

**APPLICATION 006/2012**

**AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS**

**V.**

**THE REPUBLIC OF KENYA**

**SUMMARY OF THE FACTS**

1. The Application is in respect of the Ogiek of the Mau Forest. It alleges that the Ogiek are an indigenous minority ethnic group in Kenya comprising of about 20,000 members, about 15,000 of whom inhabit the greater Mau Forest complex, a land mass of about 400,000 hectares straddling about seven administrative districts. According to the Applicant, in October 2009, through the Kenya Forestry Service, the Kenyan Government issued a thirty (30) days eviction notice to the Ogiek and other settlers of the Mau Forest, demanding that they move out of the forest on the grounds that the forest constituted a reserved water catchment zone, and was in any event part and parcel of government land under Section 4 of the Government's Land Act. According to the Applicants, the Government contends that this decision is informed by the State's attempt to conserve the forest which is a water catchment area.
2. The Application further contends that the decision of the Kenyan Government will have far reaching implications on the political, social and economic survival of the Ogiek Community.

**Complaint**

3. The Applicant alleges violation of Articles 1, 2, 4, and 17 (2) and (3) of the Charter.

**The Applicant Prayers**

4. In its Application, the Applicant prays the Court to Order the Respondent to:

- a. Halt the eviction of the Ogiek from the East Mau Forest and refrain from harassing, intimidating, or interfering with the community's traditional livelihoods;
- b. Recognize the Ogiek's historic land, and issue it with legal title that is preceded by consultative demarcation of the land by the Government and Ogiek Community, and for the Respondent to revise its laws to accommodate communal ownership of property; and
- c. Pay compensation to the community for all the loss they have suffered through the loss of their property, development, natural resources and also freedom to practice their religion and culture.

5. The Applicant subsequently requested the Court to issue provisional measures on the ground that, on 9 November 2012, the Ministry of Lands of the Respondent issued a directive that restrictions on transactions for land measuring five acres or less within the Mau Forest Complex Area be lifted. This, according to the Applicant, has the potential to cause further irreparable damage to the Ogiek in the Mau Forest Complex and will serve to perpetuate and expand the prejudice that is the subject of the Application.

6. During its 28<sup>th</sup> Ordinary Session, the Court ordered provisional measures as follows:

- a. The Respondent immediately reinstates the restrictions it had imposed on land transactions in the Mau Forest Complex and refrains from any act or thing that would or might irreparably prejudice the main application before the Court, until the final determination of the said application.
- b. The Respondent reports to the Court within a period of fifteen (15) days from the date of receipt hereof, on the measures taken to implement this Order.

## RESPONDENT'S PLEADINGS

7. The Respondent raised **preliminary objections** to the Applicant's application on the grounds that:
- a. The Applicants have not produced any evidence of exhaustion of local remedies or of the inordinate delay thereof as required under Rule 34 and that local remedies have not been exhausted since the Applicants could have applied for ex-parte judicial review orders or conservatory orders which can be issued on the basis of written submissions only.
  - b. Rule 40 requires the Court to conduct a preliminary examination of its competence and the admissibility of the application in accordance with Articles 50 and 56 of the Charter;
  - c. Under Kenyan Law, Applicants may apply for ex-parte judicial review which is not subject to inordinate delay;
  - d. Any aggrieved party may apply to the High Court for appropriate orders under its Constitutional jurisdiction and obtain conservatory orders without any inordinate delay;
  - e. Within Kenya's adversarial system, the onus of filing and fixing dates for hearing and prosecution of cases rests on the claimants/applicants/petitioners, and there is any procedural inhibitions to expeditious hearing of cases;
  - f. The procedure for seeking relief under judicial review and constitutional jurisdictions of the High Court does not require oral hearings and therefore leads to expeditious determination;
  - g. There is a pending Application before the Commission which is yet to be determined on admissibility and the merits and the Application against the Respondent filed at the Court is contrary to the principle of complementarity between the Commission and the Court.

8. In its response to the application, on the **merits**, the Respondent submits as follows:

a. It reiterates the contents of its Response to the Application before the Commission, *inter alia*:

i. The Respondent makes a background statement outlining the actions by Colonial and Post-Independence Governments to protect the Mau Forest Complex in view of its importance to the country's and region's ecology, biodiversity, resources and economic activities. The statement outlines the Ogiek's conversion from hunter-gathering activities to livestock rearing and subsistence farming activities and that in view of this, in October 2001; the Government of Kenya excised 61,586 hectares of land in the Forest Complex, mainly for the resettlement of the Ogiek. However, that this opened the area up for encroachment by other ethnic groups and this resulted in massive deforestation of the forest. In cognizance of the effects of such deforestation, in August 2-008, the Government of Kenya formed the Task Force on the Conservation of the Mau Forest Complex (Mau Task Force) to make recommendations on rehabilitation of the forest. The Task Force's recommendations were adopted by Parliament on 15 September 2009. It made recommendations on the relocation and awarding of tile to, *inter alia*, the Ogiek. The Government has been working with representatives of the Ogiek to implement the recommendations and that it acknowledges the indigenous right of the Ogiek to their land.

ii. The Respondent submits that the communication does not meet the **admissibility** criteria because of:

a) *Lack of Standing*

i. The author of the communication is not the aggrieved party in the complaint. There is no list of names of aggrieved members of the Ogiek community

attached to the communication to confirm their authorization to the author to present the case on their behalf. CEMIRIDE therefore lacks *locus standi* to make the application.

- ii. There is lack of information regarding CEMIRIDE's representatives, thus making the communication frivolous, vexatious and an abuse of process and therefore inadmissible.
- iii. CEMIRIDE has not demonstrated that it is not a busy body.
- iv. There is no evidence of CEMIRIDE having Observer Status before the Commission
- v. CEMIRIDE being a nationally registered NGO lacks locus to bring international claims.

*b) Non-Exhaustion of Local Remedies*

CEMIRIDE has not demonstrated that it has moved the Kenyan courts for any remedy. It should have exhausted the Court process in Kenya which is a process that can be accessed without impediment. In addition, it should have sought administrative and quasi-judicial remedies, specifically from the Kenya National Commission on Human Rights.

*c) Res judicata and reopening of cases*

CEMIRIDE should have sought the reopening of a case, *Kimei & 9 Others v The Attorney General* whose subject matter is the same as that in respect of which the communication was filed before claiming a violation of Article 7 of the Charter.

*d) Location of the subject matter of the dispute*

- i. The Respondent contends that the eviction notice issued in October 2009 targeted a specific area of the Mau, yet the communication claims that the

notice was in respect of the East Mau forest and that the dispute is over the whole of Mau Forest making it vague and ambiguous. The Respondent maintains that those, including Ogieks in the area covered by the notice are trespassing and that the Ogieks have been fully consulted and adequately provided for as indicated in the Mau Task Force report. Respondent has fulfilled its obligations under Article 1 of the Charter by putting in place legislative, judicial, administrative and other measures to guarantee preservation, protection and promotion of Charter rights. The Bill of Rights of the Constitution of Kenya has provisions that correspond to those of the Charter. Specific initiatives to ensure the participation of minority groups such as the Ogiek, in the development of the country, have been put in place. These include nominating Members of Parliament to represent special interest groups, the adoption of a national land policy which requires the establishment of a legal framework to secure the rights of minorities and indigenous peoples, adoption of a national poverty reduction programme and adoption of Agenda 4 of the Kenya National Dialogue and Reconciliation Framework of 28 February 2008 which requires, *inter alia*, land reforms. The Respondent has also established the Truth, Justice and Reconciliation Commission (TJRC), the Kenya National Commission on Human Rights (KNCHR), the Gender Commission and the Public Complaints Standing Committee (PCSC).

- ii. The Respondent has not violated Article 2 of the Charter as Section 82(1) of the Constitution of Kenya accords protection against discrimination. Interventions to this end include the promulgation of the National Cohesion and Integration Act of 2008 which establishes a Commission to oversee its implementation, the National Law Policy providing for recognition of communities like the Ogiek and the establishment of the Constituency Development Fund to ensure equitable and balanced development across the country. The KNCHR can investigate human rights violations, the TJRC addresses historical injustices and the PCSC deals with complaints on

administration of public institutions. The issues canvassed in the complaint fall under the mandates of these institutions which can adequately address them.

- iii. The Respondent states that it has not violated the right to life as set out in Article 4 of the Charter as this right is guaranteed in the Constitution of Kenya.
- b. Respondent asserts that the Applicants before the Commission did not have the authority nor were they acting on behalf of the Ogiek community which has been actively engaging the Government of Kenya over the issue of preservation of the Mau Forest and that to date no Ogiek has been evicted from the forest.
- c. The Commission cannot issue adverse orders against the Respondent without hearing the Respondent.
- d. The matter is pending before the African Commission yet the Commission is seeking substantive orders from the Court on the issue.
- e. The Commission should have followed the procedure set out in Article 58 of the Charter and drawn the attention of the Assembly of Heads of State and Government of the African Union to the alleged series of serious or massive violations of human and peoples' rights.
- f. That communal ownership of land is recognized under Articles 61(1) and 63 of the Constitution of Kenya.
- g. Article 11 of the Constitution of Kenya recognizes and guarantees the Ogiek community the rights to culture and the Respondent has an obligation to ensure that the community receives compensation for the loss of their cultures and cultural heritage.
- h. The Respondent has always guaranteed the Ogiek community the right to practice their religion and culture.

## **APPLICANT'S REPLY**

9. In its reply, to the **preliminary objections**, the Applicant asserts that:

- a. The Ogieks have litigated their case for 15 years in the domestic courts, including the High Court of Kenya. Most of the cases (which are quoted) are either still pending, or the Respondent has not complied therewith or sought to resolve the Ogieks' complaints. The Applicant urges the Court to find that the domestic procedure has been unduly prolonged, thus exempting the applicant from the requirement of exhaustion of local remedies;
- b. Rule 40 does not require the Court to carry out a preliminary examination of its competence and the admissibility of the case. In any event, the case meets all the admissibility requirements under Article 56, and the Court has manifest jurisdiction over the matter in accordance with Articles 3 and 5(1) of the Protocol;
- c. Effective remedies, while available in theory, have not been practically available as:
  - i. The Respondent has ignored an order of certiorari, and three cases, the earliest one of which dates back to 1999, are still pending before the Courts;
  - ii. Even if orders under judicial review and constitutional jurisdictions of the High Court were in theory available, they were not effective or sufficient as the Respondent either flagrantly violated them or they were inordinately delayed;
  - iii. While the onus is on applicants/claimants to initiate cases, the management thereof including the setting of dates for hearing, granting motions and decisions is squarely within the ambit of Judges in accordance with Kenya's Civil Procedure Rules (Rule 3(2)). The general delay in the handling of cases by the Kenya judiciary, and the non-respect of Court processes by the Respondent's lawyers are well documented. As a result, the majority of cases brought by the Ogieks remain pending;
  - iv. It is untrue that relief under judicial review and constitutional jurisdictions do not require oral hearings and is therefore expeditious as Rules 3(1), 4 and 6 of the Civil Procedure Rules of Kenya and Rule 20 of the High Court

Practice and Procedures clearly provide for a hearing in judicial review and conservatory or interim orders;

**10.** On the **merits**, the Applicant submits that:

- a. The Applicants before the Commission had *locus standi* in accordance with the *actio popularis* doctrine adopted by the Commission in its jurisprudence. In any event, two of the complainants before the Commission are NGOs registered in Kenya, one of which works specifically to promote the rights of the Ogieks;
- b. The Commission observed the *audi alterem partem* principle by serving the complaint before it on the Respondent, which made submissions on admissibility, and handed the request for provisional measures it issued to the Respondent's representative during its 50<sup>th</sup> Ordinary Session.
- c. The application before the Court is not pending before the Commission as the entire matter has been referred to the Court in terms of Article 5(1)(a) of the Protocol and Rule 33(1)(a) of the Rules of Court and Rule 118(2) and (3) of the Rules of Procedure of Commission. In any event Article 4(1) of the Protocol and Rule 123 of the Commission's Rules of Procedure preclude the two institutions considering the same matter simultaneously.
- d. While the Commission could have drawn the matter to the attention of the Assembly of Heads of State in terms of Article 58 of the Charter, it was not obliged to do so, as it had the discretion to refer the matter to the Court in accordance with the complementary protective mandate of the two institutions prescribed in Article 2 of the Protocol.
- e. And finally, while the new Constitution of Kenya recognizes communal ownership of land; guarantees the right to culture and the right to practice religion; and imposes an obligation on the State to enact legislation that ensures compensation and royalties for the Ogieks' culture and heritage, this remains a potential remedy as the necessary legislative, regulatory and institutional framework has not yet been put in place. In any event the violations arose under the old constitution and in a time frame which renders the new constitutional provisions irrelevant and renders it incapable of providing redress to the Ogieks.

