REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVILCASE NO 238 OF 1999 (OS)

FRANCIS KEMAI.....……..... 1ST APPLICANT

DAVID SITIENEI ..... 2ND APPLICANT

KIPSANG KITEL ..... 3RD APPLICANT

WITSON MARTIM..... …….....4TH APPLICANT '

WITLLIAM KIRINYET .....…….....5TH APPLICANT

JOEL BUSIENEI .....6TH APPLICANT

JOSEPH BARNO ..... 7TH APPLICANT

SAMUEL SITIENEI .... 8TH APPLICANT

DAVID KORIR ..... 9TH APPLICANT

JOSEPH KU'LANGATROTICII ..... 10TII APPLICANT

VERSUS

THE ATTORNEY GENERAL ..... 1ST RESPONDENT
THE PROVINCIAL COMMISSIONER
RIFT VALLEY PROVINCE ..... 2ND RESPONDENT

RIFT VALLEY PROVINCIAL FOREST OFFICER ..... 3RD RESPONDENT

DISTRICT COMMISSIONER
FOR N/VKURU ..... 4TH RESPONDENT

JUDGMENT

In this suit instituted by way of an originating summons (which plaintiffs called an "originating Motion" which all the parties had no doubt was meant to refer to the "originating summons"), the 5,000 members of the Ogiek ethnic community, ten of whom are expressly impleaded as plaintiffs representing themselves and the rest of the others who consented to be so represented in this suit, have moved this court (after leave of the court for that purpose) to make two declarations and two orders, that is to say:

(a) a declaration that their eviction from Tinet Forest by the Government (acting by the provincial administration) contravenes their rights to the protection of the law, not to be discriminated against, and to reside in any part of Kenya;

(b) a declaration that their right to life has been Kenya; contravened by the forcible eviction from the

Tinet Forest;

(c) an order that the Government herein represented by the Attorney-General, compensates the plaintiffs; and

(d) an order that the defendants pay the costs of this suit.

The plaintiffs seek these declarations and orders on the basis of their pleaded averments that they have been living in Tinet Forest since immemorial (counting the time their community began living in the area) and yet after virtually daily harassments by the defendants, the plaintiffs are now ordered to vacate the forest which has been the home of their ancestors before the birth of this Nation, and which is still the home of the plaintiffs as the descendants and members of that community, even after their ancestral land was declared a forest as far back as the early colonial rule and has since remained a declared forest area to this day. They complain that the eviction is coming after the Government had finally accepted to have their community settled in Tinet Forest and a number of other places like Marioshoni, Tieret and Ndoinet, among others. They say this Government acceptance was in 1991; and between 1991 and 1998 the community settled in the area in question, with the full co-operation of the Government which issued letters of allotment of specific pieces of land to the individual members of the community each of whom was shown the precise plots on the ground, whereupon the community has embarked on massive developmental activities, building many primary schools and trading centres, carrying out modern crop farming and animal husbandry and other economic management, and the construction of permanent and semi-permanent residential houses.

So, the plaintiffs say that when in May last year (1999) The Government through the District Commissioner, issued a fourteen days' ultimatum, followed a few days later with a re-iteration of the threat to the community to vacate or risk a forceful eviction from the forest and their ancestral land, they considered the ultimatum and threat a violation of their aforesaid rights and that it was so real and eminent that the eviction must be stopped, to avoid irremediable harm befalling the plaintiffs and their children and the community generally. They say that tension in Tinet Forest, following the threat is so high that unless the Government stops making good its threat there may be a breakdown in law and order in what the plaintiffs call "a clash". They say that their constitutional rights guaranteed under sections 71, and 82 of the Constitution of Kenya, are at stake. They say that is the reason they are before us, seeking the declarations to which we have already adumbrated: that is to say, that Tinet Forest, admittedly one of the country's gazetted forests is their ancestral home where they derive their livelihood where they gather food and hunt and farm, and they are not going to go away; they do not know any other home except this forest: they would be landless if evicted.

It was said on their behalf, that the applicants depend, for their livelihood, on this forest, they being food gatherers, hunters, peasant framers, bee keepers, and their culture is associated with this forest where they have their residential houses. It was said that their culture is basically one coneerned with the preservation of nature so as to sustain their livelihood. Because of their attachment to the forest, it is said, the members of this community have been a source of the preservation of the natural environment; they have never been a threat to the natural environment, and they can never interfere with it, except in so far as it is necessary to build schools, provincial Government administrative centres, trading centers, and houses of worship (to wit, the Roman Catholic Church buildings).

The four respondents, on behalf of the Government, answered the applicants by stating that the applicants have not disclosed the truth of the matter concerning this case; and, according to the respondents, the truth of the matter is that these applicants and the 5000 persons they represent, are not the genuine members of the Igiek community, and they have not been living in Tinet Forest since time immemorial; for, the genuine members of the Ogiek community were settled

by the Government at Sururu, Likia and Teret. The respondents said that in the period between 1991 and 1998 the Government, intending to degazette a part of Tinet Forest to settle there landless Kenyans, proceeded and issued some allocation of land documents certifying that the individuals named in each card and identified therein, had been allocated the plot of land whose number was stated in the respective cards, copies of which were exhibited before us in court. According to the respondents those documents were not letters of land allotment but a mere promise by the Government to allocate those people with land if it became available; but, nevertheless, the applicants were not amongst the people who were issued with those cards anyway.

The respondents say that the government later realized that the part of Tinet Forest which was intended to be degazetted for settling "the applicants" was a water catchment area, and the Government shelved the settlement plan; and when the Government discovered that the applicants had entered Tinet Forest unlawfully, it, through the chief conservator of forest, gave the applicants a notice to vacate the forest with immediate effect. The district commissioner for Nakuru District under which the Tinet Forest falls says that he gave notice to the applicants to vacate the area because the applicants had entered and settled there unlawfully. He has never harassed the applicants, but instead he has advised them to vacate the Government gazetted forest peacefully. The legal advice the district commissioner has received and verity believes to be correct is that "those rights and freedoms enshrined in the Constitution are subject to limitations designed to ensure that their enjoyment by any individual does not prejudice the rights and freedoms of others or the public interest."

Concerning the position taken by the applicants that they are completely landless, the respondents say that that is not the true position, and that archival administrative records availed from our National Archives show the contrary and that the colonial Government resettled the applicants elsewhere, along with other WaDorobo people. But after the said resettlement elsewhere, some people entered the Forest of Tinet, with an intention to dwell there without any licence given by the forests authority on behalf of the Government. The unauthorized occupation of the forest has been followed by numerous evictions since the date of the gazettement of the forest as such. The Government's 1991-1998 plan to settle all landless persons (including some Ogiek people) was purely on humanitarian considerations, but the programme did not materialise when it was later found that to go ahead with it would necessarily result in environmental degradation which would adversely affect the role of the forest as a natural forest reserve and a water catchment area, with dire consequences for rivers springing from there which, presumably sustain human life, the fauna and the flora there and downstream and their environs. So the plan was shelved, at least for the time being.

Concerning the claim of the applicants that the eviction was selectively discriminatory against them atone, the respondents answered by denying any discrimination and staled that all persons who have invaded the forest are the subject of the eviction. Regarding the applicants' averments that the eviction would deprive them of their right to livelihood, the respondents say that this allegation is not true, because the applicants have not been dependent on forest produce alone, because, they also keep livestock. The applicants' statements that there are massive developments in the area are denied by the respondents who add that livings like building schools and churches could 1191 be done without the express authorisation of the commissioner of lands as the custodian of Government Land [This aspect suggests that there was no such express or any authorisation].

The respondents say that the forest in question is still intact, and no sub-division and allocation of any piece-of land thereto anyone has been approved or effected.

The local Catholic Diocese of Nakuru came into this litigation on the side of the applicants, expressing its interest in the matter for three reasons, namely, first, that the Diocese has built churches and schools in the disputed area and is, therefore, a stakeholder on any issue touching on that land; secondly, that in the event of an eviction of the applicants taking place as it is threatened, such action is likely to impenge on the operations of the Church in the area, because the persons adversely affected by the eviction are likely to seek assistance (both material and spiritual) from the Church, and the Church is likely to incur tremendous amounts of monetary expenditure trying to look for alternative accommodation for displaced persons; and thirdly, that the Diocese is interested in the outcome of this case, and that is why it has stood by the applicants in these proceedings. No affidavit was filed on behalf of the Diocese, but it adopted everything filed by and for the applicants in seeking declarations and orders which we specified at the beginning of our judgment herein. The Diocese adopted the factual exposition laid out for the applicants.

From the historical records furnished to the court in these proceedings it is plain that by the time of the second phase of the colonial evolution and organisation of racial segregation by the creation of African ethnic land reserves through legal regimes enacted in the early 1930's particularly following the Land Commission (commonly referred as the Carter Commission), Cmd 4556, 1934, which had actually started its work as early as 1930 there were found in an area including Tinet Forest, peoples whose changing nomenclature and profusion of alternate names of the sources of confusion, just as the simplistic and indiscriminate groupings and the misleading lumping together of those diverse peoples is not helpful in distinguishing and identifying which persons are being referred to. But in these proceedings it was agreed that the people found the area in question in the 1930's were Ndorobo or Dorobo or Wandorobo, being variant terms of the Maasai term Torobo, meaning poor folk, on account of having no cattle and reduced to eating the meat of wild animals (caters of the meat of wild animals), and were, in their primary economic pursuit, hunters and gatherers limiting game and collecting honey. They commonly inhabited highland forests in the past; but with the intrusion of the white settlers they were dispersed to the plains, although they preferred their accustomed elevations, with forests as their natural environment where they found safety, familiarity and food. They left their refuge of foliage with the greatest reluctance, thanks to their honey complex.

Amongst the Dorobo is a group called Okiek, or Ogiek, living in close proximity to Kalenjin-speaking peoples, such as the Nandi and the Kipsigis, and they speak a Kalenjin-related dialect, and bear many overt cultural characteristics of their said neighbours. Traditionally they were highland hunter-gatherers inhabiting the southerly highland areas and the fringes of the tower forests. But as Andrew Fedders and Cynthia Salvadori in their useful study, ***Peoples, and Cultures of Kenya***, (1979), at p14, tell us, to-day's Ogiek "is not the sum of an age-old pre-food-producing past", and to uninitiated eyes they disguise their elemental hunter-gatherer cultural characteristics and, indeed, as those learned authors write about these people (at p 15), these people to-day attempt to herd or cultivate so that hunting has become a secondary economic pursuit for them; and although the social value of honey is incalculable, it "has never constituted more than one-fifth of their diet", and is only a pre-eminent element in ritual and social communication through exchange. It is said that their attachment to place is proverbial, yet they have always been mobile and normadic within the general bounds of their hunting and gathering grounds. Their rights "specifically involve QIC collection of honey and extend to hunting and gathering" wild vegetables, roots and berries.

One matter sharply illustrates the clear change from the traditional cultural way of life to a-very different modem lifestyle of a present-day Ogiek. Studies show an Ogiek of yesterday as one characterised by a simplicity of material culture. Home is a dome-shaped hut constructed from a frame of slicks, twigs and branches and thatched with leaves or grass; a semi-permanent shelter, easily abandoned, and no burden when people move. These traditional shelters contrast sharply with the modem houses of corrugated

iron-sheet roofs and glass windows, whose photographs this court was shown by the applicants. The schools and churches the applicants have built; the market centres developed, and agricultural activities engaged in, are all evidence of a fundamentally changed people. It boils down to one thing. It belies the notion that these people sustain their livelihood by hunting and gathering as the main or only way out to-day.

They cannot be said to be engaging in cultural and economic activities which depend on ensuring the continuous presence of forests. White the Ogiek of yester-years shaped his life on the basis of thick forests or at least landscapes with adequate trees and other vegetation, one of to-day may have to clear al least a part of the forest to make room for a market centre. White yesterday's Ogiek lived in loosely organised societies lacking centralised authority, resulting in a social fluidity which enabled him to respond to the slightest changes in his environment with an essential sensitivity and speed on which his very life may depend, an Ogiek of to-day, we are told by the applicants in their sworn affidavit, lives under a chief who was until recently, his own son. White Ogieks of perhaps the yonder past were bound by honey, those of today, as we have seen from the applicants' affidavits, are bound by the spirit of the Church.

So, whilst in his undiluted traditional culture the Ogiek knew their environment best and exploited it in the most conservational manner, they have embraced modernity which does not necessarily conserve their environment. As we have just said, they cannot build a school or a church house or develop a market centre, without cutting down a tree or clear a shrub and natural flowers on which bees depend, and on which bee-hives can be lodged, from which honey can be collected and from which fruits and berries can be gathered. The bush in which wild game can be hunted is inconsistent with the farming (even though the applicants call it peasant farming) they tell us they are now engaged in. Their own relatively permanent homesteads cannot also be home of wild game which the applicants want us to believe to be one of their mainstay. As the applicants
dig pit-latrines or construct other sewage systems for schools, market places, residences, etc, as of necessity they must have, they obviously provide sources of actual or potential terrestrial pollutants.

Plainly, therefore, for the applicants to tell the court as they did that they lead a life which is environmentally conservational, is to be speaking of a people of a by-gone era, and not of the present. Professor William Robert Ochieng' in his study of the histories, development and transformation of certain societies of the Rift Valley, groups the Ogiek people amongst communities whose character as predominantly hunter-gathers who practised very minimal agriculture subsisted only up "until the middle of the eighteenth century", and that is when they "did not have cattle" and lived by hunting; but from "the middle of the seventh century" their economy had begun to change: William Robert Ochieng, ***An Outline History of the Rift Valley of Kenya Upto AD 1900***, (1975, reprinted 1982), at p 10.

It is on record and agreed in these proceedings, that the colonial authorities declared the disputed area to be a forest area and moved people out of it and translocated them in certain designated areas; and the area has remained gazetted as a forest area to this day, under the Forests Act (cap 385). One of the effects of declaring the area to be a forest area was that it was also declared to be a nature reserve for the purpose of preserving the natural amenities thereof and the flora and fauna therein. In such a nature reserve, no cutting, grazing, removal of forest produce or disturbance of the flora shall be allowed, except with the permission of the director of forestry, and permission shall only be given with the object of conservation of the natural flora and amenities of the reserve. Hunting, fishing and the disturbance of the fauna shall be prohibited except in so far as may be permitted by the director of forestry in consultation with the chief game warden, and permission shall only be given in cases where the director of forestry in consultation with the chief game warden consider it necessary or desirable to lake or kill any species. The director of forestry or any person authorized by him in that behalf may issue licences for all or any of the enumerated purposes,

upon such conditions as may be approved by the director of forestry or upon such conditions and subject to payment of such fees or royalties as may be prescribed; but no licence shall be issued for any purpose in respect of which a licence is required under the Wildlife (Conservation and Management) Act (cap 376) or under the Fisheries Act (cap 378).

The activities in The forest, which require the aforesaid licence, and are otherwise prohibited unless an actor has a licence to do so, include felling, culling, burning, Injuring or removing any forest produce, which includes back, beeswax, canes, charcoal, creepers, earth, fibres, firewood, fruit, galls, grass, gum, honey, leaves, limestone, litter, moss, murrain, peat, plants, reeds'; resin, rushes, rubber, sap, seeds, spices, stone, timber, trees, wax, withies and such other things as the minister may, by notice in The Gazette declare to be forest produce. Another prohibition, unless done with a licence, is to be or remain in a forest area between the hours of 9 p.m. and 6 am, unless one is using a recognized road or footpath or is in occupation of a building authorized by the director of forestry.

Others of The various prohibitions which are relevant to the present case, are that as a rule, no person shall, except under The licence of (the director of forestry, in a forest area, erect any building or cattle enclosure; or depasture cattle, or allow any cattle to be therein; or clear, cultivate or break up land for cultivation or for any other purpose; or capture or kill any animal, set or be in possession of any trap, snare, gin or net, or dig any pit, for the purpose of catching any animal, or use or be in possession of any poison or poisoned weapon; but capturing or killing an animal in accordance with the conditions of a valid licence or permit issued under The Wildlife (Conservation and Management) Act is allowed. No one is allowed to collect any honey or beeswax, or to hang on any tree or elsewhere any honey barrel or other receptacle for the purpose of collecting any honey or beeswax, or to enter for the purpose of collecting these things or any of them to be in the forest with any equipment designed for the purpose of collecting honey or beeswax.

Sections 9 to 13 of The Forests A-'l set out certain statutory measures to be taken to enforce the prohibitory provisions of the Act. Nothing in The Act suggests that those measures are comprehensive and exhaustively exclusive. Certain penalties of a criminal nature following a successful criminal prosecution under the Act are also prescribed. Again nothing in the Act suggests that those are the only penal or remedial sanctions under the law to be exacted. In The Act there are also provisions for the forests authorities to have recourse to extra-curial self-help actions to deal with the law transgressors. As we had the misfortune of the learned advocates for all the parties not addressing us satisfactorily on this important legislation and its import, we had no advantage of benefiting from their expressed respective positions on the Act, and we only raise it because it is in our minds as we consider the presence of the applicants and other persons in the forest area in question. It is one of the laws relevant to the subject; nobody has challenged its prohibfli6i1s«and its permit and licensing requirements; and he who has not shown that he has complied with that law or any other law applicable, for him to be in the forest area and to exploit and enjoy its natural endowments should surely not be heard to seek the help of the law to protect him from positive action taken to help him desist from acting in disregard of the law of the land.

It was conceded by Mr. Mirungi Kariuki for the interested partly, and by extension, by Mr. Sergon for the applicants, that the applicants and/or their forefathers were repeatedly evicted from this area but they kept on returning to this forest area. They were removed to an area known as Chepalungu, and after each eviction there had been a tendency for individuals to seep back into the Tinet and adjoining forest area, where Jack of supervision caused a further build-up of settlement until measures once again had to be taken to sort them out. Records stale (at document 30AAA in the bundle of exhibits in court) that since 1941 until roughly early in 1952 the Tinet Forest area had been largely uninhabited. Later the forest department encouraged the settlement of a limited, number of families to took after the interests of the department on a part-time basis. This resulted in a build-up of settlement, and the matter led to strained relations between various colonial government departments. By 1956 only a mere seven persons appear to be in Tinet, but as forest guards.

Mr. Mirugi Kariuki said that what the repealed evictions and repeated seeping back show as is a continuing struggle of a people: a resistance of The people all along: evicted people always coming back, and being pushed out again, and people returning. From all these things the court finds that if the applicants' children, or if they themselves or some of them, are living in Tinet Forest, they are forcefully there: they are in that forest and doing what they nay they are doing in that forest, as a part of their continuing struggle and resistance. They are not there after compliance with the requirements of the Forests Act. They have not bothered to seek any licence to be there. Theirs is simply to seep back into the forest after every eviction, and after trickling back they build-up in numbers and increase Their socio-economic activities to a point they are noticed and evicted again.

These people do not think much of a law which will stand between them and the Tinet Forest. In particular, of the forests Act they say through Mr. Mirugi Kariuki, That it found them there in 1942 when it was enacted, and it never adversely affected them. But the recorded evictions they acknowledge and their admitted repeated coming back, followed by other evictions contradict them on this. That in why even in their affidavit in support they complain of a continuous harassment by the provincial administration.

The centre piece of The arguments in support of the applicants' case was that to evict The applicant from this particular forest would be unconstitutional because (a) it would defeat a people's tights to their indigenous home, and deprive them of their right to life or livelihood (as they preferred to put it); and (b) it is discriminatory, insofar as other ethnic groups who are not Ogiek are not being evicted from this very place.

We were referred to the Indian case of ***Tellis and others v. Bombay Municipal Corporation and others*** [1987] LRC (Const) 351, on the first point concerning the right to life as one of the constitutional fundamental rights. It was a case of the forcible eviction of pavement and slum dwellers in the city of Bombay, India. When we read that case, we found its main thrust on this point to be that although the right to life was a wide and far-reaching light, and the evidence suggested (hat cviciion of The petitioners had deprived them of their livelihood, The Constitution did not impose an absolute embargo on deprivation of life or personal liberty. What was protected was protection against deprivation not according to procedure established by law, which must be fair, just and reasonable; e.g. affording an intended evictee an opportunity to show why he should not he moved. In fact in that case the Supreme Court of India consisting of the very eminent Chief Justice Chandrachud, and the Hon Justices All, Tulzapurkar, Reddy and Varandarajan, found and decided and concluded that The Bombay Municipal corporation were justified in removing die petitioners, even though these pavement and slum dwellers were probably the poorest of the poor on the Planet Earth.

Tellis case is not, therefore, helpful to the present applicants. The applicants are not the poorest of poor earthlings; and even if they were, records show that they by themselves or by their ancestors were given alternative land during the colonial days, and such alternative land for Tinet Forest was compensation. All along they have had a fair opportunity to come to the court to challenge the many evictions that have gone on before, but they have never done so till this late. If they showed to the Government reasons why they should not be evicted on any previous occasions and the Government did not reverse evictions, it was incumbent upon the applicants or their forefathers to seek redress of the law. Instead, however, they have opted far either surreptitious or forceful occupation of the forest.

These applicants cannot say dial Tinnet forest is their land and, therefore, their means of livelihood. By attempting to show that the Government has allowed them to remain in the area and by trying to found their right to remain on the land by virtue of letters of land allotment and allocation, parcels of the land as they tried to show in the attached copies of those certificates of land allocation, the applicants thereby recognized the Government as the owner of the land in

question, and the right, authority and the legal power of the Government to allocate a part of its land to the applicants. If the applicants maintain that the land was theirs by right, then how could they accept allocation to them of what was theirs by one who had no right and capacity to give and allocate what it did not have or own? Once they sought to peg however lightly, their claim of light on these Government certificates of allocation of land to themselves, the plaintiffs forfeited a right to deny that the land belonged to the allocating authority, and they cannot be heard to assert that the land is theirs from lime immemorial when they are at the same time accepting it from he whose title they deny. So, we find that these particular plaintiffs are not being deprived of their means to livelihood; they are merely being told to go to where they had previously been removed: they have alternate land to go to, namely, al Sururu, Likia, Teret, ect, but they are resisting efforts to have them go there. They have not said That The alternative land given them is a dead moon incapable of sustaining human life.

To say that to be evicted from the forest is to be deprived of the means to livelihood because then there will be no place from which to collect honey or where to cultivate and get wild game, etc, is to miss the point. You do not have to own a forest to hunt in it. You do not have to own a forest to harvest honey from it. You do not have to own a forest to gather fruits from it. This is like to say, that to climb Mount Kenya you must own it; to fish in our territorial waters of the Indian Ocean you must dwell on, and own the Indian Ocean; to drink water from the weeping stone of Kakamega you must own that stone; to have access to the scenic caves of Mount Elgon you must own that mountain. But as we all know, those who fish in Lake Victoria do not own and reside on the Lake; they come from afar and near: just as those who may wish to exploit the natural resources of the Tinet Forest do not have to reside in the Forest, and they may come from Tar away districts or from nearby. We know that those who exploit the proverbial Meru Oak from Mount Kenya Forests do not necessarily dwell on that mountain in those forests. Those who enjoy the honey of Tharaka do not necessarily own the shrubs and wild flowers and wild bees which manufacture it; nor do we who enjoy that honey own the lands where it is sourced. There is no reason why the Ogiek, should be the only favoured community to own and exploit at source (he sources/of our natural resources, a privilege not enjoyed or extended to other Kenyans.

No; thy are not being deprived of their means of livelihood and a right to life. Like every other Kenyan, they are being old not to dwell on a means of livelihood preserved and protected for all others in the Republic; but they can, like other Kenyans, still eke out a livelihood out of the same forest area by observing permit and licensing laws like everyone else does or may do. The applicants can obtain permits and licences to enter (the forest and engage in some permissible and permitted life-supporting economic activity there. The quit-the-forest notice to the applicants does not bar them from continuing o enjoy the same privileges permitted by law, on obtaining the statutory prescribed authorization from the relevant authorities. They can get those permits when they are outside the forest area; just the same way other Kenyans who do not live anywhere near this same forest are gaining access to the forest and exploiting its resources, as we have been told by the applicants. They do not dwell there, and yet they come there under permit. Plainly, the means of livelihood is not denied to the applicants. The forest and its resources are open to the applicants as much as they are to other Kenyans, but under controlled and regulated access and exploitation necessary for the good of all Kenya.

If hunting and gathering in a territory were in themselves alone to give automatic legal proprietary rights to the grounds and soils we hunt and gather upon then those who graze cattle nomadically in migratory shifts everywhere according to climatic changes, would have claimed ownership of every inch of every soil on which they have grazed their cattle. If every fisherman who fished in the Sagana River or River Tana or in Lake Victoria were to say his is the Sagana River, his is the mighty Tana, his is Lake Victoria, then these and other rivers would not belong to Kenya but to private persons; and Lake Victoria would not be ours, but would have been grabbed tong time ago by every fisherman. But these gifts by Mother Nature to us have not suffered that fate, because they are common property for the good of everyone; just ns public forests are common properly for the common weal of mankind. They cannot be a free subject of uncontrolled and

unregulated privatisation either for the benefit of individuals or a group of individuals howsoever classified and called.

It is our considered opinion, that as the applicants in common with all other Kenyans may still have access to the forest under licences and permits the eviction order complained of has not encroached on the fundamental rights of the applicants as protected by the Constitution of Kenya, and their right to life is intact; their livelihood can still be earned from the forest as by law prescribed.

We were referred to the Australian case of ***Eddie Mabo and others v. The State of Queensland*** [1992] 66 QLR 408. We carefully read that case. Its decision seeing to have overthrown the landlaw of that country of about 200 years. The High Court of Australia greatly benefited from the very careful and closely reasoned arguments and a perfect analysis by the advocates who argued the case. The entire corpus of the common law and land statutes and customary law rights of the indigenous peoples of Australia, were dissected to their core by arguments most discerning; and the well-prepared and well-presented lawyers' discourses on the whole law were placed before the court. Here we have missed the opportunity to closely analyse the whole of our land law, because the various land statutes and customary law were not argued, and the case was presented within the narrow limits of the forests legislation and the extra-curial struggles and resistance of the people who had been removed from the place and relocated elsewhere.

Although we were denied the opportunity by a lack of full or any serious argument on, and analysis of, the various relevant land statutes, customary law rights, and the common law, we read the Mabo case, but found that the material facts in it and which led to the propositions of principle there cannot be fairly likened to those obtaining in the instant case. There the facts justified the analysis by the court of the theory of universal and absolute crown ownership, the acquisition of sovereignty, reception of the common law, crown title to colonies and crown ownership of colonial land, the patrimony of the nation, the royal prerogative, the need for recognition by the crown of native title, the nature and incidents of native title, the extinguishments of native title, the effect of post-acquisition transactions, and deed of grant in trust. The applicants there had a culture and rights sharply different from those of the applicants in the instant case. Theirs was a life of settled people in houses in villages in one fixed place, with land cultivation and crep agriculture as their way of life. They lived in houses organised in named villages, and one would be moving from one village to another. Land was culturally parcelled out to individuals, and "boundaries are hi terms, of known land marks". Gardening was of the most profound importance to the inhabitants at and prior to early European contact, Gardening was important not only Drum, the point of view of subsistence but to provide produce for consumption or exchange. Prestige depended on gardening prowess.

In that kind of setting, those people's rights were to the land itself. Our people of Tinet Forest were concerned more with hunting and gathering, with no territorial fixity. They traditionally shifted fluid place to place in search of hunting and gathering facilities. For such people climatic changes controlled their temporary residence. Whether a people without a fixity of residence could have proprietary rights to any given piece of land, or whether they only had fights of access to hunting and gathering grounds - whether a right of access to havens of birds, game, fruits and honey gives title to the lands where wild game, berries and bees are found - were not the focus of the arguments in this case; and the material legal issues arising from the various land law regimes were not canvassed before us as they were in the Mabo case. In the Mabo case the residents at no time ever conceded that Government had a right over the land in question. In the instant case the applicants conceded the right of the Government over the land which they were asking the Government to allocate to them. Government could not allocate to them what was theirs already if it did not have ownership power.

These considerations make it superfluous for us to deal specifically with the other cases cited on this point,

although we have anxiously studied them, and we have found them not advancing the applicants' case on the present facts before us.

With regard to the complaint that there is discriminatory action by the Government against the plaintiffs, the applicants said that while the respondents say that they are taking the action complained of because it is a gazetted forest area which they seek to protect by evicting the plaintiffs from it, there are other persons who are allowed to live in the same forest. It is said that it is the plaintiffs alone who are being addressed. This assertion if true, and it has been denied, would obviously give thee plaintiff a cause for feeling discriminated against unless other lawful and proper considerations entered the picture. The trouble here is that this was a matter of evidence, and evidence was required to prove at least seven things:

(1) who were these people;
(2) when they entered to live in the forest;
(3) under what colour of right (if any) they claimed to enter,
(4) whether they are in violation of the provisions of the statute concerned;
(5) the precise wording of the order of eviction; and
(6) the exact scope of the older of eviction, particularly with regard to the persons to be adversely affected by this implementation.
(7) the actual cited ground for removing the applicants, i.e. whether they are being removed soley or predominantly on grounds of their ethnicity.

Evidence on these things must be provided by the person alleging discriminatory action against him. For instance, in the case of ***Akar v. Attorney-General of Siera Leon***, [1969] 3 Ali ER 384, which was cited to us, a legislation was alleged to be discriminatory against a person not of negro African descent born in Siera Leone acquiring citizenship at the time of independence. The legislation in question retrospectively limited citizenship to persons of negro African descent. It was struck down as enacting discrimination on the ground of race. To arrive at that decision the Judicial Committee of the Privy Council had to analyse the precise wording of the legislation in order to, find what was discriminatory in it, taken in its proper context.

In a case here at home, Shah Vershi Devshi & Co. Ltd. v. The Transport Licensing Board, [1971] EA 289, decided by this High Court composed of Chanan Singh, J, and Simpson, J (afterwards Chief Justice of Kenya), refusal of a licence (under a transport licensing legislation) to citizens of Kenya, by reason of their being of Asian origin, led to the court holding the treatment discriminatory. To reach that conclusion the court was furnished with a letter and the court paid particular attention to it, in which was written by the chairman of the licensing board, that the licences should be refused "on the ground that the majority shares" were "owned by non-citizens", and that Africans should be favoured. As it turned out "non-citizens" was only a euphemism covering citizens who were not of black African stock. Anyway, the point is that the acts and actual words complained of were before the court.

The same was what happened in the case of Madhwa and others v. The City Council of Nairobi, [1968] EA 406, where a resolution of the Social Services and Housing Committee was in the enumerated terms titled "Africanization of Commerce: Municipal Market", then followed what had been resolved, and was complained of as being discriminatory of null-citizens being evicted from the market stalls by the City Council of Nairobi. Again the court had before it was expressed.

In our case, the actual acts and words complained of were not placed before us. What we have before us are copies of newspaper cuttings. They bear headlines "Government to evict the Ogiek", and "Ogiek notice slays, says DC". The plaintiffs have told us that there are in the forest people from other communities. The newspapers did not mention anything about such people, and whether the quit notice covered them. The accuracy of those headlines was not guaranteed.

The Ogiek people might have been the dominant community to capture the newspaper headlines, but

that did not necessarily exclude from the quit order other persons. So, there is no evidence before us providing discriminatory treatment against the plaintiffs.

It was argued in support of the plaintiffs, that the area cannot be compulsorily acquired by the Government in this case. It is the user of the forest which is being controlled here.

When Mrs. Madahana and Mr. Njoroge, for the respondents said that the Government is taking these steps to protect the forest area as a water catchment area, they were summarily dismissed by Mr. Mirugi who wondered as to when Government came to know that it was a water catchment area; and said that the fact that the land is a forest area gazetted as such, does not mean that human beings should be prevented from living in that forest.

With due respect, the court expected a more extended and in-depth presentation on this very deep-seated problem of our environment raised by the references to that problem as we discuss land rights and land use, natural resources and their exploitation, human settlement and landlessness. But the casual way in which the issue of the preservation and protection of rain water catchment areas, was handled by counsel in these proceedings only goes to illustrate the negative results of the purely economics-driven approaches to human and social problems, without caring for the limitations of the biosphere with a view to undertaking human, and socio-economic development within the limits of Earths finite natural resources endowments. There is a failure to realize that the unsustainable utilization of our natural resources undermines our very human existence.

In grappling with our socio-economic cultural problem and the complex relationship between the environment and good governance, we must not ignore the linkages between landlessness, land tenure, cultural practices and habits, land titles, land use. And natural resources management, which must be at the heart of policy options in environmental, constitutional law and human rights litigation such as this one. While we discuss rights in a macro-economic context, sight cannot be lost of the legal and constitutional effects on the environment. A narrow legalistic interpretation of human rights and enforcement of absolute individual rights may only take away a hospitable environment necessary for the enjoyment of those very human rights. A sure enforcement of legal rules for environmental governance and management of our natural resources, is the only guarantee for our very survival and enjoyment of our individual and human rights.

At present the ultimate responsibility and task of good management of our natural resources lies with the Government, with the help and co-operation, of course, of individuals and groups of civil society, including The Church. Good environmental governance will succeed or fait, depending on, how we all share the responsibility for managing the rules of natural resource management, the monitoring and evaluation and re-evaluation of existing forms of coping with environmental conservation and development, and depending on the feedback which must be accessed all times, the appropriate reformulation and rigorous enforcement of the relevant rules. It is an increasingly complex exercise which must involve many actors at all limes. And if as we urge the upholding, of human rights in their purest form we do not integrate environmental considerations into our human and property rights, then we, as a country are headed for a catastrophe in a foreseeable future. Integrate environmental considerations in our arguments for our clients human and property rights. We do not want a situation where our constitutional terrain on which human and property rights systems are rooted, cultivated and exploited for short term political, economic or cultural gains and satisfaction for a mere maximization of temporary economic returns, based on development strategies and legal arrangements for land ownership use and exploitation without taking account of ecological principles and the centrality of long term natural resources conservation rooted in a conservation national ethic.

In 21st century Kenya, land ownership, land use, one's right to live and one's right to livelihood, are not simply economic and properly questions, naked individual jural rights, or a matter of politics. All these, and more, are

questions of the sustainable use of natural resource's for the very survival of mankind before he can begin to claim those "fundamental rights", "the old individualistic models of development and property has no place in to-day's socio-economic and political strategies. To-day it is startling to hear arid legal arguments putting excessive emphasis on the recognition and protection of group or private property rights, at the expense of the corresponding duty of ecological stewardship to meet tong-term national expectations which humanity must place in land to guarantee the survival of everyone. The integration of environmental factors into growth strategies and legal argument about human rights, must be the core to all programmes, policies and the administration of justice. Without such integration we all loose humanity's supportive environment and we might not be alive to pursue the right to live let alone the right to live in the Tinet Forest.

Indeed, a legal system which provides extensive and simplified procedures for converting public land to private ownership, or which gives a reckless access to public natural resources, with little or no regard for ecological and sustainable social developmental impacts, is a national enemy of the people. We must all be ecological ignorance free; and a justice system which does not uphold efforts to protect the environment for sustainable development is a danger to the enjoyment of human rights. The real threat to the right to life and to livelihood, is not the Government eviction orders in themselves. The real threat to these human lights is the negative environmental effort of ecological mismanagement, neglect and the raping of the resources endowed unto us by Mother Nature, which are the most fundamental of all human rights: the light to breathe fresh air from the forests so that we can live to hunt and gather; the light to drink clean water so that we can have something to sweat after hunting and gathering. Hence, the importance of the issue of preserving the rain water catchment area.

We have found from the evidential materials before us in this case, that Sururu, Likia and Teret, among others, were homes for persons who seeped back into Tinet Forest and are now crying foul when they are being evicted by Government for the umpteenth lime. It is not being forthright to say they know no other home to go back to.

We have found that there is no proof by the plaintiffs of lawful re-entry after the various evictions. They have simply kept on re-entering and re-occupying, only to be met with repeated evictions.

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

The pretensions of to-day's Ogiek to conserve the forest when he has moved away from his age-old pre-food-producing past which was environmentally friendly, are short of candidness. They have taken to different socio-economic pursuits which may be inimical to forest conservation.

The Government action complained of does not contravene the rights of the plaintiffs to, the protection of the law, not to be discriminated against, and to reside in any part of Kenya: it is themselves who seek to confine themselves in one forest only. Their right to life has not been contravened by the forcible eviction from the forest; it is themselves who wish to live as outlaws with no respect for the law conserving and protecting forests: it is themselves who do not want the public forest protected to sustain their lives and those of others. They were compensated by an exchange of alternative lands for this forest.

The upshot of everything we have said from the beginning of this judgment up to this point is that the eviction is for the purposes of saving the whole Kenya from a possible, environmental

disaster, it is being carried out for the common good within statutory powers; it is aimed at persons who have made home in the forest and are exploiting its resources without following the statutory requirements, they have alternative land given them ever since the colonial days, which is not shown to be inhabitable. We find that if any schools, churches, market places have been developed, they are incompatible with the purposes for which national forests are preserved, and without following the law to put them up; the applicants have acknowledged the rights of the Government in and over the forest. There was no evidence of discriminatory treatment of the applicants against them on ethnic or other improper grounds. No case was made out for compensation to be given once more. The plaintiffs can live anywhere in Kenya, subject to the law and the rights of others.

For these reasons the court dismisses all the prayers sought. Allow us to add that any other determination would be of mischievous consequences for the country, and must lead td all extent to prodigious vexatious litigation, and, perhaps to interminable law suits. It would be a fallacious mode and an unjustifiable mode of administering justice between parties and for the public good of this country. In the context of this case, we know no safe way for this country mid for these litigants, than dismissing this case with costs to the respondents. We so order.

Signed and Dated by both of us at Nairobi, this 23rd day of March,2000.

Samuel O. Oguk & Richard Kuloba JJ.