (a) ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits;
>
> (b) work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya;
>
> (c) protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities;
>
> (d) encourage public participation in the management, protection and conservation of the environment;
>
> (e) protect genetic resources and biological diversity;

(f) establish systems of environmental impact assessment, environmental audit and monitoring of the environment;

(g) eliminate processes and activities that are likely to endanger the environment; and

(h) utilise the environment and natural resources for the benefit of the people of Kenya.

2 (Every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.")

145. The *Environmental Management and Co-ordination Act*, 1999 (EMCA) defines sustainable development as development that meets the needs of the present generation without compromising the ability of future generations to meet their needs by maintaining the carrying capacity of the supporting ecosystems. According to NEMA, the decreasing forest cover is aggravated by an abated environmental destruction of trees for charcoal burning. It is the responsibility of this court to provide a conducive environment for the enjoyment of constitutionally enshrined rights. It is of utmost importance that this court jealously protects the environment to ensure that posterity have a chance at enjoying their constitutionally enshrined rights.

In *Francis Kemai & 9 others v Ag & 3 others*, *supra*, the court held as follows:

> " individual or group rights must be balanced with environmental protection. The protection of the environment through legislation was in the interest of all citizens because natural resources were necessary to the enjoyment of fundamental rights."

146. This court finds that the need to preserve the ecosystem takes priority over the claims by the Ogiek.

In *James Kaptipin & 43 others v The Director of Forest & 2 others* (2014) eKLR the court held that;

> " There are legal ways in which the community can be allowed back into the forest to harvest honey without affecting the environment. The Director of Forest is empowered by the Act to allow people into forests to undertake certain regulated activities. The Sengwer community should embrace this in efforts to conserve the environment for the present and future generations."

In *David Kiptum Yator & 23 others v Attorney General & 15 others* *supra* the court held;

> " ...the petitioners and generally the Sengwer community, should consider pursuing their claim before the National Land Commission whose functions under article 67(2)(e) of the*Constitution*, 2010 is to among others initiate investigations on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress, should they consider the proclamation of Embobut Forest as a forest reserve in 1954, and its subsequent gazettement as a central forest in 1964, took away their ancestral land hindering their access to the cultural and religious sites and use. That alternatively, they could consider to apply for licenses or permits to access the cultural or religious sites situated in the said forest if any, from the 1st respondent in accordance with sections 8(c) and (d), 44, 45 and 46 of the Forest Conservation Management Act.

That sections 8(c) and (d) provides as follows;

"8. The functions of the service shall be to –

(c) receive and consider application for licenses or permits in relation to forest resources or management of forests or any other relevant matter in accordance with this Act;

(d) establish and implement benefit sharing arrangements in accordance with the provisions of this Act;"

That sections 44 to 46 and 52 of the Act provides for concessions on public forests, forest management agreements and consent for quarrying respectively.

That section 52 of the said Act provides as follows of customary rights over public forests;

"52. Nothing in this Act shall be deemed to prevent any member of a forest community from using, subject to such conditions as may be prescribed by this Act or any other written law, such forest produce as it has been the custom of that community to take from such forest otherwise than for the purpose of sale."

That the provisions of the foregoing sections contains some of the powers of the 1st respondent and if properly invoked especially with the 12th respondent onboard, the Sengwer community or for that matter, any community that feels aggrieved by the gazettement of land they consider ancestral land as public forest would not go without appropriate redress."

Although the petitioners claim proprietary rights over the suit land by dint of article 63(2)(d)(ii) of the *Constitution*, (ancestral rights), their claim aforesaid fails since the suit land herein falls within the provision of article 62(1)(g) of the *Constitution*, (Public Land).

147. Noting the fact that Chepkitale National Reserve was gazetted in the year 2000, it must be treated as being public land and should be handled in accordance with the provisions of the *Wildlife Conservation and Management Act, 2013* and the *Forest Conservation and Management Act*, 2016. According to section 2 of the *Wildlife Conservation and Management Act, 2013*, a National Reserve means an area of community land declared to be a National Reserve under this Act or under any other applicable written law. The characteristics outlined in section 35 of the *Wildlife Conservation and Management Act, 2013*, must be in place before a parcel of land is declared a National Reserve:

(1) The Cabinet Secretary may, upon recommendation of the relevant county government and after consultation with the National Land Commission, by notice in the Gazette, declare any land under the jurisdiction of a county government to be a national reserve where the land is—

a. rich in biodiversity and wildlife resources or contains endangered and threatened species;

b. an important catchment area critical for the sustenance of a wildlife conservation area; or

c. an important wildlife buffer, zone, migratory route, corridor or dispersal area."

148. The *Wildlife Conservation and Management Act, 2013* provides a recourse for parties that are aggrieved by the decision to declare a parcel of land to be a national reserve. Section 37 of the *Wildlife Conservation and Management Act, 2013* provides as follows:

" Variation of boundaries or revocation of a national reserve

(1) A notice under this section which proposes to—

(b) declare that a wildlife conservation area shall cease to be a national reserve;

... shall only be published by the Cabinet Secretary where a proposal is recommended by the relevant county government after consultation with the National Land Commission and the Service in accordance with subsection (2) of this section and is subsequently approved by resolution of Parliament.

(2) The relevant county government, the National Land Commission and the Service shall not recommend any such proposal unless—

(a) they are satisfied that such variation of boundary or cessation of national reserve proposed by the notice shall not—

(i) endanger any rare, threatened or endangered species;

(ii) interfere with the migration and critical habitat of the wildlife;

(iii) adversely affect its value in provision of environmental goods and services; and

(iv) prejudice biodiversity conservation, cultural site protection, or its use for educational, ecotourism, recreational, health and research purposes;

(b) the proposal has been subjected to an environmental impact assessment in accordance with the provisions of the Environmental Management and Co-ordination Act, 1999 (No 8 of 1999); and

(c) public consultation in accordance with the fourth schedule has been undertaken in relation to the proposal."

149. The *Forest Conservation and Management Act, 2016* contains a similar provision in section 34 which provides as follows:

"Variation of boundaries or revocation of public forests

1. Any person may petition the National Assembly for the variation of boundaries of a public forest or the revocation of the registration of a public forest or a portion of a public forest.

(2) A petition under subsection (1) shall demonstrate that the variation of boundaries or revocation of the registration of a public forest or a portion of a public forest does not—

a. endanger any rare, threatened or endangered species; or

b. adversely affect its value as a water catchment area; and prejudice biodiversity conservation, cultural site protection of the forest or its use for educational, recreational, health or research purposes.

(2A) A petition under subsection (1) shall only be forwarded to the National Assembly on the recommendation of the Service.

(3) A petition made under subsection (1) shall be considered in accordance with the provisions of the petitions to Parliament (Procedure) Act and the Standing Orders of the National Assembly.

(4) The Cabinet Secretary shall, within thirty days of the petition being committed to the relevant Committee, submit a recommendation on whether the petition should be approved subject to—

a. the petition being subjected to an independent Environmental Impact Assessment; and

b. public consultation being undertaken in accordance with the Second Schedule.

(5) If the relevant Committee, reports that it finds that the petition—

a. does not disclose a ground for the variation of the boundaries of a public forest or the revocation of the registration of a public forest or a portion of a public forest, no further proceedings shall be taken; or

b. discloses a ground for the variation of the boundaries of a public forest or the revocation of the registration of a public forest or a portion of a public forest, the National Assembly shall vote on whether to approve the recommendation.

(6) If the resolution under sub section (5)(b) is supported by a majority of the members of the National Assembly, present and voting, the Cabinet Secretary shall publish a notice in the Gazette."

150. Chepkitale National Reserve is a gazetted National Reserve, and the law provides the procedure for revocation of public forests in section 34 of the *FCMA 2016* and section 37 of the *WCMA 2013*. This court takes judicial notice of the fact that an executive petition was filed regarding the variation of the boundaries of Mt Elgon Forest Reserve. The executive petition was tabled in the house on July 5, 2018 pursuant to article 119(1) of *Constitution* and Standing Order No. 225(2)(b). The Petition sought the degazettement of Chepyuk phase II & III. A report dated July 4, 2019 was prepared by the Departmental Committee on Environment and Natural Resources confirming that the degazettement of Chepyuk phase II & III was approved. It is important to note that during the aforementioned process in Parliament, a representative of the residents of Chepkitale disagreed with the assertion made by the Executive in the executive petition that Chepyuk phase II & III was intended to be in exchange for Chepkitale National Reserve. The representative stated that the Chepkitale Ogiek were not ready to discuss the exchange of their ancestral land for the allocation of land in Chepyuk phase II & III. It is illogical for the Chepkitale Ogiek to suggest that their participation was only limited to their entitlement to be allocated land in Chepyuk Settlement Scheme. It is also illogical for the Chepkitale Ogiek to assert that their allocation of land in Chepyuk Settlement Scheme did not affect their entitlement to make a claim for their ancestral land which is currently gazetted as Chepkitale National Reserve.

151. This court also takes note of the recommendations made in the Report for the Consideration of a petition by the Executive Regarding the Variation of the Boundaries of Mt Elgon Forest Reserve that was tabled by the Chairperson Departmental Committee of Environmental & Natural Resources and Lands before the National Assembly on July 24, 2019. The Committee recommended the following: -

1. Pursuant to section 34 of the *FCM Act, 2016* 2016 the National Assembly approves the variation of the boundaries of Mount Elgon Forest Reserve to exclude Chepyuk Phase II and III comprising of 4,607 hectares.

2. The government should properly secure the remaining forest area within Mt Elgon Forest Reserve particularly in Chepkitale considering the need to achieve the United Nations recommended 10% forest cover in the country.

This route is still available to the petitioners should they wish to pursue it.

152. This petition seeks to have Chepkitale National Reserve degazetted so that the petitioners can get a second bite at the cherry on grounds that their ancestors had been in occupation of the suit land since time immemorial. This court is persuaded that the petitioners are attempting to approbate and reprobate. In *Republic vs Institute of Certified Public Secretaries of Kenya ex-parte Mundia Njeru Geteria* (2010) eKLR the court cited the following authorities with approval on approbating and reprobating:

> " *Evans v Bartlam* (1937) 2 All ER 649 at page 652 where Lord Russel of Killowen said;
>
> > "The doctrine of approbation and reprobation requires for its foundation inconsistency of conduct, as where a man, having accepted a benefit given to him by a judgment cannot allege the invalidity of the judgment which conferred the benefit."
>
> Again in *Banque De Moscou v Kindersley* (1950) 2 All ER 549 Sir Evershed said of such conduct;
>
> > "This is an attitude of which I cannot approve, nor do I think in law the defendants are entitled to adopt it. They are, as the Scottish lawyers (frame it) approbating and reprobating, or in the more homely English phrase blowing hot and cold."

In *Samuel M'amaroo M' Kaura & 9 others v Meru County Government & 3 others* (2018) eKLR the court held as follows:

> " Section 7 of the Wildlife (Conservation and Management Act) (repealed) provided for the procedure for cessation of an area as National Park, National Reserve or local sanctuary... The provisions of section 7 of the Wildlife (Conservation and Management Act) (repealed) are quite clear as to how an area shall cease to be a National Reserve. There was no evidence that that Legal Notice No 86 of 2000 had been withdrawn by the then President and even if it were indeed true that the said notice was withdrawn/revoked by the President via a roadside declaration, the said declaration would be null and void and of no effect since due process in allegedly withdrawing/revoking the said notice was not followed."

The Court of Appeal in *Ledidi Ole Tauta & others vs Attorney General & 2 others* (2015) eKLR, held as follows:

> "...this court notes that Ngong Hills Forest has not been degazetted as such and its boundaries have not been varied to make it available for alienation to the Petitioners. In our view the petitioners ought to have petitioned the Minister through the Kenya Forest Service Board to consider whether any basis existed to have the Ngong Hills Forest degazetted to accommodate their interests."

In *David Kiptum Yator & 23 others v Attorney General & 15 others* [2020] eKLR the court held as follows:

> "...the position taken by the petitioners herein that Embobut Forest is community land for reasons that it has been their ancestral land has no basis. That the findings in the above cases supports the respondents' position that pursuant to Embobut Forest having been proclaimed a forest reserve in 1954, and gazetted a central forest in 1964, then it forms part of public land as defined by article 62(1)(g) of the *Constitution of Kenya, 2010*, which is the Supreme law of Kenya."

153. Having established that Chepkitale National Reserve is public land, this court will proceed to consider section 77 of the *Forest Conservation and Management Act* which provides as follows:

> "Notwithstanding the repeal of the Forests Act, (No 3 of 2005), any land which immediately before the commencement of this Act, was gazetted or registered as a forest reserve as set out in the Third Schedule to this Act, or under any other relevant law shall be deemed to be a public forest under this Act."

The provisions of article 40(6) ofthe *Constitution* are instructive in this instance:

> "The rights under this article do not extend to any property that has been found to have been unlawfully acquired."

This court finds that, the petitioners' occupation of Chepkitale National Reserve amounts to what is termed as "prohibited activities in forests" under section 64 of the *Forest Conservation and Management Act* (FCMA).

154. On the issue of eviction, other than a list done and presented in court by the petitioners to prove destruction of property, the petitioners did not adduce any other evidence. They did not call any independent witness in support of this allegation. Prior to the oral testimony in court, the court did visit the locus with a view of establishing the extent of destruction on September 27, 2017 and from the evidence on record, three (3) sites were visited. There was evidence of settlement, a disused dispensary and a public primary school with reportedly two hundred and fifty four (254) pupils. No evidence of apparent destruction was noted. For the foregoing reasons, the court does find that the Petitioners have not adduced adequate evidence to support a finding that their eviction from the forest was forceful or that the eviction violated their rights stated above.

155. The petitioners have alleged that their eviction from Chepkitale National Reserve infringed their right to life and their right to be treated with dignity. This court takes cognizance of the fact that the petitioners were allocated land in Chepyuk Settlement Scheme where they engage in subsistence farming and livestock keeping. The petitioners testified that although they are a hunter-gatherer community they have had to embrace new practices. Thus their claim that eviction from the suit land

threatens their enjoyment of the right to life is unsustainable. The resettlement of Chepyuk Settlement Scheme has been admitted to have started in 1971 in phase 1 and continued to phase 11 and phase 111 and completed on or about 1989. PW1 to PW3 admitted in their testimonies that either themselves or their families were beneficiaries in the said Settlement Scheme. It follows therefore that by the time the eviction of June 20, 2016 was carried out, the petitioners herein had already been allocated alternative land over the years and had had adequate time to establish their homes and engage in activities thereon to support their lives.

156. This court declines the petitioners invitation to award the Ogiek compensation for the loss and damage occasioned to them during the eviction exercise. It is trite Law that a party should not be allowed to benefit from their illegal actions. This court takes note of the fact that natural resources are not infinite and the unsustainable utilization of natural resources undermines human existence. Forests play a major role in reducing the carbon footprint which results in adverse climate changes resulting from the depletion of the ozone layer.

157. This court therefore finds that the Petition herein has no merit and the same stands dismissed with no orders as to costs noting that this matter is a public interest claim.

It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED ON THIS 19TH DAY OF OCTOBER 2022 AT BUNGOMA.

****

BOAZ N. OLAO.

J U D G E

STEPHEN M. KIBUNJA

J U D G E

NELLY A. MATHEKA

J U D G E

PARA 19.

10.2022

Coram

Before

Hon. Justice Boaz N. Olao - The Presiding Judge).

Hon. Mr. Justice Stephen Kibunja

Lady Justice Nelly Matheka.

Court Assistants

Ms. Aoko Joy

Ms. Brenda Wesonga

Representation

Counsel for Petitioner Mr. Lempaa

1st Respondent Mr. Juma

2nd Respondent Professor. Sifuna

3rd Respondent Mr. Juma

4th Respondent Mr. N/A

5th Respondent Mr. Juma holding brief for Ms Oduor

Amicus Curiae: Ms. Asoyong

JUDGEMENT DATED, SIGNED AND DELIVERED AT BUNGOMA

IN THE OPEN COURT THIS 19TH DAY OF OCTOBER, 2022.

HON. JUSTICE BOAZ N. OLAO

JUDGE

HON. JUSTICE STEPHEN KIBUNJA

JUDGE

HON. JUSTICE NELLY MATHEKA

JUDGE

Prof. Sifuna On behalf of my clients and my worthy colleagues we appreciate the sacrifice that the Court has put in while delivering this long judgement.

If there were any incidence when tempers florid during the hearing, we take this opportunity to apologize.

Thank you.

COURT

This Court also wishes to thank counsel including their clients for the fact that they have all conducted themselves with decorum throughout this case,

We also wish to thank our researchers **Mr. T. Ngetich, Ms Susan Khadambi** and **Ms. Esther Karanja** for their industry and availing necessary case law and other relevant material.

We are also grateful to **Ms Veronica Murutu** the Court Administrator II.

The Court Assistants **Ms. Joy Aoko, Mr Francis Lusweti** and **Mr. Kizito Katamu** for always ensuring that the Court was ready and the records well kept.

Finally, we thank **Felistas Cherop** our Secretary for the industry in typing the judgment.

HON. JUSTICE BOAZ N. OLAO

JUDGE

BUNGOMA

HON. JUSTICE STEPHEN KIBUNJA

JUDGE

BUNGOMA

HON. JUSTICE NELLY MATHEKA

JUDGE

BUNGOMA