

## CHAPTER THREE

### KENYA'S LEGAL FRAMEWORK AND INDIGENOUS PEOPLES' LAND RIGHTS

#### 3.1 Introduction

This chapter discusses Kenya's legal framework and examines the extent to which it protects indigenous peoples' rights to land. It begins with a short overview of the main sources of law that are applicable in Kenya. This overview is useful in order to appreciate the force of the various laws related to the land question and how they impact upon indigenous peoples and their rights.

The chapter traces the historical development of the current legal regime related to the land question in Kenya. That is done in a bid to explore the reasons behind the current status of indigenous peoples' land issues. By recourse to two case studies, that of the Maasai and the Ogiek, the chapter then surveys the extent to which the current legal framework protects or can give meaning to indigenous peoples' land rights when invoked.

#### 3.2 Sources of applicable laws in Kenya

The hierarchy of sources of law in Kenya can be scanned from the provisions of the Judicature Act, which provides as follows:

The jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with -  
(a) the Constitution;

(b) subject thereto, all other written laws, including the (*relevant and applicable*) Acts of Parliament of the United Kingdom;

(c) subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897, and the procedure and practice observed in courts of justice in England at that date; but the common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary.

(2) The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.<sup>218</sup>

In exercising their jurisdiction, Kenyan courts of law are guided by this hierarchy. The courts have a mandate to interpret laws and applicable provisions to determine their applicability and to protect fundamental human rights and resolve disputes. In terms of the Constitution, the High Court is the superior court of record and has unlimited original jurisdiction in civil and criminal matters.<sup>219</sup> Importantly, it has original jurisdiction to determine allegations of violation of fundamental human rights.<sup>220</sup> The highest court in Kenya is the Court of Appeal, which is also a

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<sup>218</sup> Sec 3 Judicature Act Laws of Kenya Cap 8.

<sup>219</sup> Sec 60 Constitution of Kenya.

<sup>220</sup> Sec 84 as above.

superior court of record. It exercises jurisdiction and powers in relation to appeals from the High Court.<sup>221</sup> Other subordinate courts include the magistrates' courts.<sup>222</sup>

The hierarchy of sources of law places the Constitution at the pinnacle. Statutes and other written laws, including those borrowed from England, follow. Common law, doctrines of equity and statutes of general application are equally valid in so far as circumstances in Kenya permit. Ghai and McAuslan have rightly suggested that it would have been useful to make specific reference to or enact the referred applicable laws rather than a general reference to statutes of general application.<sup>223</sup> African customary law is placed at the bottom of the applicable laws. This is unfortunate given the wide cross-section of people who still rely on African customary law as a source of law.<sup>224</sup>

Most indigenous communities rely on their traditions and customs to seek recognition and protection of their land rights. The relegation of African customary law to the lowest position in the hierarchy of applicable laws means that most of these communities have to labour for recognition of their lands rights. African customary law should preferably be on a par with common law, with courts required to apply the regime either chosen by or most relevant to the parties.<sup>225</sup> Another challenge emerges from the fact that the country's land laws seem to favour

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<sup>221</sup> Sec 64 Constitution of Kenya.

<sup>222</sup> Sec 65 as above.

<sup>223</sup> Ghai & McAuslan (n 18 above) 375.

<sup>224</sup> Wanjala (n 21 above) 26.

<sup>225</sup> Ghai & McAuslan (n 18 above) 375-376.

individual land tenure, which may not always be feasible for indigenous peoples. That situation was not always the case. It only emerged after the imposition of the English colonial laws and policies whose developments are traced in the next section.

### 3.3 The land law regime in Kenya

Since colonial times, laws have been employed to alienate traditional lands belonging to African peoples. Today that situation is aggravated by the inconsistencies in the laws. Indeed, there is a general consensus that ‘the land law regime in Kenya is inordinately complex and addresses the land issues from different perspectives leading to inconsistencies in law’.<sup>226</sup> It has been suggested that the only possible way to solve the current land regime quagmire is by ‘resolving the problems between statute law and cultural rights to land that are accommodated by law’.<sup>227</sup> It is therefore important to begin by briefly tracing the history of the land tenure regime in Kenya in order to comprehend and appreciate the *status quo*.

#### 3.3.1 Pre-colonial land ownership in Kenya

In the period before Kenya became a British protectorate on 15 June 1895,<sup>228</sup> ‘the country was populated by Africans exercising a customary land tenure system’.<sup>229</sup> Ownership, access, and

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<sup>226</sup> Reassessing Kenya’s Land Reform, *The Point, Bulletin of the Institute of Economic Affairs*, Issue No 40, (November, 2000) 3; Ndung’u Report (n 1 above) 190- There are more than 40 different statutes dealing with aspects of land administration ownership and use in Kenya.

<sup>227</sup> The Point Bulletin (n 226 above).

<sup>228</sup> See generally Ghai & McAuslan (n 18 above) 3-25.

control of land were therefore dependent on the traditions, customs and ‘intricate rules of usages and practices’ of a particular community.<sup>230</sup> According to Wanjala, ‘the most common form of tenure during the period in question (pre-colonial times) is what can be termed “communal tenure” whereby land belonged to no one individual in particular but to the community (clan, ethnic group) as a whole’.<sup>231</sup> However, as seen earlier in chapter two, while communal land ownership could have been the case for certain communities and areas, some communities did exhibit individual land tenure characteristics.<sup>232</sup> Indeed, Kibutha Kibwana suggests that ‘tendencies of individual land tenure were discernible in certain ethnic groups of Central Kenya’, which are mainly lands inhabited by the Kikuyu.<sup>233</sup> In such communities, while land was based on tribal territorial boundaries, each individual had specific rights of access and control.<sup>234</sup> It is therefore more accurate to say that different communities, even in pre-colonial times, practised varied forms of land tenure according to their culture, traditions and way of life.

Some communities, particularly the pastoralists, such as the Maasai, certainly did prefer and practise communal land ownership. This meant that ‘each person in the community had rights of access to the land dependent upon his/her specific needs at the time’.<sup>235</sup> While each member of

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<sup>229</sup> TOA Mweseli ‘The centrality of land in Kenya: Historical background and legal perspective in Wanjala (n 21 above) 4.

<sup>230</sup> Ndung’u Report (n 1 above) 1; see also Wanjala (n 21 above) 26.

<sup>231</sup> Ndung’u Report (n 1 above) 1; see also Wanjala (n 21 above) 26.

<sup>232</sup> Kenyatta (n 114 above) 21.

<sup>233</sup> See Kibwana (n 114 above) 232-233.

<sup>234</sup> As above.

<sup>235</sup> Wanjala (n 21 above) 26

the community or particular group resident in a region could access the land, there existed clear guidelines governing such access and control from community leaders. The Maasai community determined the best way and means to utilize their land resources dependent on the prevailing climatic and weather conditions.

The pre-colonial land tenure system was therefore as varied as there were different tribes. While some groups practised some form of individual ownership, others held land communally.<sup>236</sup> With the advent of colonialism, the British embarked on a process of streamlining land ownership through ‘land alienation, imposition of English property law and transformation of customary land law and tenure’.<sup>237</sup>

### 3.3.2 The colonial land tenure system in Kenya

‘The declaration of protectorate status over Kenya by the British in 1895 was followed by a systematic and “legal” process of alienating large tracts of land and dispossessing indigenous peoples of their land’.<sup>238</sup> This was made possible by the erroneous reasoning that Africans were not civilized enough to govern themselves, let alone administer their property rights.<sup>239</sup> On that

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<sup>236</sup> Kibwana (n 114 above) 232-233.

<sup>237</sup> Wanjala (n 21 above) 27.

<sup>238</sup> As above 27. It must be borne in mind that the use of the term ‘indigenous peoples’ in that regard is in reference to all Africans resident in Kenya and not necessarily the groups identified as such by the African Commission’s Working Group.

<sup>239</sup> As above 27; see also Anaya (n 35 above) 31-34.

basis the British, as did most other colonial occupiers, used foreign laws and western conceptions of civilization to dispossess Africans of their land.<sup>240</sup>

It is certainly not true that the African did not have structures in place that would qualify as government. The Maasai for example had clans, councils of elders, spiritual leaders and organized structures to determine and decide on the community's needs.<sup>241</sup> The fact that they moved from place to place in pursuit of pasture dependent on the environmental conditions prevailing at certain seasons did not mean that they lacked a 'settled form of government'.

The colonial authorities promulgated laws that vested virtually the whole Kenyan territory in the Crown.<sup>242</sup> The dispossession of indigenous lands was legitimized by the enactment of the Crown Lands Ordinance of 1915, which defined 'Crown land' to mean:

All public lands in the colony which are for the time being subject to the control of His Majesty by virtue of any treaty, convention, or agreement, or by virtue of His Majesty's Protectorate, and all lands which have been acquired by his Majesty for the public service or otherwise howsoever, and shall include all lands occupied by the native tribes of the colony and all lands reserved for the use of the members of any native tribes.<sup>243</sup>

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<sup>240</sup> See Okoth-Ogendo (n 18 above) 11; see also HWO Okoth-Ogendo 'The nature of land rights under indigenous law in Africa' in A Claasens & B Cousins *Land, power & custom controversies generated by South Africa's Communal Land Rights Act* (2008) 96-99.; See also Anaya (n 35 above) 31-34 on how the colonisers consolidated power over the colonies through a trusteeship doctrine and sought to 'civilise' indigenous peoples by imposing their laws and policies.

<sup>241</sup> Galaty (n 190 above) 27; L Hughes *Moving the Maasai, A colonial misadventure* (2006) 14.

<sup>242</sup> Mweseli (n 229 above) 9; see also Okoth-Ogendo (n 18 above) 41.

<sup>243</sup> Sec 5 Crown Lands Ordinance.

According to Ghai and McAuslan, the ‘disinheritance of the Africans from their lands was complete’ by the time of the 1915 Crown Land Ordinance.<sup>244</sup> Indeed, the Colonial Court in *Isaka Wainaina wa Gathomo and another v Murito wa Indangara and others* interpreted the Crown Lands Ordinance to the effect that Africans were mere tenants at the will of the Crown with no more than temporary occupancy rights to the land.<sup>245</sup> Commonly referred to as the Barth judgment (after the then Chief Justice who decided the case), the colonial authorities, through the instrument of the law and the courts, had effectively rendered Africans landless.<sup>246</sup>

The Crown subsequently imposed taxes in a bid to secure cheap labour for the settler incursion that was precipitated by colonial property laws and policies.<sup>247</sup> Indigenous Africans were also compelled to provide cheap labour to the white settler farms through a range of measures such as the pass (kipande) system, conscription and recruitment.<sup>248</sup>

With time, however, the colonial plans for effective disinheritance of African indigenous lands fuelled discontent. Due to overpopulation, high poverty levels and increased insecurity in the reserves, the demand for the return of indigenous lands intensified.<sup>249</sup> Various efforts and

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<sup>244</sup> Ghai and McAuslan (n 18 above) 28.

<sup>245</sup> See *Isaka Wainaina wa Gathomo and Kamau wa Gathomo v Murito wa Indangara, Nganga wa Murito and Attorney General* (1922-23) 9 (2) KLR 102; see an analysis of the effect of the case in *Okoth-Ogendo* (n 18 above) 53-53.

<sup>246</sup> *Okoth-Ogendo* (n 18 above) 54.

<sup>247</sup> See for example Hut Tax Regulations Number 18 of 1901; The Native Hut and Poll Tax Ordinance Number 2 of 1910; The Native Registration Ordinance Number 1915 and 1921.

<sup>248</sup> Mweseli (n 229 above) 10.

<sup>249</sup> Wanjala (n 21 above) 29.



commissions to address the rising tension and agitation were mooted by colonial authorities, which eventually led to the 1930 Native Lands Trust Ordinance.<sup>250</sup> The Ordinance was aimed at setting aside native reserves, and where need arose, additional lands for the natives. The law also established a Native Trust Board to manage the reserves. The Ordinance had limitations to the extent that the Crown could still grant leases and licenses to Europeans in the reserves and also for public use.<sup>251</sup>

Agitation for independence did not cease with such token and unilateral measures that still preferred colonial interests to the interests of Africans. The Morris Carter Land Commission<sup>252</sup> was accordingly set up and made several recommendations that sought to address some of the natives' grievances; principally the need for more land and rights. The authorities crafted and introduced further laws<sup>253</sup> on the assumption that problems in the reserves were 'due to overpopulation, bad land use and defective tenure arrangements'.<sup>254</sup> The authorities also devised plans to co-opt the 'civilised' indigenous Africans in order to deal with the 'dangers posed to the colonial hegemony'.<sup>255</sup> According to Okoth-Ogendo, the colonial authorities identified the

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<sup>250</sup> See for example the Devonshire White Paper of 1923 providing that Kenya was an African country and native rights were paramount; Hilton Young Commission Report of 1929 endorsing the white highlands and native reserves and called for satisfaction of native requirements.

<sup>251</sup> Mweseli (n 229 above) 11-This is illustrated by 'discovery of Gold in the Kakamega reserve, which prompted the Government's acquisition of the reserve which demonstrated that security was subject to imperial interests'.

<sup>252</sup> The Report of the Kenya Land Commission (1933) (Carter Report).

<sup>253</sup> These laws were: Native Lands Trust (Amendment) Ordinance 1934; Crown Lands (Amendment) Ordinance 1938; Native Lands Trust Ordinance 1938; Kenya (Natives Areas) Order in Council 1939 and Kenya (Highlands) Order in Council.

<sup>254</sup> Wanjala (n 21 above) 30.

<sup>255</sup> Mweseli (n 229 above) 15.

solution to the problem as lying in the individualization of tenure.<sup>256</sup> The RJM Swynnerton Plan argued as follows:

Sound agricultural development is dependent upon a system of land tenure which will make available to the African farmer a unit of land and system of farming whose production will support his family... He must be provided with such security of tenure through an indefeasible title as this will encourage him to invest his labour and profits into the development of his farm and will enable him to offer it as security against such financial credits as he may wish to secure...<sup>257</sup>

While the goal behind individualization of land tenure in Kenya was officially economic, it is also reputed to have been motivated by a desire to ‘create a middle class population which was anchored to the land and which had too much to lose by supporting the Mau Mau style revolt’.<sup>258</sup> ‘Individualization would confer exclusive rights over parcels of land and thereby remove conflicts.’<sup>259</sup> The middle class who had also acquired western education and embraced its form of ‘civilization’ would eventually be groomed to take over the reins of power. Given the trappings

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<sup>256</sup> Okoth-Ogendo (n 18 above) 70.

<sup>257</sup> RJM Swynnerton A plan to intensify the development of African Agriculture in Kenya (1955) cited in Wanjala (n 21 above) 30 note 20; The Swynnerton plan sought to secure land tenure by promoting acquisition of title by individuals. In the Plan’s estimation, the mounting political problems in Kenya over land could be resolved through a restructuring of the property rights regime in the areas that were occupied by Africans. According to the Plan, by according Africans security of tenure over their lands, they would intensify agricultural production and address the thorny issue of landlessness. However, while the plan gave rise to an African middle class, it failed to address landlessness especially for those who did not register their land rights, perhaps out of lack of appreciation and comprehension of the new system or those that were absent from the process. The plan also failed to appreciate that particular communities - such as indigenous peoples- preferred to retain their African customary tenure regimes which accommodated the rights of everyone who resided in those lands, see Okoth-Ogendo (n 18 above) 69-77.

<sup>258</sup> Wanjala (n 21 above) 31. The Mau Mau revolt was the Africans armed struggle for liberation; see also MPK Sorrenson *Land reform in the Kikuyu country* (1967) 118; see also Okoth-Ogendo (n 18 above) 71.

<sup>259</sup> Mweseli (n 229 above) 15.

individual land tenure promised, and the security of title it offered, the elites who would later accede to power chose to retain the *status quo*.<sup>260</sup>

The land reform process entailed three stages: adjudication, consolidation and registration. Land adjudication demanded ‘the ascertainment of rights or interests in land amounting to “ownership” in favour of individual claimants’.<sup>261</sup> Land consolidation involved a process whereby individual holdings were to be aggregated into what were considered ‘economic units’.<sup>262</sup> Land registration entailed ‘the entry of rights shown in the adjudication register into a land register and issue of title deeds which conferred upon the individual absolute and indefeasible title to the land’.<sup>263</sup>

By the time Kenya gained independence in 1963, individualization of land tenure had taken centre stage and all legal and policy frameworks were geared towards entrenching the *status quo*. Tim Mweseli offers a plausible rationale for the retention of the *status quo* as follows:

Recognition of colonial land titles was the bedrock of transfer of political power. The nationalists accepted not only the sanctity of private property but also the validity of colonial expropriations. The independence constitution immortalized this negotiated position by declaring that there would be no state expropriation without due process...It is clear from the historical processes that by the end of the 1960s a distinct social category with vested interests in the continuity of colonial property and political

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<sup>260</sup> See generally WO Maloba, *Mau Mau and Kenya, An analysis of a peasant revolt* (1993) 144; Mweseli (n 229 above) 20; see also Lenaola et al (n 169 above) 238.

<sup>261</sup> Wanjala (n 21 above) 30.

<sup>262</sup> As above 30.

<sup>263</sup> As above 30.

processes had emerged. This accounts for the remarkable lack of transformation of the colonial land policies and property law regime after independence.<sup>264</sup>

The decision by the independence government to respect colonial land titles, in other words, effectively sealed the fate of indigenous peoples who sought restitution of land taken by the British.

### 3.3.3 Post-independence land tenure in Kenya

On attainment of independence, colonial property laws and policies were confirmed through the Registered Land Act (RLA) of 1963.<sup>265</sup> This statute recognized only individual land tenure, to the frustration of groups whose way of life was incompatible with this regime.<sup>266</sup> Although the aim of individualization of land tenure was to spur economic growth, the policy ignored indigenous peoples' needs and the contribution they might have made to such growth.<sup>267</sup>

Certain indigenous communities, particularly the pastoralists, resisted the individualization of their lands. In 1968, in response to internal pressure, and in a bid to address group rights, particularly in the semi-arid areas where pastoral and nomadic lifestyles demanded collective

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<sup>264</sup> Mweseli (n 229 above) 22.

<sup>265</sup> Registered Land Act of 1963 Laws of Kenya Cap 300.

<sup>266</sup> Wanjala (n 24 above) 173.

<sup>267</sup> See Lenaola et al (n 169 above) 239; see also M Kituyi *Becoming Kenyans: Socio economic transformation of the pastoral Maasai* (1990) 28.

land rights, the Land (Group Representatives Act) was enacted.<sup>268</sup> This statute was meant to assist pastoral communities in owning and operating group ranches. However, the scheme, as will emerge later in this thesis, was in fact a roundabout way of entrenching individualized tenure amongst these communities.

The individual land tenure system sanctified by the Registered Land Act was favoured by the state on the basis that Kenya's largely agricultural economy was dependent on it.<sup>269</sup> However, the results of imposed individualization, instead of spurring economic growth, 'only led to a destruction of communal tenure, and unmitigated landlessness'.<sup>270</sup> Such outcomes are not surprising given that the state elected to 'ignore the centrality of the people in favour of imagined economic development'.<sup>271</sup> The irony of imported foreign laws that were meant to advance the economy of the country is that they ended up creating greater inequality and poverty in various regions of the country. It is because of these inequalities, which include allocation of land resources that traditionally should have reverted to the inhabitants of customary lands, that land clashes and conflict threaten to deteriorate into civil war in Kenya.

Courts in Kenya have not made the situation any better. They have interpreted the myriad laws regulating land ownership in Kenya differently, resulting in uncertainty and confusion.<sup>272</sup> While

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<sup>268</sup> Land (Group Representatives Act) Laws of Kenya Cap 287.

<sup>269</sup> Wanjala (n 21 above) 34; see also SC Wanjala SC 'Problems of land Registration and titling in Kenya' in Wanjala (n 21 above) 97.

<sup>270</sup> As above.

<sup>271</sup> Wanjala (n 26 above) 173.

<sup>272</sup> As above 174.

giving primacy to individual land ownership where a dispute arises as to land title on the basis of the Registered Land Act, certain customary laws demand communal land access and control. Courts have on certain occasions ‘ruled that registration extinguishes customary rights to land and vests in the registered proprietor absolute and indefeasible title’.<sup>273</sup> On other occasions, however, courts have held that the ‘registration of title was never meant to disinherit people who would otherwise be entitled to their land’.<sup>274</sup> Such conflicting rulings beg the question of the extent to which the individualised tenure regime as a whole affected indigenous peoples’ diverse rights to land.

### **3.4 The dispossession of indigenous peoples’ lands through the law**

Most traditional African societies ‘land belonged to community groups like clans and ethnic groups instead of an individual. The rights of access to community land by the individual member of the group were assured and protected through a respected political authority.’<sup>275</sup> However, colonial policies and laws viewed communal land tenure as retrogressive and detrimental to development and efficient utilization of land holdings. A massive process of individualization of land tenure was hence embarked upon. The Registered Land Act enactment in 1968 ‘provided a legal framework for individual land tenure and was the basis for the

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<sup>273</sup> Wanjala (n 21 above) 35 citing sec 27 and 28 of the RLA and *Obiero v Opiyo* (1972) EA 227; and *Esiroyo V Esiroyo* (1973) EA 388 (note 29); see also *L Cotula and B Neve* ‘The driver of change’ in L Cotula (ed) *Changes in customary land tenure systems in Africa* (2007) 33.

<sup>274</sup> Wanjala (n 21 above) note 30 citing *Muguthu v Muguthu* HC Civil case No 377 of 1968 in (1971) Kenya High Court Digest No 16.

<sup>275</sup> See Kenya Land Alliance ‘The National Land Policy in Kenya: Addressing customary/communal land issue’ (2005) 4 *Issue Paper* 3.

extinction of claims based on African customary land law'.<sup>276</sup> However, as we have seen, communities whose way of life could not be pursued under individualized tenure remained disgruntled and, in an effort to appease them, the Land (Group Representatives) Act was enacted. This paved way for the group ranches scheme, which is discussed in detail in section 3.5 below.

Despite concerted efforts by successive government regimes to individualize land tenure in Kenya, customary and communal concepts of land ownership are still alive in a number of communities.<sup>277</sup> Indeed, in terms of the Constitution and the Trust Land Act, land is vested in the community but is held in trust by local authorities and is governed by the customary law of the particular community.<sup>278</sup> The Trust Land Act was enacted 'because the land adjudication and registration process to transform African land relations from communal to individual tenure was not completed by independence'.<sup>279</sup> Under the Constitution, and the Trust Land Act, county councils hold land in trust for local residents according to the customary law applicable in that area.<sup>280</sup> Most trust lands are still considered 'communal' or 'traditional' and land use practices in these areas are still based on customary law. However, entrusting the management and control of such lands to local authorities has in many instances been a recipe for appropriation by individuals and corporations in total disregard of the rights of local residents.<sup>281</sup>

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<sup>276</sup> Kenya Land Alliance (n 275 above) 3.

<sup>277</sup> Hughes (n 241 above).

<sup>278</sup> See sec 115 Constitution of Kenya and sec 69, Trust Land Act (Cap 288).

<sup>279</sup> Kenya Land Alliance (n 275 above) 6.

<sup>280</sup> Sec 115 Constitution of Kenya; sec 69 Trust Land Act; Lenaola et al (n 169 above) 242.

<sup>281</sup> Ndung'u Report (n 1 above) 16.

The authority of customary law and the viability of customary tenure are, however, limited by the Constitution through the repugnancy clause.<sup>282</sup> The clause provides that ‘no right, interest, or other benefit under customary law shall have effect ...so far as it is repugnant to any written law’.<sup>283</sup> This limitation restricts the applicability of communal land tenure under customary law where such tenure conflicts with individualised tenure.<sup>284</sup>

The dispossession of communal lands during the colonial and post-colonial period is evidenced by continued agitation for the return of these lands by certain groups and communities. The setting aside of what was known during colonial times as the white settlers’ land in the Western Rift Valley, for example, displaced the Pokot in what is today the Trans-Nzoia district. Portions of this land are still owned by some members of the settler community who opted to remain, whilst other portions have been purchased by individuals and corporations. The Pokot have continued to agitate for compensation or return of their lands, and these struggles have at times become violent.<sup>285</sup>

The next section consists of a case study of the dispossession of land belonging to one of the groups self-identifying as indigenous in Kenya, the Maasai. The section briefly traces the colonial processes that resulted in the loss of Maasai communal land through treaties and, in post-colonial

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<sup>282</sup> Sec 115 (2) Constitution of Kenya.

<sup>283</sup> As above.

<sup>284</sup> The only law purporting to legitimize communal land tenure is the Land (Group) Representatives Act which as will be illustrated in the next section is in real terms a formal extension of individualization of land tenure in the name of group ranches; see generally Ngugi (n 104 above).

<sup>285</sup> Kenya Land Alliance ‘The National Land Policy in Kenya Addressing Historical Injustices’ (2004) 2 *Issue Paper* 10.



times, the introduction of the group ranches. The Maasai claim that they were unfairly deprived of their lands by the British in what is referred to as the Anglo-Maasai treaties of 1904 and 1911.<sup>286</sup> They subsequently filed suits, still ongoing at the time of writing, seeking compensation or return of their lands, particularly in Laikipia district. Grievances by the Maasai also emanate from the group ranches scheme, which has had a very far-reaching effect on this particular community.

### 3.5 A case study of the Maasai land dispossessions

Maasai land relations are governed by their customs, traditions and culture. According to John Galaty, ‘apart from the area adjacent to the Maasai homestead (olokeri) which was often reserved for the exclusive use of the calves, sick animals and small stock of a given family, the rest of the pasture was open to free grazing by the community’.<sup>287</sup> Galaty adds that the fact that the lands and resources were ‘common’ does not imply that they were unmanaged but rather were managed by community (communal) sanctions.<sup>288</sup>

The Maasai’s attachment to and conceptualization of their land resources may be understood through the proverb ‘*ilmeishooroyu Emurua oolayioni*’, which means ‘*sons and land cannot be*

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<sup>286</sup> Mwangi (n 186 above) 11.

<sup>287</sup> Galaty (n 190 above) 27.

<sup>288</sup> As above

*given out*'. This proverb aptly captures the rationale behind the Maasai idea of communal land tenure,<sup>289</sup> which Galaty describes as follows:

Within a constituted territorial group (*Olosho*), certain areas were seasonally closed, to allow grass to rejuvenate. And in given neighbourhoods, specific locals were designated for building homesteads, so that structures would not be randomly scattered across the country side, and individual families would not appropriate the best areas for the settlements, the daily movement of their livestock thus spoiling the grazing for others. Through routine and negotiation, certain families gained acquired right of return to reside in certain wet- season areas of good grass. But these rights were never exclusive ones, for in time of environmental pressure, herds were moved freely to any region within *Olosho* with accessible pasture, if not across *Olosho* boundaries, to exploit available grazing elsewhere. The obverse is true to use but not to dispose of the resources of a given area, or the land itself. One would therefore as the proverb suggests rather give away land than give away sons, one's descendants, ones 'own blood'.<sup>290</sup>

The Maasai were therefore able to live in harmony and manage their resources equitably in an environmentally friendly manner.<sup>291</sup> However, like the rest of Kenya's territory, colonialism resulted in dispossession of the Maasai lands. The most notorious steps in this process were the 1904 and 1911 Anglo-Maasai treaties which provided for the eviction of the Maasai 'to create space for the settlement of European immigrants whose agricultural and other commercial activities were anticipated to power economic development in the new Kenya Colony'.<sup>292</sup> The

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<sup>289</sup> Galaty (n 190 above) 26.

<sup>290</sup> As above.

<sup>291</sup> Lenaola *et al* (n 169 above) 236-237.

<sup>292</sup> Mwangi (n 186 above) 11. See copies of the 1904 and 1911 Maasai agreements in Carter Report (n 252 above) Appendix VIII; For a detailed expose of the Maasai treaties see MPK Sorrenson *Origins of*

appropriated lands were converted into individual farms and ranches – a process that continues to spark violent clashes whenever the Maasai return to their ancestral lands for grazing purposes, especially during periods of drought.<sup>293</sup> Despite repeated efforts, the Maasai have been unable to reclaim their lands with success.<sup>294</sup>

The appropriation and further dispossession of the Maasai's land were sanctioned through the recommendations of 'the Kenya Land Commission of 1932 which was mandated with evaluating current and future land needs of the African population, to determine whether it was feasible to set aside more land for African communities and to evaluate African land claims over land alienated to non-natives'.<sup>295</sup> The recommendations included *inter alia* that the Maasai should be 'forced to lease out their land to other communities, particularly the cultivators' in order to 'bring tsetse-infested areas into cultivation' and 'help relieve overcrowding in other African areas, particularly in the Kikuyu reserve'.<sup>296</sup> To this day, as the Kenyan population grows, especially in urban areas such as Nairobi, the infiltration by other mainstream communities of Maasai land continues.<sup>297</sup>

The creation of national parks and reserves has also dispossessed the Maasai off their land. Most of the current national reserves and national parks are situated on Maasai land, which mainly

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*European Settlement in Kenya* (1968) 190-209; see also Hughes (n 241 above) 178-182; see also Ghai & McAuslan (n 18 above) 20-25.

<sup>293</sup> Hughes (n 241 above) xiv.

<sup>294</sup> As above.

<sup>295</sup> Mwangi (n 186 above) 11.

<sup>296</sup> As above.

<sup>297</sup> As above.

consists of plains and semi-arid areas. This has occurred, for example, through the enactment of ‘the National Parks Ordinance in 1945 which was aimed at promoting wildlife conservation and tourism through national parks, game reserves and game conservation areas’.<sup>298</sup> After colonialism, these laws and policies and their effects continued. Over time it was realised that there was a need to regulate incursions by other communities onto Maasai land, and to encourage ‘development’ by creating some sense of ownership on the part of the Maasai in their communal lands. This led to what has been referred to as the group ranches scheme.

### **3.5.1 The introduction of group ranches on Maasai land**

The conversion of communal land holdings to group ranches was facilitated through legislation. This was primarily through the Land Adjudication Act of 1968, which provided for the recording of rights and interests in customary lands, and their assignment to their customary users, and the Land (Group Representatives) Act, which provided for the governance and administration of group ranches.<sup>299</sup> In accordance with the latter Act, a group ranch becomes the property of all its members in equal and undivided shares. A group ranch may be registered in the name of ten representatives as nominal title holders who hold the land in trust for the other unregistered members of the community.<sup>300</sup> The Act requires the representatives to enact rules to govern the administration and execution of the group’s projects and activities in a democratic manner through involvement of all the members in decision making

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<sup>298</sup> Mwangi (n 186 above) 11.

<sup>299</sup> Ngugi (n 104 above) 345; see also Lenaola *et al* (n 169 above) 245.

<sup>300</sup> Lenaola *et al* (n 169 above) 248.

The ranch should be managed and operated in accordance with sound principles of land use, range management, animal husbandry and commercial practice. The Act also provides for dissolution of the ranch upon written application signed by a majority of the group's representatives. As Mwangi explains:

[The] group ranches were primarily intended to foster the commercialization of Maasai livestock management systems and to transform land into an economic good subject to free buying and selling. The program entailed a shift in land tenure and organization from one under which the range was under common ownership, to an abridged version of the original commons, variable in size and membership, but held under corporate title. Group ranching was also envisaged to facilitate the commoditization of Maasai herds and lands without creating a large pool of landless individuals. Paradoxically, it was also envisioned to provide an evolutionary mode of transformation that would be based on the traditional ways of the Maasai.<sup>301</sup>

In retrospect, the concept of group ranches was either a miscalculation or a subtle attempt convert communal land to private ownership. While there is certainly nothing wrong in privatizing property, the fact that the Maasai community was ill prepared or at least not properly consulted doomed the group ranch system to failure from the onset. Indeed, it has been contended that, 'although the Maasai did not accept or even understand some features of the group ranch such as grazing quotas, boundary maintenance and the management committee they accepted the idea of group ranches primarily because it afforded them protection against further land appropriation

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<sup>301</sup> Mwangi (n 186 above) 7.

from government, against the incursion of non-Maasai and from a land grab by the elite Maasai'.<sup>302</sup>

Some of the reasons cited by the State for the transformation of communal land to group ranches were that it would improve efficiency in the utilization of the lands, the groups would enjoy improved infrastructure and financing, and that this would in turn make the ranches commercially viable. Such reasons were premised on the notion that controlled land ownership would automatically infuse a sense of ownership in the lands among the Maasai, as if none existed, and that it would catalyze development. It is now commonly accepted that development does not solely depend on the transformation of a land tenure system from one form to another, and therefore that the independent government was wrong to persuade communities to accept the group ranches scheme by dangling the development carrot.

In particular, group ranches were said to promise development through the provision of dams and boreholes, as well as improved livestock husbandry through the introduction of dipping facilities and animal disease prevention and control.<sup>303</sup> The imposition of group ranches was patronizing to the communities who had long practised reasonably efficient traditional methods of communal land ownership.<sup>304</sup> The group ranches policy also disregarded the Maasai's customary-law rules

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<sup>302</sup> Mwangi (n 186 above) 7.

<sup>303</sup> Mwangi (n 186 above) 7.

<sup>304</sup> Lenaola et al (n 169 above) 247-253.

and traditions relating to the management and establishment of boundaries.<sup>305</sup> Instead, the State imposed statutory governance structures that were often in conflict with the traditional system. It was therefore not surprising that ‘the group ranches failed to meet their intended objectives and indeed a decade after their creation there were demands for their dissolution and subsequent division into individual, titled units for distribution among registered members’.<sup>306</sup>

The Land (Group Representatives) Act, while seeking to protect and recognize group ownership, still reflected the administration’s preference for individualized tenure in attempting to demarcate communal land holdings into separate units or group ranches.<sup>307</sup> The intention of the drafters was that the land should be held communally in accordance with applicable customary law and practices. However, the group ranches scheme was abused by elites. Persons registered to hold the ranches in trust for the community invariably resorted to selling off pieces of land to the community’s detriment. The ‘pressure to subdivide group ranches and issue individual title deeds in Maasai land resulted in landlessness, marginalization, and increased poverty levels’.<sup>308</sup> It is difficult to maintain that this turn of events was not foreseen by the authorities. Indeed ‘while land registration was supposed to obliterate the traditional concepts of land ownership, neither

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<sup>305</sup> See J Kieyah ‘Indigenous peoples’ land rights in Kenya: A case study of the Maasai and Ogiek people (2007) 15 *Penn State Environmental Law Review*, 2007 406; see also S Coldham ‘Land- tenure reform in Kenya: The limits of law’ (1979) 17 *Journal of African Modern Studies* 620.

<sup>306</sup> Mwangi (n 186 above) 12.

<sup>307</sup> Lenaola et al (n 169 above) 247.

<sup>308</sup> MO Odhiambo and E Karono, Privatisation and pastoral livelihoods in Eastern Africa: Challenges and opportunities, An issue paper, November 2005, 4.

colonialism nor the independent state decimated the traditional land holding system as it did not suit their political interests to do so'.<sup>309</sup>

### 3.5.2 The individualization of the group ranches

Various factors are advanced as having contributed to the subdivision of the group ranches. Population increase among the members, which resulted in more children attaining the requisite age for inclusion, put strains on shareholding. According to Mwangi:

As young men matured, they were recruited into group membership. This recruitment commonly involved the collective registration of an entire age set. Members' shares to group ranch land were gradually diminishing with the expansion of membership. The anticipated outcome was that land parcels would become smaller by the day and unviable upon the eventual subdivision of the group ranch. This concern also reflects a general sense that land subdivision was unavoidable.<sup>310</sup>

The subdivisions were also fuelled by political statements calling for individualization of the ranches. The most notable statements were issued by the former President Daniel Moi in the 1980s.<sup>311</sup> The former President 'stressed the need for individuals to develop their own pieces of land. Noting the unviability of group ranch operations, he expressed the fear that group ranches may in future spark trouble because registered members were inviting their friends to reside in the group ranches. He advised Maasai leaders to begin land adjudication to enable each family to

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<sup>309</sup> Odhiambo & Karono (n 308 above).

<sup>310</sup> Mwangi (n 186 above) 17; Ngugi (n 104) 348.

<sup>311</sup> See Lenaola *et al* (n 169 above) 247-248.



develop its own farm.’<sup>312</sup> This could be the reason behind the long-held belief that the state had all along meant to introduce the group ranches with the eventual goal of encouraging individualization of tenure, thereby opening up communal land to acquisition by all. Indeed, to encourage speedy subdivision of the ranches, the then President also directed the ‘rescheduling and eventual writing off of loans borrowed from the Agricultural Finance Corporation’.<sup>313</sup> This is consistent with the then regime’s *modus operandi*, where roadside directives and statements carried the weight of legal directives.

The subdivisions proceeded despite the fact that that technocrats and ‘government officials from the Departments of Lands Adjudication and range planners from the Ministry of Livestock Development had cautioned and indeed stopped short of openly discouraging group ranches against subdivision’.<sup>314</sup> The technocrats’ fears and concerns are captured in Esther Mwangi’s study citing the example of one group ranch in Kajiado district:

According to the minutes of the annual general meeting at Enkaroni group ranch of 26th February 1985, for example, the registrar of group ranches emphasized the grave consequences of ranch subdivision without basic infrastructure. At the same meeting, the Range Officer noted that it was unfortunate that members wish to subdivide the group ranch would result in unviable units which would be expensive to develop because of their small sizes. He further pointed out that if the land were partitioned equally, each member would be entitled to 79 acres (34 hectares) in which one would be able to keep no more than 7 head of cattle. Present also was the District Land Adjudication Officer

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<sup>312</sup> Mwangi (n 186 above) 17 citing *Kenya Times* of 3/9/1985.

<sup>313</sup> Mwangi (n 186 above) 17.

<sup>314</sup> As above 15.

who strongly reiterated the inordinate expenses of individual parcel management and requested members to reconsider their decision.<sup>315</sup>

From the foregoing, it is evident that the decision to individualize land tenure was not based on technical and objective considerations but rather on politics and pressure from within the Maasai. This phenomenon can in turn be traced back to the initial decision to regulate Maasai land relations in terms of group ranches with little if any due regard to their way of life and needs.<sup>316</sup> The group ranches scheme can further be faulted for discriminating against women, who were neither registered as nominees nor allotted land parcels during the process of subdivision.

The subdivisions are also said to have been catalyzed and influenced by the already existing individual ranches.<sup>317</sup> The individual ranches owned by colonial settlers and powerful and wealthy individuals were said to be role models for the eventual commercialization of the Maasai and other pastoralists' land. Mwangi avers that:

Because the individual ranchers were to be used as a model for the rest of the Maasai to emulate, conditions were created to ensure their success. Low-interest credit for the purchase of superior breeds and the construction of on-farm infrastructure such as boreholes, water pans was availed through the Agricultural Finance Corporation. This was part of World Bank Financing to Kenya's Livestock sector

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<sup>315</sup> Mwangi (n 186 above) 15.

<sup>316</sup> Lenaola *et al* (n 169 above) 241, 247.

<sup>317</sup> As above.

under the Kenya Livestock Development Program. The individual ranchers also had support from livestock extension officers from the Ministry of Agriculture and Livestock Development.<sup>318</sup>

Coupled with financial and animal husbandry support from the government, the individual ranches epitomized modern development and success in the pastoralists' areas. This attracted some individuals within the group ranches who were frustrated by the 'increasing challenges related to collective decision-making [and who thus] thus looked to individual ranching as a reasonable and viable alternative'.<sup>319</sup> Mwangi sums up the motivating factors on the part of some individuals as follows:

The individual title was viewed as the gateway to development. A title to land represented complete and secure ownership, but more. It could be used as collateral to acquire loans for farm and livestock improvement; it could be used as security against which unforeseen circumstances such as illness could be confronted. For the poor in particular, individual ownership represented not only their extrication from a grazing interaction in which they were exploited, but also an opportunity to manage their livestock in harmony with pasture availability; an ability to earn alternative incomes either by leasing out excess pastures, cultivating, selling charcoal, and in extreme cases, selling off part of their land. With individuation, the poor would become property owners and have access to alternative productive resources that would enable them improve their status within the community.<sup>320</sup>

Individual ownership of land was therefore portrayed as the solution to the underlying problems bedevilling communal ownership within the group ranches. However, even at the outset, some

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<sup>318</sup> Mwangi (n 186 above) 15.

<sup>319</sup> As above 24.

<sup>320</sup> Mwangi (n 186 above) 24.

community members saw the individual ranches as a betrayal by government of their trust and as an opportunity for unscrupulous individuals to hive off individual parcels of communal land for personal gain. The individual ranchers were also notorious for utilizing communal land during the rainy seasons and reverting to their fenced off ranches during the dry season. Subdivision was therefore seen as a solution since it would ensure that this sort of exploitation would cease and that all members would be 'equal' within their property and territories.

The group ranches were beset by various problems from their inception, ranging from inequalities in the number of livestock owned by members, to difficulties in collective decision making that ironically fuelled calls for greater subdivision. Members of the group ranches were differently endowed in terms of resource, particularly with regard to livestock holding. With such inequalities individuals with more livestock derived more benefits from the ranches to the detriment of the poor. This became more apparent during the dry season when, after exhaustion of the ranch pasture, all the livestock was compelled to seek pasture in far-flung areas, resulting in livestock deaths, with the poor bearing the brunt of the losses. 'These grazing differentials amongst group ranch members themselves dovetailed with the exploitative tendencies of the individual ranchers and pushed group members into viewing subdivision as a desirable alternative. With subdivision, each individual would acquire his own parcel and be forced to manage his pastures according to the number of cattle that he owned.'<sup>321</sup>

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<sup>321</sup> Mwangi (n 186 above) 26.

The management and control of the group ranches was in the hands of the ten nominee persons registered under the Act.<sup>322</sup> However, decision making also involved the individual members in annual general meetings that often did not attain consensus on contentious issues. Some of the main differences that persisted concerned the enforcement of livestock quotas and the infiltration of outsiders into the ranch.<sup>323</sup> Some members did not follow rules set to ensure proper management and utilization of the ranches, such as preserving areas set aside for dry seasons, as well as non-payment of fees for the development of the common projects. Managing the ranches became a difficult exercise because of such lack of cooperation from certain members in adhering to rules for resource use. The members also feared incursion into the ranches by mainstream communities, notably the Kikuyu, who had begun accessing some of the individual ranches and purchasing pieces from unscrupulous members.

The subdivision of the group ranches had various repercussions among the Maasai, most notably, increased levels of poverty caused by insufficient grazing land. Traditional migratory patterns were also blocked and much land was lost to mainstream communities who purchased land from the recipients of the ranch subdivision process.<sup>324</sup>

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<sup>322</sup> Ngugi (n 104 above) 345.

<sup>323</sup> Some members of the ranches invited their relatives and friends with their livestock from other ranches, regions and even as far as Tanzania to live and utilise their common resources.

<sup>324</sup> MK Van Klinken (ed) *The future of the Maasai pastoralists of Kajiado district* Proceedings of a colloquium held in Limuru, Kenya, May 28-31, 1989 (1990) 105.

Some commentators have gone so far as to argue that the group ranches scheme was a deliberate effort by the authorities to open up the Maasai territories to mainstream communities.<sup>325</sup> Joel Ngugi, for example, argues that the underlying assumptions for the establishment of the group ranches were (deliberately) erroneous:

The pejorative objective of 'settling down' the Maasai through legislation was not only mischievously assimilationist but was also founded on the absurd view that the Maasai roam aimlessly over their land. It overlooked the fact that they migrate according to the dictates of eco-climatic factors and that legislating that they 'settle down' in the face of these factors, which necessitate their migrations, is not only destructive of their culture but is also tantamount to destroying their economic base.<sup>326</sup>

In sum, 'the dispossession of the Maasai lands was not due to structural internal weaknesses in their traditions and their valuation of material resources or even their "stupidity" as is often made out. Rather, the instrumentality of the law as a device aimed at modernist development played a significant role in their disempowerment'.<sup>327</sup> Lenaola, Jenner and Witchart hold a similar view that 'the group initiative, despite a stated intention to provide for ownership in groups, offers the option of exclusive individual control of rights to occupation'.<sup>328</sup> It is therefore not surprising that through a biased legal framework, which was intent on benefiting the mainstream communities, indigenous peoples in Kenya have continued to lose their ancestral land rights.

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<sup>325</sup> See Lenaola *et al* (n 169 above) 247.

<sup>326</sup> Ngugi (n 104 above) 347.

<sup>327</sup> As above 300.

<sup>328</sup> Lenaola *et al* (n 169 above) 247.

The next case study looks at attempts by another indigenous community, the Ogiek, to assert their land rights in the courts. The case illustrates the hurdles indigenous communities face when seeking protection through legal processes deliberately tailored to protect dominant communities.

### 3.6 A case study of the Ogiek land dispossessions

The ‘Ogiek is a community with a long history of resistance and struggle aimed at sustaining their unity, identity and cultural distinction’.<sup>329</sup> One of the greatest struggles the Ogiek community has had is that of seeking protection and recognition of their traditional lands. The agitation began as early as colonial times when the Ogiek were regarded as primitive and in need of assimilation to become ‘useful citizens’.<sup>330</sup> The post-independent state ‘continued to sanction a series of efforts to dispossess them of their land besides seeking to exterminate, assimilate and impoverish them through constant evictions and disruption of their traditional lifestyles’.<sup>331</sup> While the evictions were not illegal *per se*, since they were based on laws that were ostensibly legislated to protect the environment, it is argued that the evictions were discriminatory, and failed to take into account the Ogiek’s customary law land rights.<sup>332</sup> That argument is revisited in further details below in the analysis of the Court’s judgment.

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<sup>329</sup> Kimaiyo (n 120 above) 4; see an analytical discussion of this case in GM Wachira ‘The Role of courts in protecting indigenous peoples’ rights to land and resources in Kenya and South Africa’ (2007) 13 (2) *East African Journal of Human Rights and Peace* 240-269.

<sup>330</sup> As above; Carter Report (n 252 above) 259-260 para 973, 974 and 980; see also Background to the Ogiek <[www.ogiek.org](http://www.ogiek.org)> accessed 19 November 2005.

<sup>331</sup> Kimaiyo (n 120 above) 4.

<sup>332</sup> See generally Wachira (n 329 above).

The Ogiek's culture and way of life is intimately connected to the forest lands they occupied but colonial and successive governments evicted them for purposes of forest conservation and development.<sup>333</sup> Their representatives (community leaders) contend that these measures were simply a pretext to deprive them of their land since the same forests were allocated to mainstream communities and private corporations to harvest and farm.<sup>334</sup> For years, Ogiek representatives requested the Kenyan Government to take action to protect them.<sup>335</sup> This involved personal and official lobbying by community leaders, as well as other stakeholders such as the church. The requests proved futile.<sup>336</sup> The community leaders were then tasked with the role of seeking justice through the courts. Due to limited resources, they relied on the goodwill of community members to donate the little they could and sought the services of a legal counsel who was willing to take their matter on a *probono* basis.<sup>337</sup>

### 3.6.1 The Ogiek attempts at protecting their lands through litigation

The current Constitution of Kenya provides that the High Court shall have original jurisdiction over allegations of breach of fundamental human rights.<sup>338</sup> It further provides that a person

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<sup>333</sup> Kimaiyo (n 120 above) 17.

<sup>334</sup> As above.

<sup>335</sup> As above 25.

<sup>336</sup> As above, 25-30 on the extensive out of court efforts mounted by the Community that even involved sending delegations to the then Head of State Daniel Arap Moi but still did not bear fruits due to the competing political and economic interests by powerful stakeholders over the Ogiek lands.

<sup>337</sup> The matter was handled on a pro bono basis by the law firm of Mirugi Kariuki and Company advocates based in Nakuru.

<sup>338</sup> Sec 84 Constitution of Kenya.



aggrieved by the determination of the High Court may appeal to the Court of Appeal, which is the highest judicial tribunal.<sup>339</sup> Members of the community launched their case in the High Court in 1997 asserting their fundamental human rights as protected by the Constitution.<sup>340</sup> They demanded a ‘declaration that the eviction from Tinet Forest by the Government contravenes their rights to the protection of the law, not to be discriminated against and to reside in any part of Kenya and further that their right to life had been violated by the forceful eviction from Tinet Forest’.<sup>341</sup> They also sought orders that the Government compensate them and pay their legal costs.<sup>342</sup> The community sought the declarations and orders on the basis of ‘having lived in Tinet Forest since time immemorial. They claimed that the forest had been the home of their ancestors before the birth of the Nation Kenya, and still was as the descendants and members of that community’.<sup>343</sup>

The community submitted that it depended for its livelihood on the forest, since most of its members were food gatherers, hunters, peasant farmers, bee keepers, and their culture was associated with the forest where they have their residential houses.<sup>344</sup> They alleged that their culture was basically one concerned with the preservation of nature so as to sustain their

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<sup>339</sup> Sec 84(7) Constitution of Kenya.

<sup>340</sup> *Ogiek* case (n 3 above) 1, 3; Chapter V Constitution of Kenya.

<sup>341</sup> *Ogiek* case (n 3 above) 1, 3.

<sup>342</sup> *Ogiek* case (n 3 above) 4.

<sup>343</sup> As above 4.

<sup>344</sup> As above 5.

livelihood and that, due to their attachment to the forest, members of the community were a source of the preservation of the natural environment.<sup>345</sup>

The State disputed the community's claim that they had lived in the forest since time immemorial and submitted that the area was a protected forest area, and as such the community had no right to live there.<sup>346</sup> The respondents contended that the Government intended to degazette the forest to resettle landless people among them the Ogiek but the policy was shelved after realizing that it was a water catchment area. They had therefore carried out numerous evictions to protect the forest.<sup>347</sup>

The Court dismissed the Ogiek case in March 2000 on the basis that 'the evictions were for the purposes of saving the whole of Kenya from a possible, environmental disaster'.<sup>348</sup> According to the Court, allowing the Ogiek to continue living in Tinet forest would spell disaster for the water catchment area whose protection was necessary for the common good of the nation.<sup>349</sup>

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<sup>345</sup> *Ogiek* case (n 3 above) 5.

<sup>346</sup> As above 5.

<sup>347</sup> As above.

<sup>348</sup> *Ogiek* case (n 3 above) 22.

<sup>349</sup> As above, 15, 22.

### 3.6.2 Analysis of the Court's judgment and factors inhibiting effective protection of the rights of indigenous peoples

In dismissing the plaintiff's case, the High Court made useful observations which have a bearing on the role of courts in protecting the marginalized. It raises issues of the role and responsibilities of lawyers, affected parties (in this particular case the indigenous community) and judges in the adjudication of matters before courts. Justice Samuel Oguk and Richard Kuloba went to great lengths to decry the fact that they were not presented with certain documentary evidence to prove certain key allegations by the applicants.<sup>350</sup> The judges lamented the fact that while certain important issues were raised by the applicants, these were not properly substantiated. Thus, the Court was not convinced that the community's rights were violated.<sup>351</sup>

The Ogiek submitted oral evidence as proof that they were among the first dwellers of the forest and engaged in a traditional way of life. However, the Court was of the view that the cultural and economic activities of the Ogiek had substantially changed and did not necessarily depend on their continuous presence in the forests.<sup>352</sup> The Court maintained that position and extensively used it to justify the reasoning that the modern Ogiek would not be expected to conserve the forest which they once ably protected and inhabited.<sup>353</sup>

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<sup>350</sup> *Ogiek* case (n 3 above) 17, 18, 22.

<sup>351</sup> As above.

<sup>352</sup> *Ogiek* case (n 3 above) 2, 8, 9; see also the courts reference to A Fedders and C Salvadori, *Peoples and cultures of Kenya* (1979) 14; WR Ochieng *An Outline History of the Rift Valley of Kenya up to AD 1900* (1975) 10.

<sup>353</sup> *Ogiek* case (n 3 above) 9.

The Court's reasoning failed to take account of the fact that, while a community may have adopted a modern way of life, that in itself does not make that community unable to maintain its cultural and traditional practices. The establishment of forest reserves and national parks by the colonial authorities had been done without regard for the concerns and land rights of the communities who occupied and owned them.<sup>354</sup> This was not surprising given that the colonial authorities had no regard for African customary law.<sup>355</sup> Notwithstanding this disdain for their rights, the communities resisted the dispossessions, but to no avail.<sup>356</sup> According to Kameri-Mbote, despite the communities' resistance, 'they were overpowered and subjugated under the new property ownership systems'.<sup>357</sup>

In the *Ogiek* case, the court, as instrument of the post-colonial state, essentially argued that the community had adopted modern livelihood strategies and could therefore not be said to be governed by its traditional values and practices.<sup>358</sup> Such a position is misconceived and fails to take account of international norms and standards. The United Nations Human Rights Committee, for example, has on various occasions held that adoption of modern livelihood strategies and technologies does not exclude communities from relying on their culture and in

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<sup>354</sup> See P Kameri-Mbote 'Righting wrongs: Confronting dispossession in post-colonial contexts' Key note speech at a conference on land, memory, reconstruction and justice: Perspectives on land restitution in South Africa, 13-15 September 2006, Cape Town, 4 available at <<http://www.plaas.org.za/events/Past-Events/landmemory/papers/Kameri-Mbote.pdf>> accessed 10 August 2008.

<sup>355</sup> See Okoth-Ogendo (n 18 above) 32-33.

<sup>356</sup> Kameri-Mbote (n 354 above) 4; see also Carter Report (n 252 above) para 983.

<sup>357</sup> Kameri-Mbote as above.

<sup>358</sup> See *Ogiek* case (n 3 above) 2, 4, 8, 9.

turn utilizing international norms and standards designed to protect their culture.<sup>359</sup> Accordingly, the community in question does not lose the capacity to claim its cultural rights. In the case of *Lovelace v Canada*, the HRC held that refusing to reinstate the rights of a native woman, previously married to a non-Native, to live on her Reserve could not be deemed a proportionate measure, as the Reserve was the only place where she could enjoy her culture.<sup>360</sup> The Committee also found a violation of article 27 of the International Covenant on Civil and Political Rights (ICCPR)<sup>361</sup> in the *Lubicon Lake Band case*.<sup>362</sup> Although Kenya is a party to the ICCPR, the covenant has not been entirely domesticated and therefore does not constitute binding authority on its courts. Nevertheless, the jurisprudence of the HRC should inspire and positively influence judicial officers where they adjudicate related matters. That this did not happen in the Ogiek case is evidence of Kenyan courts' reluctance to apply provisions of international instruments which Kenya has ratified, as further demonstrated in chapter four.

The High Court accepted that the disputed area was declared a forest area by the colonial authorities in racially discriminatory translocations to designated areas to pave the way for

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<sup>359</sup> See *Länsman v Finland* (n 100 above) para 9.3; see also *Apirana Mahuika v New Zealand*, Communication No 547/1993, UN Doc CCPR/C/70/D/547/1993 (2000) para 9.4.

<sup>360</sup> *Sandra Lovelace v Canada* Human Rights Committee Communication No. 24/1977 U.N. Doc. CCPR/C/OP/1 at 10, (1985) para. 15.

<sup>361</sup> International Covenant on Civil and Political Rights (ICCPR) was adopted by the UN General Assembly in 1966 and entered in force on 23 March 1976, 999 UNTS 171. Art 27 ICCPR states that persons belonging to ethnic, religious or linguistic minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

<sup>362</sup> *Lubicon Lake Band v Canada* (n 73 above) para 33.

exclusive use of the ‘white highlands’ by white settlers.<sup>363</sup> The postcolonial authorities inherited legislation<sup>364</sup> which required persons to seek licences to gain access or conduct any activities in the forests.<sup>365</sup> While this goal – to protect and conserve the environment – may, on the face of it, sound noble, the applicants argued, the real purpose was to grant economically endowed individuals and corporations access to the forests for far more environmentally and socially detrimental purposes, such as harvesting timber.<sup>366</sup> The community, being marginalized and poor, had neither the financial resources nor the political power to benefit from such licences.

It was also alleged that the community was evicted from the said forest while some mainstream communities and well connected individuals were left untouched.<sup>367</sup> While the Government maintained that the area was a forest zone and environmentally protected under the Forest Act, the Ogiek contended that ‘the Kenyan government [was] allowing logging companies to cut down trees in the Mau Forest’.<sup>368</sup> The Government, for example, imposed a partial logging ban but exempted three big logging companies: Pan African Paper Mills, Raiply Timber, and Timsales Ltd.<sup>369</sup> The logging activities undertaken by the three companies have had disastrous

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<sup>363</sup> Ogiek case (n 3 above) 1; see also Kimaiyo (n 120 above) 20.

<sup>364</sup> Forest Act Laws of Kenya Cap 385; Conservation and Management Act, Laws of Kenya Cap 376; Fisheries Act Laws of Kenya Cap 378.

<sup>365</sup> Ogiek case (n 3 above) 10, 11, 14, 15.

<sup>366</sup> See Kimaiyo (n 120 above) 19-21.

<sup>367</sup> See Ogiek case (n 3 above) 18) (The court however claims that evidence to that effect was not adduced and could not rely on newspaper cuttings).

<sup>368</sup> News update on the Ogiek sourced from <[www.ogiek.org](http://www.ogiek.org)> accessed on 4 November 2005.

<sup>369</sup> Background to the Ogiek (n 330 above).

environmental consequences.<sup>370</sup> In court, the state defended the private companies on the grounds that they made an important contribution to the economy.<sup>371</sup> To which the community responded that, ‘while the government allows powerful logging companies to cut down trees in the forest, it is persecuting an indigenous people who pose no environmental threat and lack political power’.<sup>372</sup>

The High Court, however, ruled that the community’s submissions to substantiate such claims were not effectively made. The Court was therefore not convinced that the evictions were discriminatory or that they took place.<sup>373</sup> While one cannot blame the judges for such a finding, it is interesting to note that the same judges were quick to dismiss the applicants’ submission on the similarity of the *Ogiek* case with the landmark *Mabo case* in Australia<sup>374</sup> on the grounds that sufficient reasoning was not put to them to make a careful consideration.<sup>375</sup>

Although Kenya adopted an adversarial legal system, it is submitted that in public interest cases, especially involving marginalized communities, courts have a duty to aid litigants by conducting further research where they can, other than just asserting that they were denied an opportunity to consider in detail the issues for lack of the applicants’ furnishing sufficient facts and evidence.

Lawyers and bar associations should also take a more proactive stance by, for example, appearing

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<sup>370</sup> Background to the *Ogiek* (n 330 above).

<sup>371</sup> As above.

<sup>372</sup> Background to the *Ogiek* (n 330 above).

<sup>373</sup> *Ogiek* case (n 3 above) 18.

<sup>374</sup> *Mabo v Queensland* (n 72 above).

<sup>375</sup> *Ogiek* case (n 3 above) 16.

as *amicus curiae* (friends of the court), as is often done in South Africa. The *amicus curiae* would assist the court to ensure justice is done by making available proper facts and evidence.<sup>376</sup> This would avert a situation where a court fails to accept critical submissions because of inadequate information.

For example, one of the points the court notes but does not seek clarification on from the state's records or independent experts concerned the history of the Ogiek's occupation of the disputed land. The relevant passage from the court's judgment is worth quoting in full:

The pre-European history of the Ogiek and the plaintiffs was not presented to us in court, to enable us determine whether their claim that they were in Tinet Forest from time immemorial is well-founded. We only meet them in the said forest in the 1930's. Such recent history does not make the stay of the Ogiek in the Tinet Forest dateless and inveterate (as we understand the meaning of the expression 'immemorial' in this context); and nothing was placed before us by way of early history to give them an ancestry in this particular place, to confer them with any land rights. Remember, they are a migratory people, depending on the climate.<sup>377</sup>

This means that the Court chose the easier route and, without evidence to the contrary, decided to rely only on evidence adduced in the ordinary way. Indeed, the Court acknowledges this and notes that it 'missed an opportunity to closely analyze the whole of the Kenyan land law, because the various land statutes and customary law were not argued, and the case was presented within

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<sup>376</sup> *Ogiek* case (n 3 above) 15, 16, 21.

<sup>377</sup> As above, 21.



the narrow limits of the forests legislation and the extra-curial struggles and resistance of the people who had been removed from the place and relocated elsewhere'.<sup>378</sup>

Apart from restrictive interpretation of laws by the court, protection of indigenous peoples' land rights is inhibited by the lack of provisions that cater for the particular circumstances of marginalised communities. The Ogiek are currently seeking a review of Kenya's Forest Act and other colonial era legislation to enjoy the right to inhabit their traditional land and traditionally conserve the forest on behalf of the community's future generations. The community presented petitions before the Commission of Inquiry into Illegal/Irregular Allocation of Public Land, established to address contentious land issues throughout Kenya.<sup>379</sup> The Commission *inter alia* recommended that the Government should resettle marginalized communities who have been evicted from their traditional lands. It still remains to be seen whether the Government will implement the said recommendations.<sup>380</sup>

Protection of indigenous peoples' rights in Kenya through courts is also adversely affected by instances of judicial interference and perceived lack of independence from the executive. According to Kenya's Constitution, judges are appointed by the President on the advice of the Judicial Service Commission.<sup>381</sup> However, members of the Judicial Service Commission are also all appointees of the President, and, although they are required by the Constitution not to be

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<sup>378</sup> Ogiek case (n 3 above) 15.

<sup>379</sup> See Ndung'u Report (n 1 above).

<sup>380</sup> As above.

<sup>381</sup> Sec 61(2) Constitution of Kenya.

subject to the direction or control of any other person or authority, the reality is different.<sup>382</sup> Parliament, for example, does not scrutinise or endorse these appointments. Instances where the President has appointed persons whose professional qualifications and character were questionable abound.<sup>383</sup> Notably, ‘the two judges (Kuloba and Ojuk) who adjudicated on the Ogiek case were [subsequently] indicted but elected to retire based on allegations of corruption and professional misconduct’.<sup>384</sup> In the recent past concern has also been raised over the single-handed appointment of almost half of the 60 judges by President Mwai Kibaki during his first five-year term.<sup>385</sup> These developments cast aspersions on the independence of the judiciary, and especially on its ability to right the wrongs suffered by the marginalised.

The executive in Kenya is also known for disregarding decisions of the courts when it suits it. For example, President Mwai Kibaki and members of his Cabinet have, since assuming power, blatantly disregarded the rule of law by ignoring court orders.<sup>386</sup> President Kibaki ignored an order of the High Court prohibiting issuance of land titles in favour of certain Ogiek community

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<sup>382</sup> Sec 68 Constitution of Kenya; see International Commission of Justice (Kenya Chapter) *Kenya judicial independence: Corruption and reform* 2005.

<sup>383</sup> There has been cases where a former Chief Justice had been prior to his appointment been declared bankrupt and pardoned by the President and later appointed to held the electoral commission and finally the judiciary. Others have been persons whose legal qualifications in terms of the Constitution requirements are wanting.

<sup>384</sup> B Ongaro & O Ambani, Constitutionalism as a panacea to ethnic divisions in Kenya: A post 2007 elections crisis perspective in GM Wachira (ed) *Ethnicity, human rights and constitutionalism in Africa*, International Commission of Jurists (Kenya) (forthcoming 2008).

<sup>385</sup> Ongaro & Ambani (n 384 above); see Gazette Notices No 3620 and 3631 of 22 May 2003; No 9935 of 10 December 2004; No 9933 and 9934 of 2004.

<sup>386</sup> See ‘Titles: Did Kibaki bend the law’ <<http://www.ogiek.org/news/news-post-05-10-31.htm>> accessed 10 June 2008; see also ‘Why Kibaki must respect courts’ <<http://www.ogiek.org/news/news-post-05-10-40.htm>> accessed 10 June 2008; see alternative views in ‘Did Kibaki really break the law on Ogiek titles’ <<http://www.ogiek.org/news/news-post-05-10-39.htm>> accessed 10 June 2008; see also ‘Stop ignoring court orders’ <<http://www.ogiek.org/news/news-post-05-10-38.htm>> accessed 10 June 2008.

members, claiming to have been left out of the exercise.<sup>387</sup> The President went ahead to issue 12 000 title deeds despite an injunction by the High Court ordering that the process of issuing the title deeds be halted. This was widely seen as an attempt by the Government to ‘bribe’ the Ogiek Community to vote for the Government during the referendum on the Constitution held on 21 November 2005.<sup>388</sup> In response, the Ogiek community leaders in a press statement refused to accept the political gesture and outlined the following conditions:

- Publish the list of the 12000 Ogiek and their clans;
- Indicate clearly which land they are giving out stating the geographical locations;
- Inform the world the criteria used to identify the Ogiek and the land in question;
- To understand that there are pending court cases over land between the Ogiek and the Government.<sup>389</sup>

This reaction seems to have been prompted by earlier empty promises by the Government to issue them with title deeds. This did not take place and instead land was allocated to members of mainstream communities to the detriment of the indigenous community.<sup>390</sup> The President’s directive, they indicated, was ill timed and a conspiracy to transfer the Ogiek’s ancestral land in the Nakuru and Narok districts to other mainstream communities for reasons of political

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<sup>387</sup> See ‘Court stops President from issuing titles’ <<http://www.ogiek.org/news/news-post-05-10-15.htm>> accessed 15 June 2008.

<sup>388</sup> The Constitutional Referendum which was held on 21 November 2005 on whether to adopt a Draft Bill to the Constitution widely seen as concentrating too much to the Presidency and the Executive and was voted against by Kenyans. The 1996 Constitution which unfortunately makes no provisions for indigenous peoples’ rights protection will therefore continue to govern the country sourced from <[http://www.eastandard.net/hm\\_news/news.php?articleid=32558](http://www.eastandard.net/hm_news/news.php?articleid=32558)> accessed on 22 November 2005.

<sup>389</sup> Press Statement to the media by the Ogiek <[www.ogiek.org](http://www.ogiek.org)> accessed 4 November 2005.

<sup>390</sup> As above.

expediency.<sup>391</sup> In March,2004, the President had apparently directed that the Ogiek be issued with title deeds and in fact went further to form a task force to implement the directive. The said task force did not, however, make public its report and neither were the Ogiek allocated any land. The community members thus wondered why the Government had slated the issuance of the title deeds at the same time as the referendum without making public the beneficiaries of the titles, their locations and mention of the pending Court cases.<sup>392</sup>

### 3.6.3 Alternatives for the Ogiek

One of the legal options left for the Ogiek was to appeal their case to the Court of Appeal as provided for by the Constitution.<sup>393</sup> However, the appeal has not been heard five years after the High Court suit was dismissed. Kenyan courts are known to delay such cases, sometimes for years.<sup>394</sup> The community ‘still seeks that the government stops the continued allocation of Mau Forest. The Ogiek believe that they have a right to live in what they consider to be their ancestral lands and that the Government is trying to force them out of the forest to give the land to private individuals’.<sup>395</sup> The community argues that by evicting them from their traditional lands, the government is violating not only their property rights, but spiritual, cultural and economic ties to

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<sup>391</sup> Press Statement to the media by the Ogiek <[www.ogiek.org](http://www.ogiek.org)> accessed 4 November 2005.

<sup>392</sup> As above.

<sup>393</sup> Sec 84 (7) Constitution of Kenya; According to Towett Arap Kimaiyo, some members of the Ogiek have since given up on the appeal process which could explain why the appeal process may not have materialised to date (Interview with Towett by the author in Nakuru in October 2006).

<sup>394</sup> News update on the Ogiek sourced from <[www.ogiek.org](http://www.ogiek.org)> accessed on 4 November 2005.

<sup>395</sup> Kimaiyo (n 120 above) 1.

the land. The community also wants the Government to protect their rights to their traditional lands and enact legislation protecting indigenous peoples' land rights.

Another alternative for the Ogiek would be to lodge a communication before the African Commission on Human and Peoples' Rights for violation of the African Charter provisions.<sup>396</sup>

Again, the Kenya State is known to disregard decisions of the African Commission as evidenced by a similar case involving the Endorois community<sup>397</sup> who, after exhausting all domestic remedies, filed a communication before the African Commission for Human and Peoples' Rights in August 2003. The communication sought restitution of land, including giving effect to their

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<sup>396</sup> Art 34 African Charter. The mandate of the African Commission is to protect and promote human and peoples' rights on the continent. Art 55 provides for individual complaints system otherwise referred to as communications and art 56 makes provisions for conditions to be fulfilled for consideration one of which art 56(5) stipulates that the communications should be sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged. The Ogiek's appeal has taken five years to be heard and as such could qualify. The specific rights that could be sought include but not limited to art 19, 20, 21 and 22 of the Charter.; see F Viljoen 'Admissibility under the African Charter in M Evans and R Murray (ed) *The African Charter on Human and Peoples' Rights, The System in Practice, 1986-2000 (2002)* 61-99 for a detailed discussion on admissibility under the African Charter on Human and Peoples' Rights.

<sup>397</sup> See Endorois case (n 3 above); see also <[http://www.minorityrights.org/news\\_detail.asp?ID=342](http://www.minorityrights.org/news_detail.asp?ID=342)> accessed 22 May 2006, The Endorois Community lived for centuries around the Lake Bogoria region in South Baringo and Koibatek Districts of Kenya. In the 1970s, the Government of Kenya, without effectively consulting the Community, gazetted the Community's traditional lands for the purposes of creating a game reserve. The Endorois peoples' health, livelihood, religion and culture are all intimately connected with their traditional land, as hunting and gathering lands, sacred religious sites and plants used for traditional medicine are all situated around the shores of Lake Bogoria. Under Kenyan Law, the region was designated Trust Land; land to be held for the benefit of the Community by local authorities. In the creation of the game reserve, the Government of Kenya disregarded national law, Constitutional provisions and, most importantly, numerous African Charter articles, including the right to property, free disposition of natural resources, the right to religion, the right to cultural life and the right to development. At the present time the Community lives in a number of locations on the periphery of the reserve, being forced from fertile lands to semi-arid areas, divided and displaced from their traditional lands. Access to the Lake Bogoria region is not of right for the Community and the Government continues to deny the Community effective participation in decisions affecting their land, in violation of their right to development. The Community has petitioned the Government on numerous occasions, most importantly in a High Court Constitutional Case in the year 2000. In the case the Community argued that, by creating the game reserve, the County Council breached Trust Land provisions of the National Constitution. The High Court of Kenya in Nakuru ruled against the Community. Despite these efforts at domestic recourse, the Community is still unable to access the land as of right and is denied effective participation in decisions affecting it. The Community has not even received adequate compensation, as required by both national and international law, from the Government for the loss of land.

traditional rights to dwell on, access and benefit from the land. The communication was seized during the Commission's 34th Ordinary Session in November 2003, and was declared admissible during the 37<sup>th</sup> Ordinary Session of the Commission in Banjul, the Gambia, in 2005. Under the Commission's Rules of Procedure, it is empowered to take action in the form of provisional measures to avoid irreparable damage being caused to the victim of an alleged violation.<sup>398</sup> In view of imminent mining activities that would cause irreversible damage to the Endorois' rights and access to lands and resources, the community requested the Commission during its 35th Ordinary Session to adopt provisional measures. This request was duly granted.

However, the 'Government of Kenya went ahead to award mining licenses to private companies in total disregard of the Commission's request for provisional measures'.<sup>399</sup> This is despite the fact that Kenya is a party to the African Charter on Human and Peoples' Rights and has undertaken to uphold its provisions which by extension would include abiding by the recommendations of the African Commission. The African Commission has delayed releasing the final decision on the merits of the case to this day.<sup>400</sup>

While the Courts in Kenya seem to echo the position of the State with regard to the land rights of the indigenous communities, the lack of concrete provisions in the Constitution and legislation does not help matters. There is a need to legislate, and sensitize the Government to the need to

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<sup>398</sup> Rule 111, African Commission on Human and Peoples' Rights, Rules of Procedure [http://www.achpr.org/english/\\_info/rules\\_en.html](http://www.achpr.org/english/_info/rules_en.html)> accessed 15 June 2006.

<sup>399</sup> *Endorois* case (n 3 above) 9.

<sup>400</sup> As of the end of May 2008 after the 43<sup>rd</sup> Ordinary Session of the African Commission on Human and Peoples' Rights at Ezulwini, Kingdom of Swaziland in May 2008, a decision on the merits of the case was still pending- six years since the case was first filed.

protect and promote indigenous peoples' rights, in particular land and resources rights, which are key to their way of life and sustenance. However, lack of specific legislation or provisions protecting indigenous peoples' right to land is not a bar to courts' innovation and progressive utilisation of laws and instruments relating to indigenous peoples to protect these communities.

### 3.7 Chapter conclusion

This chapter has revealed that colonial and post-colonial governments in Kenya have employed the law to dispossess indigenous peoples of their ancestral lands. Kenya's legal framework has entrenched the individualized land tenure systems that may be unsuitable for certain indigenous communities. It has been established that some indigenous communities, such as the pastoralist Maasai and the Ogiek, rely on traditional lands for their livelihood, economic sustenance, as well as religious and cultural life.<sup>401</sup> Indeed, indigenous peoples' land and other resources are 'the foundation of their economic, social, and cultural development'.<sup>402</sup> The recognition of indigenous peoples' laws, traditions and customs is crucial to the protection of their land and resource rights.<sup>403</sup> This is particularly so because indigenous peoples' rights over land 'flow not only from possession, but also from indigenous peoples' articulated ideas of communal stewardship over

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<sup>401</sup> Daes study (n 96 above) para.18; see also Asiema & Situma (n 96 above); Hitchcock & Vinding (n 96 above) 11.

<sup>402</sup> Art 26 UN Declaration on the Rights of Indigenous Peoples: Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they traditionally owned or otherwise occupied or used. This includes the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights; see also arts 13-19 ILO Convention No 169.

<sup>403</sup> n 400 above; see also Ngugi (n 104 above) 297.

land and a deeply felt spiritual and emotional nexus with the earth and its fruits'.<sup>404</sup> It is therefore imperative to reform the land tenure regime to redress these constraints.

The next chapter examines the extent to which the current legal framework can vindicate indigenous peoples' land rights. It reviews the application of various international norms, comparative common law jurisprudence and makes a case for progressive interpretation of the legal framework by Kenyan courts of law in order to give meaning to indigenous peoples' land rights.

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<sup>404</sup> Anaya (n 203 above) 8; see also J Burger, *Report from the frontier: The state of the World's Indigenous Peoples* (1987)13-16.