REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 821 OF 2012 (OS)

JOSEPH LETUYA ……1ST APPLICANT

PATRICK KIBET KIRESOY……2ND APPLICANT

JAMES RANA……3RD APPLICANT

NAHASHON K. KIPTO……4TH APPLICANT

ELASCO RONO……5TH APPLICANT

STEPHEN PANDUMUNYE……6TH APPLICANT

WILLIAM KIPLANGAT KALEGU……7TH APPLICANT

JOSEPH K. SANG……8TH APPLICANT

PARSOLOI SAITOTI……9TH APPLICANT

KIPRONO SIGILAI……10TH APPLICANT

ZAKAYO LESINGO……11TH APPLICANT

JULIAS SITONIK……12TH APPLICANT

ISAIAH SANET……13TH APPLICANT

JOHNSON NAMUNGE……14TH APPLICANT

SAMSON KIPKURUI MURENO……15TH APPLICANT

CHARLES K. NDARAYA……16TH APPLICANT

DANIEL KIBET CHESOT……17TH APPLICANT

WILLIAM SERONEI TIWAS……18TH APPLICANT

JOSEPH KIMAIYO TOWETT……19TH APPLICANT

STARON MAITUBUNY……..……20TH APPLICANT

SEMBUI ORIS……..……21ST APPLICANT

SIMON RANA……..……22ND APPLICANT

VERSUS

THE ATTORNEY GENERAL……1ST RESPONDENT

THE PROVINCIAL COMMISSIONER

RIFT VALLEY PROVINCE……..2ND RESPONDENT

RIFT VALLEY PROVINCE FOREST OFFICER….3RD RESPONDENT

DISTRICT COMMISSIONER NAKURU…..……4TH RESPONDENT

WILSON CHEPKWONY……..5TH RESPONDENT

THE DIRECTOR OF FORESTRY……....6TH RESPONDENT

JUDGMENT

Introduction

The suit herein was commenced by way of an originating summons dated 25th June 1997 filed by the Applicants, who are representatives of members the Ogiek community living in East Mau Forest. The Applicants are seeking the following orders from this court:-

1. A declaration that the right to life protection by section 71 of the previous Constitution of every member of the Ogiek Community in Mau Forest including the Applicants has been contravened, and is being contravened by forcible eviction from their parcels of land in the Mau Forest and settlement by the Rift Valley Provincial Administration of other persons from the Kericho, Bomet and Baringo Districts to the exclusion of the Applicants, in that such members are being deprived of their means of livelihood.
2. A declaration that the eviction of the Applicants and other members of the Ogiek Community from their land in Mau Forest and settlement of other people on their land by the Rift Valley Provincial Administration is a contravention of their right to protection of law, and their right not to be discriminated against under section 77, 81 and 82 respectively of the constitution, and their right to reside in any part of Kenya.
3. A declaration that the settlement scheme under which the Rift Valley Provincial Commissioner, Rift Valley Provincial Forest Officer and Nakuru District Commissioner are allocating to persons from Kericho, Bomet, Transmara and Baringo Districts the Applicants' land in the Marioshioni Location, Elburgon Division and Nessuit Location, Njoro Division, Nakuru District occupied by the Applicants is *ultra vires* the Agriculture Act and the Forest Act and is null and void.
4. An order restraining the second, third and fourth Respondents from allocating the Applicants' land to other persons to the exclusion of the Applicants.
5. An order restraining the fifth Respondent from interfering with the first, second and third Applicants' user of their parcels of land in Marioshoni Location, Elburgon Division.

6. An order that the first, second, third, fourth and sixth Respondents do remove forthwith from Sururu, Likia, Teret and Sigotik Forests and Marioshioni and Nessuit all person who have been purportedly allocated the land belonging to the applicants.
7. An order that the first Respondent do pay compensation to the Applicants.
8. That the Respondents do pay the costs of this suit.

The orders were sought relying on the provisions of the previous Constitution that has since been replaced by the Constitution of 2010. The Originating Summons was supported by an affidavit sworn by the 1st Applicant, Joseph Letuya, on 24th June 1997, and further affidavits sworn by the 19th Applicant, Joseph Kimaiyo Towett, on 30th October 1997 and 22nd April 2005, as well as a supplementary affidavit sworn by the said 19th Applicant on 8th March 2012.

The 1st, 2nd , 3rd, 4th and 6th Respondents' response is in a replying affidavit sworn on 21st October 1997 by Kinuthia Mbugua, the then District Commissioner of Nakuru . The 5th Respondent also filed a replying affidavit he swore on 6th November 1997.

The parties were directed to file and exchange written submissions, and the Applicants' counsel filed submissions dated 30th October 2012. The submissions filed by the 1st, 2nd, 3rd, 4th and 6th Respondents' counsel are dated 24th June 2013. The 5th Respondent did not file any submissions.

The Applicants' Case:

The Facts

The Applicants claim that they are members of the Ogiek community who are also known as the Dorobo, which has been living in East Mau Forest which is their ancestral land. Mau forest is one of the country's gazetted forests. They state that about 10% of members of the Ogiek Community derive their livelihood from food gathering and hunting whilst the others practice peasant farming.

According to the Applicants, their ancestors were living in the Mau Forest as food gatherers and hunters. However, upon the introduction of the colonial rule, their ancestral land was declared a forest. The Applicants claim that since that declaration, members of this community have led a very precarious life which has been deteriorating over the years. Further, that when land for other African communities was set aside as Trust Land between 1919 and 1939, no land was set aside for them, with the consequence that no titles to land have been issued to its members as no adjudicating rights and registration of titles could take place. This suit was thus filed by the members of the Ogiek community after their lives started being threatened by the actions of the Respondents aimed at evicting them from their said ancestral land.

The Applicants originate from Marioshoni Location of Elburgon Division and Nessuit Location of Njoro Division. They claim that these two locations now serve as the "reserves or reservations of the members of the Ogiek Community". According to the Applicants, their problems date back to 1991 when the Government through Mr. Yusuf Haji, the then Provincial Commissioner for Rift Valley, informed them that the government had finally decided to establish a settlement scheme using a part of the forest land, which the Ogiek Community understood would be de – gazetted. They state that they were shown the part of Marioshoni Location where the settlement scheme was to be, which was part of their ancestral land which the colonial government had set aside as a forest. They further stated that subsequently the said community, which is organized on the basis of clans, formed clan committees through which land was allocated to individuals.

The Applicants contend that in 1993, the 2nd to 6th Respondents started allocating the land which the Ogiek community was occupying to other persons, and examples of such allocation of land occupied by the Applicants was given in paragraphs 13 to 26 of the supporting affidavit sworn by Joseph Letuya on 24th June, 1997, and also as described by Joseph Kimaiyo Towett, , in his affidavit sworn on 30th October, 1997. Further, that between 1993 and January 1997 people from Bomet, Kericho, Trans-Mara, Chepalungu and Baringo Districts were mainly the ones who were being allocated land in the Mau-Che Settlement Scheme in Eastern Mau Forest, which was originally occupied by the Ogiek Community. The Applicants averred that the continued harassment and eviction of the Ogiek Community from their ancestral land prompted the filing of this suit, and they attached a memorandum which the members of the community submitted to members of Parliament in July 1996 in this regard.

The 19th Applicant in his affidavit sworn on 22nd April 2005 stated that the report by the Presidential Commission of Enquiry into the Irregular Allocation of Public Land was favourable to the Applicants, and he attached a copy of the said report. Further. The said Applicant in his supplementary affidavit sworn on 8th March, 2012 deponed that when this suit was pending, the Minister for Natural Resources set out to alter the boundaries of the Eastern Mau Forest in which the Applicants live. The object of the Minister's gazettement was to reduce the area of the forest cover and settle people on the land to be created.

Furthermore, that following the Minister's actions, the Applicants and many other stakeholders objected to that move, and that the Applicants herein filed a judicial review application in High Court Miscellaneous Civil Application No. 228 of 2001, partly to protect the eco-system of the Mau Forest Complex and partly to protect their means of livelihood. The deponent stated on 15th March 2001 this Court prohibited the Minister of Environment from acting on, or implementing the gazette notice, but that the Applicants later withdrew the said application so as to proceed with the suit herein. He attached the pleadings and order given in the said application.

The deponent also stated that various developments have occurred since the filing of this suit that has confirmed the need to conserve the Mau Forest Complex, and in which the Government has acknowledged that the Applicants have a right to continue living in the Mau Forest in the area they have occupied for years as their ancestral land. These developments include the **Report of the Government Task Force on the Conservation of the Mau Forest Complex** published in March, 2009; The National Land Policy published in June 2009, the Interim Coordinating Secretariat established on 4th September 2009 by the then Office of the Prime Minister to assist in implementation of the recommendations of the Mau Task Force Report; the establishment of the Ogiek Council of Elders and Interim Coordinating Secretariat Committee on Ogiek Matters (ICS-Com) on 1st April 2010, and the enactment of the new Constitution of 2010.

He attached copies of the Mau Forest Task Force Report, the Programme Document on Rehabilitation of the Mau Forest Ecosystem and the National Land Policy.

The Submissions

The Applicants' counsel Kamau Kuria and Kiraitu Advocates, filed submissions dated 30th October 2012, and argued that they are seeking, among others, redress for contravention of their rights under section 70, 71, 78 and 84 of the old Constitution. The counsel submitted that under section 84 of the old Constitution which is similar to Article 23 of the new Constitution, this court has the jurisdiction to grant the prayers that have been sought by the Applicants. Further that a declaration is a common redress where fundamental rights have been contravened as held in **Nadhwa –vs- City Council of Nairobi (1968) EA 406.**

It was submitted on behalf of the Applicants that section 71 of the old Constitution and now Article 26 of the Constitution guarantees everyone the enjoyment of right to life, which includes protection of one's means of livelihood, and reliance was placed on **Peter K. Waweru –v- Republic, High Court Misc. Civil Application No. 118 of 2004**, in this regard. Further, that the Applicants herein are seeking protection of the right to continue living in their ancestral land. The Applicants submitted that the right to have a home or is a basic need which falls within the meaning of the right to life .

It was further submitted that the right to own land is also protected under Article 40 of the new Constitution, and that although the Applicants herein do not hold titles to the land they are occupying, having lived there for all their lives and having established their homes there, they have an interest in the land which the court can protect by way of granting injunctions or other available remedies. Further, that section 75 of the old Constitution was clear that protection should be granted for not just title but also interest in or right over property.

The Applicants also stated that sections 78 and 82 of the old Constitution protect each community's right to live in accordance with its culture, and section 82 prohibits discrimination against any Kenyan because of ethnicity or local connection. They contended that this suit has been brought by the Applicants on their behalf and on behalf of other members of the Ogiek Community, and is properly before the court because under the old and the new Constitution, an individual or a group of individuals with a common grievance can move the court in one suit and allege that their fundamental rights and freedoms have been infringed.

The Applicants' relied on the decision in **Rangal Lemeiguran & Others Attorney General & Others High Court Misc. Civil Application 305 of 2004** where it was held that it would be a violation of an group of individual's rights if they are denied a right to be heard whether individually or through representatives. Further, that under Article 22 of the new Constitution, a person can institute a suit on behalf of another person, group or class of persons. The Applicants averred that due to their small population, the Ogiek people have not been able for years to have their grievances addressed, and that it is not practically possible for them to elect any leader to represent them in Parliament or any other Government forum due to their numbers.

The Applicants further submitted that they qualify as an indigenous and minority group within the definition of the two terms given in **Rangal Lemeiguran & Others Attorney General & Others (supra).** Further, that the new Constitution has specifically recognized the rights of the minorities in the society under Article 56, and that from the evidence produced by the Applicants, the Government has also acknowledged that the Ogiek people are a minority group whose interest should be considered by giving them an exception to continue living in Mau Forest.

The Applicants submitted that this court has jurisdiction under Article 23 of the Constitution to grant the prayers they seek of injunctions and relied on the decision in **Methodist Church in Kenya Trustees Registered –vs- The A. G., High Court Petition No. 4 of 2010** where the court granted injunction orders and mandatory orders in a constitutional petition. It was also submitted that they are also entitled to the costs of this suit for reason that in constitutional litigation, the court applies the general rule that the costs follows the event. Lastly, the Applicants submitted that they have proved their case on a balance of probabilities and are entitled to the reliefs which they have claimed.

The 1st, 2nd , 3rd, 4th and 6th Respondents' Case

The Facts

The 1st, 2nd, 3rd, 4th and 6th Respondents filed Grounds of Opposition to the Applicants' suit, in which they argued that the Applicants have no cause of action and are not entitled to any of the remedies sought as they have not established any legal right over the property in question, and have also failed to demonstrate what actions of the Respondents have violated on their constitutional rights. The 4th Respondent in addition also filed a replying affidavit wherein he contended that the Eastern Mau Forest is a Government Gazetted Forest and not a reservation of the Ogiek Community as an ancestral land, and that the members of the Ogiek Community who have been occupying Marioshoni and Nessuit Forests have been doing so as illegal squatters contrary to the Forest Act (Cap 385 of the Laws of Kenya)

Further, that due to this illegal occupation of the Forest by the squatters, the Government decided to provide a scheme of settling some of these random destruction of the Forest, and that the settlement only covers the plantation forest land and does not affect the indigenous forest land. The 4th Respondent averred that the settlement scheme does not involve indigenous forest land from which the community if it so desired, are still able to gather herbs, honey and fruits in the traditional manner.

He also stated that the Applicants would be treated for the purposes of the settlement as any landless Kenyan without discrimination on account of clan, tribe, religion, place of origin or any other local connection, and that some of the Applicants had already been allocated land from the settlement scheme. Further, that the Government allocated the 5th Respondent the piece of land before the 1st Applicant went to occupy it illegally.

The Submissions

The 1st, 2nd, 3rd, 4th and 6th Respondents' counsel, G.K. Oenga, a litigation counsel in the Attorney General's Office filed submissions dated 24th June 2013. The said Respondents submitted that the Applicants' claim to ownership of the land in question based on alleged pre-colonial occupation by their ancestors and clan allocation is misplaced, as the said actions do not confer any legal rights upon the Applicants. Hence there is no legal recognized right for this court to protect.

The 1st, 2nd, 3rd, 4th and 6th Respondents averred that settlement schemes have been crucial to Government in its efforts to settle landless Kenyans displaced from their lands, either through discriminatory colonial policies of land alienation, or through ethnic or communal tensions culminating in clashes, and that such settlement schemes are established as public lands. Further, that it is not in contest that the land in question forms parts of forest land which belongs to the government, and that the Applicants' claim to exclusive right of allocation of land in the settlement schemes to the exclusion of all other deserving Kenyans is without merit.

The 1st, 2nd, 3rd, 4th and 6th Respondents further argued that before granting the declaratory orders sought by the Applicants, the court must ensure that all the prerequisites for the grant of declaratory orders have been satisfied by the Applicants. The Respondents relied on the principles that govern the grant of declaratory orders as laid down in various academic texts and in the decision in the case of **Matalinga and Others v. Attorney General (1972) E.A 518,** to the effect that the question before the Court must be real and justiciable and not a theoretical question, and that the person raising it must have a real interest to raise it. The Respondents' counsel also relied on the decisions in **Re Barnato (Deceased), Joel and Another v. Sanges and Others, (I949) 1 All E.R. 515**

It was the 1st, 2nd, 3rd, 4th and 6th Respondents' further submission that the declarations sought in the present suit are contrary to the accepted principles on which the court exercises its jurisdiction to make a declaration of rights as a declaratory judgment cannot confer a right where no such right exists, and that

before a court can declare the violation of a right it must confirm and ascertain the existence of the said right and that the actions that allegedly constitute the violation of rights have already occurred.

It was also the 1st, 2nd, 3rd, 4th and 6th Respondents' contention that Article 67(2) (e) preserves the issues which constitute the cause of action in the present suit to be dealt with the National Land Commission, and that the dispute before the court is therefore not justiciable. It was the said Respondent's submission in this respect that although the Constitution confers upon the High Court unlimited jurisdiction for redress of rights and freedoms guaranteed by it, the same Constitution also establishes other specialized commissions and independent offices which are clothed with authority in regard to certain spheres, and that in exercising its general jurisdiction the court should take heed not to intrude into matters preserved for these commissions.

The 1st, 2nd, 3rd, 4th and 6th Respondents relied on the decision in **Patrick Ouma Onyango & 12 Others vs. The Attorney General & Others (2005) e KLR** in this regard. It was their view that the dispute before this court in as as far as it seeks to agitate historical land injustices and to seek the setting aside of a special land reserve specifically for members of the Applicants' community, is one that the court is ill equipped to adjudicated upon and as such is not justiciable.

It was lastly submitted by the 1st, 2nd, 3rd, 4th and 6th Respondents that it is a firmly established principle that a party who seeks redress for infringement of his or her fundamental rights is duty bound to demonstrate to the court in the clearest way possible which the manner in which the rights have been violated as held in **Matiba vs. The Attorney General, HCC Misc. Application of 666 of 1990**. The Respondents submitted that the instant application fails to meet the threshold laid out in the above case, as the Applicants have listed a number of constitutional provisions allegedly contravened in respect to them, but they have failed to draw a correlation between the said infringements with the action of the Respondents. It was the 1st, 2nd, 3rd, 4th and 6th Respondents' view that the Applicants have failed to make out a case that warrants the issuance of the orders sought in their application, and that the same ought to be dismissed as it amounts to an abuse of the court process.

The 5th Respondent's Case

The 5th Respondent in his replying affidavit stated that he had not been allocated land in his capacity as a Provincial Commissioner for Central Province nor had he been allocated land belonging to the Applicants. Further, that the Applicants have not identified precisely which parcel(s) of land they are referring to, so that he could be in a position to respond. The 5th Respondent further stated that the allocations and settlement of the allottees has nothing to do with him and he was not able to respond.

The 5th Respondent did not file any submissions.

The Issues and Determination

Arising from the pleadings and submissions made in the foregoing, it is not disputed that there has been allocation of land occupied by the Applicants in the East Mau forest by the 2nd, 4th and 6th Respondents. The Respondents' actions therefore that are alleged to infringe the Applicants' rights are the eviction or threatened eviction of the Applicants from the land they occupy, and the allocation of the said land to other persons. The court finds that there are various issues arising for determination as follows:

1. Whether the members of the Ogiek Community have recognisable rights arising from their occupation of parts of East Mau Forest.
2. If so, whether in the circumstances of the instant case the rights of the Ogiek Community have

been infringed by their eviction and allocations of land in East Mau Forest to other persons.
3. Whether in the circumstances of the instant case, the settlement schemes in East Mau Forest by the Respondents were ultra vires and null and void.
4. Whether the Applicants are entitled to the reliefs sought.

Whether the members of the Ogiek Community have recognisable rights arising from their occupation of East Mau Forest.

The Applicants in this suit are claiming relief as, and on behalf of members of the Ogiek community. They claim that East Mau Forest is the ancestral land of the Ogiek community, and that derive their livelihood from food gathering and hunting whilst others practice peasant farming. Further, that this livelihood is now threatened by their eviction from the said forest, and will infringe on their right to life.

Although this suit was filed in 1997 when the old constitution was in place, the infringements alleged by the Applicants are of a continuing nature and have not been resolved as seen by the affidavits filed by the Applicants since the promulgation of the new constitution. The provisions of the 2010 Constitution are therefore also applicable to this suit.

The first right relied upon by the Applicants was the right to life. The enjoyment of the right to life is guaranteed under section 71 of the old Constitution and Article 26 of the current Constitution. Section 71 of the old Constitution provided as follows:

“No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence under the law of Kenya of which he has been convicted.”

Article 26 of the 2010 Constitution provides as follows with regard to the right to life:

“(1) Every person has the right to life.

(2) The life of a person begins at conception.

(3) A person shall not be deprived of life intentionally, except to the extent authorised by this Constitution or other written law.

(4) Abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law.”

The Applicants have argued that the right to life includes the right to livelihood and have relied on the definition of the right to life given in **Peter K. Waweru –v- Republic, High Court Misc. Civil Application No. 118 of 2004**, reported in (**2006) 1 KLR (E&L) 677 at 691**. Honourable Justices Nyamu J. (as he then was), Ibrahim J. (as he then was) and Emukule J. found as follows with regard to the meaning of the right to life under section 71 of the Constitution,

“We have added the dictionary meaning of life which gives life a wider meaning, including its attachment to the environment. Thus a development that threatens life is not a sustainable and ought to be halted. In Environmental law, life must have this expanded meaning.

The UN Conference on the Human Environment, 1972, that is the seminal Stockholm Declaration noted that the environment was ‘essential to… the enjoyment of basic rights – even the right to

life itself'

Principle 1 asserts that:

'Man has the fundamental right to freedom equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being'

Closer home- Article 24 of the African Charter of Human and Peoples Rights 1981 provided as under:

'All peoples shall have the right to a general satisfactory environment favourable to their development'

Finally the UN Conference on Environment and Development in 1992 ie The Rio Declaration principle 1 has a declaration in these terms:

'… human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.' "

The applicants also relied on the expansive definition given to the right to life by the Supreme Court of Pakistan in its decision in **Zia –v- Wapda PLD** (**1994) SC 693** that was cited in **Peter K. Waweru –v- Republic** (**supra**). The Supreme Court of Pakistan stated as follows with respect to the provisions of section 9 of the Pakistan Constitution that no person shall be deprived of life or liberty except in accordance with the law:

"The Constitution guarantees dignity of man and also right to 'life' under Article 9, and if both are read together, the question will arise whether a person can be said to have dignity of man if his right to life is below bare necessity line without proper food, clothing, shelter, education, health care, clean atmosphere and unpolluted environment."

In addition, the United Nations Human Rights Committee in its General Comment 6 on the right to life adopted on 27 July 1982 observed that the right to life enunciated in the first paragraph of Article 6 of the International Covenant on Civil and Political Rights has been too often narrowly interpreted. It stated that the expression "inherent right to life" cannot properly be understood in a restrictive manner, and the protection of this right requires that States take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.

This court recognizes that the right to livelihood neither has an established definition nor recognition as a human right at the national or international level. However, the right to a livelihood is a concept that is increasingly being discussed in the context of human rights. This concept has mention in various international human rights treaties which are now part of Kenyan law by virtue of Article 2(6) of the Kenyan Constitution. Article 25 of the Universal Declaration of Human Rights (UHDR) does mention livelihood in relation to social security and states that:

"Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food…and the right to security in the event of unemployment, sickness, disability widowhood, old age or other lack of livelihood in circumstances beyond his control."

In addition, Article 6(1) of the International Covenant on Economic, Social and Cultural Right (ICESCR)

states that the States Parties "recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts." *T*he right to adequate standard of living as defined under Article 11 of ICESCR includes right to food, clothing, right to adequate housing, right to water and sanitation with an obligation to progressively improve living conditions.

These rights are also now expressly provided in the directive principles and Bill of Rights in the Kenyan Constitution. The Preamble to the Constitution, which directs this court as to the considerations to be taken into account when interpreting this Constitution, proclaims that the people of Kenya, when making the Constitution were committed to nurturing and protecting the well-being of the individual, the family, communities and the nation. Likewise, the national values and principles that bind this Court when interpreting the Constitution under Article 10 of the Constitution include human dignity, equity, social justice, human rights, non-discrimination, protection of the marginalized and sustainable development.

Article 28 provides for the right of inherent dignity of every person and the right to have that dignity respected and protected. Lastly, Article 43(1) of the Constitution expressly provides for economic and social rights as follows:

"(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."

It is therefore evident from the foregoing provisions that their purpose is to ensure that persons to whom they apply attain a reasonable livelihood. The Applicants in this regard relied on a memorandum dated July 15, 1996 titled "**Help Us Live in Our Ancestral Land and Retain both our Human and Cultural Identities as Kenyans of Ogiek Origin**" that was presented to the Kenyan Parliament by representatives of the Ogiek living in Nessuit and Marioshoni parts of Mau Forest. They describe their way of life therein as follows at page 9 :

"At times, governments before and after independence have treated us as lawless poachers. That is why we do not live as we used to in pre-colonial Kenya. Each clan had a number of families. Each family could have as many as five parcels of forests which were identified with it and regarded as its own. Rivers, valleys, swamps, ridges, hills and vegetation served as boundaries. Each clan carried on hunting and honey collecting in this land. Even today Ogiek clans can identify their land in the Mau Forest. So can the suit Ogiek. In the past, we made hunting expeditions to the Savannah and grasslands outside forests for big game such as elephant and buffalo. That is no longer possible. The forests are the only hunting grounds.

Today, our economy is weak one. Our social life has been destroyed by a lack of a permanent

home. Colonial and Independence governments have adopted contradictory policies towards us. As stated above, about 10% of us live on honey and game meat. They hunt the antelope, the gazelle and rock-hyrax, and collect honey. Honey is sold in market today. It is a major source of money. Cow milk and sheep are the other sources. The majority of the men work as labourers in saw mills. The average daily pay is Kshs.30/=. A few work with the civil service as clerks, forest guards, administrative police men, patrol men, assistant chiefs and chiefs. Illiteracy is very high. The majority of the children do not go to school. They look after cows and sheep. Majority of the women make homes and have got markets to sell honey and milk. A few women grow maize beans, potatoes and cabbages. It is only in early 1960s that growing of crops started among a few Ogiek. Guy Yeoman has described the changes in our fortunes as follows,

'The above description of the essential of the Dorobo, whilst still valid, must be modified by the severely damaging effects of the (to them) cataclysmic political, social and above all, ecological areas of the past century. These have combined to restrict their traditional sources of food and compel an increasing dependence on arable cultivation and cattle keeping. The limited areas at their disposal, the absence of secure land tenure, and their own tradition have prevented them from becoming very successful arable farmers.' …"

These assertions were not contested by the Respondents, and this Court finds that the Applicants' livelihood is directly dependent on forest resources and the health of forest ecosystems for their livelihoods, and to this extent that they depend on the Mau forest to sustain their ways of life as well as their cultural and ethnic identity. The Applicants' right to life and socio-economic rights are consequently defined and dependant upon their continued access to the Mau Forest and should be protected to this extent.

It is also noteworthy in this respect that the Forest Act (Chapter 395 of the Laws of Kenya) recognizes the customary rights of forest dwellers in forests and provides as follows in this regard:

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

Secondly, the Applicants also argued that they have a right to property under Article 40 of the Constitution and section 75 of the old Constitution by virtue of their interest in the Mau Forest, having lived there for all their lives and having established their homes there. The 1st, 2nd, 3rd, 4th and 6th Respondents on the other hand contend that Mau Forest is a Government gazetted forest and not a reservation, and that the members of the Ogiek Community have been occupying it as illegal squatters contrary to the Forest Act. Further, that the Applicants' allegations of clan allocations of the land cannot confer on them any recognized right in land. The said Respondents relied on the following passage in **Halsbury's Laws of England, 4th Edition (Re-issue) Vol. 8(2)** at paragraph 165:

"The protection under the Constitution of the right to property does not obtain until it is possible to lay claim in the property concerned…….an applicant must establish the nature of his property right and his right to enjoy it as a matter of domestic law."

I find that I must agree with the 1st, 2nd, 3rd, 4th and 6th Respondents' arguments. The process of conferring legal and equitable property rights in land under Kenyan law is settled, and is dependant upon formal processes of allocation or transfer and consequent registration of title, or of certain transactions that confer beneficial interests in land in the absence of a legal title of ownership. The process of allocation of forest land is further governed by the Forest Act that requires a process of excision of forest

land before such land can be allocated. The Applicants did not bring evidence of such processes of allocation of title to land located in the Mau Forest and solely relied on their long occupation of the same. In addition under law, forest land being government land, cannot be subject to prescriptive rights arising from adverse possession. This court cannot therefore in the circumstances find that they have accrued any property rights in the Mau Forest that can be the subject of the application of section 75 of the old Constitution or Article 40 of the current Constitution.

Notwithstanding the finding of this Court that no property rights are yet to accrue to the Applicants, it is noted that the Constitution now provides for community land under Article 63 of the Constitution, which shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest. Community land under Article 63 (2) (d) includes:

"(*d*) land that is—

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

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

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

These provisions of the Constitution are to be given effect to in and by an Act of Parliament which is yet to be enacted, and once enacted this is the law that will probably eventually settle the issue of the property rights of the Ogiek community in the Mau and other forests in which they claim ancestral rights. In addition, the National Land Commission which is established under Article 67 of the Constitution is mandated to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress. The Applicants claim for property rights is therefore not ripe for determination by this court, and should be pursued through the necessary legislative processes on the community land legislation, and with the National Land Commission.

The third set of rights relied upon by the Applicants were their rights as a minority group, and they contend that that have been discriminated against, because of their ethnicity and local connection contrary to section 82 of the old Constitution. Article 27(4) of the Constitution also now provides that the State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth. The Applicants relied on the definition of minorities in **Lemeiguran & 3 Others vs Attorney General & 2 Others (2006) 2 KLR 819 at 856- 857**, in which Nyamu J. (as he then was) and Emukule J. found the Il Chamus community to be a minority group.

The court in that case considered and applied the definition of minority groups in the society as defined by international covenants as follows:-

"To reinforce the above, we adopt the definition of minority proposes by the UN Special Rapporteur Fransesco Capotorti in the context of Article 27of the International Covenant of Civil and Political Rights (CCPR) in the following words:

'A group numerically inferior to the rest of the population of a state, and in a non-dominated position whose members – being nationals of the state – posses ethnic, religious or linguistic characteristic differing from those of the rest of the population and show, if only implicitly, a

sense of solidarity, directed towards preserving their culture, traditions religious and language.'

An equally eloquent definition is that of Jubs Deschenes also recommended to the UN in 1985, (Doc E/CN 4/Sub 2/1985/31) as follows:

'A group of citizens of a State, constituting a numerical minority and in a non dominant position in that State, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population having a sense of solidarity with one another, motivated, if only implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and in law.' "

This court therefore notes from the above definitions that the minority status of a community therefore is determined by the numerical disadvantage of a community that has distinct ethnic, religious or linguistic characteristics.

An indigenous community on the other hand has been defined in Article 1 of ILO Convention No. 169 on The Rights of Indigenous and Tribal Peoples, 1989 as :

"a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;

"b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions."

This court adopts the said definition for the purposes of this case, and It is apparent from the definition that the distinguishing factor for indigenous communities is their historical ties to a particular territory, and their cultural or historical distinctiveness from other populations that are often politically dominant.

The memorandum dated July 15, 1996 titled "**Help Us Live in Our Ancestral Land and Retain both our Human and Cultural Identities as Kenyans of Ogiek Origin** relied upon by the Applicants estimates at page 5 that the total population of the Ogiek community at the time was 20,000 in number. It is also indicated at page 35 of the **Report of the Government Task Force on the Conservation of the Mau Forest Complex** that when the resettlement of the Ogiek started in 1996 in the South Western Mau Forest Reserve there were 9,000 Ogiek families. This court therefore finds that these figures are indicative of a significant minority community. In addition it is also acknowledged in the memorandum and task force report that the Ogiek traditionally lived in the Mau Forest and depended on the forest for their livelihood, and to this extent this court also finds that they are an indigenous community. Being a minority and indigenous group, the Ogiek therefore merit rights that apply to them as a special group, over and above the rights applicable to other persons.

The rights of the minorities and marginalized groups are now provided for in Article 56 of the 2010 Constitution as follows:

"The State shall put in place affirmative action programmes designed to ensure that minorities and marginalised groups—

(*a*) participate and are represented in governance and other spheres of life;

(*b*) are provided special opportunities in educational and economic fields;

(*c*) are provided special opportunities for access to employment;

(*d*) develop their cultural values, languages and practices; and

(*e*) have reasonable access to water, health services and infrastructure."

The need for this affirmative action for, and special consideration of minority and indigenous groups arises from the fact that indirect indiscrimination of these groups may result from certain actions or policies which on their face look neutral and fair, but which will have a differential effect on these groups because of their special characteristics. In the present case the action that is being complained of being discriminatory is the Applicants' eviction from, and the allocation of their land in the forests to other persons by the 2nd, 4th and 6th Respondents. It is therefore the finding of this Court that to the extent that the Applicants as an indigenous and minority group are prevented by the said eviction and allocations of from continuing to live in accordance with their culture as farmers, hunters and gatherers in the forest, they are specially and differently affected and discriminated against on account of their ethnic origin and culture.

Whether the rights of the Ogiek Community have been infringed by their eviction from East Mau Forest and the settlement of other people on said land.

This court has found that the rights to life, dignity and the economic and social rights guaranteed by the Constitution in reality exist to ensure that that the livelihood of the Applicants and apply in relation to the Applicants' access to the forest lands they occupy. It is also not disputed that there have been allocations of land occupied by the Applicants in the Mau Forest to other persons by the 2nd. 4th and 6th Respondents.

The 1st, 2nd, 3rd, 4th and 6th Respondents argue in this respect that the Applicants do not have any exclusive rights to be allocated land in settlement schemes excised from the Mau forest, and that the Applicants should be treated for the purposes of the settlement as any landless Kenyan without discrimination on account of clan, tribe, religion, place of origin or any other local connection.

Quite apart from the special consideration that needs to be given to the Ogiek community as a minority and indigenous group when allocating forest land that this court has enunciated on in the foregoing, this court also recognizes the unique and central role of indigenous forest dwellers in the management of forests. This role is recognized by various international and national laws. The Convention on Biological Diversity which Kenya has ratified and which is now part of Kenyan law by virtue of Article 2(6) of the Constitution recognizes the importance of traditional knowledge, innovations and practices of indigenous and local communities for the conservation and sustainable use of biodiversity and that such traditional knowledge should be respected, preserved and promoted. Article 8 (j) of the Convention places an obligation on State Parties in this respect to:

"Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge,

innovations and practices."

This court is also guided in this respect by several multilateral environmental agreements which now shape the strategies and approaches by governments in relation to the environment and development, including forest policy. These include the Rio Declaration on Environment and Development and Agenda 21 which are widely accepted sources of international customary environmental law. Principle 22 of the Rio Declaration on Environment and Development provides that indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States are encouraged to recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development. Chapter 26 of Agenda 21 is likewise dedicated to strengthening the role of indigenous communities in sustainable development.

The participation of indigenous forest dwellers in management of forests is also specifically provided for in the Kenyan Forest Act at section 45 which provides as follows:

"(1) A member of a forest community may, together with other members or persons resident in the same area, register a community forest association under the Societies Act.

(2) An association registered under subsection (1) may apply to the Director for Permission to participate in the conservation and management of a state forest or local authority forest in accordance with the provisions of this Act."

The above provisions therefore provide a justification for priority to be given to the Ogiek community in the allocation of the excisions of Mau Forest. Indeed in the **Report of the Government Task Force on the Conservation of the Mau Forest Complex, March 2009** at page 35 states that one of the main objectives of the excision of forestland in the Mau Forests Complex was the settlement of the Ogiek people who were scattered across the forest, so as to secure the long-term conservation of the biodiversity and water catchments of the Mau Forest. A key finding in the Task Force report in this regard in the executive summary at pages 10 -11 of the report was that beneficiaries of the excisions included non -deserving people, and it recommended that the Ogiek who were to be settled in the excised areas and have not been given land, be settled outside the critical catchment and biodiversity areas.

More fundamentally, the infringement of the rights of the Ogiek community has now been officially admitted in a key government policy document**.** It is indicated in the **The Sessional Paper No 3 of 2009 on the National Land Policy, August 2009** by the Ministry of Lands that one of the policy interventions under Chapter 3.6 is to address land issues requiring special intervention. One such issue is the rights of minorities, and the policy states as follows in this regard at paragraphs 198-199 thereof:

"198. Minority communities are culturally dependent on specific geographical habitats. Over the years, they have lost access to land and land-based resources that are key to their livelihoods. For example, such loss of access follows the gazettement of these habitats as forests or national reserves or their excision and allocation to individuals and institutions, who subsequently obtain titles to the land.

199. These communities are not represented adequately in governmental decision making at all levels since they are relatively few in number. Their political and economic marginalization has also been attributed to the fact that colonial policies assimilated them into neighbouring communities. In addition, the colonial Government alienated their lands through forest

preservation policies, which effectively rendered them landless as they were denied the right to live in the forests. Colonial administration also led to the marginalization of other minority communities both urban and rural, such as hunter-gatherers. To protect and sustain the land rights of minority communities, the Government shall:

(a) Undertake an inventory of the existing minority communities to obtain a clear assessment of their status and land rights;

(b) Develop a legislative framework to secure their rights to individually or collectively access and use land and land based resources."

This court has already found that the Ogiek community is one such minority group, and the Applicants' pleadings herein also correspond with and mirror the findings and policy statements made in the National Land Policy. The Ogiek community are therefore one of the minority groups whom the Government of Kenya admits and recognizes have through successive policies lost their access to land and their right to live in forests which are key to their livelihoods.

Arising from the foregoing reasons, it is the finding of this Court that the right to life, dignity and economic and social rights of the Ogiek Community have been infringed as a result of the allocation to other persons of forest land in Marioshioni Location, Elburgon Division and Nessuit Location, Njoro Division, Nakuru District on which they were dependent for their livelihoods, and which allocation was contrary to the express purpose of the excision of the said forest land.

Whether in the circumstances of the instant case, the settlement schemes in East Mau Forest by the Respondents were ultra vires and null and void

The Applicants extensively relied on the **Report of the Government Task Force on the Conservation of the Mau Forest Complex** in their pleading that the allocations by the 2nd, 4th and 6th Respondents of land in the Marioshioni Location, Elburgon Division and Nessuit Location, Njoro Division, Nakuru District be stopped, and that the persons allocated the said land be removed therefrom.. The 1st, 2nd, 3rd, 4th and 6th Respondents on the other hand argued that the allocations were properly undertaken as part of the settlement scheme by the Government to settle landless persons. The Respondents however did not provide any evidence of compliance with the required procedure of excision of the said forest land under the then Forest Act particularly the gazettement of the said excision, or of the details of the said allocations.

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 Marioshoni Schemes were two of the schemes considered in the report with respect to the 2001 excisions, and that while the Marioshoni 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.

The task force in its report analysed the correspondence on the land allocation in the 2001 forest excisions and the green cards on the settlements established after the said excisions, and made the following key findings at pages 44 -45 of the report:

a. Some of the allocation of land was carried out by unauthorized persons.
b. The allocation of land benefited non-deserving people, such as senior Government officials, political and companies.
c. Ecologically sensitive areas, including water catchments areas were also allocated.
d. The allocation of land was carried out in breach of the Law of Kenya governing land, including the Government Land Act, Forest Act, Physical Planning Act, Agricultural Control Act and the Environmental Management and Coordination Act.
e. The allocation of the foresaid excised in 2001 was not in line with the Government's stated intention to establish settlement schemes for the Ogiek and the 1990s clashes victims by which each of the intended beneficiaries should receive one parcel of approximately 2.02 hectares (5 acres).
f. Allocations of multiple parcels of land to the same beneficiaries affected some 6,500.5 hectares. In addition, the size of may land parcels in well in excess to the normal land size of 2.02 hectares (5 acres).
g. Over 99% of the title deeds (18,516) were affected by irregularities. They were issued before the excision date when the land was not available, or issued in disregard of High Court orders restraining the Government and its officials and agents from jointly or severally alienating the whole or any portions of forestland as proposed in the 2001 excisions Legal Notices.
h. In two areas, Nessult and Kiptagich, the settlement schemes were established in the gazette forest reserves beyond the 2001 forest excisions boundaries.

In the light of these findings it is apparent that there were significant irregularities committed during the allocations made after the 2001 forest excisions of Mau Forest, which included the allocations made with respect to the land occupied by the Applicants. This court cannot therefore uphold the legality of the said allocations. This Court also in this regard adopts the findings and recommendations made in the **Report of the Government Task Force on the Conservation of the Mau Forest Complex**, and particularly the recommendations that all titles that were issued irregularly and not in line with the sated purposes of the settlement scheme be revoked, and that members of the Ogiek community who were to be settled in the excised area and have not yet been given land should be settled outside the critical catchment areas and biodiversity hotspots.

Whether the Applicants are entitled to the reliefs sought.

The 1st, 2nd, 3rd, 4th and 6th Respondents have argued that the Applicants are not entitled to the declaratory reliefs sought, for the reason that they have not established a real question or cause of action capable of being determined by the Court, and that the dispute herein is not justiciable. However, this court has in this regard already found that various existing rights of the Applicants that were violated by the 2nd, 3rd, 4th and 6th Respondents by their action of removing them from the land they occupied and allocating the said to other persons. The Applicants are therefore entitled to the declaratory relief sought in this respect.

Conversely, it is the view of this Court that the additional reliefs sought by the Applicants on the illegality of the allocations made by the Respondents and the nullification of the same, as well as the stoppage of further allocations and removal of persons allocated the land illegally have been overtaken by the events. This is for various reasons. Firstly the processes leading to the **Report of the Government Task Force on the Conservation of the Mau Forest Complex** resulted in specific findings and recommendations made in the said report, which also affect the Applicants and which have been adopted by this court. The reliefs granted to the Applicants should therefore be in consonance with the recommendations made by the task force.

Secondly, consequent to the enactment of the 2010 Constitution a new institutional framework have been put in place that has taken over the functions previously performed by the 2nd, 3rd, 4th and 6th Respondents. The National Land Commission is the only body that is now constitutionally mandated to manage, alienate and allocate public land, and to monitor the registration of all rights and interests in land in accordance with the principle laid down in the Land Act of 2012. In addition under the Land Act it is only the said Commission that shall implement settlement programmes to provide access to land for shelter and livelihood. Granting the reliefs sought as against the 2nd, 3rd, 4th and 6th Respondents would therefore not provide an effective remedy to the Applicants.

Thirdly, it is also noted that it was a specific recommendation of the **Report of the Government Task Force on the Conservation of the Mau Forest Complex** that the members of the Ogiek community need to be first identified and a register of the Ogiek community developed with the support of the Ogiek Council of Elders for them to benefit from the recommendations made therein. This o necessity also applies in this suit, as will clarify the deserving members of the Ogiek Community that are to benefit from the orders made herein. In addition the Applicants in their pleadings confirm the establishment of the Ogiek Council of Elders. This Court also notes in this regard the pleading by the 1st 2nd, 3rd , 4th and 6th Respondents that there were some Applicants who were allocated the excised forest land, and who may therefore not be deserving of any relief, and they therefore need also to be identified.

The above observations notwithstanding, this Court is now empowered by Article 23(3) of the Constitution to grant appropriate relief in proceedings seeking to enforce fundamental rights and freedoms. In addressing the question of appropriate relief to give in the circumstances of this case, I am guided by the decision of the South African Constitutional Court in the case of **Minister of Health and Others vs. Treatment Action Campaign and Others (2002) 5 LRC 216** wherein it was stated at page 249 as follows:

"Section 38 of the Constitution contemplates that where it is established that a right in the Bill of Rights has been infringed a court will grant 'appropriate relief'. It has wide powers to do so and in addition to the declaration that it is obliged to make in terms of s 172(1)(a) a court may also 'make any other order that is just and equitable' (s 172(1)(b))…Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a *mandamus* or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights…The courts have a particular responsibility in this regards and are obliged to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal…"

Any effective and appropriate remedy in the circumstances of this case will require the participation of the National Land Commission, which although not a party in this case, is the body that is constitutionally mandated to now perform the functions and remedies sought as against the 2nd 3rd 4th and 6th Respondents.

As regards the relief sought against the 5th Respondent, the Applicants failed to bring any evidence of the participation of the 5th Respondent who was sued in his personal capacity in the said allocations of the land in Mau Forest, or of the allocations of land they allege were made to him. This Court therefore finds that the Applicants have not proved their claim against the 5th Respondent and are thus not entitled to any relief against the said Respondent.

In conclusion and for the record, this Court was aware in reaching the findings herein and consideration

of the necessary reliefs of the decision made in **Kemai & Others vs Attorney General & 3 Others (2006) 1 KLR (E&L) 326**. The applicants therein were also members of the Ogiek community who had been evicted from Tinet forest, and who had sought similar relief as the Applicants herein. Oguk and Kuloba JJ in the said case declined to grant the relief sought on the ground that the Applicants therein were no longer forest dependant; had not complied with the provisions of the Forest Act with regards to the requirement of a licence to occupy land in the forest; and that they had not been deprived of their means of livelihood nor discriminated against.

The said judgment by Oguk and Kuloba JJ was delivered on March 23, 2000, and their decision is distinguished on the ground that the law and circumstances since then have significantly changed in light of the enactment of a new Forests Act of 2005, the development of the land policy in August 2009, the promulgation of the current Constitution in 2010 and the **Report of the Government Task Force on the Conservation of the Mau Forest Complex** in March 2009. These developments have all influenced my findings herein as shown in the foregoing.

The Orders

Arising from the above-stated reasons, this Court enters judgment for the Applicants only to the extent of the following orders:

1. This Court hereby declares that that the right to life protected by section 71 of the previous Constitution and Article of 26 the 2010 Constitution, right to dignity under Article 28 of the 2010 Constitution and the economic and social rights under Article 43 of the Constitution of the affected members of the Ogiek Community in Marioshioni Location, Elburgon Division and Nessuit Location, Njoro Division, Nakuru in the Mau Forest Complex including the Applicants has been contravened, and is being contravened by their forcible eviction from the said locations without resettlement and that the said members of the Ogiek community have been deprived of their means of livelihood.
2. This Court hereby declares that the eviction of the Applicants and other members of the Ogiek Community from Marioshioni Location, Elburgon Division and Nessuit Location, Njoro Division, Nakuru in the Mau Forest Complex is a contravention of their right not to be discriminated against under section 82 of the previous constitution, and Article 27 and 56 of the 2010 Constitution as it has resulted in the Applicants being unfairly prevented from living in accordance with their culture as farmers, hunters and gatherers in the forests.
3. The National Land Commission is hereby directed to within one (1) year of the date of this judgment identify and open a register of members the Ogiek Community in consultation with the Ogiek Council of Elders, and identify land for the settlement of the said Ogiek members and the Applicants who were to be settled in the excised area in Marioshioni Location, Elburgon Division and Nessuit Location, Njoro Division, Nakuru and have not yet been given land in line with the recommendations in the **Report of the Government Task Force on the Conservation of the Mau Forest Complex** published in March 2009.
4. The Applicants shall serve a copy of the judgment and orders herein on the Chairman of the National Land Commission within 30 days of the date of this judgment.
5. The 1st, 2nd, 3rd 4th 6th Respondents shall meet the costs of this suit.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____17th____ day of

_____March____, 2014.

P. NYAMWEYA

JUDGE