

THE RIGHTS TO LAND OF INDIGENOUS PEOPLES' IN KENYA: A CASE  
STUDY OF THE OGIEK COMMUNITY AND THE CONFLICT OF ARTICLES  
PORTRAYED IN THE CONSTITUTION OF KENYA.

Submitted in partial fulfilment of the requirements of the Bachelor of Laws Degree,  
Strathmore University Law School

By

DIANA ACHIEN'G OCHIEN'G

78339

Prepared under the supervision of

MR. AMBROSE RACHIER

JANUARY 2017

## DECLARATION

I, DIANA ACHIEN'G OCHIEN'G do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: .....

Date: .....

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:.....

[Supervisor's Name]

## **DEDICATION**

This research paper is dedicated to my parents, Mr. Sam Ochien'g & Mrs. Mary Anyango Ochien'g for their invaluable support and the mentorship that they have afforded me in my academic journey and their tireless labour to make me a success, their efforts will forever be engrained in my heart. And above all for their ceaseless prayers in ensuring I get the best no matter the situation.

To Kenya's indigenous peoples' who continue to struggle for adequate legal recognition, protection of their ancestral land rights and who are still affected by past historical land injustices.

## ACKNOWLEDGEMENTS

This handiwork is both a reminder and commemoration of the input of many people. Without the strength and the hand of the almighty God over my life, this work could not with no doubt have seen the light of the day.

I will forever be indebted to my Supervisor M. Ambrose Rachier for his guidance and invaluable comments at each and every stage of this work. He has made me grow academically and specifically sharpened my research skills. Even as I gear towards the finish line of my law degree I will be forever be grateful and indebted to Mr. Rachier for in him I have a lifetime mentor and inspiration in this legal field.

## Table of Contents

DECLARATION .....	2
DEDICATION .....	3
ACKNOWLEDGEMENTS .....	4
CHAPTER 1: INTRODUCTION .....	7
Background of the problem .....	7
Statement of the problem .....	9
Purpose of the study .....	10
Research Questions .....	11
Justification of the Study .....	11
Limitations .....	12
CHAPTER 2: CONCEPTUAL FRAMEWORK .....	13
AN ANALYSIS OF THE LAND LAW REGIME IN KENYA AND THE ABORIGINAL TITLE TO LAND OF THE OGIEK COMMUNITY.....	13
The land law regime in Kenya.....	13
Pre-colonial Era.....	14
The Colonial Era .....	15
Post-independence land tenure era in Kenya.....	16
Dynamics behind Dispossession and Encroachment of Ogiek's Land .....	17
CHAPTER 3: AN ANALYSIS OF THE KENYAN LAWS THAT SOUGHT TO VINDICATE INDIGENOUS PEOPLES' RIGHT TO LAND.....	22
Does the Constitution sufficiently protect and vindicate the rights to land of the Ogiek or it portrays an arena of conflict of articles in it that do not adequately cater for their rights but rather circumnavigate this issue.....	22
Do the legal instruments and provisions that have been enacted since pre-colonial times adequately cater for the rights of the Ogiek community sufficiently, specifically in relation to land as it caters for the rest of Kenyans? .....	24
CHAPTER 4: DISCUSSION .....	30
CHAPTER 5: CONCLUSION AND RECOMMENDATIONS.....	35
Recommendations .....	36
Bibliography .....	38
Books.....	38
Reports .....	39
Journals.....	40
Table of Cases .....	41

Table of Statutes and Legal Instruments .....	42
---	----

## CHAPTER 1: INTRODUCTION

### Background of the problem

The Ogiek are believed to be the first people to have settled in Eastern Africa and were found inhabiting all Kenyan forests before 1800AD. Due to domination and assimilation, the community is slowly becoming extinct with figures showing about 20,000 countrywide.<sup>1</sup> The Ogiek people commonly known as "Dorobo" are one of the most widely distributed communities in Kenya, inhabiting, now or in the recent past, virtually all of the high forest areas of Kenya.<sup>2</sup> The Ogiek are a marginalised community.<sup>3</sup> Traditionally they partake in hunting and gathering, though today virtually all of them now have added animal husbandry or cultivation, or both.<sup>4</sup>

The Ogiek have been living in Mau Forest since pre-colonial times on communally held pieces of land, which were administered through customary law.<sup>5</sup> Currently they dwell in the Mariashoni area of the East Mau forest. Everyone has ignored the fact that the Ogiek too have a right to their lands. When the British carved out areas of Kenya into tribal reserves<sup>6</sup> for the various communities, the Ogiek were excluded as they lived in small scattered groups over large areas and did not appear to have any property. This and many other agreements signed with other communities with the colonialists and poor government policies since independence has seen the loss and dispossession from their ancestral lands.<sup>7</sup> This has in turn led them to becoming 'squatters' on their own land who face eviction notices from their own government. The

---

<sup>1</sup> Kimeri Mbote Patricia, *'Following God's constitution: The gender dimension in the Ogiek claim to Mau forest complex'* International Environmental Law Research Centre (2006), 2

<sup>2</sup> Blackburn Roderick, *'A preliminary report of research on the Ogiek Community of Kenya'*, Discussion Paper 89, Nairobi: Institute for Development, University of Sussex (1970),2.

<sup>3</sup> Article 280, *Constitution of Kenya* (2010) describes a marginalised community as : (a) a community that, because of its relatively small population or for any other reason, has been unable to fully participate in the integrated social and economic life of Kenya as a whole;

(b) a traditional community that, out of a need or desire to preserve its unique culture and identity from assimilation, has remained outside the integrated social and economic life of Kenya as a whole;

(c) an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy;

<sup>4</sup> Blackburn Roderick, *'A preliminary report of research on the Ogiek Community of Kenya'*,2.

<sup>5</sup> Joseph Sang, *'Case study 3 Kenya-The Ogiek in Mau forest in Indigenous peoples and protected areas in Africa'*,2003, 115.

<sup>6</sup> Kenya Land Commission Final Report, *'Evidence from the Dorobo'* ,Vol. 3, Kenya National Archives, 17 October 1932, 34

<sup>7</sup> Joseph Sang, *'Case study 3 Kenya-The Ogiek in Mau forest in Indigenous peoples and protected areas in Africa'*,2003, 117.

government claims that the Mau complex is being destroyed and they cannot afford such a risk as it is one of the largest water catchment areas in Kenya.<sup>8</sup>

Land and resources linked to it form a critical part of many communities' life lines. Lack of access to these resources can lead to the decimation of the affected communities.<sup>9</sup> This is especially the case where the communities' life is linked to a particular ecosystem as the case for the Ogiek. In a situation where the rights of the entire community are under threat, the weaker actors ordinarily hold the shorter end of the stick in so far as access to, control over and ownership of resources is concerned.<sup>10</sup>

It is against this background that this study looks at the struggle of the Ogiek for their rights to land to access the Mau forest in the face of competing actors. On the one hand, are the genuine claims of the original inhabitants of the East Mau land and on the other, the claims of legal title holders who occupy the same land. Today, some of the original inhabitants of those lands demand and claim restitution of their traditional land rights on the basis that they were dispossessed through historical and prevailing discriminatory legal processes. The Ogiek do not have legal title to the lands they now claim, basing their demands on their customary laws, traditions and pre-colonial occupation. The land question is not new in Kenya and it has been at the center of controversy before, during and after British historical occupation.<sup>11</sup> Actually, it has been the fulcrum of cartels and the high level of chronic corruption that has tainted the country's image for quite a long period of time.<sup>12</sup> The importance and conflict of land in the economic environment is an issue that has not been resolved by policies and legislations in place since the independence in 1963.

Indigenous peoples' are any ethnic group of people who are considered to fall under one of the internationally recognized definitions of Indigenous peoples<sup>13</sup> i.e. "those ethnic groups that were

---

<sup>8</sup>Prime Minister's Task Force on the Conservation of the Mau Forests Complex,(2009),8.

<sup>9</sup> Kameri Mbote Patricia, *'Following God's constitution: The gender dimension in the Ogiek claim to Mau forest complex'* International Environmental Law Research Centre (2006), 1.

<sup>10</sup> Kameri Mbote Patricia, *'Following God's constitution: The gender dimension in the Ogiek claim to Mau forest complex'* International Environmental Law Research Centre (2006), 1.

<sup>11</sup> Frederic Jenny, *'Cartels and Collusion in Developing Countries: Lessons from Empirical Evidence'*, World Competition Journal 29 (2006), 29.

<sup>12</sup> Roger Southall, *'The Ndungu Report: Land & Graft in Kenya'* Review of African Political Economy ,2005, 142.

<sup>13</sup> The United Nations has not officially give a definition however the ILO Convention 169 in Article 1 attempts to give a definition by stating that the 'Convention apply to (a) Tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the



indigenous to a territory prior to being incorporated into a national state, and who are politically and culturally separate from the majority ethnic identity of the state that they are a part of."<sup>14</sup>

However for a community to be regarded as indigenous, self-identification shall be regarded as a fundamental criterion for identifying and terming a community as indigenous.<sup>15</sup> Unquestionably, Indigenous peoples' fall into a category of the most vulnerable and dispossessed peoples' in the world.<sup>16</sup> Despite all this, the Kenyan<sup>17</sup> and international efforts to protect the rights of indigenous peoples' has been slow and too often insensitive or neglectful in addressing the rights of Indigenous peoples.<sup>18</sup> This is despite several enacted laws that cater for the rights of indigenous communities in Kenya.

### **Statement of the problem**

There is no single accepted international definition of indigenous peoples'.<sup>19</sup> The lack of an internationally accepted definition renders it difficult to observe, respect, protect, promote and fulfil<sup>20</sup> majority, if not all, of the indigenous communities' rights.

---

national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulation (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 colonisation 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.'

<sup>14</sup> DE Sanders, *'Indigenous peoples: issues of definition'*, International Journal of Cultural Property (1999), 4.

<sup>15</sup> Barume A K, *'Land Rights of Indigenous Peoples in Africa : The case of the Ogiek of Kenya'*, International Work Group for Indigenous Affairs, 2005,55.

<sup>16</sup> I Cotler & F P Eliadis, *International Human Rights Law : Theory and Practice*, Canadian Human Rights Foundation, Montreal,1992, 63.

<sup>17</sup> Kameri Mbote Patricia, *'Following God's constitution: The gender dimension in the Ogiek claim to Mau forest complex'*, (2006),2.

<sup>18</sup> L  m Maiv  n, *At the edge of the state: indigenous peoples and self-determination*, New York Transnational Publishers, 2000, 45.

<sup>19</sup> The United Nations has not officially give a definition however the ILO Convention 169 attempts to give a definition by stating that the 'Convention apply to (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 regulation (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 colonisation 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.'

The Ogiek have been forcibly displaced from their ancestral land by state actors without restitution and all this has been done in the name of development and preservation of the Mau forest. The Ogiek have been administering their land using the customary tenure since pre-colonization. The problem that arises is one of a conflict of laws in the Constitution of Kenya and Kenyan legislation. The Kenyan laws that are in force purport to observe, respect, protect, promote and fulfil indigenous communities' rights. While it is well known that the Ogiek held their land communally in the East Mau forest, various legislations have not taken this into account when drafting of these laws was taking place.

The laws that are in place do not specifically cater for their rights. Instead what is portrayed is a multiplicity of laws that purport to cater and protect the rights of Ogiek but in actual sense, the laws circumnavigate around the issue of the rights of indigenous communities, particularly their right to land. The Ogiek have not only been left out of development plans in Kenya, but they have been forced into land that is not suitable with their traditional hunter-gathering way of life.<sup>21</sup>

The process of dispossession has continued from the colonial period to the present time. For the most part, this has involved the pronouncement of Ogiek ancestral land as forest reserves, degazettement and division of their land to other communities leading to loss of their rights over their East Mau land.<sup>22</sup> The rights of indigenous peoples' has been overstepped by development processes without due regard to the rights they possess. The problem that arises is lack of legislation that adequately and sufficiently caters for the land rights of the Ogiek and a conflict of laws that is portrayed in the Constitution.

### **Purpose of the study**

The main objective of this study will be to analyse and investigate in depth the conflict of laws in the Articles of the Constitution of Kenya that relate to the rights of the Ogiek community.

---

<sup>20</sup> Article 21 (1), *Constitution of Kenya* (2010)

<sup>21</sup> Ohenjo N, '*Kenya's Castaways: The Ogiek and National Development Processes*', (2003) [electronic version] <http://www.minorityrights.org/?lid=738> (accessed 12 February 2016).

<sup>22</sup> Kimaiyo T, *Ogiek Land Cases and Historical Injustices 1902-2004*, Egerton Nakuru, 2004, 34.

## Research Questions

The following are the research questions that this study will seek to answer

- i. Do the laws in the Constitution cater for the rights of the Ogiek or do they portray an arena of conflict of laws that do not adequately cater for their rights but rather circumnavigate this issue.
- ii. Do the legal instruments and provisions that have been enacted since pre-colonial time cater for the rights of the Ogiek community sufficiently and specifically in relation to land as it caters for the rest of Kenyans?
- iii. Are the Ogiek offered collective community land rights pertaining to community forests as is offered to other Kenyan communities?
- iv. Do the legal instruments in force provide sufficient recourse for the rights of the Ogiek?
- v. What are the implications of the recognition of community land rights for the Ogiek community in light of competing interests over such lands?
- vi. What recommendations need to be made to secure the land rights of the Ogiek community in Kenya in light of competing interests over such lands?

## Justification of the Study

The foundation of this research is based on international law and Kenyan laws that avail rights of indigenous communities. This study is justified on the basis that although there exists a wealth of literature and statute law relating to indigenous people both in Kenyan and international laws; there is an apparent scarcity and disconnect regarding a long term treatment of the problem that this study seeks to address. The Ogiek community is still facing the problem of being landless, eviction from their own ancestral land and violation of their rights. This is despite provisions of the Constitution catering for the equality of all peoples' before the law,<sup>23</sup> advocating for non-discrimination<sup>24</sup> and the right to every person either individually or in association with others, to

---

<sup>23</sup> Article 27(1), *Constitution of Kenya* (2010)

<sup>24</sup> Article 27(4), *Constitution of Kenya* (2010)

acquire and own property of any description<sup>25</sup> and in any part of Kenya. These laws and many other laws seek to provide and benefit all Kenyans and in equal measure. But over the years the Ogiek have not enjoyed the promotion and protection of these rights. This leads us to the question as to why the indigenous Ogiek community do not enjoy rights posited in various legal statutes as they ought to. Leading to them not being regarded and treated as part of Kenyans as regards their right to own property and specifically land thus leading to the historical and present day injustices they face. The Ogiek community is part of the 42 communities in Kenya and the injustice and violation of rights is a key legal issue of concern.

### **Limitations**

The study is limited in two ways. The first is that the plight of indigenous people is one that has not been paid much attention to by lawmakers thus hindering the effective vindication of their rights. The second limitation is that there exists a challenge in conducting of interviews arising from the fact that the Ogiek live in forests and are frequently displaced thus hindering their accessibility for purposes of interviews.

### **Chapter summary**

This chapter serves as a foundation and basic introduction to understanding the problem faced by the Ogiek as an indigenous community.

It provides a brief summary of the history of the Ogiek people and a description of their economic, cultural and social life. Their way of life is tied to the attachment they have to the land in East Mau. This forms a critical part of this thesis as it is necessary to understand why they are linked to this particular land and not just any other land in Kenya. Further on, a brief description of their settlement in the East Mau from time immemorial to the colonial times where their historical land injustice began and advancing into the present historical land injustices they face. This chapter provides a basic introduction to the purpose of this study and the main issue at hand that the thesis seeks to investigate; not forgetting the limitations that the study may face. It is a basic introduction and foundation to the second chapter that will seek to analyse the root cause of this problem.

---

<sup>25</sup> Article 40, *Constitution of Kenya* (2010)

## CHAPTER 2: CONCEPTUAL FRAMEWORK

### AN ANALYSIS OF THE LAND LAW REGIME IN KENYA AND THE ABORIGINAL TITLE TO LAND OF THE OGIEK COMMUNITY

This analysis on indigenous communities will start with a detailed history of land and of the dispossession Ogiek people from the pre-colonial times to the present times. An understanding of the history is important as this thesis is basing its foundation on the historical injustices that have taken place in law without consideration to the way of the life of the community and the rights they are entitled to. Further on, this analysis will entail the main legal statutes and conventions that deal with indigenous communities. However, it will mainly focus on the conflict of Articles relating to the right of land of the Ogiek community that is portrayed in the Constitution of Kenya. The study will also look at various statutes in Kenya that relate to indigenous peoples' and the conflicting laws portrayed in as so far as vindication of their rights is concerned. A combination of these two areas of interest will go ahead to in turn show how the conflicting laws impede the realization of the full potential rights of the Ogiek Community pertaining to land.

#### **The land law regime in Kenya**

Land has been a key issue in Kenya since pre-colonial times. The land question is not a new matter as it started from the times when demarcation of land was taking place when the colonialist introduced the white highlands and the native local reserves.<sup>26</sup> Since colonial times the laws in place were set up to alienate African people from their ancestral land. In present times this situation is aggravated by the inconsistencies in the laws. The land law regime in Kenya is complex and addresses land issues from different perspectives and not through one single lens.<sup>27</sup> It has been suggested that the only possible way to solve the current land regime quagmire is by 'resolving the problems between statute law and cultural rights to land that are accommodated by

---

<sup>26</sup> Frederic Jenny, 'Cartels and Collusion in Developing Countries: Lessons from Empirical Evidence', 59.

<sup>27</sup> *Reassessing Kenya's Land Reform*, The Point, Bulletin of the Institute of Economic Affairs, Issue No 40, (November 2000), 3

law'.<sup>28</sup> It is therefore important to begin by briefly tracing the history of the land tenure regime in Kenya in order to comprehend and appreciate the status quo.

### **Pre-colonial Era**

Before Kenya became a British protectorate on 15 June 1895, the country was ruled by Africans and land owned wholly on a communal basis.<sup>29</sup> Rules governing how the land was used, owned and controlled were based on traditions, customs and practices gathered over the generations for the specific community.<sup>30</sup>

This case applied even to forests. There are several communities that lived and coexisted with the forest as a part of their life. An example of this is the Mijikenda in the Coast.<sup>31</sup> Land belonged to each one and this created the right to use and access it that in turn curved out to a number of generations having the right to land over generations and generations.<sup>32</sup>

With the coming of the colonialists came the formalization of property rights in Kenya that led to a destabilisation of the property rights regime in Kenya. The web of interests was interrupted and individualisation of the concept of title introduced.<sup>33</sup> This was the primer of the slow death of the communal tenure and the historical land injustices faced by some Kenyan communities.

---

<sup>28</sup> Ghai YP and McAuslan, *Public law and political change in Kenya: A study of the legal framework of government from colonial times to the present*, OUP, 1970, 28

<sup>29</sup> Wanjala SC, 'Land ownership and use in Kenya: Past present and future' in SC Wanjala *Essays on land law, The reform debate in Kenya*, 2000, 27.

<sup>30</sup> Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (*Ndung'u Report*), Final Draft, 2004, 1.

<sup>31</sup> Githitho Anthony, 'Institutional challenges in conservation: the case of the sacred Kaya forests of the Kenyan coast' *The World Bank Initiative*, (2004), 4

<sup>32</sup> Wanjala SC, 'Land ownership and use in Kenya: Past present and future' in SC Wanjala *Essays on land law, The reform debate in Kenya*, 2000, 31.

<sup>33</sup> T Ojienda, 'Customary Land Rights and the Adjudication Process: Reviewing the Procedure for Ascertaining and Recording Land Rights in the Light of Customary Claims', in *Land Law Reform in Kenya*, Vol. 2 The Law Society of Kenya Journal, (2003), 6

## The Colonial Era

Kenya was declared a protectorate by the British in 1895 this was followed by a systematic and legal process of alienating large tracts of land and dispossessing indigenous peoples of their land'.<sup>34</sup>

The advent of dispossession of African land by the white colonialists was made possible by the fact that the Africans were thought not to be civilized enough to rule and govern themselves and their property inclusive of land. Using this basis the British colonialists did as most colonialists did. They came up with foreign laws and western concepts of civilization to disposes Africans of their land.<sup>35</sup> A community like the Maasai certainly had structures in place that served as the modern day government. It comprised of clans, councils of elders, spiritual leaders and organized structures in place to determine and decide on the community's needs thus ruling out the question of Africans lacking organization.<sup>36</sup>

The colonial authorities promulgated laws that had the effect of vesting the whole of Kenya to the British as Crown land. The dispossession of indigenous land was made legal by the enactment of the Crown Lands Ordinance of 1915, which defined 'Crown land' to mean:

*All public lands in the colony which are for the time being subject to the control of His Majesty by virtue of any treaty, convention, or agreement, or by virtue of His Majesty's Protectorate, and all lands which have been acquired by his Majesty for the public service or otherwise howsoever, and shall include all lands occupied by the native communities of the colony and all lands reserved for the use of the members of any native communities.*<sup>37</sup>

In essence the complete and total disinheritance of Africans from their original land was made possible by the Crown Lands Ordinance. This was affirmed in the colonial Courts in *Isaka Wainaina wa Gathomo and another v Murito wa Indangara* and others where they interpreted the

---

<sup>34</sup>Wanjala SC, 'Themes in Kenya land reform' in SC Wanjala Essays on land law, The reform debate in Kenya, 2000, 42.

<sup>35</sup> HWO Okoth-Ogendo, 'The nature of land rights under indigenous law in Africa: Land, power & custom controversies generated by South Africa's Communal Land Rights Act (2008), 97.

<sup>36</sup> Hughes L, 'Moving the Maasai: A colonial misadventure' Palgrave Macmillan Journal (2006), 14.

<sup>37</sup> Section 5, Crown Lands Ordinance (1915)

Crown Lands Ordinance to the effect that Africans were mere tenants at the will of the Crown with no more than temporary occupancy rights to the land thus leaving landless.<sup>38</sup>

With time the disinheritance of Africans led to their being agitated and discontent towards the British. Due to overpopulation, high poverty levels and increased insecurity in the reserves, the demand for the return of indigenous lands intensified.<sup>39</sup> Various efforts and commissions to address the rising tension and agitation were mooted by colonial authorities, which eventually led to the 1930 Native Lands Trust Ordinance.<sup>40</sup>

The Ordinance was aimed at setting aside native reserves and additional lands for the natives. The law also established a Native Trust Board to manage the reserves. The Ordinance had limitations to the extent that the Crown could still grant leases and licenses to Europeans in the reserves and also for public use. Agitation for independence did not cease with such token and unilateral measures that still preferred colonial interests to the interests of Africans. The Morris Carter Land Commission<sup>41</sup> was accordingly set up and made several recommendations that sought to address some of the natives' grievances; principally the need for more land and rights to it.

The land reform process entailed three stages: adjudication, consolidation and registration. The decision by the independence government to respect colonial land titles effectively sealed the fate of indigenous peoples who sought restitution of land taken by the British.

### **Post-independence land tenure era in Kenya**

With the coming of the colonialists the land regime was totally transformed. The individualisation of interest in land did away with the customary land tenure. This in turn set a primer for the historical land injustices faced by most communities and of which our laws have helped further this injustice by neglecting the problems and set up that was initially there before the individualisation of title in land took place.

---

<sup>38</sup> *Isaka Wainaina wa Gathomo and Kamau wa Gathomo v Murito wa Indangara, Nganga wa Murito and Attorney General* [1923] eKLR

<sup>39</sup> Tim Mweseli 'The centrality of land in Kenya: Historical background and legal perspective' in SC Wanjala Essays on land law, The reform debate in Kenya, 2000, 4.

<sup>40</sup> See for example the Devonshire White Paper of 1923 providing that Kenya was an African country and native rights were paramount; Hilton Young Commission Report of 1929 endorsing the white highlands and native reserves and called for satisfaction of native requirements.

<sup>41</sup> The Report of the Kenya Land Commission (*Carter Report*), 1933



Post independent Kenya affirmed colonial property laws and policies through the Registered Land Act of 1963.<sup>42</sup> Like the colonial laws, this statute was a furtherance of their colonial policies as it only recognized individual land tenure. This was the beginning of grievances and resistance for the communities that had their way of life circumnavigating around the communal tenure as this new era was undoubtedly incompatible with their way of life. In response to the grievances and resistance especially in semi-arid areas where pastoral and nomadic lifestyles demanded collective land rights the Land (Group Representatives Act) was enacted.<sup>43</sup> This statute was meant to assist pastoral communities in owning and operating group ranches

The individual land tenure system sanctified by the Registered Land Act was favoured by the state on the basis that Kenya was a largely agricultural economy and was dependent on it.<sup>44</sup> The general thought is that it would have geared Kenya towards spurring economic growth but it only led to the destruction of communal tenure and unmitigated landlessness.<sup>45</sup> This was not a shocking outcome as the laws did not base its foundation on the prior way of life that revolved in the communal tenure. Thus individualisation of title in land created great inequality and poverty in various regions of the country. It is because of these inequalities, which include allocation of land resources that originally should have been reverted to the inhabitants of ancestral customary lands.

### **Dynamics behind Dispossession and Encroachment of Ogiek's Land**

As previously discussed the Ogiek have been living in the East Mau area since time immemorial. This means that the land they had and held was on a communal basis. In addition to the dispossession that took place to all communities using the individualisation of title, the Ogiek have undergone further injustices and encroachment on their ancestral lands. When the British carved out areas for African reserves the Ogiek were left out as they were scattered over large tracts of land and did not own any property.<sup>46</sup>

---

<sup>42</sup> *Registered Land Act* (1963)

<sup>43</sup> *Land (Group Representatives) Act* (1968).

<sup>44</sup> Wanjala SC, 'Problems of land Registration and titling in Kenya' in SC Wanjala Essays on land law, The reform debate in Kenya, 2000, 97.

<sup>45</sup> Wanjala SC, 'Land ownership and use in Kenya: Past present and future' in SC Wanjala Essays on land law, The reform debate in Kenya, 2000, 34

<sup>46</sup> Kenya Land Commission Final Report, 'Evidence from the Dorobo', 3 Kenya National Archives, 17 October 1932, 34

Serious encroachment of Ogiek rights to their land started in 1856 when the Maasai attempted to annex Ogiek lands in Mau and Laikipia. This led the two communities to go to war. The Ogiek lost the areas around Lake Naivasha but continued to retain the lands around Nakuru.<sup>47</sup>

In 1911 the Maasai signed agreements with the colonialists giving away title to land in the area of Nakuru, Naivasha and Laikipia for the settlement of white farmers. This effectively dispossessed the Ogiek of their ancestral land. This was a victory for the Maasai who had previously clashed with the Ogiek over the same land. In 1932 an agreement between the Maasai and the colonial authorities gave out the Mau areas to the colonial settlers.<sup>48</sup>

The Ogiek faced several evictions between 1911- 1927 but they were adamant on retaining their ancestral lands. In 1927 the colonial authorities sought to remove the Ogiek from the East Mau forests which was now Crown land under the Forest Department.<sup>49</sup> This led to a clash between the authorities and the Ogiek who resisted the evictions. An agreement was signed that stipulated that the government should stop the harassment of the Ogiek, while the Ogiek on the other hand should cease invasions of the white settlers' farms. The Ogiek understood this to mean ceding their claims to the settled areas in return for being left in peace in the forests.<sup>50</sup>

In 1977 the Kenyan government began its harassment of the Ogiek. Government forces led by the Rift Valley Provincial Commissioner invaded Mau West Forest torching Ogiek houses and arraigning them in Court on the charges of being 'illegal squatters' in the forest.<sup>51</sup>

In 1987, the government banned the keeping of livestock and farming activities in forests, a ban that was applied selectively targeting mainly the Ogiek. This has selectively progressed and adopted by the Forest Act of 2005 that till today has amputated the social and cultural way of living of the Ogiek community.

By 1993 onwards, the Kenyan Government has steadily apportioned large huge areas of Mau Forest for distribution to members from other ethnic groups leading to clashes' with the Ogiek

---

<sup>47</sup> Joseph Sang, *'Case study 3 Kenya-The Ogiek in Mau forest in Indigenous peoples and protected areas in Africa'*, 2003, 116.

<sup>48</sup> Wanjala SC, *'Land ownership and use in Kenya: Past present and future'* in SC Wanjala Essays on land law, The reform debate in Kenya, 2000, 35

<sup>49</sup> Joseph Sang, *'Case study 3 Kenya-The Ogiek in Mau forest in Indigenous peoples and protected areas in Africa'*, 2003, 118

<sup>50</sup> Tim Mweseli *'The centrality of land in Kenya: Historical background and legal perspective'* in SC Wanjala Essays on land law, The reform debate in Kenya, 2000, 8.

<sup>51</sup> Kimaiyo T, *Ogiek Land Cases and Historical Injustices 1902-2004*, Egerton Nakuru, 2004, 43

who saw the annihilation of the forests and the estrangement from their lands as a persistent risk to their survival. All these factors triggered the Ogiek to accordingly file a civil suit in 2012<sup>52</sup> that will be discussed in Chapter 3. The suit originated from summons filed in 1997 claiming that their rights have been infringed on and most relevant to this study is the recognition, promotion, protection and enforcement of their right as an indigenous minority in Kenya with rights to land in the East Mau forest area.

The Constitution of Kenya talks of promoting and protecting the diversity of languages of the people of Kenya and promoting the development indigenous languages.<sup>53</sup> Culture is also recognized as the foundation of the nation and it shall promote all forms of national and cultural expression through various ways including cultural heritage.<sup>54</sup> Article 280<sup>55</sup> specifies what category of persons can be considered as marginalised and the Ogiek fit into all the specifics of this definition. Further on the rights of minorities and marginalised groups are provided for where it states that they have the right to develop their cultural values, languages and practices.<sup>56</sup> The establishment of the above rights is essential and linked to land in that they identify the diversity and culture of the Ogiek community in identifying them as a marginalised community. This corroborates the principle of self-identification that is a fundamental criterion to the observation, protection and promotion of the rights of the indigenous communities worldwide.

Self-identification is a fundamental criterion for a community to be regarded as an indigenous community. The above provisos of the Constitution head on to spell out the fact that not only are the Ogiek an indigenous community but they are also marginalised and discriminated against based on their culture, life and language which is a contradiction as the diversity of all languages, communities and peoples' of Kenya are to be protected and not discriminated. This discrimination is occurring notwithstanding the fact that Article 27 of the Constitution dispelling discrimination on any person based on any ground and of importance to this thesis is

---

<sup>52</sup> *Joseph Letuya & 21 others v Attorney General & 5 others* [2014] eKLR

<sup>53</sup> Article 7, *Constitution of Kenya* (2010)

<sup>54</sup> Article 11, *Constitution of Kenya* (2010)

<sup>55</sup> Article 280, *Constitution of Kenya* (2010) describes a marginalised community as :(a) a community that, because of its relatively small population or for any other reason, has been unable to fully participate in the integrated social and economic life of Kenya as a whole;

(b) a traditional community that, out of a need or desire to preserve its unique culture and identity from assimilation, has remained outside the integrated social and economic life of Kenya as a whole;

(c) an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy;

<sup>56</sup> Article 56, *Constitution of Kenya* (2010)

discrimination based on ethnic or social origin, religion, conscience, belief, culture, language. Without a doubt, the Ogiek is an indigenous community, this was established by the Courts in *Joseph Letuya & 21 others v Attorney General & 5 others*.<sup>57</sup> The Court applied various international and regional instruments in not only identifying that the Ogiek is an indigenous community but also that it is a forest community and thus they have the right to settle and dwell in the forest.<sup>58</sup>

The right to own property is assured to each one either individually or in association with others and the property can be of any kind and description in any part of Kenya.<sup>59</sup> Securing of community land rights are guaranteed by the Community Land Act in section 7(1)<sup>60</sup> that is pursuant to and read alongside Article 40. Article 61 states that land in Kenya can be owned individually, communally or as a nation. Public land in Kenya consists of government forests that include water catchment areas<sup>61</sup> like the Mau forest. An exception to forests that are not considered public lands are those which are lawfully held, managed or used by specific communities as community forests, grazing areas or shrines.<sup>62</sup>

The Constitution further on stipulates community land as ancestral lands and lands traditionally occupied by hunter-gatherer communities.<sup>63</sup> The Ogiek can be considered a forest community<sup>64</sup> and a marginalised community<sup>65</sup> thus ensuring their rights to live in co-existence with the forest and not face evictions. Their customary rights pertaining to the community forest are established in the Forest Act which provides that indigenous forests and woodlands shall be managed on a sustainable basis for purposes that include cultural use and heritage.<sup>66</sup> The Constitution affirms

---

<sup>57</sup> *Joseph Letuya & 21 others v Attorney General & 5 others* [2014] eKLR

<sup>58</sup> Section 45, *Kenya Forest Act* (2005) provides for the participation of indigenous forest dwellers in management of forests by affirming that 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. And that an association registered 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.

<sup>59</sup> Article 40, *Constitution of Kenya* (2010)

<sup>60</sup> Section 7, *Community Land Act* (2016) states a community claiming an interest in or right over community land shall be registered in accordance with the provisions of this Act.

<sup>61</sup> Article 62(g), *Constitution of Kenya* (2010)

<sup>62</sup> Article 63 (2) (d)(i), *Constitution of Kenya* (2010)

<sup>63</sup> Article 63 (2) (d)(ii), *Constitution of Kenya* (2010)

<sup>64</sup> Section 3, *Kenya Forest Act* (2005) defines a forest community as one that have a traditional association with a forest for purposes of livelihood, culture or religion;

<sup>65</sup> Article 280, *Constitution of Kenya* (2010)

<sup>66</sup> Section 22, *Kenya Forest Act* (2005) establishes that Nothing in the Act shall be deemed to prevent any member of a forest community from using, subject to such conditions as may be prescribed, such forest

that every person is equal before the law and has the right to equal protection and equal benefit of the law<sup>67</sup> and that no one shall use any basis to discriminate another either directly or indirectly.<sup>68</sup> All these laws plus other international laws go ahead to observe, promote, protect and fulfil the rights of indigenous communities. But the Ogiek are still landless amidst all the laws that are enacted to cater for their rights.

The above posits the conflict of articles in the Constitution as well as conflict of laws in other Kenyan legal instruments that is present in relation to indigenous communities. The challenge in protecting the rights of the indigenous communities are suffocated by the numerous conflicts of laws posited above. The rights of indigenous communities have not been addressed by our domestic legislation sufficiently and adequately. This paper will delve into this problem against arising competing interests over the East Mau forest area. This will seek to look at the legal gap availed in the laws and their contradiction upon application and interpretation. Despite the fact that the Ogiek are a minority group and entitled to rights that have been outlined above, the challenge is in the conflict of laws prevailing. There is a need for the laws to be revised in order to help prevent the Ogiek from further injustices and for the laws to match up with International instruments that explicitly cater for indigenous communities.

---

produce as it has been the custom of that community to take from such forest otherwise than for the purpose of sale

<sup>67</sup> Article 27(1), *Constitution of Kenya* (2010)

<sup>68</sup> Article 27(4), *Constitution of Kenya* (2010)

### CHAPTER 3: AN ANALYSIS OF THE KENYAN LAWS THAT SOUGHT TO VINDICATE INDIGENOUS PEOPLES' RIGHT TO LAND

From the previous chapters it has been revealed that indeed the Ogiek have faced various land injustices that has seen their aboriginal title being taken away from them by the use of laws that exclusively leave them out or the laws enacted circumnavigate the issue of their rights to land. Of most concern to this study is the conflict portrayed in the articles of the Constitution of Kenya. An arena of articles presupposes to cater for their rights but that is not the case. Furthermore the rights to land of the Ogiek community have been neglected and circumvented by other enacted laws that also do not vindicate their rights to land as pertaining to the East Mau land. The following analysis will go ahead to portray and assess this plight of the Ogiek around the existing laws and a possible solution to this great injustice.

**Does the Constitution sufficiently protect and vindicate the rights to land of the Ogiek or it portrays an arena of conflict of articles in it that do not adequately cater for their rights but rather circumnavigate this issue.**

Before the Constitution 2010, community tenure was not given adequate protection in law. Land was categorized as government land, trust land and private land.<sup>69</sup> Under the trust land concept, county councils are the trustees of Trust land and in many cases they used this power irregularly in the allocation and protection of the trust lands. Disposition of trust lands to individuals and the government were sanctioned by sections 116 and 118 of the repealed Constitution. These dispositions also affected forest lands.

The Constitution of Kenya 2010 caters for the rights of the Ogiek as a community. It specifically recognises the diversity of languages of the people of Kenya and goes ahead to ascertain the promotion and protection of indigenous languages.<sup>70</sup> The recognition of culture as the foundation of the nation is stipulated in Article 11 of the Constitution and the state shall promote all forms of national and cultural expression through various ways including cultural heritage. In addition to the Constitution recognising the Ogiek as an indigenous community, they also fit into the

---

<sup>69</sup> Wanjala SC, '*Land ownership and use in Kenya: Past present and future*' in SC Wanjala Essays on land law, The reform debate in Kenya, 2000, 35

<sup>70</sup> Article 7, *Constitution of Kenya* (2010)

category of marginalised persons expressed in Article 280.<sup>71</sup> Article 280(c) defines a marginalised community as an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy.

Based on all of the above, the issue as to whether the Ogiek are an indigenous and marginalised community is totally ousted. The study has delved into deep research to prove that not only are the Ogiek Community marginalised but they are also an indigenous community facing discrimination. Further on, the right to own property is guaranteed in the Constitution and in any part of Kenya.<sup>72</sup> Property in this end includes but is not limited to land that has and still is of significant importance to the people of Kenya. Land in Kenya can be owned individually, communally or as a nation.<sup>73</sup> The Ogiek's claim to the East Mau area is that of an aboriginal title. The bone of contention rises where government forests that include water catchment areas like the East Mau area fall under public land with no exception availed to them to live in the Mau forest a community forest. However, an exception to forests that are not considered public lands are those which are lawfully held, managed or used by specific communities as community forests, grazing areas or shrines.<sup>74</sup> The Constitution further on stipulates community land as ancestral lands and lands traditionally occupied by hunter-gatherer communities. The Ogiek can be considered a forest community<sup>75</sup> and a marginalised community<sup>76</sup> thus ensuring their rights to live in co-existence with the forest and not face evictions.

On the face of it, all the above go ahead to portray laws that cater and vindicate the rights of the Ogiek community. However, in actual sense it portrays an arena of laws that conflict each other and in turn cut off the Ogiek from enjoying land rights as other communities do. The mere fact that they live in a water catchment area that falls under public land already cuts them off from accessing and claiming that the East Mau land rightfully belongs to them as a community.

---

<sup>71</sup> Article 280, *Constitution of Kenya* (2010) describes a marginalised community as : (a) a community that, because of its relatively small population or for any other reason, has been unable to fully participate in the integrated social and economic life of Kenya as a whole;

(b) a traditional community that, out of a need or desire to preserve its unique culture and identity from assimilation, has remained outside the integrated social and economic life of Kenya as a whole;

(c) an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy;

<sup>72</sup> Article 40, *Constitution of Kenya* (2010)

<sup>73</sup> Article 61, *Constitution of Kenya* (2010)

<sup>74</sup> Article 63 (2) (d)(i), *Constitution of Kenya* (2010)

<sup>75</sup> Section 3, Kenya Forest Act (2005) defines a forest community as one that have a traditional association with a forest for purposes of livelihood, culture or religion;

<sup>76</sup> Article 280, *Constitution of Kenya* (2010)

Another bone of contention is witnessed where the Constitution stipulates that community land is ancestral lands and lands traditionally occupied by hunter-gatherer communities. Without doubt the Ogiek held the East Mau area ancestrally though the dynamics looked at in chapter witnessed their dispossession over a long period of time till the present scenario. The Constitution goes ahead to specifically provide Articles that seem to protect the Ogiek but in actual sense it circumnavigates the issue as an arena of conflict of articles in the Constitution is widely revealed. The Constitution in the specific articles above go ahead to give right to community land for the Ogiek but the same articles conflict itself in as far as protection of their rights is concerned. They can be said to claim title in land under public land with the exception of them being a forest community as well as under community land as their claim is that of an ancestral tie to that land which they have traditionally occupied as a hunter-gatherer community.

**Do the legal instruments and provisions that have been enacted since pre-colonial times adequately cater for the rights of the Ogiek community sufficiently, specifically in relation to land as it caters for the rest of Kenyans?**

As already established, the Ogiek is a community with a long history of conflict and struggle aimed at sustaining their unity, identity and cultural distinction and most importantly preserving their ancestral lands.<sup>77</sup> One of the greatest struggles the Ogiek community has had is that of seeking protection and recognition of their traditional lands. The agitation began as early as colonial times when the Ogiek were regarded as primitive and in need of assimilation to become ‘useful citizens’.<sup>78</sup>

The Ogiek’s ancestral land was in the forest. Before the coming of colonialism, forests were managed by local communities under traditional resource management institutions.<sup>79</sup> Similar practices, norms and institutions were developed to govern access and use of forest products to ensure that the needs of local communities were met. Resource use was based on communal rules which laid emphasis on conservation for the benefit of both the present and future generations.<sup>80</sup>

---

<sup>77</sup> Kimaiyo T, *Ogiek Land Cases and Historical Injustices 1902-2004*, Egerton Nakuru, 2004, 4.

<sup>78</sup> The Report of the Kenya Land Commission (*Carter Report*), 1933, 259, para 973

<sup>79</sup> Sessional Paper No 1, *A Forest Policy for Kenya*, (Government Printer, Nairobi), 1968, 5

<sup>80</sup> Kenyatta Jomo, *Facing Mount Kenya: the traditional life of the Gikuyu*, East African Educational Publishers, 2015, 45.



Apart from this utilitarian approach, forests were also protected as ritual and cultural sites. There were sacred groves and religious taboos guiding forest management.<sup>81</sup> Land within forests was held communally and each person had rights of access based on his needs. Such access rights were guaranteed by a political authority which did not own land, but merely exercised political authority over land. The political authority facilitated the structural framework within which rights of access were to be enjoyed equitably.<sup>82</sup> The social and cultural life of each traditional society was thus important in influencing tenure systems and property relations in general.

The advent of the colonialists into Kenya set the primer to the historical land injustices faced by Kenyans as a whole and more specifically to this study, the Ogiek community. Prior to the coming of the colonialists, the Maasai in 1856 had already started the injustice faced by the Ogiek. They tried taking away their lands in Mau and Laikipia leading to clashes between the two warring factions and loss of Ogiek land and peoples around Lake Naivasha.<sup>83</sup> In 1903 the colonial administration started negotiations with the Maasai over the transfer of land. This culminated in an agreement signed in 1911 between the Maasai and the colonialists in which the Maasai handed over rights to land in Nakuru, Naivasha and Laikipia for the settlement of white farmers. Ironically it appears to have been lost to the colonial authorities that the land signed over by the Maasai was Ogiek land.<sup>84</sup> This effectively dispossessed the Ogiek of their ancestral lands and was a victory to the Maasai who had failed to forcibly take over these lands in the war of 1856. In 1932 another agreement between the Maasai and the colonial authorities gave out the Mau areas to the colonial settlers.

Further on in 1903 the colonial government attempted to move them out of the forests near the Kenya-Uganda railway line so as to safeguard firewood for their locomotives. Those who resisted were arrested or killed further reducing their population.<sup>85</sup> Between 1904 and 1911 the Maasai entered into agreements with the colonialist that led to the signing off of rights to land in Nakuru, Naivasha and Laikipia to settler farmers. This land deal led to the dispossession of the Ogiek and their first forcible eviction from their ancestral land between 1911 and 1914 to go and live with the Maasai.

---

<sup>81</sup> Among the Agikuyu ngai lived in the Mount Kenya forest. The kaya forests were also protected for cultural and religious reasons.

<sup>82</sup> Wanjala SC, *'Land ownership and use in Kenya: Past present and future'* in SC Wanjala Essays on land law, The reform debate in Kenya, 2000, 33.

<sup>83</sup> Sang 2001, 116

<sup>84</sup> Kimaiyo T, *Ogiek Land Cases and Historical Injustices 1902-2004*, Egerton Nakuru, 2004, 56.

<sup>85</sup> Sang 2001, 118

Post 1915 saw the colonial authority promulgate laws that vested all lands in Kenya to be crown lands. In essence this legitimized the dispossession of the Kenyans people land to being territory of the crown and reserves being created for the Kenyan population.<sup>86</sup> With high population in the land reserved for use by natives as they were called, Africans became more discontent and started agitating for the need to have more land if not their lands back. This led to the creation of the 1930 Native Lands Trust Ordinance but this did serve the Ogiek as they were not taken into account.<sup>87</sup> The colonialists instead sought to further evict them from the East Mau area and have them assimilated by other bigger communities. This was met with agitation and resistance from the Ogiek who resisted assimilation and eviction and finally a cease-fire agreement was entered into and the Ogiek were to appear before the Carter Land Commission to settle their land grievance issue.

While the Morris Carter Land Commission exclusively fought for the rights to land of African people and help set more reserves for Africans. The report recommended that the Ogiek should be moved to the reserves of the bigger communities with whom they had an affinity like the Maasai and the Kalenjin.<sup>88</sup> These recommendations were drawn from those of a committee made up of white settlers and colonial administrators who had expressed fears that should the Ogiek be left in the forests, their population would increase leading them to claim their land which was now under the white settlers. They saw the dispersal of the Ogiek to various different locations as a means of having them assimilated by bigger communities, hence reducing the possibility of claims to property rights to their ancestral lands.<sup>89</sup>

Post independent Kenya did not do much as to rectify the current land problem by giving title based on aboriginal title but it set out to carry on the grievances and injustices practised by the colonial tenure. They furthered on policies of the colonialists by availing individual land tenure system to Kenyans. This served to help the land reform process but its shortcoming was that it did not cater for Kenyans whose life circumnavigated around the communal tenure.<sup>90</sup> And when it availed community rights to some communities, it left with no rights to the land they were living in.

---

<sup>86</sup> Okoth Ogendo HWO, *'The imposition of property law in Kenya.'* in Burman Sandra and Barbara E, *The imposition of law*, Academic Press, 1979, 67

<sup>87</sup> Sang 2001, 120

<sup>88</sup> The Report of the Kenya Land Commission (*Carter Report*), 1933, 261.

<sup>89</sup> Barume A K, 'Land Rights of Indigenous Peoples in Africa : The case of the Ogiek of Kenya' , International Work Group for Indigenous Affairs, 2005,155.

<sup>90</sup> *Registered Land Act* of 1963 Cap 300.

The laws in Kenya have adversely affected the Ogiek's cultural way of life and resulting to violation of their rights. The Government Lands Act designated most of Mau Forest as government or trust land vested in the local authority in whose territory a respective part of the forest was and therefore they were dispossessed of their land since collective land rights were not recognised in Kenya at that time. In addition the Forest Act prohibits entry into and use of forest products without express authorisation by the government. This Act also declares the land occupied by the Ogiek, as protected area and thus they cannot access their medicine and food (honey and wild game meat).

There is also the Wildlife (Conservation and Management) Act which prohibits hunting in all its forms thus criminalizing a traditional way of life and increased wildlife conservation areas. According to these laws, the government is under no obligation to consult the Ogiek with reference to development projects because their ancestral land is either gazetted as national game reserves or as government forests. The recently enacted Community Land Act<sup>91</sup> was thought to resolve the conflict of laws portrayed in the Constitution regarding conflicts of community land that coincide with public land. But this was not the case as it remained silent on this issue. All these conflicting statutes dealing with land in Kenya need to be homogenised into laws that deal with the situation on the ground. This would adequately cater and solve the land rights problem revolving around the Ogiek community.

The Maasai also faced the same grievances as the Ogiek but the laws enacted favored them as compared to the Ogiek. The Maasai were always ready to fight for their rights to land and when they realized that several incursions were taking place on their land they created some sense of ownership on the part of the Maasai in their communal lands in the form of group ranches. The conversion of communal land holdings to group ranches was facilitated through legislation. This was primarily through the Land Adjudication Act of 1968, which provided for the recording of rights and interests in customary lands, their assignment to their customary users, and the Land (Group Representatives) Act, which provided for the governance and administration of group ranches which favored their pastoral way of life. Even with the coming of colonialists the Maasai made several agreements against and behind the Ogiek's back that saw the Ogiek being dispossessed of their ancestral land.

---

<sup>91</sup> *Community Land Act* (2016)

The Endorois community is a recent community that saw their rights to land being put into the same pool of table as the Ogiek community as the area bordering Lake Bogoria was gazetted and converted into a forest reserve area.<sup>92</sup> This effectively led to the dispossession of their ancestral land without adequate or due compensation. As agro-pastoralists, land, held collectively, was the most important source of livelihood and identity for the community. Lake Bogoria was significant as a source of water, medicinal saltlicks for livestock and a sacred site for religious and cultural rituals.<sup>93</sup> The forceful eviction therefore, led to loss of livelihood, culture and religion.

This led to the filing of the suit of *William Arap Ng'asia & 29 Others* suing on the behalf of over 43,000 other members of the Endorois Community against the Baringo County Council and Koibatek County Council of 1998.<sup>94</sup> This case lost in the Kenyan Courts as it was established that the disputed lands had been gazetted as a game reserve, and that according to Sections 114 and 115 of the repealed Kenyan Constitution, Trust Lands are vested in County Councils. However it was taken up by the ACHPR and it was held that the Endorois is an indigenous community that shouldn't be evicted from their ancestral land as that will be a violation of their human rights.<sup>95</sup>

Despite the victory that was achieved the Endorois community are still facing evictions and implementation of the decision by the Kenyan government is slow if not there at all.<sup>96</sup> This case is useful in analyzing the context in which the laws in Kenya cater for its community and to what extent they have a hearing hear towards indigenous communities against competing interests over the same land. The government was the major competing actor against the rights and interests of the Endorois towards the stated land. This is despite it legally being there ancestral home land before the gazettelement by the Kenyan government which was without due consideration.

---

<sup>92</sup> Makoloo Maurice, Yash P Ghai, *Kenya: Minorities, indigenous peoples and ethnic diversity*, London Minority Rights Group International, 2005, 3

<sup>93</sup> Barume A K, 'Land Rights of Indigenous Peoples in Africa : The case of the Ogiek of Kenya' , International Work Group for Indegenous Affairs, 2005,105

<sup>94</sup> *William Arap Ng'asia & 29 Others v. Baringo County Council and Koibatek County Council* [1998]eKLR

<sup>95</sup> Barume A K, 'Land Rights of Indigenous Peoples in Africa : The case of the Ogiek of Kenya' , International Work Group for Indegenous Affairs, 2005,109. The rights of the Ogiek that were being violated by the Kenyan government under the ACHPR included the provisions of Article 55 of the African Charter on Human and Peoples' Rights. The Endorois were seeking a declaration that the Republic of Kenya was in violation of the African Charter's Articles 8 (right to freely practice their religion), 14 (right to property), 17 (cultural rights), 21 (right to natural resources and in case of spoliation, the right to the lawful recovery of property as well as to an adequate compensation) and 22 (right to development).

<sup>96</sup> Kimathi Leah, 'Contesting Local Marginalization through International Instruments: The Endorois Community Case to The African Commission on Human and Peoples' Rights, (2012), 25.

Nonetheless, it still embarked to evict the Endorois community thus facing dispossession of land and adding up to one of the many plights of Kenyan communities who are facing land scuffles.

The Mijikenda community on the other hand is a privileged community compared to the Ogiek and Endorois. Since pre-colonial times they have lived in Kaya forests and had shrines within the forest that formed a substantial part of their cultural and religious way of life. Without a doubt they reside in the forest and most of their life circumnavigates around it.<sup>97</sup> However, an exception is provided to their case by Article 63(2)(d)(i) that states government forests does not include land that is lawfully held, managed or used by specific communities as community forests, grazing areas or shrines.

On a wider perspective, most if not all Kenyan communities are accorded either individual or community rights in respect to land. This mitigates the question of landlessness among Kenyan counties. However, the Ogiek are still landless and constantly facing evictions from the land they call as their ancestral land. All the above laws, agreements and comparisons with other Kenyan communities go ahead to ascertain the fact that the laws that have been enacted do not sufficiently protect or cater for the rights to land of the Ogiek. They have faced a myriad number of circumstances enforced by law that has seen the historical injustice they faced since the pre-colonial era continuing till now. They are one of the few Kenyan communities that are still landless and ‘squatting’ on what is their ancestral land that is tied to their cultural way of life.

The injustices have been carried forward from one era to another. If the Morris Cater commission would have listened to their grievances and resolved it by allocating the Ogiek community collective land rights over the East Mau area as a community forest then none of the injustices faced by the Ogiek would have been present. They would have enjoyed collective rights as a community forest pertaining to the East Mau as how the Mijikenda and other forest communities do.

---

<sup>97</sup> Githitho Anthony, ‘*Institutional challenges in conservation: the case of the sacred Kaya forests of the Kenyan coast*’ *The World Bank Initiative*, (2004), 4.

## CHAPTER 4: DISCUSSION

This chapter will focus on the need for legislation that is coherent in relation to the rights of indigenous communities. This chapter will give an overview of the discussions made in all other chapters and thus make findings on all the issues which have been assessed throughout the research.

As deduced from previous chapters the Ogiek are an indigenous community and have lived in the now gazetted Eastern Mau forest before 1800AD. But due to the pressures from the Colonialists they were assimilated into other neighbouring communities and they are slowly becoming extinct with just about 20,000 of them remaining now.<sup>98</sup> The land was held and owned communally and administered using customary law. Their social, economic, cultural and religious way of life revolved around and inside the East Mau forest.<sup>99</sup>

The coming of the colonialists saw all land in Kenya being declared as crown land. Africans were dominated and assimilated by Western practices and laws. Land has always been at the fulcrum of most African communities and when the colonialists came they saw opportunity for the lands to be put to better practise and use via large scale agriculture. This had the effect of Africans being forced out to Native reserves which were less productive and fruitful. Colonialisation came with domination. The whites majored on the divide and rule method to conquer Africans and gain full control of them. This led to new policies like the paying of hut tax and working of white highlands so as to earn money for survival.<sup>100</sup>

The coming of colonialist's only aggravated the flight and plea of the Ogiek community. The Maasai continued taking advantage of their dominance over them plus the fact that the colonialists considered the Ogiek to be a barbaric community made it easier for their dispossession of land to happen easier compared to most Kenyan communities. This set the primer for the series of historical injustices that were to face this community.

---

<sup>98</sup>Kameri Mbote Patricia, *'Following God's constitution: The gender dimension in the Ogiek claim to Mau forest complex'*, (2006), 3.

<sup>99</sup>Joseph Sang, *'Case study 3 Kenya-The Ogiek in Mau forest in Indigenous peoples and protected areas in Africa'*, 2003, 115

<sup>100</sup> *Hut Tax Regulations Number 18 of 1901*, 5

It was not long before the communities in the Native reserves started complaining of adjudication of more land to them and even the return of their indigenous land to them.<sup>101</sup> This led to tension in the reserves and in 1930 the Native Lands Trust Ordinance was formed.<sup>102</sup> This did little to ease the tension as clearly it favoured colonial demands and interests over demands of the indigenous communities. Accordingly the Morris Carter Land Commission<sup>103</sup> was accordingly set up and made several recommendations that sought to address some of the natives' grievances; principally the need for more land and rights. The Ogiek again were not taken into account despite witnesses from their community being called to testify on their tie to that particular land. The report recommended that the Ogiek should be moved to the reserves of the bigger communities with whom they had an affinity like the Maasai and the Kalenjin.<sup>104</sup>

Post independent Kenya adopted colonial policies and laws with regard to land with minimal reformation on the land issue. They did not do much to rectify the current land problem by giving title based on aboriginal title but it set out to carry on the grievances and injustices practised by the colonial tenure. This and a multiplicity of other laws enacted post-independence saw the Ogiek continue bearing the title of 'squatters' on their ancestral lands. Their land was declared forest land and that their persistent plea to live within the forest was thought to be detrimental to the prosperity of the forest. This was a contrary opinion to the facts on the ground as the Ogiek's co-existence with the forest one was one that favoured the thriving of the forest as it formed their only livelihood. The gazettement of the East Mau area as a forest reserve sealed the fate of the Ogiek community. They were not availed the opportunity to live in the forest as forest community. This and several other laws that have been enacted from the colonial era to the current era have seen the Ogiek being dispossessed of their lands and the laws and policies enacted not being in their favour.

---

<sup>101</sup>Tim Mweseli 'The centrality of land in Kenya: Historical background and legal perspective' in SC Wanjala Essays on land law, The reform debate in Kenya, 2000, 4.

<sup>102</sup> See for example the Devonshire White Paper of 1923 providing that Kenya was an African country and native rights were paramount; Hilton Young Commission Report of 1929 endorsing the white highlands and native reserves and called for satisfaction of native requirements.

<sup>103</sup> The Report of the Kenya Land Commission (*Carter Report*), 1933, 260.

<sup>104</sup> The Report of the Kenya Land Commission (*Carter Report*), 1933, 261.

In the case of *Letuya & 21 others v Attorney General & 5 others*<sup>105</sup> the government of Kenya started allocating individual land plots to non Ogiek members in and around the Mau Forest, on land the Ogiek consider as their ancestral lands. Large numbers of non Ogiek presented as landless were being settled on the disputed lands. Following these land allocations, some members of the Ogiek indigenous community started being forcibly evicted. The Ogiek found that these actions by the government amounted to a violation of their customary rights in the disputed land. The Ogiek claimed that several of their rights had been violated and closer to this dissertation is that Sections 78 and 82 of the repealed Constitution protects each community's right to live in accordance with its culture; and to them that was living a life that co-existed with forest. At first in 1997 the case as ruled to their favor and that the land allocations should halt. However in 2001, 35,000 hectares of that same disputed land was to have its boundaries altered and put to use by the government. The Ogiek asked the Court to halt that decision as it was contrary to the 1997 ruling but the Ogiek eventually lost the case and eventually were dispossessed of more land.

Another case showing the plight of the Ogiek community is that of *Francis Kemei, David Sitienei and Others v The Attorney General & 3 others*.<sup>106</sup> This Court case was initiated by ten plaintiffs representing 5,000 other members of the Ogiek community of the Tinnet Forest in south western Mau Forest, one of the sections of the lands the Ogiek peoples claim as their ancestral lands and on which they have lived since time immemorial.

After being declared and gazetted as Forest Reserve during colonial time, there were numerous unsuccessful attempts in the early 1990s to evict the Ogiek from the disputed lands. Even when the government managed to evict some, they returned into the forest almost immediately. According to the Forests Act (Cap 385), no cutting, grazing, removal of forest produce or disturbance of the flora is allowed in such natural reserves, except with the permission of the forest authorities. It is also prohibited to be found in a forest area between 9 p.m. and 6 a.m. Similarly, it is strictly prohibited building within a gazetted forest.

In 1999, the government of Kenya through the District Commissioner issued a 14 days ultimatum. A few days later, the ultimatum was followed by another order to vacate the disputed

---

<sup>105</sup> *Joseph Letuya & 21 others v Attorney General & 5 others* [2014] eKLR

<sup>106</sup> *Francis Kemei, David Sitienei and Others v The Attorney General & 3 others* [1999] eKLR



lands or risk a forceful eviction by the government. In prevention of such a strong action by the Government, ten members of this Ogiek community decided in June 1999 to challenge the threat of eviction in Court. In so doing, the plaintiffs, who managed to also represent 5,000 other members of their community, alleged that they depend, for their livelihood, on this forest since they are primarily food gatherers, hunters, peasants farmers, beekeepers and their culture is associated with this forest where they have their residential houses. They argued that their culture is basically concerned with the preservation of nature so as to sustain their livelihood and that the Tinnet Forest was their ancestral land on which they depend for physical and spiritual survival.

The Court again ruled against them like in the case above. The Court asserted the fact that those lands are not their ancestral lands and that they were in the forest illegally. The Court also found that no discrimination was taking place as rights in the Constitution are subject to limitations designed to ensure that their enjoyment by individuals does not prejudice the rights and freedoms of others or public interests. Meanwhile serious logging and destruction of the Mau forest continued taking place. This led to the formation of the Task Force on the Conservation of the Mau Forest Complex that recommended evictions should be carried out so as to protect and conserve the Mau forest as it is one of the major water catchment areas in the country.

This prompted the Ogiek to initiate litigation before the African Commission and provisional measures were subsequently issued by ACHPR urging the Kenyan government to desist from any action to remove the Ogiek from their ancestral land pending the determination of the case by the Commission. The African Court, following the line of arguments presented by the African Commission on Human and Peoples' Rights, ordered the government of the Republic of Kenya to immediately halt any eviction of Ogiek from their ancestral forests and postpone any distribution of land in the contested forest area, pending the decision of the Court on the matter. The order also enjoins the government of Kenya to report on execution of the measures in 15 days.<sup>107</sup>

The Constitution of Kenya 2010 was thought to be the culmination of the historical injustices faced by the Ogiek community. But this was not the case. In appreciation, it included provisions that clearly dispelled the fact that the Ogiek are not an indigenous and marginalised community in Kenya. But it did not do anything to mitigate their land scuffle. What is present in the

---

<sup>107</sup>African Court on Human and Peoples' Rights v. Government of Kenya (2013) accessed at [http://www.african-Court.org/en/images/documents/Orders-Files/ORDER\\_of\\_Provisional\\_Measures\\_African\\_Union\\_v\\_Kenya.pdf](http://www.african-Court.org/en/images/documents/Orders-Files/ORDER_of_Provisional_Measures_African_Union_v_Kenya.pdf) on 16<sup>th</sup> December 2016

constitution is a number of laws that seem to cater for the rights of the Ogiek but it doesn't. They have been residing in the forest since time immemorial yet Article 63 (2) (d) (i) provides an exception to only land that is lawfully held, managed or used by specific communities as community forests, grazing areas or shrines. Further on Article 63 (2) (d) (ii) asserts community land as land that is ancestral lands and lands traditionally occupied by hunter-gatherer communities. Yet still the Ogiek are squatters on their own land. The Community Land Act was another key instrument that was thought will tackle the uncertainties over the land question and help the plight of this community but it also remained silent on this issue.

As portrayed above and in previous chapters, the laws that have been enacted do not cater and protect the rights to land of the Ogiek as is accorded to other communities. Instead a myriad of laws that are enacted seem to do more injustice to the Ogiek than the justice they should serve. Also the Courts are reluctant in vindicating the rights of this community. As it has been seen on two occasions, the Court ruled against the Ogiek's claim to their ancestral land which is a clear contravention of their rights that has been affirmed by the African Court on Human and Peoples' Rights.

The Courts is the place where all Kenyans can get justice served to them but if our own Kenyan Courts can't recognize the rights to land of the Ogiek it begets the question of sanctity of impartiality and justice being served to all without discrimination. The Courts have a duty to protect marginalised groups through progressive interpretation of the existing legal framework. The Ogiek is a Kenyan community that has lived in co-existence with the Mau forest since time immemorial and the Kenyan Courts do not need the decision and affirmation of African Court on Human and Peoples' Rights to make them realise and vindicate this right. The Courts should wright the wrongs of the previous eras and the historical injustices faced by this community. Their right to land should not be neglected just by the fact that they are a minority in Kenya.

## CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

In conclusion this study has made a case for the protection of one of the core rights of indigenous communities, namely the right to their traditional and ancestral land. As it has been revealed throughout the study, the Ogiek was and still is an indigenous community facing the same land grievances since the precolonial era. The post-independence government and the laws and provisions that have been enacted since then have not done much to resolve this concern. What has happened instead is a myriad of laws that seem to protect their rights to land but in actual sense that is not the case. Particularly of concern to this study is the Constitution of Kenya portraying a conflict of laws in Article 62(g) when read alongside Article 63(2)(d). There is a great need for the laws regarding indigenous communities to be homogenised into one authoritative law so as to oust out the gap in the laws portrayed and thus effectively safeguard the rights of such communities.

This study has gone ahead to reveal the fact that not only do the Ogiek community face discrimination in law but also in fact. The legal framework that has been employed since the pre-colonial era has also not done much to escalate the vindication and protection of the Ogiek's right to their ancestral land. What has in fact happened is that the legal framework both in the law and its application have gone ahead to marginalise this community. The study also revealed that there is a general tendency of discrimination towards other indigenous communities in Kenya.

Through the case study of the Ogiek community it has revealed how the Court and Kenya as a whole has a narrow interpretation of the legal framework in place with regard to the question of the rights to land of indigenous communities. In order for the Courts to redress discrimination and dispossession they have a duty to ensure they implement progressive interpretation of the existing legal framework. The Courts have shown a constant reluctance to rule in favor of indigenous communities when it comes to their right to land. This plus the laws in place have effectively dispossessed the Ogiek of their ancestral land.

## **Recommendations**

1. There is need for the recognition both in law and practice that Kenya has not only marginalised communities but indigenous communities exist and with such recognition will come the safeguarding of their rights.
2. The conflict of laws portrayed in the Constitution should be addressed so as to effectively protect and safeguard the rights of the Ogiek. The revisiting of the conflict portrayed in the Constitution will go a long way in ensuring their historical injustice is curbed and an exception to their land being a public land guaranteed. demarcate an area within the forest to act as their home, like any other community in Kenya, and by conserving the remaining forest. This will reduce the number of people posing as Ogiek so as to be given squatter status as they encroach on land and finally destroy the forests.
3. The National Land Commission as mandated should effectively initiate investigations into past and present historical land injustices facing the Ogiek and recommend appropriate redress so as to curb the problem of landlessness facing the Ogiek community.
4. Part of the gazetted forest land should be converted into community land for the Ogiek and the original Ogiek families identified so as to avoid a free rider problem that will only augment their land grievances. A portion within the forest should be demarcated to act as their home, and strict policies should be set up to ensure the conservation of the remaining forest as it is a major water catchment area. This will effectively reduce the number of people posing as Ogiek so as to be given squatter status as they encroach on land and finally destroy the forests.
5. The laws dealing with indigenous and marginalised communities need to be homogenised into one single statute that encapsulates all their rights. This will minimize and avoid a myriad of laws that end up creating a gap in the legal framework which trickles down to improper implementation of laws.
6. There should be co-managing of selected forests with community forest associations. These associations are to be formed by communities living adjacent to the selected forests. However, special arrangements are to be made in the case of forests considered as important water catchment areas like the Mau forest. This will ensure the forest is managed well while also catering for forest communities.

7. The Courts need to recognize indigenous community rights and implement justice that will serve this community without regard and discrimination because of competing interests of state actors.

## **Bibliography**

### **Books**

Kameri Mbote Patricia, *Following God's constitution: The gender dimension in the Ogiek claim to Mau forest complex* International Environmental Law Research Centre, 2006.

Lâm, Maivân, *At the edge of the state: indigenous peoples' and self-determination*, New York Transnational Publishers, 2000.

Tom O. Ojienda, *Principles of Conveyancing in Kenya: A practical Approach*, LawAfrica Publishing ,2007.

Barume A K, *Indigenous Battling for Land Rights: The case of the Ogiek of Kenya*, The International Work Group for Indigenous Affairs, 2005.

Kimaiyo, T, *Ogiek Land Cases and Historical Injustices 1902-2004*, Egerton Nakuru, 2004.

Blackstone W, *Commentaries on Laws of England*, Clarendon Press, Oxford, 1809.

Yeoman G H, *High Altitude Forest Conservation in Relation to Dorobo Peoples*, Kenya Past and Present, 1993

Kenyatta Jomo, *Facing Mount Kenya: the traditional life of the Gikuyu*, East African Educational Publishers, 2015.

I Cotler & F P Eliadis, *International Human Rights Law: Theory and Practice*, Canadian Human Rights Foundation, Montreal, 1992.

Ghai YP and McAuslan, *Public law and political change in Kenya: A study of the legal framework of government from colonial times to the present*, Oxford University Press ,1970

Makoloo Maurice, Yash P Ghai, *Kenya: Minorities, indigenous peoples and ethnic diversity*, London Minority Rights Group International, 2005

Okoth Ogendo HWO, *The imposition of property law in Kenya*, Academic Press, 1979

Tim Mweseli, *The centrality of land in Kenya: Historical background and legal perspective*, 2000

I Cotler & F P Eliadis, *International Human Rights Law: Theory and Practice*, Canadian Human Rights Foundation, Montreal, 1992.

Smokin C. Wanjala, *Essays on Land Law: The Reform Debate in Kenya*, 2000.

Wanjala SC, *Land ownership and use in Kenya: Past present and future* ' 2000.

## **Reports**

Devonshire White Paper of 1923

Hilton Young Commission Report of 1929

The Morris Carter Land Report

Kenya Land Commission Final Report, 1933

Roger Southall, 'The Ndungu Report: Land & Graft in Kenya' *Review of African Political Economy* (2005).

Sessional Paper No 1, A Forest Policy for Kenya, 1968,

Kenya Land Commission Final Report, 'Evidence from the Dorobo', Vol. 3, Kenya National Archives, 17 October 1932.

Prime Minister's Task Force on the Conservation of the Mau Forests Complex, (2009).

Blackburn Roderick, "A preliminary report of research on the Ogiek Community of Kenya " (1970).

## **Journals**

DE Sanders, 'Indigenous peoples': issues of definition' *International Journal of Cultural Property* (1999).

'Reassessing Kenya's Land Reform' The Point, *Bulletin of the Institute of Economic Affairs*, (2000)

Frederic Jenny, 'Cartels and Collusion in Developing Countries: Lessons from Empirical Evidence', *World Competition Journal* (2006).

HWO Okoth-Ogendo, 'The nature of land rights under indigenous law in Africa: Land, power & custom controversies, (2008)

Githitho Anthony, 'Institutional challenges in conservation: the case of the sacred Kaya forests of the Kenyan coast' *The World Bank Initiative*, (2004)

Hughes L, 'Moving the Maasai: A colonial misadventure' *Palgrave Macmillan Journal* (2006)

Onyango, Peter. 'Balancing of Rights in Land Law: A Key Challenge in Kenya.', ." *Sociology and Anthropology Journal* 2, no. 7 (2014)

Kimathi Leah, 'Contesting Local Marginalization through International Instruments: The Endorois Community Case to The African Commission on Human and Peoples' Rights, (2012),



Wanjala SC, 'Themes in Kenya land reform' in SC Wanjala Essays on land law, *The reform debate in Kenya*, (2000).

Wanjala SC, 'Problems of land Registration and titling in Kenya' in SC Wanjala Essays on land law, (2000).

Ohenjo N, 'Kenya's Castaways: The Ogiek and National Development Processes', (2003).

Joseph Sang, 'Case study 3 Kenya-The Ogiek in Mau forest in Indigenous peoples' and protected areas in Africa, 2003.

T Ojienda, 'Customary Land Rights and the Adjudication Process: Reviewing the Procedure for Ascertaining and Recording Land Rights in the Light of Customary Claims', in *Land Law Reform in Kenya, Vol. 2 The Law Society of Kenya Journal*, (2003),

## **Table of Cases**

*Isaka Wainaina wa Gathomo and Kamau wa Gathomo v Murito wa Indangara, Nganga wa Murito and Attorney General* [1923] eKLR

*Joseph Letuya & 21 others v Attorney General & 5 others* [2014] eKLR

*Francis Kemei, David Sitienei and Others v The Attorney General & 3 others* [2014] eKLR

*William Arap Ng'asia & 29 Others v. Baringo County Council and Koibatek County Council* [1998] eKLR

## **Table of Statutes and Legal Instruments**

Constitution of Kenya Review Act (Cap 3A of 2000).

Constitution of Kenya, Revised Edition (1998) 1992.

Crown Lands (Amendment) Ordinance 1938.

Community Land Act (2016)

Devonshire White Paper of 1923.

Evidence Act (Cap 80).

Forest Act (Cap 385).

Government Lands Act (Cap 280).

Hilton Young Commission Report of 1929.

Hut Tax Regulations Number 18 of 1901.

Kenya (Highlands) Order in Council 1939.

Kenya (Natives Areas) Order in Council 1939.

Land (Group Representatives) Act (Cap 287).

Native Hut and Poll Tax Ordinance Number 2 of 1910.

Native Lands Trust (Amendment) Ordinance 1934.

Native Lands Trust Ordinance 1938.

Native Registration Ordinance Number 1915 and 1921.

Registered Land Act (Cap 300).

Registration of Documents Act (Cap 285).

Registration of Titles Act (Cap 284).

Trust Land Act ( Cap 288).

Wildlife (Conservation and Management) Act