Tonui v Kenya Forest Service & 3 others; Law Society of Kenya & Others & 12 others (Interested Parties) (Constitutional Petition 11 of 2020) [2024] KEELC 6320 (KLR) (30 September 2024) (Judgment)

Neutral citation: [2024] KEELC 6320 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CONSTITUTIONAL PETITION 11 OF 2020

JM MUTUNGI, J

SEPTEMBER 30, 2024

BETWEEN

HON SAMUEL KIPKEMOI TONUI ..... PETITIONER

AND

KENYA FOREST SERVICE ..... 1ST RESPONDENT

THE ATTORNEY GENERAL ..... 2ND RESPONDENT

CABINET SECRETARY, MINISTRY OF ENVIRONMENT & FORESTRY ..... 3RD RESPONDENT

GEORGE NATEMBEYA ..... 4TH RESPONDENT

AND

LAW SOCIETY OF KENYA & OTHERS ..... INTERESTED PARTY

ZAKAYO KIPKOECH LESINGO (SUING ON HIS OWN BEHALF AND ON BEHALF OF THE MAU OGIEK COMMUNITY OF EASTERN MAU FOREST) ..... INTERESTED PARTY

LIWOP-MOROP SELF-HELP GROUP ..... INTERESTED PARTY

JOSEPH KIPKEMOI ..... INTERESTED PARTY

JOEL KITUIYA ..... INTERESTED PARTY

JOSEPH KIPYEGON SOMOEI ..... INTERESTED PARTY

DAVIDSON KIPRONO LANGAT ..... INTERESTED PARTY

BENJAMIN CHEPKOIMET CHEPCHIENG ..... INTERESTED PARTY

ERASTUS NGETICH ..... INTERESTED PARTY

DAVID KIPRONO MISOI ..... INTERESTED PARTY

JOHANA KIPKURUI ROTICH ..... INTERESTED PARTY

DAVID CHERUIYOT KENDUIYWO ..... INTERESTED PARTY

OGIEK WELFARE COUNCIL ..... INTERESTED PARTY

The Mau East Forest Complex was lawfully excised and degazetted

This case involved multiple petitions challenging evictions from the Mau East Forest Complex. The petitioners, including residents of various settlement schemes and the Ogiek community, argued they had legal rights to the land based on issued titles or ancestral claims. The government contended that the degazettement process was incomplete, making the titles invalid, and that evictions were necessary for environmental conservation. The High Court ruled that the excision and settlement process was legally sanctioned through Gazette Notices, making the titles valid. It directed the government to demarcate forest boundaries and issue titles to rightful allottees while ordering any illegal occupants of forest land to vacate. The court orderd for the settlers to ensure that 30% of the land was covered with forest. The court also acknowledged the Ogiek's indigenous rights but found that implementation of their reparations, as awarded by the African Commission on Human and Peoples Rights, was a separate matter. Compensation claims for unlawful evictions were dismissed for lack of sufficient evidence.

Reported by John Ribia

Land Law *– public land – forest land – excision – degazzettment – legitimate expectation of settlers - Mau East Forest Complex – process - whether the Mau East Forest Complex was lawfully excised and degazetted in accordance with the applicable legal framework to allow for settlement – whether the principle of legitimate expectation applied to persons who were allocated forest land, issued title deeds, and allowed to develop the land for an extended period before subsequent government action deemed them illegal occupants - whether the government was obligated to provide alternative resettlement or compensation to persons evicted from land they occupied under an alleged legitimate claim - whether title deeds issued over land previously designated as forest land were lawfully acquired and conferred valid property rights - whether there was a clear delineation of the Mau East Forest Complex so as to be able to distinguish between forest land and the settlement area – Constitution of Kenya articles 2(6), 10, 22, 2, 27, 28; 29, 35(1), 40, 43, 47, 66, 67(2)(e), 69, 70, 132(3)(c), 135, and 260; Forest Act (repealed) (cap 385) section 4; Land Act, (cap 280), section 152G; National Land Commission Act, (cap 281), section 15(3)(b); Registered Land Act (repealed) (cap 300) section 143; The Environmental (Impact Assessment and Audit) Regulations (cap 387) regulation 4 and 42.*

Land Law *– community land – claim that a community was illegally evicted – Ogiek Community - whether the Ogiek community had an enforceable legal and constitutional claim to the Mau Forest as indigenous land, and if so, whether their rights had been unlawfully infringed by their eviction - Constitution of Kenya articles 2(6), 10, 22, 2, 27, 28; 29, 35(1), 40, 43, 47, 66, 67(2)(e), 69, 70, 132(3)(c), 135, and 260; Forest Act (repealed) (cap 385), section 4; Land Act (cap 280) section 152G; National Land Commission Act (cap 281), section 15(3)(b); Registered Land Act (repealed) (cap 300), section 143; The Environmental (Impact Assessment and Audit) Regulations (cap 387) regulation 4 and 42.*

Environmental Law *– forest land – eviction of settlers from forest land – where the settlers were settled there by the government - whether when faced with the hazard of opening forest land to settlement, the State could reverse the decision and evict the settlers legally - whether the State's actions in evicting settlers that it had legally settled in forest land and reclaiming forest land was justified in the public interest, particularly in relation to environmental conservation and sustainable land use – Constitution of Kenya articles 2(6), 10, 22, 2, 27, 28; 29, 35(1), 40, 43, 47, 66, 67(2)(e), 69, 70, 132(3)(c), 135, and 260; Forest Act (repealed) (cap 385) section 4; Land Act (cap 280) section 152G; National Land Commission Act (cap 281) section 15(3)(b); Registered Land Act (repealed) (cap 300) section 143; The Environmental (Impact Assessment and Audit) Regulations (cap 387) regulation 4 and 42.*

Public International Law *– regional courts – jurisdiction of regional courts vis-à-vis jurisdiction of local courts – enforceability of decisions of regional courts in Kenya - whether Kenyan courts were bound by decisions of the*

African Commission on Human and Peoples Rights - whether the High Court had the jurisdiction to compel the enforcement of a decision of the African Commission on Human and Peoples Rights - Constitution of Kenya articles 2(6), 10, 22, 2, 27, 28; 29, 35(1), 40, 43, 47, 66, 67(2)(e), 69, 70, 132(3)(c), 135, and 260; Forest Act (repealed) (cap 385) section 4; Land Act (cap 280) section 152G; National Land Commission Act (cap 281) section 15(3)(b); Registered Land Act (repealed) (cap 300) section 143; The Environmental (Impact Assessment and Audit) Regulations (cap 387) regulation 4 and 42.

Brief facts

The case concerned multiple consolidated petitions challenging evictions from the Mau East Forest Complex. The lead petition, ELC Petition No. 11 of 2020, was filed by Hon. Samuel Kipkemoi Tonui on behalf of residents of Nessuit, Mariashoni, Sururu, Likia, Terit, and Sigotik Settlement Schemes. The petitioners claimed that the Kenyan government, through the Kenya Forest Service and other agencies, had unlawfully evicted them despite their legitimate ownership of the land. They argued that the government excised 35,301 hectares from the forest in 2001 for settlement purposes and issued title deeds to beneficiaries, many of whom were victims of land clashes. The petitioners asserted that the government had since reversed its position and was treating them as illegal settlers despite their legal documentation.

Additional petitions were filed by other individuals and groups, including the Ogiek community, who claimed ancestral and indigenous rights to the forest. The Ogiek argued that the Mau Forest had historically been their home and that successive government actions, including forced evictions, violated their rights. They relied on the African Court on Human and Peoples' Rights decision, which recognized their land rights. The Ogiek further contended that the government's ongoing activities, including the issuance of titles to other individuals, undermined their rightful claims.

The respondents maintained that the excision of forest land in 2001 was not legally completed, rendering the issued titles null and void. The State asserted that it was acting to protect a vital water catchment area and that continued settlement in the Mau Complex threatened environmental sustainability. It further argued that some titles were issued illegally before the purported degazettement process was completed. The respondents also stated that any evictions carried out were necessary to prevent further environmental degradation and that affected individuals were either squatters or holders of unlawfully obtained titles.

Issues

i. Whether the Mau East Forest Complex was lawfully excised and degazetted in accordance with the applicable legal framework to allow for settlement.
ii. Whether when faced with the hazard of opening forest land to settlement, the State could reverse the decision and evict the settlers legally.
iii. Whether the State's actions in evicting settlers that it had legally settled in forest land and reclaiming forest land was justified in the public interest, particularly in relation to environmental conservation and sustainable land use.
iv. Whether the principle of legitimate expectation applied to persons who were allocated forest land, issued title deeds, and allowed to develop the land for an extended period before subsequent government action deemed them illegal occupants.
v. Whether the government was obligated to provide alternative resettlement or compensation to persons evicted from land they occupied under an alleged legitimate claim.
vi. Whether title deeds issued over land previously designated as forest land were lawfully acquired and conferred valid property rights.
vii. Whether there was a clear delineation of the Mau East Forest Complex so as to be able to distinguish between forest land and the settlement area.
viii. Whether Kenyan courts were bound by decisions of the African Commission on Human and Peoples Rights.
ix. Whether the High Court had the jurisdiction to compel the enforcement of a decision of the African Commission on Human and Peoples Rights.

x. Whether the Ogiek community had an enforceable legal and constitutional claim to the Mau Forest as indigenous land, and if so, whether their rights had been unlawfully infringed by the state's actions.

Held

1. The origin of land settlement schemes in Kenya had to do with the transition of Kenya from a colonial state to an independent state. At the time of transition, settlement schemes were conceived to de-racialize land ownership in the former whites – only scheduled areas and to offer land to many of those who had been displaced during the struggle against the colonial rule. The Government's primary objectives over the years in creating settlement schemes had been to satisfy hunger for land in regard to the landless, to promote political stability, and to ensure agricultural productivity of the land was sustained. The emergence of public land buying companies soon after independence whose purpose was to purchase large tracts of land and settle their members also played a significant role in the establishment of settlements. Notwithstanding the settlements created following the transition to independence, there were still numerous persons who had no land, those living in communal villages and informal settlements (slums) and those persons who were labourers in the white settlers farms and forest workers following the abolishment of the "forest *shamba* system".
2. The petitioners were the products of the forest *shamba* system where they were permitted to reside and cultivate within the forest as they nurtured the forest. The *shamba* system was abolished the 1980's rendering all those persons landless as many of them never had land elsewhere.
3. While the Ogiek Community were acknowledged as an indigenous community who were living within the Eastern Mau Forest Complex, the Government had not conclusively resolved the Ogiek Community land issue as recommended by the Courts in *Joseph Letuya & Others v Attorney General & 5 Others* (2014) eKLR and the African Court on Human and Peoples Rights. In the instant petition the Ogiek Community were basically seeking to have the Judgment of the African Court implemented.
4. The Government in the 1990s allowed and/or permitted people to enter and occupy tracts of land which constituted forest reserves around Londiani, Elburgon, Njoro and Kuresoi which were within the Eastern Mau Forest Complex. In Nakuru District, the Government around 1997 designated thousands of hectares of the Eastern Mau Forest as settlement schemes and allocated 5 acres parcels of land to the settlers. That saw the creation of Nessuit, Mariashoni, Sururu, Likia, Terit and Sigotik settlement schemes. The same time that the Government sought to have part of the Mau Forest excised to create settlements, the Government was also privatizing what used to be known as Agricultural Development Corporation Farm (ADC) by creating settlement schemes. The only difference was that whereas the forest excision was intended for settlement of landless persons, the ADC farms were targeted for acquisition by well to do members of the society.
5. The Mau Forest Complex was a critical water tower upon which many lives and species depended both locally and regionally and hence it was vital that the Mau ecosystem was maintained and sustained for the benefit of the present and future generations. Any degradation and/or depletion of the Mau Forest Complex would have far reaching ramifications and there was therefore need to jealously conserve and safeguard the forest land for the benefit of all. The Government apparently in realization that there had been widespread intrusion and damage to the Mau Forest Complex, including within the Eastern Mau Forest, had embarked upon a campaign to restore and rehabilitate the Mau Forest.
6. The Government through the relevant Minister issued the Notice of Intention to Alter the Eastern Mau Forest Boundary vide Gazette Notice No. 889 of January 30, 2001 as required under section 4(2) of the Forest Act. As at January 30, 2001 when the Minister issued the notice of intention to alter the forest boundary, settlements had already taken place in the settlement scheme. The Minister was in effect taking steps to regularize what otherwise had been unlawfully done without first having the forest boundary altered before establishing the settlements.
7. It could not be that the Government did not know settlers had settled in the area earmarked for excision from the forest with the tacit approval of the Government. Many of the settled individuals were those

who had been affected by the 1992 land tribal clashes and those who had been removed from the forest following the abandonment of the forest *shamba* system. Those were basically landless people who the Government under article 43 of Constitution would have been expected to make provisions for under the ambit of economic and social rights guaranteed under the Bill of Rights.

8. There was no clear and definite delineation of the forest area. In that regard issues arose whether the boundary recognized by the Kenya Forest Service took into account the settlement scheme areas and specifically whether such boundary as acknowledged by the Kenya Forestry Service (KFS) included the excision of approximately 35,301.01 Hectares as per the Legal Notice No. 142 of October 8, 2001 or it was the boundary before the excision. The settlers must have referred to the boundary after the excision and/or forest boundary after the alteration.

9. The Government through its officers made promises to settle the petitioners and in that regard established the six settlement schemes. Sururu, Mariashoni, Nessuit, Likia, Terit and Sigotik on which they allocated people land who moved in and settled thereon. In furtherance and execution of the promise the Government gave a Notice of Intention to alter the boundary of Eastern Mau Forest by issuing the Gazette Notice No. 889 of January 30, 2001 as required under the law. The Government had the power and authority to alter the forest boundary to create a settlement as they did. The Government duly gazetted the degazettment of the portion of 35,301.01 hectares of Eastern Mau Forest vide Legal Notice No. 142 of October 8, 2001 which Gazette Notice had never been annulled or revoked.

10. The petitioners were given a promise, they were let in occupation by the Government, and the Government by its conduct of gazetting the intention to alter the forest boundary, and ultimately degazetting the land set apart from the forest, gave the petitioners and settlers within the scheme the legitimate expectation that their resettlement was "*fait accompli*". The Government had the ability to give the promise and the petitioners were entitled to act on it. The petitioners/settlers had a legitimate expectation that the Government would settle them in the land identified for settlement by the Government. The Government by seeking to go back on its promise, violated the petitioners legitimate expectation and their property rights.

11. Whereas the Government may have realized it erred by opening forest land to settlement, the realization was fraught with challenges as to reverse the position to pre 1997 when the settlements commenced in earnest, would be nearly impossible. There were thousands of people who had settled in the established schemes and any mass evictions would require a massive resettlement plan of the evictees. The Government had not indicated they had such a plan and if anything the Government appeared only to be focused on getting the settlers out of what it claimed to be forest land. While it was essential and necessary to preserve and conserve the forest, the court must be alive to the situation on the ground and in doing so to also be conscious of the dictates of article 43 of Constitution.

12. The court had to be careful not to in the name of endeavouring to protect the environment, to unwittingly usher in a humanitarian crisis where inhabitants were flushed out and left on the roadsides and market and trading centers where they add to the population of internally displaced persons (IDP's). The court took notice that not all IDP's from the 2007/2008 post-election violence had been settled.

13. There could be persons who may have taken advantage of the confusion relating to the delineation of the forest area from the settlement area and encroached onto the forest land. Those persons, if found to have encroached onto the forest area beyond the boundary of the settlement schemes, were to be evicted forcefully as they could be the source of the problem. There was no clarity as to which boundary, whether the one before or the one after degazettment, was to be re-established.

14. The Government properly degazetted 35,301.01 Hectares of Eastern Mau Forest. The persons who were settled within that area were validly settled and if they had been issued titles, such titles were valid and should be respected. The Government and the Kenya Forest Service had to move with speed to

delineate the boundary and any person found to be beyond such boundary once established had to vacate from the forest land and/or be evicted forcefully.

15. Human activities over time globally had adverse effects to the environment. There had been widespread deforestation that had seen forested land reclaimed for human settlement. There had been air pollution caused by industrialization and illegal disposal of toxic and hazardous waste. The combined effect was that globally there was climate change and notably there had been increased global warming leading to the threat of desertification as rainfall yields decreased and rivers dried up. Kenya had not been spared the adverse effects of the global climate change and hence every activity that had potential to adversely affect the environment must be carefully considered and evaluated to ensure the adverse effects were mitigated. The allocation of part of the forest as settlement land definitely affected the ability of the Mau Forest Complex to act as water catchment area and as such action must be taken to restore the tree cover to the extent possible and it was for that reason as a mitigation measure of the impacts of deforestation, the court recommended a limitation of the land use within the settlement area with a view of mitigating the adverse impacts of deforestation resulting from human settlement in what was forest land.
16. The protection and conservation of the environment was for the public good and the Government and the Agencies that had the responsibility to ensure the environment and water catchment areas were protected such as NEMA and the Water Resources Management Authority (WARMA) must play their part as mandated by the law. The Government under article 66 of Constitution has a broad duty to regulate use of land whether public or private.
17. Under article 66(1) of Constitution the Government in the public interest could impose regulations regarding the use of land and with regard to the settlements that were carved out of what was forest land the Government could properly through its agencies regulate the land use such that the impacts of deforestation were mitigated to minimize the negative adverse effects of the action taken to degazette part of Eastern Mau Forest by the Government. Article 69(1)(a) and (b) of Constitution placed obligations on the state to ensure sustainable exploitation and utilization of resources and to also ensure a threshold tree cover of 10% was attained countrywide.
18. The legal framework to ensure the environment was adequately protected and conserved existed and all that needed to be done was ensure there was a proactive and effective mechanism for enforcement and application of the law. The various State agencies charged with the responsibility of coordinating environmental protection and conservation efforts must play their part for the objective to be realized. The Government and its agencies owed the public a duty to ensure the environment was conserved and protected.
19. While there was evidence there could have been some evictions, it was not ascertainable whether the evictions were executed on forest land and/or settlement land. The Kenya Forest Service had a mandate to protect forest land from intrusion and could properly carry out evictions from forest land provided they did so upon notice and effected the evictions in a humane manner. No evidence was adduced to demonstrate that they had carried out any evictions unlawfully and/or in an inhumane manner. The claim for damages was not proved.
20. The High Court had no power/jurisdiction to compel the respondents to enforce a decision of the African Commission on Human and Peoples Rights (the Commission). The Commission through the reparations Judgment had demonstrated it had ability to enforce its own Judgment.
21. To the extent that the Task Forces were established with the objective of implementing the merits Judgment of the African Commission on Human and People's Rights (App. No. 006 of 2012) which the Ogiek Community had prosecuted and obtained the Judgment in their favour, they were entitled to be involved in the activities of the Task Forces and to be furnished information upon request. The activities that the Task Forces were undertaking were likely to affect the Ogiek Community and they therefore had the right to be informed what was happening and/or the progress of the activities.

22. The establishment of the Multi-Agency Task Force in August/September 2020, which was not gazetted and/or with any publicized Terms of Reference, and without the involvement of the Ogiek Community representatives and yet one of the Task Force's objectives was the implementation of the Merits Judgment of the African Commission on Human and Peoples Rights was unlawful and lacked any legal backing. The activities of the Task Force were a nullity as it lacked a legal framework to anchor its activities.
23. The Judgment on reparations changed the landscape fundamentally as it issued indictments against the State and set new timelines and thresholds for the Government to meet. The High Court had no information the extent to which the terms of the reparations Judgment had been met. The Ogiek Community should focus on the implementation and satisfaction of the reparations Judgment as it was in effect, given in enforcement of the merits Judgment.
24. As a national court, the High Court was expected to interpret Constitution or the national laws and on the basis of the evidence make a determination. Hence where a dispute concerned the application of any domestic laws and/or customary or international law, the jurisdiction of the national court could not be surrendered to the regional courts but the jurisprudence from such courts could be taken as persuasive authorities.
25. International or regional courts were empowered to conduct procedural reviews on decisions of the national courts and call attention to violations only but in line with the mandate conferred by their parent treaty or convention, and not national laws.
26. Notwithstanding the decision by the African Commission on Human and Peoples Rights the court would be entitled to consider the applicable law and the evidence and make its own decision which of course would be subject to appeal.
27. The petitioners were not opposed to the Ogiek Community being settled and allocated land as determined in the Judgment of the African Commission on Human and Peoples Rights, as long as their settlements (petitioners) were not interfered with. The Government with the intention of settling landless persons created Nessuit, Mariashoni, Sururu, Likia, Terit and Sigotik Settlement Schemes where the Government allocated people (petitioners) individual parcels of land. To facilitate the settlement, the Government gave notice to alter the boundary of East Mau Forest vide Legal Gazette Notice No. 889 of January 30, 2001 and that the forest boundary was altered vide Legal Gazette Notice No. 142 of October 8, 2001 which Gazette Notices had never been cancelled and/or revoked.
28. The petitioners/residents were rightfully in occupation of the land allocated to them provided such land fell within the forest land that was excised for settlement purposes. Considering that the land was part of the Eastern Mau Forest before excision, the land use by the settlers must be such as to compliment the greater Mau Forest Complex for sustenance of the Ecosystem of the Mau Forest as a water tower and a water catchment area. The residents must be required to ensure there was no interference with the riparian reserve of all rivers that flow through the settlement lands. The settlers must also be required to plant trees and to maintain a tree cover in respect of each parcel of land of not less than 30%.
29. To attain the threshold of 30% tree cover, Kenya Forest Service would need to avail tree seedlings to the settlers and in liaison with the Local Administration of the Ministry of Interior and Coordination of National Government and the County Environment Department could easily ensure compliance. They were under article 69(2) of Constitution obligated to do that and they should. Everybody had a role to play in the conservation and protection of the environment for sustainable development to be a reality.

Petition partly allowed.

Orders

i. *Legal Notice No. 142 of October 8, 2001 was to be implemented and the Government within a period of 12 months from the date of the instant Judgment to establish and delineate the forest boundaries within the settlement schemes by placing physical and visible beacons on the ground.*

ii. *The Government through the Ministry of Interior and Coordination of National Government and the Ministry of Lands, Housing and Urban Development was directed to verify and authenticate the allottees of land within the settlement schemes and to issue titles to any of the allottees who may not have been issued title to land allocated to them.*

iii. *Upon the delineation and establishment of the forest boundary any person found to have encroached onto the forest land to vacate forthwith failing which the Kenya Forest Service to be at liberty to evict such people forcefully but any such evictions to be humane and to comply with section 152G of the Land Act.*

iv. *The owners of land within the schemes shall be required to ensure there was no interference with the riparian reserve of any rivers flowing through their lands and every land owner within the schemes shall be required to increase the tree cover in their parcels of land to a minimum of 30% of the land within a period of 60 months from the date of the instant Judgment.*

v. *The Ministry of Interior and Coordination of National Government, the Kenya Forest Service, the National Environment Management Authority (NEMA) and the Water Resources Management Authority (WARMA) shall oversee the implementation of (v) above under the auspices of article 69(2) of Constitution.*

vi. *The Ogiek Community's right of access to information was violated by the respondents but the Judgment on reparations dated June 23, 2022 had rendered any orders otiose. The Government should facilitate the implementation of the Judgment.*

vii. *The Petition No. 6 of 2020 was not proved and was dismissed.*

viii. *Each party was to bear their own costs of the consolidated petitions as the petitions involved public interest.*

Citations

Cases

1. Ambale v Masolia (Civil Case 759 of 1971; [1976] KEHC 34 (KLR)) — Followed
2. Atik Mohamed Omar Atik & 3 Others v Joseph Katana & Another (Environment & Land Case 33 of 2019; [2019] KEELC 552 (KLR)) — Mentioned
3. Attorney General (On Behalf of the National Government) v Karua (Reference E001 of 2022; [2024] KESC 21 (KLR)) — Explained
4. Clement Kipchirchir & 38 Others v PS Ministry of Lands Housing & Urban Development & 3 Others (Petition 42 of 2013; [2015] KEELC 692 (KLR)) — Explained
5. Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others (Petition 14, 14A, 14B & 14C of 2014 (Consolidated); [2014] KESC 53 (KLR)) — Explained
6. Fanikiwa Limited & 3 others v Sirikwa Squatters Group & 17 others (Petition 32 (E036), 35 (E038) & 36 (E039) of 2022 (Consolidated); [2023] KESC 105 (KLR)) — Explained
7. George Bala v Attorney General (Petition 238 of 2016; [2017] KEHC 8350 (KLR)) — Explained
8. Jane Kiongo & 15 others v Laikipia University & 6 others (Petition 596 of 2017; [2019] KEHC 11480 (KLR)) — Explained
9. Joseph Letuya & 21 Others v Attorney General & 5 Others (Civil Suit No 821 of 2012; [2014] KEHC 6421 (KLR)) — Explained
10. Katiba Institute v President's Delivery Unit & 3 Others (Constitutional Petition 468 of 2017; [2017] KEHC 2183 (KLR)) — Explained
11. Kenya Revenue Authority v Export Trading Company Limited (Petition 20 of 2020; [2022] KESC 31 (KLR)) — Explained
12. Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae) (Petition 3 of 2018; [2021] KESC 34 (KLR)) — Explained

13. Mureithi & 2 others (All suing for and on behalf of Mbari-Ya Murathimi Clan) v Attorney General & 5 others (Miscellaneous Civil Application 158 of 2005; [2006] KEHC 3488 (KLR)) — Explained
14. Republic v Minister for Environment & 5 others; Exparte Kenya Alliance of Resident Associations & 4 Others (Misc. Civil Application No. 421 of 2001) — Explained
15. Republic v Minister for Transport & Communication & 5 others ex parte Waa Ship Garbage Collector & 15 othersGarbage Collector & 15 others (Civil Appeal 617 of 2003; [2004] KEHC 10 (KLR); (2006) 1 KLR (E&L) 563) — Explained
16. Satrose Ayuma & 11 Others v Registered Trustee of Kenya Railways Staff Retirement Benefits Scheme & 3 Others (Petition 65 of 2010; [2015] KEHC 8007 (KLR)) — Followed
17. Tabot v Attorney General; Kalimbula Investments Limited (Interested Party) (Environment & Land Case 288 of 2018; [2023] KEELC 16846 (KLR)) — Explained
18. National Director of Public Prosecutions v Phillips & Others ((2002)(4) SA 60 (W)) — Explained
19. Africa Commission on Human and Peoples' Rights v Republic of Kenya (Application 006 of 2012; [2022] AfCHPR 1 (KLR)) — Explained
20. Esiroyo v Esiroyo ((1973) EA 388) — Mentioned
21. Obiero v Opiyo ((1972) EA 227) — Mentioned

Statutes

1. Access to Information Act (cap 7M) — section 4, 5, 5(1)(c) — Interpreted
2. Community Land Act (cap 287) — Interpreted
3. Constitution of Kenya, 2010 — article 2(6); 10 ; 22; 23 ; 27; 28; 29 (d) (f); 35(1); 40; 40(2)(b); 43; 47; 66; 67(2)(e); 69 ; 69(2); 70; 132(3)(c); 135; 260 — Interpreted
4. Environmental Management And Co-Ordination Act (cap 387) — section 57, 58 — Interpreted
5. Fair Administrative Action Act (cap 7L) — section 4 — Interpreted
6. Forest Act (repealed) (cap 385) — section 4, 4(2) — Interpreted
7. Land Act (cap 280) — section 152G — Interpreted
8. Land Adjudication Act (cap 284) — Interpreted
9. National Land Commission Act (cap 281) — section 15(3)(b) — Interpreted
10. Registered Land Act (repealed) (cap 300) — section 143 — Interpreted
11. The Environmental (Impact Assessment and Audit) Regulations (cap 387) — regulation 4, 42 — Cited

Texts

1. National Environment Management Authority (2012), NEMA Guidelines on Strategic Environmental Assessments

International Instruments

1. International Covenant on Civil and Political Rights (ICCPR), 1966 — article 27
2. International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966 — article 15(1)(a)
3. special Rapporteurs report on the Rights of Indigenous Peoples
4. United Nations Declaration on the Rights of Indigenous Persons (UNDRIP), 2007 — article 32(2)

Advocates

None mentioned

JUDGMENT

Introduction and Background

1. This judgment is in respect of all the five (5) consolidated petitions namely; Petition No 11 of 2020 by Hon Samuel Kipkemoi Tanui; Petition No 130 of 2017 by Charles K Langat & 14 others; Petition No

E005 of 2020 by John Njenga Mbugua & 5 others; Petition No E006 by Johnson Kamuri Murugami & 16 others and Petition No E 16 of 2020 by Ogiek Council of Elders (suing on their behalf and on behalf of the Mau Ogiek Community) & another. On being consolidated, the court directed that Petition No. 11 of 2020 becomes the lead, file. In all the petitions the subject matter is the Mau East Forest Complex and the broad issues are whether there was encroachment onto forest land; whether there had been any degazettment of any part of the forest; whether there were titles issued on forest land, and if so, the validity or otherwise of such titles; the rights of the Ogiek as a Community as pertains to occupancy of the Mau Forest Complex; and whether any parties constitutional rights were violated by the Government in its endeavor to protect and conserve the Mau Forest Complex.

2. To contextualize the judgment the brief particulars of the consolidated petitions are as set out hereunder:-

    1. Petition No 11 of 2020

        Hon Samuel Kipkemoi Tonui v Kenya Forest Service & 4 others

        The petitioner on behalf of the residents of Nessuit, Mariashoni, Sururu, Likia, Terit and Sigotik Settlement Schemes alleged violation of their constitutional rights by the respondents under articles 10,22,23,28,29 (d) and (f), 40 and 47 of the *Constitution*. The petitioner averred that the Respondents had set in motion actions to forcefully and illegally evict the residents of the aforestated settlement schemes in the guise of removing persons they claimed had encroached onto forest land. The operation was spearheaded by a Multi-Agency Team of officers from the Kenya Forest Service and Officers from the National Police Service coordinated by the Ministry of Interior through the Regional Commissioner. The Petitioners position was that they were not in occupation of forest land and had not encroached forest land. They contended they held valid titles issued to them by the Government following the establishment of the aforementioned settlement schemes after the forest boundary was altered. The Petitioners sought the following prayers vide the petition:-

        1. A declaration that the actions of the respondents are in violation of Constitutional rights of the residents of Nessuit, Mariashoni, Sururu, Likia, Terit and Sigotik settlement schemes specifically in violation of articles 10, 22, 23, 26, 27, 28,29(d) and (f), 40 and 47 of *Constitution* of Kenya.

        2. An order that the residents of Nessuit, Mariashoni, Sururu, Likia, Terit and Sigotik Settlement Schemes be compensated by the respondents for their illegal actions of threat to life, mass destruction of property and forceful evictions.

        3. An order directed at the 1st respondent to forthwith, and in any event not later than 365 days from the date of Judgment, establish the existing boundaries of the entire Mau Forest Complex, including Eastern Mau Forest and clearly mark the same by erecting a fence to separate the forest from the excised land.

        4. An order that upon clearly marking the boundaries as per prayer 3 above, the 1st respondent to issue a 6 month notice of vacation to persons found to have illegally occupied part of the forest which has not been degazetted and or excised.

        5. An order directed at the respondents to initiate resettlement of persons affected by prayers 3 and 4 herein above.

        6. An order of permanent injunction against the 1st, 2nd, 3rd and 4th respondents restraining them from interfering or continuing to interfere with the quiet and

peaceful enjoyment of the property rights of residents of Nessuit, Mariashoni, Sururu, Likia, Terit and Sigotik Settlement Schemes.

7. An order for costs of the petition.

2. Petition No 130 of 2017

Annah Chelangat & 50 others v David Kiprono Busienei, CS Ministry of Lands, Housing And Urban Development & 2 others

The petitioners stated that they had been allocated parcels of land by the Government of Kenya in Nakuru/Tinet/Settlement Scheme in 1997 through the Local Administration. They claimed they were issued Allotment Letters through the District Commissioner, Nakuru and they settled on the land. However about 2005, the petitioners claim strangers were brought into the area for political reasons and were issued with title deeds leaving out the petitioners. The petitioners claimed they were subjected to constant harassment by the Local Administration who were using the Administration Police and that despite raising complaints to the National Land Commission they got no redress. It is the petitioner's assertion that their constitutional rights were violated and there was deprivation of property contrary to article 40(2)(b) of *Constitution*.

The petitioners prayed for orders as follows:-

a. A declaration that the actions of the respondents have been discriminatory, inhuman and degrading against the Petitioners.

b. An order directing the 2nd and 3rd respondent to issue title to each of the petitioners.

c. An order of permanent injunction restraining the 1st respondent by himself, Agents, Servants and hirelings from interfering with, invading or in any other way dealing with petitioner's land parcels contained in Map Sheet No 12 Nakuru/Tinet/Sotiki Settlement Scheme together with the fixtures and developments thereon.

d. A declaration that the 3rd and 4th respondents have abdicated their constitutional and legal roles and are therefore escapists.

e. Any other relief the court may deem fit to grant in redress of the clear violation of the petitioners' rights to property and

f. Costs of the petition.

3. Petition No E005 of 2020.

John Mbugua & 5 others v The Cabinet Secretary, Ministry of Lands, Housing And Urban Development & 6 others.

The petitioners in the petition averred that from about the year 1900 they together with the Ogiek Community settled in Nessuit, Mariashoni, Sururu, Likia, Teret, Kiptunga, Barget, Molo Forest and Elburgon Forest. The petitioners stated that these were the only areas they knew as their homes having been born bred and brought up there. The petitioners averred that their lives were cruelly disrupted in 1988 when they were violently and forcefully evicted by the Government allegedly on grounds of forest conservation. The petitioners claim they had resided, cultivated and had constructed schools and dispensaries within the areas they had settled in and were living harmoniously and were not in any way harming the forest but rather conserving the same. The petitioners alleged the evictions were carried out in a discriminatory

manner in that the Ogiek, with whom they had settled in the area were not evicted. Further, the petitioners averred that the Government did not give them alternative area to settle.

The petitioners alleged that other persons from Kericho, Bomet and Baringo were settled in the same area that they had been evicted from in 1997. The petitioners further aver that the respondents were in the process of surveying, sub-dividing and alienating land in the area comprising. Nessuit, Marishoni, Sururu, Likia, Teret, Kiptunga, Barget, Molo Forest and Elburgon Forest to the person living there but the petitioners contend as the original settlers in the lands, they are the persons entitled to be settled on the land and issued titles. The petitioners inter alia seek orders for:-

i. Compensation for illegal and unjust evictions.

ii. Resettlement and to be issued titles.

iii. Permanent injunction.

iv. Damages for violation of their rights.

v. Costs of the petition.

4. Petition No E006 of 2020.

Johnson Kamuri Muragami & 14 others v National Land Commission & 3 others.

The petitioners petition dated December 11, 2020 was amended on July 19, 2021. The petitioners claim that their fathers and forefathers were employees of the Colonial Government and were engaged in the development of forest and were actively involved in taking care of Mau Forest including planting trees and harvesting the mature ones and at the same time protecting the forest from illegal loggers and destruction by fire. The petitioners claim as such employees they were permitted to cultivate within the forest and to settle therein with their families. The petitioners aver that they had all the time dating to the colonial period resided within the forest and that in 1968 the late President Mzee Jomo Kenyatta promised that all families that were working within the forest were each to be allocated 2 hectares of land for their settlement. The petitioners however state that the promise was never honoured and that the Petitioners were in 1988 unlawfully evicted from their settlements within the Mau East Forest and that in 1993 persons were brought from diverse places and settled in the areas that the Petitioners had hitherto occupied.

The petitioners contended their eviction was unlawful, forceful and infringed the right to human dignity and constituted deprivation of property. The plaintiffs aver they were rendered squatters within the neighbouring trading centers and claim they have suffered historical land injustice which the 1st respondent has failed to redress contrary to article 67(2)(e)of *Constitution* and section 15(3)(b) of the *National Land Commission Act*. The petitioners further averred by the Respondents settling and allocating other persons land that they had previously settled and occupied before they (petitioners) were unlawfully and violently evicted, the respondents were acting in a discriminatory manner and that constituted an infringement of the petitioners rights under article 27 of *Constitution*.

The petitioners among other prayers seek declarations that they are entitled to protection of their proprietary land rights to the areas that they occupied before they were unlawfully evicted; that the 1st respondent carries out investigation on the petitioners historical land rights over the areas they occupied within the Mau East Forest with a view of recommending a

comprehensive resettlement plan of the petitioners; and compensation by way of damages for illegality and violation of the petitioners constitutional rights.

5. Petition No E16 of 2020 (ELC No E009 of 2020).

Ogiek Council of Elders (suing on their behalf and on behalf of the Mau Ogiek Community) & another v The Attorney General & 9 others; Commission on Administration of Justice and Prof Karima Bennoune, Un Special Rapporteur, Cultural Rights.

The Ogiek claim that Mau Forest is both their ancestral land and an integral part of their culture. The Ogiek state that there have been Judicial pronouncements in the case of *Joseph Letuya & 21 others v Attorney General & 5 others* (2014) eKLR where the court found that Mariashoni and Nessuit, were ancestral lands of the Ogiek and their forced eviction from the land was therefore unconstitutional. The African Court on Human and People's Rights (African Court) also in 2017 delivered a Judgment where they held that the Mau Ogiek were an indigenous Community and that the Mau Forest was their ancestral land.

In the petition, the petitioners aver that the respondents have in disregard of the Law and the rights of the Mau Ogiek declared their intent to issue individual titles and a block title in the Eastern Mau Forest which they claim would infringe on the rights of the Ogiek. The petitioners aver that the Government constituted an unconstitutional and illegal "Multi-Agency Team" whose mandate was unclear but whose intention was to undertake activities in East Mau region that was to culminate to the issuance of individual titles to land to persons residing within the area on December 11, 2020 in compliance with a directive issued by the President. The petitioners claim there was an earlier Taskforce Report on the Mau to which the petitioners had been denied access though their rights as a community were affected and they had a right to access the information contained in the Report. The petitioners faulted the respondents in denying them access to information and further averred that the process through which the respondents were carrying out the land audit, survey and other activities with a view of issuing occupants with 5 acres plots of land was unconstitutional as it infringed the rights of the Ogiek who were indigenous and the land was ancestral land. The petitioners averred there was lack of Public participation and the work of the Multi Agency Team was shrouded in mystery as there was no gazettment of the Multi Agency Team and/or publication of its functions and/or its Terms of Reference.

3. The petitioners contended the respondents were in carrying out the activities that they were through the Multi Agency Team, in violation of the petitioners rights under article 10, 35, 40, 47,69 and 70 of *Constitution*. The petitioners sought a multiplicity of reliefs and orders including: That their right to access to information was violated; that the respondents violated the national values and principles in article 10 of *Constitution*; that the petitioners rights under article 40 of *Constitution* were violated; an order of Mandamus compelling the 3rd respondent to furnish the petitioners with information sought by the petitioners in their letters of April 8, 2020 and to publish the Taskforce Report on the implementation of the decision of the African Court on Human and Peoples' Rights issued against the Government of Kenya and an order prohibiting the respondents from issuing titles in Eastern Mau Forest or carrying any further activities relating to the issuance of titles until there has been compliance with *Constitution*; the *Environmental Management and Coordination Act*, 1999; the *Access to Information Act*, 2016, the *Fair Administrative Action Act*, 2015; the Judgment of the African Court of Human and Peoples' Rights, and any other relevant Laws.

4. The petitioners in Petition No E16 of 2020 (the Ogiek) applied and were joined as interested parties in the primary Petition No 11 of 2020 and participated as such interested party in that petition and separately prosecuted their substantive Petition No E16 of 2020. Save for the Petition by the Ogiek the

other four petitions relate to persons claiming ownership of either individual parcels of land or persons who claim to have occupied and/or had settled within what the Government claims was part of the Mau East Forest and were evicted. The holders of title claim to have been allocated the land and were issued titles to the land by the Government following degazettment of the forest land and alteration of the forest boundary. As regards to the Ogiek, they claim that as a community they had always resided within the forest and that the land constituting the forest is their indigenous and ancestral land. The Ogiek further claim their claim over the forest land had been adjudicated by both the National Court and the African Court on Human and People's Rights and the problem has only been with the implementation of the decisions, particularly the decision of the African Court on Human and Peoples' Rights delivered in 2017.

5. Various other parties who either had settled occupied and/or had been issued titles within the Settlement Schemes namely Nessuit, Mariashoni, Sururu, Likia, Terit and Sigotik applied and were joined as interested parties in the petition. The general thread in the case by the various Interested Parties was that they had been allocated and settled on the disputed land by the Government following intermittent land clashes from the early 1990s and had been issued with titles which were valid and were not in unlawful occupation of forest land. The Ogiek Community apart from being admitted as interested parties in Petiti on No 11 of 2020 filed their own distinct Petition No E16 of 2020 as highlighted above. The case for the interested parties, was that the respondents were unlawfully and illegally seeking to evict them from their land in respect of which they held lawful titles duly issued to them by the Government. The interested parties contended that the respondents were acting in violation of their constitutional rights to own property and that they could not be deprived of their property without due compliance with the law.

Amicus Curiae

6. Professor Karima Bennoune, the United Nations Special Rapporteur in the field of Cultural Rights applied and was admitted to appear as an *amicus curiae* to provide neutral and unbiased expertise on the cultural rights of indigenous peoples and the obligation to seek the free prior and informed consent of indigenous peoples when their Cultural Rights are threatened. The application for leave to appear as an *amicus curiae* was supported with a detailed amicus brief which the court admitted as the pleading of the *amicus curiae*. On July 26, 2021, the court directed that the *amicus* brief was to be limited to presentation on the cultural aspects as they touched and related to the Ogiek Community. The court further directed the petition(s) as consolidated would proceed on the basis of the affidavit evidence and the documents filed and parties were further allowed to present limited oral evidence through witnesses to buttress the affidavit and documentary evidence that had been filed.

The Petitioners Case (Petition No. 11 of 2020)

7. Hon. Samuel Kipkemoi Tonui, then a member of the County Assembly and Deputy Speaker, Nakuru County and who had filed the petition on behalf of the affected residents within Nessuit, Mariashoni, Sururu, Likia, Terit and Sigotik Settlement Schemes testified in support of the petition on behalf of the petitioners who all resided within East Mau, Nakuru County. In his testimony he relied on the supporting and supplementary affidavits sworn in support of the petition. In his testimony he claimed that the Kenya Forest Service (KFS) Officers were evicting people from their land purporting they were reclaiming forest land. It was his evidence that the persons targeted in the evictions had settled on their land for many years and that Kenya Forest Service was indiscriminately damaging and demolishing their homes and destroying their property.

8. The witness stated that the Government had vide a Legal Gazette Notice (EKN) No 889 of January 30, 2001 declared intention to alter the forest boundary through excision of 35,300 Hectares

approximately out of the Mau Forest Complex for resettlement. He stated that the Notice of Intention to alter the forest boundary was issued by Hon. Nyenze (now deceased) when he was a Minister for Environment, while Hon Katana Ngala who succeeded Hon. Nyenze as Minister issued Legal Notice No 142 dated October 8, 2001 to alter the forest boundary through the excision of approximately 35,300 Hectares from the forest land. The Petitioner's position was that the Government's intention to alter the forest boundary was given effect as Settlement Schemes were created and people were allocated title and issued title deeds. He maintained that the Government's gazette notice of intention to degazette the area earmarked for settlement out of the forest was never revoked by the Government and hence there was no basis for the persons who had been settled in the Settlement Schemes to be evicted from the land they had known as their homes.

9. The petitioner contended that the title deeds the residents held were issued by the Government and had never been revoked and/or challenged through any legal process. He stated that the Government had no right to encroach onto the Settlement Schemes claiming it was part of the forest when the same Government had itself allocated the land and issued titles to the residents. He asserted that the boundary delineating forest land and the Settlement ought to be established so that the intermittent cases of unlawful evictions can be eliminated. The petitioner stated he was aware the Ogiek Community had instituted a case before the African Court and had obtained Judgment in their favour and it was his position that the Petitioners were not opposed to the Ogiek Community being given land.

10. The petitioner stated that at the time the notice to degazette part of Eastern Mau Forest for excision, there were several other similar Notices to alter forest boundaries issued by the Government affecting various forests in the Country. He stated the affected Eastern Mau Settlement Schemes have over 100,000 people and that Nessuit Ward alone has 12,000 registered voters.

11. Cross examined by Ms. Shirika state counsel, PWI stated he brought the petition on behalf of the residents and that their claim was limited to the 35,300 hectares that had been excised out of the forest to create the settlements. He reiterated that the residents desired to have the boundaries of the Settlement Schemes delineated in conformity with the Gazette Notice of the alteration of the forest boundary.

12. Joseph Kipkemoi Kebenei (PW2) who was an interested party testified in support of the petition. He had sworn a replying affidavit dated November 3, 2020 and had annexed title to his parcel of land Nakuru/Likia/964 measuring 4.04 Hectares issued on July 16, 1997. He explained that he had been enlisted as one of the beneficiaries in the programme initiated by the Government to settle landless people and/or those who had been displaced during tribal land clashes. He stated that people were moved from South West Mau which was considered more of a Wet land comprising of Tiinet, Donnet and Kiptololo areas and settled within Eastern Mau, Nakuru County. He stated that the Government started subdividing the land for resettlement in 1995 and the Survey was spearheaded by Mr Halake who was the Regional Surveyor, Rift Valley Province. He testified that in 2000 the Government gave notice of its intention to degazette part of the Mau Forest land for resettlement purposes. He stated that at the time the notice to degazette the forest land was issued, people had already moved into the area and the boundary of the area to be degazetted had been surveyed and people settled in the area. He stated the boundary of the forest land and the settlement area had been established and a survey map had been prepared.

13. PW2 further testified that in 2020 the Kenya Forest Service (KFS) personnel came to the settled area and started interfering with the residents requesting that they vacate the area. He stated that the people who had settled outside the boundary area and had encroached into the forest land had earlier been evicted. They however were harassing people who had been legally settled within the settlement

Scheme boundary. He stated that the Government established the Multi Agency Task Force who created what he stated was an imaginary boundary which fell inside the settled area with the result that a large number of the regularly settled residents were of a sudden being declared to be encroachers into the forest land. It was his position that the Respondents were acting illegally and unlawfully and in violation of the resident's Constitutional rights.

14. Respecting the Ogiek Community PW2 stated that they were occupants of Nessuit and Mariashoni Settlement Schemes and some of them had been issued with title deeds.

15. In Cross examination by Ms Shirika senior state counsel on behalf of the Attorney General, PW2 admitted that he was issued his title in 1997 and that by that time there had been no degazettment of the part of Mau Forest where the Settlement Schemes were created. He stated that he was removed from South West Mau in 1995 to Mau East where he was allocated land by the Government. He stated he was a member of the Ogiek Community. He stated the allottees of land were issued allocation letters and/or cards before they were issued with title deeds. It was his view that the activities of the Multi Agency Task Force in forcing people out of their lands were unlawful since the people had been lawfully settled. He stated that a total of 35,301 Hectares of Mau Forest was degazetted to pave way for the settlements.

16. The witness in concluding his evidence stated he belonged to the Ogiek Community and that he had settled in South West Mau before moving to East Mau where he was allocated land. He stated the Ogiek Comprised 18 clans within East Mau and 7 groups in South West Mau. He stated there had been no challenge in regard to the titles issued to them by the Government and hence it was his position that the Multi Agency Task Force was acting in violation of the law in chasing people away from their lands.

17. PW3 Charles Kiptum Chepsergon testified in support of the petition on behalf of Lipop Morop Group who had been joined to the petition as interested parties. He stated he represented about 1,900 land owners within the Sururu, Likia, Mariashoni, Nessuit and Doinnet Settlement Schemes. He stated the land owners have settled within the Settlement Schemes from 1997 and that the majority of them had been issued titles of the land they occupy by the Government following allocation. The witness affirmed that he applied for and he was allocated land by the Government. He stated that over time they had experienced repeated disturbances from the Forestry Department on the lands they occupy and stated there was need for the Government to settle the issue of land ownership vis-a-vis the forest land once and for all, as the settlers were at all times living in fear of being harassed and being evicted.

18. PW3 stated the petitioner brought the petition on their behalf to seek a lasting solution for the problems that they have repeatedly been exposed to. He asserted that Government has never recalled and/or cancelled the land titles that it issued to the settlers and it was their wish and desire that their titles be acknowledged and they be treated as lawful land owners.

19. In cross examination the witness stated he was issued his title in 1997 and he had not been issued with an allotment letter before being issued with a title. He however stated the Survey Department had delineated the forest land and the settlement land. The witness asserted that the KFS had chased some people from the land claiming they were on forest land. He further affirmed that all the titles he had attached to his affidavit were from Likia Settlement Scheme.

20. PW4 John Mungai Kimani testified that he was previously working as a Headman in Nessuit Forest where he and others had been allowed as squatters to utilize portions of forest land while they nurtured forest tree nurseries. He however stated in 1988 they were ordered out of the forest and they camped outside the forest area as they waited to be resettled by the Government. He claimed that their pursuit of the Government to be resettled had not borne any fruit and they remain as squatters whom the Government had forgotten and assert they were the persons who should have been resettled by the

Government. He claimed their pleas to the Land Adjudication and Settlement Office have only yielded the response that the office had no funds to have them resettled.

Case of the 2nd Petitioner: (Ogiek Community)

21. Martin Lele Kiptiony testified on behalf of the Ogiek Community who had been joined to the petition as an interested party. In his evidence he also prosecuted the petition filed on behalf of the Ogiek Community.

22. He stated he was the Secretary Ogiek Council of Elders and he testified the Ogiek Comprise of 22 clans spread over the Counties of Kericho, Narok, Nakuru, Baringo and Uasin Gishu. He stated that they had a National Council of Elders and that they had representatives in Sururu and Mariashoni. He stated he became aware of the Government Multi Agency Team when they were summoned by the Regional Commissioner to attend a meeting at Naivasha whose agenda was to discuss land and peace. He stated at the meeting, the Cabinet Secretary announced that all occupants of Mau would each get 5 acres of land. He testified that as the Ogiek Community, they did not consider that to be fair as they had always been residents and occupants of Mau forest.

23. The witness testified the Ogiek Community had a Judgment from the African Court and the High Court which had made pronouncements respecting the rights of the Ogiek Community that had not been implemented by the Kenya Government. He stated that at the Multi Agency Team they were not given an opportunity to state their concerns but were merely informed of the decision by the Interior Cabinet Secretary. He testified that as a Community it was not their intention to have individual titles but rather Community land title. He stated the Multi Agency Team were supposed to comply with the decision of the African Court as the Court had given a timeframe within which the Judgment was to be implemented.

24. The witness further testified that the Government had kept them in the dark in regard to any steps they were taking to implement the Court Judgment and it was their right as parties who were affected to be furnished with this information. The witness asserted that it was their right to have the African Court on Human and People's Rights Judgment implemented fully and urged the Court to grant them the reliefs they have sought in their petition.

25. On cross examination by Mr Kipkoech Advocate for the 1st petitioner, the witness stated Lady Justice Nyamweya in 2014 rendered a Judgment that directed that the Ogiek Community be settled by the Government on land to be identified but the Government did not implement the Judgment which led them to file the case before the African Court. The witness further stated that by the time the Multi Agency Team Meeting was called, the Kenya Forest Service had placed some beacons on the land without consultation with anybody.

26. In further cross examination by Ms Shirika for the Attorney General the witness admitted that the Courts never set out the procedures to be followed by the Government to settle the Ogiek but he indicated that it was the wish of the Ogiek Community that they live together to observe and preserve their traditions and culture. He stated that they came to court because the Government did not consult them on the implementation of the court Judgment and/or furnish them any information on the implementation. He denied that the court action by them frustrated the implementation of the court judgment.

27. The witness in concluding his evidence stated that the Multi Agency Team never furnished any minutes of the Naivasha meeting or any report on the status of implementation of the Judgment. He further stated that NEMA never involved them or consulted them on the implementation of the Court Judgment.

The Respondents' Case.

28. The respondents called two (2) witnesses namely; Solomon Kihiu- the County Director of Environment, and Evans Kegode, Head of Survey at Kenya Forest Service who testified on behalf of the Respondents in the consolidated petitions.

29. The County Director, Environment in his evidence stated that he prepared the report dated June 29, 2021 which was filed in Court and he adopted the report as his evidence and indicated it was NEMA's response to the Petition.

30. The witness in cross examination by Ms Kinama for Ogiek Community stated that he was not aware that any Environment Impact Assessment (EIA) for for Eastern Mau had been done. He stated that he was appointed to join a special Task Force (Multi Agency Team) on October 7, 2020 by a letter. He was unaware if the Task Force was gazetted. He stated he was not involved in the Naivasha meeting of September 21, 2020 of the Multi Agency Team. He explained that as per the work – plan a EIA license would have been issued by December 20, 2020. He affirmed that no Environment Impact Assessment (EIA) for Eastern Mau had ever been done as no report had been presented to their office to review. The witness explained that the County Commissioner was heading the Multi Agency Task Force and he was the one who informed him the work of the Task Force had been stopped. He further explained that if the EIA report had been prepared it would have indicated whether people had settled in the forest land. He further stated as per the press release made by the Cabinet Secretary on September 21, 2020 titles were to be issued on December 11, 2020.

31. The witness affirmed that the work plan that had been prepared for EIA was never actualized as the activities of the Multi Agency Task Force was stopped by the court.

32. Evans Kegonde (RW2) testified that as head of Survey at Kenya Forest Service his duties included Survey, Gazetting and maintaining all the records of all forests. He relied on his sworn affidavit dated 1September 6, 2020 and filed in court on September 28, 2020 and the annextures attached thereto in his evidence.

33. The witness testified that Eastern Mau Forest was proclaimed as a forest vide *Legal Notice No 34 of 1932* and was later confirmed vide *proclamation No 57 of 1941*. Following independence Eastern Mau was in 1964 declared a Central Forest Via Legal Notice No 174 of May 20, 1964. He stated Eastern Mau Forest is one of the 22 Blocks of Mau Forest complex. The witness explained the significance and importance of the Mau Forest Complex. He stated interference with the Mau Forest Complex ecosystem would be prejudicial and could have detrimental effects to many people who derive benefits from the existence and sustainability of the Mau Forest Complex. The protection and preservation of the Mau Forest Ecosystem was therefore vital and of critical significance.

34. The witness clarified that the *proclamation No 57 of 1941* merely confirmed the earlier *proclamation of 1932*. He stated the declaration of Eastern Mau Forest in 1964 indicated that it comprised of 160,639 acres. The witness stated that as far as he was aware the boundaries of East Mau Forest have never been altered and have remained as per the *proclamation of 1932*. The witness explained that he was aware of Gazette Notice No 889 of January 30, 2001 published on February 16, 2001 which he stated was an intention to alter the forest boundary but was not actualized as per the provisions of the *Forest Act* cap 385 Laws of Kenya. He stated the process of degazetting the forest land was never done. He stated the Settlement Schemes namely Nessuit, Mariashoni, Sururu, Likia, Territ and Sigotik that were established in the affected area were not legal and the titles that were issued in the said schemes were equally illegal. The witness however conceded the Notice of Intention to alter the forest boundary was not formally cancelled and/or revoked.

35. The witness further testified that the Government in 2020 established a Multi Agency Task Force Team to ostensibly restore the Eastern Mau forest by confirming the forest boundaries. He stated the Task Force Team was also supposed to set aside some land to sort out the Ogiek Community. He reiterated that the laid down procedure under the Forest Act were neither adhered to nor complied with rendering the declaration of intention of no legal consequence. He contended the relevant Government Minister at the time never communicated with the Forest Department to have the appropriate and necessary Survey carried out and the authenticated survey plan used to Gazette the boundary alteration.

36. Under cross examination by Mr Kipkoech for the petitioner the witness affirmed the Gazettee Notice No 889 of January 30, 2001 was a declaration of intention to alter the East Mau Forest Boundary. He admitted that the Forest Department never objected to the notice. The witness further admitted Legal Notice No 142 of October 8, 2001 altered the boundaries of Eastern Mau Forest and that as per the schedule land approximating 35,301.01 Hectares was to be degazetted from the East Mau Forest.

37. The witness affirmed there is a gazetted police station within Nessuit Settlement Scheme and another at Mauche but stated Government institution do coexist and there was nothing unusual with the police stations being located within a forest area/reserve. He admitted there were equally schools within the forest blocks.

38. The witness further admitted persons were pursuant to the *Legal Notice No 142 of 2001* by Hon Katana Ngala issued titles. He further stated in 2020 he was a member of a Multi Agency Task Force that was formed to re-establish Mau Forest Boundaries. He stated the Task Force comprised representatives from various Government Departments and among other matters, the Task Force was to confirm the titles issued in the Eastern Mau Forest and that they indeed did confirm several people held titles in the area. He affirmed neither the Kenya Forest Service and/or the Attorney General has ever challenged those titles. The witness stated that they reestablished the boundaries for East Mau Forest but he did not have any beacon certificates.

39. The witness in concluding his evidence under cross-examination by Biko Advocate for Liwop-Morop Group – Interested party affirmed that all the titles issued in the settlement schemes were signed by the Land Registrar. He admitted the Settlement Fund Trustees had mandate to facilitate settlement of people. He agreed amenities such as electricity, health centers and schools were within the settlement schemes.

40. The witness affirmed that he attended the Multi Agency Team meeting at Naivasha on September 21, 2020. He stated their mandate as the Multi Agency Team was; to identify the number of parcels in the schemes; to identify the people with title deeds; to identify persons with titles and homes in the Schemes; and those who had encroached onto forest land. The witness further affirmed that prior to 1990 there were settlements within the forest reserves but these were phased out. He stated that the Government settled some of those who had squatted in the forest. The witness finally stated the Multi Agency Task Force never completed its tasks as they were stopped by the court.

41. The witness in re-examination by Ms Shirika stated once there was a challenge to the intention to alter the forest boundary, the process stopped. He stated the Legal Notice issued by Hon Ngala was issued in error and was *ultra vires*. He reiterated the titles issued pursuant thereof were illegal and of no legal consequence.

42. Following the close of the trial the parties made written submissions as per the directions of the court and made highlights of the submissions orally on October 9, 2020.

Submissions of the 1st Petitioner (Petitioners in Petition No 11 of 2020).

43. Mr Kipkoech Advocate for the 1st petitioner made submissions for and on behalf of 1st petitioner on behalf of the residents of the Settlement Schemes. Mr Biko Advocate and Mr Mukira Advocate who represented some of the interested parties supported the submissions made on behalf of the 1st petitioner.

44. Ms Kinama Advocate for the Ogiek Council of Elders and the Ogiek Community the petitioners in Petition No E16 of 2020 made submissions on their behalf and her submissions were supported by Ms Musembi Advocate who appeared on behalf of the Commission on Administration of Justice (CAJ) who were an interested party in the petition by the Ogiek Community.

45. The 1st petitioner submitted that the respondents had no Legal justification to evict residents of Nessuit, Marishoni, Sururu, Likia, Terit and Sigotik Settlement as they had lawfully been allocated land by the Government in these Schemes. The 1st petitioner took the position that the Notice to degazette and to alter the Mau East Forest boundary having been issued and acted upon, the respondents could not reverse that which had already occurred. The 1st petitioner argued that the residents had acquired lawful and valid titles which were indefeasible. The 1st petitioner in consequence submitted the act of the respondents notably the 1st respondent in seeking to forcefully and violently evict them from their land was in contravention of the provisions of *Constitution* articles 10, 40 and 47. The 1st petitioner submitted that the exercise by the Multi – Agency Task Force dabbed "operation to stop all illegal human activities from Government forests which form the Eastern side of Mau Forest Complex" was unlawful since they were seeking to evict people from their own lands which they had lawfully been allocated and issued titles.

46. The 1st petitioner in his submissions highlighted the fact that settlement in the affected areas started in 1995 and that the forest excision process commenced by then Minister Nyenze in January 2001 and completed by his successor NK Ngala in October 2001 was to give legal effect to the settlements that the Government had established. The Petitioner argued that the residents have honoured and continue to honour the settlement boundaries and have not encroached onto the forest area under the management of the 1st respondent. The petitioner in support of his submissions contended that the court in the case of *Joseph Letuya & 21 others v Attorney General & 5 others* (2014) eKLR acknowledged there had been forest excision in 2001. In the case Lady Justice Pauline Nyamweya as she then was stated:-

> "I have perused the Report of the Government Task Force on the conservation of the Mau Forest Complex, March 2009 and note that the Task Force undertook an extensive audit of the settlements made by the Government through excisions of forests since independence in 1963, and also more particularly of the 2001 excisions of the Mau Forest Complex whose purpose was to settle the Ogiek Communities and 1990's clash victims. The Court notes in this regard that the Nessuit and Mariashoni Schemes were two of the schemes considered in the report with respect to the 2001 excisions and that while Mariashoni scheme was intended to benefit the Ogiek families and had started in 1996 but was put on hold in 1997 due to a Court injunction, the beneficiaries of the Nessuit Scheme were not stated, and it was indicated that they were already resident on the land."

47. The court further in the *Joseph Letuya Case* (*supra*) went on to hold that the eviction of the Ogiek from the settlement area without resettlement was in contravention of *Constitution*. The court ordered that the National Land Commission in consultation with the Ogiek Council of Elders, do identify any of

the Ogiek members who ought to have been settled in the excised areas and were not, and to identify land for their settlement.

48. The 1st petitioner in his submissions further contended that the Gazette No 889 of January 30, 2001 published on February 16, 2001 declaring intention by the then Minister to alter boundary of Eastern Mau Forest and the subsequent Legal Notice No. 142 of October 8, 2001 confirming the alteration of the forest boundary effectively set apart a total of 35,301.01 hectares for settlement out of the forest land. The petitioner contended that even though there were proceedings for Judicial Review filed at Eldoret High Court vide Misc Application No 38 of 2001 challenging gazette Notice No 889 of January 30, 2001 the same was struck out on a preliminary objection and hence the gazette notice and subsequent Legal Notice remained valid and unchallenged.

49. The 1st respondent contended that apart from the Gazette Notice relating to alteration of East Mau Forest there were other several notices for alteration of forest boundaries issued at the same period in various parts of the country yet there has been no issues raised in regard to the other forests whose boundaries were altered. The 1st petitioner submitted the Survey Map for the excised area delineating the Settlement Schemes exhibited in the petitioners supporting affidavit established the scheme boundaries and that the respondents ought to be bound by the boundaries as established following the excisions. The 1st petitioner maintained that there was due compliance with the section 4 of the *Forest Act*, cap 385 Laws of Kenya(repealed) on the excision of forest land which provides as follows:-

> 4.
>
> (1) The Minister may, from time to time, by notice in the Gazette –
>
> (a) declare any unalienated Government land to be a forest area;
>
> (b) declare the boundaries of a forest and from time to time alter those boundaries;
>
> (c) declare that a forest area shall cease to be a forest area.
>
> (2) Before a declaration is made under paragraph (b) or paragraph (c) of subsection (1), twenty-eight days' notice of the intention to make the declaration shall be published by the Minister in the Gazette.

50. The 1st petitioner contended that as the Legal Notice No 142 of October 8, 2001 has never been revoked the excision of 35.301.01 hectares out of Mau East Forest remained valid and consequently the Settlements and land titles issued to the settlers were equally valid and lawful. The petitioner therefore argued the residents are entitled to compensation for unlawful evictions. The petitioner argued that the respondents effected evictions of the residents without any regard to their constitution rights and in violation of United Nations Guidelines on steps that ought to be taken in effecting evictions where large groups of people stood to be affected. The petitioner in support of their submissions sought to rely on the Supreme Court decision in *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 Others* (2021) KESC 34 *Atik Mohamed Omar Atik & 3 Others v Joseph Katana & Another* (2019) eKLR; and *Satrose Ayuma & 11 Others v Registered Trustee of Kenya Railways Staff Retirement Benefits Scheme & 3 Others* (2015) eKLR.

51. The 1st petitioner in response to the respondent's submissions filed supplementary submissions on July 25, 2023. The 1st petitioner asserted that the residents who were allocated land and issued titles within the Settlement Schemes were first registered owners and that by virtue of the provisions of section 143 of the repealed *Land Registered Act*, cap 300 Laws of Kenya, their titles were absolute and indefeasible.

The petitioner cited the cases of *Ambale v Masolia* (1976) eKLR; *Obiero v Opiyo* (1972) EA 227; and *Esiroyo v Esiroyo* (1973) EA 388 to support this submission.

52. Further the 1st petitioner submitted that the provisions of the Forest Act as variously amended cannot be applied retrospectively so as to invalidate any gazettment made by the previous Minister. The petitioner argued the residents in the settlement schemes had a legitimate expectation that consequent to the Gazettment of the intention to alter the forest boundaries and the Legal Notice altering the boundaries, that their land allocation and subsequent issuance of title deed was validated. The petitioner relied on the case of *Jane Kiongo & 15 others v Laikipia University & 6 others* (2019) eKLR where Muita, J cited the South African decision in the case of *National Director of Public Prosecutions v Phillips & Others* (2002)(4) SA 60 (W) Para 28 where the court stated:-

> " The Law does not protect every expectation but only those which are "legitimate". The requirements for legitimacy of the expectation, include the following:-
>
> i. The representation underlying the expectation must be 'clear, unambiguous and devoid of relevant qualification'.
>
> ii. The expectation must be reasonable.
>
> iii. The representation must have been induced by the decision maker.
>
> iv. The representation must be one which it was competent and lawful for the decision maker to make without which the reliance cannot be legitimate.

Submissions by the Ogiek Community (2nd Petitioners).

53. As indicated earlier in this Judgment, the Ogiek Community filed their submissions through Ms Kinama Advocate. It was their position that the African Court had on May 26, 2017 delivered a Judgment in favour of the Ogiek in the Case of *African Commission on Human and People's Rights v Republic of Kenya* (App No 006 of 2012). In the Judgment the court held that the Mau Forest was the ancestral land of the Ogiek, an indigenous hunter – gatherer Community. The court further held the forceful eviction of the Mau Ogiek from their ancestral lands violated their rights to culture, religious, property, natural resources, development and non discrimination, contrary to the African Charter on Human and Peoples Rights to which Kenya was a State party.

54. The African Court gave time frames for the implementation of their Judgment, which the Ogiek claim the Kenyan state failed to honour despite initiating several Taskforces ostensibly to oversee the implementation of the Judgment.

55. The 2nd petitioner (Ogiek) contended that the Government (3rd respondent) on October 23, 2017 established the first Taskforce (the Dr Mwakima Taskforce) whose terms of reference were published vide Gazette No 10944 but averred the terms were unfulfilled and that one year later on October 25, 2018 the 3rd respondent established yet another Taskforce on the implementation of the decision of the African Court (the Dr Kibugi Taskforce). The petitioner submitted the latter Taskforce held several public meetings, completed its work and submitted its report to the 3rd respondent.

56. The 2nd petitioner submitted that its rights to access to information was violated since despite requesting, they were not furnished with a copy of the Taskforce report and neither were the contents of the report published. The 2nd petitioner stated that they formally made a request to the 3rd respondent on April 8, 2020 seeking production of the Taskforce report but as of November 10, 2020 when the 2nd petitioner filed its petition they had not received any response from the 3rd respondent save that they were invited to Naivasha to what turned out to be a meeting of a Multi Agency Taskforce

formed by the President which was not gazetted and/or its terms of reference publicized. The 2nd petitioner argued that the Taskforce, not having been gazetted lacked any force of law to the extent that the President had not complied with the provisions of section 135 of *Constitution* which required all his decisions to be in writing and to be sealed. Further as the Multi Agency Team was seeking to carry out functions that are donated by various Acts of Parliament including the *Land Act*, *Land Adjudication Act*, the *Community Land Act*, and the *Forest Conservation Act*, the President needed to act in compliance with article 132(3)(c) in establishing the same article 132(3)(c) of *Constitution* provides that the President shall:-

(c) By a decision published in the Gazette, assign responsibility for the implementation and administration of any Act of Parliament to a Cabinet Secretary, to the extent not inconsistent with any Act of Parliament.

57. The 2nd petitioner in support of their submissions placed reliance on the case of *George Bala v Attorney General* (2017) eKLR in contending that the Multi Agency Taskforce lacked any legal validity to carry out the functions it purported to carry out as it was neither gazetted and/or appointed by the President as prescribed under the law. The terms of reference for the Multi Agency Taskforce were unknown and hence the Taskforce was an unlawful entity.

58. The 2nd petitioner (Ogiek Community) further submitted that even though the Government (3rd respondent) was ordered/directed by the African Court to implement its merit Judgment delivered on May 26, 2017 and in that regard set up a Taskforce to oversee the implementation of the Judgment, the 3rd respondent failed and/or neglected to give the 2nd Petitioner any information and/or any access to the working of the Taskforce despite request to be given the information. The 2nd petitioner contended the 3rd respondent's action violated article 35(1) of *Constitution* and section 4 and 5 of the *Access to Information Act*. It was thus the 2nd petitioner's position that to the extent that the Taskforce (s) were dealing with matters (issues) that directly affected the 2nd petitioner it was necessary for the 3rd respondent to involve the 2nd petitioner in their deliberations as the 2nd petitioner stood to be affected by any decision that would be arrived at. The 2nd petitioner contended they were neither given access to any information and/or given any hearing contrary to article 47(1) and (2) of *Constitution* which constituted a violation of their right to Fair Administrative Action as envisaged under *Constitution* and the *Fair Administrative Action Act*, 2015 section 4.

59. The 2nd petitioner further submitted that the respondents violated articles 2(6) and 10 of *Constitution* by failing to obtain free prior informed consent of the Ogiek Council of Elders and the Ogiek Peoples Development Programme (1st and 2nd petitioners in Petition No E 16 of 2020). The submission was premised on the merits decision of the African Court of May 26, 2017 and the reparations Judgment handed down on June 23, 2022. The 2nd petitioner argued that Kenya being a party to the protocol to the African Charter on Human and Peoples' Rights by virtue article 2(6) of *Constitution* was bound to execute and implement the Judgment of the African Court. In support of the submission the 2nd petitioner cited the Kenya Supreme Court Case of *Mitu –Bell Welfare Society v Kenya Airports Authority & 2 others* (2021) KESC 34 (KLR) (1) January 2021) where the Supreme Court stated:-

> " On the other hand, article 2(5) and (6) is inward looking in that, it requires Kenyan Courts of Law to apply international Law (both Customary and treaty law) in resolving disputes before them as long as the same are relevant, and not in conflict with, *Constitution*, local statutes, or a final Judgment pronouncement. Where for example, a court of law is faced with a dispute, the elements of which require the application of a rule of international Law because, there is no domestic Law on the same, or there is a lacuna in the Law, which may be filled by reference to International Law, the court must apply the latter, because it forms

part of the Law of Kenya. In other words, article 2(5) and (6) of *Constitution*, recognizes International Law (both Customary and treaty Law) as a source of Law in Kenya. A court of law is at liberty, to refer to a norm of International Law, as an aid in interpreting or clarifying a Constitutional provision."

60. The 2nd petitioner argued that the Ogiek having been acknowledged as an indigenous Community by the African Court, the *United Nations Declaration on Rights of Indigenous Persons* (UNDRIP) should be held to be applicable to the Ogiek of the Mau Forest so that their Free Prior Informed Consent (FPIC) should have been sought and obtained before the Multi Agency Taskforce was put in place since it was to deal with issues that affected them as an indigenous Community. In other words the 2nd petitioner's position was that the Ogiek of the Mau Forest were not represented in the Multi Agency Task Force by any representatives nominated by them and hence there was no compliance with FPIC International Human Rights standard to insulate the actions of the Multi Agency Task Force. The 2nd petitioner contended the Ogiek of Mau Forest being an indigenous Community within the meaning of article 260 of *Constitution* deserved special protection owing to their vulnerability.

61. In the Reparations Judgment of the *African Commission on Human and Peoples Rights v Republic of Kenya* (App No 006/2012) delivered on June 23, 2022 at paragraph 142 the court stated:-

> ----- that it is a basic requirement of International Human Rights law that indigenous people like the Ogiek, be consulted in all decisions and actions that affect their lives. In the present case, therefore, the Respondent state has an obligation to consult the Ogiek in an active and informed manner, in accordance with their customs and traditions, within the framework of continuous communication between the parties. Such consultations must be undertaken in good faith and using culturally- appropriate procedures. When development programmes are at stake, the consultation must begin during the early stages of the development plans, and not only when it is necessary to obtain Ogiek's approval. In such a case, it is incumbent on the respondent state to ensure that the Ogiek are aware of the potential benefits and risks so they can decide whether to accept the proposed development or not. This would be in line with the notion of Free Prior Informed Consent which is also reflected in article 32(2) of the UNDRIP."

62. The 2nd petitioner maintained that the respondents were bound by the judgment of the African Court and were under an obligation to obtain the Ogiek's free, prior and informed consent before embarking on a project concerning their rights to ancestral lands, natural resources, culture and development. They asserted that the Multi Agency Task Force was formed without any consultation with them and there was, therefore, no free prior informed consent from them which rendered all its activities including the September 20, 2020 at Naivasha at which some representatives of the Ogiek were invited, a nullity.

63. Finally the 2nd petitioner submitted that the respondents, notably the 10th respondent, NEMA violated the right to a clean and healthy environment under articles 42 and 69 of *Constitution* as well as sections 57 and 58 of the *National Environment Coordination Act* (EMCA) by failing to undertake a Strategic Environmental Assessment (SEA) and Environmental Impact Assessment (EIA) before commissioning the titling and settlement of persons in the Mau East Forest. The 2nd petitioner argued the respondents were abrogating their responsibility of protecting and conserving the environment as envisaged under article 69(2) of *Constitution* and in that regard the respondents acted in violation of articles 10, 42 and 69 of *Constitution* and sections 57A and 58 of the *EMCA* and the enabling regulations 4 and 42 of the *EIA Regulations* and the *NEMA Guidelines on Strategic Environmental Assessments*.

64. The 2nd petitioner thus submitted they were entitled to the reliefs they sought in their petition No 16 consolidated with the instant petition.

Amicus Curiae Brief

65. The *amicus curie* brief of the United Nations Special Rapporteur in the field of cultural Rights submitted by the *Amicus Curiae* supported the submissions made by counsel for the Ogiek (2nd Petitioner) particularly in regard to the rights and treatment of indigenous communities such as the Ogiek. The *amicus* observed that the right to take part in cultural life is recognized in article 15(1) (a) of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) to which Kenya is a state party. Equally article 27 of the *International Covenant on Civil and Political Rights* (ICCPR) to which also Kenya is a state party recognizes cultural and indigenous rights and protections and hence the Ogiek as an indigenous community were deserving of the Cultural and indigenous rights being upheld and protected. *Amicus* has strongly urged that the Free, Prior and Informed Consent of affected indigenous communities should be a prerequisite before any project affecting the environment they live in is implemented and has further argued such communities have the ability and know how to practice culture and traditions without harming the environment.

66. In the case of the Ogiek he states as follows at paragraph 42 of his brief:-

> " 42. Forest dwelling peoples like the Ogiek are well placed to conserve their ancestral lands, particularly if the customary ownership rights are recognized and protected, including by seeking and obtaining their Free, Prior and Informed Consent when their fundamental rights are at stake".

67. To underscore the role of indigenious communities the Amicus refers to the *special Rapporteurs report on the Rights of Indigenous Peoples* (6,UN.DOC. A/HRC/36/46 (NOV, 1,2017) where the Special Rapporteur stated thus:-

> " Indigenous people are however not simply victims of climate change but have an important contribution to make to address climate change. Due to their close relationship with the environment, indigenous people are uniquely positioned to adopt to climate change. Indigenous people are also repositories of learning and knowledge about how to cope successfully with local-level climate change and respond effectively to major environmental changes such as natural disasters. Indigenous peoples play a fundamental role in conservation of biological diversity and the protection of forests and other natural resources, and their traditional knowledge of the environment can sustainably enrich scientific knowledge and adaptation activities when taking climate change related actions."

In summation the amicus stated as follows:-

> " ---- As beekeepers, the Ogiek are particularly well suited to conserve their ancestral lands in the Mau Forest. Yet the Cultural Rights of the Ogiek are under threat from climate change, deforestation, and climate action that is not rights – respecting. The defence of those cultural rights is critical for their well being and for their enjoyment of other human rights, but also for the protection of the environment and indeed the well being of all.

Submissions by Commission on Administration of Justice (Interested Party) (CAJ).

68. Counsel for the interested party filed written submissions dated September 25, 2023 basically supporting the Petition on behalf of the Ogiek Community. The interested party submitted that there

was violation of article 35(1) of *Constitution* by the Government in regard to the right of access to information by the Ogiek Community on the actions being taken by the Government to implement the Judgment delivered in their favour by African Court on Human and People's Rights on May 26, 2017. It was the position of the interested party that the Task Forces that were formed by the Government to implement the Judgment were under article 35(3) of *Constitution* and section 4 and 5 of the *Access to Information Act*, 2011 obligated to give access to the 2nd petitioner to all information that related to and affected them. They argued the 3rd respondent had never published any information respecting the Task Force that was formed to implement the Judgment of the African Court and that constituted a violation of its duty of disclosure under section 5(1)(c) of the *Access to Information Act*. To support its submission in this regard the interested party cited the case of *Katiba Institute v President's Delivery Unit & 3 Others* (2017) eKLR where the court held a public authority cannot deny access to information without justification and that information should be disclosed free of charge notwithstanding the reason for seeking the information.

69. The interested party asserted that the facts revealed that the 2nd petitioner had requested for information from the 3rd respondent which was not provided. Though the 2nd petitioner applied to the Commission for review of the refusal/denial of access to information and the review process was initiated, the 3rd respondent merely responded that the report of the Task Force would be made public in due course and was never availed. The interested party contended that the 3rd respondent ignored the 2nd petitioner's request for information and concluded that the 3rd respondent ought to be held to have violated the 2nd petitioner's right to access to information.

Submissions of the Attorney General on behalf of the Respondents.

70. The submissions on behalf of the Attorney General for the respondents were dated 17th July and filed on the same date. The Attorney General's submissions related to all the respondents in the instant petition and Petition No E 16 of 2020 save for the 10th respondent (NEMA) in the latter petition. The Attorney General submitted that the consolidated petitions had everything to do with environmental protection and conservation and the question of sustainable development coupled with human settlement. At the heart of the petitions, the Attorney General argued, was preservation of the Mau Forest Complex of which the East Mau Forest which is the subject matter in the petitions, was a part of. The Attorney General to contexliatise his submissions quoted an extract of the Judgment of my brother Justice Ombwayo, J in the Case of *Tabot v AG; Kalimbula Investments Ltd* (2023) KEELC 16846 (KLR) where the Judge in opening his Judgment stated as follows:-

> "1. Our environment is everything and if we do not protect our beautiful environment, then we will end up destroying our lives. God put us in a clean and healthy environment 6 million years ago, early man did not interfere with his environment which was then known as the Garden of Eden, but later man started cutting down trees to access land for cultivation, settlement, timber and firewood, and soon the World is headed to a concrete jungle. The Governments of the World are to blame for the concrete jungle and desertification because they authorize the illegal acquisition of the forest land. Soon, human beings will be struggling with a very unhealthy Environment due to climate change caused by their negative activities towards the said environment."

71. The Attorney General in his submissions took the position that the respondents were acting proactively in protecting the forest from intrusion by illegal settlers in an endeavour to conserve and

protect the environment for the benefit of both the current and the future generations as *Constitution* demands.

72. The Attorney General submitted that although the petitioner(s) in ELC Petition No 11 of 2020 had alleged violations of constitutional rights in regard to articles 10, 22, 23, 26, 27, 28, 29, 40 and 47 of *Constitution* no proof of any violation had been demonstrated and that the allegations remained just mere allegations. In particular the Attorney General submitted there was no demonstration of how article 10 had been violated and/or how the Petitioners had been discriminated against. The Attorney General submitted that no person had been deprived of any property and consequently argued there had been no violation of article 40 of *Constitution* as alleged. The Attorney General contended that some of the Petitioners who had been issued title deeds had been issued such titles unprocedurally and illegally and that the titles could not be protected under the Law as they were null and void. The Attorney General submitted that the titles issued to some of the residents of Nessuit, Mariashoni, Sururu, Likia, Terit and Sigotik Settlement Schemes annexed to the Petition at Pages 34 to 50 were issued between the periods 1997 and 2013 with a batch of them being issued in 1997 and 1999 though the petitioner himself held no title in these schemes. The Attorney General submitted that there had been no degazettment of the Mau East Forest in 1997 and 1999 to enable any titles to be issued on land that was comprised in the Eastern Mau Forest gazetted as such through *proclamation No 57 of 1941* and further declared as certified forest vide *Legal Notice No. 174 of 1964*.

73. The Attorney General pointed out that the petitioners claim legitimacy and validity of the titles they hold on the basis that the Government degazetted part of the East Mau Forest vide Legal Gazette Notice No 142 of October 8, 2001 that allegedly had about 35,301.01 Hectares of the forest land excised to create the settlements, yet some of the titles were issued prior to the alleged degazettment. The Attorney General submitted that it could not have been possible to issue titles on forest land that had not been degazetted and contended such titles could only have been unprocedurally and illegally issued. The Attorney General cited and relied on the case of *Clement Kipchirchir & 38 Others v PS Ministry of Lands Housing & Urban Development & 3 others* (2015) eKLR where Munyao, J, held that titles issued before there was a formal degazettment of the forest land were invalid. The Attorney General further relied on the case of *Kiptarus Tabot v Attorney General & Kahimbula Investments Ltd* (*supra*) where Ombwayo, J, declined to declare the plaintiff to be lawful allottees of Sururu Settlement Scheme and/or hold the titles that they held were valid on the basis that the land from which they had been evicted from was still gazetted forest land and the titles had been obtained unprocedurally.

74. The Attorney General to fortify his submission that the process of degazettment of the Mau East Forest was never completed, cited the case of *Rep v Minister for Environment & 5 others; Exparte Kenya Alliance of Resident Associations & 4 others* (Nairobi HC Misc Civil Application No 421 of 2001) where he asserted the Court stayed the implementation of the Legal Notice No 140 – 153 giving notice of alteration to of forest boundaries of various forests. The Attorney General thus submitted there was no compliance with section 4 of the *Forest Act*, cap 385 Laws of Kenya (now repealed) that then provided the procedure to be followed before forest land could be degazetted as such. The Attorney General argued the notice of intention to alter the forest boundary having been challenged in court, meant that the whole process of degazzetting the forest on the basis of that notice, was stayed and could only have been restarted afresh which never happened.

75. The Attorney General consequently contended that any titles the petitioners may have obtained could not be valid and they could therefore not rely on their indefeasibity to urge their case in the instant petition. To illustrate the fact that illegally and/or unprocedurally acquired titles cannot be set up to defeat public interest, the Attorney General cited the Case of *Republic v Minister for Transport &*

Communication & 5 Others; Exparte Waa Ship Garbage Collector & 15 others (2006) 1 KLR (E&L) 563 where Maraga, J (as he then was) stated thus:-

> " Courts should nullify titles by land grabbers who stare at your face and wave to you a title of the land grabbed and loudly plead the indefeasibility of title deed.-----
>
> -----A democratic society holds public land and resources in trust for the needs of that society. Alienation of land that defeats the public interest goes against the letter and spirit of ----- *Constitution*."

76. The Attorney General also cited the cases of *Mureithi & 2 others (for Mbari ya Murathimi clan) v Attorney General & 5 Others* (2006) 1 KLR 443 where Nyamu J, (as he then was) echoed similar sentiments as Maraga, J, in the above case. The Attorney General thus took the position that the petitioners had nonetheless failed to demonstrate that the titles that they held were within the alleged excised area within the Eastern Mau Forest. The respondents denied there was any destruction of any property and/or that the Petitioners had proved any damage to entitle them to any compensation.

77. In regard to Petition No E 16 of 2020 by the Ogiek Community, the Attorney General submitted in part that the court would have no power to compel the respondents to implement the merits Judgment of the African Commission on Human and Peoples Rights. At any rate the Attorney General submitted that the 2nd petitioners prayer for a declaration that the respondents had violated article 40 of *Constitution* by failing to implement the said Judgment had been overtaken by events as the African Court had on June 23, 2023 delivered the reparations Judgment respecting the implementation of the merits Judgment delivered on May 26, 2017. The Judgment on reparations had ordered the implementation of the merit Judgment and gave specific measures and timelines to be adhered to by the Kenya Government.

78. On the issue whether the respondents (the Government) violated the 2nd petitioners right of access to information under article 35 of *Constitution*, the Attorney General submitted that the 2nd petitioner had not demonstrated that the information sought was of importance to the Nation as to require publication as envisaged under article 35(3) of *Constitution*. The Attorney General argued the Multi Agency Task Force was only to oversight operations and needed not to be gazetted. The Attorney General further submitted the Multi Agency Team never completed its task as its operations were stopped by the court and hence had not prepared a report that could be publicized.

79. In conclusion the Attorney General submitted that Petiti on 11 of 2020 was an abuse of the court process and should be dismissed with costs while as regards the Ogiek Community petition the Attorney General left the issue of costs to the discretion of the court.

Analysis, Evaluation and Determination:-

80. After reviewing the respective pleadings of the parties, the evidence, and having considered the written and oral submissions made on behalf of the parties, I have identified the following issues for determination:-

    i. Whether the Government created settlement schemes in Nessuit, Mariashoni, Sururu, Likia, Terit, and Sigotik, and if so, whether the petitioners in Petition 11 of 2020 were settled in these schemes?

    ii. Whether the Government had given notice to alter the forest boundary of the Eastern Mau Forest vide Legal Notice No 889 of 30.1.2001, and if so, whether the process of degazettment of the forest area was completed?

iii. Whether there was a clear delineation of the forest land and the settlement area, and if so, whether the petitioners have encroached onto the forest land?

iv. Whether the petitioners legitimate expectation that they would be settled on the land they occupy and hold titles to was violated by the Government?

v. Whether the petitioners are entitled to compensation for any unlawful eviction from their land?

vi. Whether the Ogiek Community's (2nd petitioner's) rights to property were violated by the respondent?

vii. Whether the 2nd petitioner's rights of access to information in regard to the implementation of the Judgment of the African Commission on Human and Peoples Rights were violated by the respondents?

viii. Whether the Multi Agency Task Force established in August/September 2020 had any legal mandate to deal with issues relating to the disputed settlements within the Eastern Mau Forest?

81. From both the affidavit evidence and the evidence adduced viva voce in court by the witnesses, it is clear the Eastern Mau Forest has been the scene of various inter-tribal conflicts and clashes propelled by disputes over settlement. This puts into question how the warring factions came to be in the forest area. Were there any Settlement Schemes created in the area and/or how did the persons come to be inhabitants of the area?

82. The origin of land settlement schemes in Kenya has to do with the transition of Kenya from a colonial state to an independent state. At the time of transition, settlement schemes were conceived to de-racialize land ownership in the former whites – only scheduled Areas and to offer land to many of those who had been displaced during the struggle against the Colonial rule. The Government's primary objectives over the years in creating settlement schemes has been to satisfy hunger for land in regard to the landless, to promote political stability, and to ensure agricultural productivity of the land was sustained. The emergence of public land buying companies soon after independence whose purpose was to purchase large tracts of land and settle their members also prayed a significant role in the establishment of settlements. Notwithstanding the settlements created following the transition to independence, there were still numerous persons who had no land, those living in communal villages and informal settlements (slums) and those persons who were labourers in the white settlers farms and forest workers following the abolishment of the "forest shamba system". In the instant Petition some of the settlers are the products of the forest shamba system where they were permitted to reside and cultivate within the forest as they nurtured the forest. This shamba system was abolished the 1980's rendering all those persons landless as many of them never had land elsewhere.

83. While the Ogiek Community were acknowledged in the case of *Joseph Letuya & others v Attorney General & 5 Others* (2014) eKLR as an indigenous community who were living within the Eastern Mau Forest Complex which position the African Court on Human and Peoples Rights reiterated in their merits Judgment and the Judgment on reparations; the Government has not conclusively resolved the Ogiek Community land issue as recommended by the courts in the Letuya case and the African Court. In the instant petition the Ogiek Community are basically seeking to have the Judgment of the African Court implemented.

Whether any settlement schemes were created by the Government?

84. There is uncontroverted evidence that the Government during the 1990s allowed and/or permitted people to enter and occupy tracts of land which constituted forest reserves around Londiani, Elburgon, Njoro and Kuresoi which were within the Eastern Mau Forest Complex. In Nakuru District, the Government around 1997 designated thousands of hectares of the Eastern Mau Forest as settlement schemes and allocated 5 acres parcels of land to the settlers. This saw the creation of Nessuit, Mariashoni, Sururu, Likia, Terit and Sigotik settlement schemes. It is not disputed that indeed such settlements exist and are occupied and settled in. The issue as I have understood it, is whether the settlement schemes were procedurally created and whether they legally exist. Of note is that at the same time that the Government sought to have part of the Mau Forest excised to create settlements, the Government was also privatizing what used to be known as Agricultural Development Corporation Farm (ADC) by creating settlement schemes. The only difference was that whereas the forest excision was intended for settlement of landless persons, the ADC farms were targeted for acquisition by well to do members of the Society. The case of Ngata ADC farm in the outskirts of Nakuru City would aptly illustrate the point.

85. The Government no doubt recognized there was a laid down procedure to be followed to alter the boundaries of any gazetted forest. The Government thus issued the requisite notices under section 4(2) of the *Forest Act* cap 385 Laws of Kenya (now repealed) of the "Intention to Alter Boundary" of the Eastern Mau Forest vide Gazette Notice No. 889 dated 30.1.2001. The notice provided as follows:-

> The Eastern Mau Forest
>
> Intention to Alter Boundaries in Accordance with the Provisions of section 4(2) of the Forest Act, the Minister for Environment gives Twenty Eight (28) days notice with effect from the date of the publication of this notice of his intention to declare the boundaries of the Eastern Mau Forest, will be altered so as to exclude the area described in the schedule hereto.
>
> Schedule
>
> An area of land of approximately 35,301.01 Hectares, adjoining the Western, Northern and Eastern boundary of Eastern Mau Forest situated approximately 7 Kilometres, South of Njoro Township, in Nakuru District, Rift Valley Province, the boundaries of which are more particularly delineated, edged on boundary plan No 175/388 which is signed and sealed with the seal of the Survey of Kenya and deposited at the Survey Records Office, Survey of Kenya; Nairobi and a copy of which may be inspected at the office of the District Forest Officer, Forest Department, Nakuru.
>
> Dated the January 30, 2001.
>
> FM Nyenze
>
> Minister For Environment.

86. The petitioners contend that the area that was intended to be set apart from the forest land as per the schedule measuring approximately 35,301.01 Hectares is what is now Nessuit, Mariashoni, Sururu, Likia, Terit and Sigotik Settlement Schemes. It was the petitioners position that the Government had earmarked the area for settlement from way back in 1995 and settled people in the area and issued them with titles for their parcels of land in accordance with the survey that was carried out in 1997. The petitioners maintained that clear boundaries were established and there was a clear cut line of the land

excised from the forest and the settled area and that beacons were placed to delineate the forest land with the settlement land.

87. As affirmation that the forest land was indeed excised in terms of Boundary Plan No 175/388 referenced in the Notice of Intention to alter the forest boundary, the Director of Survey wrote to the Chief Conservator of Forests on May 23, 2002 (Letter exhibited as "SKT b" at page 87 of the Petition) as follows:-

> Date May 23, 2002
>
> The Chief Conservator of Forests,
>
> PO Box 30513
>
> Nairobi
>
> Re: Excision From Eastern Mau Forest Bp No 175/388
>
> It has been brought to my attention that a portion of Eastern Mau Forest that was part of the excision was left out on the boundary plan erroneously.
>
> The said portion is enclosed by beacons NI2-SW(anticlockwise) see F/R 380/44. I have amended the original of the boundary plan to include that area and forwarded to you five (5) copies as usual together with copies of the approved survey plans F/R's 301/30 and 380/44.
>
> However the total area under excision is not affected.
>
> Signed.
>
> SM Muhoro
>
> For- Director of Surveys.
>
> CC:- The Commissioner of Lands.
>
> The Provincial Surveyor.

88. The petitioners have contended that the alteration of the Eastern Mau Forest together with various other forest boundaries were appropriately carried out pursuant to Legal Notices No 142 to 153 dated October 8, 2001 issued by NK Ngala then Minister for Environment and published on October 19, 2001. In regard to Eastern Mau Forest Legal Notice No 142 provided thus:-

> Alteration of Boundaries – Eastern Mau Forest.
>
> In exercise of the powers conferred by section 4(1) of the Forest Act, the Minister for Environment declares that the boundaries of Eastern Mau Forest be altered so as to exclude the area described in the schedule hereto.
>
> Schedule
>
> An area of land measuring approximately 35,301.01 hectares adjoining the Western, Northern and Eastern boundaries of Eastern Mau Forest situated approximately 7 Kilometres South of Njoro Township in Nakuru District, Rift Valley Province, the boundaries of which are more particularly delineated edged red, on Boundary Plan No 175/388 which is signed and sealed with the seal of the Survey of Kenya and deposited at the Survey Office, Survey of Kenya, Nairobi, and a copy of which may be inspected at the Office of the District Forest Officer Forest Department, Nakuru.
>
> Dated the October 8, 2001

NK Ngala

Minister For Environment.

89. The Attorney General on behalf of the respondents has argued that the intention to alter the Forest Boundaries and more specifically the Legal Gazette Notice No 142-153 were challenged in court and thus the process was stayed and was not completed. The Attorney General contended that the process of degazetting the forest land having not been completed, the settlement and the titles issued to some of the petitioners were invalid and illegal since the land was and remained a gazetted forest. The Attorney General submitted that some of the titles exhibited by the petitioners were subject matter in Nakuru ELC Petition No 42 of 2013:- *Clement Kipchirchir & 38 others v PS Ministry of Lands & Urban Development & 3 others* (2015) eKLR and Nakuru ELC No 288 of 2018:- *Kiptanui Tabot v Attorney General:- Kalimbula Investments Ltd (Interested Party)* and the courts found them to be invalid for having been issued on gazetted forest land. In the suits referred to, individual title owners were seeking to have the titles they held declared to be valid on the basis that they had been issued to them by the Government and the courts took the position that it had not been proved that the forest land had been procedurally degazetted for titles to be issued on what was a gazetted forest.

90. In the instant petition the court is called upon to determine whether the Government did infact establish the settlement schemes said to be within the Eastern Mau Forest and whether the Government's intention to alter the boundary of the forest as envisaged under Gazette Notice No 889 of January 30, 2001 was complied with. There is no question and/or dispute that there was Government facilitated settlements in Nessuit, Mariashoni, Sururu, Likia, Terit and Sigotik where from 1995 persons were allowed to occupy portions of land that were surveyed and parcelled out and given distinct numbers. Indeed a large number of people had title deeds processed and issued to them from 1997 through to 2017. I would therefore in answer to issue Number (i) affirm that on the basis of the evidence the Government consciously established the aforementioned settlement schemes and allocated and/or permitted persons to enter and occupy the land within the said schemes. The creation of the settlement schemes may have been motivated by consideration of other factors, most probably political, rather than environmental considerations. The Mau Forest Complex is a critical water tower upon which many lives and species depended both locally and regionally and hence it is vital that the Mau ecosystem is maintained and sustained for the benefit of the present and future generations. Any degradation and/or depletion of the Mau Forest Complex would have far reaching ramifications and there is therefore need to jealously conserve and safeguard the forest land for the benefit of all.

91. The Government apparently in realization that there has been widespread intrusion and damage to the Mau Forest Complex, including within the Eastern Mau Forest, has embarked upon a campaign to restore and rehabilitate the Mau Forest. The question however remains whether such restoration should entail eviction of the settlers from the land that the Government voluntarily allowed and facilitated them to settle in without a clear resettlement plan. If the people are to be removed from the settlement schemes, and they could be in hundreds of thousands, where do you take them? Were they to blame for the occupation?

Was there an intention to alter the forest boundary?

92. It is not disputed that the Government through the relevant Minister issued the Notice of Intention to Alter the Eastern Mau Forest Boundary vide Gazette Notice No 889 of January 30, 2001 as required under section 4(2) of the *Forest Act* Cap 385 Laws of Kenya (repealed) section 4 of the *Forest Act*, provides as follows:-

(1) The Minister, may from time to time, by notice in the Gazette:-

a. Declare any unalienated Government land to forest area;

b. Declare the boundaries of forest and from time to time alter those boundaries;

c. Declare that a forest shall cease to be a forest area.

(2) Before a declaration is made under paragraph (b) or paragraph (c) of subsection (1) Twenty Eight days notice of intention to make the declaration, shall be published by the Minister in the Gazette.

93. It is noteworthy that as at January 30, 2001 when the Minister issued the notice of intention to alter the forest boundary, settlements had already taken place in the settlement scheme. In a sense therefore the Minister was in effect taking steps to regularize what otherwise had been unlawfully done without first having the forest boundary altered before establishing the settlements. It cannot be that the Government did not know settlers had settled in the area earmarked for excision from the forest with the tacit approval of the Government. Many of the settled individuals were those who had been affected by the 1992 land tribal clashes and those who had been removed from the forest following the abandonment of the forest shamba system. These were basically landless people who the Government under article 43 of *Constitution* would have been expected to make provisions for under the ambit of economic and social rights guaranted under the Bill of Rights. Article 43 of *Constitution* provides as follows:-

43.

(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.

94. The Government's determination to complete the process of altering the forest boundary of the Eastern Mau forest is evidenced by the fact that the then Minister, NK Ngala on October 8, 2001 issued Legal Notice No 142 for Alteration of Boundaries – Eastern Mau Forest to effectively sanction the excision of 35,301.01 hectares as specified in the schedule attached to the Legal Notice from the forest. The question arises whether or not the Legal Notice took effect and/or was implemented. The Attorney General and the Kenya Forest Service have argued the Legal Notice was challenged and the implementation of the Legal Notice was stayed. The Attorney General, however even though he cited Nairobi High Court Misc Civil Application No 421 of 2002 as having stayed the implementation of Legal Notice No 142 of October 8, 2001, did not furnish the Judgment and/or the order issued

by the Court on April 22, 2002. It is therefore not possible to ascertain the terms of the Judgment and/or whether there was a Judgment. It was not demonstrated that the Legal Notice was quashed and/or what the terms of the stay were. At any rate if there was a Judgment in the suit referred to, it would only be persuasive and not binding to this court. It not having been demonstrated that the Legal Notice No. 142 of October 8, 2001 was quashed, and/or annulled, it is my view that, even if there was an order staying implementation it could not have been indefinite. An order of stay is ordinarily pegged on the occurrence of some event and cannot be for an indefinite time. The Legal Notice in my view still remained valid and consequently served to complete the process that was commenced by Minister Nyenze vide the Gazette Notice No 889 of 30th January, 2001. Accordingly, I hold that the Legal Gazette Notice No 142 of October 8, 2001 operated to alter the boundary of the East Mau Forest as expressed in the Gazette Notice.

Whether there was Delineation of the Forest Land?

95. In the present petition, the petitioners claim they were within the area delineated as settlement area within the schemes. The Kenya Forest Service and the Government at large claim there has been intrusion by settlers into forest land. It is evident from the evidence there is no clear and definite delineation of the forest area. In this regard issues arise whether the boundary recognized by the Kenya Forest Service takes into account the settlement Schemes areas and specifically whether such boundary as acknowledged by the KFS includes the excision of approximately 35,301.01 Hectares as per the Legal Notice No 142 of October 8, 2001 or it is the boundary before the excision. On the part of the Settlers is the boundary they refer to the boundary after the excision or before the excision? Most probably the settlers must be referring to the boundary after the excision and/or forest boundary after the alteration.

96. The petitioners/settlers were freely and voluntarily settled in the parcels of land within the settlement schemes by the Government and many of them were issued with title deeds as in the Case of Liwop-Morop Self Help Group (3rd interested party) who exhibited nearly 2,000 titles issued to their members spread in Sururu, Likia, Mariashoni, Nessuit and Doinnet Settlement Schemes.

97. The petitioners have contended that the Government having voluntarily allocated them the land on which they have settled, they had a legitimate expectation that the same Government would allow them to settle in peace and would not turn against them and seek to evict them. The petitioners argue that following the Gazettement of the Notice of intention to Alter the Forest Boundary and the consequent gazettement of the Alteration of Boundary – Eastern Mau Forest they legitimately expected that their "troubles" of being landless would be over and they would henceforth be at peace and live happily in their newly found land. The petitioners/settlers must have been even more fortified when the Government issued them titles.

98. The Supreme Court of Kenya in the case of *Fanikiwa Ltd & 3 others v Sirikwa Squatters Group & 17 others* (Pet. No E036 consolidated with E038 & E039) stated as follows at paragraph *87* & 88 of their Judgment in regard to the principle of legitimate expectation:-

    (87) The Principle of legitimate expectation imposes a duty to act fairly and to honour reasonable expectation raised by the conduct of public authority. If a public body has raised expectations that it will in future undertake a certain course of action, then it should ordinarily fulfil those expectations. This is important for the promotion of certainity and consistency in public administration.

    (88). For an individual to invoke the Principle of legitimate expectation, an expectation must have been induced by some conduct of the public authority. The principle extends to any individual

who is in a situation in which it appears that the administration's conduct led him to entertain certain expectations."

In the case of *Kenya Revenue Authority v Export Trading Co Ltd* (2022) KESC 31 the Supreme Court stated:-

> "---- Legitimate expectation may take many forms. It may take the form of an expectation to succeed in a request placed before a decision maker or it may take the objective form that a party may legitimately expect that before a decision that may be prejudicial is taken, one shall be afforded a hearing.
>
> Respectfully, we take the view that the question of whether a legitimate expectation arose is more than a factual question it is not merely confined to whether an expectation exists in the mind of an aggrieved party, but whether viewed objectively, such expectation is in a legal sense, legitimate."

In the case of *Communications Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others* (2014) eKLR the Supreme Court summed the principles of legitimate expectations as follows:-

a. There must be an express, clear and unambiguous promise given by a public authority.

b. The expectation itself must be reasonable;

c. The representation must be one which it was competent and lawful for the decision maker to make; and

d. There cannot be a legitimate expectation against clear provisions of the law or *Constitution*.

99. In the case at hand there can be no denial that the Government through its officers made promises to settle the petitioners and in that regard established the six settlement schemes. Sururu, Mariashoni, Nessuit, Likia, Terit and Sigotik on which they allocated people land who moved in and settled thereon. In furtherance and execution of the promise the Government gave a Notice of Intention to alter the boundary of Eastern Mau Forest by issuing the Gazette Notice No 889 of January 30, 2001 as required under the law. The Government had the power and authority to alter the forest boundary to create a settlement as they did. The Government duly gazetted the degazettment of the portion of 35,301.01 hectares of Eastern Mau Forest vide Legal Notice No 142 of October 8, 2001 which gazette Notice has never been annulled and/or revoked. The petitioners were given a promise, they were let in occupation by the Government, and the Government by its conduct of gazetting the intention to alter the forest boundary, and ultimately degazetting the land set apart from the forest, gave the Petitioners and settlers within the Scheme legitimate expectation that their resettlement was "fait accompli". The Government had the ability to give the promise and the petitioners were entitled to act on it. It is therefore my determination that the Petitioners/Settlers had a legitimate expectation that the Government would settle them in the land identified for settlement by the Government. The Government by seeking to go back on its promise, violated the Petitioners legitimate expectation and their property rights.

100. Admittedly the Government may have realized that it goofed by opening what was otherwise forest land to settlement and legitimizing it by undertaking the process of degazetting the forest land. The realization is fraught with challenges as to reverse the position to pre 1997 when the settlements commenced in earnest, would be nearly impossible. There are thousands of people who have settled in the established schemes and any mass evictions would require a massive resettlement plan of the evictees. The Government has not indicated they had such a plan and if anything the Government appears only to be focused on getting the settlers out of what it claims to be forest land. While it is essential and necessary to preserve and conserve the forest, the court must be alive to the situation on

the ground and in doing so to also be conscious of the dictates of article 43 of *Constitution*. The court has to be careful not to in the name of endeavouring to protect the environment, to unwittingly usher in a humanitarian crisis where inhabitants are flushed out and left on the roadsides and market and trading centers where they add to the population of internally displaced persons (IDP's). The court takes notice that not all IDP's from the 2007/8 post election violence have been settled todate.

101. The court is conscious that there may be persons who may have taken advantage of the confusion relating to the delineation of the forest area from the settlement area and encroached onto the forest land. These persons, if found to have encroached onto the forest area beyond the boundary of the Settlement Schemes, are to be evicted forcefully as they could be the source of the problem. The Multi Agency Task Force had one of its objectives being to reestablish the boundary between the settlement land and the forest land. Which boundary were they to re-establish? Was it the boundary before the degazettment of the forest vide Legal Notice 142 of October 8, 2001 or after the degazettment? It is evident people were settled on the 35,301.01 hectares that were degazetted and that explains the present petition. Is it the Government's position that all the persons settled on the degazetted forest land were to be evicted? There was no clarity and no numbers were given although the petitioners claimed there were over 100,000 inhabitants who stood to be affected.

102. As I have determined that the Government properly degazetted 35,301.01 Hectares of Eastern Mau Forest, it follows the persons who were settled within this area were validly settled and if they had been issued titles, such titles were valid and should be respected. The Government and the Kenya Forest Service have to move with speed to delineate the boundary and any person found to be beyond such boundary once established has to vacate from the forest land and/or be evicted forcefully.

103 There is no doubt that human activities over time globally have had adverse effects to the environment. There has been widespread deforestation that has seen forested land reclaimed for human settlement. There has been air pollution caused by industrialization and illegal disposal of toxic and hazardous waste. The combined effect is that globally we have witnessed climate change and notably there has been increased global warming leading to the threat of desertification as rainfall yields decrease and rivers dry up. Kenya has not been spared the adverse effects of the global climate change and hence every activity that has potential to adversely affect the environment must be carefully considered and evaluated to ensure the adverse effects are mitigated. The allocation of part of the forest as settlement land definitely affected the ability of the Mau Forest Complex to act as water catchment area and as such action must be taken to restore the tree cover to the extent possible and it is for that reason as a mitigation measure of the impacts of deforestation, the court recommends a limitation of the land use within the settlement area with a view of mitigating the adverse impacts of deforestation resulting from human settlement in what was forest land.

104 The protection and conservation of the environment is for the public good and the Government and the Agencies that have the responsibility to ensure the environment and water catchment areas are protected such as NEMA and the Water Resources Management Authority (WARMA) must play their part as the law mandates them to do. The Government under article 66 of *Constitution* has a broad duty to regulate use of land whether public or private.

Article 66 of *Constitution* provides as follows:-

66.

(1) The State may regulate the use of any land, or any interest in or right over any land, in the interest of defence, public safety, public order, public morality, public health, or land use planning.

(2) Parliament shall enact legislation ensuring that investments in property benefit local communities and their economies.

105. Under article 66(1) of *Constitution* the Government in the public interest can impose regulations regarding the use of land and in my view, with regard to the settlements that were curved out of what was forest land the Government can properly through its Agencies regulate the land use such that the impacts of deforestation are mitigated to minimize the negative adverse effects of the action taken to degazette part of Eastern Mau Forest by the Government. Article 69(1)(a) and (b) of *Constitution* places obligations on the state to ensure sustainable exploitation and utilization of resources and to also ensure a threshold tree cover of 10% is attained country wide. These provisions provide as follows:-

69 (1) The State shall—

(a) ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits;

(b) work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya;

106. It is evident that the legal framework to ensure the environment is adequately protected and conserved exists and all that needs to be done is ensure there is a proactive and effective mechanism for enforcement and application of the law. The various State Agencies charged with the responsibility of coordinating environmental protection and conservation efforts must play their part for the objective to be realized. The Government and its agencies owe the public a duty to ensure the environment is conserved and protected.

107. The petitioners in the petition have prayed for compensation for unlawful and forceful evictions. While there is evidence there could have been some evictions, the court is not able to ascertain whether the evictions were executed on forest land and/or settlement land. The Kenya Forest Service has mandate to protect forest land from intrusion and can properly carry out evictions from forest land provided they do so upon notice and effect the evictions in a humane manner. No evidence was adduced to demonstrate that they had carried out any evictions unlawfully and/or in an unhumane manner. The claim for damages was not proved and is dismissed.

Whether the rights of the Ogiek Community were Violated?

108. In this petition the Ogiek Community claim that their right in regard to occupation and settlement within the Mau Forest Complex have been adjudicated by the African Commission on Human and Peoples Rights which rendered a merits Judgment on May 26, 2017 and a reparations Judgment on June 23, 2022. In as far as the Ogiek community is concerned, it is only the implementation of the Judgments that remain outstanding and it was on that account they joined the petition as interested parties and filed Petition 16 of 2020 which was consolidated with the instant petition.

109. The petition was filed after the African Commission on Human and People Rights had rendered its merits Judgment but before the Judgment on reparations arising out of the merits Judgment. The Judgment on reparations sought to give enforcement of the merits Judgment and that in its final orders

in the reparations Judgment the court granted specific remedies and set time lines for the fulfilment of other obligations by the State. The Ogiek under prayer (4) of their petition prayed thus:-

> That a declaration that the respondents are violating the rule of law under article 40 of *Constitution* by failing to respect and implement the Judgments of the African Court of Human and People's Rights in Application Number E006 of 2012.

110. With respect this prayer, given the reparations Judgment, has been overtaken by events. Besides this court in my view would have no power/jurisdiction to compel the respondents to enforce the decision of the African Commission on Human and Peoples Rights. The commission through the reparations Judgment has demonstrated it has ability to enforce its own Judgment.

111. The Ogiek Community, in the petition complained that when the Government set out Task Forces and more specifically the Multi Agency Task Force to oversee the implementation of the Judgment of the African Commission on Huma and People's Rights they were denied access to information in violation of article 35 and section 4 of the *Access to Information Act*, 2016.

112. To the extent that the Task Forces were established with the objective of implementing the merits Judgment of the African Commission on Human and People's Rights (App No 006 of 2012) which the Ogiek Community had prosecuted and obtained the Judgment in their favour, they were entitled to be involved in the activities of the Task Forces and to be furnished information upon request. The activities that the Task Forces were undertaking were likely to affect the Ogiek Community and they therefore had the right to be informed what was happening and/or the progress of the activities.

113. The establishment of the Multi Agency Task Force in August/September 2020, which was not gazetted and/or with any publicized Terms of Reference, and without the involvement of the Ogiek Community representatives and yet one of the Task Force's objectives was the implementation of the Merits Judgment of the African Commission on Human and Peoples Rights was unlawful and lacked any legal backing. The activities of this Task Force were a nullity as it lacked a Legal frame work to anchor its activities.

114. As I have observed the Ogiek Community joined the petition and filed their petition before the delivery of the reparations Judgment on June 23, 2022. The Judgment on reparations changed the landscape fundamentally as it issued indictments against the state and set new time lines and thresholds for the Government to meet. As at the moment this court has no information to what extent the terms of the reparations Judgment have been met. The Ogiek Community in my view should now focus on the implementation and satisfaction of the reparations Judgment as it was in effect, given in enforcement of the merits Judgment. This court, as earlier observed, cannot execute the judgment of the regional court, at least not within the ambit of the present petition.

115. Although the issue was not raised and canvassed by the parties, the issue does arise as to whether this court and indeed other local courts would stand bound by the decision of the African Commission on Human and Peoples Rights. The Ogiek Community have for instant presented the Judgments delivered by that court as though they were fait accompli where this court was bound by them and all that remained was to implement the Judgments. I find some difficulty in that since as a national court, the court is expected to interpret *Constitution* or the National Laws and on the basis of the evidence make a determination. Hence where a dispute concerns the application of any domestic laws and/or customary or International Law, the jurisdiction of the national court cannot be surrendered to the regional courts but the jurisprudence from such courts can be taken as persuasive authorities.

116. The Kenya Supreme Court in an advisory opinion on the matter of *Attorney General (on behalf of the National Government v Karua* (2024) KESC 21 (KLR) had occasion to consider the position of

regional courts in a matter where Karua, a contestant of the Kirinyaga Gubernatorial Seat in 2017 having exhausted her Judicial remedies after the Supreme Court dismissed her appeal, approached the East African Court of Justice (EACJ) for review of the Supreme Court's decision. The Supreme Court inter alia held under Paragraphs *15*, *29*,*31* and *32* reproduced hereunder as follows:-

> 15. It was implied that *Constitution* embodied the primacy of domestic laws and the subsidiarity of international laws. The principle of subsidiarity respected national sovereignty by recognizing that each State retained the ultimate authority over matters occurring within its territory, because in the case of Kenya, article 1 of *Constitution* declared that all sovereign power belonged to the people of Kenya, and that power to be exercised only in accordance with *Constitution*.
>
> 29. International or regional courts were empowered to conduct procedural reviews on decisions of the national courts and call attention to violations only but in line with the mandate conferred by their parent treaty or convention, and not national laws. Therefore, in accordance with the EAC Treaty, EACJ's mandate was the interpretation and application of the EAC Treaty only.
>
> 31. A mere disagreement with the interpretation that domestic courts have made of pertinent legal provisions did not constitute violations of the EAC Treaty. Interpretation of *Constitution* or national laws, and weighing of evidence is the mandate of domestic courts, which could not be replaced by the EACJ in that regard.
>
> 32. Regional and international courts such as the EACJ were, by Treaty or Convention, granted the mandate to examine how state organs satisfied regional or international obligations of the state to interpret and apply national laws save as for the specified limitations. Such courts should only act as agencies and tools for strengthening of local conditions, including democracy and the rule of law but not as substitutes of state organs.

117. Guided by the Supreme Court Advisory opinion, it is my view that notwithstanding the decision by the African Commission on Human and Peoples Rights the court would be entitled to consider the applicable law and the evidence and make its own decision which of course would be subject to appeal.

118. In the present petition subject to the determination the court has made, the petitioners are not opposed to the Ogiek Community being settled and allocated land as determined in the Judgment of the African Commission on Human and Peoples Rights, as long as their settlements (Petitioners) are not interfered with.

What remedies should the Court grant?

119. The petitioners have demonstrated they indeed are residents of Nessuit, Mariashoni, Sururu, Likia, Terit, and Sigotik Settlement Schemes having been allocated land in the Schemes that were created and established by the Government. The court on the basis of the analysis and evaluation of the evidence finds and holds that the petitioners/residents are rightfully in occupation of the land allocated to them provided such land falls within the forest land that was excised for Settlement purposes. Considering that the land was part of the Eastern Mau Forest before excision, the land use by the settlers must be such as compliments the greater Mau Forest Complex for sustainance of the Ecosystem of the Mau Forest as a Water Tower and a water catchment area. The residents must be required to ensure there is no interference with the riparian reserve of all rivers that flow through the Settlement lands. The Settlers must also be required to plant trees and to maintain a tree cover in respect of each parcel of land of not less than 30%. I am aware the Settlers have or will be issued free hold titles which have no encumbrances but i take cognizance that if article 66(1) & 69 (2) of *Constitution* are invoked both the Settlers and the Government Officers on the ground can enforce compliance. Article 69(2) provides:-

(2) Every person has a duty to co-operate with state organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.

120. To attain the threshold of 30% tree cover, Kenya Forest Service would need to avail tree seedlings to the settlers and in liaison with the Local Administration of the Ministry of Interior and Coordination of National Government and the County Environment Department could easily ensure compliance. They are under article 69(2) of *Constitution* obligated to do that and they should. Everybody has a role to play in the conservation and protection of the environment for sustainable development to be a reality.

121. The upshot is that i find merit in the petition and make the following is consequential orders:-

1. That the Government with the intention of settling landless persons created Nessuit, Mariashoni, Sururu, Likia, Terit and Sigotik Settlement Schemes where the Government allocated people (Petitioners) individual parcels of land.

2. That to facilitate the Settlement the Government gave notice to alter the boundary of East Mau Forest vide Legal Gazette Notice No 889 of January 30, 2001 and that the forest boundary was altered vide Legal Gazette Notice No 142 of 8.10.2001 which Gazette Notices have never been cancelled and/or revoked.

3. It is ordered that the Legal Notice No 142 of October 8, 2001 be implemented and the Government within a period of 12 months from the date of this Judgment to establish and delineate the forest boundaries within the Settlement Schemes by placing physical and visible beacons on the ground.

4. The Government through the Ministry of Interior and Coordination of National Government and the Ministry of Lands, Housing and Urban Development is directed to verify and authenticate the allottees of land within the Settlement Schemes and to issue titles to any of the allottees who may not have been issued title to land allocated to them.

5. That upon the delineation and establishment of the forest boundary any person found to have encroached onto the forest land to vacate forthwith failing which the Kenya Forest Service to be at liberty to evict such people forcefully but any such evictions to be humane and to comply with section 152G of the *Land Act*, 2012.

6. The owners of land within the Schemes shall be required to ensure there is no interference with the riparian reserve of any rivers flowing through their lands and every land owner within the schemes shall be required to increase the tree cover in their parcels of land to a minimum of 30% of the land within a period of 60 months from the date of this Judgment.

7. The Ministry of Interior and Coordination of National Government, the Kenya Forest Service, the National Environment Management Authority (NEMA) and the Water Resources Management Authority (WARMA) shall oversee the implementation of (6) above under the auspices of article 69(2) of *Constitution*.

8. The Ogiek Community's Rights of Access to information was violated by the respondents but the judgment on reparations dated June 23, 2022 has rendered any orders otiose. The Government should facilitate the implementation of the Judgment.

9. The Petition No 6 of 2020}} was not proved and is dismissed.

10. Each party to bear their own costs of the consolidated petitions as the petitions involved public interest.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY VIA VIDEO LINK AT KERUGOYA THIS 30TH DAY OF SEPTEMBER 2024.

J. M. MUTUNGI

ELC - JUDGE