Public Yet Sacred:
The Kenyan Experience in "Resolving" the Conflicting Demands of Shared Spaces

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Introduction

While Kenya is predominantly Christian and Muslim, it also has a considerable population who adhere to African Traditional Religions (ATRs) who follow religious practices unique to the different ethnic groups. The adherents of these ATRs have legitimate claims and very close attachment to ancestral lands—with sacred places, holy sites, and shrines—that are littered across the country, in private, communal, public, or government lands. There are instances where sites are in government-protected national parks, game reserves, or cultural heritage sites. There have also been instances of clashes related to the conflicting proprietary interest to these places. Sometimes, the ATR adherents and the government have had to negotiate an agreement that protects the nature of these places as public, communal, or government spaces while upholding overarching sacredness claims by the ATR adherents. However, at times, the government endeavors to invalidate the ATR adherents' claims to these lands, under the doctrine of eminent domain.

This article explores historical claims of ATR adherents, the importance of land to these religious groups, and how Kenyan laws, judicial decisions, and administrative regulations governing these spaces have attempted to alienate the indigenous communities' interests and claims. In particular, it explores the genesis of these competing claims and the role the government has played in these conflicts, highlighting two cases argued at the African Court of Human and People's Rights contesting the government's decision to relocate some indigenous people from their land by declaring it exclusively for public use. Lastly, it explores the impact of such decisions on the rights and livelihood of these communities.

I. Indigenous People and Their Religions

ATRs are as diverse as the ethnic communities in Africa. "Africans are notoriously religious," notes Africans religions scholar John Mbiti, "and each people has its own religious systems with a set of beliefs and practices" (1990:1). It is therefore very difficult to conduct a study of all these religions and arrive at acceptable generalization.

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Since the ATRs permeate every aspect of life, there is no distinction between the secular or the sacred, or spiritual and materials things. They are not just expressions of the individual but also of the community, which is why one cannot detach oneself from the religion of the community. Mbiti states that African religion as "the product of the thinking and experiences of our forefathers and mothers, that is men of former generations." It is for every member of a given community and one can only partake of the religious experience if that person was born into that community. African religions are therefore generally non-proselytizing religions for they are specific to a given geographical and cultural setting—that of the community that professes it (Mbiti 1970:2; Mbiti 1991:13-19).

"Most African Traditional Religions have a central figure (God), intermediaries (divinities, spirits), religious leaders (medicine-people, mediums, diviners, priests), and a profound respect for the departed (ancestors) and the natural world." God is often regarded as the creator of all the earth and everything in it. He is also "believed to be omniscient (all-knowing), omnipresent (everywhere at once), and omnipotent (all-powerful)" (Bailey 2016:9).

Time and space are two important aspects of African Traditional Religions. They also help define who Africans are, and properly place them in the circle of time and in the hierarchy of beings. Mbiti aptly puts it

> … Africans are particularly tied to the land, because it is the concrete expression of both their *Zamani* (past) and their *Sasa* [now]. The land provides with them roots of existence, as well as binding them mystically to their departed. People walk on the graves of their forefathers, and it is feared that anything separating them from these ties will bring disaster to family and community life. (1970:27)

It is this sacredness and connection to the ancestors that make it most painful even to contemplate a temporary absence from the land; it is an abomination to ATR adherents to be forcefully removed from their land. It is especially torturous since Africans believe that "[a]s the keepers of tradition, ancestors can be relentless in ensuring that their descendants adhere to the letter of the law, causing anything from minor disruptions to catastrophic events if familial and community customs such as burial rites are not appropriately carried out" (Bailey 2016:11).

It is in these lands that shrines, sacred places, and religious objects are situated. It is at these places that the African religionists make or bring offerings. It is also in these places that they offer their sacrifices. These shrines and places of worship may be owned by families (and thus kept by these families), or by the whole community, under the custody of the religious leaders and elders of the community. They would then develop rituals and customs to keep the shrines and sacred places holy. The duty to care for these shrines and sacred places is almost an everyday affair; any long absence could be read as abandonment, which could invite the wrath of the deities (Mbiti 1991:20-24).

This concept of time and space places Africans in their immediate surroundings. The powers of the spirits and the ancestors mostly are felt within the confines of the ethnic

community. For Africans therefore, life can only have meaning as they interact with their environment, their *Sasa* and their *Zamani*.

While Western societies have had private property regimes for thousands of years, this concept was alien to pre-colonial Kenyan societies (Brewer and Staves, eds. 1995). This was especially so in the hunter-gatherer and pastoral communities who would move from one place to another depending on the season of the year. The hunter-gatherers would move to find food, while the pastoralists would move in search of water and pasture for their animals. Even with the agricultural communities, elders would give temporary and periodic loose possession of a plot of land to families for cultivation of the crop they would need for subsistence and for barter trade with their neighboring communities (Truth, Justice and Reconciliation Commission [hereinafter TJRC] 2013:167).

This had been the Kenyan communities' way of life for as long as they had occupied the land now called Kenya. Though loosely held by individuals, land was still the most important possession of the community. This is because "it is around land that socio-cultural and spiritual relations among community members are defined and organized, it is viewed as having an ancestral cultural bond, spiritual and philosophical dimensions, thus linking the physical and metaphysical worlds" (TJRC 2013:165). It was also a mark of ethnic identity of each of the communities occupying those lands. The attachment to land goes beyond mere use to which the communities put the land. It was more than a means of economic advancement, but rather a means through which purpose and meaning of life is derived.

This communal land-owning system was first interrupted when the Sultan of Zanzibar invaded the East African Coast in the 1800s and forcefully acquired the land otherwise belonging to the Mijikenda. The Sultan ceded his claim to the 10-mile coastal strip to the British in 1888 and 1894 agreements. This effectively dispossessed the local community of their land. In 1895, the British declared Kenya a British Protectorate. To acquire as much land as they projected they would need for settlers they would invite to make Kenya economically productive, the British extended the application of the *Indian Lands Acquisition Act of 1894* to the East Africa Protectorate (including Kenya) in 1899. This Act converted "all land in Kenya that had not been appropriated by individuals or by the colonial administration into 'Crown Land,' meaning land belonging to Her Majesty, the Queen of England, which she could grant to individuals in leaseholds for a term of years or in fee simple" (TJRC 2013:168-170; see also Okoth Ogendo 1976:152). By that move, Kenyan communities' land became the land of the British monarch; the natives could not do anything to contest this declaration. To further consolidate the British claim, they passed an East Africa Order in Council and the *Land Ordinance in 1901*, which further refined the definition of "Crown Land," effectively alienating the communal claims to all the lands that these communities occupied.

In several carefully choreographed moves, the British entered into or coerced various communities into "agreements" acquiring parcels of land for almost nothing. For the communities at the Coastal strip, their fate was sealed when the British enacted the *Land Titles Ordinance of 1908* requiring "all persons being or claiming to be proprietors of, or having or claiming to have any interest whatever in immovable property within the ten-mile Coastal Strip to lodge their claims, whether of title, mortgage or other interest,

within six months with a Land Registration Court which was presided over by a Recorder of Titles." If the Recorder was satisfied, he would issue a certificate of title which would be conclusive and indefeasible evidence of title. The local communities did not know the existence of this Ordinance and if they did, they did not understand what it required of them (TJRC 2013:171). Additionally, the British did not believe that any African, individually or communally, had title to the land; therefore they treated all land occupied by Africans as ownerless land (Mathai 1978:3).

The same script was repeated throughout Kenya with the British displacing local communities, with pastoral communities (especially the Maasai) suffering the worst displacement. The British preferred to settle in places along the railway line. For them anywhere along the railway that had no physical presence of natives was unoccupied land fitting within the definition of "Crown Land" (Kilson 1995:112). These places—concentrated in present-day Rift Valley, Western, Nyanza and Central regions, which they believed were more favorable for settlement because of their "temperate climate, fertile soil, and relatively disease-free environment" (TJRC 2013:179)—came to be referred to as "White Highlands."

While part of the reason Kenyans fought for independence was to get back their land lost to the settlers, at independence the leaders insisted on a "willing buyer – willing seller" policy. The leaders then secured cheap loans from the British (government-government lending) with which they bought these lands and appropriated it for themselves, their families, and friends, completely ignoring the claims of the communities that had been displaced by the British. Instead of resettling communities in these lands, the independent government chose to establish settlement schemes where people who could afford and/or were willing to relocate would be moved. Most indigenous communities rejected this scheme; this was the continuation of the British policy of disenfranchisement against which most of these communities fought.

II. Conflicting Rights; Overlapping Claims

While the *Indian Lands Acquisition Act of 1894* introduced the concept of "Crown Land" to help the British appropriate Kenyan territory, the independent government used similar concepts and laws to disenfranchise indigenous communities. The British promulgated different ordinances to assert that they had power both to own and to appropriate land. They held that even though individuals or entities could hold title to any piece of land, the state maintained a residual claim to the land which it could exercise at any time out of public interest. The independent government inherited these same powers.

This practice has its roots in the 1920 conference on British East Africa in London, when the colonial office came to the conclusion that British East Africa would become a colony and that they would treat as paramount the interests of African natives while at the same time ensuring that the venture was profitable to the settlers who had been enticed to invest in the colony. This marked a difference in policy that slowly made every decision to reflect the nature of the colony, now Christened Kenya as a black man's country (Jackson 2011). While it was the attitude of the settlers that Kenyan law was the instrument through which a new Kenyan society would be formed, it was also their view that English laws

were too advanced and largely irrelevant to the Kenyan situation. They therefore often demanded a bending of the laws as they applied to Africans, and sometimes resorted to extrajudicial means (Shadle 2010). While examples of this are numerous, brutal, and well documented, in general the administration insisted on an application of the law that increasingly recognized Africans as legal entities with rights. These efforts took a while to realize, but with the pressure from home to "uplift the natives" and to justify their continued existence and privilege in Kenya, the settlers worked with the administration increasingly to give more thought to the African voice and aspiration (Jackson 2011).

When the British realized that they could not sustain the white-minority domination of the Africans, they initiated independence talk originally with a view that they would negotiate a multi-racial government that continued to protect the settlers' interests. However, strong nationalist interest prevailed, with the British agreeing to bend to "the wind of change that was blowing across Africa" which had made it impossible to continue British colonization. Land issues were discussed extensively, with the African contingent to the Lancaster conference divided between those who favored an immediate settler withdrawal with land redistributed on a "willing buyer – willing seller" basis (favored by most of the delegates from large communities), and a gradual repossession of land and redistribution in a manner that would honor historical communal claims (favored by those from pastoral communities) (TJRC 2013:200, 202).

The views of the dominant political party (the Kenya African National Union) were adopted; the British government would provide a loan to the Kenyan government which would be used by the government to buy out the settlers (TJRC 2013:202-205). The government would then redistribute the land to anyone willing to buy it. This approach presented three problems. First, exceptionally few Africans could afford to buy these lands meaning that land would be bought by those who could access the government loans. Second, this approach extinguished historical or ancestral claims to these lands. Third, this approach did not respect community boundaries and communities' claims to lands alienated by the British. The Maasai and representatives of other indigenous communities refused to sign the deal.

At independence, the government bought the settlers out using the loan from the British government. Jomo Kenyatta (Kenya's first president) and his friends then proceeded to allocate to themselves these lands, completely ignoring communal land claims. A few others (mostly from the president's community and the ruling class) got soft loans from the government, which they used to buy parcels left by fleeing settlers. Those who collaborated with the British against the war of independence and the independence struggle were also able to afford land. Government settlement schemes were botched and hijacked by those with power and the influence in the independence government (TJRC 2013:205-225). Often one piece of land was allocated more than once, with the effect that two or more persons would lay claim to a piece of land. In that case, the individual with the backing of the powerful and influential would take possession of the land.

What was known as "Crown Land" became known as Trust Land, whose administration lay with regional governments through local councils. The local councils held these lands in trust for the ethnic communities who had occupied these lands before independence. The government had hoped that eventually these lands would be returned

to the individual members of the communities. However, in 1964 Kenyatta initiated a policy of abolishing the regional governments. According to the 2013 "Final Report" of the Truth, Justice and Reconciliation Commission, the government "also conferred upon itself the power to unilaterally take over trust lands which were, formerly, African reserves for specific ethnic groups, which counties were to hold in trust for the groups, collectively, without compensation" (TJRC 2013:205, 207, 210).

The government also appropriated the power to acquire any piece of land (including trust land) whenever there was a public need. This was the beginning of the process of alienation of land belonging to indigenous persons (TJRC 2013:165-342).

The independent government aggressively maintained the British campaign promoting Kenya as a tourist destination of choice: the tropical taste of paradise for the British aristocracy (Jackson 2011). It embarked on an ambitious program to protect wildlife, to conserve their natural habitat, and to conserve certain eco-systems. This resulted in "8% of the Kenya's land mass being protected area for wildlife conservation… including forests, wetlands, savannah, marine, arid and semi-arid eco-systems," with "23 terrestrial National Parks, 28 terrestrial National Reserves, 4 marine National Parks, 6 marine National Reserves and 4 national sanctuaries" ("Overview" 2018). While in terms of conservation it is case of commendable success, for indigenous communities, it is a trail of tears: wanton destruction and untold suffering where the government has often unilaterally declared indigenous communities' land an area for conservation and then evicting the communities.

From the enactment of the *National Parks Ordinance of 1945* and the creation of Aberdare Royal Park and Mount Kenya Royal Park (later renamed "National" parks), the establishment of parks in Kenya has led to conflict with the local communities (Chongwa 2012). After independence, the Wildlife (Management and Conservation) Act created protected areas that, by default, became government lands (TJRC 2013:259). The TJRC documents instances when the government declared trust land as conservation areas without consultation or consideration of the ethnic communities in whose trust the government through the local authorities held those lands. There are also countless times when such land ended up being alienated illegally into private hands. Worse still, there have been instances when the local communities have been forcefully evicted from these lands without compensation and without alternative places of settlement (Ibid.:260-275).

That the British introduction of private land ownership of land was alien to Kenyan communities' communal ownership is no secret; the British claim to large tracts of land designated as 'Crown Land' was at best a futile declaration that conferred no good title. How then, can a bad title inherited by the Kenyan government become good?

If it was merely a matter of private property interest, then the principle *ubi jus ibi remedium* ("There is no right without remedy") would explore the possible remedies, settle for one, and declare it, or it would by a wave of hand declare *vigilantibus non dormientibus aequitas subvenit* ("Equity aids the vigilante not the indolent") and dismiss any claims. Surely, to wait for 123, 100, or 20 years would be enough to establish indolence. However, as illustrated earlier, land among indigenous communities (whose majority still practice ATRs) is much more than chattel; it defines who they are, the essence of their very existence. How does one resolve their claim to these lands? How does one resolve these

conflicts in manner that respects their right to practice their faith? In the following two case studies, we shall explore this dilemma.

III. The Endorois Community and the Conflict With the Government

The Endorois community is an indigenous community of about sixty thousand people who historically have occupied the Lake Koibatek – Lake Bogoria area in Baringo (Ashamu 2011:300-313). They are a minority group forming part of the larger Tugen sub-tribe of the Kalenjin community. Their land formed part of the native reserves under the British administration; at independence, this area became trust lands held by the local councils. The Endorois continued to occupy this land uninterrupted until the government converted it to a game reserve in 1973; "apart from a confrontation with the Maasai over the Lake Bogoria region approximately three hundred years ago," they had "been accepted by all neighbouring tribes as bona fide owners of the land and… continued to occupy and enjoy undisturbed use" of it while under the British colonial administration, although the British claimed title to the land in the name of the British Crown" (*Centre for Minority Rights Development [Kenya] and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* [hereinafter *Endorois*] 2009: "Summary of Alleged Facts").

The only other claim to this land was the British application of the Indian Lands Acquisition Act of 1894 to East Africa Protectorate (including Kenya) in 1899 which declared virtually all land in Kenya not owned by the Sultan of Zanzibar as Crown Land. This declaration was later altered by the British who recognized the Endorois claim to this land as their native reserve. According to the complaint filed with the African Commission on Human and Peoples' Rights (hereinafter "African Commission"), the area was "central to the Endorois religious and traditional practices," surrounded by "the community's historical prayer sites, places for circumcision rituals, and other cultural ceremonies" that were "used on a weekly or monthly basis for smaller local ceremonies, and on an annual basis for cultural festivities involving Endorois from the whole region." The community believed that "the spirits of all Endorois, no matter where they are buried, live on in the Lake, with annual festivals taking place at the Lake," and that the Monchongoi forest was "the birthplace of the Endorois and the settlement of the first Endorois community" (*Endorois* 2009: "Summary of Alleged Facts," ¶16).

For them, the lake and the land around it housed their shrines, sacred places, and places of worship. It defined who they were. It gave them meaning and helped place them in the hierarchy of beings. It allowed them to worship and provided the hope of life after death. It made life worth living and helped maintain the ancestral spirits' happiness so that they might protect the community. For the Endorois, to be forced out of their ancestral land would be to deny them their right to practice their religion. The Lake Bogoria area was therefore the spiritual home of the Endorois, both living and dead (*Endorois* 2009: ¶167).

While the Endorois considered the Lake Bogoria their home, land, and heritage, it is also endowed with rare beauty and natural resources that the government was determined not only to conserve, but also to exploit as a tourist attraction. Since 1974 it has been a

national reserve, and in 2001 it was listed as "a wetland of international importance under the Ramsar convention" (Joint Management of Lake Bogoria 2007:5).

For the government, it was an ecosystem that could be exploited economically and conserved so that the exploitation could be extended as long as possible. The presence of the Endorois on the piece of land was a mere inconvenience. The government did not consult the Endorois before declaring their land a national reserve; since then it has embarked on a campaign of intimidation, disenfranchisement, and trickery against the Endorois.

According to *Endorois*, shortly after the creation of the Game Reserve "The Kenyan Wildlife Service (KWS) informed certain Endorois elders … that 400 Endorois families would be compensated with plots of 'fertile land'… that the community would receive 25% of the tourist revenue from the Game Reserve and 85% of the employment generated, and that cattle dips and fresh water dams would be constructed by the Kenyan government" (2009: ¶7). After thirteen years, only 170 of the four hundred families had received Kenya Shillings 3,150 (or roughly USD $30) per family, which they understood to be used to move off the land, not as payment for it (Ibid.: ¶¶8-9).

They had agreed to this relocation understanding that they would be allowed free access to their shrines and sacred places along and around the lake. They also understood that the government would clearly mark and preserve these places. However, after the agreement and without consultation, the Endorois were forced out of their homes. The Kenyan government then fenced off the land around the lake and deployed the KWS guards to stop all "illegal" entry. The community members could not access their shrines and sacred places and therefore could not conduct their daily worship services, the periodic ritual services, or the annual community-wide celebration and cleansing. In fact, like everyone else, they were required to pay a park entrance fee to access their land (*Endorois* 2009: ¶15). They approached then-President Daniel Arap Moi (who was also their Member of Parliament) but nothing came of these efforts. Later the government awarded a ruby mining contract to a multi-national company (again without consulting the Endorois; Ibid.: ¶14). Various individuals, including President Daniel Moi, also received rights to build luxurious hotels at the lake, without regard to the Endorois' religious claims.

Forty years after the initial agreement, having turned into squatters on their own land, without access to their grazing lands, without meaningful sources of livelihood, and expelled from their shrines and sacred places, the Endorois resorted to legal redress.

In *William Yatich Sitetalia et al. v. Baringo Country Council* (2002), the Endorois instituted a claim before the High Court for the restitution of their land. They gave compelling evidence of their claim to the land and highlighted the concerted government efforts at alienating them from it. However, the High Court dismissed this petition holding that the Endorois "had effectively lost any legal claim as a result of the designation of the land as a Game Reserve in 1973 and in 1974," and that "the money given in 1986 to 170 families for the cost of relocating represented the fulfillment of any duty owed by the authorities towards the Endorois for the loss of their ancestral land." The Court indicated throughout that it was ill equipped to "address the issue of a community's collective right to property, referring throughout to 'individuals' affected"; "Kenya law," it argued, should not address "any special protection to a people's land based on historical occupation and

cultural rights" (*Endorois* 2009: ¶¶ 11-12, quoting *William Yatich Sitetalia et al. v. Baringo Country Council* 2002).

It was clear that the Kenyan court was not willing to make any decision that would counter the government's position. This set the stage for the Endorois to seek redress before the African Commission.

In May 2003, the Centre for Minority Rights and Development initiated proceedings with the African Commission on behalf of the Endorois community (*Endorois* 2009: ¶23). After reviewing the complaint, the Commission ruled on violations of the *African Charter on Human and Peoples' Rights* (hereinafter "the *Charter*") alleged to have been committed by the Kenyan government, two of which are worthy of our particular attention.

Article 8 of the Charter provides for freedom of conscience and the profession and guarantee of free practice of religion, subject to law and order. The Endorois had alleged that by evicting them from their land, and refusing them access to Lake Bogoria and other surrounding religious sites, the Kenyan government had violated their right to freely practice their religion. In addition, the government had interfered with the Endorois' ability to practice and worship as their faith dictates because the religious sites within the Game Reserve have not been properly demarcated and protected (*Endorois* 2009: ¶163).

Quoting *Amnesty International v. Sudan* (1999), the African Commission held that while there might be limitations on the right to freedom of religion, any such limitation must be necessary in public interest, but it must not result in vitiation of the right altogether; the expulsion of a people from their land—making it impossible to practice their religion—was not a limitation acceptable under Article 8. Thus on this point the African Commission ruled against the Kenyan government (*Endorois* 2009: ¶173); the Commission was clear that the right freely to practice one's religion is one of those core rights whose limitation it would allow only in exceptional circumstances prescribed by law and proportionate to the public interest (Ibid.: ¶172).

Article 14 of the Charter guarantees the right to property and allows this right to be encroached upon "only in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws." The Endorois had argued that the Baringo County Council held all the land in trust and that, even if a decision were made to make it government land, it should be put to a use that is beneficial to the community. Citing the Inter-American Court of Human Rights in the case of *The Mayagna (Sumo) Awas Tingni v Nicaragua*, the Commission noted "that the Inter-American Convention protected property rights in a sense which include the rights of members of the indigenous communities within the framework of communal property" and that "possession of the land should suffice for indigenous communities lacking real title to obtain official recognition of that property" (*Awas Tingni v. Nicaragua* 2001:70-72, 76 [§§140, 151]). Drawing extensively from the European Court of Human Rights and the Inter-American Court cases, the Commission concluded that "traditional possession of land by indigenous people" was the legal equivalent of "state-granted full property title," and therefore that "members of indigenous peoples who have unwillingly lost possession of their lands, when those lands have been lawfully transferred to innocent third parties, are entitled to restitution thereof or to obtain other lands of equal extension and quality." Because the government's encroachment was considered disproportionate to the public need or

interest, and because the government had dismissed Endorois willingness to cooperate with government conservation efforts while remaining on the contested land, the African Commission affirmed that "the land of the Endorois has been encroached upon," in violation of Article 14 (*Endorois* 2009: ¶¶209-215).

The Commission also found that the Kenyan government had violated the Endorois right to freely take part in the cultural life of their community, and that government had failed to promote and to protect morals and traditional values of the Endorois (*Charter*, Article 17 [§§1 and 2]); that Endorois were not adequately compensated for their land (*Charter*, Article 21); and that the government had violated their right to their economic, social and cultural development (*Charter*, Article 22). In view all these violations, the commission ordered that the Kenyan government recognize the Endorois' right of ownership, provide restitution for the land, guarantee Endorois access to the Lake Bogoria area, compensate the community for current economic activities on the land, provide employment opportunities to community members, and engage the Endorois community in dialogue about the best ways to implement the various elements of the ruling (*Endorois* 2009: "Recommendations").

While government of Kenya formally recognized the decision of the Commission, it did little to implement it (Kiprotich 2010; see also "Endorois Celebration" 2010). According to one account, the government has done all it can to frustrate the Endorois, including the "rushed-through" passage of the Kenya Wildlife Bill in 2011 without Endorois participation, which requires anyone entering Lake Bogoria to pay an entrance fee, and criminalizes "activities that might endanger wildlife in the area, leaving no exception for the religious and cultural practices of the people indigenous to the land" (Marlin 2014). The government has also continued to push to have the Lake and the land around it declared a World Heritage site, which would make it easier to justify the continued alienation of the Endorois from their land ("Lake Bogoria National Reserve" 1999).

The Kenyan government's failure to implement the Endorois decision has since been noted and discussed by the United Nations Committee on Economic, Social and Cultural Rights. While commending the formation of a Task Force in September 2014 to implement the decision, the Committee was concerned that the Endorois were not represented there, and that they had not been updated on its progress. They recommended that Kenya "implement, without further delay, the African Commission on Human and Peoples' Rights … and ensure that the Endorois are adequately represented and consulted at all stages of the implementation process." The Committee also recommended that Kenya "set up a mechanism that [would] facilitate and monitor the implementation" (Committee on Economic, Social and Cultural Rights 2016:3, ¶¶15-16). According to a report published by the U.N. Committee on the Elimination of Racial Discrimination (2017), even as late as May of that year, the government continued to harass, stop access to, and forcefully evict the Endorois from their land.

The Endorois are an indigenous people who live by the customs and laws of their community; common law and the private property system are alien to them. However, even where they choose to engage a government (that purports to operate by law) on the terms of these alien laws, the government chooses to ignore the decisions of its courts.

IV. The Ogiek Community and the Mau Forest Conservation

The Ogiek community (also known as the Dorobo or the Okiek) are a small group of people sometimes wrongly considered as part of the Kalenjin community since they have largely been assimilated by their Kalenjin neighbors. The name means the "guardians of the forest and wildlife," a true reflection of their lifestyle for the many generations they have lived in the Mau forest ("Ogiek Community Fights…"). They participated in the conserving efforts, creating a balanced ecosystem that supported all the livelihoods of the forest: they only gathered dead trees for firewood and shelter, and they only hunted for small game that was abundant in the forest.

The Ogiek community land problem began when the colonial government, understanding the importance of the Mau as a water catchment area, classified it as forest lands. According to summaries in *Joseph Letuya et al. v. Attorney General et al.* (hereinafter *Letuya* 2014), a lawsuit initiated in 1997 in response to government actions in the Mau Forest, "when land for other African communities was set aside as Trust Land between 1919 and 1939, no land was set aside for them, with the consequence that no titles to land have been issued to its members as no adjudicating rights and registration of titles could take place" (3).

For more than sixty years after the declaration, while the government did limit Ogiek hunting rights, it made no attempt to evict them. In 1991, the Kenyan government recognized their claim to the land and informed them that the government would allocate approximately three thousand Ogiek families living in Mau part of their land in Marioshoni Location of Elburgon Division and Nessuit Location of Njoro Division. However, instead of de-classifying this land for the Ogiek, the government started irregularly allocating it to other communities (*Letuya* 2014:3-4). This started a period of wanton destruction of the Mau forest and the displacement and the threatening of the Ogiek way of life and survival. In 1997, the Ogiek went to court to compel the government to recognize their right to the two locations in the Mau forest complex. They petitioned that this parcel be protected from the displacement caused by illegal re-allocation, and for title to these lands.

As the case dragged in court, the government established a "Task Force on Conservation of the Mau Forest Complex." This task force, which presented its report in March 2009, highlighted the crux of the Mau Forest Complex land problem, confirmed part of the Mau Forest as Ogiek ancestral land, and suggested that part of the Mau Forest be excised and distributed to the Ogiek. It concluded by calling upon the government to revoke all of the irregularly issued title and have the Ogiek resettled in the excised areas ("Report of the Prime Minister's Task Force on the Conservation of the Mau Forests Complex" 2009). In implementing this report, the government forcefully evicted everyone, including the Ogiek, from Mau, ruining their livelihood. Ultimately, the High Court ruled in favor of the Ogiek, ordering the National Land Commission to "identify and open a register of members of the Ogiek Community… and identify land for the settlement of the said Ogiek members" and others who had "not yet been given land" according to the Task Force's 2009 report. The Court gave the government one year (*Letuya* 2014:19).

The government did little to implement the decision. However, while this case languished in court for over 17 years, the Ogiek—buoyed by the Endorois community decision at the African Commission in 2009—initiated their own claim. Because Kenya was hostile to the African Commission, the Commission filed the case with the African Court of Human and Peoples' Rights.

In *African Commission on Human and People's Rights v. Kenya* (hereinafter *African Commission* 2017), the Ogiek (through the African Commission) challenged the government's decision to evict members of their community from the Mau forest complex. They also accused the Kenyan government of violating Articles 1, 2, 4, 8, 14, 17(§§2-3), 21 and 22 of the *African Charter* (*African Commission* 2017:28 [¶101]).

The Court delivered its ruling on May 26, 2017. First, it satisfied itself that the Ogiek were an indigenous population therefore deserving of special protection. The Ogiek provided enough evidence that the Mau forest had been their ancestral land for many generations, and their neighbors recognized both the Ogiek claim and possession of the land in question (*African Commission* 2017:31-33 [§§107-112]).

Article 8 of the *Charter* provides for the right "free practice of religion." In their submission, the Ogiek gave a preview into their religious life; they practiced a monotheistic religion that was closely tied to, and protective of the natural environment (*African Commission* 2017:46-47 [§157]). They asserted "that the sacred places in the Mau Forest … were either destroyed during the evictions which took place during the 1980s, or knowledge about them [had] not been passed on by the elders" (Ibid.:47 [§158]). They argued that they would only be able properly to preserve and use these places if they had unfettered access to the forest. While some members of the community accepted Christianity, a great number kept the ancestral religion. The Court held that indigenous societies "in particular" depend on "access to land and the natural environment" for their religious freedom and to "engage in religious ceremonies," and "any impediment … severely constrains their ability to conduct or engage in religious rituals with considerable repercussion on the enjoyment of their freedom of worship." The Court also affirmed the centrality of the Mau Forest to Ogiek religious practice, and that evicting them "rendered it impossible for the community to continue its religious practices and [was] an unjustifiable interference with the freedom of religion of the Ogieks" (Ibid.: 49 [§§164-166]; 50 [§169]).

Article 14 of the *Charter* guarantees the right to property. It can only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws. The Ogiek claimed that the failure by the government to recognize them as an indigenous community, effectively denied them the right to communal ownership of land (*African Commission* 2017:33 [§114]).

Since the Kenyan government did not provide any evidence that the continued presence of the Ogiek in the forest was the reason for degradation of the Mau ecosystem, the Court held that "by expelling the Ogieks from their ancestral lands against their will," the Kenyan government also had violated their Article 14 rights (*African Commission* 2017:38 [§131]).

Article 17(2) provides the right to freely take part in the cultural life of one's community to every individual. The Court, quoting *Endorois v. Kenya*, defined culture as

"the sum total of the material and spiritual activities and products of a given social group that distinguish it from other similar groups," expressed either by an individual or within a community. It was the positive duty of the State to protect and to promote a community's culture (*African Commission* 2017:51, 53 [§§170, 177, 179]). After describing the Ogieks' "distinct way of life" with regard to the Mau Forest, the Court observed that "in the course of time, the restrictions on access to and evictions from the Mau Forest have greatly affected their ability to preserve these traditions." The Court ruled that the government had "interfered with the enjoyment of the right to culture of the Ogiek population" (Ibid.:55 [§§183-184]).

The Court also held that the Charter does not provide for exceptions to the right to culture (*African Commission* 2017:56 [§187]). Even if the court were to presume an exception to the right to culture, the Kenyan government provided no evidence to justify its violation of the Ogiek right to culture (Ibid.:57 [§189]).

The Court also found that the Kenyan government had also violated Articles 1, 2, 21 and 22 of the Charter. It ordered the Kenyan government "to take all appropriate measures within a reasonable time frame to remedy all the violations established and to inform the Court of the measures taken within six (6) months from the date of [the judgment]" (*African Commission* 2017:68 [§227: "On the Merits," iii]). As with the Endorois before them, the Kenyan government has done little to implement the decision of the African Court.

V. Conclusion

Given the very nature of ATR adherents' attachment to land, it is inevitable that their interest will conflict with public or government interest. It is true that the ATR adherents' claims to these lands have a priority in time to any claim that the Kenyan government can invoke. It is also conceivable that there may be instances when public interest and the need for sustainability far outweigh the religious right and interest in a particular parcel of land. In these instances, the parties involved must be willing to negotiate a settlement that will protect both the public interest and the demands of the sacred. It may be that Kenya could learn a thing or two on how other nations (such as Canada) have resolved these conflicts.

While adherents of African Traditional Religions often have demonstrated a willingness to share their sacred spaces with the public, the government often has resorted to campaigns of violence, the use of force, intimidation, and disenfranchisement to frustrate amicable solutions. Kenya is therefore an example of how not to resolve conflicts over public/sacred spaces. Kenya should be willing to engage adherents of ATRs so that they may work out solutions that enable amicable coexistence of the public and the sacred in shared spaces.

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