



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E & L PETITION NO. 15 OF 2013

[FORMERLY ELDORET HIGH COURT PETITION NO. 6 OF 2013]

IN THE MATTER OF ARTICLES 2(6), 10(2)(b), 63(d)(I) and (ii) AND 258 OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF THE CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 11, 19(C), 25(a), 28, 29(c), 43, 56 AND 63(d), (I) AND (ii) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF VARIOUS PROVISIONS OF INTERNATIONAL HUMAN RIGHTS LAW

BETWEEN

DAVID KIPTUM YATOR,

LUKA TOROITICH KIRATON AND

JOSEPH CHEPTORUS.....PETITIONERS

(Suing as Leaders of the Sengwer Community)

AND

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

THE KENYA FOREST SERVICE.....2ND RESPONDENT

ZONAL FOREST MANAGER (MARAKWET DISTRICT).....3RD RESPONDENT

THE DISTRICT COMMISSIONER (MARAKWET EAST DISTRICT).....4TH RESPONDENT

THE NATIONAL LAND COMMISSION.....5TH RESPONDENT

AND

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

PETITION NO. 3 OF 2018

IN THE MATTER OF ARTICLES 2, 3, 10, 19, 20, 21, 22, 23(1) & (3), 26, 27(1) & (2), 28,

40(1), 43, 47, 165(3)(b) & (6) AND 258 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER

ARTICLES 2, 3, 10(2)(b), 11, 21(1), (3), 22(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 OF KENYA, 2010

AND

IN THE MATTER OF SECTIONS 4(1), (2), (3) & (4) AND 5 OF

THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015

AND

IN THE MATTER OF SECTIONS 152B, C, E, F & G OF THE LAND ACT NO. 6 OF 2012

BETWEEN

PETITIONERS:

1. ELIAS KIBIWOT KIMAIYO
2. PAUL KIBOR KITOM (KIPTUKA)
3. ALBINA CHEBOI
4. LEAH JEBET BIWOTT
5. ABRAHAM TOROITICH
6. BRENDA CHEBOI
7. MICAH TOROITICH BIWOTT
8. MARY KHATI KOMEN
9. ROBERT TOROITICH YEGO
10. REBEKAH JEPTOO KIMAIYO
11. DESPER KIPTOO
12. LEAH SOMOKWONY KILIMO
13. ISMAEL KIROP
14. JENIFFER SOMOKWONY KIPKORIR
15. THOMAS KIROP
16. EVERLYNN JUMA
17. SAMMY KIPCHEMERI LOMUCHAK
18. JOHN TOROITICH
19. JOEL KIPTALA
20. ESTHER KHOMAN CHEPKIYENG
21. PAUL CHEBET KIBOR

(ACTING ON THEIR OWN BEHALF AND AS REPRESENTATIVES OF THE SENGWER COMMUNITY OF EMBOBUT FOREST,

CHERANGANY HILLS)

RESPONDENTS:

1. KENYA FOREST SERVICE (KFS)
2. DIRECTOR OF KFS, EMILIO N. MUGO
3. KFS COMMANDANT, ALEX LEMARKOKO
4. KFS NORTH RIFT COMMANDANT, STEPHEN CHESSA
5. KFS HEAD OF CONSERVANCY (HOC) NORTH RIFT, DEDAN NDERITU
6. KFS COUNTY CONSERVATOR, ELGEYO MARAKWET COUNTY, ANDREW SOI
7. KFS FORESTER KAPYEGO/TIRAP STATIONS
8. ELGEYO MARAKWET COUNTY COMMISSIONER, FREDRICK NDAMBUKI
9. ELGEYO MARAKWET DEPUTY COUNTY COMMISSIONER,
MARAKWET EAST, STEPHEN SANGALO
10. ELGEYO MARAKWET NATIONAL POLICE SERVICE COUNTY COMMANDER
11. THE ATTORNEY GENERAL
12. THE NATIONAL LAND COMMISSION

JUDGMENT

[ELC PETITION NO. 15 OF 2013 AS CONSOLIDATED WITH ELC PETITION NO. 3 OF 2018 UNDER COURT ORDER OF 22ND MAY, 2019]

1. The Petitioners in Eldoret ELC Petition No. 15 of 2013, described as leaders of Sengwer Community, filed the petition dated the 22nd March, 2013 seeking for the following;

- (a) *An order directing Kenya Forest Service not to carry out any eviction of Sengwer Community members from Embobut Forest.*
- (b) *A declaration be issued that the Petitioners' rights, individually and in association with others, to participate in the cultural life, of the person's choice guaranteed by **Article 44 of the Constitution** of the Constitution have been and will be contravened if the intended eviction of the community is executed by the Respondents.*
- (c) *A declaration be issued that the Respondents have contravened **Article 10 of the Constitution** in that the National values and principles of Governance set out have not been observed and that the decisions to evict the Sengwer Community has been procured without the free informed participation of the community.*
- (d) *Conservatory order be issued in respect of Embobut Forest and its environs until further orders of this Court.*
- (e) *Orders of mandamus compelling the National Land, the 5th Respondent, to discharge its lawful statutory and constitutional obligations in **Articles 63(3) of the Constitution** as read with **Section 5(2)(c) of the National Land Commission Act No. 36 of 2012** including the observance of a moratorium with respect to community land as clearly stated in **Article 63(4) of the Constitution**.*
- (f) *Such further orders and directions as the Court may deem fit to meet the ends of justice, and the protection of the constitutional rights of the Petitioners.*
- (g) *The Petitioners be availed the costs.*

2. The Petitioners in Eldoret ELC Petition No. 3 of 2018 commenced the proceedings through the Petition dated the 22nd January, 2018 on their own behalf, and on behalf of members of the Sengwer Community of Embobut Forest, and seeks for the following;

- (a) *A declaration be issued that the violent attacks, burning of houses, destruction of property and eviction of the members of the*

Sengwer Community from Embobut and threats of eviction is a violation of the Petitioners, and members of the Sengwer Community of Embobut Forest rights under **Articles 26, 28, 29, 40, 42, 44 and 56 of the Constitution**.

(b) A declaration be issued that the actions of the County Commissioner, and The Kenya Forest Service and its officers in burning houses, and destroying the property of the Sengwer was a violation of its values, and its principles of governance under **Article 10 of the Constitution** especially because it was inimical to the values of human rights, rule of law, good governance and marginalized group. It is also a violation of **Article 21(1) of the Constitution** to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights. Further, the named Respondents' officers are in violation of the Public Officers Ethics Act.

(c) A declaration be issued that the acts of the Respondents, especially the 1st to 10th Respondents, is a violation of the right to property of the members of the Sengwer Community of Embobut in regard to their Community Land protected under Article 40 as read together with **Article 63(3) of the Constitution**.

(d) An order of permanent injunction be issued restraining the Respondents or their agents from interfering with the quiet enjoyment of life and property of the Sengwer Community of Embobut through either harassment, burning, and destruction of their houses and property or through evictions or threats of evictions.

(e) Costs of the petition be awarded to the Petitioners.

3. That the Respondents in both petitions are government or public officers/offices and a constitutional commission. That Katiba Institute is the Interested Party in ELC Petition No. 15 of 2013. That as ELC Petition No. 15 of 2013 has five (5) Respondents who are also in one description or the other part of the twelve in ELC Petition No. 3 of 2018, the reference in the judgment will follow the order of the Respondents in the latter petition.

- The 1st Respondent is sued as a public body created by **Section 7 of the Forest Conservation and Management Act** and seized with the functions set out in **Section 8 of the said Act**, and corroborates with other organization and communities in management and conservation of forests.
- The 2nd to 7th Respondents are sued as officers of the 1st Respondent who among others, allegedly cleared the forest, planted non-native species on the already deforested lands, burnt their houses, destroyed their food crops, and through their institutional hierarchy oversaw, ordered and or executed the illegal, violent evictions and dispossession of the Sengwer community who for ages resided in Embobut forest, in contravention of the **Constitution of Kenya, 2010** and the **Public Officers Ethics Act**.
- The 8th and 9th are sued as the most senior officials of the National Government in Elgeyo Marakwet County, and the 10th Respondent as most senior officer of the National Police Service in the said County, where the acts complained off including eviction took place, and failed to take action to stop the same.
- The 11th Respondent is sued as the Principal Legal Advisor to the Government of Kenya whose agencies and officers were involved in ordering and or implementing the alleged illegal evictions of the Sengwer Community from Embobut forest.
- The 12th Respondent is an independent commission established under **Articles 67 and 248 of the Constitution** to manage Public Land on behalf of the National and County governments and oversees the implementation of **Article 63** of the said Constitution.

4. The ELC Petition No. 15 of 2013 is premised on **Articles 2(6), 10(2)(b), 11, 19(c), 25(a), 28, 29(c), 43, 56, 63(d)(i) and (ii) and 258 of the Constitution of Kenya, 2010**. The ELC Petition No. 3 of 2018 is premised on **Articles 2, 3, 10(2)(b), 11, 20, 21(1) and (3), 22(1), 23(1) and (3), 26(1), 27(1) and (2), 28, 29, 42, 43, 44, 47, 56, 63(2)(d)(i) and (ii), 165(3)(b) and (6) and 258** of the said Constitution. The Petitioners' claim in both petitions care as summarized hereinbelow;

(a) That the Sengwer community are hunter-gatherers with some level of pastoralism and agricultural activities. That they have an all-encompassing and profound connection to Cherangany Hills where their ancestors were buried and the place their cultural, spiritual and rites sites are situated. That the place is also the source of their food, water, and where their homes and livelihoods including, honey gathering and herbs comes from.

(b) That the physical and cultural integrity of Cherangany Hills depends wholly on their occupation. That the land running from the Hills to the plains below form part of their ancestral lands. That the lands outlying areas of Embobut Forest were encroached by the British colonial administration and subsequently by other dominant ethnic groups including Marakwet, Pokot, and Kikuyu thereby exposing the Sengwer community to racial discrimination and marginalization.

(c) That apart from being the Sengwer community's ancestral home, Embobut forest is also recognized as trust land and forest reserve. That as part of the 1st Respondent's quest to manage and conserve the forest, it cleared the native forest, planted non-native species on already deforested lands, burnt their homes and destroyed their food crops in an effort to seek their forced eviction with the assistance of Local National Administration Officers [8th and 9th Respondents], and its local forest officers [4th to 7th Respondents] in 2007 to 2010.

(d) That the burning of their homes led to the community being affected negatively in health including psychiatric trauma, and pneumonia while the loss of property and crops led to socio economic harm, loss of education for their children whose books and uniforms were burnt in the process.

(e) That the threats of forceful eviction from their ancestral land was likely to render the community members squatters with no place for their physical and cultural rites and to call home. That the 1st Respondent's action of violating their rights has led to the suspension of the World Bank Water, and Natural Resources Management Project within Embobut forest which would have

guaranteed them resettlement and demands for their ancestral land.

(f) That the Sengwer community members faced fierce lethal and violent evictions and attack from the 1st Respondent. That on the 29th December 2017, over 100 guards entered the Embobut Forest, and burnt at least fifteen (15) homes and killed several livestock. That on the 16th January, 2018 the guards shot and killed one Robert Kirotych and injured David Kosgey Kiptikesi, both members of the Sengwer community during an eviction raid. That the attacks led Sengwer community members to flee the forest, hiding in caves and other venerable places exposing themselves to wild animals, vagaries of weather and rendering them unable to undertake their daily activities. That as a result, the European Union suspended its social programs in the forest including the Water Tower Project.

(g) That further, the Kenya National Commission on Human Rights [KNCHR] issued statements on the 16th and 15th January, 2018 respectively condemning the attacks and eviction of the Sengwer Community from Embobut Forest by the 1st Respondent.

(h) That the Sengwer Community have lived in Embobut Forest for many years and the forest is their ancestral land. That they have significant connection to the forest where they have religious and cultural sites and are extremely protective of the forest unlike the 1st Respondent, which allows its destruction through illegal logging and farming. That if evicted, their ancestral land and significant aspects of their culture would be lost. That the eviction was calculated to dispossess the community of their property rights over the Embobut Forest which is community land.

(i) That the Petitioners have moved the Court as they are apprehensive of eviction that threatens to violate the Constitution in regard to national values and principles of governance, right to culture, right to land, housing and reasonable sanitation, right to life, dignity and protection against violence from public and private services. That the forced evictions have no basis in law, are *ultra vires*, unlawful and unconstitutional and have caused harm, damage, loss to property, death, personal injury, suffering, material damage, and loss to amenity. That the assaults, burning, destruction, evictions and threats has violated **Articles 26, 28, 29, 40, 43, 44, 45, 63(2) of the Constitution**, and the treaties which Kenya has ratified. The petitions are supported by the affidavits sworn by David Yator Kiptum sworn on the 22nd March, 2013 and 21st May, 2014 and that of Elias Kibiwott Kimaiyo sworn on the 22nd January, 2018 to which are annexed several documents.

5. The following is a summary of the Respondents' response to the two petitions:

(a) That Embobut Forest is one of the three forests within Cherangany Hills that was promulgated and declared a national forest and gazetted as such by the colonial administration through **Legal Notice No. 26 of 1954**. That it was then declared a Central Forest vide Legal Notice No. 174 of 20th May, 1964, and is therefore protected under the Constitution and statutes.

(b) That the Petitioners' claim that Embobut Forest is a community forest, or community land or ancestral land for the Sengwer community is not true. That the claim is therefore incompetent in view of the provisions of the Constitution of Kenya 2010, Kenya's Forest policy, the National Land Policy, the **Forest Conservation and Management Act 2016**, the **Environmental Management and Co-ordination Act of 1999** and the fundamental principles of environmental management and sustainable development.

(c) That the forest was unlawfully invaded and inhabited by different ethnic communities who practiced farming and livestock keeping. The communities included the Pokots, Marakwets, Kikuyus, and Sengwer. That some of the said unlawful inhabitants were permit holders while others were landslide victims, and others christened as forest dwellers. That the inhabitants' economic activities were at variance with the conservation efforts as they cleared the forest to pave way for farming, and livestock rearing hence threatening the ecological existence of the rivers flowing from the Cherangany Hills, and sustainable development.

(d) That in a bid to restore and conserve Embobut Forest, and ensure sustainable conservation, the Government set up a Task Force in 2009 to investigate, examine, identify genuine and qualified squatters in the forest, and suggest recommendations to restore, conserve and protect the forest. That the Task Force comprised of Government officials, elected leaders and representatives of the squatters. That after a series of sensitization programs, and discussions with the squatters, the Task Force prepared and submitted to the then Minister for Forestry and Wildlife their Report with recommendations towards conservation efforts.

(e) That though the government had proposed to resettle the squatters elsewhere, the squatters preferred monetary rewards instead. That in consultation with the squatters, each of the 2,864 households originally squatting in the forest were paid Kshs.400,000 [Four Hundred Thousands] in 2014 to purchase or acquire alternative land outside the forest. That upon the payment being made, the squatters voluntarily vacated the forest. That it is not true to claim that they were forcefully evicted.

(f) That on the 18th February 2015, Ombwayo J, issued orders in Eldoret ELC Petition No. 15 of 2013 that pending the final submissions, the status quo be maintained as the Petitioners had left the forest. That the status quo meant the Petitioners were to continue remaining outside the forest pending the determination of that petition. That the claim by the Petitioners in Eldoret ELC Petition No. 3 of 2018 that they were evicted from the Embobut Forest in 2017, and 2018 would mean they had violated the status quo order of 18th February, 2015 by re-entering into the forest while the order was still in force.

(g) That the learned Counsel for the Petitioners in Eldoret ELC Petition No. 3 of 2018 is the counsel for the Interested Party in Eldoret ELC Petition No. 15 of 2013, and must have known of the status quo order of 18th February, 2015 but did not disclose the existence of the earlier petition and the order therein in the subsequent petition.

(h) That the Respondents only removed the structures that were left standing in the forest after the squatters had vacated. That it is only the squatters who had delayed in vacating after receiving the payments that were removed.

(i) That by virtue of **Article 62(1)(g), and (3) of the Constitution** and **Section 30 of the Forest Conservation and Management Act**, Embobut Forest is a government forest hence Public Land, and is vested in the National Government to be held in trust for the people of Kenya.

(j) That after the order of status quo dated 18th February, 2015 in ELC Petition No. 15 of 2013, the persons who attempted to enter into the forest were arrested, and arraigned in Court. That there were no forceful eviction from the forest on the 25th December, 2017 to 20th January, 2018 but there were reports of insecurity in Embobut Forest involving cattle rustlers, armed Militia groups and terrorists. That the County Security Committee in consultation with the community sanctioned a crackdown to flush out from the forest all armed criminals and herders who were terrorizing the neighbouring communities, and causing breach of the law, peace and order. That the said exercise was not targeting any specific ethnic group or the Sengwer people but the Militia groups who had on various occasions brutally attacked the 1st Respondent's rangers, scouts and community members. That during the said exercise, no formal settlement were found but the livestock and human enclosures and hide-outs were destroyed to prevent their resurgence.

(k) That no complaints have been received about the alleged fatal shooting and injury of Robert Kiprotich and David Kosgei Kiptikesi respectively, and therefore the said incidents did not occur.

6. The learned Counsel for the Petitioners, Respondents and Interested Party filed written submissions and made oral submissions on the 25th February, 2020. The following are therefore the issues for the Court's determinations;

(a) Whether Embobut Forest is Public Land or Community Land.

(b) Whether the Petitioners were forcefully evicted by the Respondents from Embobut Forest, and if so, whether the Respondents were justified in their action.

(c) Whether the Respondents breached their constitutional and statutory duties or obligations.

(d) Whether the Petitioners' constitutional rights and freedoms were violated by the Respondents.

(e) What orders or reliefs to issue if any.

7. The Court has carefully considered the grounds on the two petitions, the affidavit evidence, the written and oral submissions by the learned Counsel for the parties, and the superior Court's decisions cited therein, and come to the following determinations;

(a) That the proclamation and subsequent gazettelement of Embobut Forest as a forest reserve, and thereafter as a central forest protected by the state through the **Proclamation No. 26 of 1954 and Legal Notice No. 174 of 20th May, 1964** respectively, has not been disputed. The **Proclamation No. 26 of 1954** had been issued through the then Forest Ordinance. That the current legislation is the **Forest Conservation and Management Act [ECMA]**, whose long title contains its aim which is to –

“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.”

(b) That the petitions are effectively a challenge by the Petitioners of that legal status of Embobut Forest. That from the Petitioners' affidavit evidence, and the submissions by their learned Counsel, and that of the Interested Party, the land comprised of Embobut Forest is the ancestral land of the Sengwer Community who lived there long before its proclamation, and gazettelement as a forest. That it is their case that Embobut Forest is therefore community as opposed to public land. That on the other side, the Respondents' case through their affidavit evidence, and submissions by their learned Counsel is that Embobut Forest land is a gazetted forest and therefore public land. That the Constitution of Kenya, 2010 provides as follows at **Article 63** on Community land –

“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 governments on behalf of the communities for which is held.

(3) Any unregistered community and 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.”

That pursuant to **Article 63(5) Parliament** enacted the **Community Land Act No. 27 of 2016** “to provide for the recognition, protection, and registration of land rights; management and administration of Community Land; to provide for the role of County government in relation to unregistered community land and for connected purposes.” That the Act was assented to on 31st August, 2016 and has a commencement date of 21st September, 2016. The Act defines Community Land to include –

“(a) Land declared as such under Article 63(2) of the Constitution;

(b) Land converted into community land under any law.”

That on the other hand, the Constitution of Kenya, 2010 provides as follows at **Article 62** on Public Land –

“62 (1) Public land is –

(a) Land which at the effective date was unalienated 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.

(3) 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.

(4) 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.”

That **Article 62(1)(g)** leaves no doubts that government forests, other than forests to which **Article 63(2)(1)** applies, government game reserves, water catchment areas, national parks, government animal sanctuaries and specially protected areas are public lands. That **Article 63(2)(d)(i) of the Constitution** provides that Community land is land that is lawfully held, managed or used by specific communities as community forests, grazing areas or shrines. That the Court has considered the decisions in related matters by the superior courts cited by the learned Counsel in their submissions, and specially the following;

- ***Ledidi Ole Tauta & Others Vs Attorney General & 2 Others [2015] eKLR***, in which the Petitioners claimed that they were entitled to the land known as Ngong Hills as their ancestral land which had however, been gazetted as a forest in 1949. That the three (3) Judge bench of *Nyamweya, Ougo and Mutungi JJ*, held as follows;

“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.”

- ***Joseph Letuya & 21 Others Vs Attorney General & 5 Others [2014] eKLR***, where the Applicants claimed that they were members of the Ogiek Community also known as the Dorobo who lived in East Mau Forest since time immemorial, and that the land was their ancestral land though it was gazetted as a forest. That *Nyamweya J*, held as follows:

“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.”

That the Court further went on to hold that the Applicants’ claim for property rights should be pursued through the Community Act that was yet to be enacted by then, and the National Land Commission established under Article 67 of the Constitution that was mandated to initiate investigations on its own initiative or on a complaint being lodged, into present or historical land injustices, and make recommendations for redress.

- ***Perskire Stephen Muskasio & 14 Others*** [Suing on the behalf of and on behalf of their families and all the members of the Maasai Community on Land Reference No. 8396 (I.R. 11977) situated in ***Kedong Vs Kedong Ranch Limited & 8 Others***, Nakuru High Court Petition No. 57 of 2014, where the Petitioners claimed the land registered as private land was their ancestral land having been occupied by the Maasai community from time immemorial. That *Munyao J*, found as follow;

“52. The land in issue is registered in the name of Kedong Ranch. It is a leasehold interest for a term of 999 years from 1st May, 1950. It cannot be argued that the land is public land, and neither can it constitute community land. Looking at the definition of public land, community land and private land, the land is definitely private land in favour of the 1st Respondent.

53. 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.”

That the foregoing superior court’s decisions are of a persuasive rather than binding nature to this Court. That the issues in the cases are however, more or less relevant to the instant petitions. 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.

(c) 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. That the evidence availed only show that some members of the Sengwer community were among the people from several ethnic groups who had entered into Embobut Forest for various reasons, and purposes and that the Government of Kenya through the **Task Force of 2009** engaged them, leading to an agreement that they vacate the forest, and acquire alternative settlement outside upon being paid, Kshs.400,000 [Four hundred thousand] per household. That position was brought to the attention of the Court during the proceedings of 18th February, 2015, and the Court ordered as follows;

“Due to the fact that the Petitioners have left the forest, I do order that status quo be maintained.”

That there is no evidence presented to show or suggest that the order of 18th February, 2015 on maintaining status quo was varied, set aside or reviewed by this Court or on appeal. That it therefore means that any of the Sengwer community who returned to the Embobut Forest after leaving upon receiving the payment agreed to facilitate alternative settlement, and after the status quo order, they did so in contravention of the said court order. That the squatters could not have received the payments of Kshs.400,000, and then remained put in the forest as the payment was to allow them move out, and settle elsewhere. That then, the filing of ELC Petition No. 3 of 2018 when ELC Petition No. 15 of 2013 was still pending by and for the same community, and over the same forests does not only amount to a contravention of **Section 6 of the Civil Procedure Act Chapter 21 of Law of Kenya** by being *sub-judice*, but also amounts to a confirmation of outright disobedience of the status quo order of 18th February, 2015.

(d) That the Respondents' explanation that the operations of January, 2018 were aimed to flush out from Embobut Forest of the armed criminals and illegal occupants who had been terrorizing the 1st Respondent's rangers and the neighbouring communities has not been controverted or rebutted. That the Sengwer community members having left the forest before the status quo order was made on the 18th February, 2015 could not have been affected by the subsequent operation of January, 2018 unless they were among the group described by the Respondents, which the Court would want to believe they were not. That in the absence of any documented 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**.

(e) That further to the finding in (d) above, the Court finds that the Petitioners allegations that the Respondents contravened or breached the national values, and principles of governance by neglecting, disregarding and breaching the principles under **Article 10 of the Constitution of Kenya, 2010** of sharing and devolution of power, participation of the people, good governance, integrity and sustainable development have not been established in view of the undisputed work of the **Task Force of 2009** that led to the squatters being compensated, leading to voluntary moving out of the forest. That the decisions in the following cases of before and after the Constitution of Kenya, 2010 are relevant –

- ***Anarita Karimi Njeru Vs The Republic (1976-1980) KLR 1272.***
- ***Mumo Matemu Vs Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR; and***
- ***Northern Nomadic Disabled Person's Organization (Nondo) Vs Governor County Government of Garissa & Another [2013] eKLR.***

(f) That the Respondents, especially the 1st respondent, has duty to perform the functions set out by **Section 8 of the Forest Conservation and Management Act No. 34 of 2016** which include to conserve, protect and manage all public forests. That the Chief Conservator of Forests or any authorized officer of the 1st Respondent has the powers set out under **Section 62 of the Act**, which includes to demand from any person the production of an authority or licence for any act done or committed by that person, to account for being found in the forest, and to ***“take all reasonable steps to prevent the commission of an offence under this Act.”*** That **Section 64 of the Act** sets out the offences, and penalties which includes, being or remaining in the forests between 7 p.m. and 6 a.m., erecting any building or livestock enclosure, allowing livestock to be in the forests, and breaking up forest land for cultivation. That the Sengwer community, and other communities having left the Embobut Forest after the agreed payments, the 1st Respondent was justified to initiate the operations as it did, with other government agencies in January, 2018 to flush out the illegal groups who had re-entered, and who had reportedly carried out attacks on the Forest Rangers and neighbouring communities. That the operation cannot be said to have amounted to an infringement or breach of the Petitioners' rights and freedoms to property, culture, religion, land or fair administrative action under the circumstances.

(g) That the plight of the Sengwer community, and specifically their settlement, has been an issue in other judicial pronouncements including **James Kaptipin & 43 Others Vs The Director, Forest & 2 Others [2014] eKLR**, and like in the other decisions cited above, where members of other ethnic communities had lodged proprietary claims over protected forest lands, claiming the land was part of their ancestral land, and hence community land, the solution lies with the National Land Commission, the 12th Respondent. That though the 12th Respondent was a party in both petitions, it did not participate in the proceedings. That prayer (a) in ELC Petition No. 15 of 2013 was directed specifically to the National Land Commission to be compelled to discharge its lawful statutory, and constitutional obligations in **Articles 63(3) and (4) as read with Section 5(2)(e) of the National Land Commission Act No. 36 of 2012**. That **Article 63(3) and (4) of the Constitution, 2010** provides as follows:

“63.(3) Any unregistered community land shall be held in trust by County government 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.”

That **Section 5 of the National Land Commission Act** sets out the functions, and powers of the National Land Commission. That **sub-section (2)(e)** that provided that the Commission with the power manage and administer all unregistered trust land and unregistered community land on behalf of the county government was deleted through the **Land Laws (Amendment) Act No. 28 of 2016**. That as the Court has already determined as set out above that Embobut Forest is public land, and not the Petitioners’ ancestral or community land, then there is no need for the Court to pronounce itself on that prayer notwithstanding the failure of the National Land Commission to effectively participate in these proceedings.

(h) That the above said, 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 gazettelement 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 gazettelement of land they consider ancestral land as public forest would not go without appropriate redress.

(i) That though the foregoing shows that the Petitioners in both petitions have failed to establish their claims against the respective Respondents, the Court is of the view that this being a public-spirited proceedings, each party should bear their own costs.

8. That flowing from the findings above, the two petitions fail and are dismissed with each party bearing their own costs.

Orders accordingly.

Delivered and signed at Eldoret this 13th day of May, 2020

S. M. KIBUNJA

JUDGE

Judgment read through video conference in the virtual presence of M/s Kimama, Mr. Ochiel, Mr. Odongo and Prof. Sifuna for the Petitioners, Interested Party, the 1st to 7th and 8th to 11th Respondents respectively. The Deputy Registrar to digitally send the judgment to the Counsel electronically.

Court Assistant: Christine