

6 February 2024

Attorney General of the Republic of Kenya
Sheria House, Harambee Avenue

RE: CALL FOR KENYAN STATE TO FULFILL LEGAL OBLIGATION TO IMPLEMENT AFRICAN COURT ON HUMAN & PEOPLES' RIGHTS TWIN JUDGMENTS IN CASE APPLICATION NO. 006/2012 IN FAVOUR OF THE OGIEK COMMUNITY

We the undersigned write in solidarity with the Ogiek community for their ongoing, long standing struggle to their ancestral land and traditional livelihood and submit this letter to call for an end to the State's ongoing inhumane forced evictions of the community from the Mau Forest and further call for government's fulfillment of its legal duty to implement the African Court on Human & Peoples' Rights (hereinafter the Court) twin judgments in the Ogiek cases: Case Application No. 006/2012 – *The African Commission on Human and Peoples' Rights vs Republic of Kenya* – issued on 26 May 2017, and the follow up on reparations issued on 23 June 2022. ESCR-Net - International Network for Economic, Social and Cultural Rights is a global network comprising of over 300 members including social movements, Indigenous Peoples' groups, NGOs, academic institutions, trade unions and advocates across more than 80 countries who are committed to a common mission of building a global movement to make human rights and social justice a reality for all.

SUMMARY

The Ogiek community continue to suffer historical land injustices to date as the Government of Kenya has been undertaking forced evictions in the Mau Forest since 2 November 2023. The ongoing forced evictions have so far affected more than 700 people from the Ogiek Community, of which half of them are women and children. Their homes, schools, and belongings have been burned and demolished, and the rainy season makes their situation even more vulnerable.

The government defends its decision on the basis of 'conservation' of the area, however this defense does not consider that the evictions directly endanger the forest by undermining the Ogiek community's role as stewards of nature and exemplify a blatant disregard of the Court's Orders and Kenya's obligations under international law. No alternative has been provided to the community and irreparable damage may be caused to their lives, sources of livelihoods, family life, safety and security if the evictions are not stopped, further defying Kenya's obligations under international law.

Effective implementation of human rights decisions is vital to the rule of law. It has been 6 years since the merits judgment was issued by the Court and over a year since the reparation judgment was delivered, yet the Government's non-compliance continues as it engaged in new campaigns to forcibly evict Ogiek community members and subject them to perpetual historical injustices, with no redress for the violations suffered. As the world grapples with the twin crises of climate change and biodiversity loss at an unprecedented scale, there is no possibility of

transformative solutions if Indigenous communities like the Ogiek are not involved. Indigenous communities play an outsized role in actually addressing these intersecting crises, as opposed to false promises of counterproductive and violative fortress conservation models. The government's role in forest conservation today works best when it is a true service agency, acting as technical advisor, supporter, monitor and regulator affirming forest communities' custodianship and efforts to protect and rehabilitate forests.

BACKGROUND OF THE OGIEK CASE & TWO JUDGMENTS ISSUED BY THE AFRICAN COURT

The Ogiek Case, brought by the Ogiek Peoples Development Programme (OPDP) and Minority Rights Group (MRG), that reached the Court was a culmination of a struggle against historical injustices of forced evictions and dispossessions against the Ogiek dating back to the colonial days. In 2009, the Ogiek received a 30-days eviction notice from the Kenyan Forestry Service, to leave the Mau Forest and therefore filed a case at the African Commission on Human and Peoples' Rights (the Commission), contesting the planned evictions and requesting for the ordering of Provisional Measures to prevent irreparable harm being done to them, pending the final determination of the communication. Provisional measures were Ordered, which the Government of Kenya illegally refused to comply with. The Commission, thereafter, referred the case to the Court, thereby, becoming the Applicant before the Court. Amicable settlement initiatives failed, and the Court decided to consider the complaint on its merits. On 26 May 2017, the Court delivered judgment on the merits of the case, ruling that the Ogiek are an Indigenous People of Kenya and that the evictions of the Ogiek from the Mau Forest violated their rights in terms of Article 2 (freedom from discrimination), Article 8 (freedom of religion), Article 14 (right to property), Article 17(2 & 3) (right to culture), Article 21 (the right to freely dispose of wealth and natural resources), Article 22 (right to development) and Article 1 (which obliges all member states of the Organization of African Unity to uphold the rights guaranteed by the African Charter on Human and Peoples' Rights). On 23 June 2022, the Court delivered judgment on reparations, bringing to a close 13 years of litigation at the supranational level and ordered the Government of Kenya to:

- 1. Pay the Ogiek KES. 157.85 million as collective compensation for material and moral damages suffered;**
- 2. Return the Ogiek's ancestral lands in the Mau Forest to collective title within two years through a delimiting, demarcation and titling exercise in consultation with the Ogiek;**
- 3. Commence a dialogue and consultation process with the Ogiek and any concerned parties in relation to any concessions and/or leases granted over Ogiek lands to reach an agreement on whether or not these operations will continue by way of lease or benefit sharing agreement and, where no agreement is reached, to return the lands to the Ogiek and compensate concerned third parties;**
- 4. Adopt all necessary measures to ensure the full recognition of the Ogiek as an Indigenous People of Kenya, including recognition of their language and cultural and religious practices;**
- 5. Adopt all necessary measures to ensure the Ogiek are effectively consulted, in accordance with their traditions and/or their right to give or withhold their free,**

- prior and informed consent, in relation to any development, conservation or investment projects on Ogiek lands;
6. Ensure full consultation with the Ogiek, in accordance with their traditions and customs, in the reparations process as a whole;
 7. Adopt all necessary measures to give full effect to the judgment as a means of guaranteeing the non-repetition of violations;
 8. Establish a community development fund within one year of the judgment for the benefit of the Ogiek people as a repository for the compensation awarded;
 9. Coordinate the establishment of a committee to oversee the community development fund, which must include representatives chosen by the Ogiek and be operationalized within one year of the judgment;
 10. Publish, within six months, the official summaries of the merits and reparations judgments in the Official Gazette and in a newspaper of wide circulation, as well as the full merits and reparations judgments, together with their summaries, on an official government website for a period of at least one year; and
 11. Submit a report on the status of implementation of the reparations judgment within one year of the judgment.

The Court also ruled that it shall conduct a hearing on the status of implementation of the orders made in the judgment on a date to be appointed by the Court, twelve (12) months from the date of the judgment.

FAILED GOVERNMENT RESPONSES SINCE THE JUDGMENTS AND ONGOING DEMANDS FOR IMPLEMENTATION

We condemn the Government of Kenya's continuing violations of the rights of the Ogiek by undertaking forced evictions of the Ogiek from the Mau Forest, including since 2 November 2023, despite the fact that the Court noted in 2017 that forest conservation should not be a pretext for the expulsion of Indigenous Peoples from their ancestral territories. The Government of Kenya has not taken any formal initiative to implement any of the orders in the Court's twin judgments – not even the least of the orders, which is to publish the summaries of the Merits and Reparations judgments in the Official Gazette and in a newspaper of wide circulation, as well as the summaries and the full judgments in an official government website. The Government of Kenya has also not taken any “measures to guarantee full recognition of the Ogiek as an Indigenous People of Kenya in an affirmative and effective manner, including but not limited to according full recognition to the Ogiek language and Ogiek cultural and religious practices”.

As a result of non-compliance, various efforts have been made over the years to ensure full implementation of the Court's Orders in the twin judgments. The Ogiek have initiated dialogue with the Committee on Administrative Justice (CAJ), the National Land Commission (NLC); the Historical Land Injustices (HLI) Division of the NLC; the OHCHR Kenya; the Attorney General's Office; the National Gender and Equality Commission (NGEC), Kenya National Commission on Human Rights (KNCHR) and the National Cohesion and Integrations Commission in attempts to get the Government of Kenya to take steps to implement the Court's twin judgments. Further to

these, government agencies, including the Ministry of Environment and Forest, Kenya Forest Services (KFS), Treasury, the Office of the Attorney General, and the Ministry of Lands and Physical planning (MoLPP) have all participated in meetings organized by the CAJ on the content and implementation of the orders in the twin judgments, but concrete commitments have not been forthcoming.

After consideration of Kenya's 5th to 7th Periodic Report in 2017, the Committee on the Elimination of Racial Discrimination called upon Kenya to prevent, investigate, prosecute and sanction acts threatening the physical security and property of the Ogiek and other Indigenous Peoples as well as ensure legal acknowledgement of the collective rights of the Ogiek and other Indigenous Peoples to own, develop, control and use their lands, resources and communal territories according to customary laws and traditional land-tenure systems and to participate in the exploitation, management and conservation of the associated natural resources. Kenya submitted a Report to the said Committee in 2021 where the government stated that:

"with regard to the Ogiek, Endorois and Sengwer communities, Kenya submits that in a situation where the State needs to save the forest's ecosystem, which is under constant threat from illegal settlement and deforestation, all genuine indigenous occupants are offered compensation to settle elsewhere, or land is identified elsewhere, and the occupier moved."

IMPACTS OF THE GOVERNMENT'S FAILURE TO IMPLEMENT THE JUDGMENTS

The Kenyan State's refusal to comply with and implement the Orders in the twin judgments of the Court and its insistence on committing further violations through new forcible evictions of the Ogiek contravenes the Court's clear Orders in the twin judgments and Kenya's broader obligations under international human rights law. Aside from the ongoing forceful evictions, there has been recent lifting of caveats in some of the areas inhabited by the Ogiek community and logging licenses being issued for harvesting of trees from the Mau Complex without consultation with the community and without their free prior and informed consent to such activities as ordered in the Court's Reparations judgment.

Non-implementation is also impacting negatively on the environment, as illegal logging and other destructive activities by third parties lead to forest degradation. The Ogiek community has always conserved the forest and their presence in the Mau furthers conservation more substantially than any destructive fortress conservation measures. The Ogiek have since time immemorial coexisted with the forest and have been called the Caretakers, as they have preserved and respected the forest as well as contributed to the arrests of illegal settlers and loggers in the forest. As a forest-dependent community, who live, work, and subsist off the forest, a healthy environment is a necessary precondition for fully exercising many of the Ogiek communities human rights. The Government of Kenya acknowledged this by stating that the Ogiek's presence in their ancestral territory is not the source of the degradation, but rather that comes from logging licenses and illegal intruders. The role of Ogiek as Indigenous People in conservation of biodiversity is greatly undermined as the ongoing forced evictions are being carried out in the name of conservation.

KENYA'S OBLIGATIONS UNDER INTERNATIONAL HUMAN RIGHTS LAW

Articles 2(5) and 2(6) of the Constitution of Kenya, 2010 play a crucial role in defining Kenya's obligations under international human rights law and its commitment to respecting, and fulfilling human rights. In particular, Article 2(5) states that: "the general rules of international law shall form part of the law of Kenya." Additionally, Article 2(6) states that: "any treaty or convention ratified by Kenya shall form part of the law of Kenya." These two provisions underscore Kenya's commitment to international human rights law and emphasize the incorporation of international treaties into domestic law, the supremacy of international law, and the importance of respecting, protecting and fulfilling human rights obligations and rulings. The provisions also serve as a foundation for upholding human rights in Kenya's legal and political system.

Kenya's acceptance and ratification of international human rights instruments, such as the Universal Declaration of Human Rights (UDHR); the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); and the African Charter on Human Peoples' Rights (African Charter) obligate the state to uphold the rights and duties contained in these instruments which include but not limited to: (i) respecting, protecting and fulfilling the rights enshrined in the treaties for all individuals within its jurisdiction; (ii) providing remedies and access to justice for individuals whose rights have been violated; (iii) reporting to international human rights monitoring bodies on its compliance with the treaties through periodic reports; and (iv) cooperating with the international community and organizations to advance human rights globally.

Kenya, by incorporating international human rights law in the Constitution, underscores the significance of respecting, protecting, and fulfilling human rights which is the cornerstone of democratic governance and the protection of individual freedoms and dignity. The Government is therefore bound to take active measures to prevent human rights violations, protect individuals from abuses, and ensure access to remedies when rights are violated. Moreover, respect for international human rights rulings is fundamental to the rule of law and the protection of human rights. It not only reflects a commitment to justice, equality and the rule of law but it is also essential to the stability, progress and prosperity of a nation and the global community as a whole.

In view of the foregoing, it is imperative that the Government of Kenya and other institutions comply with Court Orders and ensure full implementation as a matter of justice for the Ogiek community. A failure to do so undermines the authority of the regional system of human rights protection.

CALL TO ACTION

We draw attention to the aforementioned twin Judgments and hereby call on the Government of Kenya **TO:**

- 1. Stop the ongoing forceful evictions of the Ogiek community, who have been living in harmony with nature for generations in the Mau Forest;**
- 2. Fast-track implementation of the Court's twin judgments by engaging the Ogiek community within twenty one (21) days from the date of this letter, with a view to build consensus on the implementation plan of the decision;**
- 3. Provide to the community an implementation plan after consultations with them on the steps the government will take to fast track implementation of the judgments and the responsible government agencies;**
- 4. Pay reparations to the individuals affected by the recent evictions; and**
- 5. Comply with reporting guidelines by providing regular reports to the Court on the progress made towards the implementation of the twin judgments.**

Thank you for your consideration. We look forward to your response via Samuel Ade, Minority Rights Group ([contact in original]) and Fernando Delgado, ESCR-Net secretariat ([contact in original]).

Yours Sincerely,



Ogiek Peoples' Development Program



Minority Rights Group



Endorois Welfare Council



Endorois Indigenous Women Empowerment Network

الشبكة العالمية
للحقوق الاقتصادية
والاجتماعية والثقافية



ESCR-Net
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Réseau-DESC

ESCR-Net - International Network for Economic, Social & Cultural Rights



INITIATIVE FOR
ECONOMIC AND
SOCIAL RIGHTS

A11 Initiative - Serbia



Хүний Эрх Хөгжил Төв
CHRD

Centre for Human Rights & Development - Mongolia



**Centre for
Human Rights**

UNIVERSITY OF PRETORIA

Centre for Human Rights, University of Pretoria



ECOTERRA International

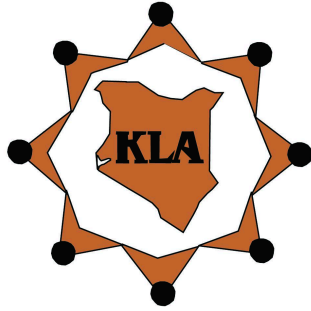


International Centre for Ethnic Studies - Sri Lanka



KENYA HUMAN RIGHTS
COMMISSION

Kenya Human Rights Commission



Kenya Land Alliance

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WITNESS

cc: **Solicitor General of Kenya**
National Assembly of Kenya
Kenya National Commission on Human Rights
The Commission on Administrative Justice (Office of the Ombudsman)
National Gender & Equality Commission
County Government of Nakuru
Cabinet Secretary Ministry of Lands, Public Works, Housing & Urban Development
Principal Secretary, State Department for Lands & Physical Planning

Annexures:

1. African Commission on Human and Peoples' Rights v. Republic of Kenya, Application No. 006/2012 Judgment
2. African Commission on Human and Peoples' Rights v. Republic of Kenya, Application No. 006/21 Judgment on Reparations