



## CORRIGENDA

1. Paragraph 76 (a) of the Judgment delivered on 27<sup>th</sup> July, 2018 refers to members of the Ogiek Community to whom these proceedings relate who were evicted from South Eastern Mau Forest.
2. The same paragraph states that the 2<sup>nd</sup> Respondent shall identify land for resettlement of the members of the said Ogiek Community evicted from South Eastern Mau who have not been resettled in line with the report of the Government Task Force on the conservation of the Mau Forest Complex 2009.
3. The correct position is that members of the Ogiek Community were evicted from South West Mau Forest. Thus the reference to South Eastern Mau Forest is a clerical error.
4. Further the second sentence of paragraph 76 which makes reference to resettlement has omitted the Petitioners in Petition No. 6 of 2017. The correct position is that this Judgment relates to the Petitioners in Petition No. 5 of 2017 and Petition No. 6 of 2017.
5. Accordingly, paragraph 76 aforesaid is corrected under Section 99 of the Civil Procedure Act to read as follows:  
  
“**South West Mau Forest**” instead of South Eastern Mau Forest.
6. The second sentence in paragraph 76 is also corrected to read “the 2<sup>nd</sup> Respondent shall identify land for the resettlement of “**the Petitioners in Petition No. 6 of 2017** and members of the said Ogiek Community evicted from **South West Mau Forest.**”

**Dated and delivered at Kericho this 24<sup>th</sup> day of October, 2018.**

**J.M.ONYANGO**

**JUDGE**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERICHO**

**IN THE ENVIRONMENTAL AND LAND COURT**

**CONSTITUTIONAL PETITION NUMBER 6 OF 2017**

**JOHN K.KENY.....1<sup>ST</sup>PETITIONER**

RICHARD CHEPKWONY.....2<sup>ND</sup> PETITIONER  
RICHARD KIBET TOO.....3<sup>RD</sup> PETITIONER  
WILSON MARITIM ARAP MAGEREO.....4<sup>TH</sup> PETITIONER  
DANIEL KIPKEMBOI SAWE.....5<sup>TH</sup> PETITIONER  
SAMWEL KIPNGETICH TUM.....6<sup>TH</sup> PETITIONER  
SAMWEL KIPLANGAT SANG.....7<sup>TH</sup> PETITIONER

-VERSUS-

THE PRINCIPAL SECRETARY MINISTRY OF LANDS,  
HOUSING AND URBAN DEVELOPMENT.....1<sup>ST</sup> RESPONDENT  
THE NATIONAL LAND COMMISSION.....2<sup>ND</sup> RESPONDENT  
KENYA FOREST SERVICE.....3<sup>RD</sup> RESPONDENT  
THE DIRECTOR KENYA SURVEY.....4<sup>TH</sup> RESPONDENT  
ATTORNEY GENERAL.....5<sup>TH</sup> RESPONDENT

AND

CONSTITUTIONAL PETITION NO. 5 OF 2017

OGIEK INDEPENDENT COUNCIL OF  
SOUTH WEST MAU FOREST (KONOIN-BOMET).....PETITIONERS

VERSUS

PRINCIPAL SECRETARY MINISTRY OF LANDS,  
HOUSING AND URBAN DEVELOPMENT.....1<sup>ST</sup> RESPONDENT  
THE NATIONAL LAND COMMISSION.....2<sup>ND</sup> RESPONDENT  
KENYA FOREST SERVICE.....3<sup>RD</sup> RESPONDENT  
THE DIRECTOR KENYA SURVEY.....4<sup>TH</sup> RESPONDENT  
ATTORNEY GENERAL.....5<sup>TH</sup> RESPONDENT

JUDGMENT

## Introduction

1. The Petitioners instituted a Constitutional Petition dated 30th May 2017 against the Respondents seeking the following orders *inter alia*:

- a) A declaration that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents have violated the Petitioners' rights to human dignity under Articles 28 of the Constitution and the right not to be subjected to any form of violence or be treated in a cruel, inhuman or degrading manner under Article 29(c) and (f) of the Constitution.
- b) A declaration that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents have violated the Petitioners' right to own property under Article 40(3) of the Constitution.

c) A declaration that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents have violated the Petitioners' right to equal benefit of law under Article 27 of the Constitution, right to a fair administrative action under Article 47 of the constitution, right to a fair hearing under Article 50 of the Constitution and the right to access justice under Article 48 of the Constitution.

d) An Order compelling the Petitioners and all other people and communities that were formerly living in South Western Mau Forest to be allowed to re-occupy their respective parcels of lands.

e) That an order of mandamus be issued compelling the Respondents to provide security against reckless individuals within the Government and to restore the Petitioners and other affected communities within South Western Mau Forest to their respective parcels of land forthwith.

f) A declaration that the actions of the Government of Kenya, of evicting, razing down houses and de-gazetting private property without due process are brazen, illegal, egregious, discriminatory and hence null and void for violating the right to property and freedom and security of person and the right to dignity of the Petitioners.

g) A declaration that the Government has abdicated its role and has become an escapist by acting on individual President's whims, sweet and caprice.

h) In the alternative, adequate and prompt compensation at market value of the parcels of land in question be paid to the Petitioners and all the people who were initially living in South Western Mau forest at the time of eviction in 2009.

i) A declaration that the right to life provided for under Article 26 of the Constitution of Kenya of every member of the Kipsigis Community and other communities and or individuals that were living in South Western Mau Forest including the Petitioners was contravened, and is being contravened by forcible eviction from their parcels of land in the South West Mau Forest and settlement and or Compensation of others who were affected by the same De-gazettement to the exclusion of the Petitioners, in that such members are being deprived of their means of livelihood and are being discriminated against.

j) A declaration that the eviction of the Petitioners and other members of the Kipsigis Community from their land in South Western Mau Forest and settlement of other people on their land by the Respondents is in contravention of their right to protection of law, and their right not to be discriminated against under Article 27 of the Constitution of Kenya 2010, and their right to reside in any part of Kenya.

k) An order restraining the first, second, third and fourth Respondents from allocating the Petitioner's land to other persons to the exclusion of the Petitioners and all allocations made with respect to South Western Mau forest de-gazettement be set aside as the same is null and void.

l) An order quashing the de-gazettement of South Western Mau forest and allowing the Petitioners and other Communities who were previously occupying the said lands to re-occupy them.

m) An order restraining the Respondents from interfering with the Petitioners and other communities who were previously living in South Western Mau Forest from the use of their parcels of land.

n) Any other appropriate relief that the Court deems fit.

o) An award of damages for pain and suffering, humiliation and distress visited upon the Petitioners.

p) Costs of this Petition.

2. The Petition is supported by the affidavit of John Kenny the 1<sup>st</sup> Petitioner herein sworn on his own behalf and on behalf of the 2<sup>nd</sup> to 7<sup>th</sup> Petitioners pursuant to an authority dated 30<sup>th</sup> May 2017 and filed together with the supporting affidavit.

3. Contemporaneously with the Petition, the Petitioners filed a Notice of Motion under Certificate of Urgency dated 30<sup>th</sup> May 2017 seeking inter alia an order of mandatory injunction that the Petitioners be allowed to re-occupy their respective parcels of land pending the hearing and determination of the main suit. They also sought an order of mandamus compelling the Respondents to provide security against reckless individuals within the Government and to restore the Petitioners and other affected communities within South West Mau forest to their respective parcels of land pending the hearing of the main suit.

4. In the alternative, they prayed that adequate and prompt compensation at market value of the parcels of land in question be paid to the Petitioners and other communities living in South West Mau Forest.

5. The 2<sup>nd</sup> Respondent entered Appearance on 28<sup>th</sup> January 2018 but never filed any other documents.

6. The 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents filed Grounds of Opposition dated 6<sup>th</sup> March 2018 in response to the Petitions No. 5 and 6 and the Notice of Motion. When the matter came up on 25<sup>th</sup> January 2018 for the hearing of the application, it was agreed by consent that the application would be abandoned and that the parties would proceed with the main suit. The Respondents were then given 30 days to file their responses to the Petition.

7. On 12<sup>th</sup> March 2018, the Court directed that the Petition be canvassed by way of written submissions and each party was given 14 days to file and serve their submissions. The Petitioners filed their submissions on 11<sup>th</sup> May 2018. The Respondents filed theirs on 9.6.2018. In the meantime, the Court directed that this case be handled concurrently with Kericho ELC Constitutional Petition No. 5 of 2017 and the orders in this suit be applied to Constitutional Petition No 5 of 2017.

#### **Petitioners' Case in brief**

8. It is the Petitioners' contention that they were all living in the areas of South Western Mau Forest in 2009 before they were mercilessly evicted by the 3<sup>rd</sup> Respondents. They claim that they have known no other place as home other than areas forming part of the South Western Mau Forest. The Petitioners herein bring this Petition on their own behalf and on behalf of all the people that were evicted from the South Western part of Mau forest upon de-gazettment.

9. It is the Petitioners' contention that the land that was occupied by the Petitioners and several other people is part of the land that was de-gazetted vide Gazette Notices dated 16<sup>th</sup> February, 2001 and 19<sup>th</sup> October, 2001 by the 1<sup>st</sup> Respondent. Consequent upon the said de-gazettement, in the year 2009, the Petitioners and several other people were evicted from their parcels of lands without following the due process of the law and without being fully compensated.

10. Upon eviction, the Petitioners were put in camps where they have lived since 2009 to date. Despite being promised by the Respondents that they were to be resettled and or compensated, to date they have never been compensated.

11. The Petitioners contend that they and other families and or communities living in South Western Mau Forest were rendered homeless without being fully compensated and resettled in accordance with the law.

12. It is their contention that they have been discriminated against in the resettlement and eviction programmes by the National Government as other communities that were living in the Eastern Mau Forest, Nakuru Forest, Nabkoi Forest, Mount Kenya Forest, Marmanet Forest, Northern Tinderet Forest, Mount Lodian Forest, South Nandi Forest, Molo Forest and Kapsaret whose land was also degazetted have been compensated and or resettled and are living happily in their respective homes with an exception of those that were living in the South Western Mau Forest.

#### **1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondent's response in brief**

13. In their Grounds of Opposition dated 6<sup>th</sup> March 2018, the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents deny the Petitioners allegations and claim that the suit herein is res judicata.

14. The said Respondents argue that public interest litigation is undertaken in rem and cannot be instituted through multiple suits over the same subject matter.

15. The Respondents further contends that the Petitioners have neither alleged nor adduced any evidence on the alleged evictions.

16. They take issue with the fact that the Petitioners are invoking the provisions of the Constitution of Kenya 2010 yet their cause of action preceded the 2010 Constitution. They argue further that the Petitioners have not demonstrated any proprietary interest over the Mau Forest in order to warrant the orders sought being granted.

17. The Respondents argue that Mau Forest is public land under the definition in Article 62 of the Constitution of Kenya.

18. They argue that the Petitioners have neither particularized nor adduced any evidence of loss and instead they have drawn their claim in general terms without specifying any particular infractions, places, and individual perpetrators thus making it difficult for the Respondents to respond to their claim. They therefore argue that the Petition is bad in law and ought to be dismissed.

#### **Issues for Determination**

19. Arising from the pleadings, Grounds of Opposition and rival submissions, the following issues emerge for determination:

1. Whether the suit herein is res judicata.
2. Whether the decisions in the previous cases on the Mau Forest evictions namely; **Joseph Letuya & Others V Attorney General & Others** and **Nakuru ELC Petition No. 42 of 2013, Clement Kipchirchir & Others V P. S Ministry of Lands & Others** and **African Court on Human and Peoples Rights V Republic of Kenya Application No.006 of 2012** are judgments in rem which apply to the instant suit.
3. If the answer to Nos. 1 and 2 above are in the negative, whether the lawful process and procedure was followed when evicting the Petitioners.
4. Whether the Petitioners' rights were violated.
5. Whether the Petitioners are entitled to the reliefs sought.

6. Who should bear the costs of this suit?

## Analysis and Determination

### Whether the Petition herein is Res Judicata and whether previous decisions on Mau evictions are Judgments in rem

20. I shall address the first and second issues together as they are closely linked.

21. The doctrine of res judicata is contained in **Section 7 of the Civil Procedure Act** which provides as follows:

**“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”**

22. Akiwumi, Tunoi and Shah JJA in the case of **Uhuru Highway Development vs Central Bank [1996] LLR CAK 2126** summarized the test in res judicata as follows:

**(i) There must be a previous suit in which the matter was in issue;**

**(ii) The parties must be the same or litigating under the same title;**

**(iii) There must be a competent Court which heard the matter in issue;**

**(iv) The issue must have been raised once again in a fresh suit;**

23. The Petitioners herein have submitted that in all the above tests the doctrine of res judicata does not apply hence the court should proceed and hear the matter at hand.

24. Counsel for the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents has submitted that the suit herein is res judicata as the issue before this Court has been litigated in 3 other suits namely; **Nairobi ELC Civil Suit No. 821 of 2012 (O.S) Joseph Letuya & Others V Attorney General & Others** and **Nakuru ELC Petition No. 42 of 2013, Clement Kipchirchir & Others V P. S Ministry of Lands & Others** where judgment was delivered. Secondly the Petitioners have made reference to the judgment of the **African Court on Human and Peoples Rights V Republic of Kenya Application No. 006 of 2012** where the African Commission on Human and Peoples Rights sued the Republic of Kenya on behalf of the Ogiek community of the Mau Forest.

25. It is therefore the Respondents' submission that the issue of the compensation of the Ogiek community following their eviction from the Mau Forest has been determined by the courts and the same issue cannot be reopened by the Petitioners.

26. In the case of **E.T V Attorney General and Another (2012) eKLR** the Court stated as follows:

**“The Court must always be vigilant to guard against litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court in another way and in the form of a new cause of action which has been resolved by a court of competent jurisdiction”**

27. In **Okiya Omtatah Okoiti V CAK & 14 Others** Justice Lenaola quoted with approval the words of Justice Kuloba in **Njangu V Wambugu & Another Nrb HCCC No.2340 of 1991** in regard to having closure in litigation:

**“If parties were allowed to go on litigating forever over the same issue with the opponent before courts of competent jurisdiction merely because one gives his case some cosmetic facelift on every occasion he comes to court, then I don't see the use of the doctrine of res judicata”**

28. In the case of **Okiya Omtatah Okoiti & Another V Attorney General & 2 Others Petition No 593 of 2013** the Court held as follows:

**“Whereas these principles (of res judicata) have generally been applied liberally in civil suits, the same cannot be said of their application in Constitutional matters. I say so because in my view, the principle of res judicata can and should only be invoked in Constitutional matters in the clearest of cases and where a party is re-litigating the same matter before the Constitutional Court and where the Court is called upon to re-determine an issue between the same parties and on the same subject matter. While therefore the principle is a principle of law of general application, it must be sparingly invoked in rights-based litigation and the reason is obvious”**

29. The Court of Appeal in the case of **John Florence Maritime Services Ltd & Another V Cabinet Secretary for Transport and Infrastructure & 3 Others (2015) eKLR** held as follows:

**“The rationale behind res judicata is based on public interest that there should be an end to litigation, coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res judicata ensures the economic use of the Court's**

*limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon.*

*It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the Courts and predictability which is one of the ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unravelling uncontrollably. In a nut shell res judicata being a fundamental principle of law may be raised as a valid defence. It is a doctrine of general application and it matters not whether the proceedings in which it is raised are Constitutional in nature. The general consensus therefore remains that res judicata being a fundamental principle of law that relates to the jurisdiction of the Court may be raised as a valid defence to a Constitutional claim even on the basis of the Court's inherent power to prevent abuse of the process of the Court under Rule 3(8) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013"*

30. Learned counsel for the Respondents has submitted that the above cited cases are judgments in rem. In support of her submissions she has cited the following authorities where the court has pronounced itself on the same issue:

31. In Edward **R-Ouko vs Speaker of the National Assembly & 4 others (2017) eKLR**, Justice G. V. Odunga quoted the case of Kamuyu and others vs Attorney General & others (2007) IEA 116 it was held that;

*"In a suit seeking judgement in rem, that is a judgement applicable to the whole world, an individual does not sue on behalf of the whole world. In other words, in the present case, the appellants when successful in the suit obtain judgement, which is effective against the whole world but does not confer benefits upon the whole world."*

32. Therefore, the mere fact that a person was neither a party to the cause in which the decision was made nor a party on whose behalf the same was instituted does not deprive it of the benefit of the said order as long as the same was a decision in rem.

33. Similarly, in **Japheth Nzila Muangi vs Kenya Safari Lodges & Hotels Ltd (2008) eKLR** it was held that;

*"It is trite law that ordinarily a judgement binds only the parties to it. This is known as Judgement in personam. A judgement may also be conclusive not only against the parties to it but also against all the world. This is known as a judgement in rem. This is a judgement which declares, defines or otherwise determines the status of a person or of a thing i.e. the jural relation of the person or thing to the world generally."*

34. Justice G. V. Odunga in the **Edward Ouko** case (supra) further states as follows:

*"In my considered view, the issue of the propriety of proceedings before the National Assembly during the pendency of legal proceedings challenging the same cannot be said to be restricted to the parties in Petition 62 of 2017. Such a decision is a decision in rem which are defined as a final judgement or order or decree of competent courts which confers or takes away from any person or legal character, or to be entitled to any specific thing, not as against any specific person but absolutely."*

35. It is clear from the Petition herein that the Petitioners have instituted this suit in their individual capacities and as members of the Ogiek Independent Council of South West Mau Forest (Konoin Bomet). The Petitioners are part of the wider Ogiek community referred to in Petition No. 6 of 2017 and the three decisions referred to hereinabove. The above decided cases adjudicated upon the subject matter of this suit and reached a decision on the same which has an implication on the manner in which the Mau evictions ought to be handled.

36. The difference is that the Petitioners in the Joseph Letuya case are members of the Ogiek community from Marioshoni location, Elburgon Division, Nessuit location, Njoro Division Nakuru while the current Petitioners are from Konoin in Bomet County. In this suit the Petitioners have sued the Permanent Secretary Ministry of Land Housing and Urban Development, National Land Commission, Kenya Forestry Service, Director of Surveys, Kenya and the Attorney General. In Joseph Letuya the Plaintiffs who are individual members of the Ogiek Community sued the Attorney General, Provincial Commissioner, Rift Valley Province, Rift Valley Forest Service Officer, District Commissioner, Nakuru, Wilson Chepkwony and the Director of Forestry.

37. In the case at the African Court on Human and Peoples Rights, the African Commission on Human and Peoples Rights sued the Republic of Kenya on behalf of the Ogiek community represented by the Centre for Minority Rights Development.

38. At the centre of these three suits are the rights of the Ogiek peoples of Kenya to occupy, use and derive their livelihood from the Mau Forest vis-a- vis the need to protect the environment, particularly the Mau Forest as a water catchment area for current and future generations. The Ogiek community members argue that the Mau Forest is their cradle and they and their ancestors have lived there from time immemorial and have derived their livelihood therefrom through their way of life as hunter-gatherers, without destroying the forest. They therefore claim that their eviction from the said forest is not only unlawful but is a threat to their life and in essence, their existence.

39. On the other hand, the Respondents position is that applicants have no cause of action and are not entitled to the remedies sought as they have not established any legal right over the property in question and have also failed to demonstrate that the actions of the Respondents have violated their Constitutional rights . They contend that the Eastern Mau Forest is a Government gazette Forest and not a reservation of the Ogiek community as an ancestral land and that the Ogiek community who have been occupying the said forest are doing so illegally and are therefore squatters. They stated that the applicants would be considered like any other landless Kenyans for purposes of resettlement by the Government of Kenya.

40. While in the cases of **Joseph Letuya** and **Clement Kipchirchir** (supra) the Courts adjudicated upon the rights of individual members of the Ogiek community in relation to their eviction from the Mau Forest, the case of the African Commission on Human and Peoples Rights

was broader and addressed the issue of the Ogiek land rights in the context of historical land injustices. In my view the judgment of the African Court on Human and Peoples Rights looked at both the past, prevailing and future violations of the Ogiek eviction from the Mau Forest.

41. The Court takes judicial notice that the eviction of people from the Mau Forest is not a one-off event but is a recurrent and cyclical occurrence that lends itself to political undertones. At the time of writing this Ruling, there are on-going evictions in the southern part of Mau Forest and this problem will keep recurring and is not likely to end any time soon.

42. It is against this background that the Court must adopt an approach that does not just address individual concerns with regard to the evictions but look at the broader policy questions in resolving the vexed issue of the Mau Forest and other ecologically sensitive areas. In view of the foregoing, the issue of res judicata must in this context be interpreted widely as the previous suits referred to hereinabove were brought by members of the Ogiek community. In particular, the African Commission on Human and Peoples Rights case whose decision is binding on this Court by virtue of Article 2(6) of the Constitution of Kenya 2010 set out various remedies of restitution, compensation, satisfaction and guarantees of non-repetition for the violations committed by the various state organs.

43. It is therefore my finding that this suit is res judicata and that the decisions in the 3 cases touching on the Mau Forest evictions are judgments in rem which have a bearing on the property rights of the occupants of Mau Forest, particularly the members of the Ogiek community.

44. Even though I need not do so, I shall proceed to determine whether the lawful processes and procedures were followed when evicting the Petitioners and whether the Petitioners' rights were violated. I do so in case my interpretation of the doctrine of res judicata and judgment in rem is wrong.

45. Learned Counsel for the Petitioners has submitted that the Petitioners rights were violated. It is his submission that the Constitution of the Republic of Kenya, 2010 (hereinafter referred to as "the Constitution") provides for the Fundamental Rights under Chapter Four which provides for Bill of Rights.

46. In generality, Article 19 of the Constitution of Kenya states as follows:

***“ Rights and fundamental freedoms***

***(1) The Bill of Rights is an integral part of Kenya's democratic***

***state and is the framework for social, economic and cultural policies.***

***(2) The purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings.***

***(3) The rights and fundamental freedoms in the Bill of Rights—***

***(a) belong to each individual and are not granted by the State;***

***(b) do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognised or conferred by law, except to the extent that they are inconsistent with this Chapter; and***

***(c) are subject only to the limitations contemplated in this Constitution.”***

47. He submits that the Constitution of the Republic of Kenya does recognise that fundamental rights are natural and not given. The wording of the Constitution further recognises that protection of the human rights and fundamental freedoms is preservation of dignity of individuals and communities hence, promoting social justice.

48. The fundamental rights that are enshrined in the Constitution of the Republic of Kenya include equality and freedom from discrimination; human dignity; freedom and security; protection of right to property; economic and social rights; a right to clean and healthy environment among others.

49. He submits that Article 21 of the Constitution of Kenya provides for implementation of rights and fundamental freedoms under the laws of Kenya. The said Article states as follows:

***“Implementation of rights and fundamental freedoms***

***(1) It is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.***

***(2) The State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43.***

***(3) All State organs and all public officers have the duty to address the needs of vulnerable groups within society, including***

women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities.

**(4) The State shall enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms.**

50. It is counsel's submission that the implementation and enforcement of the human rights and fundamental freedoms is bestowed unto the State, the Government of Kenya and every State Organ within the Government of Kenya. The State is mandated to protect and promote human rights and fundamental freedoms in equal measure amongst all the people within the Republic of Kenya.

51. He submits that the Petitioners and/or Kipsigis communities who were living in the South Western Mau Forest within the Republic of Kenya like any other individual within the Republic ought to have their rights and fundamental freedoms protected and preserved by the State as enshrined in the Constitution of the Republic of Kenya.

52. It is his submission that the following rights of the Petitioners have been violated:

i) The right to property:

Article 40 of the Constitution of the Republic of Kenya states as follows:

**“Protection of right to property:**

**(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property**  
=

**(a) of any description; and**

**(b) in any part of Kenya.**

**(2) Parliament shall not enact a law that permits the State or any person—**

**(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or**

**(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4).**

**(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—**

**(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or**

**(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—**

**(i) requires prompt payment in full, of just compensation to the person; and**

**(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.**

**(4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.**

**(5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.**

**(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.**

53. Article 63 of the Constitution provides for Community land and states as hereunder:

**“Community land**

**(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.*

54. Counsel submits that the Petitioners were in occupation of the South West Mau Forest (Konion-Bomet) which comprised their ancestral homes as well as a source of livelihood. Apart from utilizing the land for pastoral grazing and habitation, the Petitioners had established schools and health centres for the community. Thus, South West Mau Forest was the place they called home for many years.

55. Counsel submits that on 16<sup>th</sup> February 2001 and 19<sup>th</sup> October 2001 respectively, land in the Mau Forest was gazetted as a Forest reserve. This included the South West Mau Forest inhabited by the Petitioners. Pursuant to the said gazettement, the Petitioners were evicted from their ancestral home in South West Mau Forest in 2009. During the eviction, their houses were destroyed and set ablaze by the evictors. Animals were killed, and food plantations were destroyed.

56. It is his submission that since their eviction the Petitioners have had no place to call home and have been living as internally displaced persons.

57. It is counsel's submission that the Petitioners having inhabited the suit land since the 1960's or thereabouts, the said land vested in them.

58. Counsel submits that Article 40 (3) (b) (i) of the Constitution of Kenya as read with Section 111 of the Land Act No. 6 of 2012 provides for prompt payment in full, of just compensation to persons whose land has been compulsorily acquired.

59. He submits that even though the eviction was carried out under the guise that the land was being gazetted as forest reserve, it is common ground that to-date, there is pastoral grazing and tea plantations that belong to private individuals.

60. Counsel submits that the eviction and compulsory acquisition of South West Mau Forest from the Petitioners deprived the people of their land which is in violation of Article 40 (3) of the Constitution of the Republic of Kenya and the failure to pay and/or compensate them as per Article 40 (3)(b)(i) as read with Section 111 of the Land Act is a total violation of Article 40 hence and infringement of the Petitioners' right to own and utilize land as per the fundamental rights enshrined in the Constitution of Kenya.

ii) The second right that is alleged to have been violated is the right to Economic and Social Rights:

61. It is counsel's submission that the Petitioners' economic and social rights have been violated. He submits that the Petitioners were wrongfully and unlawfully evicted from their ancestral land in South West Mau Forest which was a source of livelihood. They were hence deprived of access to basic amenities such as basic housing; schools; health facilities; security; clean water; and food.

62. Article 43 of the Constitution of the Republic of Kenya provides as follows:

***“Economic and social rights***

***(1) Every person has the right—***

***(a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;***

***(b) to accessible and adequate housing, and to reasonable standards of sanitation;***

***(c) to be free from hunger, and to have adequate food of acceptable quality;***

***(d) to clean and safe water in adequate quantities;***

***(e) to social security; and***

***(f) to education.***

***(2) A person shall not be denied emergency medical treatment.***

***(3) The State shall provide appropriate social security to persons who are unable to support themselves and their dependants.”***

63. It is therefore counsel’s submission that the lives of the Petitioners are at risk, as they are prone to danger including diseases, illiteracy, insecurity, and hunger among other things.

iv) The right to a clean and health environment

64. It is counsel’s submission that the State’s and/or its organs’ failure to provide health care services, reasonable standards of sanitation, clean and safe water to the Community, accessible and adequate housing has exposed the Petitioners to an unclean and unhealthy environment exposing them and future generations to risk and danger.

65. Counsel submits that Article 42 of the Constitution of the Republic of Kenya provides for protection of the Environment and states as follows:

***“Every person has the right to a clean and healthy environment, which includes the right—***

***(a) to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and***

***(b) to have obligations relating to the environment fulfilled under Article 70.”***

v) The right to equality and non-discrimination

66. It is counsel’s submission that the Petitioners’ right to equality and non-discrimination has been violated. Counsel has submitted that the State and its organs have in the past evicted people and groups and further compulsorily acquired their land. The evicted people and groups have been resettled and adequately compensated for.

67. The other communities that have been evicted by the State through compulsory acquisition of their land include communities that were living in Eastern Mau Forest, Nakuru Forest, Nabkoi Forest, Mount Kenya Forest, Marmanet Forest, Northern Tinderet Forest, Mount Lodian Forest, South Nandi Forest, Molo Forest and Kapsaret. They have been fully compensated with an exemption of those that were living in the South Western Mau Forest.

68. It is counsel’s submission that the State and/or its Organs has provided health facilities, basic education, health facilities, adequate housing to the said communities thus, ensuring a clean, healthy and sustainable environment. However, the Petitioners have since their eviction been living in a very sorry state.

69. Counsel submits that the aforesaid communities were no different from the Petitioners. They all shared a common feature that is their previous settlement in the designated lands were their ancestral home and they were all evicted by the State and/or its Organs. However, the difference between the said communities and the Petitioners and People who were living in South Western Mau Forest is that despite the fact the said Communities were evicted, and their land compulsorily acquired by the State, they were resettled and compensated by the State and/or its Organs whereas the Government has failed to resettle and adequately compensate the Petitioners for their land that was wrongfully and unlawfully acquired by the State and/or its Organs since 2009 or thereabouts.

70. Counsel submits that the State’s action of selectively resettling and compensating some communities and it's failure to resettle and compensate the Petitioners is discriminatory and in violation of Article 27 (4) of the Constitution of Kenya.

71. Article 27 of the Constitution of the Republic of Kenya provides for Equality and freedom from discrimination and states as follows:

***“Equality and freed from discrimination:***

***(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.***

***(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.***

***(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.***

***(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy,***

marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

*(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).*

*(6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.*

*(7) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.*

*(8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two thirds of the members of elective or appointive bodies shall be of the same gender.”*

vi) The Right to Fair Administrative Action

72. It is counsel’s submission that Article 47(1) of the Constitution and Section 4(1) of the Fair Administrative Action Act provides for the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair. He further submits that Section 4(3) (b) of the Fair Administrative Action Act requires a person against whom an administrative action has been taken to be given an opportunity to be heard and to make representations in that regard where an administrative action is likely to affect the fundamental rights and freedoms of that person. It is his submission that the Respondents have neither given the Petitioners an opportunity to be heard nor defend themselves with regard to the decisions that were taken.

73. The Respondents refute the allegation that the Petitioners’ rights have been violated. With specific reference to their right to property learned counsel for the Respondents has submitted that the Petitioners have not proved any proprietary claim over the Mau Forest.

74. It is her submission that Article 62 of the Constitution (2010) defines ‘Public Land’. The Petitioners have not demonstrated that they are entitled to the said ‘public land’. They have also not demonstrated any violation to their constitutional rights so as to seek compensation.

75. I have anxiously and carefully considered the pleadings, rival submissions and the law and the authorities cited to me and it is my finding that the Petitioners have proved that their rights have been violated. However, the Court has already pronounced itself on the manner in which the persons evicted from the Mau Forest in similar circumstances ought to be redressed in the 3 cases cited above. That being the case, this court can do no better than restate the position in the said authorities and direct that the Petitioners pursue their remedies for compensation with the National Land Commission (2<sup>nd</sup> Respondent) whose mandate it is to manage, alienate, and allocate public land and to monitor the registration of all rights and interests in land in accordance with the principles laid down in the land Act 2012.

76. Accordingly, I make the following final orders:

- a) The 2<sup>nd</sup> Respondent is directed to within 10 months from the date of this judgment, in consultation with the chiefs, and Ogiek Council of elders identify and open a register of members of the Ogiek community to whom these proceedings relate and who were evicted from South Eastern Mau Forest specifically Konoin- Bomet. The 2<sup>nd</sup> Respondent shall identify land for the resettlement of the members of the said Ogiek community evicted from MF who have not been resettled in line with the Report of the Government Task Force on the Conservation of the Mau Forest complex 2009.
- b) A copy of this judgment be served upon the Chairman of the National Land Commission for necessary action.
- c) Each party shall bear its own costs.

**Dated, signed and delivered at Kericho this 27<sup>th</sup> day of July 2018.**

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**J.M ONYANGO**

**JUDGE**