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ENHANCING THE PROTECTION OF THE RIGHTS TO ACCESS AND SECURITY OVER LAND FOR INDIGENOUS COMMUNITIES IN KENYA: A CASE FOR THE OGIEK

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DECLARATION

I, CAROLYNE NABALAYO KITUYI, do hereby declare that this is my original work and has not been submitted and is not currently being submitted for a degree in any other University.

SIGNED:…….

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This thesis has been submitted with my approval as the University Supervisor.

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DEDICATION

This work is dedicated to my children, Mwimali, Obonyo and Micha (MOM).

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LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
AD	Anno Domini
CAP	Chapter
CLO	Crown Lands Ordinance
GoK	Governement of Kenya
ICCPR	International Covenant on Civil and Political Rights
ICS	Interim Coordinating Secretariat
ILO	International Labour Organization
NLP	National Land Policy
RLA	Registered Land Act
UDHR	Universal Declaration of Human Rights
UNDRIP	UN Declaration on Rights of Indigenous Peoples
USA	United States of America

CHAPTER ONE

Nobody can live without land, and most people have to share it, creating competing rights. Disputes about rights in land cannot be avoided. People's relationships to land depend on many factors and have a strong cultural element.[1]

1.0 Background

The Mau is the largest block of forests in Kenya that is threatened with encroachment and degradation by people who have constructed settlements therein. The forest forms a large expanse that touches the Counties of Kericho, Nakuru, Narok and Bomet. This is the only forest where the Ogiek live in.[2]

On 15 September 2009, the Kenyan Parliament adopted the Mau Task force Report, which called for the removal of all current inhabitants from the Mau Forest Complex in Narok District, purportedly in the interest of conservation.[3] The Mau Forest Complex covers 40,000 hectares in the Narok District, Rift Valley region of Kenya. It constitutes a key region for economic development in the context of power generation, tourism, and tea plantations. It also serves as an important water catchment area for the whole of Kenya and the surrounding region.

Recent concerns over environmental degradation and loss of vegetation within the Mau Forest Complex have led to Government intervention in the name of conservation and

[1]Tenga, Ringo W and MrambaS.J., (2008): Manual on Land Law and Conveyancing in Tanzania, Tumaini university, (Unpublished) in Abdon Rwegasira,(2012) Land as a Human Right: A History on Land law and Practice in Tanzania

[2]John Kamau, 'An in-depth report on the Ogiek', Rights Features Service.

[3]James Anaya, 'Kenya: Alleged eviction of the Ogiek indigenous peoples from the Mau forest complex', the Special Rapporteur (June 2009 – July 2010), 15 September 2010.

environmental protection.[4] The complex is one of Kenya's five water towers, the others being Mt. Kenya, Aberdare ranges, the Cherangani Hills and Mt. Elgon.[5]

It is reported that the Mau forests complex forms the largest closed-canopy forest ecosystem of Kenya, as large as the forests of Mt. Kenya and the Aberdare ranges combined. Being one of the five water towers in Kenya and the single most important water catchment in Rift Valley and western Kenya, it is a natural asset of national importance.[6] It is also argued that forest complex biodiversity and habitats provide vital ecological services to the country, in terms of water storage, river flow regulation, flood mitigation, recharge of groundwater, reduced soil erosion and siltation, water purification, conservation of biodiversity, and micro-climate regulation.[7]

Through these ecological services, the forest complex supports key economic sectors in Rift Valley and Western Kenya, including energy, tourism, agriculture, and industries.[8] The negative impact of the degradation of the Mau forest has been felt most by farmers along the valleys through which rivers originating from the forest drain as well as the tea and tourism industries in the neighbourhood.[9]

The threat posed by the encroachment and degradation of the Mau over the decade between 1995 – 2006 led to a sustained public outcry that in 2007 compelled the Government to set up an Interim Coordinating Secretariat for the restoration of the Mau Forest (ICS for the Mau

[4]Ibid
[5] Baobab, 'Degradation of Mau forests threatens agriculture and Kenya's economy', Issue 62, June 2011. Found at http://www.agriculturesnetwork.org/magazines/east-africa/62-trees-farming/mau-forest-degradation accessed 29 September 2015.
[6]Baobab magazine, 'Degradation of Mau forests threatens agriculture and Kenya's economy' Issue 62, June 2011.
[7]Ibid
[8]Ibid
[9]Ibid.

forest). Kenya's then Prime Minister, Rt. Hon. Raila Odinga spearheaded the Mau Task Force Initiative that was officially launched by the Prime Minister on 23rd July 2008.[10]

The mandate of the Task Force was to formulate recommendations to the Government on providing for the relocation of the people who were residing in the forests and the restoration of all degraded forests and critical water catchment areas in the Mau Complex and mobilizing resources to implement the above mentioned objectives and secure the sustainability of the entire ecosystem.[11]

After the Mau Taskforce Report was adopted, the Government started to indiscriminately evict people from the forest to ostensibly save the forest and allow regeneration of the forest with a view to restore the water catchment area to its former state.[12] The Ogiek, being historical inhabitants of the forest, were also part of the group that was being evicted from the forest. They did not have anywhere else to run to. The Mau forestland was central to their survival and identity as a people and if they were not allowed to access and have title to the forestland, they would lose their identity and livelihood as a people forever. This was against their human rights as indigenous peoples among them the right to non-discrimination, the right to life, the right to religion, the right to property, the right to culture, the right to free disposition of natural resources and the right to development as well as their right to self-determination.[13] They needed to be allowed back into the forest and given a title to the forest land.

[10]James Anaya, 'Kenya: Alleged eviction of the Ogiek indigenous peoples from the Mau forest complex', the special rapporteur [June 2009 – July 2010], 15 September 2010.
[11]Ibid.
[12]James Anaya, 'Kenya: Alleged eviction of the Ogiek indigenous peoples from the Mau forest complex', the special rapporteur [June 2009 – July 2010], 15 September 2010.
[13]Article 28 of the African (Banjul) Charter On Human And Peoples' Rights, (Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered intoforce 21 October 1986)

The Ogiek people have been described as the last remaining forest dwellers and the most marginalised of all indigenous peoples and minorities in Kenya.[14]In a letter to the National Land Commission,[15] the traditional forest dwellers of Kenya recognised themselves as: the Ogiek of both Mount Elgon and the Mau, the Sengwer of Cherengany, the Yaaku of Mukogodo, the Aweer/Boni of Lamu County and the Sanye of Lamu. One of the main issues they raised in their letter was that the rights to their lands and resources had not been recognised and respected by the government and dominant neighbouring people who had encroached on their land. They demanded to be acknowledged and recognised as traditional forest dwellers and to have their principle lands thus the forests to be returned to them under community land title.

The Ogiek are believed to be friendly to their environment as they mainly survive on hunting and gathering. 'Dorobo' is a nickname given to them by their neighbours, the Maasai. The name Dorobo is derived from a Maasai name '*iltorobo'* which means a "poor person who has no cattle and has to live on hunting and gathering"[16] and is currently widely used especially by the Maasai to refer to many other communities that inhabit the Kenyan forests. They prefer to be referred to as 'Ogiek', which literally means 'the caretaker of all plants and wild animals'.[17]

According to the website Ogiek.org[18], initially, the Ogiek covered virtually all the central highland zones of the country but have slowly been squeezed out of their lands first by invading tribes, the colonial settlers and now by settling communities. The Ogiek lost their land also through declaration of their ancestral land as forest reserves. The above processes

[14]Sang Joseph K, 'The Ogiek in Mau Forest' [April 2001].
[15]Letter dated 11th September 2014 to the NLC Task Force on Historical land injustices published in the local Daily media.
[16] The Maasai do not eat wild game and rely on meat from their livestock. To the Maasai the Ogiek way of life depicts poverty hence the nickname "ilTorobo
[17]John Kamau,'Anin-depth report on the Ogiek', Rights Features Service. Found at http://www.ogiek.org/report/ogiek-ch1.htm accessed 29 September 2015.
[18]http://www.ogiek.org/report/ogiek-ch1.htm

have not only led to wanton destruction of the natural forest on which the Ogiek depend on, but has also seen the replacement of indigenous forest cover with useless exotic conifer plantations. The destruction of Ogiek forests saw them turn to small-scale arable farming and stock raising in the forests.[19]

The unassuming community found later that the only land they could call home was Forestry Department land and they were being granted short-term tenure on sufferance in return for clearing and cultivating the soil for the planting of exotic trees.[20]

The Ogiek and the surrounding communities believe that the indigenous community were the first people to settle in the East African forests.[21] The Ogiek together with the Sanye and Wata of Ethiopia are regarded as the aborigines, since there is no known evidence of them having migrated from somewhere. From history, the Ogiek have always lived in areas where there are forests adjacent to plains; living in the forests during the dry periods and moving out to the plains during the rainy periods. The uniqueness of the Ogiek is captured by Guy Yeoman who says that the Ogiek are intimately related to a particular ecosystem and will not be able to survive if that environment is destroyed.[22]

Towett J. Kimaiyo notes in his book,[23] that an Ogiek's dominion was threatened very early in time. This was started by the colonial government that started a campaign of oppression by declaring the Ogieks home as forestland. The colonial government further pursued them in their newly found places of refuge and hounded them with policies aimed at their marginalisation, ostracism, impoverishment, decimation and ultimate assimilation.

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[19] ibid.
[20] Ibid.
[21] Sang Joseph K, 'The Ogiek in Mau Forest' April 2001.
[22] Is the author of the book 'The Quest for the Secret Nile: Victorian Exploration in Equatorial Africa 1857-1900.'
[23] Towett J. Kimaiyo, 'Ogiek Land Cases and Historical Injustices1902 – 2004', Volume 1, 2004.

All these policies were leading to the extinction of the Ogiek as a community. The Ogiek realised that his home was threatened from the arbitrary gazettement of his land as crown land. The State as then it was, was behind the authorized deforestation that was escalated with commercial logging and other commercial activities like crude, wasteful, charcoal burning and allocation of huge chunks of the forest to politically correct persons. [24]

Based on the above background, it is clear that the Ogiek's rights to their forest lands has faced and is still facing a grave danger of being taken away from them both by greedy private developers and the Government on the pretext of conservation of the forest lands.

The Ogiek, is not the only indigenous community that has faced problems from successive governments with regards to their lands. Other communities such as the Endorois of Bogoria and the Boni of Lamu have equally suffered. The Endorois, a community that has lived for centuries around the Lake Bogoria region lost their land to the Kenya Government. In the 1970s, the Government, 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, similar to the Ogiek, 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.

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 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.[25] The Community had petitioned the Government on numerous occasions, most importantly in a High Court Constitutional case in

[24] Towett J. Kimaiyo, 'Ogiek Land Cases and Historical Injustices1902 – 2004', Volume 1, 2004.
[25]Mukundi.

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.

The community took their case to the African Commission on Human and People's Rights where the Commission ruled on February 4, 2010 that the Endorois' eviction from their traditional land for tourism development violated their human rights. This case marked the first time the Commission had recognized indigenous peoples' rights over traditionally owned land and their right to development under the African Charter. The decision was also noteworthy because the Commission emphasized the African Charter's protection for collective claims to land rights by indigenous communities. It was also a relevant decision for economic, social and cultural rights advocates because the Commission stated that while the Kenyan Constitution guaranteed civil and political rights, it did not give an equivalent degree of constitutional protection to economic, social, cultural, or group rights and concluded that this denied the Endorois an opportunity to launch an effective claim on their ancestral land in the Kenyan High Court.

1.1 Statement of the problem

This study argues that the existing laws both national as well as international and ratified treaties recognize and protect the land rights of indigenous peoples like the Ogiek, but the Kenyan government and the international community at large have failed to enforce the laws relating to realisation of these land rights.

1.2 Identification of the Issues.

The issues that validate the above position include the fact that despite all the evidence that the Ogiek community in Kenya are some of the aboriginal communities in the country, they remain landless.

The Ogiek People's Development Program website notes that differentiated land tenure systems and regimes over the years have negatively affected the Ogiek community leaving them landless and unable to access the forest for their livelihoods. For instance the Ogiek close to the Maasai Mau found themselves in the Narok County Council, hence the land under their occupation became Trust Land at independence. Similarly, Ogiek in Central Mau-Tinet, Marioshoni, Baraget and other areas were designated as Government forest areas under the Government Lands Act and Forest Act, hence the Ogiek communities in these areas became squatters on Government Land.

The Ogiek of Mount Elgon, on the other hand, became dispossessed of any entitlement under Trust Land by virtue of the creation of the Mount Elgon Game Reserve and a few of them became beneficiaries of small parcels of land granted through the Registered Lands Act.[26] Over the years, Ogiek groups have suffered dispossession of their ancestral lands without their consent and without the provision of compensation. Previously, this loss of land occurred because of agricultural expansion, introduction of exotic plants, logging, and other development activities.[27]

The above-mentioned activities have contributed to the environmental degradation of the Mau Forest Complex, and, over time, have led to an increasing inability of Ogiek communities to practice their traditional economic activities. The Ogiek have lost vast amounts of their traditional lands to state-sponsored conservation efforts, primarily the establishment of national parks and protected areas, which has resulted in the eviction of Ogiek communities from their ancestral lands and the denial of access to the forest resources upon which they depend for their survival.[28]

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[26]Ogiek People's Development Program website found at http://www.ogiekpeoples.org/index.php/features/ogiek-history accessed 29 September 2015.
[27] Ibid.
[28]Ibid.

The post-colonial Government also maintained the oppressive practise of the colonial Government by gazetting Ogiek lands as forests.[29] This meant that the lands that had been converted to forest land had to be conserved as laid down by the various Forest land laws. However, in the advent of the new constitution, the Ogiek community constitutionally qualify to be identified as indigenous peoples. The constitution also protects community land.[30] What is not clear is whether the Ogiek land that is found in areas that are designated as forests are also protected under the constitution as community lands.

Despite the fact that communal land rights are protected, we have seen a sustained attempt to evict the Ogiek from forestlands. This is the land that they are laying claim to as their community land since the Ogiek are a group of people who have always lived in forests. The Ogiek community continues to be threatened with eviction from their current homes. Their ability to make use of the indigenous forest for food, cultural and religious ceremonies, and traditional medicines, is under threat. They are excluded from effective participation in the management of their ancestral land, their inability to share in the benefits of logging concessions granted over it, and indeed their inability to challenge their eviction, threatens their very existence, and results in a violation of their right to economic, social and cultural development with due regard to their freedom and identity.

This study therefore postulates that the only way to ensure that the rights of access and control of the Ogiek to their forest lands is by the Government enacting a specific Act of parliament that will safeguard the forest lands of the Ogiek.

[29]Sang Joseph K, 'The Ogiek in Mau Forest' April 2001. See also, Lynette Obare and J. B. Wangwe, Underlying Causes of Deforestation and Forest Degradation in Kenya, World rainforest movement. Found at http://www.wrm.org.uy/oldsite/deforestation/Africa/Kenya.html

[30]Article 63 of the Kenya constitution.

1.3 Theoretical Framework

This study is based on the property law theory. This specific theoretical framework is important since it helps to answer the question, how things come to be owned. This is a fundamental puzzle for anyone who thinks about property. One buys things from other owners, but how did the other owners get those things? Any chain of ownership or title must have a first link. Someone had to do something to anchor that link- this is what I am going to do under this sub-title.

Property is a general term for rules governing access to and control of land and other material resources.[31] To be specific, this study is based on the 'First Possession or the Occupation Theory' *vis a vis* 'Discovery Theory'. It is important to point out that traditionally, international law recognises five different forms of territorial acquisition: Occupation, prescription, cession, accretion, and conquest.[32]

The First Possession or Occupation Theory suggests that the party who is the original occupant of land was or is entitled to dispose of the land. This rule grants an ownership claim to the party that gains control before other potential claimants. This approach has the advantage of certainty and security as the person in possession can retain possession until someone else shows a better title. While there are legal scholars who have argued that that there is no moral justification for first possession rules, they acknowledge that there is a strong practical and intuitive appeal to the rules under first possession theory.[33]

According to Richard A. Epstein, within the common law, theoretical justifications for private property tend to assume an initial blank slate and, from there, elaborate a defensible

[31] Stanford Encyclopaedia of Philosophy, 'Property and Ownership', first published Monday Sep 6, 2004. Found at http://plato.stanford.edu/entries/property/ accessed 29 September 2015.
[32] Robert Y. Jennings, 'The Acquisition of Territory in International Law(1963).
[33] Epstein, Root of Title, supra note 19, at 1240-41.

rule of First Possession.[34] This assumption in property tends to rely strongly on a narrative framework rather than a scientific or analytical one.[35] While there are many competing theories that people use to defend the origin and the basis of their property rights, First Possession is the most dominant in most communities. Indeed, first possession rules are common to a variety of legal schemes across the broadest range of cultures-from Native American to African law and from Civil to Islamic law.[36]

Acquisition of property in African tribes involved First Possession or Settlement.[37] Even in the ancient era, there are indications to suggest the First Occupation of a parcel of land generated a right of ownership,' and in the modem world, First Possession rules have spread from property in land to other interests such as oil and gas, water rights, and wildlife.[38]

Jill M. Fraley notes that in ***Sabariego v. Maverick***,[39] a trespass case decided by the U.S. Supreme Court in 1887, the Court reasoned that "*first possession should in such cases be the better evidence of right*" because such a conclusion was *"the just and necessary inference of law."* Other legal thinkers like Blackstone have argued that occupancy is the thing by which the title was in fact originally gained.[40] Further back, the English preference for rules of first possession may find their root in Roman law,[41] which was highly influential on both civil and common law systems. Its central concept was the idea of *dominium*, or the right to full control and to exclude others.

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[34] Richard A. Epstein, 'Possession as the Root of Title', 13 GA. L. REV. 1221, 1221-22 (1979).
[35] Jill M. Fraley, 'Finding Possession: Labour, Waste and the Evolution of Property', 39 Cap. U. L. Rev. 51 (2011).
[36] Richard A. Epstein, Property as a Fundamental Civil Right, 29 CAL. W. L. REV. 187, 190 (1992).
[37] K. Bentsi-Enchill, 'The Traditional Legal Systems of Africa', in 4 International Encyclopaedia of Comparative Law: Property and Trust 68, 94-95 (Frederick H. Lawson et. al. eds., 1973).
[38] Jill M. Fraley, 'Finding Possession: Labour, Waste and the Evolution of Property', 39 Cap. U. L. Rev. 51 (2011).
[39] 124 U.S. 261 (1887).
[40] WilliamBlackstone 2 Commercial *2-11 (1776), reprinted in Perspective on Property Law 45, 46 (Robert C. Ellickson et al. eds., 3d ed. 2002) (discussing how a theory of first possession creates efficiency and generates economic value).

[41] Joshua Getzler, Roman Ideas of Landownership, in Land Law: THEMES AND PERSPECTIVES 81, 81-83 (Susan Bright & John Dewar eds., 1998).

While many writers have talked about the rights under the Theory of First Possession, few have defined what it means. To demonstrate the above problem, Jill M. Fraley has discussed a case in which an English court was challenged to define possession. In, ***re Southern Rhodesia***[42], a British case, the court was challenged to determine whether a group of natives had possession of the land at issue, the court found that they did not have possession because they did not have a system of property that the Europeans recognized. They did not have possession of the land specifically because they did not have *"transferable rights of property as we know them."*[43]

The word possession comes from the root word 'possess'. The Merriam Webster dictionary defines possess as to have and hold as property, or to have as an attribute, knowledge, and skill, or to seize and take control of, or to enter into and control firmly.[44] The origins of "possess" are from the Middle English, from Middle French *possesser* to have possession of, take possession of, from Latin *possessus*, past participle of *possidēre*, from *potis* able, having the power + sedēre to sit — more at potent, sit. The above definition would therefore resonate with what a person who is occupying land does or possesses.

This fits in well with what the Ogiek community were doing over their land at the time when the colonial government came to Kenya. However, Black's Law Dictionary has defined an occupant as equivalent to one *"who can control what goes on in premises."*[45]The above definitions appear to be making a distinction between who *can* control a property and who has *aright* to control the property. Be that as it may, a case can be made to show that the Ogiek were in possession of their land and therefore had the right to control what happened thereon. However, some writers have pointed out that to find out the person who had

[42] In re Southern Rhodesia, [1919] A.C. 211 (P.C.)
[43] 1919] A.C. 211 (P.C.)
[44]Merriam Webster online dictionary, found at http://www.merriam-webster.com/dictionary/possess accessed 19 October 2015.
[45] Black's Law Dictionary 973 (9th ed. 2009).

possession of a particular land, title more often also depended upon labour, cultivation, and improvement.[46]

Jill M. Fraley notes that the connections between property, possession, and labour were indeed so strong that some theorists, such as Scrope (who elaborated on Blackstone's original theory), have suggested that possession is not valid as a property claim unless there is "*full and complete utilization"* of the property.[47] This is one of the instances where Europeans tried to override the principle of first-in-time under First Possession theory to dispossess native populations on the pretext that they did not make full and complete utilization of their land and that if the Europeans demonstrated their part in making full and complete utilization of the land, they could end up becoming the beneficiaries of the titles to land.[48]

Most indigenous communities, including the Ogiek of Kenya, have maintained an argument that they were always the first occupants of the lands where they are laying claim. In the case of the Ogiek of Kenya and most other local indigenous communities, there have not been evidence to discredit this assertion and therefore, one can assume that they are true assertions. Therefore, going by the principle of the First Possession theory of property acquisition, the Ogiek and not the colonial as well as subsequent governments in Kenya have right to the forest lands that the Ogiek are laying claim to.

In conclusion, it is clear that in any legal system, property doctrines are particularly tied to narratives and imbedded within social practices and understandings. That is, the narrative of a community about its own origin, settlement and exploitation of land. Going by this conclusion, it is clear that the Ogiek's narrative moves towards proving the fact that they were the first occupiers of their lands as argued above. The first possessors. However, going

[46] James R. Rasband, Questioning the Rule of Capture Metaphor for Nineteenth Century Public Law: A Look at R.S. 2477, 35 ENvTL. L. 1010, 1012 (2005).
[47] Jill M. Fraley, 'Finding Possession: Labour, Waste and the Evolution of Property', 39 Cap. U. L. Rev. 51 (2011).
[48] Ibid.

by the narrative of the colonial governments where possession had to emerge from first possession, first occupation, and homesteading, the colonial government felt that they had the right to the Ogiek land because they had exercised full utilization of the land through cultivation.

In addition to the above criteria, which was also an invention of the European powers since most indigenous communities never practised settled cultivation of lands as most of them were either nomads or hunters and gatherers. I will be demonstrating in the substantive chapters that this conviction of the colonial government was flawed and in fact, while not being cultivators, the Ogiek had other uses of their land and that the conviction of the colonial government is part of the discrimination that the Ogiek have suffered as an indigenous community and therefore truly, they should be considered to have title to their land since they satisfy the criteria set out under the First Possession Theory.

On the other hand, the discovery theory is distinguished from the theory of first possession in the sense that while both of the theories rely on the owner of the title to land to be the first claimant to the title the difference is that under discovery, it is proved that even though there are people who could be occupying land that is discovered, those people are not considered the first lawful claimants of title since they do not have *property systems* that were identifiable to the discoverers that govern the handling of land matters. (Emphasis is mine)

In his ruling in the case of ***Johnson v. McIntosh***[49]*,* Justice Marshall stated that the principle under discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession. The above case is the bedrock of this principle.[50]

[49] Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).
[50] Ibid. n51

This observation was made closer home in ***Kemai and 9 others***[51], the applicants, members of the Ogiek ethnic community, sought a declaration that their eviction from Tinet Forest by the government contravened their right to life, the protection of the law and the right not to be discriminated against. This was based on the claim that they had been living in Tinet Forest since time immemorial, where they derived their livelihood by gathering food, hunting and farming. The applicants argued that they would be left landless if evicted from the forest. They also claimed that their culture was concerned with the preservation of nature so as to sustain their livelihood and that they had never been a threat to the natural environment. They further called evidence to show that the government had allowed them to remain in the area by giving them allotment letters.

The respondents on their part maintained that the applicants were not genuine members of the Ogiek community and that they had entered the forest unlawfully. The Court held that the applicants had changed from the traditional forest dependent community to a modernized people who were no longer living a simple forest based lifestyle. The applicants were also finding to be living in the forest illegally without complying with the requirements of the Forests Act, as they had not sought a license to be there. The acknowledgement by the applicants that the government had issued them with allotment letters showed that they recognized the government as the owner of the land in question and therefore could not assert that the land was theirs from time immemorial.

The Court also held that the eviction from the forest did not bar the applicants from exploiting the natural resources of Tinet forest, upon obtaining licences prescribed under the Forest Act. It was also noted that the applicants were not being deprived of a means of livelihood and right to life but they were merely being stopped from dwelling on a means of

[51]Kemai and 9 others v AG and 3 others Civil case No 238 of 1999 in eKLR (E& I) (Ogiek case);

livelihood preserved and protected for all Kenyans and that there was no evidence of discriminatory treatment of the applicants on ethnic or improper grounds.[52]

Clearly the court was discriminatory by holding that "going into a bush to collect wild berries" was not a way of life but rather an act that did not require entitlement to that land. And that anyone could access a piece of land to pick fruits or harvest wild honey without a claim of title. The court was also discriminatory by stating that no recognised activity could be associated with "berry pickers" –as the Ogiek were referred to as. This is because the Ogiek way of life was not seen as modern. The court further failed to acknowledge the fact that the Ogiek Community had changed their way of life because the circumstances had forced them in this case; the trees they used to collect berries from and hang their hives had been replaced by exotic species that bees could not harvest pollen from for processing of honey.

Discovery was specifically developed to control European actions and conflicts regarding exploration, trade, and colonization of non-European countries, and was used to justify the domination of non-Christian, non-European peoples.[53] The Doctrine was rationalized under the authority of the Christian God and the ethnocentric idea that Europeans had the power and justifications to claim the lands and rights of Indigenous peoples and to exercise dominion over them.[54]

Whenever European nations discovered lands unknown to other Europeans, the discovering country automatically acquired sovereign and property rights over the lands, even though Indigenous peoples were in possession of the said lands.[55] The discoverer also gained a limited form of sovereignty over natives and their governments, which restricted Indigenous

[52]ibid
[53] Robert J. Miller & Micheline D'Angelis, Brazil, indigenous peoples, and the international law of discovery, Brooklyn Journal of International Law, 2011.
[54]Ibid
[55]Ibid.

political, commercial, and diplomatic rights of the community or people in possession. This transfer of sovereign and property rights was accomplished without the knowledge or the consent of native peoples, and without any payment.

According to Seth Adema, the doctrine of discovery comes from the same intellectual background as *terra nullius*, a Latin term that means "unused or vacant land", a legal construct that assumed that Aboriginal peoples only held the right to occupancy. According to *terra nullius*, Aboriginal peoples did live on the land, but they occupied the land in a way like fish occupied water or birds occupied air. Essentially, this meant that if the land was not farmed, it was "empty".[56]

Robert J. Miller and Micheline D'Angelis[57] expound what they consider to be the ten sub-principles of the doctrine as developed in the case of ***Johnson v. M'Intosh***. First, there had to be a discovery. The first European country to "discover" new lands unknown to other Europeans gained property and sovereign rights over the lands. Secondly, there had to be actual occupancy and possession. A European country had to actually occupy and possess newly found lands. This was usually done by actual physical possession with the building of a fort or settlement, for example, and leaving soldiers or settlers on the land.[58]

Thirdly, there was the right of pre-emption.[59] The discovering European country gained the power of pre-emption, the sole right to buy the land from the Indigenous peoples. This is a valuable property right. The government that held the Discovery power of pre-emption prevented or pre-empted any other European or American government or individual from

[56]Seth Adema, 'The Christian Doctrine of Discovery: A North American History', a Literature Review Commissioned by the Doctrine of Discovery Task Force with the support of Christian Reformed Centre for Public Dialogue, November 2013.
[57]Robert J. Miller &MichelineD'Angelis, 'Brazil, Indigenous Peoples, and the International Law of Discovery', Brooklyn Journal of International Law, Volume 37 2011 Number 1.
[58] Ibid.
[59] Ibid.

buying land from the discovered native people.[60] Fourthly, loss of title. After first discovery, indigenous nations were considered by European and American legal systems to have lost the full property rights and ownership of their lands. They only retained the rights to occupy and use their lands.

There is also the issue of limiting sovereign and commercial rights and they could only deal with the European powers that discovered them. There was also the principle of contiguity. This element provided that Europeans had a Discovery claim to a reasonable and significant amount of land contiguous to and surrounding their actual settlements and the lands they actually possessed. Other sub-principles that were apparent are principles such as *terra nullius*. This phrase literally means a land or earth that is null or void. The term *vacuum domicilium* was also sometimes used to describe this element, and this term literally means an empty, vacant, or unoccupied home or domicile.[61]

According to this idea, if lands were not possessed or occupied by any person or nation, or were occupied by non-Europeans but not being used in a fashion that European legal systems approved, the lands were considered to be an empty and waste and available for Discovery claims. Europeans and Americans were very liberal in applying this definition to the lands of native people. Euro-Americans often considered lands that were actually owned, occupied, and being actively utilized by indigenous people to be "vacant" and available for Discovery claims if they were not being "properly used" according to European and American law and culture.[62]

[60]See foot note 40 above.
[61]Robert J. Miller & Micheline D'Angelis, 'Brazil, Indigenous Peoples, and the International Law of Discovery', Brooklyn Journal of International Law, Volume 37 2011 Number 1
[62]Ibid

As mentioned herein above, according to Robert J. Miller & Micheline D'Angelis, religion was a significant aspect of the doctrine of discovery.[63] Non-Christians were not deemed to have the same rights to land, sovereignty, and self-determination as Christians because Christians could trump their rights upon their discovery.[64] The other two principles that were used by the European powers to justify their discovery included the principle of civilisation. They thought that God had directed them to bring civilized ways and education and religion to indigenous peoples and often to exercise paternalism and guardianship powers over them. And lastly, there is the principle of conquest. This had two meanings, first, it was used to mean a military conquest and it was also used as a "term of art," a word with a special meaning, when it was used as an element of Discovery.[65]

The objective of discussing the doctrine of discovery is to demonstrate that the doctrinal foundation of title to land for colonial governments and then the subsequent governments that inherited their structure was founded on weak arguments that are now considered to be against the principle of equality of races. By portraying the foundation of this theory as racist and full of racial supremacy, I hope to demonstrate that the Ogiek community and other indigenous communities never truly lost title to their lands since the legal basis of the regime that took away their land rights is or was unlawful from conception.

1.4 Literature Review

The rights of indigenous people to land in Kenya and the world at large has been reasonably documented through writing and succinctly addressed by various resource persons of academia. Almost all these have concentrated on what has been committed to infringe upon the rights of these people. Few authors have suggested that the government should allow the Ogiek community access to their ancestral lands that are forestlands. But the big question

[63]Ibid
[64]Ibid at no.41.
[65] see n 40

here is whether the land rights for the indigenous peoples should be *recognised* since the indigenous people already own these rights or whether the same should not be *granted* as they already have the rights. This is the proposition of this work.

Is this sufficient considering that the forestlands are administered through a different Act of Parliament which does not recognise human habitation in the forests *vis a vis* human rights which are considered universal?

In addition to echoing the recommendations that most writers have come up with regarding the Ogiek, this thesis goes further to recommend that instead of just granting access to the Ogiek, the government should in fact recognise the fact that the Ogiek have laid claim and occupied the land that they often refer to as their ancestral land and thus they should recognise this practice as an international customary practice and confirm it as a law by granting unfettered access and control to these communities. Access without control does not amount to much in matters to do with land unless the person with the access also has control. This is best achieved by legally being designated as the owner of the land. For land matters, access must go hand in hand with control.

From the foregoing observation I have looked at a vast amount of literature documenting the challenges that indigenous communities go through. It is clear from the available literature that landlessness and lack of recognition as indigenous people are the two biggest challenges. This is so despite the fact that the rights of indigenous communities are protected under various statutes and international instruments. For instance, there are many international, regional and national legal frameworks that have granted these communities special protection. Before mentioning these frameworks and instruments, it will be proper to state that the indigenous people movement is an age old phenomenon that has disturbed great minds in the international human rights camp. This problem dates back to the pre-19th century

movement of the native people in America following the gradual European occupation of their ancestral lands and the forced evictions that ensued.[66]

However, it was until the middle of the 20th century that the human rights movement took over the problem of indigenous people which had been treated as a localised issue. This started with the United Nations Declaration on Human Rights of 1948 (UDHR), the International Labour Organization (ILO) Conventions 107 and 169 of 1957 and 1989 respectively, the International Covenant on Civil and Political Rights of 1966 (ICCPR) and then the UN Declaration on Rights of Indigenous Peoples of 2007 (UNDRIP) which are some of the international documents that have enshrined the rights of indigenous peoples.

The African Charter on Human and Peoples' Rights (African Charter)[67] and East African Community Charter/Treaty which establishes the East African Court of Justice are examples of the regional legal frameworks that also have sought to protect the indigenous communities such as the Ogiek. The legal documents above have recognized the wide range of basic human rights and fundamental freedoms of the indigenous peoples such as the right to unrestricted self-determination and inalienable and collective land and resource rights.

I looked at George Mukundi Wachira's PhD thesis titled *'Vindicating indigenous peoples' land rights in Kenya'*.[68] Mukundi shares the basic assumptions in this work by affirming the fact that indigenous peoples have lost their lands through action from the Government that ironically is supposed to safeguard the interests of these people. My work adopts some of the arguments in his work but I go much further to recommend that the government should adopt modern and creative ways such as cartography to give visibility of the Ogiek territories in

[66]Abdon Rwegasira, Land as a Human Right: A History of Land Law and Practice in Tanzania, African Books Collective, 2012.
[67]Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at: http://www.refworld.org/docid/3ae6b3630.html [accessed 30 October 2016]
[68]George Mukundi Wachira, 'Vindicating indigenous peoples' land rights in Kenya', PhD thesis, Faculty of Law, University of Pretoria. Accessed 30 January 2016

official maps and therefore acknowledge the existence of these people as well as tie their existence to specific territory(s).

I have also had a look at Assa Kibagendi Nyakundi's LLM thesis on *'The Problem of Land rights Administration in Kenya'*[69]. He discusses on land tenure and sanctity of titles in Kenya. He has also discussed how land that was considered trust land was often administered as government land although relevant legislation required that the interests of customary land occupiers should override all decisions to alienate or otherwise deal with such land. I agree with the thrust of this work and it will inform the recommendations of my work.

Other writers who have documented arguments that are agreeing with this research include writers such as Towett J. Kimaiyo who has noted in his book, *'Ogiek Land Cases and Historical Injustices1902 – 2004'*[70] how the community lost its land to both the colonial and post-colonial administrations. Kimaiyo further notes in his book that political machinations also led to loss of land for the community to other communities that were politically correct.

HWO Okoth-Ogendo's who in his book*, 'Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya'*[71] noted that Laws were promulgated that vested virtually the whole Kenyan territory in the Crown leaving all landless, tracing the genesis and genealogy of the problem of land rights administration in Kenya to colonialism British power. He observes that by 1920, when Kenya was formally declared a colony, all land in the country, irrespective of whether it was occupied or unoccupied, was regarded by the British authorities as Crown Land, hence available for alienation to white settlers for use as private estates.[72] I have use the knowledge in his book to show how the inhabitants of various parts of the country were rendered landless.

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[69]Found at http://erepository.uonbi.ac.ke/xmlui/bitstream/handle/11295/14961/Kibagendi_The%20problem%20of%20land%20rights%20administration%20in%20Kenya.pdf?sequence=4&isAllowed=y

[70]Towett J. Kimaiyo, Ogiek Land Cases and Historical Injustices1902 – 2004, (Volume 1, 2004)

[71]Okoth-Ogendo, H. W. O. 1991. Tenants of the crown: Evolution of agrarian law and institutions in Kenya. ACTS Legal Studies Series no. 2. Nairobi: African Centre for Technology Studies (ACTS).

[72]Okoth-Ogendo, above.

John Kamau, has documented a whole history of the Ogiek Community in his website '*An in-depth report on the Ogiek'*, *Rights Features Service*.[73] The information from this website was very helpful in my bid to understand the efforts that the Ogiek community has employed in trying to get solution to the situation in which the community finds itself. My work agrees with the recommendations in the said website and it is important to note that these recommendations were made by the Ogiek community themselves, a key element of self-determination.

Regarding the issue of displacing the Ogiek community from their land in the recent past on the pretext of environmental conservation, I looked at the report by James Anaya, the UN special rapporteur on the human rights and fundamental freedoms of indigenous people.[74] Anaya brought to the attention of the Government of Kenya information in relation to the alleged proposed eviction of the Ogiek indigenous peoples from the Mau Forest Complex. His report draws attention to the underhand tactics that the government through its various organs was using to defeat the efforts of the Ogiek community to stop the eviction. According to the report, the government was calling for meetings with the council of elders of the Ogiek ostensibly to find workable solutions but the meetings arranged with the individuals constituting the Council of Elders were suffering from various shortcomings. In particular, the report noted, the government called meetings with short notice, making it difficult for elders, who must come from disparate parts of the forest, to attend.

Furthermore, since the Council of Elders had no independent funds, it could only convene when meetings were arranged by the Secretariat. The report showed that the Ogiek Council of Elders had not been included in the recent steps of the Secretariat to begin surveying the

[73]John Kamau, 'An in-depth report on the Ogiek', Rights Features Service. http://www.ogiek.org/report/ogiek-ch1.htm
[74]James Anaya, 'Kenya: Alleged eviction of the Ogiek indigenous peoples from the Mau forest complex', the Special Rapporteur (June 2009 – July 2010), 15 September 2010.

Mau Forest Complex, and therefore the traditional Ogiek boundaries risk being ignored when the forest was to be partitioned. In summary, Anaya's work agrees with my work that the government has a duty to consult with the Ogiek people as indigenous peoples with regard to any developments affecting the lands that the community legally has a claim to which is also in line with Article 10 of the UNDRIP.

It also agrees that the Government has a duty to recognize and protect indigenous rights in land and natural resources. Anaya's report noted that in the event that the government was considering relocating the Ogiek community, adequate redress and mitigation measures had to be put in place. Since the report also contained a response from the government on the acts that were against the government's obligations, this helped shine light on the thinking from the government's side. For instance, while acknowledging that the Ogiek's traditional way of life never led to degradation of the Mau forest, the Government argued that there were some emerging Ogiek livelihood activities that were not compatible with forest conservation. Specifically, the government notes that livestock herding and cultivation, two increasingly important livelihood activities of the Ogiek, were not compatible with the conservation of forests.

In establishing the original claim of the Ogiek to their traditional lands that are now either forest lands or other protected lands, we look at the works of authors such as Robert Y. Jennings' work on the acquisition of territory in international law.[75] Singer, Joseph William's work on '*Property law: Rules, policies and practices*'[76] also helps to determine legal means to claim of territory. Authors such as L Hughes' work *'Moving the Maasai: A colonial misadventure*'[77], demonstrates the history of losing land for the Ogiek. William Blackstone's

[75] R Y Jennings, The acquisition of territory in international law, Manchester University Press; New York: Oceania Publications, ©1963.
[76]Joseph William Singer, Property Law: Rules, Policies, and Practices 6E,
[77]L. Hughes, Moving the Maasai: A Colonial Misadventure (St Antony's) 2006th Edition

Commentaries as reprinted in Perspectives on Property Law,[78] discussing how a theory of first possession creates efficiency and generates economic value helps shed light on why the same theory should be applied to consider the Ogiek as the first true owners of the land that they are laying claim to.

Abdon Rwegasira, in his book '*Land as a human right, a history of land law and practice in Tanzania'*[79] gives a clear comparison between 'minorities' and 'indigenous people'. He also illustrates in a few local cases how issues as regards the rights to access and security over land have been handled in Tanzania. I also found insightful information on how minorities and indigenous people in Tanzania were treated as regards their land.

While coming up with the final recommendations of the research, I looked at the six point criteria developed by Roque Roldan Ortiga in his work while looking at the different land tenure regimes for various indigenous communities in South America.[80] I agree with the six principles as provided by Ortiga and the recommendations of this work will mirror those principles.

Other works that support the Ogiek cause in one way or another that I have relied on to support the arguments and conclusions in this work are appropriately referenced to throughout the research.

1.5 Objectives and research questions

The objective of this study is to highlight the land access and control challenges that indigenous communities face in this country. By highlighting this illogical state of affairs, the

[78]Blackstone, William (2001), Blackstone's commentaries on the Laws of England [1763], Wayne Morrison (ed.), London: Cavendish Publishing.
[79]A .Rwegasira, Land as a Human Right: A History of Land Law and Practice in Tanzania, Published September 28th 2012 by Mkukina Nyota Publishers.
[80]Roque Roldan Ortega, Models for Recognizing Indigenous Land Rights in Latin America, PAPER NO. 99 October 2004.

study hopes to present a case for the Government to grant access and control of ancestral forestlands to these indigenous communities such as the Ogiek.

To help in this journey, I will therefore seek to answer the following questions:

1) Does Kenya have sufficient legal and regulatory framework with regard to land owned by indigenous people?
2) Do the Ogiek as aboriginal indigenous people enjoy the property rights?
3) What is hindering their enjoyment of access and control rights to these lands?

1.6 Methodology

This research will adopt a library and a desk review of the available relevant literature on this subject. Published as well as unpublished materials such as books, journal articles, research papers, reports, internet sources and newspapers will be utilised.

The above materials form the primary and secondary sources of information for this study. The primary sources of information for this work will include the Constitution of Kenya (2010), Kenyan Statutory laws such as the Land Act, 2012, the Land Registration Act, 2012, the National Land Commission Act, 2012 and the Forests Act 2005. I will also look at the information contained in just passed Community Land Act as well as look at the Land Policy 2009 among other policies.

The secondary sources of information will include journal articles, newspaper articles as well as website sources of information. The study will be both descriptive and towards the end analytical.

1.7 Limitation of Scope

Although there are many indigenous communities in Kenya such as the Endorois, the Sangwer and the Boni, this research will be limited to the Ogiek community and it will not

examine all the indigenous communities since the issues canvassed under this study will also apply to them. The study will concentrate on the issue of access to and control rights, that is, property rights over indigenous communities' forestlands.

1.8 Chapter Breakdown

This study is divided into five chapters in the following order. Chapter one is this introduction. It contains the background, statement of the problem, identification of the issues, theoretical framework, literature review, objectives and the research questions, methodology and limitations of scope amongst other things.

Chapter two discusses the applicable legal framework in Kenya for the indigenous communities' lands. The chapter will look at the law as it is and then determine whether enough has been done to make the rights of access and control over indigenous communities' forest lands a successful dream.

Chapter three will discuss the Ogiek land question and the Government land practices that have led to the dispossession of this community of their land. The chapter will trace the origin of the claims on particular forest lands that the Ogiek are claiming to be their ancestral lands. It will also discuss the various ways in which the Ogiek lands rights have been infringed upon.

Chapter four is going to consider what exactly the Government needs to put in place to address the issue of indigenous communities in Kenya like the Ogiek being declared landless and ensure that these communities finally are granted access as well as permanent property rights over the forest lands that they are laying a claim to. Chapter five will provide the findings, conclusion and recommendations of the study.

CHAPTER TWO

KENYA'S LEGAL FRAMEWORK WITH REGARDS TO THE INDIGENOUS PEOPLES' LAND RIGHTS

2.1 Introduction

This chapter discusses Kenya's legal framework and examines the extent to which the legal framework protects indigenous peoples' rights to land. The chapter provides the legal regime that serves to protect the Ogiek's land rights as indigenous people. The discussion will proceed to put into perspective how through the different periods in the country's development, different policies have led to the dispossession of land for the indigenous peoples.

This chapter therefore traces the historical development leading to the current legal regime related to the land question in Kenya. This is done in a bid to explore the reasons behind the current status of indigenous peoples' land issues. The chapter will discuss the current position of the Kenyan Constitution 2010 regarding the rights of Indigenous people to their land. 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 currently.

2.2 Applicability and interpretation of laws

When it comes to the interpretation and use of law, the Kenyan courts are guided by the hierarchy as set out in the Judicature Act [81]while exercising their jurisdiction. The courts have a mandate to interpret laws and applicable provisions to determine their applicability and to protect fundamental human rights and resolve disputes. The High court has unlimited original jurisdiction in civil and criminal matters.[82] Importantly, it has original jurisdiction to hear and

[81]Chapter 8 laws of Kenya
[82]Article 165 (3) (a) of the constitution of Kenya 2010

determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.[83]

The hierarchy of sources of law places the Constitution at the top. 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. 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 in Kenya including the indigenous populations.[84]

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.[85]African customary law should preferably be at par with common law, with courts required to apply the regime either chosen by or most relevant to the parties.[86]

It should also be noted that ever since the colonial masters set foot in Kenya and imposed their legal regime in the country, the land tenure system together with the laws thereto favoured individual ownership that does not resonate well with the land use principles and traditions of indigenous peoples who use their land communally.[87]

[83]Article 23 (1) of the constitution of Kenya 2010
[84] SC Wanjala 'Land ownership and use in Kenya: Past present and future' in SC Wanjala Essays on land law: The reform debate in Kenya (2000) 27-29.
[85] George Mukundi Wachira, vindicating indigenous peoples' land rights in Kenya, PhD thesis, Faculty of Law, University of Pretoria. Accessed 30 January 2016.
[86] YP Ghai and JPWB McAuslan Public law and political change in Kenya: A study of the legal framework of government from colonial times to the present (1970) 25-30.
[87]Mukundi (n 41)

2.3 The International and National legal regime impacting on the Land Rights of the Indigenous Communities in Kenya

2.3.1 Who are the Ogiek and what is their origin?

From the introduction in Chapter one, I have traced the origin and habitation of the Ogiek[88]. Professional anthropologists refer to the hunter-gatherer communities that inhabit the forests in Kenya central Rift Valley with the name Ogiek. The name Dorobo has also been used in recent literature to refer to the Ogiek and in newspaper articles. "Dorobo" is a term adopted from the Maasai word "Iltorobo, "meaning poor because they did not have any cattle which is a Maasai's measure of wealth.

The Ogiek believe that they were the first people to settle in the East African forests. They regard themselves as the aborigines together with the Sanye and Wata of Ethiopia as there is no evidence of them having migrated from elsewhere. They also believe that they are forest caretakers making them successful foresters and environmentalists in the past.

An American researcher, Roderic H Blackburn, in his article titled 'High altitude forest conservation in relation to the Dorobo' described the Ogiek as follows:

> The Ogiek are uniquely specialized people intimately related to a particular ecosystem. They are incapable of retaining their essential characteristics, if that ecosystem is destroyed. In the beginning of the last century their ancestral lands were taken from them in a manner little different from the seizure of the Native American hunting grounds in today U.S.A, but with the difference that no Ogiek Reserves were retained. To this great injustice has been added the effects of the forest policy that has progressively and on immense scale replaced their natural forests with conifer forests that are, to the Ogiek, totally sterile and unproductive, useless for either bees or wild animals. Ironically and tragically, the employment offered by the forest department

[88]The name Ogiek is used by professional anthropologists to refer to the hunter-gatherer communities that inhabit the forests in Kenya central Rift Valley. The name Dorobo has also been used in recent literature to refer to the Ogiek and in newspaper articles. Amongst themselves, members of this community prefer the term Ogiek, also spelt Okiek.

> makes them work for their own extinction. Every hectare of plantation trees they plant is a hectare of their birthright lost forever.[89]

The Ogiek believe that due to their small numbers, they remain an easy target for those seeking land on which to farm or graze. They have not been able to speak up and be heard. Everyone has ignored the fact that they too have a right to life. When the British carved areas of Kenya into tribal reserves to be occupied by various tribes, the Ogiek were excluded as they lived in small, scattered groups over a large geographical area and did not appear to have any property.[90]

According to John Kamau in his report on 'The Ogiek: The On going Destruction of a Minority Tribe in Kenya'[91], There is controversy on the origins of the Ogiek with some earlier scholars thinking that the Ogiek's were "probably remnants of some pre-Maasai people who occupied the Rift valley and adjacent areas before the arrival of the Maa speaking peoples".[92]

Kamau[93] notes that the first mention of the Ogiek in published literature was by W.A. Chandler who noted their unique physical features and thought they were different compared to other tribes[94] while C.W. Hobley said they reminded him of "Mongolian types".[95] What followed was a general speculation about the Ogiek and their neighbours[96] and the final conclusion reached by 1974 was that "there is nothing in the traditional Ogiek life of hunting

[89] 'High altitude forest conservation in relation to the Dorobo in Kenya Past Present and future', Swara Magazine (East African Wildlife Society) August 1978: 23.
[90] Ibid, Kimaiyo.
[91] John Kamau, Ogiek: History of a Forgotten Tribe, 2000.
[92] J.l. Bernsten, 1973, "Maasai and Iloikop: Ritual Experts and their followers", MA Thesis, University of Wisconsin, 47.
[93] Ibid n93
[94] W.A. Chandler, 1896, Through the Jungle and the Desert: Travels in East Africa, Macmillan, London.
[95] C.W. Hobley, 1903, "Notes Concerning the Eldorobbo of Ogiek Man 317, 33-4.
[96] See for instance K.R. Dundas, 1908, "Notes on the Origin and the history of the Kikuyu and Dorobo tribes", Man p.136-9. And G.W.B. Huntingford, 1929, "Modern Hunters", Journal of the Royal Anthropological Institute 59, 333-78.

and gathering which would indicate a prior adaptation to a plains environment or to pastoralism or agriculture".[97]

The question that remains then is why the Ogiek were never taken to be a tribal and distinct cultural entity and why everyone wanted them out of their habitats. Although they speak a Kalenjin dialect, depending on whom they border, as their first language, the Ogieks do not consider themselves to belong to Tugen, Nandi or Kipsigis by virtue of speaking the language. All Ogiek maintain that they are one people in origin who have separated sometime in the past and now live in different high forest areas and have become like their non-Ogiek neighbours in language and to some extent culturally, socially and technologically.[98]

However, they differ from neighbouring tribes in that for many years they lacked corporately organised formal institutions. They had no chiefs, clan leaders or formal councils. Historians say that the Ogiek were the original inhabitants of the Central Rift Valley leading to a general feeling that only the Ogiek "have at least a claim to be aboriginal East Africans since there is no evidence of their having come from elsewhere.[99]

2.3.2 Do the Ogiek community qualify to be identified as indigenous peoples?

To help steer the discussion under this next part of this chapter, I will first seek to address the question whether the Ogiek in Kenya are part of what is considered to be indigenous peoples under the current human rights movement internationally. The African Commission on Human and Peoples' Rights (ACHPR or African Commission) has been debating the human rights situation of indigenous peoples since 1999 as these are some of the most vulnerable

[97] R.H. Blackburn, 1974, "The Okiek and their History", Azania on Property Law 45, 46 (Robert C. Ellickson et al. eds., 3d ed. 2002) (discussing how a theory of first possession creates efficiency and generates economic value).Vol 9, 150.
[98] Ibid.
[99] Yeoman, G.H., 1993: "High Altitude Forest Conservation in Relation to Dorobo People" Kenya Past and Present, 3.

groups on the African continent.[100] However, the debate has not yet come up with a concrete definition of the phrase 'indigenous peoples'. The best outcome so far from the debate provides an outline of the characteristics that are considered to be associated with indigenous peoples.

It is argued that it is far more relevant and constructive to try to outline the major characteristics that can help identify who the indigenous peoples and communities in Africa are than to have a one definition fits all. This is in fact the major internationally recognized approach, advocated by the ACHPR as well as the United Nations bodies dealing with the human rights of indigenous peoples.[101] This is also in line with the "Cobo definition" [102] as well as the ILO Convention on Indigenous and Tribal People of 1989, which provides a working definition that highlights the distinct characteristics of indigenous people.[103]

According to the ACHPR, the overall characteristics of groups identifying themselves as indigenous peoples are that their cultures and ways of life differ considerably from the dominant society, and that their cultures are under threat, in some cases to the point of extinction. A key characteristic for most of them is that the survival of their particular way of life depends on access to and rights over their traditional lands and the natural resources thereon. They suffer from discrimination as they are regarded as less developed and less advanced than other more dominant sectors of society.[104] They often live in inaccessible

[100]The African Commission's work on indigenous peoples in Africa, 'indigenous peoples in Africa: The forgotten peoples? 2006.
[101] Ibid at page 9.
[102] Jose Martinez Cobo was a special Rapporteur on Discrimination against Indigenous Populations.
[103] Francesca Panzironi, *Indigenous Peoples' Rights to Self Determination and Development Policy* PhD Thesis 2006 University of Sydney. The main characteristics of indigenous people are: a) Self identification as indigenous, b) Historical continuity with pre-colonial and /or pre-settler societies c) Distinct social, economic or political systems d) Strong link to territories
e) Distinct language, culture, and beliefs f) Form non-dominant sectors of society g) Resolve to maintain and reproduce their ancestral environment and distinctive communities.

[104]Ibid

regions, often geographically isolated, and suffer from various forms of marginalization, both politically and socially. [105]

They are subjected to domination and exploitation within national political and economic structures that are commonly designed to reflect the interests and activities of the national majority.[106] This discrimination, domination and marginalization violates their human rights as peoples or communities, threatens the continuation of their cultures and ways of life and prevents them from being able to genuinely participate in decisions regarding their own future and forms of development.[107]

It is important to note therefore that in this thesis, the question of aboriginality or of 'who came first' is not a significant characteristic by which to identify indigenous peoples in itself. The challenge of using aboriginality in Africa stems from the fact that almost all people in Africa were aborigines relative to the time of colonization. As a matter of fact, domination and oppression only do not qualify a community to be called indigenous peoples since this would then make the whole continent a continent of indigenous peoples.

Moreover, it should be noted that, white settlers and colonialists have not exclusively practised domination and colonisation. In Africa, dominant groups have also repressed marginalized groups since independence, and it is this sort of present day internal repression within African states that the contemporary African indigenous movement seeks to address and therefore communities repressed and marginalised and self-identified as indigenous are what the term indigenous peoples stands for.[108]

[105]Ibid
[106]Ibid
[107] The African Commission's work on indigenous peoples in Africa, 'indigenous peoples in Africa: The forgotten peoples? 2006 at page10.
[108] Ibid.

Rather than aboriginality, the principle of self-identification is a key criterion for identifying indigenous peoples. This principle requires that peoples identify themselves as indigenous, and as distinctly different from other groups within the state. There is a strong emphasis on the importance of the principle of self-identification among organisations working on indigenous peoples issues, including the ACHPR, the International Labour Organisation (ILO), other UN agencies and indigenous peoples' own organisations.

Erica-Irene Daes of the United Nations Working Group on Indigenous Populations provides a four point criteria of identifying indigenous peoples. She states that the indigenous peoples are identified through:[109]

i. The occupation and use of a specific territory;

ii. The voluntary perpetuation of cultural distinctiveness, which may include the aspects of language, social organization, religion and spiritual values, modes of production, laws and institutions;

iii. Self-identification, as well as recognition by other groups, as a distinct collectivity;

iv. An experience of subjugation, marginalisation, dispossession, exclusion or discrimination.

The above four elements do not have to be present at the same time and it will suffice that only a single criteria is met for a community to be considered indigenous.

According to the constitution of Kenya, Article 260 provides that a "marginalised community" is a community that, because of its small population or for any other reason, has not been unable to fully participate in the integrated social and economic life of the country as other communities have because of its relative geographic isolation.[110]

The Ogiek community identifies itself as an indigenous community as used by the ACHPR and other international organisations and the community also meets the criteria of a marginalised community in Kenya and marginalisation is one of the characteristics of indigenous communities and therefore it is clear that the community fully deserves to be

[109] UN Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1982.
[110] Article 260 of the Constitution of Kenya

treated as indigenous peoples on that basis and therefore qualifies for the protection of legal instruments both international and local that seek to further the interests of such groups.

2.3.3The basis and Legal regime impacting on the Ogiek as indigenous peoples.

From the foregoing discussion in chapter one, it is clear that it was until the middle of the 20th century that the human rights movement took over the problem of indigenous people which had been treated as a localised issue owing to lack of a movement to advocate their plight.[111] The problem of indigenous people access and occupation over their land dates back to the pre-19th Century of the native people on America following the gradual European occupation of their (indigenous) ancestral lands and forced evictions that ensued[112]

It is proper to note that the land issue has always been associated closely with the human rights issue and is in the context of human rights. Most cases in which courts have either expressly or implicitly invoked the human rights language to deliver decisions in favour of the marginalised landless or against them for status quo. An example is given of the case of *Mulbadaw Village Council & 67 others v NAFCO*where it was decided that wherever someone is in lawful occupation of land, no valid right of occupancy can be offered to anyone else over the same land unless the provisions of the Land Acquisition Act (41 of 1907) had been complied with.[113]

Indigenous Peoples are now fighting for the recognition of their right to own, manage and develop their community (traditional) lands, territories and resources. This is not only in

[111]Abdon Rwegasira, *Land as a Human Right- a History of Land Law and Practice in Tanzania* (2012) 283-307.
[112]Ibid.
This forceful eviction and occupation of land by the European countries found support in the 'doctrine of discovery' whereby Europeans claimed to have discovered land that they alleged to be *terra nullius* thus 'land without an owner.'
[113](1984) TLR 15 (HC) this finding can be tied to the decision in the appeal of the case of Likengere Faru Parutu Kamunyu and 53 others *v* Minister for Tourism Natural Resources and Environment & 3 others (2000) TLR 288(CA) also known as the *Mukomazi Case.*

Kenya, but also around the whole world.[114] Their relationship with their community lands and territories forms a core part of their identity and spirituality. It is deeply rooted in their culture and history.

There are a number of international legal regimes that have been put in place to secure the rights of these groups of people. It all started with The United Nations Declaration on Human Rights of 1948 (UDHR), The International Covenant on Civil and Political Rights, (ICCPR) of 1966[115], the International Labour Organization (ILO) Conventions 107 and 169 of 1957 and 1989 respectively, and The United Nations Declaration on Rights of Indigenous Peoples (UNDRIP) of 2007. These are some of the international documents that have enshrined the rights of indigenous peoples.

Other international legal documents include the African Charter on Human and Peoples' Rights (African Charter)[116] and East African Community Charter/Treaty,[117] which establishes the East African Court of Justice. The court is a rights enforcement agency that factors in rights of all categories of people including the indigenous communities.

The UNDRIP was adopted in 2007, it recognizes the wide range of basic human rights and fundamental freedoms of indigenous peoples such as the right to unrestricted self-determination and inalienable and collective land and resource right. It also establishes guarantees against ethnocide and genocide.[118] The text recognises the wide range of basic human rights and fundamental freedoms of indigenous peoples. Among these are the right to unrestricted self-determination, an inalienable collective right to the ownership, use and

[114]Birgitte Feiring, Indigenous peoples' rights to lands, territories, and resources, International Land Coalition.

[116] Also sometimes called the "Banjul Charter", the African Charter was adopted in Nairobi, Kenya on 27 June 1981 and entered into force on 21 October 1986.
[117] Treaty for the Establishment of the East African Community, Adopted on November 30, 1999 at Arusha, entered into force on July 7, 2000, amended on December 14, 2006 and further amended on August 20, 2007.
[118] International Work Group for Indigenous Affairs website, International Human Rights Instruments, found at http://www.iwgia.org/human-rights/international-human-rights-instruments accessed 21 February 2016.

control of lands, territories and other natural resources, their rights in terms of maintaining and developing their own political, religious, cultural and educational institutions along with the protection of their cultural and intellectual property.[119]

The Declaration highlights the requirement for prior and informed consultation, participation and consent in activities of any kind that impact on indigenous peoples, their property or territories. It also establishes the requirement for fair and adequate compensation for violation of the rights recognised in the Declaration.

Article 3 of the instrument provides for self-determination of indigenous peoples whereby they have the right to freely determine their political status and freely pursue their economic, social and cultural development. The UNDRIP at Article 4 further provides that indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.[120]

The UNDRIP is celebrated globally as a symbol of triumph and hope. While it is not legally binding on States, and does not, therefore, impose legal obligations on governments, the Declaration carries considerable moral force.

The ILO has adopted two Conventions pertaining to indigenous peoples' rights: Convention 107 (ILO 107) of 1957[121] and Convention 169(ILO 169) of 1989[122]. It is important to note that the ILO Convention No 169 is one of only two treaties specifically dealing with

[119] Article 1-10 of UNDRIP.
[120] Article 5 of UNDRIP
[121] Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (Entry into force: 02 Jun 1959) Adoption: Geneva, 40th ILC session (26 Jun1957) found at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:C107 accessed 21 February 2016.
[122] Convention concerning Indigenous and Tribal Peoples in Independent Countries (Entry into force: 05 Sep 1991) Adoption: Geneva, 76th ILC session (27 Jun 1989). Found at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169 accessed 21 February 2016.

indigenous peoples' rights, the other being the ILO Convention No 107. It's only the Central African Republic in Africa that has ratified ILO 169[123], however, the standards that the treaty enumerates continue to inspire indigenous peoples globally to demand the recognition of their fundamental rights.[124]Article 1(2) of the ILO Convention No 169 provides for the principle of self-identification, which has become the fundamental criterion for determining which groups are considered indigenous people.

While ILO 107 has been superseded and replaced by ILO 169, it remains in force for those countries that ratified it but have not ratified ILO 169. ILO 107 states that the right of ownership, collective or individual, of the members of the population concerned over the lands that these populations traditionally occupy shall be recognised. Six African states have ratified ILO 107.[125]

The Universal Declaration of Human Rights (UDHR)[126] is the basis for the formulation of the International Covenant on Civil and Political Rights, (ICCPR) 1966[127]. Article 27 of the ICCPR provides that States in which ethnic, religious or linguistic minorities exist, should not deny persons belonging to such minorities 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.

[123] http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314 accessed 21 February 2016.
[124] Some of the standards enumerated by the ILO Convention No 169 are also reflected in the recently adopted UN Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N.Doc.A/RES/47/1 (2007).
[125] http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312252 accessed 21 February 2016.
[126] UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at: http://www.refworld.org/docid/3ae6b3712c.html accessed 21 February 2016.
[127] UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: http://www.refworld.org/docid/3ae6b3aa0.html accessed 21 February 2016.

The Committee on the Elimination of Racial Discrimination, General Recommendation 23 on Rights of indigenous peoples[128], calls upon States in particular parties to recognize and respect indigenous distinct culture, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation. The states should also ensure that members of indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on indigenous origin or identity. They should also provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics.

The committee further provides that the state should ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent.[129]

The Committee especially calls upon States parties to recognize and protect the rights of indigenous people and where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. The right to restitution can be substituted by the right to just, fair and prompt compensation only when for factual reasons the restitution is not possible. Such compensation should as far as possible take the form of lands and territories.[130]

[128] Committee on the Elimination of Racial Discrimination, General Recommendation 23, Rights of indigenous peoples (Fifty-first session, 1997), U.N. Doc. HRI\GEN\1\Rev.6 at 212 (2003). Found at http://www1.umn.edu/humanrts/gencomm/genrexxiii.htm accessed on 21 February 2016.
[129] Ibid. n140
[130] Ibid.

Inter-American Court on Human Rights in its ruling in the ***Awas Tingni case***[131] using the "evolutionary" method of interpretation held that "the concept of 'property' includes the communal property of indigenous peoples that is defined by their customary land tenure. Possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property." The court held further that given the characteristics of the instant case, some specifications are required on the concept of property in indigenous communities.

Ownership of the land is not centred on an individual but rather on the group and its community among indigenous peoples. This is guided by a communitarian tradition regarding a communal form of collective property of the land. Since indigenous groups by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures. These relations to the land are not merely a matter of possession and production, but also form a material and spiritual element that they must fully enjoy and preserve their cultural legacy and transmit it to future generations. This was both observed in the pleadings in the Endorois case and the Kemai case.[132]

The African Charter and the East African Community Charter are also crucial instruments that guide the protection and promotion of Human Rights including those of the Indigenous Communities. The African Union has both judicial and law making bodies that help in the formulation and enforcement of the laws. One main body that has had positive impact on the lives of indigenous communities in Africa is the African Commission on Human and

[131]The Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Judgment of August 31, 2001, Inter-Am. Ct. H.R., (Ser. C) No. 79 (2001). Available at https://www1.umn.edu/humanrts/iachr/AwasTingnicase.html accessed on 21 February 2016.
[132] Kemai and 9 others v AG and 3 others Civil case No 238 of 1999 in eKLR (E& I) (Ogiek case);

Peoples' Rights and the African Court. It is out of this institution that a landmark case on the community land rights of the *Endorois* community was decided way back in 2010.[133]

The above legal regimes taken in their totality are meant to protect the property rights which includes land ownership right of indigenous communities such as the Ogiek in Kenya. Unfortunately, Kenya is not a signatory to most of these international instruments and therefore many of these international instruments are peremptory in nature and lack the binding force. This means that they act as soft law in Kenya. Although they are soft law, it is possible that these instruments may play a big role in influencing land policies in the country going forward and therefore by extension ensure that the land rights of the Ogiek are protected.

2.4 The evolution of the land law system in Kenya

2.4.1 Pre-colonial land ownership in Kenya.

The pre-colonial period is that span of time before foreign rule was established in Kenya.[134]In the period before Kenya became a British protectorate on 15 June 1895,[135] 'the country was populated by Africans exercising a customary land tenure system'.[136]Ownership, access, and control of land, was therefore dependent on the traditions, customs and 'intricate rules of usages and practices' of a particular community.[137]

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

[133] African Commission on Human and Peoples' Rights, Case 276, 2003 – Centre for Minority Rights and Development (Kenya) and Minority Rights.
Group International on behalf of Endorois Welfare Council v. Kenya (2010) [hereinafter "ACHPR Endorois Case"], para. 191.

[134]Rutten, M.M.E.M, & Ombongi, K(2005) Kenya : Pre-colonial, Nineteenth Century New York :Fitzroy Dearborn pp4
[135] See generally Ghai & McAuslan (n 42 above) 3-25.
[136] TOA Mweseli 'The centrality of land in Kenya: Historical background and legal perspective in Wanjala (n 40 above) 4.
[137]Mweseli (above)

individual in particular but to the community (clan/ethnic group) as a whole'.[138] There are other authors who have argued that even in the pre-colonial Kenya, although some communities exhibited tendencies of individual land ownership, most communities owned land communally.[139] The Ogiek community fall under the category of communities that owned land communally.

2.4.2 The colonial land tenure system in Kenya

When Kenya was declared a British Protectorate in 1895, systematic and "legal" processes of alienating large tracts of land and dispossessing indigenous peoples of their land kicked in. 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. This was not limited to groups such as the Ogiek. The alienation was made possible by the erroneous reasoning that Africans were not civilized enough to govern themselves, let alone administer their property rights.[140]

The British colonizers, as did other colonialist powers used their foreign laws and western conceptions of civilization to dispossess Africans of their land. They believed that the Africans did not have in place structures that would qualify as government and therefore foreign powers could exercise their authority over them. This 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.[141] The fact that they moved from place to place in

[138] SC Wanjala 'Land ownership and use in Kenya: Past present and future' in SC Wanjala Essays on land law: The reform debate in Kenya (2000).
[139] K Kibwana 'Land tenure in pre-colonial and post-independent Kenya' in W Ochieng (ed) Themes in Kenya history (1990) 232.
[140] Anaya, S J Indigenous peoples in international law (2004) 3-72.
[141] L Hughes, Moving the Maasai, A Colonial Misadventure (2006) 14.

pursuit of pasture dependent on the environmental conditions prevailing at certain seasons did not mean that they lacked a 'settled form of government'.

Laws were promulgated that vested virtually the whole Kenyan territory in the Crown.[142] 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[143]

All throughout the colonial period, different commissions were formed that recommended the individualization of land rights even in the African reserve. For instance, The Swynnerton plan[144] 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 granting 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

[142] HWO Okoth-Ogendo Tenants of the Crown: Evolution of agrarian law and institutions in Kenya (1991)
[143] Section 5 of the Crown Lands Ordinance of 1915.
[144] This was under Roger Swynnerton who was a government official under the Agricultural Department. It was aimed at enabling families be self-sufficient in terms of food production.

to retain their African customary tenure regimes that accommodated the rights of everyone who resided in those lands.[145]

The various land reforms proposed by the several commissions over time basically 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'. Land consolidation involved a process whereby individual holdings were to be aggregated into what were considered 'economic units'. 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.[146]

2.4.3 Post-independence land tenure in Kenya

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 processes had emerged. This accounts for the remarkable lack of transformation of the colonial land policies and property law regime after independence[147]

[145]Okoth Ogendo (above).
[146]Mukundi (above).
[147] Mweseli , TOA 'The centrality of land in Kenya: Historical background and legal perspective in Wanjala (n 21 above) 4.

According to Mukundi, 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.[148]

2.5 The dispossession of indigenous peoples' land through the use of the law.

On attainment of independence, the Registered Land Act (RLA) of 1963 was enacted. This Act effectively confirmed the colonial property laws and policies.[149] According to Wanjala, this statute recognized only individual land tenure, to the frustration of groups whose way of life was incompatible with this regime.[150] 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.[151]

Mukundi argues that certain indigenous communities, particularly the pastoralists, resisted the individualization of their lands.[152] 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 land rights, the Land (Group Representatives Act) was enacted.[153] 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.

Mukundi further argues that 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

[148]George MukundiWachira, 'Vindicating indigenous peoples' land rights in Kenya', PhD thesis, Faculty of Law, University of Pretoria. Accessed 30 January 2016.
[149] Registered Land Act of 1963 Laws of Kenya Cap 300.
[150] SC Wanjala 'Land ownership and use in Kenya: Past present and future' in SC Wanjala Essays on land law: The reform debate in Kenya (2000)
[151]M Kituyi Becoming Kenyans: Socio economic transformation of the pastoral Maasai (1990) 28. And as the Maasai
were to discover to their detriment, not even treaties' similar to those concluded elsewhere in
Central and Southern Africa, were capable of offering protection then.
[152]Mukundi, above.
[153] Land (Group Representatives Act) Laws of Kenya Cap 287.

was dependent on it. However, the results of imposed individualization, instead of spurring economic growth, 'only led to a destruction of communal tenure, and unmitigated landlessness'. Some authors have pointed out the fact that even courts in Kenya have been mostly favouring the individual ownership of land as opposed to the communal tenure system preferred by the indigenous people, while 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, yet courts have on certain occasions 'ruled that registration extinguishes customary rights to land and vests in the registered proprietor absolute and indefeasible title'.[154]

By the time Kenya attained independence, the process of land adjudication had not been completed.[155] Under the then Constitution of Kenya, and the Trust Land Act, county councils held land in trust for local residents according to the customary law applicable in that area.[156] It was however observed that, entrusting the management and control of such lands to local authorities had in many instances been a recipe for appropriation by individuals and corporations in total disregard of the rights of local residents.[157] It should also be noted that the authority of customary law and the viability of customary tenure were, however, limited by the previous Kenyan Constitution through the repugnancy clause[158] and even under the current constitution of Kenya.[159]

[154]Wanjala citing sec 27 and 28 of the RLA CAP 300 (now repealed) and Obiero v Opiyo (1972) EA 227; and Esiroyo v Esiroyo (1973) EA 388 and later in Mbui v Mbui CA 281 of 2000.
[155] Kenya Land Alliance 'The National Land Policy in Kenya: Addressing customary/communal land issue' (2005) 4 Issue Paper 3.
[156] See sec 115 of the former Constitution of Kenya and sec 69, Trust Land Act (Cap 288).
[157] The Republic of Kenya, Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land, Government Printer, Nairobi, 2004, 1(Ndung'u Report).
[158] Sec 115 (2) of the previous Constitution of Kenya.
[159]Article 2(4) of the constitution of Kenya 2010.

Article 2 (4) of the Constitution of Kenya provides that any law, including customary law that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid. This limitation restricts the applicability of communal land tenure under customary law where such tenure conflicts with individualised tenure.

2.6 The current land law regime in Kenya and how they impact on the Land Rights of the Indigenous Communities.

Land law in Kenya is one of the earliest divisions of law to exist. Unlike other laws, Land Law has developed throughout Kenya's history. Other branches of law have also developed in Kenya but not with great magnitude as Land Law.[160]

During the clamour for change and reforms in Kenya, one of the most prominent issues that Kenyan agitated for was reforms in land administration and management.[161] It is in this regard that the Constitution of Kenya endeavoured to satisfy this clamour, by providing amongst other things a reformed legal framework for the administration, use and management of land in Kenya.[162]

The Constitution of Kenya establishes a legal framework on land by providing among other things, the definitions of land and land systems in Kenya as well as setting out a land legislative obligation on Parliament. Pursuant to the above obligation, parliament enacted new land laws regime in 2012. The current land regime in Kenya comprises of The Constitution of Kenya, The Land Act 2012, The Land Registration Act 2012, The National Land Commission Act 2012 and the Environment and Land Court Act and it has replaced the past regimes which included amongst other laws; The Land Titles Act, The Registration of

[160] Peter Onyango O, Balancing of Rights in Land Law: A Key Challenge in Kenya, School of Law, University of Nairobi, Kenya.
[161] The Constitution of Kenya Review Commission (CKRC) Report 2005.
[162] Chege Daniel, analysis of the land law reforms in Kenya, found at http://lawyerchegekamau.blogspot.co.ke/2012/08/normal-0-false-false-false_24.html accessed 30 January 2016.

Titles Act, The Registration of Land Act, The Government Land Act and The Indian Transfer of Property Act.

Under the new laws, land has been classified into Public Land, Private Land; and Community Land. Public land is defined pursuant to Article 62 of the Constitution and includes un alienated land, land occupied by a State organ, land transferred to the State, land to which no heir can be identified, minerals, forests, reserves, national parks, water catchment areas, sea, lakes, rivers, land between high water mark and low water mark, any land not classified as private land or community land. The National Land Commission is responsible for administration of public land.

Private land includes registered land held by any person under freehold tenure, land held by any person under leasehold tenure and any other land declared private land under any Act of Parliament. It is important to note that Land can be converted from one category to another.

Community land is defined pursuant to Article 63 of the Constitution and includes land lawfully registered in the name of group representatives, land lawfully transferred to a specific community and any land declared to be community land by an Act of Parliament. Community land shall be managed in accordance with the law enacted pursuant to the Constitution.

Under the Constitution of Kenya, there are a number of relevant provisions that protect the rights of indigenous communities both expressly and impliedly. These provisions include among others Articles 56, 60 (1) (g), 63, 67, 69(1) (c) and 260.

Article 56 (b) and (d) of the Constitution provides that the State shall put in place affirmative action programmes designed to ensure that minorities and marginalised groups are provided special opportunities in educational and economic fields and to develop their cultural values,

languages and practices. The government can take advantage of this constitutional provision therefore to give life to the demands of the Ogiek with regard to their claim for recognition of their land rights. Article 60(1) (g) on the other hand provides for the principles of land policy. This provision encourages communities to settle land disputes through recognized local community initiatives consistent with the Constitution.

Article 63 provides for community land which is defined as land that is lawfully held, managed or used by specific communities as community forests, grazing areas or shrines; ancestral lands and lands traditionally occupied by hunter-gatherer communities; or - lawfully held as trust land by the county governments, but not including any public land held in trust by the county government.[163]

All community lands are held in trust by the county governments on behalf of the communities for which it is held (sub-article 3). In addition, the Constitution forbids disposal or use of community lands in a manner that is against provisions of the Community Land Act that should specify the nature and extent of the rights of members of each community individually or collectively [Article 63(4)]. Article 69(1) (c)on the other hand requires the state to protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the generic resources of the communities.

Under Article 260 there are a number of definitions attributed to marginalized communities. Paragraph C of the provision defines a marginalized community as an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or

[163] The Constitution of Kenya

gatherer economy.[164] Paragraph (d) on the other hand defines the term as pastoral persons and communities, whether they are nomadic, or a settled community that, because of its relative geographic isolation, has experienced only marginal participation in the integrated social and economic life of Kenya as a whole. The Constitution has allowed for the formation of National Land Commission under Article 67 with key mandates such as investigation of historical injustices. This is also in line with the National Land Policy of Kenya[165]other bodies include the Environment and Land Court.[166]

The President signed the Community Land Act on the 31 August 2016 and now we await the operation of the same Act that is supposed to ensure registration, administration and use of community land.

2.7 Chapter conclusion

The chapter has clearly defined the Ogiek community and traced their origin. It has also established the legal basis of Ogiek claiming the title of an indigenous community. The chapter has also identified both the international and national legal regimes that govern the land rights of the Ogiek in Kenya as an indigenous community. The chapter has traced the development of the current land law regime in the current starting with the pre-colonial period through independence up to the present moment. The chapter has demonstrated how the translocation of the African customary law by the colonial land law system that favoured individual land ownership conflicted with the communal land tenure that was being practised in the country and more so by the pastoralist as well as indigenous communities such as the Ogiek.

[164] The Constitution of Kenya

[165]Disseminated by GoK through the Ministry of Lands as Sessional Paper No. 3 of 2009. Available at http://www.lands.go.ke.

[166]Article 162 (2) (b) of the constitution of Kenya 2010.

The new land regime led to the dispossession of land for whole communities. In the marginalised communities this started through entrusting these community lands to the local councils to hold them in trust for the communities and later some of this land has been converted to either public land or protected forest areas which effectively disqualifies the land from being owned by any community.

CHAPTER THREE

PRACTISES THAT HAVE DISPOSSESSED THE OGIEK OF THEIR PROPERTY RIGHTS

3.0 Introduction

Chapter three discusses the Ogiek land question and the Government land practices that have led to the dispossession of this community of their land. The chapter traces the origin of the claims on particular forest lands which the Ogiek believe to be their ancestral lands.

3.1The basis of Ogiek community's claim to the forest lands

There are various ways in which people acquire title to land. Some of these ways that one can acquire an interest in land include purchase, transfer from an estate, with or without a will, gift, grants from the Crown/ president and through continual use, such as adverse possession (Squatter Rights), prescription and lastly, proving use since "time immemorial". The Ogiek's claim to the forestlands in Kenya is based on the legal doctrine of first possession or occupation theory.

The first possession or occupation theory as discussed in chapter one suggests that the party who is the original occupant of land was or is entitled to dispose of the land. This rule grants an ownership claim to the party that gains control before other potential claimants. This approach has the advantage of certainty and security as the person in possession can retain possession until someone else shows a better title. From the preceding sub-topic, we have demonstrated that the Ogiek were the original inhabitants of the Central Rift Valley and this leads to a general conclusion that only the Ogiek have at least a claim to be aboriginal East Africans since there is no evidence of their having come from elsewhere.

For the Ogiek therefore title is derived from their historic "occupation, possession and use" of traditional territories such as the Kenya forests that they lay claim to. For them, title was

obtained after proof of continued occupancy of the lands in question even at the time that colonialists asserted sovereignty. As per the traditions of the Ogiek, all members of the community hold title collectively.

3.2The Ogiek land question

Land in Kenya remains the single most explosive issue. It was a major issue in the quest for independence. Various commissions have been tasked with looking into the land question from colonial times to the present time.[167]However, this question has not been sufficiently addressed for some communities such as the Ogiek.

One of the greatest challenges that post-independent Kenya faces is how to resolve competing claims over land.[168] This is especially so when on the one hand, are the genuine claims of the original inhabitants of particular lands, and, on the other, the claims of legal titleholders who occupy the same land.[169] Today, some of the original inhabitants of those lands such as the Ogiek demand and claim for restitution of their traditional land rights on the basis that they were dispossessed through historical and prevailing discriminatory legal processes.[170] Some of those groups do not have legal title to the lands they now claim, basing their demands on their customary laws, traditions and pre-colonial occupation.[171] However, Kenya's legal framework subjugates African customary law to written laws.[172] Consequently,

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[167] Patricia Kameri-Mbote, in Governance: Institutions and the Human Condition, Strathmore University and Law Africa (2009) pp. 219-246.

[168]See Report of the Office of the High Commission for Human Rights Fact-finding Mission to Kenya, 6-28 February 2008, 6 <http://www.ohchr.org/Documents/Press/OHCHRKenyareport.pdf> accessed 22 March 2008(OHCHR Kenya Report); see also the Republic of Kenya, Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land, Government Printer, Nairobi, 2004, 1(Ndung'u Report).

[169] As above; see also Country Review Report of the Republic of Kenya, African Peer Review mechanism, May 2006 (Kenya APRM Report) 47-62.

[170] See for example, Kemai and 9 others v AG and 3 others Civil case No 238 of 1999 in eKLR (E& I) (Ogiek case);

[171] See OHCHR Kenya Report (n 1 above); see generally on indigenous peoples struggles to reclaim their ancestral lands in a report prepared by EI Daes 'Indigenous peoples and their relationship to land: Final working paper' UN Doc E/CN.4/SUB.2/2001/21(Daes final working paper).

[172] Sec 3(2) Kenya Judicature Act, Cap 8Laws of Kenya.

legal titleholders continue to own disputed lands, a situation that today is an existential threat to some of the dispossessed communities.

The Ogiek land question primarily examines the inequality in access to land. The issue grew out of the colonial era when European settlers took control of large areas of productive land in the Rift Valley. This completely altered the land use systems and way of life of the communities in that area. This is because the colonial government introduced land title deeds that allowed people to be individual owners of land, which was meant to be communally owned. As a result, private property began to replace the traditional communal land ownership system. Also, the colonial policy changed the economic structure so that land replaced cattle and other crafts as the customary measure of wealth, security, and status. As the demand for land rose, the availability of land fit for the traditional ways of living of the Ogiek was reduced by colonial settlement and the introduction of foreign species in the forest that were of little use to the Ogiek.

Historically, the Ogiek have suffered from dispossession of their land, first by the colonial state and later by the post-independence State. During the 1990s, the Government encouraged Ogiek people in the Mau Forest to subdivide their lands and register title deeds in their names. In his report on the situation of the human rights and fundamental freedoms of indigenous peoples in Kenya, the former Special Rapporteur, Professor Rodolfo Stavenhagen recommended that, "the rights of indigenous hunter-gatherer communities (particularly the Ogiek in Mau Forest) to occupy and use the resources in gazetted forest areas should be legally recognized and respected. Further excisions of gazetted forest areas and evictions of hunter-gatherers should be stopped."[173]

[173]Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, Rodolfo Stavenhagen, Mission to Kenya, A/HRC/4/32/Add.3 (26 February 2007), para 102.

Through a number of international as well as regional agreements, the rights of indigenous peoples such as the Ogiek are affirmed and protected. The African Commission on Human and Peoples Rights for example has affirmed that such rights to lands and natural resources based on traditional tenure or effective possession are protected by article 14 of the African Charter on Human and Peoples Rights. In a recent decision concerning the Endorois indigenous people in Kenya (dealing with the situation of an indigenous people forcibly removed to make way for a national reserve and tourist facilities), the African Commission affirmed that traditional indigenous tenure constitutes property that State parties to the Charter are bound under article 14 not only to respect but also to affirmatively protect.[174]

It is clear that the rights of the Ogiek people to their traditional lands and resources within the Mau Forest Complex have not been adequately recognized and respected; neither historically nor during the recent process of developing measures to protect and rehabilitate the Mau Forest Complex.[175] For the Ogiek therefore, the issue at hand is how access to their lands and title to that land can be achieved.

3.3 Land governance practises that dispossessed and disentitled the Ogiek

Since the colonial era, the Ogiek have suffered dispossession of their ancestral lands without their consent and without the provision of compensation. Previously, this loss of land occurred because of the need for agricultural expansion, introduction of exotic plants, logging, and other development activities. These activities contributed to the environmental degradation of the Mau Forest Complex, and, over time, led to an increasing inability of Ogiek communities to practice their traditional economic activities. More recently, the Ogiek

[174]African Commission on Human and Peoples' Rights, Case 276, 2003 – Centre for Minority Rights and Development (Kenya) and Minority Rights.
Group International on behalf of Endorois Welfare Council v. Kenya (2010) [hereinafter "ACHPR Endorois Case"], para. 191.
[175]Kenya: Alleged Eviction of the Ogiek Indigenous Peoples from the Mau Forest Complex, A/HRC/15/37/Add.1, 15 September 2010.

have lost vast amounts of their traditional lands to state-sponsored conservation efforts, primarily the establishment of national parks and protected areas, which has resulted in the eviction of Ogiek communities from their ancestral lands and the denial of access to the forest resources upon which they depend for their survival.[176]

The Ogiek who are hunter-gatherers were forcefully removed from the Mau forest, through the gazettement of the forest, in effect denying them access to their traditional lands that were the source of their cultural and spiritual nourishment as well as a source of livelihood.[177]

The Crown Lands Ordinance that established the native reserves established Forest Lands. Once land had been gazetted as forestland, then it could not be put to any other use unless de-gazetted through another gazette notice. Gazetting of forest land did not consider the fate of communities living in the forest like the Ogiek/Dorobo. Men, women and children were legally locked out from forest land and any resources found within, yet forest-dwellers continued to access the forests for the necessities of life, which in all practical purposes made their livelihoods illegal through their hunting and gathering in the forest.[178]

The orcible eviction of the Ogiek started between 1911 and 1914 after the signing of the first pact between the colonial authorities and the Maasai. The Colonial soldiers were used to evict the Ogiek and their animals from Mau to Narok regions. These groups of indigenous people were later evicted again in 1918 and this time the African soldiers in the employ of the colonial authorities were used to chase them forcibly from the Eastern Mau to Olpusi-Moru in Narok. The Ogiek were adamant and they refused to surrender their animals and found their way back into Mau Forest. This led to further evictions by the British colonial administrators of the Ogiek from their ancestral lands were in 1926 and 1927. The Ogiek who

[176]Ibid.
[177]Kimaiyo (n 105 above).
[178] Leah Onyango, Anne Omollo and Elizabeth Ayo, Gender Perspectives of Property Rights in Rural Kenya, in Essays in African Land Law, Robert Home (editor) Pretoria University Press 2011.

had managed to remain on their ancestral lands that had been alienated and converted to settler farms, were forced into the forests that had been declared crown land during these evictions. These led to fierce resistance, which led to a cease-fire agreement between the Ogiek, the colonial administration and the white settlers. The agreement, dated 23 September 1932, stipulated that the government stops the harassment of the Ogiek, while the Ogiek on the other hand were to cease invasions of the white settlers' farms. The Ogiek understood this to mean ceding their claims to the settled areas in return for being left in peace in the forests. This agreement was made by four colonial representatives and the 12 elders representing the Ogiek.[179]

Ogiek elders appeared before the Hon. Harris Carter Land Commission on 17 October 1932 following the agreement to cease-fire. The elders presented the Ogiek's stand, which was not to move out of the forests. The Carter Commission report recommended that the Ogiek were to be moved to the reserves of the bigger tribes with whom they had an affinity; these were the Maasai and the Kalenjin. The recommendations had been drawn from those of a committee made up of white settlers and colonial administrators (the Ogiek were not part of this) who had expressed fears that should the Ogiek be left in the forests, their population would increase leading them to claim their land which was now under the white settlers.

This recommendation saw the dispersal of the Ogiek to various different locations as a means of having them assimilated by bigger tribes, hence reducing the possibility of claims to their ancestral lands. '*Whenever possible the Dorobos should become members of and absorbed into the tribes with which they have most affinity*' recommended acting Chief Native Commissioner Mr. A De Wade in 1933.[180]

[179]Ibid.
[180] Archival Information Records. Administrative files Vol. iii 1933, Kenya National Archives, Nairobi.

According to Sang, the encroachment of Ogiek lands by fellow Africans started way back when identity cards were issued to Africans for the second time. Other members of the Kalenjin tribe registered themselves as Ogiek in order to pass as indigenous and have a stake in the Ogiek claims to their ancestral lands. Initially after independence, the government did not interfere with the Ogiek way of life. The interference by the government started around 1977 when government forces led by the Rift Valley Provincial Commissioner invaded Mau West Forest. They torched the houses occupied by the Ogiek and confiscated and arrested members of the community who were then arraigned before the court on the charge of being illegal squatters in the forest.[181]

The Kenyan Government then systematically carved out huge parts of Mau Forest for settlement of people from other communities and allowed commercial activities such as logging and intercropping to take place. This led to constant conflict with the Ogiek who saw the destruction of the forests and the alienation of their lands as a continued threat to their existence.[182]

The Ogiek community sought explanations and help from various government officials and various representations were made to the community that the Mau land belonged to the Ogiek community. However, settlement schemes benefitting members of other communities continued in the Mau unabated. Dissatisfaction with the government's statement, which was totally at variance with the truth, led the Ogiek to file a constitutional land suit in June 1997.[183] This was later moved to the Environment and Land Court in 2012 after the promulgation of the new Constitution. In the case of ***Letuiya & 21 others V Attorney General & 5 others***,[184] in this application, the court ordered the eviction stops as it

[181] Sang Joseph K, 'The Ogiek in Mau Forest' [April 2001].
[182] Ibid.
[183] Letuiya & 21 others V Attorney General & 5 others in HCCA 635/97, High Court of Kenya, Nairobi.
[184] ELC Civil Suit no. 821 0f 2012(OS)

contravened the right not to be discriminated against and it also directed the National Land Commission to open a register for the Ogiek Community and identify land to settle them.

Among the declarations sought in the case were:[185]

- A declaration that the right to life of every member of the Ogiek community in Mau Forest, including the applicants, has been contravened and is being contravened by forcible eviction from their parcels of lands in the Mau Forest and pretended settlement by the Rift Valley Provincial Administration of other persons from the Kericho, Bomet and Baringo to the exclusion of the applicants.
- A declaration that the eviction of the applicants and other members of the Ogiek community from their land in Mau Forest and settlement of other people on their land by the Rift Valley Provincial Administration is a contravention of their right to protection by law and their right not to be discriminated against under sections 77 and 82 of the Constitution.(now repealed)
- A declaration that the pretended settlement scheme under which the Rift Valley Provincial Forest Officer and Nakuru District Commissioner are allocating to persons from Kericho, Bomet, Transmara and Baringo districts, the applicants' land in the Mariashoni location, Elburgon division and Nessuit location, Njoro division and Nakuru district occupied by the applicants is ultra vires the Agricultural Act and the Forest Act and is null and void.

On 22 October 1997, the government defended itself by arguing that:

- The Mau Forest is a gazetted government forest and that the Ogiek had been using it illegally.
- The settlement scheme covered only the plantations area and did not affect the indigenous forestland.
- The settlement scheme did not involve indigenous forest land from which the community could gather herbs, honey and fruits in the traditional manner.
- The plantation forest land was the property of the government who planted the trees therein for environmental and revenue purposes.
- The applicant would be treated for the purpose of the settlement as any landless Kenyan without discrimination on account of clan, tribe, and religion, place of origin or any other local connection.
- The Mau Forest was a gazetted government forest and not a reservation of the Ogiek community as ancestral land.

[185]Letuiya & 21 others V Attorney General & 5 others in HCCA 635/97, High Court of Kenya, Nairobi.

The Ogiek community managed to get an injunction against the government but On 12 January 2001, the demarcation and allocation of land in East Mau Forest began again. In July 2008, Kenya's prime minister established a "Task Force on the Conservation of the Mau Forest Complex" to look into the Mau question. The Task Force published its report in March 2009, recommending, among other things, that all settlers be evicted from the Mau complex as soon as possible. On 15 September 2009, the Kenyan Parliament adopted the Mau Taskforce Report, which called for the removal of all current inhabitants from the Mau Forest Complex in Narok District, purportedly in the interest of conservation.[186] This would result in the displacement of Ogiek tribal members from their traditional lands within the Mau Forest Complex.[187]

The Taskforce Report failed to adequately identify boundaries of the proposed conservation areas, did not contemplate provision of alternative land or compensation for the displaced communities, and failed to take into account on going need for Ogiek communities to have access to forest resources in order to maintain their traditional hunter-gatherer subsistence lifestyle. This is a clear example the dispossession of their land.

This prompted the Ogiek to initiate litigation before the African Commission and provisional measures were subsequently issued by the African Charter on Human and Peoples Rights (ACHPR) urging the Kenyan government to desist from any action to remove the Ogiek from their ancestral land pending the determination of the case by the Commission. In March 2012, the African Commission took the decision to refer the matter to the African Court on Human and Peoples Rights on the basis that it had received a complaint on behalf of the Ogiek

[186]Kenya: Alleged Eviction of the Ogiek Indigenous Peoples from the Mau Forest Complex, A/HRC/15/37/Add.1, 15 September 2010.
[187] James Anaya, 'Kenya: Alleged eviction of the Ogiek indigenous peoples from the Mau forest complex', the special rapporteur [June 2009 – July 2010], 15 September 2010.

community of the Mau forest and that there was evidence of serious and mass human rights violations guaranteed under the African Charter on Human and Peoples' Rights.

A year later (March 2013), the African Court, following the line of arguments presented by the African Commission on Human and Peoples' Rights, ordered the government of the Republic of Kenya to immediately halt any eviction of Ogiek from their ancestral forests and postpone any distribution of land in the contested forest area, pending the decision of the court on the matter.[188]

3.3.1 Ogiek interests versus Government interests

The conflict between the Ogiek and the government is historical in that in 1932, during the colonial administration, the Kenya Land Commission denied the Ogiek ownership rights for political and selfish reasons and declared Ogiek land to be forest. This was in the context of preservation and conservation of Forests. The Ogieks were first subjected to their land being declared forest land under the Forest Act followed by forceful eviction on the note that the same was being conserved as a water catchment; which was seen as a better utilisation. This can be compared to the reasoning in the ***Mukomanzi case*** where the reason for eviction was for tourist purpose, which was to earn foreign exchange for the country.[189] However, the Ogiek, who were unaware that they had effectively lost their land, continued living peacefully in the forest. There were several unsuccessful eviction orders during that time and also after independence. In 1991 the government initiated a settlement scheme, which was originally understood as solving the Ogiek's constitutional land problem. But this scheme turned out to be politically motivated and unsustainable as the beneficiaries, numbering close

[188] African Court on Human and Peoples' Rights v. Government of Kenya, Application 006/2012 Order of ProvisionalMeasures.Athttp://www.african-court.org/en/images/documents/Orders-Files/ORDER__of_Provisional_Measures_ African_Union_v_Kenya.pdf.
[189] See at n60

to 30,000 overall, were mainly from neighbouring districts with good political connections. Ironically, the Ogiek were being evicted to pave the way for more new settlers.

This now marked the beginning of the conflict over ownership of the forest. The government claimed ownership by virtue of the forest gazettement and declaration of 1942 under the Forest Act (CAP 385). However, the community lays claim to the same land on the basis of historical use and occupancy as their aboriginal land.

The Ogiek interests are mainly their cultural survival. The fear of being extinct and landless is very painful in the hearts of many Ogiek. The desire to have somewhere to call home, like all other communities in Kenya, is the main interest of the Ogiek.

3.3.2 Ogiek interests versus forests department interests

The Ogiek's land dilemma is complicated by the structure of forest management in Kenya. From this, a number of issues arise including the fact that the Forest Department has been in serious conflict with the Ogiek regarding access to natural resources. The Forest Department considers the Ogiek to be squatters, while on the other hand the Ogiek consider the forest as their only ancestral home which the Forest Department is only using for a while.

There is animosity and mistrust between the communities that border forests and the Forest Department as personified by forest guards and forest officers. The result is that there are constant skirmishes with the communities; there are illegal squatters in the forest; forests are often set on fire; and communities do not protect forests against illegal poachers. This state of affairs is not helping the country's forests.

There is no transparency and accountability in the management of forests. Thus, in a number of areas, forest officers and forest guards hold their own 'courts', 'fine' offenders, and confiscate whatever has been illegally obtained. The fines and the confiscated materials end

up in the pockets of the forest officer or forest guards. In other areas, foresters collude with timber companies to defraud the State. Further, in many cases, forestland has been allocated to 'developers' under very unclear circumstances, while in others, even water catchment areas have been placed under agriculture by local communities. All these have led to forest degradation and the demoralisation of honest officers.

3.4 Conclusion

The chapter has established the basis of the Ogiek's claim to the forestlands. Under this chapter as well, from the factual events that have happened to the Ogiek, we have clearly demonstrated how successive governments have not been persuaded by the fact that the Ogiek have been the aboriginal inhabitants of the lands that they lay claim to and instead through various Government practises, the community has been dispossessed of their land. Unfortunately, the government has been among the players that have propagated this misfortune on the people that it is supposed to protect. It has been clearly demonstrated that the Ogiek have faced serious hurdles in trying to have their grievances heard and the chapter has highlighted these hurdles. The next chapter will consider the possible solutions to the challenges highlighted.

CHAPTER FOUR

RIGHTING THE WRONGS VISITED UPON THE OGIEK COMMUNITY: THE GOVERNMENT'S ROLE

4.0 Introduction

The Ogiek as indigenous peoples are fighting not only for the recognition of their right to own, manage and develop their traditional and ancestral lands but also for their territories and resources. One can understand why this is the case since for indigenous communities such as the Ogiek, their relationship with their ancestral lands and territories forms a core part of their identity and spirituality. It is deeply rooted in their culture and history.[190]From the previous chapter, we have noted that the wrongs visited upon the Ogiek, such as dispossession of their land, being denied the recognition as rightful claimants of their territories and being forced to change their way of life and essentially their rights for the self-determination of their way of life being taken away.

It was clear that the biggest perpetrator of the above wrongs was the government, both the colonial government as well as the post-colonial government. In the constitution of Kenya, the government has been charged with the role of protecting every person's property rights including rights to land and this includes community land. Wrongs are best rectified by working on or with the people who are central actors in the situation. The government is therefore best suited to right the wrongs that the Ogiek people have suffered for so long. The chapter looks at the various ways that the government can right these wrongs and discuss them in detail.

[190]Indigenous access to and ownership of land within the on going investment in East Africa.

4.1 Why the government needs to step in

According to the World Bank "Indigenous peoples are commonly among the poorest and most vulnerable segments of society". [191]As a result, Indigenous people have been the target of a wide range of initiatives, efforts and programs to assist them in economic development. However, most times, the strategies adopted to achieve this noble objective have been externally developed and modernization-based. These efforts have greatly failed to improve the economic circumstance of the Indigenous people and at the same time have damaged their traditional way of living leaving them less self-reliant and therefore worse off than before.

It has dawned on indigenous communities that they have to take their destiny into their hands and they are therefore struggling to reassert their nationhood within the states in which they find themselves. For the Ogiek, this is through reclaiming their traditional lands and the right to use the resources of these lands. Use of the Ogiek's land for traditional purposes such as hunting and gathering and spiritual purposes is central to their drive to have the title as well as access rights to their lands.

Land is important in two respects. First, traditional lands are the 'place' of the Ogiek and the lands therefore are inseparable from the people, their culture, and their identity as a community. Second, land and resources, as well as traditional knowledge, are the foundations upon which Indigenous people intend to rebuild the economies of their communities and therefore improve their socio-economic circumstance. There is also a human rights dimension of land rights that has legal, economic, and social ramifications. Land is not only a physical asset with some economic and financial value, but an intrinsic dimension and part of peoples'

[191]World Bank,2001

lives and belief systems. The end is not necessarily a material product or a level of economic productivity". [192]

4.2 The six point criteria which must be met for the wrongs against the Ogiek to be corrected

Before looking at the various ways that the government can right the wrongs against the Ogiek, it is important to introduce six criteria for judging the quality of a particular land and resources rights regime for indigenous peoples. These criteria were developed by Roque Roldan Ortiga in his paper "Models for Recognizing Indigenous Land Rights in Latin American," prepared in 2004 for the World Bank. They are international in scope and are based on the rights in ILO 169, Articles 14 and 15. At Article 14 of the ILO169 it is provided that the rights of ownership and possession of the peoples concerned over the lands, which they traditionally occupy shall be recognised.[193]

Further, measures are to be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention is to be paid to the situation of nomadic peoples and shifting cultivators in this respect. Governments shall take steps as necessary to identify the lands, which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession. Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.

[192]Ortiga 2004, VI.
[193] International Labor Organization Article 14 available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::p12100_instrument_id:312314#A14 last accessed 18 August 2016.

Article 15[194] on the other hand provides that the rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources. In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damage which they may sustain as a result of such activities.[195]

Ortiga's criteria will be used to examine how the proposed solutions will go towards resolving the problems of the Ogiek. As James Anaya points out regarding ILO 169, the international community has begun to reach "certain new common ground about minimum standards that should govern behaviour toward indigenous peoples" (Anaya, 1997). Ortiga's six criteria are as follows:[196]

1) **Land tenure regime:** The character of the right over land that has been recognized, which can range from outright (fee simple) ownership through several types of restricted ownership to simple use rights (usufruct)
2) **Territorial recognition:** Recognition of land in a form that corresponds to the concept of an Indigenous territory, as defined by ILO 169

[194]Ibid.
[195] International Labor Organization Article 15 available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::p12100_instrument_id:312314#A14 last accessed 18 August 2016.
[196]Ortiga, 2004, 17.

3) **Natural resources rights:** The sorts of rights over natural resources ownership, administration, and use granted as a consequence of the land right
4) **Tenure security:** The degree of security of the type of land title
5) **Autonomy:** The amount of autonomy in managing their own affairs that is accorded to an Indigenous group as a consequence of their land rights, including legal recognition as an Indigenous group, and their ability to use their own traditional legal and justice systems
6) **Legal recourse:** The legal actions to which they have recourse in order to defend their lands.

Ortiga concludes that there is no single pattern of legal rights that guarantees a successful outcome on the ground for Indigenous land tenure; rather, different combinations of rights can yield strong or weak results, depending on the context and the extent of political will. Nevertheless, the case studies do show that legal systems more strongly support Indigenous land rights when they take into account not only land ownership itself, but also the security of that ownership and whether it is conceptualized within the framework of the concept of an Indigenous territory.[197]

Land rights are also stronger when the legal system concurrently recognizes other rights over natural resources on Indigenous lands and the rights of Indigenous peoples to manage their own affairs. Recognizing the land rights of Indigenous peoples then is not a simple question of granting title, but involves addressing a more complex set of interrelated legal, social, and political issues in order to be effective and secure.[198]

[197]Robert B. Anderson, Bettina Schneider, and Bob Kayseas, Indigenous Peoples' Land and Resource Rights, National Centre for First Nations Governance.
[198]Ortiga 2004, p. 25.

4.3 How the government can restore the title and access rights to the Ogiek

4.3.1 Legislation

Chapter five of the Kenyan constitution deals with land matters. This will therefore inform the proposal under this subtopic about the use of legislation to right the wrongs to the Ogiek since all legislation must meet the constitutional thresholds.

As per the constitutional provisions in Kenya, land in Kenya is to be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with principles such as equitable access to land, security of land rights, sustainable and productive management of land resources, transparent and cost effective administration of land, sound conservation and protection of ecologically sensitive areas, elimination of gender discrimination in law, customs and practices related to land and property in land and encouragement of communities to settle land disputes through recognised local community initiatives consistent with this Constitution.[199]The constitutional principles reflect the principles as provided in the National land policy.[200]

These principles are to be implemented through a national land policy developed and reviewed regularly by the national government and through legislation. Land is a central category of property in the lives of Kenyans and especially the marginalized communities such as the Ogiek. It is the principal source of livelihood and material wealth, and invariably carries cultural significance for many Kenyans the Ogiek's included. This therefore explains why land is being treated as a constitutional issue as shown through Article 60 of the constitution. Since the constitution has set out the broad principles on land with a view to establish an efficient and equitable institutional framework for land ownership, administration and management it is the Government's duty to come up with legislation to ensure that the above constitutional objectives and principles are met.

[199]Article 60 of the Constitution of Kenya 2010.
[200]Section 1.5.1 of National Land Policy of Kenya 2010.

In this sub-topic, our concern is land that is classified as public land as well as community land. Article 62 of the Kenyan Constitution deals with public land as discussed in chapter 2 herein above, while community land is defined under Article 63 of the Constitution. The President signed the Community Land Bill into law in August 2016 and it is to give effect to Article 63 of the Constitution. An interesting provision of this new law is Section 42[201]. It provides for the enactment of laws by parliament to enable the conversion of land from public to community use. The application of this provision is very important as the forest land, which the Ogiek are laying claim to would fall under this category.

I have provided the above two definitions of the classes of land for two main reasons. First, since the Ogiek community own land communally, it is important to understand what the constitution provides for with regard to Community land. Secondly, some of the land held by the government pursuant to Article 62(3) is land that was taken from the Ogiek community. This is land declared as Forest and through various Acts of Parliament. Although Article 63 (2) (*d*) (i) provides that land that is lawfully held, managed or used by specific communities as community forests, grazing areas or shrines does not belong to the Government, the Ogiek territory forests are not captured under this criteria and therefore it vests in the Government.[202]

Under the current Constitution of Kenya, the entity that has the mandate to, among other functions, manage the public land as well as conduct investigations relating to land injustices against communities is the National Land Commission. This is established under Article 67 of the constitution and some of its functions that are directly of importance to this work are to manage public land on behalf of the national and county governments; to recommend a national land policy to the national government and to initiate investigations, on its own

[201] The Community Land Act 2014 signed into law on 31 August 2016
[202] The Constitution of Kenya

initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress. The National Land Commission may perform any other functions prescribed by national legislation.

From the previous chapter, we noted that the Ogiek community lost its land to the colonial and post-colonial governments and other Kenyan communities ironically through the use of the law. Kenya did not, during the colonial period and immediately after independence and it does not currently, have a single legal instrument that governs land. As a way of example, I will mention legislations that led to the dispossession by the Ogiek. Some of these Acts of Parliament have already been repealed, they include Act such as the Government Lands Act Cap 280, under this act the president through the commissioner of lands, could allocate any an unalienated land to any person he so wished. Most of the territories occupied by the Ogiek, however, was covered by Forest Act and therefore deemed an unalienated land in the sense that it is not occupied.

Under the Registered Land Act Cap 300, any person could acquire absolute ownership to any land once they had been registered as the absolute owners. On registration such a person acquired freehold interests on the land. Freehold implied absolute ownership. Such land became private land and this is what had seen the Ogiek lose most of their land through the provisions of this Act. Under the Trust Land Act[203], all land, which was not registered under any Act of parliament, was vested on local authorities as Trust Land.

Although almost all Kenyan communities had land assigned to them under the Trust Land Act, the Ogiek had not been allocated any land.[204] In these Trust Lands a person could acquire leasehold interest for a specific number of years. The local authorities retained the

[203] Cap 285 Laws of Kenya
[204] John Kamau, 'An in-depth report on the Ogiek' Rights Features Service. http://www.ogiek.org/report/ogiek-ch1.htm

powers to repossess such land for their own use should the need have arisen. The Wildlife (Conservation and Management) Act[205] prohibits hunting except with a license. This law has seen the Ogiek as intruders in the Mau Forest rather than joint owners of the forestland. Lastly, the Forest Act Cap 385 gives the minister wide powers to declare any unalienated land to be a forest area, to declare the boundaries of the forest and to alter the boundaries. The minister is also vested with powers to declare that a forest area cease to be a forest and all he is supposed to do is give a 28-day notice to the public via Kenyan gazette notice. The same Act grants the minister powers to issue licences for the use of forest produce. Under this Act the Ogiek found that they had been contravening the law by using forest products, including honey, without the consent of the minister.[206]

Since from the above we have noted that the Ogiek land in all material facts was lost through legislation, it is my argument that this wrong can be made right through legislation. The Kenyan government has an opportunity to accomplish this based on the provisions of the Constitution which provides that Parliament shall, among other things, revise, consolidate and rationalise existing land laws;[207] revise sectoral land use laws in accordance with the principles set out in Article 60 (1); and enact legislation to regulate the manner in which any land may be converted from one category to another; to protect, conserve and provide access to all public land; to enable the review of all grants or dispositions of public land to establish their propriety or legality and to provide for any other matter necessary to give effect to the provisions in the constitution.[208] It therefore remains to be seen whether the Government will implement the constitutional principles under chapter five or not.

[205] Cap 376 Laws of Kenya
[206] The Forest Act Cap 385 Laws of Kenya
[207] Article 68
[208] ibid

Among the principles that Parliament can consider while coming up with legislation to implement the above constitutional principles are the principles provided below. These principles reflect the on the principles that were provided for under the national land policy. Land reforms should adhere to the principles of redistribution, restitution, resettlement and land readjustment in order to secure the land rights of the Ogiek specifically.

4.3.1 (a) Redistribution

The purpose of land redistribution is to provide the Ogiek with access to land for residential and productive purposes. The need for land redistribution also arises because of the gross disparities in ownership that has been occasioned by dispossession, lopsided development priorities, environmental degradation, and trans-generational discrimination. The Government shall develop a legal and institutional framework that defines the standards, procedures and criteria for land redistribution.

4.3.1 (b) Restitution

The purpose of land restitution is to restore land rights to those that have unjustly been deprived of such rights. It is based on a recognition that the lack of access to land may be due to unfair governmental policies and laws. It underscores the need to address circumstances that give rise to such lack of access, including historical injustices. The Government should develop a legal and institutional framework for handling land restitution to the Ogiek community.

4.3.1 (c) Resettlement

The purpose of resettlement is to grant the landless Ogiek access to land, and to provide them with infrastructure and basic services such as shelter, water and sanitation facilities.

Resettlement therefore aims to empower the Ogiek who lost their land so that they may become self-reliant. Further, the resettlement principle seeks to procure adequate land for the reorganization of the community in light of expanding populations. The Government shall establish criteria for the determination of who qualifies to benefit from resettlement programmes and ensure that it is carried out in a transparent and accountable manner.

4.3.2 Use of cartography to protect the territory of the Ogiek

Cartography is the art or process of drawing or making maps.[209] A map is a visual representation of an entire area or a part of an area. The work of a map is to illustrate specific and detailed features of a particular area, most frequently used to illustrate geography but can also provide more information depending on the intended use. Maps attempt to represent various things, like political boundaries, physical features, roads, topography, population, climates, natural resources and economic activities. Undoubtedly, maps have been used for political ends. Even as a primary data set, they can be manipulated to tell people what you want them to know. Therefore Maps are not value neutral.

For a territory to exist, it must also be acknowledged through a representation on a map. In Kenya, it is very easy for an average primary school student who has studied Geography to pinpoint to you what parts of Kenya represent what community. However, all indigenous communities in Kenya are not recognised or even acknowledged in any map in the country. Across the world, most indigenous communities have not been acknowledged to exist through the information available through maps.

[209] Oxfordonline dictionary found here http://www.oxfordlearnersdictionaries.com/definition/english/cartography last accessed 21 August 2016.

There is a developing jurisprudence emanating from Brazil where indigenous communities are fighting to have their territories acknowledged through the Brazil maps as a way of giving the communities recognition but also as a way of safeguarding their territories. This concept can be borrowed and applied in the situation of the Kenyan indigenous communities such as the Ogiek. Through the use of creative cartography therefore, the government can come up with maps that acknowledge the existence of indigenous communities by showing their territories and therefore help in protecting these territories since this makes alienation of their lands difficult. Cartography therefore makes territorial recognition for the Ogiek possible.

4.4 Conclusion

This chapter has laid the basis for government intervention in righting the wrongs committed to the Ogiek that led to their dispossession of their land and this in turn led to their denial of access to their ancestral lands necessary for the propagation of their culture. The chapter has demonstrated that it was mostly through legislation that the Ogiek lost their land and therefore it is through legislation as well that the community can gain access and ownership rights to the community land. To safeguard the territory once granted, the study has suggested that the government should re-examine the maps in the country and come up with new and accurate maps that acknowledge the existence of indigenous communities by acknowledging their territories in official maps.

CHAPTER FIVE

FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

5.0 Introduction

This Chapter discusses the conclusions and recommendations from this study. The chapter starts with conclusions of the study and then proceeds to provide the recommendations.

5.1 Findings and Conclusions

The study has successfully established that the Ogiek community is an indigenous people's community as espoused by local, regional and international legal frameworks. These legal frameworks include the Kenyan Constitution, the African Charter on Human and Peoples Rights (ACHPR) and the UNDRIP as well as the ILO Conventions 107 and 169 of 1957 and 1989 respectively. The ironical twist is that the same international law that came to disinherit the Ogiek and leave them landless is the same law that has come up with strategies and ways of recognising and settling the issues of indigenous people. It is critical to note that the Kenyan Government is bound by the above legal documents and therefore it needs to respect the status of this community as determined above. This categorisation as indigenous peoples ultimately confers upon the Ogiek community various rights and among them is the right to property and the right not to be discriminated upon especially culturally.

Secondly, the research has demonstrated how the marginalised communities, in this case the Ogiek, lost their lands through entrusting their community lands to the local councils to hold them in trust for the communities and later some of this land was converted to either public land or protected forest areas which effectively disqualifies the land from being owned by any community. The research has also demonstrated how the Ogiek community was displaced from the Mau on the basis that the government wanted to conserve the Mau which

is a water catchment area but in the end, the community lost their lands to politically connected communities. The research argues that since the primary way through which the Ogiek lost their land was through various government legislations, similarly, it is through positive legislation that the community can secure its access to their ancestral forest lands and secure the land rights.

The research explores a very interesting concept which is predominantly used in geography as the best solution, among others, to solve the problems that the Ogiek community have faced. The concept explored is known as legal cartography. This will give a geographical identity to the Ogiek lands and thereby protect their very existence and being pinned to a particular geographical area.

5.2 Recommendations

The recommendations of this study are as follows:

1. Although the Community Land Bill 2014 has been signed into law as one of the instruments that should protect community land, the same still leaves a gap as regards how property that the indigenous communities lay claim to that is still considered forest land and hence administered as public land.

   Amendments should be introduced in consultation with the aggrieved communities to solve this and operationalize the principles under chapter five of the Constitution. The Act should however take into consideration the principles of redistribution, restitution, and resettlement and land readjustment in order to secure the land rights of the Ogiek specifically.
2. The Government to allocate the Ogiek the land they always lay claim to and ensure the same is registered under the Community Land Act of their own where they can assert their customary rights and also can exercise their interests. In this way justice

will be done. This can be through the assumption of International law where by a practice is eventually recognised as a law and in this case the practise of the Ogiek lifestyle of living in Forests to be recognised and adopted.

3. The African Commission to set up a follow up mechanism or system to ascertain adherence to ensure that states implement the recommendations of the Commission. In this way the Ogiek problems would be aired to the relevant authorities considering free and prior informed consent.
4. The Ogiek to be granted special seating or nominations in the National Lands Commission and to any future commissions and various task forces related to investigations on the land injustices. This will help them protect and preserve their interests.
5. The government to adopt a national land policy that requires the establishment of a legal framework to secure the rights of the minorities and indigenous people. This will include the enactment of legislation that ensures compensation and royalties for the Ogiek's culture and heritage.
6. The government to ensure that the Ogiek territories are reflected in all official maps. This will be through the enactment of a law to guide the cartography exercise that will identify these lands, ensure their demarcation and eventually issue titles or just map them out for identification. This will give the community lands and visibility, which will give the communities an identity. This is what was decided and implemented in the *Awasi Tingni Case.*

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