



Local communities' and indigenous peoples' land and forestry rights

Assessing the law and practice on tenure security in Kenya

Robert Kibugi



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Photo by Robert Kibugi

A Glade in the Kipkunur Block of Embobut Forest, Elgeyo Marakwet County, Kenya

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Executive summary

This study aimed to understand whether, and to what extent, Kenyan legal provisions are sufficient to secure community land rights, particularly those of indigenous peoples and local communities. It assesses the adequacy of Kenya's legal framework for protecting and promoting tenure rights of forest communities, including over protected areas. Kenya's current Constitution was promulgated into law in August 2010. In order to implement its provisions, various land laws have been enacted and a number of institutions, such as the National Land Commission (NLC), have been set up to govern the administration and management of land rights in Kenya. Nonetheless, historical challenges to guaranteeing community land rights remain. In particular, challenges resulting from the slow pace of Kenya in ascertaining, adjudicating and registering community land rights. There is an enduring problem pertaining to historical land injustices, where certain indigenous peoples and local communities have sought formal recognition of their land rights over areas classified as public land, which are managed mainly as public forests or national wildlife reserves. Three key indicators were identified to evaluate the levels of protection and securing of community land and forest tenure rights, as follows:

- **Indicator 1:** the scope and security of tenure, under the Community Land Act
- **Indicator 2:** the legal status and protection of indigenous peoples' (forest peoples') tenure rights
- **Indicator 3:** community participation in management of public forests.

Property rights in Kenya are protected by the Constitution (2010) and classified as a human right. This is set out in the Bill of Rights, which contains extensive provisions regarding property rights and other critical human rights. Article 40 provides the right, for every person, either individually or in association with others, to acquire and own property of any description and in any part of Kenya. There is protection of land rights against arbitrary deprivation by the State, unless this results from compulsory acquisition for public purposes or in the public interest. Further, compensation may be paid to occupants of land that is acquired for a public purpose or public interest who may not hold title to the land, provided such occupation is in good faith. Where persons occupying land have no title and may be evicted in the public interest, the Supreme Court has ruled that such persons can seek protection of the court in terms of compensation, adequate notice before eviction, the observance of humane conditions during eviction and the provision of alternative land for settlement.

Land in Kenya is either public, private or community. This study focuses on public and community land. Indigenous peoples and other local communities have interests and claims over lands in these two categories. The Constitution requires communities to be identified on the basis of ethnicity, culture or similar community of interest. Indigenous communities are defined through the lens of marginalization as having retained and maintained a traditional lifestyle and livelihood based on a hunter-gatherer economy. Kenyan courts have expanded on this by adopting the 1989 ILO Indigenous and Tribal Peoples Convention.

The scope of land tenure rights discussed here includes the establishment and implementation of statutory, customary or hybrid rules to define how property rights to land are to be allocated. Further, it defines how access is granted to the rights to use, control and transfer land. The paper examines the bundle of rights that comprise tenure, including the degrees of completeness. It then reviews the parameters of tenure security

which reinforce land tenure rights. Based on this analysis, it is apparent that certain local communities already have *de facto* possession and occupation of land, and implementation of community land rights may only clarify the bundle of rights or enhance tenure security. Consideration must be given to the potential risk that formal registration could result in landlessness, as communities opt for individual holdings that they eventually sell.

The analysis demonstrates there are improvements in legal protection for indigenous communities. This includes the recognition of indigenous status. Nonetheless, a legal conundrum results from how Kenyan courts have interpreted the law concerning claims by certain indigenous communities over land falling under article 63(2)(d)(i) of the Constitution. These are lands mainly classified as public land or forests – and according to the courts no land rights have accrued despite recognition of long historical ties to such land. This approach contrasts with the view taken by the African Court, concerning the Ogiek of Mau, where the court determined that certain (albeit limited) tenure rights have accrued to the community. The African Commission, with respect to the Endorois, recommended that Kenya recognized their ownership over Lake Bogoria and instituted land restitution. The courts' preferred approach is for indigenous communities to first petition the NLC to determine their land claims as historical land injustices, and thereafter request Parliament to approve revocation of forest status on the land. It is only then that such land can be transferred formally to the specific indigenous community. This approach, while potentially intended to protect the environmental functions of forests, places a major burden on indigenous communities seeking equality in recognition of their land rights.

1 Introduction

This study aimed to understand whether, and to what extent, Kenyan legal provisions are sufficient to secure community land rights, particularly those of indigenous peoples and local communities. The research examined the legal framework in Kenya, based on the Constitution (2010), and highlighted that land tenure is a question of fundamental human rights that are guaranteed for each person in Kenya. In addition, the Constitution guarantees the equality of all persons and prohibits discrimination on any grounds, including ethnicity. It reforms land rights, by introducing community land, in addition to public and private land categories.

This study aimed to assess the adequacy of Kenya's legal framework in protecting and promoting tenure rights of forest communities, including over protected areas. It was guided by five specific objectives:

- (i) To identify and analyze existing State legislations (laws, regulations and policies) that establish statutory tenure regimes recognizing rights of indigenous and other forest communities
- (ii) To analyze the extent to which rights recognized in regulations account for the different bundle of rights in relation to land and forests (scope of rights granted) and develop indicators that evaluate the existence of such provisions in regulations
- (iii) To determine the extent to which these legal provisions provide the basis for ensuring tenure security
- (iv) To identify existing incongruities, gaps and inconsistencies in regulations relevant to collective forest tenure reform across different sectors and levels of governance
- (v) To identify changes of regulations and their impact on the recognition of bundle of rights and tenure security.

Kenya's current Constitution was promulgated into law in August 2010. In order to implement its provisions, various land laws have been enacted, and a number of institutions, including the National Land Commission (NLC) have been set up to govern the administration and management of land rights in Kenya. Nonetheless, historical challenges to guaranteeing community land rights remain. These include challenges resulting from the slow pace of ascertaining, adjudicating and registering community land rights. There is an enduring problem pertaining to historical land injustices, where certain indigenous peoples and local communities have sought formal recognition of their land rights over areas currently classified as public land, which are managed mainly as public forests or national wildlife reserves.

This was the case for the Ogiek community who secured a judgment in their favor at the African Court on Human and Peoples Rights in May 2017. The legal impact of this decision, which recognized that Kenya has violated the property rights of the Ogiek community in the Mau Forest, must however be seen in context of similar judgments by Kenyan courts. Therefore, this study analyzed judgments concerning the Ogiek and the Sengwer communities. Similarly, in 2010, the decision of African Commission on Human and Peoples Rights concerning the Endorois community is examined.¹ The import of this decision to the community land tenure rights is discussed later.

The focus of the paper is the land and forest rights of indigenous peoples and local communities. For the former, the constitutional definition refers to

¹ Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council v Kenya Communication 276/2003.

the indigenous community and therefore in this paper the terms indigenous peoples and indigenous communities are used interchangeably. The analysis in Section 4 begins with a review of the legal definition of indigenous peoples in Kenya, the distinction between global and treaty practice, and how courts have framed the definition.

This study reviewed the country's legal framework governing land administration. It also reviewed the framework, under forestry law, which permits forest-adjacent communities to access and participate in the management of public forests. This includes the controversial non-resident cultivation system that has been blamed for facilitating forest encroachment and degradation. This is because local or forest-adjacent communities enjoy either customary rights of access or statute defined access and user rights in public forests.

Three key indicators were identified as the basis for evaluating the levels of protection of community land and forest tenure rights:

- **Indicator 1:** the scope and security of land tenure under the Community Land Act
- **Indicator 2:** the legal status and protection of indigenous peoples' (Forest Peoples) tenure rights
- **Indicator 3:** the level of community participation in managing public forests.

These are all qualitative indicators. They were evaluated by reviewing the legal provisions. The study is thus a desk review of Kenya's legal and policy framework on land and forest tenure rights of communities. This study is widely informed by secondary literature and analysis of judicial decisions in order to comprehend the practice.

The paper is divided into five main sections with Section 6 presenting the conclusions. Section 2 analyzes the legal framework relating to tenure of communities and indigenous people. Sections 3, 4, and 5 deal with the three key indicators.

2 The legal framework of tenure rights of communities and indigenous people

This section provides an overview of the legal framework for land tenure and administration in Kenya. This relates to the land rights of indigenous people and local communities.

2.1 Constitutional governance of land tenure

The ownership, holding and use of land in Kenya is, historically, grounded in constitutional provisions. Section 19 of the 1963 Independence Constitution of Kenya included protection of property of any description, including land, from compulsory acquisition except where this was necessary to promote the public benefit. This was only permitted when the necessity in question was reasonable, and there was payment of prompt compensation. Section 75 of the 1969 Constitution, which was in force until 27 August 2010, provided similar protection to property rights from arbitrary deprivation, and required compulsory acquisition to be applied only where there was a public benefit, and upon payment of prompt compensation.

The current Constitution of Kenya, in force since 27 August 2010, makes extensive provisions regarding general property rights, and land tenure rights. In particular, the Constitution addresses the classification of land as either public, private or community. The Constitution further provides a legal definition of the term community; and as discussed, addresses the question of community tenure rights over certain types of forests, and the rights of indigenous peoples, forest communities and local communities.

2.1.1 Protection of property rights as a human right

Property rights in Kenya are protected by the Constitution and classified as a human right. This is set out in the Bill of Rights, which contains extensive provisions regarding property rights, and other critical human rights that are analyzed below.² These rights impact the access to and security of land tenure by various individuals and communities.

The right to own property of any description, in any part of Kenya and its limitations

Article 40 provides a right, for every person, either individually or in association with others, to acquire and own property of any description and in any part of Kenya. This includes property rights in land, but there is a clear exception or limitation under article 65 which restricts the land rights of non-citizens only to acquisition of leasehold tenure, for periods not exceeding 99 years.

Article 40(3) provides important protection to land rights against arbitrary deprivation by the State, unless this results from compulsory acquisition for public purposes or in the public interest. There should be prompt payment of just compensation to the affected person. It is important to note that a 2019 law, the Land Value Amendment Act, amended the Land Act 2012 to provide a new definition of prompt payment to mean “within a reasonable time of, and in any case not more than one year after,

² Constitution of Kenya, 2010, Cap 4.

the taking of possession of the land by the NLC”.³ This presents a risk in terms of the meaningfulness of the compensation, since the landowner has to vacate the land and lose its use, without any help to transition to a different place or lifestyle, and delayed transmission of compensation.

In addition, any affected person that believes any elements of their right to property have been violated through a compulsory acquisition process can access a court of law for redress. However, recent (2019) changes in law, through the Land Value (Amendment) Act, have introduced new requirements for compulsory acquisition disputes: NLC decisions have to be determined by a Land Tribunal. This concerns disputes relating to the compulsory acquisition of land.⁴ In situations where the Land Tribunal is of the view that the sum which ought to have been awarded as compensation is greater than that awarded by the NLC, the Tribunal is empowered by law to direct the Commission to pay interest on the excess amount.⁵ This Land Tribunal is empowered to confirm, vary or quash the decision of the Commission.⁶ Prior to the 2019 amendments, any dispute arising out of the compulsory acquisition process was subject to the jurisdiction of the Environment and Land Court.⁷ This pathway is retained for other disputes under the Land Act, while compulsory acquisitions disputes must first be determined by the Tribunal, with appeal to the Environment and Land Court.⁸

Article 40(4) allows for situations where compensation may be paid to occupants of land that is acquired for a public purpose or public interest, who may not hold title to the land, provided such occupation is in good faith.

This provision also concerns people occupying public lands. In a January 2021 decision, *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa*

(*Amicus Curiae*), Kenya’s Supreme Court ruled that:⁹

... where the landless (people) occupy public land and establish homes thereon, they acquire not title to the land, but a protectable right to housing over the same. Why, one may wonder, should the illegal occupation of public land give rise to the right to shelter, or to any right at all.

The Constitution has radically transformed land tenure in the country by declaring that *all land in Kenya belongs the people of Kenya collectively as a nation, communities and individuals*. It also now creates a specific category of land known as *public land*.¹⁰ Therefore, every individual as part of the collectivity of the Kenyan nation has an interest, however indescribable, however unrecognizable, or however transient, in *public land*.

Thus, according to the Supreme Court, this right gained by residents of an informal settlement over public land crystallizes by virtue of a long period of occupation by people who have established homes and raised families on the land. The right derives from the principle of equitable access to land under article 60(1)(a) of the Constitution.

This holding by the Supreme Court is important for indigenous peoples and those local communities seeking to enforce land rights under article 63(2)(d) of the Constitution (discussed further in Section 4). This is either community land that is (i) lawfully held, managed or used by specific communities as community forests, grazing areas or shrines; or (ii) ancestral lands and lands traditionally occupied by hunter-gatherer communities, which may have been occupied for long periods by specific communities, but without formal adjudication, registration and issuance of title to such land.

The importance is premised on a key plank of the judgment in *Mitu-Bell*. Even without land tenure rights, potential evictees have a right to petition the court for protection. This can be either a restraint on the State from eviction (except where

3 Land Value (Amendment) Act, 2019, § 2.

4 Land Value (Amendment) Act, 2019, § 133C.

5 Land Value (Amendment) Act, 2019, § 133C (5).

6 Land Value (Amendment) Act, 2019, § 133C (7).

7 Land Act, 2012, § 128.

8 Land Value Amendment Act § 133E.

9 *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* [2021] eKLR, para 151.

10 Constitution of Kenya, 2010, art. 62.

it is justifiable in the public interest) or, under article 23(2) of the Constitution, the court may craft orders aimed at protecting that right, such as requiring compensation, adequate notice before eviction, the observance of humane conditions during eviction, the provision of alternative land for settlement, etc.¹¹

Protections from discriminatory treatment and definition of marginalized communities and groups

Article 27 of the Constitution affirms the equality of all persons before law, and freedom from discrimination, including an assertion that “women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres”.¹² Further, article 27(4) expressly bars the State from discriminating directly or indirectly, against any person on any ground, including, among others, ethnic or social origin, age, culture, language or birth. Culture is, for instance, recognized by the Constitution, as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation.¹³ This means that while each person is entitled to enjoy their culture and use their language, the use of this to discriminate against others is prohibited.¹⁴ Further, while traditional dispute resolution mechanisms are permitted by the Constitution, their utility is proscribed where they are repugnant to justice and morality or result in outcomes that are repugnant to justice or morality.¹⁵

This prohibition of discriminatory elements in any action taken by the State is important because it is reiterated by the Constitution in the context of property rights. Article 40(2) (b) of the Constitution clearly bars Parliament from enacting a law that permits the State or any person to limit or in any way restrict enjoyment of any right under article 40 on the basis of any of the grounds specified or contemplated in article 27(4). For clarity, this would mean that

any legislation on property rights, including land tenure, which discriminates against certain people including on the grounds specified in article 27(4) would be unconstitutional. Importantly, while marginalization is not included in these grounds, discrimination on the basis of ethnic or social origin is proscribed. In addition, article 56 of the Constitution affirms the rights of minorities and marginalized groups and requires Kenya to implement various affirmative actions to fulfill these rights. Indigenous communities are recognized under Kenya's Constitution through the lens of marginalization, and the courts have broadened this definition to include international law characterization of these communities. This status and relation to land and forest tenure rights is reviewed in Section 4 of this paper.

It is important to emphasize that regardless of how the marginalization occurred, the obligations in article 56 on affirmative action and requirements for equality of persons and non-discrimination are core to Kenya's obligations to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights.¹⁶

The right to a clean and healthy environment, and corollary duties

The Constitution, through article 42 (part of the Bill of Rights), grants a specific right to a clean and healthy environment to every person. Article 42 provides that the environmental right shall be realized through legislative and other measures, particularly those contemplated in article 69, which highlights two sets of obligations.

The first set of obligations, in article 69(1), outlines obligations on the Kenyan State, which are mandatory, as evident in the use of the word “shall”. Four of these obligations are relevant to this research. They require the State to (i) ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources; (ii) work to achieve and maintain a tree cover of at least 10% of the land area of Kenya; (iii) protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities; and (iv) encourage public participation in the management, protection and conservation of the environment.

11 *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* [2021] eKLR, para 152.

12 Constitution of Kenya, 2010, art. 27(3).

13 Constitution of Kenya, 2010, art.11.

14 Constitution of Kenya, 2010, art. 44(2)(a).

15 Constitution of Kenya, 2010, art. 159(3).

16 Constitution of Kenya, 2010, art. 27(1) and art. 21(1).

The second set of obligations, in article 69(2), outlines a duty on every person to cooperate with State organs and other persons “to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources”. This environmental duty on citizens of Kenya manifests three obligations: (i) a specific obligation on each individual to protect and conserve the environment; (ii) a specific obligation on every individual to cooperate with the State organs, and other people, to protect and conserve the environment; and (iii) an overall obligation on people, working together and with the State, to conserve the environment, ensure ecologically sustainable development and use of natural resources.

Article 69(2) of the Constitution is important. This is because the foregoing text: casts the mold for proactive public participation in environmental management; and requires that performance of this duty includes a collaboration between citizens and public agencies and officers (Kibugi 2014, 314). The explicit outcome of this proactive public participation obligation is clearly set out as “ensuring ecologically sustainable development, and use of natural resources” (Kibugi 2014, 315). Arguably, article 69(2), through the environmental duty, sets the foundational basis for public participation in environmental decision making, with sustainable development as a clear output (Kibugi 2014, 315). This provision should be read together with article 10 of the Constitution, which sets out national principles and values of governance, that are also mandatory.

2.1.2 Constitutional principles governing land rights and land policy

Below are two sets of constitutional principles. The first are principles stipulated to guide land management. The second are the mandatory values and principles of national governance that must be taken into account in all aspects of public administration.

Constitutional principles of land policy

The Constitution makes clear provision for the principles of land policy in Kenya, requiring all land to be held, used and managed in a manner that is equitable, efficient, productive and

sustainable, and in accordance with the following principles:¹⁷

- (a) equitable access to land
- (b) security of land rights
- (c) sustainable and productive management of land resources
- (d) transparent and cost-effective administration of land
- (e) sound conservation and protection of ecologically sensitive areas
- (f) elimination of gender discrimination in law, customs and practices related to land and property in land; and
- (g) encouragement of communities to settle land disputes through recognized local community initiatives consistent with this Constitution.

The Constitution further provides that these principles will be implemented through a national land policy, as well as through relevant legislation. The 2009 National Land Policy, which preceded the Constitution, framed these principles (Republic of Kenya 2009b, 2). The land policy also recognizes that land is critical to the economic, social, and cultural development of Kenya, noting that land was a key reason for the struggle for independence and that land issues remain politically sensitive and culturally complex (Republic of Kenya 2009b, 1). These principles of land policy provide guidance on how administration of tenure rights and the use of land should be undertaken. It is important to note, for instance, that the constitutional principles include three legal issues that have presented challenges to the tenure rights of indigenous peoples and many local communities: (i) equitable access to land; (ii) security of land rights; and (iii) elimination of gender discrimination in law, customs and practices relating to land.

National values and principles of governance under the Constitution

Implementation of the tenure rights provisions of the Constitution is, further, influenced by the national principles and values of governance set out in article 10(2) of the Constitution. These

¹⁷ Constitution of Kenya, 2010, art. 60.

principles and values of governance include, among others:

- (i) and participation of the people
- (ii) rule of law
- (iii) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination, and protection of the marginalized
- (iv) good governance, integrity, transparency and accountability
- (v) sustainable development.

These principles and values of national governance are important, because the Constitution, in article 10, provides that they are “binding” on the State when interpreting and implementing the Constitution, making and implementing any laws; and in the making of public policy decisions. When it comes to constitutional values and principles, the question arises as to whether they are enforceable, or merely instructive. The Court of Appeal of Kenya, in a 2017 Judgment in *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others*,¹⁸ made a firm determination on this question, and arrived at the clear conclusion that the values and principles set out in article 10(2) of the Constitution are neither aspirational nor progressive; but that they are justiciable and enforceable immediately.¹⁹ In the context of tenure rights, this finding is profound for several reasons:

- (i) First, it means that the principles of land policy set out in article 60 of the Constitution must be read and implemented together with, and in the context of the values and principles in article 10(2) of the Constitution.
- (ii) The values and principles set out in article 10(2) have a compelling effect since they are binding.
- (iii) Any legislation regarding land rights, the issue of concern for this research, should internalize these national principles and values of governance.

The principles of land policy, including equitable access to land, security of land rights, and sustainable and productive management of land resources, mean that tenure rights, in terms of

access to land and security of land rights should be implemented in a manner that respects human dignity, including inclusiveness, non-discrimination and protection of the marginalized, which is a significant legal challenge affecting indigenous peoples and local communities in Kenya. Importantly, the Supreme Court of Kenya, in a 2014 decision, *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others*²⁰ recognized the central role of sustainable development in governance, as stipulated in article 10(2). Here, the Supreme Court held that “as already stated, the Kenyan Constitution under article 10, provides that sustainable development is a national value and principle to be taken into account when the Constitution is interpreted as well as a guide to governance”.²¹ The 2016 Forest Conservation and Management Act affirms this approach, identifying its guiding principles to include good governance and public participation, in accordance with article 10 of the Constitution, as well as community involvement in the management of forests which is consistent with article 69(1)(d) of the Constitution.²²

2.2 Overview of the legal and institutional framework for land administration

Kenya has put in place a comprehensive legal and institutional framework to implement the provisions of the 2010 Constitution governing land rights, security of tenure, and land use. Below is an overview of the legal and institutional framework for land administration.

2.2.1 The Land Act

The Land Act was enacted in 2012 to govern the administration and management of all types of public land and establish rules for administration and transactions over private land. The Land Act grants the National Land Commission (NLC) overall authority for management of all types of public land, including the allocation of rights in public land. Further, it provides the procedure to

18 [2017] eKLR

19 *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 others*, [2017] eKLR, para 80–81.

20 [2014] eKLR

21 *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR, para 381.

22 Forest Conservation and Management Act, 2016, § 4.

be followed during implementation of compulsory acquisition of private and community land, including ensuring the payment of prompt and just compensation as required by article 40 of the Constitution.

2.2.2 Land Registration Act

The Land Registration Act was enacted in 2012 to provide a unified system for registration of interests in land in Kenya, including private and community land. This law provides for the appointment of a Chief Lands Registrar by the Public Service Commission. It also sets out the process to be followed in registration of land, the form taken by the lands register, as well as the legal effect granted by the registration of ownership interests in land.

2.2.3 National Land Commission Act

The National Land Commission Act was enacted in 2012 to give effect to article 67 of the Constitution by establishing the NLC and providing for its institutional structure. The NLC is an independent constitutional commission, protected from interference in its work through article 248(2) and (3) of the Constitution. It has authority to administer all public land on behalf of the national and county governments. Importantly, the NLC has a supervisory role over all public entities entrusted with management of public land, including public forests, national parks and catchment areas. The NLC, through section 15 of this law, is empowered to carry out the process of investigating all historical land injustices and making recommendations and/or taking actions to provide remedies.

These three land laws replaced earlier laws that governed land administration in Kenya, including the Government Lands Act (1915) Cap. 280, the Registration of Titles Act (1920) Cap. 281, the Registered Land Act (1963) Cap. 300,; the Land Titles Act (1908) Cap. 282; and the Indian Transfer of Property Act (1882).

2.2.4 Forests Conservation and Management Act

The Forests Conservation and Management Act was enacted in 2016, to replace the Forests Act of 2005, and to implement provisions of the

2010 Constitution. The 2016 law retains the Kenya Forest Service (KFS) as administrator of all public forests and recognizes the roles of county governments in the management of forests. It also classifies forests as public, private or community forests. In addition, the law provides for community participation in the management of public forests, through community forests associations (CFAs). Through section 77(a) and the Third Schedule, the law declares every gazetted (protected) forest at the time of its enactment to be a public forest. As highlighted in Section 4, this potentially contradicts article 62(1)(g) of the Constitution which excludes certain community forests (those falling under article 63(2)(d)(i)) from classification as public forests. This legal confusion is at the heart of the Ogiek community land claims over the Mau Forest as their ancestral home. However, Kenyan court decisions concerning these provisions have rejected the existence of automatic property rights and urged communities to pursue settlement of historical land injustices.

2.2.5 The Community Land Act

The Community Land Act was enacted in 2016 to give effect to article 63 of the Constitution. Further, it aims to enhance implementation of the various human rights set out in the Constitution whose fulfillment has been undermined by weak or absent community tenure rights. The law establishes the community as a collective legal entity, capable of being registered and issued with a title document over land and of making decisions regarding the use, control and transfer of the land. This law eliminates certain discriminatory customary practices, such as patriarchy, by providing that all adult members of the community will comprise the community assembly, without undue discrimination against women members. In addition, the law provides for the election of a community land management committee by the community assembly and this committee exercises day-to-day management of community land affairs.

This law was enacted to repeal the Land (Group Representatives) Act (1968) Cap. 287, which incorporated certain types of community land through a system of 12 elected representatives, in whose name the land was registered. Further, the law repealed the Trust Lands Act (1939) (Cap. 288), which governed the administration

of community lands to which customary land interests were adjudicated and were classified as trust lands. These were initially managed by local authorities, and from 2013, by county governments. As per article 63 of the Constitution, enactment of the Community Land Act reclassified trust lands as community land, which should be subjected to a process of adjudication and registration, where valid customary rights have been ascertained.

2.3 Classification of land under Kenyan law

Article 260 of the Constitution sets out an all-encompassing definition of land as including:

- (a) the surface of the earth and the subsurface rock
- (b) any body of water on or under the surface
- (c) marine waters in the territorial sea and exclusive economic zone
- (d) natural resources completely contained on or under the surface
- (e) the air space above the surface.

The Constitution sets out, unambiguously, that all land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals.²³ For that reason, land is classified as either public, community or private.²⁴

It is important to clarify that the classification of land by the Constitution, is distinct from the forms of land tenure that are applicable in Kenya. These are defined with respect to private land, under article 64(a–b) of the Constitution, and further, by section 5 of the 2012 Land Act,²⁵ which recognizes freehold, leasehold and customary land rights, where consistent with the Constitution.²⁶

2.3.1 Public land

The 2009 National Land Policy defined public land as comprising all land that is not private land or community land and any other land declared to be public land by an Act of Parliament (Republic of Kenya 2009b, 14). At the time of

approval, the National Land Policy observed that there was “currently no system for registering public institutional land, and in order to safeguard such land, a practice had emerged over the years under which it was registered in the name of the Permanent Secretary in the Ministry of Finance” (Republic of Kenya 2009b, 14).

The 2010 Constitution therefore sought to rectify the flaws flagged by the 2009 National Land Policy and therefore provided, in article 62, a detailed definition and categorization of all land in Kenya classified as public land, which includes the following:

Article 62(1)

- (a) land which at the effective date was unalienated government land as defined by an Act of Parliament in force at the effective date
- (b) land lawfully held, used or occupied by any State organ, except any such land that is occupied by the State organ as lessee under a private lease
- (c) land transferred to the State by way of sale, reversion or surrender
- (d) land in respect of which no individual or community ownership can be established by any legal process
- (e) land in respect of which no heir can be identified by any legal process
- (f) all minerals and mineral oils as defined by law
- (g) government forests other than forests to which article 63(2)(d)(i) applies, government game reserves, water catchment areas, national parks, government animal sanctuaries, and specially protected areas
- (h) all roads and thoroughfares provided for by an Act of Parliament
- (i) all rivers, lakes and other water bodies as defined by an Act of Parliament
- (j) the territorial sea, the exclusive economic zone and the seabed
- (k) the continental shelf
- (l) all land between the high and low water marks
- (m) any land not classified as private or community land under this Constitution
- (n) any other land declared to be public land by an Act of Parliament.

Although the constitutional classification of public land, set out above, is rather extensive, one class of public land is relevant to the current study:

23 Constitution of Kenya (2010), art. 61(1).

24 Constitution of Kenya (2010), art. 61(2).

25 Land Act, 2012.

26 Land Act, 2012, § 5(1).

Article 62(1)

(g) **Government forests** other than forests to which Article 63(2)(d)(i) applies, government game reserves, water catchment areas, national parks, government animal sanctuaries, and specially protected areas.

These concern lands which, formally and under current law, already have the legal status of public lands (including protected forests) but are also claimed by indigenous peoples as land that is “lawfully held, managed or used by specific communities as community forests, grazing areas or shrines”. This paradox is examined in Section 4. It includes recent findings by Kenyan courts that have declined to automatically recognize community land rights over such lands; and instead require that a prior formal legal process (such as historical injustices investigations) precede any formal transfer of such (art. 62(1)(g)) land to a community.

2.3.2 Private land

Article 64 of the Constitution defines private land as consisting the following classes of land:

- (a) registered land held by any person under any freehold tenure
- (b) land held by any person under leasehold tenure
- (c) any other land declared private land under an Act of Parliament.

2.3.3 Community land

A definition of what comprises community land is set out in article 63(2) of the Constitution as follows:

- (a) land lawfully registered in the name of group representatives under the provisions of any law.²⁷
- (b) land lawfully transferred to a specific community by any process of law
- (c) any other land declared to be community land by an Act of Parliament
- (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.²⁸

When the Community Land Act was enacted in 2016, Section 2 set out a modified definition of community land, differing in certain aspects from the Constitution:

‘Community land’ means includes:

- (a) land declared as such under Article 63(2) of the Constitution
- (b) land converted into community land under any law

The use of the words “means” and “includes” adjacent to each other to define community land, above, was challenged at the Environment and Land Court in *Kelly Malenya v Attorney General and another; Council of Governors (Interested Party)*.²⁹ The petitioner argued that the Constitution (art. 63(2)), in defining community land, had used the words “community land consists of ...” and therefore when section 2 of the Community Land Act applied the phrase “means includes” it had departed from the intent of article 63(2), and was therefore unconstitutional. According to the court, the word “includes” means “includes but not limited to”, while the text of the Constitution applied the phrase “consists of”. Thus, the court ruled that juxtaposing the words “means” and “includes” gave the definition of community land multiple meanings, more than intended by the Constitution, and therefore made that definition unconstitutional. Therefore, the definition of community land is strictly the one stated in article 63 of the Constitution of Kenya.

2.4 The legal definition of “communities” and implications in context of land tenure rights

The Constitution is clear that community land will vest in and be held by communities identified on the basis of (i) ethnicity, (ii) culture or (iii) similar community of interest.³⁰

²⁷ Note that this was land that was registered under Land (Group Representatives) Act, Cap 287, Laws of Kenya. Repealed through § 45(a) of the Community Land Act, 2016.

²⁸ Note that trust lands were previously governed by the Trust Lands Act, Cap 288, Laws of Kenya. Repealed through § 45(b) of the Community Land Act, 2016.

²⁹ *Kelly Malenya v Attorney General and another; Council of Governors (Interested Party)* [2019] eKLR.

³⁰ Constitution of Kenya, art. 63(1).

The Community Land Act defines “community” to mean “... a consciously distinct and organized group of users of community land who are citizens of Kenya and share any of the following attributes: common ancestry; similar culture or unique mode of livelihood; socioeconomic or other similar common interest; geographical space; ecological space; or, ethnicity”.³¹ Further, the community land law defines “community of interests” to mean “the possession or enjoyment of common rights, privileges or interests in land, living in the same geographical area, or having such apparent association”.³²

In the definition of a community, under article 63, the Constitution refers to communities as identified on the basis of (i) ethnicity, (ii) culture or (iii) similar community of interest. As the definitions in this section show, both the community land and the forestry law have adopted this approach, with some variance. The Forest Conservation and Management Act, in its definition of a community,³³ uses the same wording as article 63 of the Constitution. The Community Land Act, in its definition of a community, widens the scope to include “socio-economic or other similar common interest”.³⁴ This legal element of a community arising out of a “community of interest” is particularly important with respect to community tenure rights over land and forests, where such community does not necessarily arise from either ethnic or cultural homogeneity, or traditional association, as discussed above in context of indigenous peoples rights.

Kameri-Mbote et al. (2013, 104) argued that the notion of community of interests is discernible in cases where communities are brought together by land principally and by land-based resources, such as forests or water. They further contend that this criterion – community of interests – is critical for the creation of cohesive communities in Kenya, in light of ethnicized sociopolitics, where increased allegiance to ethnic groups rather than to Kenyan nationalism, makes ethnic identity the default frame of reference. Some context on this is provided below.

In 1998, then President of Kenya, Daniel Arap Moi, appointed a Judicial Commission of Inquiry into Tribal Clashes in Kenya³⁵ (commonly referred to as the Akiwumi Commission)³⁶ following the eruption of serious ethnic clashes during and after the 1992 and 1997 general elections. The findings of this Commission (excerpts below) are critical:

81. Immediately after independence, the Government established various mechanisms that would enable Africans to buy back white-owned farms through soft loan schemes for squatters and local landless people in a given area, and landless people from any part of the country. [...] These farms became the source of serious conflicts between indigenous landless persons of the area where the farms were situated, and the new owners. [...] Many of the indigenous people from say, the Maasai and Kalenjin tribes whose traditional lands had been alienated by the colonial government for the benefit of white settlers and thus, rendered landless, strongly resented the manner in which members of other tribes had been settled on land that had at one time, belonged to their forebears. Such resentment also stemmed from the fact that whilst the indigenous people were landless and lived in conspicuous poverty, the new owners of the farms almost exclusively occupied the most fertile arable rain-fed land in the given area [...] Another problem was the conflicting interests of tribe [...] the Maasai as pastoralists value land for grazing of livestock, the Kikuyu treasured the same for farming. (Akiwumi et al. 1999, 55)

82. Up to a point, this order of things was tolerable but with the advent of multiparty politics and the increased population of the new farm owners, the situation became increasingly difficult. Apart from the newcomers asking for Chiefs and Assistant Chiefs from their own tribes, multiparty democracy of one-man one vote meant that the ‘foreigners’ or, as they were to be derogatorily referred to as ‘madoadoa’ (which colloquially means undesirable blots/spots) in

31 Community Land Act, 2016, § 2.

32 Community Land Act, 2016, § 2.

33 Community Land Act, 2016, § 2.

34 Community Land Act, 2016, § 2.

35 Appointment was made through Gazette Notice No. 3312, on 1 July 1998.

36 This was after its Chair, Retired Justice of Appeal Akilano Molade Akiwumi.

the Rift Valley Province, or as ‘Watu wa Bara’ in the Coast Province, could win elections and represent the ‘indigenous people’ in Parliament and local authorities [...] who saw it as a further move to marginalize and dispossess them of land. This scenario provided a fertile ground for exploitation of political ends through ethnic cleansing. (Akiwumi et al. 1999, 54)

This situation, of ethnic identity around land tenure rights, and a risk of exclusion of certain communities from some geographical areas was further revisited about a decade after the Akiwumi Commission. Against a background of the disputed 2007 General Elections, and the post-election violence that followed, President Mwai Kibaki, on 23 May 2008, appointed the Commission of Inquiry into Post-Election Violence, otherwise referred to as the Waki Commission.³⁷ Among other issues, the Waki Commission report addressed “land and inequality”. The report noted that while Kenya consists of 42 ethnic groups, many areas outside major cities and towns are relatively homogenous ethnically. Therefore,

according to the Waki Commission report, problems of inequality and marginalization are often viewed through ethnic lenses, even though inequality maybe higher among individuals from the same tribe (Truth, Justice, and Reconciliation Commission 2008, 30). The report of the Waki Commission further noted that while constitutionally, individuals may own land in any place in Kenya, ethnic homogeneity, or the insistence on ethnic homogeneity in land ownership was, as a matter of fact, a general characteristic of many areas. This has in turn created the notion of ‘insiders’ who are native to a place, and ‘outsiders’ who have migrated there, a notion that has been tapped by aspiring politicians (Truth, Justice, and Reconciliation Commission 2008, 31).

As observed by Kameri-Mbote et al. (2013, 104), the Waki Report argued that the constitutional liberty to own land anywhere in Kenya exists only in theory. This is why a constitutional basis for the protection of community land rights is critical, as is enhanced enforcement and protection of the human right to property, and other human rights, as specified by the Constitution of Kenya.

³⁷ Appointment was made through Kenya Gazette Notice No. 4473, 23 May 2008.

3 Indicator 1: Evaluating the scope of land tenure and security of tenure under the Community Land Act

To assess this indicator on land tenure and the parameters of tenure security, tenure rights and security of tenure are examined from a conceptual perspective. Existing legal provisions are reviewed to analyze the extent to which these provisions form a basis for tenure security, and to identify incongruencies that undermine secure tenure.

3.1 Unbundling the content of land tenure rights

The scope of land tenure rights is defined to include the setting up and implementation of statutory, customary or hybrid [statutory and customary] rules to define how property rights to land are to be allocated; and to define how access is granted to the rights to use, control and transfer land (FAO 2002). Consequently, the bundle of land tenure rights comprises:

1. **Use rights.** Rights to utilize the land for a variety of purposes, such as grazing, growing subsistence crops, gathering minor forestry products, or settlement.
2. **Control rights.** Rights to make decisions how the land should be utilized, such as deciding what activities can be undertaken on the land, crops to be planted, etc.
3. **Transfer rights.** Rights to sell or mortgage the land, to convey the land to others through intra-community reallocation, to transmit the land to heirs through inheritance, and to reallocate use and control rights. Communally held land may have restrictions on transferability to third parties or require collective action and consensus from the community.

The user and control rights, when present together, signify the legal right and ability of a person or community holding these tenure rights, to make decisions on how they can use their land to achieve

their desired objectives. The transfer rights element implies that the landowner/community is able to dispose the land in question, either through sale or inheritance.

According to Place et al. (1993, 23), the completeness of these tenure rights, which is instrumental to defining security of tenure may vary as follows:

- (a) Complete rights, which mean that the tenure right holder has the power to exercise the use, control and transfer rights.

Section 16(a) of the Community Land Act is illustrative, as it provides that the registration of a community as the proprietor of land shall vest in that community the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto. Further, section 17(1) provides that the rights of a registered community as the proprietor of land shall be held on behalf of the community, free from all other interests and claims. These rights may only be defeated (i.e. nullified, or extinguished) through a legal process.

In this case, the community that has legal rights over community land that has been adjudicated and registered is granted *the absolute ownership rights* of the land and therefore is able to exercise use and control rights over the land. The scope of use and control rights includes:

- Section 13(3) grants a community the power to reserve special purposes areas for farming, settlement, community conservation, cultural and heritage sites, urban development, or other purposes as determined by the community, county government, or national government for the promotion of the public interest.

The powers of the county and national government to direct land use, referred to here as a limitation on what the community can do, is drawn from article 66(1) of the Constitution which grants the Kenyan State (including the national and county governments), the power to regulate the use of any land in the interests of defense, public safety, public order, public morality, public health or land use planning.

- Section 15(5) grants the community the power and authority to transfer land.

Nonetheless, the Community Land Act has set a very high threshold for this, making provision that the decision of the community to dispose or alienate community land shall only be considered lawful and binding if it is supported by at least two-thirds of the registered members of the community.

(b) Preferential rights, which means that the tenure right holder has the power to use and control the land, but the ability to permanently transfer land is either not there or is restricted to circumstances defined through law or custom. Section 27 of the Community Land Act makes provision for some instances where preferential rights arise. Section 27(1) allows for a community, with the approval of its members (given by a simple majority of the members present at a meeting convened for that purpose) to allocate part of its registered community land to a member or a group of members of the community for exclusive use and occupation. This allocation for exclusive use and occupation will be granted for a period to be determined by the community. However, despite the allocation being for exclusive use and occupation, there shall be no separate title issued for the parcel of land, within the registered community land, that is allocated for the exclusive use and occupation of some members.

There are several elements of preferential title:

- There is an allocation of part of the community land to a member, or group of members, of the community.
- The allocated land is exclusively for their use and occupation (they will enjoy use and control rights).
- Section 27(2) is that clear that no separate (ownership) title will be issued for the land allocated, which means they have no rights to transfer the land. In addition, the allocation to use the land is for a defined period.

This means that the members enjoying exclusive use and occupation can enjoy the use and control (subject to bylaws) but cannot transfer or sell the land, as no ownership rights are granted.

(c) Limited rights exist, where use rights are given with limited or no control rights, and there is not ability to effect permanent transfer of ownership.

The legal mechanism for community participation in sustainable management of public forests demonstrates one instance of limited rights. Section 48 of the 2016 Forest Conservation and Management Act provides that a member of a forest community, together with other persons resident in the same area, may register a CFA, and apply to the KFS, for permission to participate in the conservation and management of a public forest. Therefore, the forest tenure rights obtained by CFAs can only be limited rights, as assignees of the Kenyan State (through KFS), under a permit.

Section 49 further provides that the management agreement concluded between the KFS and a CFA, shall confer on the CFA “forest user rights” that include collection of medicinal herbs; harvesting honey, timber or fuel wood; grass harvesting or grazing; plantation establishment through non-resident cultivation, among others. The CFA is under legal obligation to ensure that its activities do not conflict with the conservation of biodiversity.

Therefore, the scope of land tenure rights, whether complete, preferential or limited, determine *who* can do *what* with particular land, and sometimes also *when* and *how* they can do it, in order to confer security of tenure (Meinzen-Dick et al. 1997; see also Weibe and Meinzen-Dick 2005, 205).

3.2 The parameters of tenure security

The security of land tenure rights can be defined to exist when an individual perceives that he or she has rights to a parcel of land on a continuous basis, free from imposition or interference from outside sources, as well as ability to reap the benefits of labor and capital invested in that land, either in use or upon transfer to another holder (Place et al. 1993, 19). Thus, land tenure security exists when an individual or community has confidence regarding the certainty of their bundle of rights

(Hanstad et al. 2009, 34) and enjoys protection from external interference. The bundle of tenure rights, even when a complete bundle of rights exists, may not assure land tenure security if there is no certainty and if it is subject to interference. The existence of confidence could derive from statutory provisions, or become a matter of perception by the community (Nguyen 2012), based on their experience with those land rights, for instance a long period of enjoyment of use and transfer rights over land without evictions or other forms of interference. Here, the research adopts three sub-indicators proposed by Place et al. (1993), in their research on the methodology for measuring land tenure security in Africa, as a basis for assessing the security of land tenure: breadth, duration and assurance of tenure.

3.2.1 Breadth of rights

This refers to the legal quantity or bundle of rights held, which may include the entire spectrum of use, control and transfer rights, or certain rights out of this bundle being held either as preferential or limited rights tenure rights, as discussed above. The breadth of rights further refers to the legal quality of rights held, otherwise referred to as the robustness of the tenure rights. With respect to tenure rights under the Community Land Act, and the Forest Conservation and Management Act, the following elements can be assessed with respect to robustness:

- (i) Legislative provisions grant a registered community the complete set of tenure rights, with respect to their community land, as evident in provisions for registration and grant of absolute rights (section 16(a)) and the protection from external interference, through section 17(1) of the Community Land Act, as follows:

The rights of a registered community as proprietor [...] shall not be liable to be defeated except as provided in this Act or any other written law and shall be held on behalf of the community [...] free from all other interests and claims whatsoever, but subject to (encumbrances and overriding interests).

- (ii) In addition, the community is granted the power to dispose and alienate (transfer, sell) land under (section 15(5)), as discussed above.
- (iii) An additional mechanism for enhancing the robustness of community land rights in Kenya is through the legal process of recognition, adjudication and subsequent registration of community land.

Section 8 of the Community Land Act requires the Cabinet Secretary responsible for lands, together with the relevant county government, to develop a comprehensive adjudication program for the registration of community land and, in doing so, ensure that the process of documenting and developing an inventory of community land is undertaken in a participatory, transparent and cost-effective manner. The inventory developed under this process should be accessible to members of affected communities, and the government is required to issue a public notice of the intention to commence the surveying, adjudication and registration of community land. This process of recognition, adjudication and registration of community land, which was established by the Community Land Act in 2016, is important to address existing legal gaps, where communities who have been occupying ancestral land for a long time, have the robustness of the breadth of rights regularly infringed upon, due to lack of adjudication and registration. The experiences of the community of Ngare Mara in Isiolo County, drawn from a 2016 research report (Kibugi et al. 2016, 24), is illustrative of this challenge.

Ngare Mara is a community resident within Isiolo County. Although they refer to their land as a group ranch, it had not been adjudicated in the manner required for group ranches. This is a process that, prior to the Community Land Act, would have been undertaken under the Land Adjudication Act³⁸ in order for a freehold title deed to be issued once the land was registered to the community, and the governance arrangements incorporated under the Land (Group Representatives) Act.³⁹

³⁸ Land Adjudication Act, 1968, Cap 284 Laws of Kenya

³⁹ Cap 287, Laws of Kenya (now repealed by the Community Land Act, 2016)

Community members indicated that, despite the absence of formal surveying and registration, they had been implementing localized land administration system and had elected a *community land committee* that determined how various families and individuals were allocated parcels. They had also identified common areas and set them aside for community use, such as the market center, school and an area for a health center. However, community members lamented that the failure to adjudicate the land formally as community land had previously caused problems. For example, during construction of the Isiolo–Moyale road, part of their land was taken by government as a stone quarry to provide road construction material. After the road works were finalized, there was no rehabilitation of the land, which now caused problems because of water logging, and injuries to livestock and people.

This community was enjoying relative tenure security because no attempts had been made to forcefully evict them or deny their rights. They had even made local governance arrangements in absence of incorporation under the Land (Group Representatives) Act. However, with their past experience where part of their land was taken for use in road construction by the government, they were concerned about their tenure security in the face of expected land acquisition for purposes of infrastructure for the Lamu Port South Sudan Ethiopia Transport (LAPSSET) corridor (Kibugi et al. 2016, xix). The Ngare Mara community could therefore have their tenure security enhanced by the (national and Isiolo County) government initiating a program of adjudication and registration over the parcel of land which they possess and occupy, and over which they lay an ancestral claim.

- (iv) Internal community land governance mechanisms through a land management committee and community assembly.

The administration of community land, in terms of the law, is governed by Part III of the Community Land Act, which establishes a community land committee and a community assembly:

The community assembly

Section 15(1) provides that a community assembly is mandatory for each registered community and will consist of all adult members of the community. This provides a strong basis for governance, and

decision making because of the legal requirement for the community assembly to comprise of all adult members of the registered community.

Section 30(3) requires that women, men, youth, minorities, persons with disabilities and marginalized groups should have the right to equal treatment in all dealings in community land. This creates a broad-based structure of participation by all members, which enhances internal transparency by the community and the robustness of tenure rights by preventing or minimizing internal divisions, or deviation from the will of the majority to the benefit of a small minority of members. Provisions relating to investments on the community land are illustrative. Section 36(1) requires that any proposed investment in the land must be preceded by a free, open and consultative process of consultation. This is a form of free prior informed consent because from it, the community could reject the proposed investment. Section 36(3) provides that no agreement between an investor and the community shall be valid unless it is approved by two-thirds of adult members at a community assembly meeting called to consider the offer and at which a quorum of two-thirds of the adult members of that community is represented. This high threshold requirement for quorum is important to uphold that broad-based participation in decision making by all members.

The community land management committee

Section 15(3) requires the community assembly to elect between 7 and 15 members of the community assembly to constitute the community land management committee. The functions of this committee include responsibility over the day-to-day running of community functions; and managing and administering the register of members. For communities whose land interests are being adjudicated and registered for the first time under the Community Land Act, section 7 provides that, after being elected, the community land management committee shall come up with a comprehensive register of all members with a communal interest over the land.

3.2.2 Duration of the rights

This refers to the length of time during which a given right is legally valid and, ideally, longer durations imply greater tenure security (Place et al. 1993, 20). Where land tenure rights are

fully vested in an individual or community, the duration of ownership is likely in perpetuity (Hanstad et al. 2009, 36) and, if not, should be for a duration that is clearly defined, e.g. the length of a leasehold. The duration of the land rights should be clear and the length ought to have certainty if the rights are not held in perpetuity. In terms of section 16 of the Community Land Act, the duration of the rights of community as the proprietor of land vests ownership in perpetuity or until the community decides to sell and transfer the land to another owner. Where the community is registered as the proprietor of a leasehold interest over land, this shall be for the duration of the lease.

3.2.3 Assurance of the breadth of rights and duration

This refers to the certainty of the breadth and duration of the land rights, which is necessary to ensure that an individual or community that possesses land rights of a specific breadth and duration is legally able to exert or enforce those rights (Hanstad et al. 2009, 35). Without such capability, the assurance of such rights is compromised, which may result in weak legal enforcement of the bundle of rights such that the land owner(s) is unable to prevent external interference, or even in dispossession and loss of the entire legal rights, for instance through evictions, or land grabbing (Place et al. 1993, 20). Assurance may be informed by the legal position, for instance, the community assembly and the community land management committee. The legal assurance of tenure rights may also be through conferment or ascertainment of tenure rights through legal process, such as the adjudication and registration of such rights, as well as the issuance of formal documents, such as title documents as evidence of such registration.

Assurance of community tenure rights through legal provisions and registration of ownership

Article 63(1) of Constitution of Kenya addresses the question of assurance of tenure, through the provision that "Community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest". The word "vest" applied here

means the communities in question have been granted an immediate, present and future right to that land by the Constitution. Therefore, legal procedures such as adjudication and registration, where not undertaken before, will confirm this vesting of tenure rights to the community as a legal entity. This is what has resulted in repealing and replacing of the Land (Group Representatives) Act through section 45 of the 2016 Community Land Act. The Land (Group Representatives) Act did not vest land in the community as a legal entity, but rather established an elected body of 'group representatives' in whose name the land was registered on behalf of the community. Section 8(2) of that law provided that the group representatives were under a duty to hold any property on behalf of and for the collective benefit of all members of the group.

This approach has been modified by the Community Land Act to comply with the Constitution and assert the assurance of the tenure rights as belonging to the community. Section 16(a) provides that the registration of a community as the proprietor of land shall vest in that community the absolute ownership of that land.

Section 11(3) provides that upon completion of the adjudication process, the community shall be issued with title relating to the community land. Section 18(1) enhances the tenure security provided by registration with the provision that the certificate of title issued by the Registrar to a community upon registration shall be considered by the courts (in the event of a dispute over ownership) that the person named as proprietor of the land is the absolute and indefeasible owner. This certificate of title, according to section 18(1)(a) and (b) can only be challenged on the grounds of misrepresentation or fraud where the community is proved to be a party or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

The question of registration also arises with respect to community forests which (under article 63(2) (d)(i) of the Constitution) comprise part of community land governed by the Community Land Act. Section 31 of the 2016 Forests Conservation and Management Act provides that all community forests shall be vested in the community and requires the KFS to register each community forest. In this case, the forestry

legislation merely affirms the explicit vesting of the tenure rights of the forest to the community. It is important to note that the registration being undertaken under forestry legislation is not for purposes of issuance of a title document, or to confer or confirm ownership. This is already vested by the Constitution, through article 63(2)(d)(i), which defines community land as including land that is “lawfully held, managed or used by specific communities as community forests, grazing areas or shrines”. Therefore, a community forest in this category, prior to registration under the Forests Conservation and Management Act, should have been adjudicated, registered and title issued in terms of the 2016 Community Land Act. The purpose of the registration is set out by section 31(4) of the Forests Conservation and Management Act, which is to allow the community to apply to the county government for technical advice regarding appropriate forestry practices and conservation; or to the Forest Conservation and Management Trust Fund, for loans to support the development of the forest.

Opportunity to enhance tenure security through evolution from *de facto* assurance of community tenure rights in absence to registration

The assurance of tenure rights may also be *de facto*, applying as a matter of fact, informed by the practical situation that people find themselves in – for instance, a community having actual possession and use of land over several generations, without any formal adjudication and registration of such rights. Such *de facto* assurance may continue until the landholders, perhaps due to external interference, feel the need to pursue *de jure* (legal) assurance by seeking adjudication and registration, through the procedures described above. In Kenya, where communities occupy land on the basis of *de facto* assurance, they can face challenges from land grabbing and evictions, which undermine security of tenure and disrupt quiet possession. The case of the Aweer community is illustrative.

The Aweer, an indigenous community in Kenya, are resident in Lamu County, on the northern part of the Kenyan coastline, close to Somalia. The 2019 population census recorded around 20,103 members of the Aweer/Watta community

resident in Kenya (Republic of Kenya 2019, 423). They farm livestock and keep bees, relying on the land for livelihood (Nunow 2012). Although the Aweer have occupied land in Lamu, this land was never recognized as community land, or protected as trust land (as in the case of the Endorois discussed in Section 4) but was, in terms of land law, considered to be government land.⁴⁰ Without registration of this land as the community property of the Aweer, they face challenges of security of tenure. This is threatened, for instance, by the planned construction of the Lamu Port, which is part of the large-scale, multi-country LAPSSET. The Aweer have continued to assert *de facto* tenure through continuous occupation and use of the land, even though their right faces multiple threats.

A 2016 study of one Aweer community, resident in Bargoni, Lamu County, found that community members perceived the land as belonging to them (Kibugi et al. 2016). There had been no detailed attempts by the government to adjudicate the land in favor of individuals or the community. Since the community practiced nomadic pastoralism, whereby much land could be left to lie fallow to grow pasture, the local community were apprehensive that speculators could assume that the land had no owners.

The 2016 study found there had been one attempt to register part of the land that the community claimed as their own, through the registration of an entity called a ‘self-help ranch’ which involved creating a community-based organization (CBO) called the Bargoni Boni Community Ranch Initiative. In this Bargoni Boni Community Ranch Initiative, there are approximately 563 Aweer community members with a customary claim to the land, but the actual formal registration of the land was done in the name of 12 community representatives.

Two legal challenges arise from this approach, which undermine the tenure rights of the community. First, the entity referred to as a CBO is an administrative (not legal) instrument created by the government to provide a simplified mechanism for self-help groups by avoiding the complex legal requirements, for instance, of incorporating a

⁴⁰ Under the now repealed Government Lands Act, 1915, Cap 280 Laws of Kenya, this land was deemed unalienated government land and ancestral claims were not recognized.

society.⁴¹ Second, the CBO was incorporated prior to enactment of the Community Land Act, at a time when the Land (Group Representatives) Act,⁴² was the law operating that was most suitable for registration of community tenure rights. This law had been enacted to provide a legal mechanism for registration of land rights claimed by a community on the basis of ancestral rights (community land) and the incorporation of a group ranch. The term group ranch colloquially refers to the entire community that has tenure interests in the particular land but, legally, the land is registered in the name of group representatives; that is 12 individuals selected by the community to hold the land in trust and administer the affairs of the group ranch, on behalf of and collectively for the community. Thus, with the land registered as a CBO, legally it was not properly protecting the community land rights, and therefore needed to be formally adjudicated and registered under the Community Land Act. This involved the formation of a community assembly and the election of a community land management committee, as well as the establishment of a community land register of all those members with a customary land claim. Once the adjudication is completed, a formal title document will be issued in the name of the registered community, as a legal entity.

In an earlier report, the Kenya Human Rights Commission had cautioned that the expected construction of Lamu Port has put considerable pressure on already insecure land tenure, with speculators acquiring land ahead of expected compensation upon exercise of eminent domain (Kenya Human Rights Commission 2014, 23). There were reports of illegal and coercive acquisition of land at the expense of Aweer community land rights, including intimidation and undue pressure by government officials and private developers. In this case, the *de facto* assertion of tenure rights appears to work tenuously for the community.

3.3 Conclusion

Implementation of the Community Land Act will be a long-term complex process. The ascertainment, adjudication and registration of the community, and its ownership interests over any land will remain a complex exercise. In instances where the community has continuously occupied land that is outside protected (forests, wildlife) areas, the process will be less complex, similar to conversion of land registered under group representatives. However, the process of ascertaining customary interests, adjudication and registration regarding community land rights falling in protected areas will remain complicated.

It is possible that registration of hitherto unregistered community land could bring additional problems. These include the legal possibility of subdivision and selling of the land, thereby resulting in community landlessness, while the intent was to assure tenure. In pastoralist areas, which are usually arid and semi-arid lands, demarcation of community land boundaries should be preceded by spatial or physical planning. This is important in order to identify, map out and make provision for ecological resources necessary for pastoralist mobility and the transhumance lifestyle, including livestock pathways, water sources and holding grounds. If this is not undertaken and critical pastoralist infrastructure is included as part of community land rights bundle, this will create complications, including conflict.

⁴¹ The process for incorporating and registering a Society is specified in the Societies Act, 1968, Cap 108 of the Laws of Kenya

⁴² Cap 287, Laws of Kenya (now repealed by the 2Community Land Act, 2016)

4 Indicator 2: Evaluating the legal status and protection of indigenous communities tenure rights

4.1 Legal recognition of indigenous communities by Kenyan law

Kenya's Constitution recognizes the presence of indigenous communities in the country, but this is set out through the lens of marginalization. Article 260 provides definition for "marginalized community" and "marginalized groups":

Article 260

Marginalized community is defined to mean:

- (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; or
- (d) pastoral persons and communities, whether they are:
 - (i) nomadic; or
 - (ii) a settled community that, because of its relative geographic isolation, has experienced only marginal participation in the integrated social and economic life of Kenya as a whole.

"Marginalized group" means a group of people who, because of laws or practices before, on or after the effective date, were or are disadvantaged by discrimination on one or more of the grounds in article 27(4).

From the above, the Constitution refers to "an indigenous community that has retained and maintained a traditional lifestyle and livelihood

based on a hunter or gatherer economy". It is arguable that the lens of marginalization in defining an indigenous community can, legally, be used to take away the same status and deny protections. However, in interpretation of the Constitution, law and treaties, Kenyan courts have widened the definition of indigenous communities, such as in *Joseph Letuya & 21 others v Attorney General & 5 others* where judges relied on the 1989 ILO Indigenous and Tribal Peoples Convention.⁴³

This treaty defines "indigenous community" as:

- (i) 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;
- (ii) 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.

In its judgment, the court adopted the above ILO Convention definition of an indigenous community. The judges also observed that "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."⁴⁴

⁴³ International Labour Organization (ILO), Indigenous and Tribal Peoples Convention, C169, 27 June 1989, C169.

⁴⁴ *Joseph Letuya & 21 others v Attorney General & 5 others* [2014] eKLR, p.13.

This approach, while eventually linked to tenure rights over lands claimed as ancestral, also means that indigenous communities in Kenya do not have constitutional recognition of native title, or a category of *sui generis* or unique title akin to the Australian approach in *Mabo v Queensland (No.2)*.⁴⁵ In this instance, native title was defined as having its origin and is given its content by the traditional customs observed by the indigenous inhabitants of a territory; and the nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs (Strelein 2005). Native title was defined as *sui generis* or unique because it reflected the rights and entitlements of indigenous peoples under their own laws (Strelein 2001).

4.2 Human rights challenges facing indigenous communities land and natural resources rights

The socioeconomic vulnerability of indigenous peoples is a challenge, which is made worse by discriminatory treatment, according to the UN Special Rapporteur on Human Rights and the Environment, in a March 2017 Report to the Human Rights Council.⁴⁶ The Special Rapporteur argued that States, when dealing with indigenous peoples' legal rights, must have heightened obligations to ensure that such laws and policies satisfy the requirements of legitimacy, necessity and proportionality. The questions of legitimacy, for instance, arise with respect to protection of indigenous people's rights, as collective rights for the entire group, the role of customary conservation practices. According to the Special Rapporteur, heightened obligations are necessary because measures that may adversely affect ecosystems may well have disproportionately severe socioeconomic and environmental effects on the enjoyment of human rights of members of marginalized ethnic groups who rely directly on the ecosystems.⁴⁷ One such heightened obligation relates to provision of legal guarantees and protections concerning access to land, the presence of bundle of tenure rights and tenure security.

The land rights of indigenous peoples, and communities, including forest tenure, have been recognized widely, through various international instruments, and judicial decisions. Chapter 26 in the 1992 Agenda 21 (United Nations 1992) recognized that indigenous people and their communities have an historical relationship with their lands, and have developed over many generations a holistic traditional scientific knowledge of their lands, natural resources and environment. Yet, according to Agenda 21, the ability of indigenous peoples to participate fully in sustainable development practices on their lands has tended to be limited as a result of factors of an economic, social and historical nature. The Universal Declaration on Human Rights (UDHR)⁴⁸ sets a meaningful basis for addressing the rights of indigenous peoples, by asserting that all human beings are born free and equal in dignity and rights,⁴⁹ and that all are equal before the law and are entitled without any discrimination to equal protection of the law.⁵⁰ The ILO Indigenous and Tribal Peoples Convention restates this need for indigenous peoples to enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination.⁵¹

The provisions of the UDHR, with explicit references to the rights of indigenous peoples, are supported by the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).⁵² Although non-binding, UNDRIP asserts that indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.⁵³ While Kenya abstained from voting with respect to this resolution, it echoes national constitutional provisions (art. 27) discussed earlier that guarantee every person equality before

45 *Mabo v Queensland (No.2)* (1992) 175 CLR 1.

46 A/HRC/22/43.

47 A/HRC/22/43, para 55.

48 Universal Declaration of Human Rights, UNGA res. 217A (III), UN Doc A/810 at 71 (1948).

49 Ibid., art. 1

50 Supra note 1, art. 7

51 International Labour Organization (ILO), Indigenous and Tribal Peoples Convention, C169, 27 June 1989, C169.

52 United Nations Declaration on the Rights of Indigenous Peoples G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007), 46 I.L.M. 1013 (2007)

53 United Nations Declaration on the Rights of Indigenous Peoples 13 September 2007, A/RES/61/295, art. 2.

the law, including to protection and benefit, as well as full and equal enjoyment of all human rights. This provision extends to expressly barring discriminatory treatment of any person on any grounds, including ethnic origin. It is this context that informs the legal analysis undertaken in this section, especially whether the recognition of indigenous peoples, their rights including to affirmative action, guarantees of equality and non-discrimination have brought about heightened obligations on the Kenyan State.

4.3 Evaluating the legal recognition and land rights of indigenous communities in Kenya through judicial decisions

This section analyzes further how courts have interpreted and applied the law on legal recognition of indigenous communities. Additionally, it examines how these judicial decisions have approached the land rights claims made by the Ogiek, Endorois and the Sengwer concerning lands currently classified as public forests. These include the 2010 decision concerning the Endorois ancestral land claim over Lake Bogoria National Reserve by the African Court of Human and Peoples Rights, and earlier judgment on the same by the High Court in Kenya.

We also review the May 2017 decision concerning ancestral land claims by the Ogiek community over the Mau Forest, as well as High Court decisions made prior to and after that decision. Finally, the section reviews a recent judgment delivered by the Environment and Land Court concerning an ancestral land claim submitted by the Sengwer community over Embobut forest, which was delivered in May 2020.

4.3.1 Judgment on Ogiek land claims in a section of the Mau Forest in 2000, prior to the 2010 Constitution

The decision of the High Court of Kenya in its 2000 judgment in the case of *Francis Kemai and 9 Others v. The Attorney General and 3 Others*,⁵⁴ concerning the Ogiek community of Tinet Forest in the Mau, is an important starting point due to

⁵⁴ *Francis Kemai and 9 Others v The Attorney General and 3 Others High Court of Kenya*, Civil Case No. 238 of 1999 (Unreported).

the similarity of facts to other cases, and because the outcome was very different. This case was brought by 10 people representing 5000 members of the Ogiek community inhabiting Tinet Forest in the Mau Forest Complex, in the then Nakuru district of the Rift Valley Province of Kenya (now Nakuru County). They argued that their eviction from Tinet Forest by the government contravened their right to life, as well as their right of protection from discrimination, and the right to be residents in any part of Kenya. The Ogiek further argued that they had inhabited the forest since time immemorial but had faced consistent harassment from the government, who eventually ordered them to vacate the forest, prompting the suit. They conceded that while the land was declared a forest by colonial authorities, and had remained a State forest, the government had agreed to settle them in that forest and had proceeded to issue letters of allotment to individual members of the community.

The government disputed these claims and argued that this was a gazetted State (public) forest in which it had no intention of settling anyone. It claimed that these were not genuine members of the Ogiek community, arguing that those genuine members of the community had been previously settled in other areas.⁵⁵ The court agreed with the government that in their attempts to show that the government had allowed them to remain in the forest area through various letters of allotment, the Ogiek had recognized the government as the owner of the land in question. For this reason, according to the court, the government had the right, authority and legal power to allocate the land. If the Applicants then claimed the land was theirs, the court wondered how they “could accept allocation to them of what was theirs by one (the government) who had no right and capacity to give what they did not own?”⁵⁶

The judges ruled that “there is no reason why the Ogiek should be the only favoured community to own and exploit at source, the sources of our natural resources, a privilege

⁵⁵ The other places mentioned by the government, as respondent, are Sururu, Likia and Teret. See *Francis Kemai judgment* at 3.

⁵⁶ *Francis Kemai and 9 Others v The Attorney General and 3 Others High Court of Kenya*, Civil Case No. 238 of 1999 (Unreported), p. 3

Table 1. Excerpt of details concerning Ogiek community settlement in Tinet, Mau Forest Complex from the 2009 Mau Forest Complex report.

Name of scheme	Scheme area (ha)	Intended beneficiaries	Number of intended beneficiaries	Remarks
Tinet	12,132	Ogiek families	5016 families	Parcels demarcated, surveyed and allotment letters issued by 1996.

not enjoyed or extended to other Kenyans".⁵⁷ However, a government Task Force had, in 2009, acknowledged that about 12,132 Ogiek families had been settled in Tinet Forest (part of Mau Forest Complex), as Table 1 shows (Republic of Kenya 2009a, 35).

The 1999 Kemai decision notwithstanding, the Constitution defines indigenous communities as those who have retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy. Further, as elucidated earlier, the Constitution guarantees equality before the law and prohibits discrimination on any grounds, including ethnic origin. In the *Joseph Letuya & 21 others v Attorney General & 5 others* decision discussed below, the High Court recalled this prior judgment in Kemai and departed from it on the basis that since the year 2000, when it was delivered, the law and circumstances had changed significantly especially with promulgation of the 2010 Constitution, and the publication of the 2009 Report of the Government Task Force on the Conservation of the Mau Forest Complex.⁵⁸

The sections below analyze several judgments delivered after the Kemai decision. Specifically, two decisions concerning the Endorois and Ogiek community ancestral land claims have been rendered by the African Commission on Human and Peoples Rights, and the African Court of Human and Peoples Rights, respectively. Within the Kenyan legal system, the reviewed decision concerns Ogiek community land claims over East Mau Forest (*Joseph Letuya, 2014*) and Sengwer Community land claims over Embobut forest (*David Kiptum Yator, 2020*). The aim is to examine

the legal practice in interpreting constitutional provisions that recognize indigenous communities and, further, how their land rights claims have been treated by the courts.

4.3.2 The African Commission on Human and Peoples Rights recommendation concerning Endorois community ancestral land claims

The Endorois community have an ancestral claim over Lake Bogoria National Reserve, which is a protected wildlife area. Their claim, in *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council of Kenya decision (Endorois case)*⁵⁹ was submitted in 2003 to the African Commission on Human and Peoples Rights. This Commission was established under article 30 of the African Charter on Human and Peoples Rights,⁶⁰ with the mandate to promote and ensure the protection of human and people's rights.

The Endorois complaint followed rejection of a suit in the year 2002, on the same issues, by the High Court of Kenya in *William Yatich Sitetalia and 72,000 Others v. Baringo County Council*.⁶¹ In this judgment, the High Court had decided that the Endorois community had extinguished any land rights over Lake Bogoria National Reserve because "there was common ground that before the lake and the surroundings were declared a game reserve, meetings were held and compensation

⁵⁷ *Francis Kemai and 9 Others v. The Attorney General and 3 Others High Court of Kenya*, Civil Case No. 238 of 1999 (Unreported), p. 12.

⁵⁸ *Joseph Letuya & 21 others v Attorney General & 5 others* [2014] eKLR, pp. 3-4.

⁵⁹ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council v Kenya* Communication 276/2003.

⁶⁰ Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ('Banjul Charter'), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

⁶¹ *William Yatich Sitetalia and 72,000 Others v Baringo County Council* High Court of Kenya at Nakuru. Miscellaneous Civil Case 183 (unreported) of 2002.

paid to the residents who were to give way to the game reserve”.⁶²

In their complaint to the African Commission, the Endorois made the following claims against the Government of Kenya:⁶³

- (i) They are a community of about 60,000 people who have inhabited the Lake Bogoria area for centuries. Prior to dispossession through creation of a national reserve in 1973, they had established a sustainable way of life inextricably linked to the land.
- (ii) They were forcibly removed from their ancestral land around the Lake Bogoria area in Baringo and Koibatek administrative districts without prior consultations, adequate or effective compensation.
- (iii) At independence in 1963, the British Crown’s claim to the Endorois land in question was passed on to county councils which, under the Constitution, held the land in trust for the communities until it was declared a protected national reserve in 1973.
- (iv) The area surrounding Lake Bogoria is fertile land, with green pasture and medicinal salt licks that help raise healthy cattle. The Endorois claimed that the area was central to their religious and cultural practices housing their historical prayer sites, places for circumcision rituals and other ceremonies.

The African Commission determined that indigenous people have an unambiguous relationship to a distinct territory and that all attempts to define the concept of indigeneity recognize the linkages between people, their land and culture.⁶⁴ The Commission also found, that based on submissions before it, the Endorois culture, religion and traditional way of life are intimately intertwined with their ancestral land, and, without access to that land, the Endorois are unable to fully exercise their cultural and religious rights, and feel disconnected from their

land and ancestors. The Commission made several other findings:

- (i) The Endorois community has a right to property with regard to this ancestral land, possessions attached to it and their animals.
- (ii) After expropriation by the British, the Endorois were never given back full title but the land was instead made subject of a trust,⁶⁵ under the then Constitution of Kenya (now repealed). This trust only gave the Endorois a beneficial title, administered by the relevant local authority, instead of a full title vested in the community. The Commission argued that “ownership ensures that [...] a community can engage with the State and third parties as active stakeholders rather than passive beneficiaries”. In this case, trust land relegated the community to passive beneficiaries on administration by the local authorities, and hence proved ineffective to protect their interests. In any event, this trust status was lost once the land was gazetted into a wildlife protected area in 1973.
- (iii) There was no effective participation that was allowed for the Endorois, nor has there since been any reasonable benefit enjoyed by the community. Further, an environmental and social impact assessment was not undertaken prior to conversion of the land into a wildlife reserve. According to the African Commission, this amounted to violation of article 14 of the African Charter on the right to property, and the failure to guarantee effective participation and access to reasonable share of profits from the game reserve (or other adequate forms of compensation) also extends to a violation of the right to development.⁶⁶

With these findings, the African Commission recommended that Kenya should:⁶⁷

- (i) Recognize rights of ownership to the Endorois and restitute their ancestral land.
- (ii) Ensure that the Endorois community has unrestricted access to Lake Bogoria and

62 *William Yatich Sitetalia and 72,000 Others v Baringo County Council High Court of Kenya at Nakuru*. Miscellaneous Civil Case 183 of 2002 (unreported) at 4.

63 Communication 276 / 2003 – Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of *Endorois Welfare Council v Kenya*, pp. 1–2.

64 Communication 276 / 2003 – Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of *Endorois Welfare Council v Kenya*, p. 36.

65 Communication 276 / 2003 – Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of *Endorois Welfare Council v Kenya*, p. 52.

66 Communication 276 / 2003 – Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of *Endorois Welfare Council v Kenya*, p. 60.

67 Communication 276 / 2003 – Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of *Endorois Welfare Council v Kenya*, p. 80.

surrounding sites for religious and cultural rites for grazing their cattle.

- (iii) Pay adequate compensation to the community for all the loss suffered.
- (iv) Pay royalties to the Endorois community from existing economic activities and ensure that they benefit from employment possibilities in the game reserve.

The decision of the African Commission was however not an actual judgment, but a recommendation made to the Government of Kenya. At the time of this study, recognition of land rights had not been undertaken, and, in light of the reasoning by Kenyan courts in *Letuya and Yator* below, it appears courts of law are unwilling to take on the task to formally shift land rights from public status (forest) to community land or forests. As seen in *Letuya* below, the court suggested the Ogiek could petition the NLC to adjudicate their historical land claims over Mau Forest or follow the formal legal process of removing the protected status of forests under forestry law.⁶⁸

4.3.3 The African Court on Human and Peoples Rights judgment concerning the Ogiek community of Mau Forest

In May 2017, the African Court on Human and Peoples' Rights issued the judgment in *African Commission on Human and Peoples' Rights v. Republic of Kenya*.⁶⁹ The claim, submitted by the African Commission related to the Ogiek community of the Mau Forest who stated that they are an indigenous minority ethnic group in Kenya comprising around 20,000 members, 15,000 who occupy Mau Complex land mass of about 400,000 ha.⁷⁰ According to the claim, in October 2009 the KFS issued a 30-day eviction notice to the Ogiek and other settlers demanding they leave since the forest was a water catchment zone and government land under section 4 of the Government Lands Act (now repealed and replaced

by the Land Act, 2012).⁷¹ The Ogiek claimed they have consistently raised objections to the evictions with local and national administrators, Taskforces and commissions and have instituted judicial proceedings to no avail. They alleged violations of Articles 1, 2, 4, 8, 14, 17(2)&(3), 21 and 22 of the African Charter on Human and Peoples' Rights (African Charter) by the Government of Kenya.⁷²

In its decision, the African Court recognized that the African Charter does not define indigenous peoples, and relying on various international legal instruments, the court deduced criteria applicable to Africa. Thus, the court determined that, under international law in the identification and recognition of an indigenous population, the relevant factors to consider are:

- (i) the presence of priority in time with respect to the occupation and use of a specific territory
- (ii) a voluntary perpetuation of cultural distinctiveness, which may include aspects of language, social organization, religion and spiritual values, modes of productions, laws and institutions
- (iii) self-identification as well as recognition by other groups, or by State authorities that they (indigenous population) are a distinct collective
- (iv) an experience of subjugation, marginalization, dispossession, exclusion or discrimination, whether or not these conditions persist.

On this basis, the African Court found the Ogiek community to be an indigenous population that is part of the Kenyan people having a particular status and deserving special protection deriving from their vulnerability.⁷³ Subsequently, the court assessed whether Kenya was in violation of the African Charter.⁷⁴

Article 14 of this Charter, on the right to property, is especially pertinent to this discussion, because it guarantees the right to property and specifies

⁶⁸ See of the Forest Conservation and Management Act, 2016, § 34.

⁶⁹ *African Commission on Human and Peoples' Rights v. Republic of Kenya*, Application No. 006/2012, Judgement, para 107.

⁷⁰ *African Commission on Human and Peoples' Rights v. Republic of Kenya*, Application No. 006/2012, Judgement, para 6.

⁷¹ *African Commission on Human and Peoples' Rights v. Republic of Kenya*, Application No. 006/2012, Judgement, para 7.

⁷² *African Commission on Human and Peoples' Rights v. Republic of Kenya*, Application No. 006/2012, Judgement, para 10.

⁷³ *African Commission on Human and Peoples' Rights v. Republic of Kenya*, para 112.

⁷⁴ *African Commission on Human and Peoples' Rights v. Republic of Kenya*, para 176.

this may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

The reasoning of the court was that the right to property applies to groups or communities as it can be individual or collective; and this right comprises three elements: the right to use the thing that is the subject of the right (*usus*), the right to enjoy the fruit of the land (*fructus*); and the right to dispose of and transfer the land (*abusus*).⁷⁵ This finding is consistent with the normative content of land tenure rights discussed in Section 3 as comprising user, control and transfer rights.

In order to demonstrate the basis for this reasoning, the African Court relied on article 26 of the UNDRIP,⁷⁶ which provides that:

- (i) Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
- (ii) Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
- (iii) States shall give legal recognition and protection to these lands, territories and resources; such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.”

Relying particularly on article 26(2) of UNDRIP, the court argued that land rights that can be recognized for indigenous peoples/communities on their ancestral lands are variable and do not necessarily entail the right of ownership in its classical meaning, including the right to dispose thereof (*abusus*).⁷⁷ This provision, per the court, places greater emphasis on the rights of possession, occupation, use/utilization of land.⁷⁸

75 *African Commission on Human and Peoples' Rights v Republic of Kenya*, para 123, 124.

76 Universal Declaration of Human Rights, UNGA res. 217A (III), UN Doc A/810 at 71 (1948).

77 *African Commission on Human and Peoples' Rights v Republic of Kenya*, para 127.

78 *African Commission on Human and Peoples' Rights v Republic of Kenya*, para 127.

In its final determination, the court found that Kenya had not disputed that the Ogiek had occupied lands in the Mau Forest since time immemorial.⁷⁹ Therefore, considering it had already recognized the Ogiek as an indigenous community, the court ruled that under article 14 of the African Charter as read together with article 26 of UNDRIP, the Ogiek “have the right to occupy their ancestral lands, as well as use and enjoy these lands”.⁸⁰

After making this determination, the African Court directed the Government of Kenya to take all appropriate measures within a reasonable time frame to remedy all the violations established and to inform the court of the measures taken within 6 months of 26 May 2017, the date of the judgment.

In response to this directive by the African Court, the Government of Kenya on 31 October 2017 appointed a ‘Task Force on the Implementation of the Decision of the African Court on Human and Peoples’ Rights Issued Against the Government of Kenya in Respect of the Rights of the Ogiek Community of Mau’.⁸¹ The Task Force was mandated, among other tasks, to:

- (i) Study all land related laws and policies to see how they address the plight of the Ogieks of the Mau Forest.
- (ii) Establish both the registration and ground status of the claimed land.
- (iii) Recommend measures to provide redress to the Ogiek’s claim. These may include restitution to their original land or compensation with case or alternative land.
- (iv) Prepare interim and final reports to be submitted to the African Court on Human and Peoples Rights in Arusha.
- (v) Examine the effect of the judgment on other similar cases in other areas in the country.

The mandate of this Task Force lapsed before it had submitted a report. Subsequently, a second Task Force was appointed by the Cabinet Secretary for Environment and Forestry, through a legal notice in the Kenya Gazette on 25 October 2018.⁸² This second Task Force had a much wider mandate

79 *African Commission on Human and Peoples' Rights v Republic of Kenya*, para 128.

80 *African Commission on Human and Peoples' Rights v Republic of Kenya*, para 128.

81 Kenya Gazette Notice No. 10944, 31 October 2017.

82 Kenya Gazette Notice No. 11215, 25 October 2018.

than the first one, with the following Terms of Reference being relevant to the current discussion concerning the African Court decision on the Ogiek community of Mau Forest:

- (i) Review the decision of the African Court on Human and Peoples Rights issued against the Government of Kenya in respect of the rights of the Ogiek community of Mau and any other judgments issued by domestic courts in relation to the Ogiek community's Occupation of the Mau Forest.
- (ii) Make recommendations on the short term, medium term and long-term actions to give effect to all final court decisions or orders; and Prepare interim and final reports that shall be submitted to the African Court on Human and People's Rights on actions taken pursuant to any orders in respect of indigenous communities in Kenya.

The Task Force submitted its report to the Ministry of Environment on 20 March 2020, but since the report is not yet public, its contents are not addressed by this study.⁸³

4.3.4 The 2014 Judgment of the High Court of Kenya concerning the Ogiek community of East Mau Forest: *Joseph Letuya & 5 Others v Attorney General & 21 Others*

The facts presented to the court in *Joseph Letuya & 21 others v Attorney General & 5 others*⁸⁴ can be summarized as follows.

In their petition to the High Court, the Applicants claimed:

- That they were members of the Ogiek community, also known as the Dorobo. They have been living in East Mau Forest which is their ancestral land. Mau Forest is one of the country's gazetted forests. They stated that about 10% of members of the Ogiek community derive their livelihood from food gathering and hunting, while the others practice subsistence farming.
- According to the Applicants, their ancestors were living in the Mau Forest as food gatherers and hunters. However, upon the introduction of colonial rule, their ancestral land was declared a forest.
- The Applicants claimed that since that declaration, members of the community have led precarious lives, which have deteriorated over the years. Further, when land for other African communities was set aside as trust land between 1919 and 1939, no land was set aside for them. This meant that no titles to land have been issued to its members as no adjudicating rights and registration of titles could take place. The suit was thus filed by the members of the Ogiek community after their lives became threatened by the actions of the Respondents aimed at evicting them from their said ancestral land.
- The Applicants indicated that they originate from Mariosioni 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 through Mr. Yusuf Haji, the then Provincial Commissioner for Rift Valley, the government informed them that it 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 Mariosioni 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 second and third Respondents started allocating the land that the Ogiek community was occupying to other persons, and examples of such allocation of land occupied by the Applicants was given their supporting affidavit sworn by Joseph Letuya.
- Further, the Applicants told the court that between 1993 and January 1997 people from Bomet, Kericho, Trans-Mara, Chepalungu and Baringo Districts were mainly the ones being allocated land in the Mau-Che Settlement Scheme in Eastern Mau Forest,

⁸³ See: <https://web.facebook.com/MENRKE/posts/1168458820169780>. Disclaimer: The author was Chairperson of this Taskforce and nothing in this study represents either the deliberations or contents of the final report submitted to the government as the disclosure can only be made by the Government of Kenya.

⁸⁴ *Joseph Letuya & 21 others v Attorney General & 5 others* [2014] eKLR

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. They attached a memorandum which the members of the community submitted to members of Parliament in July 1996 in this regard.

The court adopted the ILO definition of indigenous communities, emphasizing that the distinguishing factor is the historical ties of such a community to a particular territory, and their cultural or historical distinctiveness from other populations that are often politically dominant.⁸⁵ The court was also invited by the Ogiek community to determine other questions, two of which are relevant to this study:

Question 1. Do the members of the Ogiek community have recognizable rights arising from their occupation of parts of East Mau Forest?

The Ogiek community claimed to the court that East Mau Forest is their ancestral land, and that they derive their livelihood from food gathering and hunting, while others practice subsistence farming. They also told the court that this livelihood was now threatened by their eviction from the forest and will infringe on their right to life.⁸⁶ The court recognized that the Ogiek were, under Kenya's Constitution, guaranteed a right to life,⁸⁷ an inherent right to dignity that must be respected and protected,⁸⁸ and socioeconomic rights to:⁸⁹

- (i) the highest attainable standard of health, which includes the right to health care services, including reproductive health care
- (ii) accessible and adequate housing, and to reasonable standards of sanitation
- (iii) be free from hunger, and to have adequate food of acceptable quality
- (iv) clean and safe water in adequate quantities
- (v) social security
- (vi) education.

85 *Joseph Letuya & 21 others v Attorney General & 5 others* [2014] eKLR, p.13.

86 *Joseph Letuya & 21 others v Attorney General & 5 others* [2014] eKLR, p.8.

87 Constitution of Kenya, art. 26.

88 Constitution of Kenya, art. 28.

89 Constitution of Kenya, art. 43.

According to the court, the aim of these socioeconomic rights is “to ensure that persons to whom they apply attain a reasonable livelihood”.⁹⁰

In their submissions to the court concerning their claims of having recognizable rights in the East Mau Forest, the Ogiek relied on a memorandum dated 15 July 1996, referred to extensively in the judgment, which was titled “Help Us Live in Our Ancestral Land and Retain both our Human and Cultural Identities as Kenyans of Ogiek Origin”⁹¹ The assertions made by the Ogiek (living in Nessuit and Mariosioni parts of Mau Forest) through this memorandum are important to this discussion and are set out below:

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 sawmills. The average daily pay is Kshs.30/=. A few work with the civil service as clerks, forest guards, administrative police men, patrol

90 *Joseph Letuya & 21 others v Attorney General & 5 others* [2014] eKLR, p.10.

91 *Joseph Letuya & 21 others v Attorney General & 5 others* [2014] eKLR, p.10.

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.

According to the court, “these assertions were not contested” by the Government of Kenya during the hearing of the case. For this reason, based on the submission, and consideration of constitutional provisions, the court determined that the Ogiek’s livelihood is directly dependent on forest resources and the health of forest ecosystems for their livelihoods, and to the extent that they depend on the Mau Forest to sustain their ways of life as well as their cultural and ethnic identity. Thus, it was determined that the Ogiek’s right to life and socioeconomic rights are consequently defined and dependent upon their continued access to the Mau Forest and should be protected to this extent.⁹²

Question 2. If the Ogiek have recognizable rights in the Eastern Mau, have these rights been infringed by their eviction and allocations of land in East Mau Forest to other persons?

In order to determine this question, the Court relied on the March 2009 *Report of the Government Task Force on the Conservation of the Mau Forest Complex* (Republic of Kenya 2009a). The judge noted that the Task Force undertook an extensive audit of the settlements made by the government through excisions of forests (conversion to other uses such as settlement and agriculture) since independence in 1963, and more particularly of the 2001 excisions of the Mau Forest Complex whose purpose was to settle the Ogiek communities, among others. According to the judge:

...the court notes in this regard that the Nessuit and Mariosshoni Schemes were two of the schemes considered in the report with respect to the 2001 excisions, and that while the Mariosshoni 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 court noted that the Task Force had analyzed the correspondence on the land allocation in the 2001 forest excisions and the land registry records on the settlements established after the said excisions, and made the following key findings (Republic of Kenya 2009a, 44–5):

- (i) Some of the allocation of land was carried out by unauthorized persons.
- (ii) The allocation of land benefited non-deserving people, such as senior government officials, political leaders and companies.
- (iii) Ecologically sensitive areas, including water catchment areas were also allocated.
- (iv) 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.
- (v) The allocation of the aforesaid excision in 2001 was not in line with the Government’s stated intention to establish settlement schemes for the Ogiek and the 1990s victims of clashes by which each of the intended beneficiaries should receive one parcel of approximately 2.02 hectares (5 acres).
- (vi) Allocations of multiple parcels of land to the same beneficiaries affected some 6500.5 hectares. In addition, the size of many land parcels was in excess to the normal land size of 2.02 hectares (5 acres).
- (vii) Over 99% of the title deeds (18,516) had 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.
- (viii) In two areas, Nessuit and Kiptagich, the settlement schemes were established in the gazette forest reserves beyond the 2001 forest excisions boundaries.

Based on these findings, the court determined 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

⁹² *Joseph Letuya & 21 others v Attorney General & 5 others* [2014] eKLR, p.11.

by the Ogiek. Thus, the court declined to uphold the legality of the allocations. It adopted the recommendations made by the 2009 Mau Forest Task Force that (a) all titles that were issued irregularly and not in line with the stated purposes of the settlement scheme be revoked, and (b) 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.⁹³

An important question arises at this point: whether on the basis of this finding, the Ogiek community had land tenure rights over the Mau Forest. The Ogiek, in their submissions to the Court, argued that they have a right to property under article 40 of the Constitution by virtue of their interest in the Mau Forest, having lived there for all their lives and having established their homes there.⁹⁴ The government, on its part, argued that Mau Forest is a public (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, according to the government, the Ogiek claims of clan allocations of the land cannot confer on them any recognized right in land.⁹⁵ In this respect, the judge agreed with the government, and decided that:

- (i) The process of conferring legal and equitable property rights in land under Kenyan law is settled, and is dependent upon formal processes of allocation or transfer and consequent registration of title, or of certain transactions that confer beneficial interests in land in the absence of a legal title of ownership.
- (ii) The process of allocation of forest land is further governed by the forest law that requires a process of excision of forest land before such land can be allocated.

The court took the view that the Ogiek 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 forest land. In addition, according to the court, under law, forest land being government land cannot

be subject to prescriptive rights arising from adverse possession. The court held that it cannot, therefore, in the circumstances, find that the Ogiek have accrued any property rights in the Mau Forest that can be the subject of the application of article 40 of the current Constitution.

While the court in adopting the ILO definition of indigenous communities emphasized that historical ties of such a community to a particular territory was a distinguishing factor, the same court declined to recognize any land rights having accrued to the Ogiek based on historical ties. In addition, this judgment is in contrast with the African Court decision, also concerning the Ogiek of Mau, which ruled that as an indigenous community, they “have the right to occupy their ancestral lands, as well as use and enjoy these lands”.⁹⁶

Nonetheless, while the court found that no property rights were yet to accrue to the Ogiek in the Mau Forest, the judge recognized constitutional provisions on community land which vests in and is held by communities identified on the basis of ethnicity, culture or similar community of interest. According to the court, the provisions of the Constitution on community land were to be given effect to through legislation, in this case the Community Land Act, which was enacted two years after this judgment. Further, the court held that the NLC had powers under article 67 of the Constitution to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices and recommend appropriate redress. The court therefore found that while the rights of the Ogiek had been violated by the unlawful excisions in the Mau Forest and the evictions, their claims for property rights in the Mau Forest was “therefore not ripe for determination” and “should be pursued through the necessary legislative processes on the community land legislation, and with the National Land Commission”.⁹⁷

93 Joseph Letuya & 21 others v Attorney General & 5 others [2014] eKLR, p.17.

94 Joseph Letuya & 21 others v Attorney General & 5 others [2014] eKLR, p.11.

95 Joseph Letuya & 21 others v Attorney General & 5 others [2014] eKLR, p.11.

96 African Commission on Human and Peoples' Rights v. Republic of Kenya, para 128.

97 Joseph Letuya & 21 others v Attorney General & 5 others [2014] eKLR, p.12.

4.3.5 The 2020 Judgment of the Environment and Land Court concerning the Sengwer Community and Embobut forest: *David Kiptum Yator & 23 others v Attorney General & 15 others*

Before reviewing the judgment, some background information on Embobut forest is important. It is currently classified under section 77(a) and the Third Schedule to the Forest Conservation and Management Act as a public forest. It was declared as such through Legal Notice No.174 of 1964.⁹⁸ According to the 2010 Embobut Forest Task Force Report, by the end of 2008, about 16,000 ha of the forest was under human encroachment, and approximately 19,500 people were (illegally) living in the forest. Evictions have been recurrent and a vicious cycle of evictions has not yielded positive results for either the government or forest dwellers, such as Sengwer and other groups who were there from pre-colonial times (Embobut Forest Task Force 2010, 8–9). In 2009, the government began the process of eviction again through consultative meetings with local leaders and the community to achieve critical mass public sensitization, to reach a resolution that people should move out of the forest voluntarily. On 1 May 2009, the government began the process of eviction, amid difficulties in determining who the genuine squatters were. The immediate effects of eviction on the forest residents were painful and resulted in a humanitarian crisis (Embobut Forest Task Force 2010, 8–9). In 2013, the Government of Kenya, undertook a compensation process whereby 2,874 families were paid Kshs 400,000 (US\$ 4585 in 2013). The KFS (2014_ argued this money was to purchase alternative land (Kshs 390,000) while the remainder was to cover the cost of relocation and pave way for the government to restore Embobut Forest. Following the compensation, an eviction notice was issued and enforced by KFS. Amnesty International, however, has argued that after being unsuccessful in identifying alternative parcels of land to move the *Sengwer* community, the national government instead imposed an offer of cash compensation to individuals registered for this purpose, mostly heads of families.

Representatives of the Sengwer community filed two petitions in the Environment and Land Court in 2013 and 2018 seeking to stop eviction and adjudicating on ancestral land rights, respectively. These were consolidated by the court and heard as *David Kiptum Yator & 23 others v Attorney General & 15 others*.⁹⁹ This judgment did not address the status of the Sengwer as an indigenous community and the court framed several issues for determination (those requiring the decision of the court), including whether Embobut forest is public land or community land.¹⁰⁰

According to the court, Embobut forest having been proclaimed a forest reserve in 1954, and gazetted as a central forest in 1964, is public land as defined by article 62(1)(g) of the Constitution of Kenya, 2010. According to the judge, the Sengwer community did not tender any evidence to show or suggest that the said land had been legally and procedurally degazetted as a protected forest or procedurally and legally alienated to them as the Sengwer community or Petitioners. The court held further that the evidence availed only showed that some members of the Sengwer community were among the people from several ethnic groups who had entered into Embobut forest for various reasons and purposes and that the Government of Kenya through the 2009 Mau Forest Task Force engaged them, leading to an agreement that they vacate the forest and acquire alternative settlement outside upon being paid, Kshs.400,000. The court, therefore, rejected the petition that Embobut forest was a community forest, under article 63 of the Constitution and instead found that it was a public forest under article 62(1)(g).

4.4 Examining the challenge of legality or formality to indigenous community acquisition of ancestral land title under article 63(2)(d)(i) of Constitution

As highlighted above, the basis for rejection of the indigenous community claims of land classified as forest in *Letuya* and *Yator* judgments was that they

⁹⁸ See Third Schedule to the Forest Conservation and Management Act, 2016. Embobut Forest is listed as Public Forest No. 105.

⁹⁹ *David Kiptum Yator & 23 others v Attorney General & 15 others* [2020] eKLR

¹⁰⁰ *David Kiptum Yator & 23 others v Attorney General & 15 others* [2020] eKLR, p. 7.

were public land under article 62(1)(g) which had not been formally transferred to the communities.

Article 63(2)(d)(i) recognizes as vested in a community any land that is “lawfully held, managed or used by specific communities as community forests, grazing areas or shrines.” This nexus between article 62(1)(g) that recognizes government forests as public land, and the community land under article 63(2)(d)(i) is where the problem for both the Sengwer community in the *Yator* case and the Ogiek community in the *Letuya* case arises. This is seen in how both courts relied on formal legal processes to determine whether the land in question was “lawfully held, managed or used by specific communities”.

In the *Letuya* case, the court specifically relied on formal legal process to determine that the Ogiek had not shown evidence of having formally acquired property rights over Mau Forest. The paragraph below is illustrative of the formalist reasoning:¹⁰¹

The process of conferring legal and equitable property rights in land under Kenyan law is settled, and is dependent upon formal processes of allocation or transfer and consequent registration of title, or of certain transactions that confer beneficial interests in land in the absence of a legal title of ownership. The process of allocation of forest land is further governed by the Forest Act that requires a process of excision of forest land before such land can be allocated. The Applicants did not bring evidence of such processes of allocation of title to land located in the Mau Forest and solely relied on their long occupation of the same. 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.

¹⁰¹ *Joseph Letuya & 21 others v Attorney General & 5 others* [2014] eKLR, p. 12.

In the *Yator* case, the court also relied on the absence of a formal legal process in terms of article 63(2)(d)(i) to rule that there were no property rights. The paragraph below is illustrative:¹⁰²

[T]he Court finds that the Petitioners have not tendered any evidence to show or suggest that the said land had been legally, and procedurally degazetted as a protected forest or procedurally and legally alienated to them as the Sengwer community or Petitioners.

In a 2015 judgment, the High Court addressed itself to similar questions on the implied need for a community to first obtain formal ownership and transfer of land claimed under article 63(2)(d)(i) in *Ledidi Ole Tauta & Others v Attorney General & 2 others*.¹⁰³ In this case, the Petitioners claimed that Ngong Hill Forest, currently classified as a public forest, was their ancestral land. According to the Petitioners:¹⁰⁴

... pursuant to the Anglo-Maasai agreements signed between the Maasai and British Protectorate government on 15th August 1904 and 4th April 1911, the Maasai people vacated all the area and land known as Nairobi County and settled on Ngong Hills and surrounding areas. As a result, it was claimed by the Petitioners, the Maasai have been living in the said Ngong Hills as a community practicing their culture and sustaining their economic lifestyle for decades. The Petitioners argued that in 1949, Ngong Hills were gazetted as crown (government) land which was subsequently degazetted in 1963 and re-gazetted under trust land under the jurisdiction of Ol Kejuado County Council. The court however found that the land claimed by the Petitioners falls within the Ngong Hills Forest, which had been gazetted (formally declared to be a public forest) in 1985 and now falls under the Management of the Kenya Forest Service.

The court’s decision to reject the petition hinged on the fact that no formal processes had been

¹⁰² *David Kiptum Yator & 23 others v Attorney General & 15 others* [2020] eKLR, p.11.

¹⁰³ *Ledidi Ole Tauta & Others v Attorney General & 2 others* [2015] eKLR

¹⁰⁴ *Ledidi Ole Tauta & Others v Attorney General & 2 others* [2015] eKLR, p.1.

executed to change the status of Ngong Hills Forest from a protected public forest:¹⁰⁵

To conclude, this court notes that Ngong Hills Forest has not been degazetted as such and its boundaries have not been varied to make it available for alienation to the Petitioners.

The court's view was that the Petitioners ought to have petitioned the Minister through the KFS Board to consider whether any basis existed to have the Ngong Hills Forest degazetted to accommodate their interests. Additionally, the court found that the Petitioners could have engaged the KFS to be granted rights for community participation since forest law did not make provision for individualized ownership of land that had been brought under its operation.¹⁰⁶ The court in *Letuya* also gave this as an option holding that the "participation of indigenous forest dwellers in management of forests is also specifically provided for" in Kenyan forest law. This was in reference to provisions for community participation in the management of public forests, discussed in the next section.

The conclusion from this analysis is that the legal requirement of a prior formal process of transferring ownership of (public land or forest) land from the State to an indigenous community places a significant legal burden. This is because in order to realize their ancestral land rights under article 63(2)(d)(i), with respect to certain land currently classified as public forests such as Mau or Embobut forests, the communities have to petition Parliament to invoke section 34 of the Forest Conservation and Management Act. This is the provision that sets out the procedure and requirements for revoking the forest status of public land. The public forest revocation of registration procedure requires the interested community to file a petition in Parliament (either the National Assembly or Senate). The petition must demonstrate (section 34(2)) that the revocation of registration does not endanger any rare, threatened or endangered species; or adversely affect the value of the public forest as a water catchment area, or prejudice biodiversity

conservation or cultural site protection of the forest or its use for educational, recreational, health or research purposes. In addition to carrying out of public consultations, a mandatory independent environmental impact assessment is required.

A decision on whether to approve the petition will include a recommendation made by the Cabinet Secretary responsible for forests, and a vote taken by the relevant house of Parliament. The procedure for revocation of the registration of a public forest is not only long and complex, but it also involves a technical threshold (section 34(2)) that is difficult to fulfill. This means that in many instances, communities will likely be granted alternative land or other forms of compensation.

Once this revocation (commonly known as degazettement) is approved by Parliament, the now unprotected public land (no longer a forest) can be converted into community land. This conversion is permissible under section 24 of the Community Land, through an allocation to a community by the NLC exercising authority given under section 12 of the Land Act. One pathway for indigenous communities to trigger revocation with justification is pursuant to findings and recommendations of historical land injustice investigations by the NLC.

4.5 Determination of historical land injustices as a pathway for indigenous communities to claim ownership of community land under article 63(2)(d)(ii)

Historical land injustices are recognized by the Constitution, which grants the NLC the power to investigate and settle such claims.¹⁰⁷ In the *Letuya* case, the court ruled that the Ogiek petition on property rights was not ripe for determination by the court and should be pursued with the NLC under its powers to investigate and determine historical injustices. Similarly, in the *Yator* judgment, the court urged the Sengwer community to (a) either apply to the KFS for licenses or permits to access the cultural or religious sites situated or (b) consider pursuing their claim before the NLC for determination under its powers to investigate such claims. According to the court, the NLC has power to offer appropriate redress should

105 *Ledidi Ole Tauta & Others v Attorney General & 2 others* [2015] eKLR, p. 15.

106 *Ledidi Ole Tauta & Others v Attorney General & 2 others* [2015] eKLR, p. 15.

107 Constitution of Kenya, art. 67 (2)(e)

it consider the proclamation of Embobut forest as a forest reserve in 1954, and its subsequent gazettement as a central forest in 1964, took away the Sengwer ancestral land hindering their access to the cultural and religious sites and use.¹⁰⁸

While this court made this as a suggestion, the court in *Ledidi* noted that the Petitioners' claim to the land was predicated on what they claimed were historical injustices visited on the community by the colonial masters "who required that they move out of what they claim were ancestral lands to pave way for white settlement".¹⁰⁹ This court held the view that "the Constitution acknowledged there could have been historical injustices in the manner land issues were handled by past regimes and hence among the functions and mandate of the NLC is to investigate historical injustices and to make recommendations for redress".¹¹⁰

In its final determination, the court in *Ledidi* was more restrained in taking up jurisdiction to determine historical land injustices. In its view, the NLC has that constitutional mandate and, as such, the court is not the appropriate organ to carry out the investigation and/or inquiry and where the law has made provision for a State organ or institution to carry out a specific function, that institution should be allowed to carry out its mandate.

The court would get involved once a person has exhausted the process of degazetting a forest and/or having the NLC adjudicate a historical land injustice and make its determination. In this sense, since communities laying land claims under 63(2)(d)(i) are required to show proof of a formal legal transfer of the land to them, it may be advisable for indigenous communities to pursue ancestral land rights (currently held as public forests) under article 63(2)(d)(ii) of the Constitution through the procedure for historical land injustices.

This procedure is stipulated under section 15 of the National Land Commission Act, which defines a historical land injustice to mean a grievance which:

- (a) was occasioned by a violation of right in land on the basis of any law, policy, declaration, administrative practice, treaty or agreement

108 *David Kiptum Yator & 23 others v Attorney General & 15 others* [2020] eKLR, p.12.

109 *Ledidi Ole Tauta & Others v Attorney General & 2 others* [2015] eKLR, p.16.

110 *Ledidi Ole Tauta & Others v Attorney General & 2 others* [2015] eKLR, p.16.

- (b) resulted in displacement from their habitual place of residence
- (c) occurred between 15th June 1895 when Kenya became a protectorate under the British East African Protectorate and 27th August 2010 when the Constitution of Kenya was promulgated
- (d) has not been sufficiently resolved and subsists up to the period specified under paragraph (c)
- (e) meets the criteria set out under subsection 3 of this section.

Section 15(3) provides that a historical land claim may only be investigated by the NLC if it meets the following criteria:

- (a) it is verifiable that the act complained of resulted in displacement of the claimant or other form of historical land injustice
- (b) the claim has not or is not capable of being addressed through the ordinary court system
- (c) the claimant was either a proprietor or occupant of the land upon which the claim is based
- (d) no action or omission on the part of the claimant amounts to surrender or renouncement of the right to the land in question
- (e) it is brought within five years from the date of commencement of this Act, (from September 2016). This means that an amendment would have to be approved by Parliament before September 2021 to prevent this provision from expiring.

Under this law, a historical land claim will be permissible if it was occasioned by, among other causes, colonial occupation, independence struggle, pre-independence treaty or agreement between a community and the government, development-induced displacement for which no adequate compensation was given, inequitable land adjudication process, or politically motivated or conflict-based eviction.¹¹¹ The additional criteria under section 15(3) appear likely to make it hard for indigenous communities to have their historical land injustice claims.

There are several remedies available under section 15(9), with the most relevant ones to this study set out below:

- (i) Restitution of claimant to the land in question.

This would mean, for instance, that if the NLC accepted a historical land injustice claim and

111 National Land Commission Act, 2012, § 15(4).

decided to recommend restitution, it could direct that community lands falling within the scope of article 63(2)(d)(i) or (ii) of the Constitution be transferred to the indigenous community in question. In such case, this would mean that the revocation (gazettement) procedures stipulated under section 34 of the Forest Conservation and Management Act can be triggered if the land in question was classified as a public forest. Afterwards, the public land (that is no longer a forest) can be converted to community land. There is a legal requirement for the recommendations of the NLC to be implemented within three years of being made, by any authority that is mandated to implement.¹¹²

(ii) Compensation, if it is impossible for restitution to be given.

For instance, where the community lands fall within public forests, and either section 12 of the Land Act prevents allocation of tenure rights because it is forest land or the legal requirements for revocation of registration of a public forest under section 34 of the Forests Conservation and Management cannot be fulfilled.

(iii) Resettlement on an alternative land.

(iv) Rehabilitation through provision of social infrastructure.

(v) Implementation of affirmative action programs for marginalized groups and communities.

The NLC has now formally published, in the Kenya *Gazette*, the National Land Commission (Investigation of Historical Land Injustices) Regulations, 2017.¹¹³ Among other examples discussed in this report, the case of the Sengwer, and their land claims into Embobut forest; and the various land claims by the Ogiek, Endorois, Aweer and other indigenous communities in Kenya fall within the scope of this legal provisions and could be settled through the historical land injustice

processes. Although beyond the scope of this paper, the ability of the NLC to adequately implement this mandate should be analyzed further based on institutional challenges that have afflicted its execution of mandate.

4.6 Conclusion

The Constitution and enhancements by judicial decisions have affirmed that Kenya recognizes the identity of indigenous communities, based on unique lifestyle and historical ties to certain lands. This recognition, together with equality and affirmative action provisions in the Constitution can enhance socioeconomic circumstances, if adequately implemented. Nonetheless, a legal conundrum results from how Kenyan courts have interpreted the law concerning claims by certain indigenous communities over land falling under article 63(2)(d)(i) of the Constitution. These are lands mainly classified as public land or forests – and according to the courts no land rights have accrued despite recognition of long historical ties to such land. This approach contrasts the view taken by the African Court, concerning the Ogiek of Mau, where the court determined that certain (albeit limited) tenure rights have accrued to the community. The African Commission, with respect to the Endorois, recommended that Kenya recognized their ownership over Lake Bogoria and instituted land restitution. The preferred approach by the courts is for indigenous communities to first petition the NLC to determine their land claims as historical land injustices, and thereafter request Parliament to approve revocation of forest status on the land. It is only then that such land can be transferred formally to the specific indigenous community. This approach, while potentially intended to protect the environmental functions of forests, places a major burden on indigenous communities seeking equality in recognition of their land rights.

112 National Land Commission Act, 2012, § 15(10).

113 National Land Commission (Investigation of Historical Land Injustices) Regulations, 2017. Legal Notice No. 254, Kenya Gazette Supplement No. 258.

5 Indicator 3: Assessing the legal provisions securing community participation in management of public forests

Community participation in the management of public forests has a long history in Kenya. It can be traced to the *shamba* system which had been pursued in forest plantation establishment since 1910 to produce wood for industries and domestic uses away from natural forests (Kagombe and Gitonga 2005; see also Kibugi 2011, 294–296). Several types of participants, such as serving and retired forest workers, landless peasants and those who live within the immediate vicinity of the forest area, used to be involved in the practice (Oudol 1986, 366). Under the *shamba* system, the government allowed farmers to work on tasks agreed with the Forests Department while cultivating the *shambas* allotted to them to grow food crops, for to two or three years, giving them the sole right to all such produce (Oudol 1986, 366). With time, laxity in controls and oversight led to an influx of people, higher demand for more forest land to set up *shambas*, poorly tended *shambas* and low survival of planted trees (World Bank 2007). The system was suspended by a Presidential decree in 1987 and all forest workers and other people resident in forest villages were evicted in 1988 (Oudol 1986, 366; see also Kibugi 2011, 294–296).

In the period since then, Kenya has put in place legal and institutional mechanisms governing community participation in management of public forests. This is through establishment and licensing of CFAs first introduced through the Forests Act of 2005, and this is now continued by the 2016 Forests Conservation and Management Act, which replaced the 2005 law. It is important to recall earlier discussions where Kenyan courts in *Yator*, *Letuya* and *Ledidi* urged the Sengwer (Embobut forest), Ogiek (Mau Forest) and Maasai (Ngong Hills Forest) communities, as an alternative to pursuing historical land injustice, to seek permits from the KFS and access the socioeconomic benefits, cultural and sacred sites through community participation.

5.1 The role of Community Forests Associations in securing participation of forest-adjacent communities

CFAs were first established through provisions for community participation in forests management in Part IV of the Forests Act, 2005; and continued through Part V of the Forest Conservation and Management Act, 2016. Section 48 of the 2016 forestry law provides as follows:

48(1) A member of a forest community may, together with other members or persons resident in the same area, register a community forest association ...

The language in the legislation implies a community of interest rather than a community by ancestry, although the latter are not excluded. It thus recognizes that a member of a forest community may register a CFA “*together with other members, or persons resident in the same area*” (emphasis added). In addition, section 48(2) provides that a registered CFA may apply to KFS for permission to participate in the conservation and management of a public forest. The law is thus clear that community participation in management of public forests does not amount to granting of ownership rights over the public forest in question, but rather, amounts to “permission to participate in the conservation and management of a public forest”¹¹⁴ through a management agreement between the CFA and the KFS.¹¹⁵

This means that communities participating in forestry management through a CFA are doing so under a license (or permit) given by KFS and

114 Forest Conservation and Management Act, 2016, § 48(2).

115 Forest Conservation and Management Act, 2016, § 48(4).

under conditions specified by KFS. In essence, they are holding a limited bundle of tenure rights, that gives clearly defined user rights. Security of the limited tenure rights is for a defined duration, and assurance is provided through the legal provisions governing termination of the CFA permit and access to the National Environmental Tribunal for resolution of any disputes that may arise between the CFA and KFS.¹¹⁶ The implementation of these provisions is still being guided by the 2009 *Forests (Participation in Sustainable Forest Management) Rules*¹¹⁷ also known as the Forest Rules, developed for the 2005 legislation but reserved through section 77(e) of the 2016 Forest Conservation and Management Act, until new regulations are put in place. The 2009 Forest Rules classify community participation into two forms. The first form involves community forest management agreements whereby a local community is authorized to participate in forest conservation and management, based on user rights assigned by the Forest Service.¹¹⁸ The second form involves the issuance of permits to community forest associations, allowing its members to engage in non-residential cultivation of degraded industrial forest plantations, as they tend and grow tree seedlings.¹¹⁹

5.2 Procedure for CFAs to commence community participation in forestry

There is a contradiction between the 2016 forests law, and the Forest Rules regarding how participation of a CFA in sustainable forestry should commence. Section 48(2) of the Forest Conservation and Management Act anticipates a situation where registered forest associations “may apply to the KFS for permission” to participate in conservation and management of a public forest. In contrast, the 2009 Forest Rules appear to reserve the authority to the KFS “whenever circumstances make it necessary or appropriate to do so, *to invite forest associations* to participate in the sustainable management of State forests”. This situation removes the legal opportunity for communities

to proactively apply to participate in sustainable forestry management.

5.2.1 The rights and duties of CFAs under a management agreement

Section 49(1) of the Forest Conservation and Management Act sets out the functions of a CFA when participating in the conservation and management of public forests. This is done through conclusion of a management agreement between the CFA and KFS, which sets out various obligations of the CFA, including to:

- protect, conserve and manage the forest pursuant to an approved management agreement and the provisions of the management plan for the forests
- formulate and implement forest programs consistent with the traditional forest user rights of the community concerned in accordance sustainable use criteria
- protect sacred groves and protected trees
- keep the Forest Service informed of any developments, changes and occurrences within the forest which are critical for the conservation of biodiversity
- help in firefighting.

One of the purposes of a CFA, under a management agreement with KFS, is for members to access various benefits, as from time to time agreed. Section 8(d) empowers the KFS to establish and implement benefit-sharing arrangements that are consistent with the forestry law. There are no other provisions governing benefit sharing, pending further action by KFS. Thus, an assumption appears to be that each CFA will internally, through its Constitution, provide for the sharing of financial benefits. When developing new regulations for the 2016 Forestry Law, it may be necessary to include a clause requiring each CFA, at the time of registration, or at defined intervals, to submit internal benefit-sharing criteria.

Further, new regulations should provide content for section 8(d) of the Forestry Law by identifying and implementing benefits and benefit-sharing arrangements. One example is the benefits that could arise from implementation of the KFS function in section 8(j), to manage water catchment areas in relation to soil and water conservation, carbon sequestration and other environmental services. In this context,

116 Forest Conservation and Management Act, 2016, § 70(2).

117 Legal Notice No. 165 (6 November 2009).

118 Rule 43.

119 Rule 50.

CFAs could take part in activities intended for reducing emissions from deforestation and forest degradation (REDD)+, as well as schemes involving payment for environmental services.

5.2.2 Legal provisions on issuance of non-residential cultivation permits to CFAs

According to the 2009 Forest Rules, non-resident cultivation is restricted to areas of State forests intended for the establishment of industrial plantations.¹²⁰ This is presumably those areas which have not been replanted and remain degraded. The Forest Rules require KFS to identify and zone off the earmarked forest areas that qualify for cultivation, which are then demarcated into individual plots with a minimum of 0.25 hectare and the maximum determined on a case-by-case basis. Subsequently, KFS is required to prepare a sketch map of all the plots, which will be prominently displayed at the local forest station.¹²¹ In order to enhance transparency in the process, regulations require the allocation of plots by the Forest Service to be done through a balloting system organized through the CFA. After this, the selected persons will be issued with written permits. It is a legal requirement that the chosen method of plot allocation must give preference to the poor and vulnerable members of the community.¹²² The permit issued only confers limited user rights and a tenancy for a period not exceeding three years with respect to a particular plot.¹²³

The Forest Rules prohibit the allocation of plots for cultivation in forest areas that include important water catchment areas or sources of springs; on slopes exceeding a 30% gradient; within 30 m of either side of a river course or wetland, spring or other water source; or in firebreaks, road reserves, natural glades, natural forest areas and areas under mature plantations.¹²⁴ The permit holders are not authorized to lease out or sublet the allocated plot and must pay annual rental fees to KFS. The permit maybe terminated if any conditions are violated. In addition, the permit only authorizes the planting of annual crops such as maize, non-climbing beans or potatoes, limits the permit holders to only using hand tools for

land preparation, and prohibits erection of any structures on the plot, except in areas with high incidences of wildlife-induced crop damage.¹²⁵

In practice, non-residential cultivation is referred to as the Plantation Establishment and Livelihood Improvement Scheme (PELIS). Its performance and risks to forest conservation was the focus of a Task Force appointed by the government to investigate illegal logging. In its 2018 report, the Task Force noted that while the PELIS program was meant to improve the economic gains of participating farmers while ensuring the success of planted trees, it had instead led to considerable abuse and loss of forestland (Republic of Kenya 2018, 35). This is because many other illegal practices are camouflaged under its umbrella, including agricultural encroachment into the indigenous forest via plantations. According to the report:

- PELIS provides access to land, leading to illegal conversion of indigenous forests into plantations.
- Some of the PELIS areas are located deep inside the forest, creating resident farmers who are entirely dependent on forest resources.
- PELIS also leads to the depletion of wildlife and human–wildlife conflict in cases where plantations are bordered by indigenous forests.

For these reasons, the Task Force recommended that the non-resident cultivation program should be progressively phased out over a four-year period and that no further PELIS areas should be opened. As an alternative, the Task Force recommended that the government should provide a role for CFAs in the establishment of plantation forests by providing access to concession agreements (Republic of Kenya 2018, 44).

5.3 Conclusion

The utility of community participation in the management of public forests was addressed by the 2009 Mau Task Force Report (Republic of Kenya 2009a). This report noted that forest-adjacent communities continue to depend on forests for various needs including water, firewood, grazing, fruits, vegetables and medicinal plants. In addition, the report observed that degradation of the Mau

120 Rule 50.

121 Rule 51.

122 Rule 46.

123 Rule 55.

124 Rule 45.

125 Rule 47(1).

Forest Complex has been associated with activities of communities residing in and around the forest, such as firewood collection, overstocking livestock, encroachment, illegal logging for timber and charcoal production. The Task Force recommended fast tracking participatory forest management to enhance engagement of forest-adjacent communities in afforestation and reforestation and the proper designing of benefit-sharing arrangements. The enhancement of community participation, if implemented, will support Kenya in fulfilling its constitutional obligation under article 69(1) to ensure the country has a

minimum tree cover of 10% of total land cover. The country should also enhance and promote on-farm forestry activities, outside protected public forests, to promote socioeconomic and environmental benefits, including drawing of benefits from innovative systems, such as payment for environmental services. It is important too, that a decade later in 2018, another Task Force firmly called for the phasing out and abolition of non-resident cultivation in public forests. Instead, it proposed the enhancement of communities' roles in establishing plantation forests, including by granting concessions.

6 Conclusion and key recommendations

6.1 Conclusion

This study set out to assess the tenure security over land and forestry rights of local communities and indigenous peoples under the Kenyan legal framework. The objective was to assess the adequacy of this legal framework in protecting and promoting tenure rights of forest communities, including over protected areas. Kenya has had a complicated and difficult history with the administration and protection of community land rights. However, the country, having adopted a progressive constitutional framework, not only has a strong human rights structure underpinning land rights in place, but has also improved clarity by reclassifying land to include a distinct category of community land. The process of transitioning the management of these community land rights to the new legal framework is now underway, albeit at a slow pace. In the fullness of time, the value of these legal provisions and structures in protecting the tenure rights of communities will be tested.

An assessment of the Community Land Act, undertaken in this report, shows that, in compliance with the Constitution, this law has comprehensively defined community tenure rights and put in place legal provisions to enhance and guarantee security of tenure. It is notable that ancestral land claims by indigenous communities over lands classified and held as public forests, have been turned down by courts. Indeed, Kenyan courts as seen in *Letuya*, *Ledidi* and *Yator* have declined to recognize indigenous community land rights over land currently classified as public forests. The courts have, in so doing, pointed to the lack of a prior legal process through which those lands were formally transferred, from being public forests, into community land transferred to those indigenous people.

In *Letuya* for instance, the High Court even after finding that the land rights of the Ogiek were violated, declined to recognize that the Ogiek had accrued property rights over the Mau forest. Instead, the Court ordered the National Land Commission, within one (1) year, to 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 of the Mau forest.¹²⁶ The African Court, in contrast, having found that Ogiek land rights in the Mau forest had been violated went on to determine that having ancestral ties to the Mau forest, the Ogiek have the right to occupy their ancestral lands, as well as use and enjoy those lands. The African Court did not, however, set out or prescribe the manner through which right of the Ogiek to occupy land in the Mau forest would be implemented and actualized, in practice. Similar to the African Court, in 2010 the African Commission found that the Endorois culture, religion and traditional way of life are intimately intertwined with their ancestral land and without access to that land the Endorois are unable to fully exercise their cultural and religious rights and feel disconnected from their land and ancestors. For this reason, the Commission recommended that the Government of Kenya should recognize the Endorois rights of ownership and restitute their land.

The Kenyan courts have generally recommended that these indigenous communities submit historical land injustice claims, over the same lands, to the NLC for determination. The Commission is empowered by the Constitution and law to hear the claims, and if persuaded, to recommend

¹²⁶ Joseph Letuya & 21 others v Attorney General & 5 others [2014] eKLR, p. 19.

remedies that must be implemented within three years. Nonetheless, while substantive provisions to enable this process were enacted in September 2016, they are valid for five years with expiry in September 2021 unless extended by Parliament.

Implementation of the Community Land Act will be a long-term and complex process. The ascertainment, adjudication and registration of the community and its ownership interests over any land will be a complex exercise. In instances where the community has continuously occupied land that is outside protected (forests and wildlife) areas, the process will be less complex, similar to conversion of land registered under group representatives.

It is possible that registration of hitherto unregistered community land could bring additional problems. These include the legal possibility of subdivision and selling of the land, thereby resulting in community landlessness despite the intent to assure tenure. In pastoralist areas, which are usually arid and semi-arid lands, demarcation of community land boundaries should be preceded by spatial or physical planning. This is important in order to identify, map out and make provision for the ecological resources necessary for pastoralist mobility and a transhumance lifestyle, including livestock pathways, water sources and holding grounds. If this is not undertaken, and critical pastoralist infrastructure is included as part of community land rights bundle, this will create complications, including conflict.

While community participation in the management of public forests has been identified as critical to their sustainable management, it may be insufficient. There is need for enhancement of benefit generation and sharing. Recommendations have been made to fast-track participatory forest management to enhance the engagement of forest-adjacent communities in afforestation and reforestation, and involve them in the proper design of benefit-sharing arrangements. The enhancement of community participation, if implemented, will support Kenya in fulfilling the constitutional obligation under article 69(1) to ensure the country has a minimum tree cover of 10% of total land cover. This will help Kenya to meet its commitments under the Paris Agreement to reduce greenhouse gas emissions by 32% with forestry as a major carbon

sink. However, concern has been raised over the sustainable value of non-resident cultivation programs and a firm recommendation has been made by the 2018 Task Force report for this to be closed down. Instead, it should be replaced by enhancement of communities' roles in establishing plantation forests, including through the granting of concessions.

6.2 Key recommendations

To enhance application of the legal framework to ensure protection of indigenous peoples and community land rights, this paper makes several key recommendations:

- (i) It is important to undertake and finalize the mapping out and development of an inventory of areas of community land that require ascertainment of customary rights, adjudication and registration. This should be done in a participatory manner. Areas previously adjudicated and registered through the Land (Group Representatives) Act can be transitioned with ease through the creation of a community assembly and election of a community land management committee.
- (ii) Participatory development of bylaws, including those governing management, land use and sustainability requirements of community land should be a priority. Areas of community land previously governed either under the Trust Lands Act or the Government Lands Act (i.e. those lands occupied by communities with ancestral claims but remaining unalienated) should also be prioritized, especially those areas without a dispute on the identity of the community with land interests.
- (iii) A system should be put in place to map out which community forests legally fall within the scope of article 63(2)(d)(i) and (ii) of the Constitution – and to distinguish the proper legal process to be followed. Based on the court decisions reviewed above, it appears that indigenous peoples and other local communities need to trigger the NLC to initiate and conclude historical land injustices hearings regarding those lands they claim as ancestral homes. In this respect, the Commission should be commencing the processes of admitting and hearing historical land injustices publicly and rendering remedies without further delay.

- (iv) There should be prioritization of the needs of indigenous communities in addressing ancestral land claims, either directly through implementation of the Community Land Act provisions on adjudication and registration, or through commencement of investigations into historical land claims and injustices. Regulations have now been enacted to implement the National Land Commission to admit and determine historical land injustices. Thus, the NLC should expedite the process as the law provides that historical land claims should be brought within five years from September 2016. It may be necessary to amend the law and place a fixed period within which the investigations of historical land claims must be concluded, in order to enhance the pace at which the human rights of the concerned communities are fulfilled.
- (v) There should be evaluation and determination of the appropriate governance framework that will be applied in the event a protected area (e.g., public forest) is converted into community land and is transferred or registered to an indigenous community. This situation may likely result from successful conclusion of a historical land injustice claim over a public forest, and a decision to transfer such public forest, or a portion to an indigenous community has been made. In this case, taking into account the importance of forests, there is a need to maintain forest status of the transferred land, albeit indigenous community-owned and managed. Modifications to the governance framework could include how to codify customary practices and culture that are consistent with biodiversity conservation, the Constitution and the fulfillment of human rights. Practices should eliminate internal

- discriminatory practices, supporting the role and rights of women in holding tenure rights as part of the collective community land title and securing an equal non-discriminatory role for women in decision making processes.
- (vi) The implementation of legal mechanisms for community participation in management of public forests is critical for Kenya, including to fulfill the constitutional obligation to increase tree cover to 10% of total land cover. This requires revisiting the regulations made in 2009 for the now repealed 2005 forest legislation, which are still in force. This will ensure that the incongruities highlighted have been corrected to enhance the role of forest-adjacent communities in management of public forests. In addition, promotion of on-farm forestry to relieve pressure on protected forests is important, including enhancing the registration of private and community forests to ensure the receipt of benefits from county governments and the KFS.

Kenya has a new legal framework and institutions have revised mandates or completely new mandates. In the years to come, whether this new legal framework governing community land rights will result in enhanced protection of community tenure rights will depend on the functioning and effectiveness of these institutions. In order to ensure this golden opportunity of realizing community land rights is not lost, a monitoring and evaluation framework for the performance of these institutions should be set up under the Community Land Act. This framework can monitor effectiveness of the institutions in executing their mandate, and fidelity to the law. Reporting arrangements to provide information for the monitoring framework should be defined, including public dissemination of those reports.

References

- Akiwumi AM, Bosire SEO and Ondeyo SC. 1999. *Report of the Judicial Commission of Inquiry into Tribal Clashes in Kenya*. Nairobi: Government Printer.
- Amnesty International. 2018. *Families torn apart: Forced eviction of Indigenous People in Embobut Forest, Kenya*. London: Amnesty International.
- Embobut Forest Task Force. 2010. *Embobut Forest Task Force Report*. Nairobi: Ministry of Forestry and Wildlife.
- Hanstad T, Prosterman RL and Mitchell R. 2009. Poverty, law and land tenure reform. In Prosterman RL, Mitchell R and Hanstad T, eds. *One Billion Rising: Law, Land and the Alleviation of Global Poverty*. Leiden: Leiden University Press. 34.
- [FAO] Food and Agriculture Organization. 2002. *Land tenure and rural development*. FAO Land Tenure Studies 3. Rome: FAO.
- Kagombe J and Gitonga J. 2005. *Plantation Establishment in Kenya: A Case Study on Shamba System*. Nairobi: Kenya Forestry Research Institute & Forest Department.
- Kameri-Mbote P, Odote C, Musembi C and Kamande M. 2013. *Ours by Right: Law, Politics and Realities of Community Property in Kenya*. Nairobi: Strathmore University Press.
- Kenya Human Rights Commission. 2014. *Forgotten in the scramble for Lamu: A position paper on the LAPPSET Project in the Case of the Aweer and the Fisherfolk*. Nairobi: Kenya Human Rights Commission.
- [KFS] Kenya Forest Service/ 2014. *Embobut Forest*. Nairobi: Kenya Forest service. http://www.kenyaforestservice.org/index.php?option=com_content&view=article&id=379:embobut-forest&catid=81&Itemid=538
- Kibugi R. 2014. The constitutional basis of public participation 315 in environmental governance. In Hassane C, Madhava Menon NR, Cordonier Segger M and Nmehielle VO, eds. *The World Bank Legal Review, Volume 5. Fostering Development through Opportunity, Inclusion, and Equity*. Washington, DC: World Bank.
- Kibugi R. 2011. *Governing Land Use in Kenya: From Sectoral Fragmentation to Sustainable Integration of Law and Policy*. [Doctoral thesis] Ottawa, Canada: University of Ottawa.
- Kibugi R, Mwathane I and Makathimo M. 2016. *Large scale land acquisitions for investment in Kenya: Is the participation, and benefits of affected local communities meaningful, and equitable? A case study of the situation in Lamu, Isiolo and Siaya Counties*. Nairobi: Land Development and Governance Institute.
- Meinzen-Dick R, Brown LR, Feldstein HS and Quisumbing AR. 1997. Gender, property rights and natural resources. *World Development* 8(25):1303.
- Nguyen HL. 2012. Agricultural land tenure security under Vietnamese Land Law: Legislative changes and improvements since the economic reform. *Land Tenure Journal* 2(12):67–93.
- Nunow AA. 2012. *The displacement and dispossession of the Aweer (Boni) Community: The Kenya Government dilemma on the new Port of Lamu*. International Conference on Global Land Grabbing II, 17–19 October 2012, Land Deals Politics Initiative (LDPI). Ithaca, NY: Cornell University.
- Oduol PA. 1986. The shamba system: an indigenous system of food production from forest areas in Kenya. *Agroforestry Systems* 4:365–73.
- Place F, Roth M and Hazell P. 1993. Land tenure security and agricultural productivity performance in Africa: Overview of research methodology. In Bruce JW and Migot-Adholla S, eds. *Searching for Land Tenure Security in Africa*. Iowa: Kendall Hunt Publishing/World Bank. 23.
- Republic of Kenya. 2009a. *Report of the Government's Task Force on the Conservation of*

- the Mau Forests Complex*. Nairobi: Office of the Prime Minister.
- Republic of Kenya. 2009b. *Sessional Paper No.3 of 2009 on National Land Policy*. Nairobi: Government Printer.
- Republic of Kenya. 2018. *A report on forest resources management and logging activities in Kenya: Findings and recommendations*. Nairobi: Taskforce to Inquire into Forest Resources Management and Logging Activities in Kenya, Ministry of Environment and Forestry,
- Republic of Kenya. 2019. *National Population and Housing Census: Distribution of Population by Socio-economic characteristics, Volume IV*. Nairobi: Republic of Kenya. 423.
- Strelein L. 2005. From Mabo to Yorta: Native Title Law in Australia. 19 Wash U JL & Pol'y 225, p.250.
- Strelein L. 2001. Conceptualising native title. 23 Sydney L Rev 95, p. 99.
- Truth, Justice, and Reconciliation Commission. 2008. *Report of the Commission of Inquiry into Post-Election Violence*. Nairobi: Truth, Justice, and Reconciliation Commission
- United Nations. 1992. *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992. Vol. I: Resolutions adopted by the Conference, resolution 1, annexes I and II*. New York: United Nations. para 26.1.
- Weibe KD and Meinzen-Dick R. 2005. Property rights as policy tools for sustainable development. *Land Use Policy* 15(3):203–15.
- World Bank. 2007. *Strategic Environmental Assessment of the Kenya Forest Act 2005*. Washington, DC: The World Bank.

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This study aimed to understand whether, and to what extent, Kenyan legal provisions are sufficient to secure community land rights, particularly those of indigenous peoples and local communities. It assesses the adequacy of Kenya's legal framework for protecting and promoting tenure rights of forest communities, including over protected areas. There is an enduring problem pertaining to historical land injustices, where certain indigenous peoples and local communities have sought formal recognition of their land rights over areas classified as public land, which are managed mainly as public forests or national wildlife reserves.

The analysis uses three indicators to evaluate the levels of protection and securing of community land and forest tenure rights: the scope and security of tenure; the legal status and protection of indigenous peoples' (forest peoples') tenure rights; and community participation in management of public forests.

It demonstrates that there are improvements in legal protection for indigenous communities. Nonetheless, a legal conundrum results from how Kenyan courts have interpreted the law concerning claims by certain indigenous communities over land falling under article 63(2)(d)(i) of the Constitution, mainly classified as public land or forests. For example, whereas the African court recognized the Ogiek rights over Mau Forest, the Kenyan courts have declined to do so. Also, despite its finding, the African Court did not prescribe how those land rights can be actualized; and the courts in Kenya have advised the communities to utilize the resolution of historical land injustices procedures prescribed in law. This Occasional Paper explores this case and others.



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