



**Ngusilo (Suing as the Chairman of the Ogiek Council of Elders) & 2 others v Attorney General & 5 others (Petition 1 of 2023) [2024] KEELC 4427 (KLR) (30 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4427 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAKURU**  
**PETITION 1 OF 2023**  
**A OMBWAYO, J**  
**MAY 30, 2024**  
**IN THE MATTER OF ARTICLES 2 (5) AND 2 (6), 3, 10, 21, 22,**  
**23 AND 258 OF THE CONSTITUTION OF KENYA (2010)**  
**AND**  
**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF**  
**ARTICLES 28, 29 (C) (D) (F), 35 (1), 40, 44, 47, 53 (1) (B),**  
**(C), (D), 53 (2), 57 (B) (C), 63 (2) (D), AND 69 (2) (D) OF THE**  
**CONSTITUTION OF KENYA (2010)**  
**AND**  
**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF**  
**SECTION 4 AND 5 OF THE ACCESS TO INFORMATION ACT**  
**NO 31 OF 2016**  
**AND**  
**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF**  
**SECTION 4 AND 5 OF THE FAIR ADMINISTRATIVE ACTION**  
**ACT NO 4 OF 2015**  
**AND**  
**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF**  
**SECTIONS 152D (1) AND 152G LAND ACT, 2016**  
**AND**  
**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF**  
**SECTIONS 4, 5, 6 AND 8 OF THE PREVENTION, PROTECTION**  
**AND ASSISTANCE TO INTERNALLY DISPLACED PERSONS**



AND AFFECTED COMMUNITIES ACT NO 56 OF 2012

AND

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PETITION NO 1 OF 2023

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF  
ARTICLES 14, 16, 17, 21 AND 28 OF THE AFRICAN CHARTER  
ON HUMAN AND PEOPLES' RIGHTS

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF  
ARTICLE 27 OF THE INTERNATIONAL COVENANT ON CIVIL  
AND POLITICAL RIGHTS

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF  
ARTICLE 15 OF THE INTERNATIONAL COVENANT ON  
ECONOMIC, SOCIAL AND CULTURAL RIGHTS

BETWEEN

WILSON MEMOSI OLE NGUSILO (SUING AS THE CHAIRMAN OF THE  
OGIEK COUNCIL OF ELDERS) ..... 1<sup>ST</sup> PETITIONER  
SALATON OLE NADUNGUEKOP ..... 2<sup>ND</sup> PETITIONER  
KENYA NATIONAL COMMISSION ON HUMAN RIGHTS .... 3<sup>RD</sup> PETITIONER

AND

THE ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT  
THE CABINET SECRETARY MINISTRY OF ENVIRONMENT, FORESTRY  
AND CLIMATE CHANGE ..... 2<sup>ND</sup> RESPONDENT  
KENYA FOREST SERVICE ..... 3<sup>RD</sup> RESPONDENT  
KENYA WILDLIFE SERVICE ..... 4<sup>TH</sup> RESPONDENT  
THE INSPECTOR GENERAL OF POLICE ..... 5<sup>TH</sup> RESPONDENT  
RIFT VALLEY REGIONAL COMMISSIONER ..... 6<sup>TH</sup> RESPONDENT

JUDGMENT

## INTRODUCTION

1 The Petitioners commenced the present proceedings vide the Petition dated 8<sup>th</sup> November, 2023 which was subsequently amended and duly filed in court on 24<sup>th</sup> May, 2024. The Petitioners aver that for many



decades, the Ogiek people dwelling within the Mau Forest Complex have fought for their recognition as an indigenous community and their rights to their ancestral lands.

- 2 The Petitioners aver that indigenous people continue to face a myriad of challenges. They aver that lack of land tenure rights to their ancestral lands remains a key concern as they are so connected to their lands that the lands enable them to enjoy other rights such as the right to culture and religion. The Petitioners aver that the forced evictions that have been routinely carried out by the Government of Kenya since 2004 have perennially pushed these indigenous people from their ancestral lands and have in effect made it impractical for them to enjoy their rights. They aver that coupled with land and resource tenure insecurity, they also face poor service delivery, poor political representation, discrimination and exclusion.
- 3 The Petitioners aver that in a landmark judgment dated 26<sup>th</sup> May, 2017, the African Court on Human and People's Rights in the case of African Commission on Human and Peoples' Rights vs Republic of Kenya Application No 006/2012 affirmed the rights of the Ogiek to their ancestral land in the Mau Forest Complex. The Petitioners further aver that the judgment was followed by the reparations judgment dated 23<sup>rd</sup> June, 2022 in which the African Court inter alia granted collective title to the Ogiek through delimitation and demarcation and ordered the full recognition of the Ogiek as an indigenous people of Kenya including their language, cultural and religious practices within one year.
- 4 The Petitioners aver that the judgment also ordered the Government to take all necessary measures to recognize, respect and protect the right of the Ogiek to be effectively consulted, in accordance with their tradition/customs in respect of all development. Conservation or investment projects on Ogiek ancestral land. The Petitioners aver that the court further ordered the full publication of both the May 2017 judgment and the reparations judgment of June 2022 in the official gazettes, newspaper of nationwide circulation, within six months of the date of judgment and awarded a total of Ksh 157 million to the Ogiek from the Government of Kenya as material and moral damages, to be paid into a Community Development Fund established within 12 months from the date of judgment.
- 5 The Petitioners aver that that the court found that the government's failure to recognize the Ogiek's status as a distinct tribe, as afforded to other similar groups, denied them the rights available to other tribes, and thus amounted to discrimination.
- 6 The Petitioners aver that the court also stipulated that the Ogiek had a communal right to their ancestral land, and that their expulsion from their ancestral land against their will and without prior consultation, violated their property rights guaranteed by the African Charter on Human and Peoples' Rights.
- 7 The Petitioners aver that the Court unequivocally stated that the preservation of the forest could not justify the lack of recognition of the Ogiek's indigenous or tribal status/denial of the rights associated with that status. They aver that it further explicitly confirmed that the Ogiek could not be held responsible for the depletion of the Mau Forest nor could it justify their eviction or the denial of access to their land to exercise their right to culture. The Petitioners aver that the court appreciated the connection between the Ogiek and their land and the resultant inability to practice their religion freely, noting that eviction of the Ogiek from the Mau Forest constituted an interference with the freedom to practice their religion.
- 8 The Petitioners further aver that given the Ogiek's distinct ties between the land and their cultural practice, their eviction from the Mau Forest equally violated the right to culture. They aver that in assessing the right to use and dispose of wealth and resources, such as land, the Court concluded that, so far as it had already determined the Ogiek's rights to their ancestral land and that those rights had been violated, the eviction clearly violated the right to access and occupy the land and the evictions



- significantly impacted their economic, social, and cultural development, thus violating their right to development.
- 9 The Petitioners aver that the Court also emphasized that given the indigenous people's unique situation and way of life, it is essential to conceptualize and understand the distinctive dimensions in which their rights to property, like land, can be manifested. They aver that according to the Court, ownership of land for indigenous people entails the right to use, occupy and control access to indigenous lands.
  - 10 The Petitioners aver that the Court held that the physical delineation, demarcation and titling of Ogiek ancestral land are essential and that the Government of Kenya should undertake this exercise to protect the Ogiek's right to property, which in this case revolves around their occupation, use and enjoyment of the Mau Forest and its various resources. They aver that despite these binding judgements rendered by the African Court, the government of Kenya has not implemented the said orders and the Ogiek community continues to be evicted from the Mau Forest Complex in blatant contempt of the Court's orders.
  - 11 The Petitioners aver that in September and October 2023, the Government embarked on a fresh round of evictions of alleged encroachers in the Mau- forest Complex, on the alleged grounds that illegal settlers had put up their homes on forest land. The Petitioners aver that the evictions led to the burning of houses, loss of property including destruction of crops such as maize and displacement of many settlers, including those who have lived in the forest since time immemorial. The petitioners aver that the KNCHR continues to receive and document instances of human rights violations against the Mau Ogiek Community.
  - 12 They aver that notably, the lack of land tenure rights, non-implementation of relevant decisions of the African Court on Human and Peoples Rights in the Ogiek case and the never-ending evictions which continue to marginalize the Ogiek and also gives rise to further human rights violations.
  - 13 The Petitioners aver that on 30<sup>th</sup> September, 2023, the President of the Republic of Kenya, Hon. William Ruto issued a statement on television stating that people would be removed from the Mau-forest. They aver that on 31<sup>st</sup> September, 2023, some members of the Mau Ogiek Council of Elders of Narok chapter and other Ogiek leaders held a meeting to deliberate on the way forward as they were fearful of the possibility of eviction from the Mau forest. The Petitioners aver that later, a delegation comprising members of the Ogiek Community Council of Elders Narok Chapter, went to the office of the County Commissioner of Narok Mr. Issac Masinde to seek further guidance as to who would be evicted from the forest.
  - 14 The Petitioners aver that the County Commissioner did not assist the community members and stated that the African Court of Human and Peoples' Rights judgment was too long, and he did not understand what it said. The Petitioners aver that after a few days, the same group of Ogiek leaders visited the Regional Commissioner of Rift Valley, Dr Abdi Hassan on the same matter but did not receive any assistance. They further aver that on 19<sup>th</sup> October, 2023, the 2<sup>nd</sup> Respondent issued a press release stating that the government was reclaiming the Mau Forest from encroachment and illegal eviction and warned against actions that will lead to destruction of property.
  - 15 The Petitioners aver that on 24<sup>th</sup> October, 2023 the community members then witnessed representatives of the Kenya Wildlife Service, Kenya Forest Service, and Administrative Police demolishing houses in the Naituyupaki area.



- 16 The Petitioners aver that on 25<sup>th</sup> October, 2023, an officer of the Kenya Forest Service, Mr. Mutoro, phoned the 1<sup>st</sup> Petitioner and told him that the community should gather all the children in one area because the Kenya Forest Service would go around to evict the Community members.
- 17 The Petitioners aver that on 26<sup>th</sup> October, 2023, the 1<sup>st</sup> Petitioner was also called by the Chief of Enabelibel location who stated that the Assistant County Commissioner of Olokurto informed him that the Mau Ogiek should move out of their homes because they would be evicted on that day or the following day. The Petitioners aver that on 27<sup>th</sup> October, 2023 acting on the verbal notice, from the aforesaid chief, the Ogiek Council of Elders Narok Chapter including the 1<sup>st</sup> Petitioner lodged a complaint with the 3<sup>rd</sup> Petitioner about the imminent eviction.
- 18 The Petitioners aver that this threat to evict was actualized on 2<sup>nd</sup> November, 2023 when the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents began demolishing and even burning the houses of some of the members of the Ogiek community. The Petitioners aver that these affected families including women, children, and the elderly are still in the area as they have not been offered any alternative place to relocate to. The Petitioners aver that the evictions are set to continue, despite the ongoing El Nino rains and harsh weather conditions. The Petitioners aver that the demolitions have not stopped, and there are other community members such as those living in the East Mau Complex who are still under threat of eminent eviction with no alternative land. The Petitioners aver that they have reason to believe that they are at risk of losing their ancestral lands due to the imminent evictions scheduled to occur and the evictions that have taken place.
- 19 The Petitioner prays for the following orders:
- a. A declaration that the Respondents' eviction, demolition burning and general destruction of the houses of members of the Ogiek community in the Sasumwani and Nkareta areas within Maasai Mau Complex and the threat of the same to the Ogiek Community residing in the rest of the Mau Complex is in contravention of *the Constitution* of Kenya (2010) and the law;
  - b. A declaration that the Respondents' eviction, demolition, burning and general destruction of the houses of members of the Ogiek community in the Sasumwani and Nkareta areas within Maasai Mau Complex and the threat of the same to the Ogiek Community residing in the rest of the Mau Complex is a violation of Articles 2 (5) and 2 (6) of *the Constitution* of Kenya 2010 and Articles 18, 24, 25, 27 of the ICCPR and Article 15 of the ICESCR;
  - c. A declaration that failing to respect the rights of the Ogiek Community and evicting them on the basis of verbal threats of eviction was a violation of the Respondents' State obligations to uphold human rights under Article 3 and 21 of *the Constitution* of Kenya 2010;
  - d. A declaration that the Respondents threats to evict, and evicting some of the Mau Ogiek community of Maasai Mau trust land forest without proactive disclosure of information about the eviction is a violation of Article 35 (3) of *the Constitution* as read with Sections 4 and 5 of the *Access to Information Act*;
  - e. A declaration that the Respondents' aforesaid acts constitute a violation of the right to fair administrative action enshrined under Article 47 and Sections 4 and 5 of the Fair Administrative Actions Act;
  - f. A declaration that the Respondents' actions threatening to evict and demolish the houses of members of the Ogiek community, and the evictions and demolition, burning and general destruction of the houses of members of the Ogiek community in Sasimwani is contrary to the



land policy, which provides for the security of tenure and transparency in land administration as provided under Article 260 of *the Constitution*;

- g. A declaration that the Respondent's evicting some of the Mau Ogiek Community of Maasai Mau trust land forest without provision of measures for resettlement to prevent their internal displacement is a violation of Sections 4, 5 and 6 of The *Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act* No 56 of 2012;
  - h. An order restraining the Respondents jointly and severally, their representatives, agents or assigns from continuing to evict the Ogiek community from their ancestral lands or threatening to evict them contrary to *the Constitution* of Kenya, the several statues cited in this petition and the African Court on Human Rights Judgements in African Commission on Human and Peoples' Rights v Republic of Kenya Application No 006 of 2017 dated 26<sup>th</sup> May, 2017 and 23<sup>rd</sup> June, 2022;
  - i. An order directing the Respondents jointly and severally to cease forthwith from any further evictions and demolition of the homes of the Ogiek community in the Mau forest;
  - j. An order directing the 2<sup>nd</sup> and 6<sup>th</sup> Respondents to profile the Ogiek Community from being evicted during the ongoing multi-agency security operations by the state to reclaim the Mau Forest complex from the alleged encroachers;
  - k. General damages.
- 20 There was no response from the 1<sup>st</sup> Respondent, 2<sup>nd</sup> Respondent, 5<sup>th</sup> Respondent and 6<sup>th</sup> Respondent.

### **3<sup>rd</sup> RESPONDENT'S RESPONSE**

- 21 The 3<sup>rd</sup> Respondent filed a Replying Affidavit dated 22<sup>nd</sup> March, 2024. It deposes that it just supports conservation and management activities on all forests in the nation as guided by the *Forest Conservation and Management Act*, 2016.
- 22 The 3<sup>rd</sup> Respondent deposes that Maasai Mau Forest was surveyed between years 2005 and 2006 and registered as Land Reference number 27432 as depicted on f/r No 337/81. It deposes that the said forest covers approximate area of 43,260.8 Hectares.
- 23 The 3<sup>rd</sup> Respondent deposes that Maasai Mau Forest complex offers critical ecological services in form of: being a carbon sink, provides an ecosystem for conservation of biodiversity and water catchment for the wildlife in the Mara and the people across the African Region among a myriad of other ecosystem benefits in Kenya, but continues to suffer deforestation due to forest related crimes and encroachment.
- 24 The 3<sup>rd</sup> Respondent further deposes that there is no evidence that any member of the Ogiek is under threat of eviction. The 3<sup>rd</sup> Respondent deposes that the Petitioners are mistaken in trying to use this Court to implement orders not issued by it and bypass the timelines and procedures laid down by the African Court on Human and Peoples Rights in the reparations judgment. It deposes that the Petitioners have not proved that they are members of the Ogiek family.
- 25 The 3<sup>rd</sup> Respondent deposes that questions arising from the decision of the African Court on Human and Peoples Rights can only be handled by the said court. It deposes that it is not true that the State is in disobedience of the orders issued by the African Court on Human and Peoples Rights as alleged by the Petitioners. It deposes that the Petitioners are well aware that contempt of court orders is punishable under the law by the Court that issued the orders alleged to have been disobeyed.



- 26 The 3<sup>rd</sup> Respondent deposes that the said forest is the property of Narok County Government which was not a party to the case in the African Court on Human and Peoples Rights and as such cannot be bound by the resultant decision.
- 27 The 3<sup>rd</sup> Respondent deposes that the Mau Forest as envisaged in the decision of the African Court on Human and Peoples Rights does not include the Maasai Mau Forest the subject matter of the instant suit. The 3<sup>rd</sup> Respondent deposes that the rights of encroachers on our forests does not supersede and or override the right to a clean environment.
- 28 The 3<sup>rd</sup> Respondent deposes that the requirement that the State shall publish and publicize any important information affecting the nation is strictly on the information affecting the nation and not information affecting a section or a community.
- 29 The 3<sup>rd</sup> Respondent deposes that the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners have not demonstrated that they are the chairman and member of the Ogiek council of elders. It deposes that the 3<sup>rd</sup> Petitioner lacks locus to bring the instant suit. The 3<sup>rd</sup> Respondent deposes that the Petitioners have not demonstrated that indeed any of the members of the Ogiek has or was evicted or is under threat of eviction from the Maasai Mau. The 3<sup>rd</sup> Respondent deposes that even if the decisions were to be implemented by a Court in Kenya then the right court to address the issue would be a High Court not an Environment and Land Court. It deposes that the Petitioners Petition should be dismissed with costs.

#### **4<sup>th</sup> RESPONDENT'S RESPONSE**

- 30 The 4<sup>th</sup> Respondent filed a Replying Affidavit dated 1<sup>st</sup> December, 2023. It deposes that its mandate as prescribed in the [Wildlife Conservation and Management Act](#) No 47 of 2023 includes; conserving and managing national parks, wildlife conservation areas, and sanctuaries under its jurisdiction and providing security for wildlife and visitors in national parks, wildlife conservation areas and sanctuaries.
- 31 It deposes that Mau Forest is not in its jurisdiction as it is gazetted as a Public Forest under the [Forest Conservation and Management Act](#) No 34 of 2016.
- 32 It deposes that the execution of the orders of the African Commission on Human and People's Rights as stated in the Petitioner's supporting affidavit is not within its mandate. It deposes that despite the assertion that its representatives were observed demolishing houses at Naituyupaki, the Petitioners have not adduced any evidence to support this claim.
- 33 It deposes that the Petitioners have not demonstrated a prima facie case with a likely chance of success as against it and it should be dismissed.

#### **SUBMISSIONS**

- 34 The Petitioners filed written submissions dated 2<sup>nd</sup> April, 2024. They identified the following issues on determination:
- a. Whether the Environment and Land Court has the jurisdiction to entertain this matter?
  - b. Whether the Respondents failed to adhere to the obligations set out under [the Constitution](#) to respect, uphold and protect the human rights of the Petitioners?
  - c. Whether the right of access to information and public participation of the members of the Ogiek community was infringed upon and violated?



- d. Whether the right to fair administrative action of the Ogiek community was violated by the respondents?
  - e. Whether the Ogiek community's right to property and security of land tenure was infringed upon as a result of the actions of the respondents?
  - f. Whether the right to human dignity, equality and freedom from non-discrimination of the Ogiek community was violated by the respondents?
  - g. Whether the respondents infringed upon the rights of the Ogiek community to participate in their religion and cultural life?
  - h. The legality/propriety of the evictions.
- 35 The Petitioners submit that this Honourable court possesses the jurisdiction to determine matters touching on the violation and/or infringement of the fundamental bill of rights and freedoms, so long as the same relate to the environment and land. The Petitioners further submit that the court's jurisdiction in this regard is not limited to matters that only touch on the right and freedom to a clean and healthy environment under Article 42, 69 and 70 of *the Constitution* as provided under Section 13 (3) of the ELC Act, 2011.
- 36 The Petitioners submit that the general jurisdiction of the Environment and Land Court (ELC) is set out in Section 13 (1) of the ELC Act, 2011, which emphasizes that the ELC has both original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (2) (b) of *the Constitution*, relating to environment and land. They submit that Section 13 (2) clarifies the general jurisdiction set out in Section 13 (1). They submit that Section 13 (2) (e) in very broad terms, states that the court has jurisdiction to hear any other dispute relating to environment and land.
- 37 The Petitioners submit that they note however that certain disputes pertain to issues that fall within the concurrent jurisdiction of the High Court and the Environment and Land Court as is the case with this petition. They submit that this matter not only deals with the legality of the forced evictions as per the *Land Act*, 2012 but also alleges violations and threats to constitutional rights and fundamental rights. The Petitioners rely on the judicial decisions of Ledidi Ole Tauta & Others vs Attorney General [2015] eKLR and Patrick Musimba vs National Land Commission & 4 others [2015] eKLR.
- 38 The Petitioners submit that this court being a court of equal status to the High Court, possesses the same powers as the High Court in the performance of its judicial function so long as it is within its specialized jurisdiction. They submit that the Environment and Land Court would therefore also have the authority to entertain a matter regarding the implementation and enforcement of foreign decisions if it touches on the environment and the use and occupation of, and title to, land or any other disputes relating to the environment and land as contemplated by Section 13 (2) (e) of the ELC Act, 2011. The Petitioners rely on the judicial decision of Republic v Karisa Chengo & 2 others [2017] Eklr.
- 39 The Petitioners also rely on Article 3 (1), 21 and 53 of *the Constitution* of Kenya. They submit that the evictions in question further violated children's rights to access education. Reliance is further placed on Article 27 (4), 56 and 260 of *the Constitution* of Kenya. The Petitioners also relied on Article 24 of the International Covenant on Civil and Political Rights (ICCPR). The Petitioners submit that the Respondents as agents of the state acted in blatant disregard of Article 56 of *the Constitution* of Kenya.
- 40 The Petitioners submit that in conducting the evictions in question, the Respondents did not pay any regard to Article 57 of *the Constitution* of Kenya. The Petitioners submit that the actions of the Respondents cumulatively amount to their failure to uphold and respect the rights of the Petitioners and members of the Ogiek community.



- 41 The Petitioners rely on Section 4, 6 and 8 of the *Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act*, No 56 of 2012. The Petitioners submit that as an indigenous community in Kenya whose livelihood and continued existence and enjoyment of various other rights (among them the right to culture and religion) largely depend on their ancestral land within Mau forest; the state was/is obligated to facilitate the enjoyment of their rights principally by allowing them the right to use, occupy and control access to their ancestral land and at the very least should not engage in violating their rights.
- 42 The Petitioners submit that despite the issuance of conservatory orders, the 3<sup>rd</sup> Respondent has remained in the area. Reliance is placed on the judgment delivered on 26<sup>th</sup> May, 2017 of the African Court on Human and Peoples Rights in African Commission on Human and People Rights V the Republic of Kenya (Application No 006/2012) which found in favour of the Ogiek of the Mau community and confirmed their ancestral land rights to the Mau Forest Complex. The Petitioners submit that in its reparations judgment delivered on 23<sup>rd</sup> June, 2023, the African Court made it clear that the bundle of ancestral land rights for the community include the right to use, occupy and control access to their territory. Reliance is placed on the judicial decision of John. K Keny & 7 others v Principal Secretary Ministry of Lands, Housing and Urban Development & 4 others [2018] eKLR. The Petitioners submit that the community cannot be arbitrarily removed from their ancestral land.
- 43 The Petitioners rely on Article 35 (1) and Article 69 (1) (d) of *the Constitution* of Kenya. Reliance is also placed on Section 3, 4 (1) and 5 of the *Access to Information Act*. The Petitioners submit that no information was shared with them and they were never issued with any formal notices demanding their vacation from the land in question. Reliance is placed on the judicial decision of Abdullahi Mohammud Farah & 3 others v County Government of Mandera & another [2022] eKLR.
- 44 The Petitioners rely on Article 47 of *the Constitution* of Kenya and Sections 2 and 3 (1) (c) of the *Fair Administrative Action Act*. The Petitioners submit that the members of the Ogiek community were not notified in writing of the impending evictions and the proper procedure as is provided for under the *Land Act* was completely disregarded. Reliance is placed on the judicial decisions of Wilfred Juma Wasike & 11 others v Ministry of Interior and Co-ordination & Another [2022] eKLR, Evelyn College of Design Ltd v Director of Children’s Department & another; Petition 228 of 2013 and Adan Abdirahani Hassan & 2 others v The Registrar of Titles & others; Nairobi Petition No 7 of 2012 [2013] eKLR.
- 45 The Petitioners rely on Article 40 of *the Constitution* of Kenya and Article 63 of *the Constitution* of Kenya. The Petitioners also rely on Article 14 of the African Charter. The Petitioners submit that the community has since time immemorial harmoniously co-existed with the Mau forest eco-system and do not pose any threat to the ecological welfare of Mau forest.
- 46 The Petitioners rely on Articles 10, 24 (4), 25, 28, 29 and 57 of *the Constitution* of Kenya. The Petitioners also rely on the judicial decision of MWK & another v Attorney General & 4 others [2017] eKLR. The Petitioners further rely on Article 44 of *the Constitution* of Kenya and Articles 8 and 17 of the African Charter on Human and People’s Rights.
- 47 The Petitioners also rely on the judicial decisions of William Musembi & 13 others v Moi Education Centre Co. Ltd & 3 others [2021], Satrose Ayuma & 11 others *vs Registered Trustees of the Kenya Railways Staff Retirement Benefit Scheme & 2 others Petition No 65 of 2010* and the African Commission on Human Rights in the case of the Social Economic Rights Centre & Centre for Economic and Social Rights v Nigeria, Com. No 155/96 (2001).



48 The Petitioners submit that state and or its agents would still be required to conduct the evictions in a manner that respects the Petitioners rights under fundamental freedoms under Articles 20 (3) (b), 20 (4) and 259 (1) of *the Constitution* of Kenya. The Petitioners rely General Comment No 7 on forced evictions by the Committee on Economic Social and Cultural Rights and submit that the state failed in its duty of respecting their rights and ensuring that they are not in any way subjected to the illegal evictions under challenge.

## ANALYSIS AND DETERMINATION

49 After considering the Amended Petition, the Affidavits sworn by the Respondents and the submissions filed, the issues that arise for determination in my view are:

- a. Whether this court has jurisdiction to hear and determine this Petition?
- b. Whether the Petitioners are entitled to the orders sought in the amended Petition?

50 It is the Petitioner’s case that this Honourable Court possesses the jurisdiction to determine matters touching on the violation and/or infringement of the fundamental bill of rights and freedoms so long as the same relate to the environment and land.

51 This court is guided by the judicial decision of Law Society of Kenya v Attorney General & 3 others; Katiba Institute & 6 others (Interested Parties) (Environment & Land Petition E001 of 2023) [2023] KEELC 20583 (KLR) where it was pronounced as follows at paragraph 153:

“...Further, while the High Court and the Environment and Land Court are courts of equal status, the High Court does not have jurisdiction to render itself on matters concerning the right to a clean and healthy environment....”

52 This court further takes into account the reasoning in the Supreme Court of Kenya decision of *Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties) (Petition E007 of 2023)* [2023] KESC 113 (KLR) where at paragraph 75 it was stated as follows:

...Having considered the matter, it is our firm finding that the above issues fall squarely within this court’s appellate jurisdiction in Article 163(4)(a) of *the Constitution* and call for us to determine them as a matter of constitutional interpretation and application. This is also because the question of ELC’s jurisdiction requires interpretation of Articles 162(2) as read with Articles 40, 42 and 70 of *the Constitution* and whether the superior courts properly applied their mind to the petition that had invoked those Articles. It is also necessary for us to consider the context in which the appellant claims that various rights enshrined in *the Constitution* were violated, and whether the trial court ought to have heard his plea and interrogated those violations....”

53 The Court of Appeal in *Karisa Chengo & 2 others v Republic Civil Appeal Nos. 44, 45 & 76 of 2014* [2015] eKLR observed as follows: -

“The Committee of Experts in its Final Report thus, adverted to three main factors in securing anchorage in *the Constitution* for the specialized Courts. These were, first, setting out in broad terms the jurisdiction of the ELC as covering matters of land and environment ... but leaving it to the discretion of Parliament to elaborate on the limits of those jurisdictions in legislations. Secondly, and more fundamentally, the establishment of the ELC was inspired by the objective of specialization in land and environment matters by requiring that ELC Judges were, in addition to the general criteria for appointment as Judges of the superior Courts, to have some measure of experience in land and environment matters. Lastly, the Committee of Experts ensured the insertion in *the Constitution* of a



statement on the status of the specialised Courts as being equal to that of the High Court, obviously to stem the jurisdictional rivalry that had hitherto been experienced between the High Court and the Industrial Court.....”

54 The matter was appealed to the Supreme Court in Petition No. 5 of 2015 Republic vs. Karisa Chengo & 2 Others [2017] eKLR. The Supreme Court rendered itself as follows: -

(52) In addition to the above, we note that pursuant to Article 162(3) of *the Constitution*, Parliament enacted the *Environment and Land Court Act* and the Employment and *Labour Relations Act* and respectively outlined the separate jurisdictions of the ELC and the ELRC as stated above. From a reading of *the Constitution* and these Acts of Parliament, it is clear that a special cadre of Courts, with *suis generis* jurisdiction, is provided for. We therefore entirely concur with the Court of Appeal’s decision that such parity of hierarchical stature does not imply that either ELC or ELRC is the High Court or vice versa. The three are different and autonomous Courts and exercise different and distinct jurisdictions. As Article 165(5) precludes the High Court from entertaining matters reserved to the ELC and ELRC, it should, by the same token, be inferred that the ELC and ELRC too cannot hear matters reserved to the jurisdiction of the High Court. [Emphasis mine]

(79) It follows from the above analysis that, although the High Court and the specialized Courts are of the same status, as stated, they are different Courts. It also follows that the Judges appointed to those Courts exercise varying jurisdictions, depending upon the particular Courts to which they were appointed. From a reading of the statutes regulating the specialized Courts, it is a logical inference, in our view, that their jurisdictions are limited to the matters provided for in those statutes. Such an inference is reinforced by and flows from Article 165(5) of *the Constitution*, which prohibits the High Court from exercising jurisdiction in respect of matters “reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or (b) falling within the jurisdiction of the Courts contemplated in Article 162(2).”

55 The court in the judicial decision of David Ramogi & 4 others v The Cabinet Secretary, Ministry of Energy & Petroleum & 7 others [2017] eKLR stated as follows:

.....At this point, I wish to clearly state that the jurisdiction of the Environment and Land Court is only limited to the disputes contemplated under Article 162(2)(b) of *the Constitution* and Section 13 of the Act. In this regard, my view is that the intention in *the Constitution* is that if an issue arises touching on land in respect of its use, possession and control, then this High Court will have no jurisdiction. If the dispute touching on land is for anything else other than which I have stated, my view is that, that dispute will be outside the jurisdiction of the Land Court

.....Drawing a line between what matters squarely fall under a particular High Court division, particularly the Constitutional and Human Rights Division is, in my humble view not always a work of mathematical precision especially bearing in mind, let’s face it, most if not all disputes before a court of law will necessarily involve some form of constitutional infraction, directly or indirectly; however remote. Perhaps this is a riddle better solved by way of ‘elimination method’.

56 The Petitioners in their submissions have asked the Court to rely on the judicial decision of Patrick Musimba vs National Land Commission & 4 others [2015] Eklr as cited in Mohammed Ali Baadi vs The Attorney General & 12 others [2012]. The court stated:

57 A closer reading of the Petition especially the complaints and the reliefs sought revealed that the petition was simply not about the environment and land. Substantial questions had been raised not only on the process of compulsory acquisition of land but also on the integration and generation of the



environment. Questions had been raised about denial of access to information as well as a threatened contravention or violation of the right to fair administrative action. Questions had also been raised on the violation and or further threatened violation of the dignity of the petitioner's constituents.

..... It could not have been the intention of the draftsmen of *the Constitution* that when the Court was faced with a mixture of causes of action touching on *the Constitution*, especially on fundamental rights, a separationistic approach was to be adopted by the Court and half the claim dispatched to one Court as the other half was retained." [Emphasis mine].

58 This court is further guided by the reasoning of the Supreme Court of Kenya at paragraph 50 in the judicial decision of *Adega & 2 others v Kibos Distillers Limited & 5 others (Petition 3 of 2020)* [2020] KESC 36 (KLR) (Constitutional and Human Rights) (4 August 2020) (Ruling) where it was pronounced as follows:

...It would therefore seem that the Superior Court, determined, quite incorrectly, that it had the power or jurisdiction to hear and determine the Petition, which although raised issues that were clearly within its purview, were also intertwined with other issues which were rather obviously not within its jurisdiction, and which could have been effectively determined by another legislatively established tribunal, in this instance two bodies, the National Environmental Tribunal and the National Environmental Complaints Committee...."

59 This court will thus apply a separationistic approach in determining this Petition. This Court will be guided by the remedies sought in this petition, their merits and whether they are within the preserve of this courts.

60 The 3<sup>rd</sup> Respondent in its replying affidavit deposed that it just supports conservation and management activities on all forests in the nation as guided by the *Forest Conservation and Management Act*, 2016. It deposed that Maasai Mau Forest was surveyed between years 2005 and 2006 and registered as Land Reference number 27432 as depicted on f/r No 337/81. It deposed that the said forest covers approximate area of 43,260.8 Hectares.

61 The 3<sup>rd</sup> Respondent deposed that Maasai Mau Forest complex offers critical ecological services in form of: being a carbon sink, provides an ecosystem for conservation of biodiversity and water catchment for the wildlife in the Mara and the people across the African Region among a myriad of other ecosystem benefits in Kenya, but continues to suffer deforestation due to forest related crimes and encroachment. The 3<sup>rd</sup> Respondent deposed that the Petitioners have not proved that they are members of the Ogiek family.

62 The 4<sup>th</sup> Respondent on the other hand in its replying affidavit deposed that despite the assertion that its representatives were observed demolishing houses at Naituyupaki, the Petitioners have not adduced any evidence to support this claim.

63 The 4<sup>th</sup> Respondent deposed that the Petitioners have not demonstrated a prima facie case with a likely chance of success as against it and it should be dismissed.

64 It is trite law that he who alleges must prove. This is set out in section 107 of the *evidence Act*. It is as follows:

1. Whoever desires any court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove those facts exist.
2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.



65 This court notes that the Petition is supported by the Affidavits of Wilson Memosi Ole Ngosilo (the 1<sup>st</sup> Petitioner) sworn on 9<sup>th</sup> November, 2023 and that of Salaton Ole Nadunguekop (the 2<sup>nd</sup> Petitioner) also dated 9<sup>th</sup> November, 2023.

66 Under Article 258 of *the Constitution* of Kenya, every court proceeding a person claiming that *the Constitution* had been contravened or was threatened with contravention either in person or on behalf of another person or as a member of a group, class of persons or an association or in the public interest. May bring forth and lodge such proceedings.

67 Article 22 (3) of *the Constitution* of Kenya allows a party approaching the court to act in person or on behalf of or in the interest of a group or class of persons in which he is a member or in the public interest.

68 This Petitioners in their amended Petition state that the Ogiek People dwelling within the Mau Forest Complex have fought for their recognition as an indigenous community and their rights to their ancestral lands. This court in determining the issue of the Petitioners claim as ancestral land is guided by the following judicial pronouncements:

In the judicial decision of Joseph Letuya & 21 others v Attorney General & 5 others (2014) eKLR, the Court, 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.”

69 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 (i.r 11977) situated IN Kedong) vs Kedong Ranch Limited & 8 others (2015) eKLR, the Court, 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.”

70 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.”



71 It is a fact that Mau Forest is gazetted as a Public Forest under the *Forest Conservation and Management Act* No 34 of 2016 and it has not been procedurally degazetted. 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.

72 It is so ordered.

**DATED AND DELIVERED VIRTUALLY AT NAKURU THIS 30<sup>TH</sup> DAY OF MAY, 2024**

**A.O. OMBWAYO**

**JUDGE**

