

# briefing

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## Reparations at last: Land justice for Kenya's Ogiek

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The Ogiek community jubilantly exiting the African Court after a favourable judgment. *Credit: Ogiek Peoples' Development Program.*

### Acknowledgements

The authors would like to acknowledge the bravery and resilience of the Ogiek people of the Mau forest, whose perseverance in the face of adversity has led to the remarkable outcome in this case. They would also like to acknowledge the tireless advocacy that the Ogiek Peoples' Development Program has undertaken on behalf of the Ogiek for decades, without which this victory would not have been possible.

The authors would also like to acknowledge the generous funding they have received from the Bernstein family as recipients of the Robert L. Bernstein Fellowship in International Human Rights, which made their contributions to this case possible.

Minority Rights Group International would like to acknowledge the support received from the European Union and Irish Aid to help fund this case.

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**ISBN** Print: 978-1-912938-85-8 Online 978-1-912938-82-7. **Published** November 2022.

**Reparations at last: Land justice for Kenya's Ogiek** is published by MRG as a contribution to public understanding of the issue which forms its subject. The text and views of the author do not necessarily represent in every detail and all its aspects, the collective view of MRG.

## The reparations judgment

On 26 May 2017, the African Court on Human and Peoples' Rights ('the Court') delivered a landmark judgment recognizing the Ogiek people's right to their ancestral lands in the Mau Forest, holding that a series of interrelated human rights had been violated by Kenya given the state's failure to uphold the Ogiek's land rights.<sup>1</sup> Five years later, on 23 June 2022, the Court delivered another judgment in favour of the Ogiek people, setting out the reparations owed for the violations established in the merits judgment.<sup>2</sup> In the reparations judgment, the Court rejected all of Kenya's pleas and objections and ordered the government to:

- pay the Ogiek KES 157.85 million as collective compensation for material and moral damages suffered;
- 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;
- 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;
- 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;
- 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;
- ensure full consultation with the Ogiek, in accordance with their traditions and customs, in the reparations process as a whole;
- adopt all necessary measures to give full effect to the judgment as a means of guaranteeing the non-repetition of violations;
- 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;
- 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;
- 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

- submit a report on the status of implementation of the reparations judgment within one year of the judgment.

The reparations judgment represents a hard-won and long-awaited victory for the Ogiek after decades of dispossession, non-recognition and marginalization. It is significant because it clarifies the scope and content of state obligations to uphold indigenous peoples' land rights and represents a beacon of hope for other indigenous peoples across Africa.

## The Ogiek: A history of dispossession and marginalization

The Ogiek of the Mau Forest, who number some 40,000, are among Africa's last remaining forest dwellers.<sup>3</sup> Known for their traditional way of life based on honey-gathering, they survive mainly on wild fruits and roots, game hunting and traditional bee keeping. The Ogiek have lived in Kenya's Mau Forest since time immemorial, and are the custodians of the environment on which they depend. They have a unique way of life, well adapted to the forest. To them, the Mau Forest is a home, school, cultural identity and way of life that provides the community with an essential sense of pride and destiny. In fact, the term 'Ogiek' literally means 'caretaker of all plants and wild animals'. Unsurprisingly, the survival of the Mau Forest is therefore inextricably linked with the survival of the Ogiek people.

For decades, Ogiek have been routinely subjected to arbitrary forced evictions from their ancestral land without consultation or compensation, first by colonial authorities and subsequently by the Kenyan government. Ogiek rights over their traditionally owned lands have been systematically denied and ignored. The government has allocated land to third parties, including political allies, adopted policies that have encouraged illegal encroachment by non-indigenous settlers and permitted substantial commercial logging to take place, without sharing any of the benefits with the Ogiek. This has resulted in significant degradation of the Mau Forest, which has been used to justify the removal of Ogiek from their ancestral lands even though they are not responsible for the forest's destruction. The eviction of Ogiek from their ancestral land and the refusal to allow them access to their spiritual home has prevented them from practising their cultural and religious traditions and customs. The culmination of all these actions has resulted in the Ogiek being prevented from practising their traditional hunter-gatherer way of life, thus threatening their very existence.

In October 2009, the government, through the Kenya Forestry Service, issued a 30-day eviction notice to the Ogiek and other settlers of the Mau Forest, demanding

that they leave the forest. Concerned that this was a perpetuation of the historical land injustices already suffered, and having failed to resolve these injustices through repeated national litigation and advocacy efforts, the Ogiek decided to lodge a case against their government before the African Commission on Human and Peoples' Rights (the Commission),<sup>4</sup> with the assistance of Minority Rights Group International (MRG), the Ogiek Peoples' Development Program (OPDP) and the Centre for Minority Rights Development (CEMIRIDE).<sup>5</sup>

In November 2009, the Commission, citing the far-reaching implications on the political, social and economic survival of the Ogiek people and the potential irreparable harm if the eviction notice was actioned, issued an Order for Provisional Measures requesting the government to suspend implementation of the eviction notice. Although Ogiek were not evicted on that occasion, their precarious situation continued. In July 2012, following the government's lack of engagement on the issue, the Commission referred the matter to the Court pursuant to Article 5(1)(a) of the Protocol on the establishment of the Court. On 15 March 2013, the Court issued an Order for Provisional Measures, mirroring the order already issued by the Commission. Unfortunately, neither was complied with and evictions, harassment and intimidation of Ogiek continued, including a violent eviction of approximately 1,000 Ogiek and police intimidation in March 2016.

On 26 May 2017, after years of litigation, a failed attempt at amicable settlement and an oral hearing on the merits, the Court rendered a merits judgment in favour of the Ogiek people. It held that the government had violated Articles 1, 2, 8, 14, 17(2) and (3), 21 and 22 of the African Charter on Human and Peoples' Rights in relation to the denial of the Ogiek's right to communal ownership of their ancestral lands, discrimination, interference with their ability to practise their faith, and denial of their rights to culture, development and natural resources. The Court reserved its decision on reparations and ordered Kenya to take all appropriate measures within a reasonable timeframe to remedy the violations established in its judgment.<sup>6</sup>

At the end of 2018, after the parties had made their written submissions on reparations, the Court proceeded to deliberate. On 22 November 2019, the Court notified the parties that it would be holding an oral hearing on reparations in March 2020 and indicated a series of issues on which it wanted the parties to provide further written submissions. The oral hearing on reparations was postponed several times due to the Covid-19 pandemic and on 29 June 2021, the Court decided to forgo an oral hearing and dispose of the matter based on the parties' written submissions.<sup>7</sup>

Notwithstanding the 2017 merits judgment, the government used delays in the reparations phase of the case to continue to evict, harass and intimidate Ogiek, claiming these evictions were necessary to implement the merits judgment. In July–August 2020, the government violently

evicted 1,000 Ogiek in an operation that resulted in widespread police harassment and fuelled inter-ethnic violence between Ogiek and non-indigenous settlers.<sup>8</sup>

## The Ogiek's key arguments

The heart of the Ogiek's reparations claim was for the restitution of their ancestral lands in collective title through a delimiting, demarcation and titling exercise with the meaningful participation of the community. The Ogiek also sought the facilitation of a dialogue mechanism between themselves, the Kenya Forest Service and relevant private sector operators to reach mutual agreement on whether commercial activities on Ogiek land should cease, or whether these would be allowed to continue via a lease of the land and/or a royalty and benefit sharing agreement between themselves and the commercial operators.<sup>9</sup>

In relation to compensation, the Ogiek requested an award of US\$204.6 million in pecuniary damages arising from the Kenyan government's violation of their property and natural resource rights.<sup>10</sup> The Ogiek submitted that evictions from their land and the resulting loss of their non-movable possessions, including dwellings, religious and cultural sites, and beehives, the lack of prompt and full compensation for the loss of their ability to use and benefit from their property over the years, and the denial of benefit, use of and interest in their traditional lands since their eviction, including the denial of any financial benefit from the land's resources, such as those generated by logging concessions and tea plantations, should inform the award of compensation.<sup>11</sup> To substantiate their claim, the Ogiek submitted a compensation analysis report that included a community survey to quantify the pecuniary damages owed to the Ogiek people as a whole. It represented the 'best efforts of the community to provide the evidentiary elements for the Court to have confidence to set a compensation award for the community'.<sup>12</sup>

The Ogiek also claimed US\$92.5 million in non-pecuniary damages stemming from their non-recognition as an indigenous people and the denial of their rights to development, culture and religion.<sup>13</sup> The community's representatives arrived at this sum based on the compensation analysis report, which included a survey of non-pecuniary damages awards in other indigenous rights cases before the Inter-American Court, the seriousness of the violations, the large number of victims, and the anxiety, inconvenience and uncertainty caused by the ongoing nature of the violations.

The Ogiek further requested orders directing the government to: (i) adopt legislative, administrative and other measures to recognize and ensure the right of the Ogiek to be effectively consulted with regard to development, conservation or investment projects on their ancestral land (including adequate safeguards for their social, economic and cultural survival);<sup>14</sup> (ii) provide for full consultation and participation of the Ogiek in the

reparations process as a whole;<sup>15</sup> (iii) introduce legislative, administrative and other measures necessary to give effect to the obligations of the Kenyan government in relation to restitution, compensation and other guarantees of satisfaction and non-repetition sought by the Ogiek;<sup>16</sup> (iv) recognize the Ogiek as an indigenous people of Kenya;<sup>17</sup> (v) publicly issue a full apology to the Ogiek for all the violations of their rights as identified by the merits judgment<sup>18</sup> (vi) erect a public monument acknowledging the violation of Ogiek rights;<sup>19</sup> and (vii) take all necessary measures to create a community development fund for the benefit of the Ogiek people where any compensation awarded by the Court could be deposited.<sup>20</sup>

## The Kenyan government's response

In response to the Ogiek's submissions on reparations, the Kenyan government raised three objections for consideration before a judgment on reparations could be rendered.<sup>21</sup>

The government claimed that there was no basis for a claim for compensation for any violations that took place before 1992, which was the year Kenya became a party to the Charter. Moreover, the government submitted that any claim for financial compensation could only be determined as of 26 October 2009, and only in relation to the notice given to the Ogiek community to vacate the south-western Mau Forest.<sup>22</sup>

The government's second objection related to their submission that the dispute should be resolved through amicable settlement under Article 9 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights given the 'peculiar circumstances' of the case.<sup>23</sup>

Third, the government objected to the involvement of CEMIRIDE, MRG and OPDP in the proceedings, arguing that the original complainants were not representative of the Ogiek people and that the Court's rules did not provide for their participation in the proceedings.<sup>24</sup>

In relation to restitution, the government argued that the right to use and occupy the Mau Forest did not grant the Ogiek ownership rights. Accordingly, any violations established in the merits judgment could be remedied by guaranteeing and granting access to the forest. The government further argued that, in this context, a demarcation and titling exercise was unnecessary and would undermine common access and use by other people. In this regard, the government asked the Court to clarify that its merits judgment had not recognized the Ogiek as owners of the Mau Forest.<sup>25</sup>

The government also asked the Court to reject the Ogiek's compensation claim.<sup>26</sup> In particular, the government argued that pecuniary damages could not be awarded on the basis of 'best efforts' or premised on speculative presumptions, and therefore objected to the admissibility of the compensation analysis report.<sup>27</sup> The government submitted that the Ogiek's claim for pecuniary



Expectant and hopeful Ogiek community members at the gate of the African Court on Human and Peoples' Rights, heading in to hear the reparations judgement. Ogiek Peoples' Development Program.

damages was fanciful, had no basis in law or practice, and if awarded alongside other forms of reparations, would be manifestly disproportionate, constituting unjust enrichment contrary to principles of reparations under international law.<sup>28</sup>

In relation to non-pecuniary damages, the government reiterated its objection to the admissibility of the compensation analysis report<sup>29</sup> and argued that it had already taken measures to remedy the violations underlying the Ogiek's non-pecuniary damages claim. The government submitted that its Constitution provided a solid legal superstructure to address the root causes of the Article 2 violations, and that granting access to the Mau Forest would be sufficient to redress violations of the Ogiek people's rights to culture and religion.<sup>30</sup>

The government also asked the Court to: (i) find that the government remained committed to implementing the merits judgment as evidenced by the establishment of a Task Force to oversee its implementation; (ii) order that guarantees of non-repetition together with rehabilitation measures were the most far-reaching forms of reparation and sufficient to redress the violations established in the merits judgment; (iii) use its offices to facilitate an amicable settlement with the Ogiek; (iv) find that the Kenyan Constitution creates a legal structure capable of addressing the causes underlying the Article 2 Charter violations; and (v) hold that there was no basis for ordering the erection of a monument commemorating the violation of the Ogiek people's rights.<sup>31</sup>

## Analysis of the Court's judgment

Before addressing the substance of the reparations claims, the Court first responded to the objections raised by the Kenyan government and rejected them all.

In relation to liability for events that took place before 1992, the Court emphasized that the issue had been resolved in its merits judgment when it confirmed its temporal jurisdiction.<sup>32</sup> The Court held that reparations could take into account events before and after the date Kenya ratified the Charter, as long as they were connected to the harm suffered by the Ogiek in relation to the infringement of their rights. Doing so would ensure that reparations awarded would comprehensively address the prejudice suffered by the Ogiek as a result of Kenya's conduct.<sup>33</sup> In this regard, the Court underscored that the violations experienced by the Ogiek remain unaddressed to date.<sup>34</sup>

The Court also rejected the government's proposal for amicable settlement, recalling that at the merits stage of the proceedings, it had initiated a process for amicable settlement, which collapsed when the parties could not agree on the issues to be covered by the settlement.<sup>35</sup> Furthermore, from the totality of the parties' submissions on reparations, it was clear that they held opposing views

on the feasibility of amicable settlement. The Court stressed that a key prerequisite for an amicable settlement is the parties' willingness to engage in the process. As such, the Court found that the prerequisites for amicable settlement were not met.<sup>36</sup>

With regard to the involvement of CEMIRIDE, MRG and OPDP, the Court recalled that the question of the representation of the Ogiek had been raised and disposed of at the merits stage. The Court reiterated that the applicant before the Court is the Commission, rather than the 'original complainants' that filed the case on behalf of the Ogiek before the Commission, and that the proper parties were therefore before it.<sup>37</sup>

In relation to the substance of the reparations claims, the Court recalled that the right to reparations for the breach of human rights obligations is a fundamental principle of international law, and that the state responsible for an international wrong is required to make full reparations for the damage caused. The wrongful acts underlying the international responsibility of Kenya resulted in violations of Articles 1, 2, 8, 14, 17(2) and (3), 21 and 22 of the Charter. All the reparations claims had to be considered and assessed in relation to those Charter violations.<sup>38</sup>

## Compensation

Deciding on the pecuniary reparations, the Court first acknowledged that compensation is an important means for effecting reparations.<sup>39</sup> The Court underscored, however, that it is not enough for an applicant to show that the respondent has violated a provision of the Charter, it must also prove the damage that the state is being required to indemnify. As such, applicants bear the duty of proving the causal nexus between the violations and the damage suffered and must specifically prove all material loss.<sup>40</sup>

Notwithstanding, the Court acknowledged that victims of human rights violations may, for various reasons, face challenges in collecting evidence in support of their claims.<sup>41</sup> Because of this, the Court proceeded to analyse the specific circumstances of the case at hand, assessing the consistency and credibility of the Ogiek's material damages claim in the light of the whole application. Acknowledging the limitations of the community survey submitted by the Ogiek to substantiate their claim, the Court held that the best way forward was to make an equitable award, mindful of the general challenges involved in assessing material compensation with mathematical precision in cases involving violations of indigenous peoples' rights.<sup>42</sup>

The Court reasoned that it was incontrovertible that the government was responsible for the violation of the Ogiek people's rights under Articles 14 and 21 of the Charter (among other violations), and it thus followed that it must rectify the consequences of its wrongful acts.<sup>43</sup> Given the length of time over which the violations occurred, the number of people affected by the violations, the Ogiek's

way of life and the general difficulties in attaching a monetary value to the loss of resources in the Mau Forest, among other factors, the Court acknowledged that arriving at a precise and mathematically exact quantification of pecuniary loss would be difficult.<sup>44</sup> For these reasons, the Court decided to exercise its discretion in equity to determine the amount of fair compensation to be paid to the Ogiek.<sup>45</sup> In so doing, the Court did not subject the final award to its 'absolute and unregulated discretion', but relied on the applicable law, and all the submissions and the supporting documents filed by the parties, the amici curiae and the independent experts to inform its decision.<sup>46</sup>

In assessing material damages, the Court underscored that the Ogiek had suffered multiple rights violations under the Charter, pointing to systemic violations of their rights.<sup>47</sup> Given the collective nature of the violations, the Court found it inappropriate to order that each member of the Ogiek community be paid compensation individually, or that compensation be pegged to a sum due to each member of the Ogiek community, bearing in mind the practical challenges of making individual awards for a group of approximately 40,000 individuals.<sup>48</sup> Taking all factors into consideration, the Court decided that the government must pay the Ogiek KES 57.85 million as collective damages for the material prejudice suffered.<sup>49</sup>

In assessing the non-pecuniary damages for the violations of Articles 2, 8, 17(2) and (3) and 22 of the Charter, the Court held that moral prejudice includes both the suffering and distress caused to the direct victims and their families, the impairment of values that are highly significant to them, and other changes of a non-pecuniary nature in the living conditions of the victims or their family.<sup>50</sup> In this case, it was clear that members of the Ogiek community suffered from the lack of recognition as an indigenous people, from the evictions from their ancestral land, the denial of enjoyment of the benefits emanating from their ancestral land, the inability to practise their religion and culture, and to fully and meaningfully participate in their economic, social and cultural development.<sup>51</sup> Accordingly, the Court found that while it was not possible to allocate a precise monetary value equivalent to the moral damage suffered by the Ogiek, it could award compensation by exercising judicial discretion in equity, taking into account the specific circumstances of the case.<sup>52</sup> In this context, the Court was mindful that the violations established relate to rights that remain central to the very existence of the Ogiek. The Court therefore held that the Kenyan government must pay the Ogiek KES 100 million as collective compensation for the moral prejudice suffered.<sup>53</sup>

## Restitution

Noting the communal nature of indigenous ownership of ancestral lands, the Court underscored that indigenous

peoples 'have, by the fact of their existence, the right to live freely in their own territory' and that 'the close ties that indigenous peoples have with the land must be recognised and understood as the fundamental basis of their cultures, spiritual life, integrity and economic survival'.<sup>54</sup> In the case of the Ogiek, while their way of life has not remained stagnant over the years, the evidence before the Court demonstrated that they have maintained a way of life in and around the Mau Forest that distinguishes them as an indigenous people, and that securing their right to property, especially land, would create a conducive context for guaranteeing their continued existence.<sup>55</sup>

The Court further observed that, in the context of indigenous peoples' land claims, demarcation is the formal process used to identify the actual locations and boundaries of indigenous lands, and to physically mark those boundaries on the ground. This process is necessary because mere abstract or legal recognition of indigenous lands, territories or resources can be practically meaningless unless the physical identity of the land is determined and marked. Demarcation also removes uncertainty with respect to the land on which indigenous peoples are entitled to exercise their rights.<sup>56</sup>

For these reasons, the Court flatly rejected the Kenyan government's contention that access to the Mau Forest would suffice in lieu of a delimiting, demarcation and titling exercise. It held that the protection of rights to land and natural resources remains fundamental for the survival of indigenous peoples and that, under international law, granting indigenous peoples privileges such as mere access to land is inadequate to protect their rights.<sup>57</sup> While the Court recognized that ownership of indigenous lands is not necessarily equivalent to other forms of ownership, such as fee simple title (i.e. full and irrevocable ownership of land), it nevertheless entails 'the right to control access to indigenous lands. It thus behoves duty bearers, like the Respondent State, to attune their legal systems to accommodate indigenous rights to property such as land'.<sup>58</sup> What is required is to legally and securely recognize indigenous peoples' collective title to ancestral lands in order to guarantee their permanent use and enjoyment of the same.<sup>59</sup>

In view of this, the Court reiterated that the Ogiek have an ownership right to the land that they have occupied and used over the years in the Mau Forest complex, and that to make the protection of the Ogiek's land rights effective requires more than an abstract or juridical recognition of the right to property.

*It is for this reason that physical delineation, demarcation and titling is important: this delineation, demarcation and titling must be premised on, among others, the Respondent State's Community Land Act, 2016, and the Forest Conservation Management Act, 2016, without undermining any of the protections accorded to indigenous peoples by the applicable international law.'*<sup>60</sup>

Accordingly, the Court ordered the government ‘to take all necessary measures be they legislative or administrative to identify, in consultation with the Ogiek and/or their representatives, to delimit, demarcate and title Ogiek ancestral land and to grant *de jure* collective title to such land in order to ensure the permanent use, occupation and enjoyment, by the Ogiek, with legal certainty’. The Court specified that this process must be undertaken and concluded within two years from the date of notification of the reparations judgment.<sup>61</sup>

In relation to any concessions or leases granted over Ogiek ancestral land to non-Ogiek and other private individuals or corporations, the Court ordered the government to commence dialogue and consultations between the Ogiek and/or their representatives and the other concerned parties for purposes of reaching an agreement on whether or not they can be allowed to continue their operations by way of lease and/or royalty and benefit sharing with the Ogiek. In cases where land was allocated to non-Ogiek and where it proves impossible to reach a compromise, the Court ordered that the government to compensate the concerned third parties and return the land to the Ogiek.<sup>62</sup>

## Recognition of the Ogiek as an indigenous people

The Court recalled that in its merits judgment it found that the Respondent State had violated Article 2 by failing to recognize the Ogiek’s status as a distinct tribe like other similar groups, thereby denying them the rights available to other tribes in Kenya. The merits judgment also recognized the Ogiek as an indigenous people having a particular status and deserving special protection deriving from their vulnerability.<sup>63</sup> In this context, the Court found that the Task Force established by the government to implement the merits judgment had not contributed meaningfully to its implementation.<sup>64</sup> The Court thus ordered the government to take all necessary legislative, administrative and other measures to guarantee the full recognition of the Ogiek as an indigenous people of Kenya in an effective manner, including but not limited to according full recognition and protection to the Ogiek language and their cultural and religious practices within 12 months of notification of this judgment.<sup>65</sup>

## Public apology and erection of a monument

The Court rejected the Ogiek’s request for a public apology and the erection of a monument commemorating the rights violations, reasoning that a judgment can constitute a sufficient form of reparation and measure of satisfaction. The Court held that in the instant case the merits and reparations judgments would provide a sufficient measure of satisfaction and that therefore it was

not necessary for the government to issue a public apology or erect a monument.<sup>66</sup>

## Effective consultation

The Court underscored that in the merits judgment it had found that the Ogiek had been continuously evicted from the Mau Forest without being effectively consulted and that the evictions had adversely impacted on their economic, social and cultural development. This lack of consultation extended to failure to actively involve the Ogiek in developing and determining health, housing and other economic and social programmes affecting them.<sup>67</sup> While the Court acknowledged that the Kenyan government had not, generally, been opposed to the establishment of mechanisms and processes that could facilitate engagement with the Ogiek, and had expressed its willingness to engage the community to solve the land problem in the Mau Forest, there was little evidence of any concrete steps taken by the government to do so.<sup>68</sup>

In view of this, the Court reiterated its position that it is a basic requirement of international human rights law that indigenous peoples be consulted in all decisions and actions that affect their lives. The Court held, therefore, that the Kenyan government had an obligation to consult the Ogiek in an active and informed manner, in accordance with their customs and traditions, within the framework of continuing communication between the parties.<sup>69</sup> The Court thus ordered the government to:

*‘take all necessary legislative, administrative or other measures to recognize, respect and protect the right of the Ogiek to be effectively consulted, in accordance with their tradition/customs, and/or with the right to give or withhold their free, prior and informed consent, with regards to development, conservation or investment projects on Ogiek ancestral land and to implement measures that would minimize the damaging effects of such projects on the survival of the Ogiek.’<sup>70</sup>*

Furthermore, given that the Court had established that the violation of the Ogiek’s rights was partly due to the government’s failure to consult the Ogiek, the Court ordered the government to ensure the full consultation and participation of the Ogiek in the reparations process as a whole, including specifically all the steps taken to comply with the reparations judgment.<sup>71</sup>

## Guarantees of satisfaction and non-repetition

The Court recalled that guarantees of non-repetition aim to ensure that further violations do not occur. As a form of reparation, they serve to prevent future violations,



to stop ongoing violations and to assure victims that the harms they have suffered will not recur, including the adoption of concrete action to prevent their repetition.<sup>72</sup> Accordingly, the Court ordered the Kenyan government to

*‘adopt legislative, administrative and/or any other measures to avoid a recurrence of the violations established by the Court including, inter alia, by the restitution of the Ogiek ancestral lands, the recognition of the Ogiek as an indigenous people, and the establishment of mechanisms/frameworks for consultation and dialogue with the Ogiek on all matters affecting them.’<sup>73</sup>*

## Community development fund

The Court held that, given the collective nature of the violations established in its judgments, the recurrence of violations over a prolonged period of time, the large number of Ogiek victims, and the size of the Mau Ogiek community (numbering 40,000), it was critical that any benefits derived from the litigation should be extended to as many members of the community as possible, noting that ‘the establishment of a fund is one mechanism to ensure that *all Ogiek* benefit from the outcome of this litigation’.<sup>74</sup> For these reasons, the Court ordered the Kenyan government to establish a community development fund to act as a repository of all the funds ordered as reparations in the judgment. The Court specified that the fund must be:

*‘used to support projects for the benefit of the Ogiek in the areas of health, education, food security, natural resource management and any other causes beneficial to the well-being of the Ogiek as determined from time to time by the committee managing the fund in consultation with the Ogiek.’<sup>75</sup>*

The Court further directed the government to take the necessary administrative, legislative and any other measures to establish it within 12 months of the notification of the judgment and to coordinate the process of constituting a committee to oversee the management of the fund.<sup>76</sup> The Court specified that this committee ‘must have adequate representation from the Ogiek with such representatives being chosen by the Ogiek themselves’,<sup>77</sup> and be established and operationalized within 12 months of the judgment.<sup>78</sup>

The establishment of community development funds has been ordered as reparations in other indigenous rights cases, particularly in the Inter-American system. It is seen as an appropriate mechanism to address the collective nature of the compensation being awarded and is not intended to be used to compensate specific individuals within affected communities. Rather, the purpose of a community development fund is to act as a repository for the compensation awarded so that the Ogiek people can

collectively decide how to use funds in support of projects that benefit the Ogiek community as a whole.

As part of the reparations process, the Ogiek will have to elect representatives who will serve on the committee, overseeing the management and disbursement of funds. Representatives can be members of the community and can also include people from outside the community with technical expertise that will be of value in the decision-making process. The people selected to oversee the community development fund will have fiduciary obligations and should therefore be trustworthy people with integrity, expertise, and knowledge of finance and reinvestment. It is also advisable for the majority of the board to be made up of respected members of the community who have the collective interests of the Ogiek at heart.

The board overseeing the fund will be accountable to the Ogiek community and, as such, mechanisms should be established to ensure adequate consultation of the Ogiek so that they can input and collectively determine how the funds are being used. In this context, it will be critical to foster transparency and to ensure that decisions being made in relation to the community development fund are being reported back to the community in real time.

## Implementation and reporting

The Court indicated that it would remain actively engaged in overseeing the implementation of both judgments, ordering the Kenyan government to submit, within 12 months of the judgment, a report on the status of implementation of all the orders contained therein. It also specified that it would hold a hearing on implementation on a date to be appointed by the Court 12 months from the date of the judgment.<sup>79</sup> This is significant because it is the first time the Court has ordered an implementation hearing, indicating the Court’s willingness to monitor implementation to ensure respondent states comply with the judgments it delivers.

The Court also ordered the government to publish the official English summaries of the merits and reparations judgments, within six months, in the *Official Gazette* and in a newspaper of wide national circulation. The Court further stipulated that the government must make those summaries, and the full text of the merits and reparations judgments, available on an official website, within six months of the judgment, for a period of at least one year.<sup>80</sup>

## The implications of collective title under the Kenyan legal framework

As explained above, the Court ordered the Kenyan government to return the Ogiek’s ancestral lands in the

Mau Forest in *collective title* within two years through a delimiting, demarcation and titling exercise in consultation with the community.

This collective titling would first entail recognizing the Ogiek community as a legal person, similarly to how the law recognizes individuals or companies as legal persons. This recognition would subsequently make it possible for the community, as a legal person, to be registered as a landowner. Upon the official registration of the community as a legal person it can apply to have its customary property formally surveyed, demarcated, adjudicated and titled – as ordered by the Court.

Even though the community as a legal person would under this scheme own the land in common, an individual, family or clan can own the *exclusive [use] right* to use a specific part of the land, that is, a particular parcel of the land. These exclusive use rights are called *Customary Rights of Occupancy and Use*, and may be registered at the same time as the community ownership of the entire land area is agreed upon.

These (individual) exclusive use rights would give individuals, families or clans the exclusive right to use the land within the limits of the law. This means that they would be able to build homes on the land, use the lands for cattle to graze, and in other ways use the land for purposes of their traditional lifestyle and culture. This exclusive right, however, will not be unlimited. Under the community land rights agreements, and the subsequent individual customary rights, it is very likely that agreements will be made on limiting the right to sell the land in order to prevent fragmentation of the ancestral lands. In this way, issues regarding the use of the lands by non-Ogiek, or other use that is not in accordance with Ogiek traditions, may be prevented.

## Process of community land titling

The process of titling, surveying, demarcating, adjudicating and registering collectively owned land under Kenyan law is a lengthy one.

First, a community meeting needs to be held; legally referred to as the *Community Assembly*. This is the owners' meeting and is the institution that has the power to make final decisions. The first aim of the meeting is to raise awareness among the members about their land rights, what community land titles are, the purpose of such rights and how community land titles can help secure their customary land rights. Being the institution that has the power to make final decisions, a practical output should be that there is a majority agreement of the members (two thirds of all adult members) on who is eligible to be a member, on what the exact area is that the community will claim to be subject to community land ownership title, and on the proposed name of the community. Lastly, the

Community Assembly needs to appoint a provisional *Community Land Management Committee*. This committee will serve as the administrator of the land for the community and report to members by holding community assemblies. The committee's first tasks are to compile a register of all members, and to draft land rules and regulations for the community to consider and agree. Ideally, the committee will also take the opportunity to meet with neighbours (including non-Ogiek) to provisionally agree where the boundaries should lie.

The next step is to notify the County Community Land Registrar of the community's intention to seek a community land title. In response, the Registrar posts an official Government Notice inviting all community members to a meeting to formally elect the Community Land Management Committee. In order to establish a quorum, all adults in the community must attend to elect between 7 and 15 members to serve on the committee, so that the committee may officially begin its work.

The committee will elect its chair, secretary and treasurer at its first meeting and designate specific tasks to members. The Community Land Act requires the Ministry of Lands and the County to conduct training (although it may be that the community will seek NGO [non-governmental organization] assistance). These tasks will include completing the Community Members Register; finalizing the rules and regulations, including rules for how the committee will operate; preparing one or more sketches showing the land area over which the community seeks community land title; and estimating its area. These documents are required for the committee to make an official application on a specified form to register the community. In addition, the committee should attach the minutes of the Community Assembly at which the committee was elected, and the minutes of the Community Assembly where the rules and regulations were approved. It must also indicate the objective of the community in seeking community land title.

Although the Community Land Act does not require this, communities are being advised to prepare a zoning plan for the property, to distinguish between settlements and communal grazing, forest and other special zones that may require special management.

After all these steps are taken, the process of land adjudication may be initiated. It should be noted, however, that this process may not begin until the Cabinet Secretary of Lands has declared community land registration units (in response to a request of the County Land Officer or Community Land Registrar, which will seek to launch adjudication in all community lands in a division of the County, to minimize time and costs).

Once initiated, the Cabinet Secretary will issue a Notice of Intention that will notify the relevant communities of an adjudication starting date and will provide details of an appointed Adjudication Officer tasked with managing a Surveyor and Physical Planning Officer as part of a

dedicated Adjudication Team. Members of the Community Land Management Committee advise the Adjudication Officer. After, dates for on-site adjudication are set, at which all community members should be present. In addition, the Notice of Intention calls upon any other persons, companies or agencies, such as the Kenya Forest Service or the County Government, to present claims to any land they hold in the community land, which should be excluded from the community property.

Adjudication involves the submission of all claims to community land, which all claimants must physically present to the Adjudication Committee. The primary task of the Adjudication Committee is to scrutinize these claims; to visit each area and arrive at its best judgment as to where the perimeter boundary of the community land should lie; and to survey and mark this outer boundary accordingly. In addition, the Adjudication Committee will invite members of the community to submit claims for house, farm and other plots they may hold customarily which should also be mapped. Should these claims not be disputed these will be registered under exclusive and inheritable Customary Right of Occupancy.

Once the Adjudication Officer is confident his committee has all the information it requires, it will display its recommendations and maps in the community and in the County Government Office for 60 days. Any objections by the Community Land Management Committee, the community or individual members must be submitted to the Adjudication Officer within that period of 60 days.

In the event of any disputes over land claims, the Ministry of Lands appoints a *Dispute Resolution Committee* to hear and determine these. This committee includes a Deputy County Commissioner as chair, two nominees from the County Government, the Surveyor, and the Land Adjudication Officer as secretary. Further, up to four representatives from the community are invited if they are not members of the Community Land Management Committee. The Dispute Resolution Committee must give a decision within 21 days of the hearing, after which the community – if dissatisfied with the decision – may appeal to the county court within 30 days.

The final step entails the registration of community land. The Adjudication Register is finalized only after any possible decisions of the Dispute Resolution Committee are made. In other words, the final decision does not wait for the results of any possible pending court cases. The Adjudication Officer for the area submits the final register to the Chief Adjudication Officer, Chief Survey Officer and Chief Registration Officer in the Ministry of Lands for their approval. If no issues are raised, the Registration Officer approves the recording of the community title for the community in the Community Land Register. The Registration Officer subsequently issues a Certificate of Community Ownership to the community, which serves as evidence of what is laid down in the Community Land

Register. This act results in the community being the registered owner of the parcel described and numbered in the Register.

## Impact of the reparations judgment in Kenya and beyond

The reparations judgment is significant because it builds on the precedent established in the merits judgment and clarifies the scope of state obligations to uphold indigenous peoples' land rights across Africa. It emphasizes that states have concrete obligations to legally recognize and protect indigenous peoples' ancestral lands, and that failure to do so requires restitution in collective title through a delimitation, demarcation and titling exercise as redress. The Court made clear that, more than just abstract recognition of ancestral lands, what is required is a mechanism under domestic law through which indigenous ownership in collective title can be formalized and secured as a means of allowing indigenous peoples themselves to control who has access to their lands. This has implications not just for the Mau Ogiek, but also for other indigenous communities in Kenya (such as the Mt Elgon Ogiek, Sengwer and Anwer) and across Africa.

The reparations judgment also breaks new ground, not just in terms of the Court's willingness to oversee implementation, but also on the issue of compensation for collective violations experienced by indigenous peoples. The Court's willingness to expressly rely on principles of equity to use its discretion to arrive at the sum to be awarded as material compensation represents a departure. While reliance on equity to calculate moral damages is not uncommon, it is in the context of calculating material damages, where courts generally require evidence of the specific harm or damage and its nexus to the act or omission of the respondent. It is significant that in this case, the Court openly acknowledged the difficulties involved in calculating collective compensation for material damages in indigenous rights cases, where violations are often multi-generational, extending over time and involving hundreds, if not thousands, of victims. This is compounded by the fact that there is often little documentation available to quantify material damages due to the nature of the evictions, the passage of time and the fact indigenous peoples rely on oral rather than written ways of memorializing the past.

Moreover, the Court made it clear that states must seek indigenous peoples' free, prior and informed consent in relation to any development, investment or conservation project on their lands. This obligation extends to 'all decisions and actions that affect their lives' and to the measures being undertaken to implement any judgments delivered in favour of indigenous peoples.<sup>81</sup> This is significant in the Ogiek case, given that Kenya has attempted to use implementation as a pretext to continue

evicting the Ogiek and granting titles on Ogiek ancestral lands to non-indigenous settlers. The reparations judgment makes clear that such efforts run counter to Kenya's obligations to uphold the Court's judgments.

Critically, the Court held that indigenous peoples must be consulted and must be able to give or withhold their prior consent in relation to any conservation projects on their lands, reaffirming that conservation cannot be used to justify indigenous dispossession. Given the prevalence of fortress conservation models across Africa, where conservation-related displacement remains a serious threat to indigenous territories, the Court's judgment has weighty implications. It calls on governments, conservation organizations and donors to

uproot coercive approaches to conservation that have had catastrophic consequences for indigenous peoples in Africa. Recent examples of indigenous peoples fighting to uphold their land rights in the context of conservation projects include the Batwa of Kahuzi Biega, Democratic Republic of Congo, the Benet of Mt Elgon, Uganda, the Mt Elgon Ogiek and Sengwer in Kenya, and the Maasai in Tanzania. In this sense, the reparations judgment makes it clear that lands appropriated from indigenous peoples in the name of conservation must be returned, indigenous peoples' underlying ownership rights must be recognized in law, and their right to be the ultimate decision makers about what happens on their lands protected and upheld.

# Notes

- 1 *African Commission on Human and Peoples' Rights v Kenya*, Application 006/2012, Judgment of African Court of Human and Peoples' Rights, 26 May 2017 (the Ogiek Judgment), <https://www.african-court.org/cpmt/storage/app/uploads/public/5f5/5fe/9a9/5f55fe9a96676974302132.pdf>
- 2 *African Commission on Human and Peoples' Rights v Kenya*, Application 006/2012, Judgment of African Court of Human and Peoples' Rights, 23 May 2022 (the Ogiek Reparations Judgment), <https://www.african-court.org/cpmt/storage/app/uploads/public/62b/aba/fd8/62babafd8d467689318212.pdf>
- 3 The Court uses this approximate number for ruling purposes, which is in line with the most recent census figures. See, for example, Ogiek Reparations Judgment, para. 76.
- 4 *CEMIRIDE, Minority Rights Group International & Ogiek Peoples Development Program (On Behalf of the Ogiek Community) v Republic of Kenya*, Communication 381/09.
- 5 CEMIRIDE and OPDP are both NGOs registered in Kenya; OPDP works specifically to promote and protect Ogiek culture, land, language, environment, and human rights.
- 6 Ogiek Judgment, para. 227.
- 7 Ogiek Reparations Judgment, paras 19–20.
- 8 See MRG, 'Kenya flouts African Court judgment, continues to evict Ogiek in the midst of Covid-19 pandemic', 2020, <https://minorityrights.org/2020/07/17/ogiek-evictions/>
- 9 Ogiek Reparations Judgment, paras 95–101.
- 10 *Ibid.*, paras 47–51.
- 11 *Ibid.*, para. 48.
- 12 *Ibid.*, paras 49, 50.
- 13 *Ibid.*, paras 78–81.
- 14 *Ibid.*, paras 134–6.
- 15 *Ibid.*, para. 136.
- 16 *Ibid.*, paras 22(vii).
- 17 *Ibid.*, paras 118–19.
- 18 *Ibid.*, para. 127.
- 19 *Ibid.*, para. 130.
- 20 *Ibid.*, paras 151–2.
- 21 *Ibid.*, para. 24.
- 22 *Ibid.*, para. 25.
- 23 *Ibid.*, para. 28.
- 24 *Ibid.*, para. 33.
- 25 *Ibid.*, paras 103–6.
- 26 *Ibid.*, para. 23.
- 27 *Ibid.*, para. 52.
- 28 *Ibid.*, para. 53.
- 29 *Ibid.*, para. 82.
- 30 *Ibid.*, paras 83, 84.
- 31 *Ibid.*, para. 23.
- 32 *Ibid.*, para. 26.
- 33 *Ibid.*, para. 27.
- 34 *Ibid.*, para. 26.
- 35 *Ibid.*, paras 30, 31.
- 36 *Ibid.*, para. 32.
- 37 *Ibid.*, para. 35.
- 38 *Ibid.*, paras 36, 45.
- 39 *Ibid.*, para. 59.
- 40 *Ibid.*, para. 60.
- 41 *Ibid.*
- 42 *Ibid.*, para. 63.
- 43 *Ibid.*, para. 65.
- 44 *Ibid.*, para. 66.
- 45 *Ibid.*, para. 66.
- 46 *Ibid.*, para. 67.
- 47 *Ibid.*, para. 75.
- 48 *Ibid.*, para. 76.
- 49 *Ibid.*, para. 77.
- 50 *Ibid.*, paras 85, 86.
- 51 *Ibid.*, para. 89.
- 52 *Ibid.*, para. 90.
- 53 *Ibid.*, para. 93.
- 54 *Ibid.*, paras 112, 113.
- 55 *Ibid.*, para. 115.
- 56 *Ibid.*, para. 107.
- 57 *Ibid.*, paras 109, 110.
- 58 *Ibid.*, para. 111.
- 59 *Ibid.*, para. 110.
- 60 *Ibid.*, para. 114 (emphasis added).
- 61 *Ibid.*, para. 116.
- 62 *Ibid.*, para. 117.
- 63 *Ibid.*, paras 122, 126.
- 64 *Ibid.*, para. 124.
- 65 *Ibid.*, para. 126.
- 66 *Ibid.*, paras 129, 133.
- 67 *Ibid.*, para. 139.
- 68 *Ibid.*, paras 140, 141.
- 69 *Ibid.*, para. 142.
- 70 *Ibid.*, para. 144.
- 71 *Ibid.*, para. 145.
- 72 *Ibid.*, para. 148.
- 73 *Ibid.*, para. 150.
- 74 *Ibid.*, para. 154 (emphasis added).
- 75 *Ibid.*, para. 155.
- 76 *Ibid.*, paras 155–6.
- 77 *Ibid.*, para. 156.
- 78 *Ibid.*, para. 160(xiii).
- 79 *Ibid.*, paras 160(xv–xvi).
- 80 *Ibid.*, para. 160(xiv).
- 81 Ogiek Reparations Judgment, paras 142, 145.

# working to secure the rights of minorities and indigenous peoples

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## Reparations at last: Land justice for Kenya's Ogiek

The Ogiek of the Mau Forest in Kenya are among Africa's last remaining forest dwellers and have lived there since time immemorial. To them, the Mau Forest is a home, school, cultural identity and way of life that provides the community with an essential sense of pride and destiny. In fact, the term 'Ogiek' literally means 'caretaker of all plants and wild animals'.

For decades, however, Ogiek have been routinely subjected to arbitrary forced evictions from their ancestral land without consultation or compensation, first by colonial authorities and subsequently by the Kenyan government. Ogiek rights over their traditionally owned lands have been systematically denied and ignored, while the government has allocated land to third parties, including political allies, and permitted substantial commercial logging to take place without sharing any of the benefits with the Ogiek. The culmination of all these actions has resulted in the Ogiek being prevented from practising their traditional hunter-gatherer way of life, thus threatening their very existence.

On 26 May 2017, in a landmark judgment, the African Court on Human and Peoples' Rights recognized the Ogiek people's right to their ancestral lands in the Mau Forest, holding that a series of interrelated human rights had been violated by Kenya's failure to uphold the Ogiek's land rights. Five years later, on 23 June 2022, the Court delivered another judgment in favour of the Ogiek people, setting out the reparations owed for the violations established in the merits judgment. The reparations judgment represents a hard-won and long-awaited victory for the Ogiek after decades of dispossession, non-recognition and marginalization. It is significant because it clarifies the scope and content of state obligations to uphold indigenous peoples' land rights and represents a beacon of hope for other indigenous peoples across Africa.



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ISBN Print: 978-1-912938-84-1 Online 978-1-912938-83-4.

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