



# KENYA

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**Indigenous defenders on the run:  
a country study on the criminalization  
of and human rights violation against  
Indigenous Peoples in conservation**



**Indigenous Peoples  
Rights International**

Championing Indigenous Peoples Rights



## Acknowledgements

This report was written by Daniel Kobei. It was developed with the help of Patrick Kuresoi, Sara Osas, Kilagui Sumuni, Dennis Kibilo, Ogiek Council of Elders, Julius Sulunye, Annah Naeku, Raphael Kerenke, Robinson Torome, Wiliam Sipai, Elias Kimaiyo, and Ogiek Peoples' Development Program's (OPDP) staff. Their time and effort in contributing to an in-depth reflection on issues and challenges that the Indigenous Peoples face in their defense of their land rights are invaluable. Their immense insight in this study was vital in the formulation of recommendations regarding Indigenous Peoples human rights defenders in conservation areas in Kenya.

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### Caption photo cover:

(above) Members of the Indigenous Ogiek community march in protest over the killing of a 16-year-old boy by the police. (Photo: OPDP)

(below) A six-feet deep trench and steel chicken wire fence restrict the movement of the indigenous Maasai community and their livestock living inside their customary lands encroached by Kedong Ranch Ltd. (Photo: Daniel Kobei)

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## Executive summary

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Human rights violations against Indigenous Peoples living within and around conservation and protected areas is a persisting issue in Kenya. Colonial laws on conservation were progressively amended under Kenya's Constitution of 2010 resulting in laws crafted with specific clauses recognizing the roles of communities, including those of Indigenous Peoples residing in conserved forests and protected areas. However, these laws are largely disregarded by authorities who still regard and treat them as illegal settlers or encroachers. The report highlights cases of arrests and trumped-up charges against Indigenous Peoples human rights defenders from Ogiek and Maasai communities, and a series of violent evictions of the Sengwer community in 2020 and 2021. These cases have yet to acquire any restitution or justice.

The two conservation laws that primarily criminalize practice of traditional livelihood and access to forests and protected areas are Forest Conservation and Management Act no. 34 of 2016 and Wildlife Management and Conservation Act of 2013. The Wildlife Management Act categorizes protected areas into national parks, national reserves, and conservancy. At present, there are 27 national parks with four sanctuaries in them, 34 national reserves, and 160 conservancies. National parks are managed by Kenya Wildlife Service; national reserves by county government; and conservancies by either private entities or communities. Currently, some community conservancies are being managed by communities and make up approximately 11 percent of the country's total land area. On the other hand, forests in Kenya are under the Forest Conservation Act and are managed by Kenya Forest Service. Kenya has around 7.4 percent forest cover and the government aims to expand it to 10 percent by 2022 as noted in the progress assessment of Aichi Target 5 on habitat loss.

The African Commission on Human and People's Rights identified 14 indigenous communities that are inextricably linked to their lands and natural resources for their livelihood, food, identity, survival, and perpetuation of their cultural heritage. Largely grouped as hunter-gatherers are the Ogiek, Watta, Sengwer, and Yaaku communities; and as pastoralists are the Maasai, Samburu, Elmololo, Turkana, Rendille, Borana, Somali, Gabra, Pokot, and Endorois communities.

The government has consistently denied and ignored the existence of indigenous communities in forests and protected areas, but the Sengwer in Embobut Forest, the Yaaku in Mukogodo Forest, the Ogiek in Mt. Elgon National Park and in Mau Forest, and the Maasai in Hell's Gate National Park, have been living and traditionally managing these lands. At some point in their lives, these communities have experienced violent evictions, criminalization of their leaders and council elders, and other human rights violations. These incidents have caused prolonged and undue stress and trauma to the communities. The Sengwer people regard themselves as "socially dead" after being deprived for decades of freely practicing their cultural ceremonies and rites within their forest. Lack of access to their lands and natural resources has driven indigenous communities to poverty and many of them have turned to charcoal burning for sustenance.

The report underlines that deprivation and insecurity of Indigenous Peoples' land tenure are deeply rooted in discrimination against them. The Indigenous Peoples' way of life was never regarded as a crucial contribution to wildlife conservation and natural resource management despite being recognized in Kenya's conservation laws and Community Land Act no. 27 of 2016. Prejudice against Indigenous Peoples is such that they are treated as less than human and their traditional livelihood and practices are devalued and criminalized.

Kenya's conservation initiatives still echo its colonial past, which several influential international and intergovernmental conservation institutions reflect in their programs. Despite these institutions' avowed recognition and protection of Indigenous Peoples' rights through safeguard policies, they still reiterate the existing model of conservation that the government strongly implements. The Endorois community fears the disregard and violation of their land rights as Lake Bogoria National Park is set to be included as a UNESCO's World Heritage Site. Similarly, the Ogiek community dreads disenfranchisement with the Mau Forest being admitted to the Queen's Commonwealth Canopy in 2020 as pronounced by the United Kingdom Government and will be considered a highly conserved forest.

The report recommends that the government of Kenya properly implement the Community Land Act and the decision of the African Court of Human and Peoples Rights recognizing the Ogiek community's land rights in the Mau Forest Complex. The Kenyan government should bolster its existing legal instruments and ratify ILO Convention 169 and UNDRIP. It should recognize the role of Indigenous Peoples in achieving the government's biodiversity targets and conservation initiatives and create an enabling environment where Indigenous Peoples can be considered for leadership roles in the government or through creation of special constituency.

The report further recommends that international and intergovernmental conservation institutions ensure that their initiatives and recommendations to the government do not disenfranchise Indigenous Peoples of their collective rights to lands. Lastly, support organizations should continue standing with Indigenous Peoples human rights defenders and consider providing them and their families psycho-social support.

## About this report

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As part of its work to confront criminalization of, and human rights violations against Indigenous Peoples, Indigenous Peoples Rights International (IPRI) decided to contribute to the ongoing calls for a human rights-based approach to conservation. As a start, we conducted a research study on the issue and commissioned global and country reports covering Democratic Republic of Congo, Kenya, Tanzania, Nepal, and Thailand. Each report is published independently.

The study aims to contribute in raising awareness and attention to the issue of criminalization and violations of Indigenous Peoples' rights in relation to environmental conservation. We hope that it will be useful for Indigenous Peoples and human rights organizations in their advocacy initiatives at the national, regional, and global levels. We also hope the reports will be useful for states and conservation institutions when developing programs and policies that aim to address human rights violations in conservation areas, including the access to justice and remedy of the victims of criminalization and human rights violations.

The analyses and discussions in the country report of Kenya involved desktop review of related studies on laws and policies related to conservation areas, indigenous communities of Kenya and the trends in the criminalization of the land right defenders and their indigenous community.

Focus group discussions and interviews with land rights defenders and community leaders were conducted. The key informants and respondents to the survey question developed were selected based on referral, their residence status, and knowledge and involvement in matters concerning Indigenous Peoples in the country.

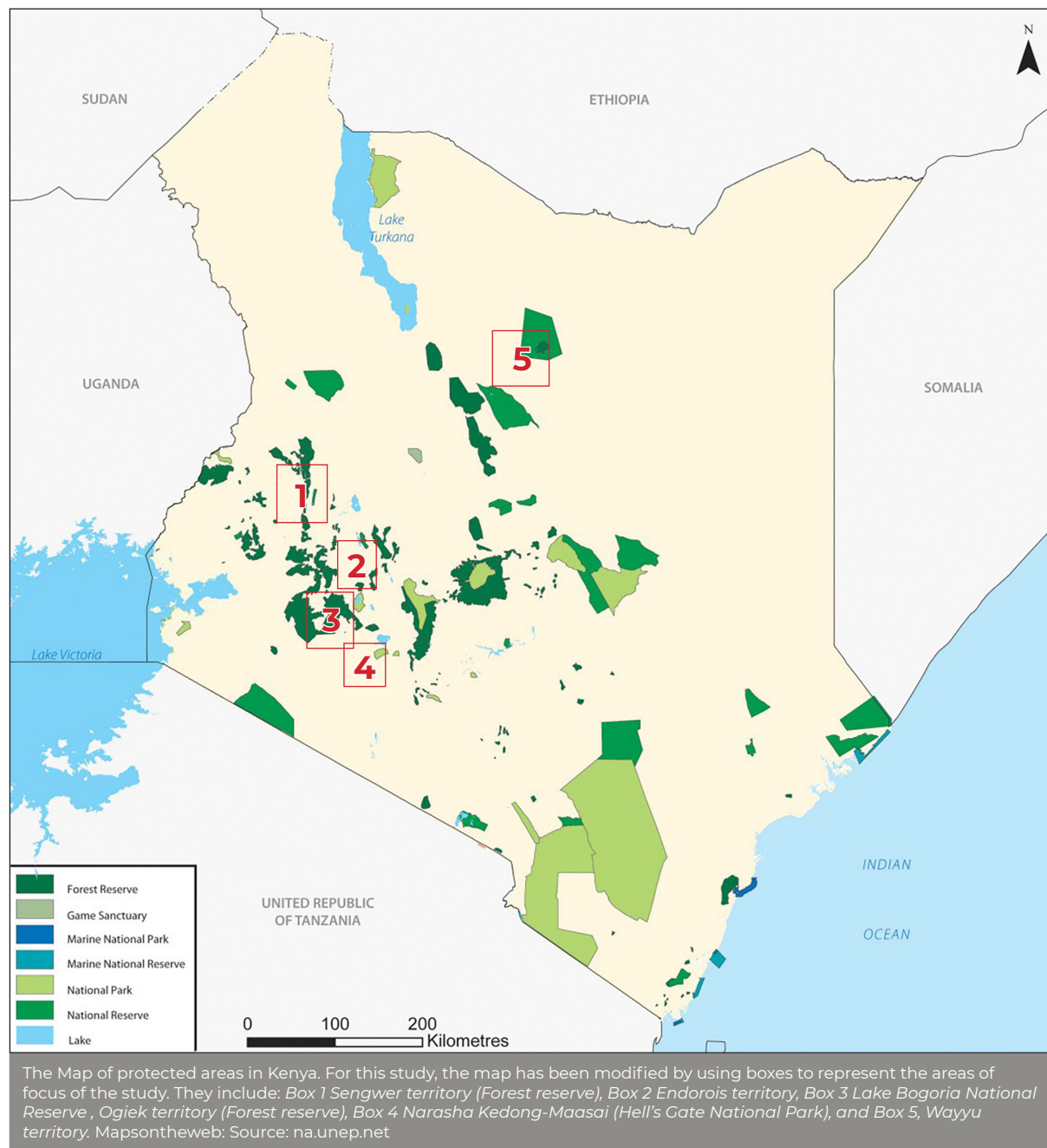
This study points out the criminalization not only of indigenous leaders but also of communities and their livelihoods due to laws, policies, and practices that continue to negatively impact on them. Indigenous communities suffer due to their insecure tenure as they exist and occupy conservation areas like National Parks and National Reserves. Due to their role in defending community tenure rights and their self-determination, indigenous leaders face the wrath of the state machinery and perpetrators.

This report analyzes and discusses criminalization of human rights defenders in Kenya's conservation areas and specifically focuses on the Ogiek of Mau Forest, the Sengwer of the Elgeiyo Marakwet/Embobut Forest and the Maasai of Kedong and the conservation laws and policies that affect indigenous leaders and their communities. The study also brings out a number of cases of criminalization and human rights violations of indigenous human rights defenders, and the impact on these groups and individuals.

It concludes with recommendations on how to address the various issues that lead to the human rights violations and criminalization of indigenous communities with a view to improving their tenure rights through effective consultation, respect for human rights, and adherence to the rule of law and international best practices on human rights.



## Overview of conservation areas



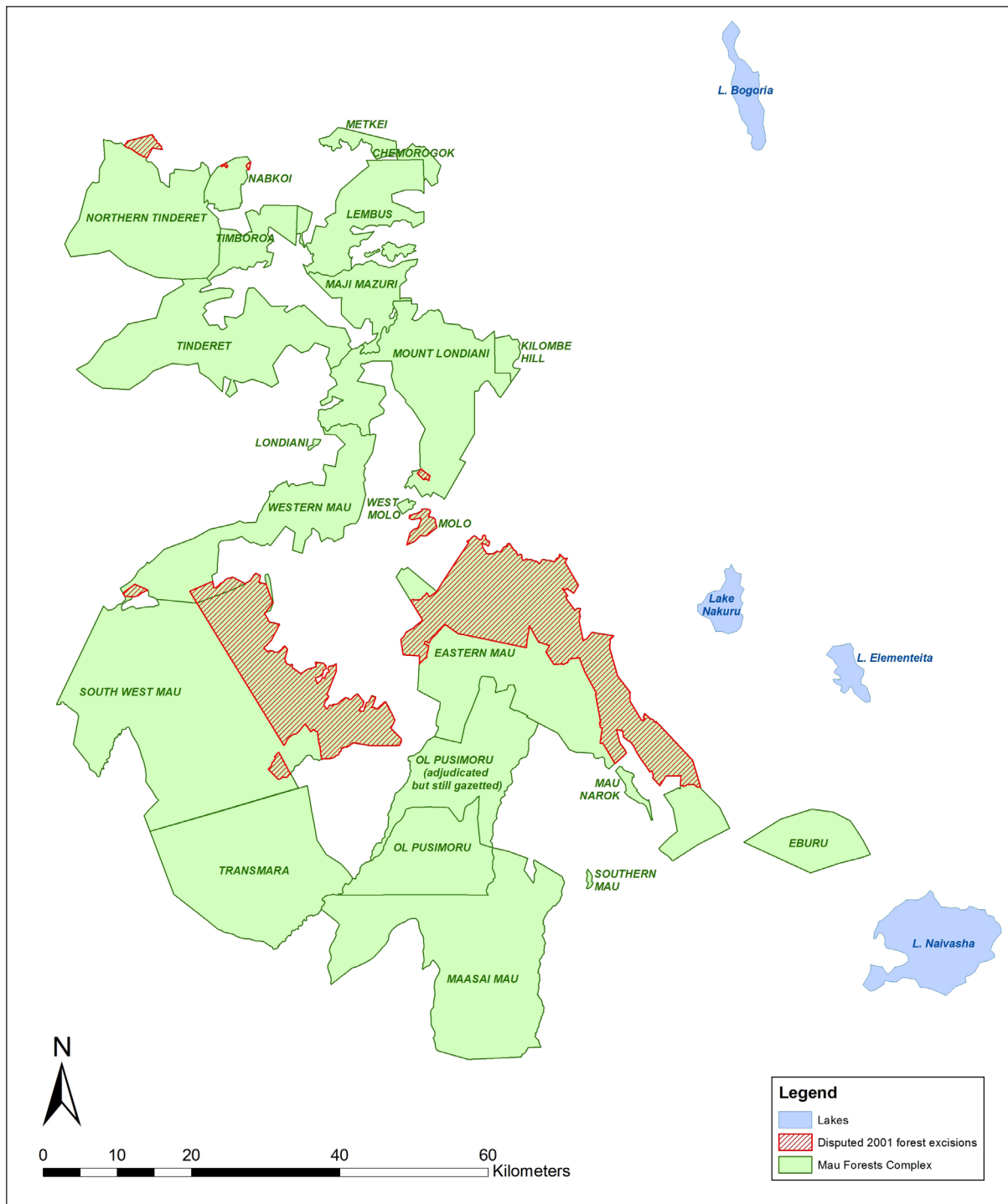
Kenya is rich in terms of biodiversity and cultures of the varied African communities. Found in the Eastern Coast of African, Kenya lies astride the equator and has an area of 582,650 sq km and a population of 47 Million as of the 2019 census report. Kenya borders South Sudan and Ethiopia in the North, on the East by Somalia, on the Southeast by the Indian Ocean, on the South by Tanzania, and on the West by Lake Victoria and Uganda.

In Kenya, protected area means a defined geographical space, recognized, dedicated, and managed through legal or other effective means, to achieve long-term conservation of nature with associated ecosystem services and cultural values. At the same time, there are set areas known as conservation areas comprised of a tract of land, lake or sea with notable environmental, natural features, biological diversity, cultural heritage, or historical importance that are protected by law against undesirable changes<sup>1</sup>.

Protected areas governed by wildlife laws are categorized as: national parks, national reserves and conservancies. A wildlife conservancy is land managed by an individual landowner, a body or corporate, group of owners or a community for purposes of wildlife. A national park is an area of land and/or sea especially dedicated to the protection and maintenance of biological diversity, and of natural and associated cultural resources, and managed through legal or other effective means. It is managed by Kenya Wildlife Service. National reserve means an area of community land declared to be a national reserve, which are managed by county governments.

National Parks and reserves cover about 8 percent of the country's land surface. About 160 conservancies protect about 11 percent of Kenya's land<sup>2</sup>. These protected areas are about 17 percent of the country's total land area. There are other areas under significant government protection, and these include the forests and Kenya Water Towers Agency (KWTa). All the forests are primarily under the management of the Kenya Forest Services (KFS) while the water towers are under the management of the Kenya Water Tower Agency. The water towers are mainly found within the gazetted forests and game reserves.

The distinction between national parks and national reserves is that there is complete protection of natural resources in parks and the only activities allowed are tourism and research; while in reserves, human activities are allowed under specific conditions such as grazing, fishing in marine reserves and firewood collection in terrestrial reserves.



Though the government does not always admit, there are indigenous communities living in the national reserves and forests as in the case of the Sengwer in Embobut Forest, the Yiaku in Mukogodo Forest, the Ogiek in Mt. Elgon National Park and in Mau Forest, and the Maasai in Hell's Gate National Park. These forest communities who are mainly pastoralist interact with wild animals while protecting them. The neighboring parks often experience challenges of wildlife wreaking farms and livestock of communities which bring them at loggerheads with the government agencies in the protection of wildlife.

A number of national parks and forests are also World Heritage sites like the Kaya Forests and Mt Kenya National Forests. Some parks and forests are on the UNESCO list of becoming World Heritage sites like Lake Bogoria National Park, which threatens the indigenous Endorois' rights to access and use the lake. Increased restrictions are expected after the park acquires the status of a World Heritage site.

In 2020, it was declared that the Mau Forest Complex water tower was being admitted by the United Kingdom Government to the Queen's Commonwealth Canopy and be part of highly-conserved forests like the Great Bear forest in Canada, Arboretum of Ruhunde in Rwanda, Kawari Forest Reserve in Nigeria, Liwonde National Park in Malawi, Mt Elgon in Uganda, among other countries of the Commonwealth.

The Mau Forest Complex is located about 170 kilometers north-west of Nairobi. The forest was declared a Crown Land in the 1930s and made a National Reserve in 1945 and officially gazetted in 1954 as a Forest Reserve under the Forest Act. The forest is the largest remaining indigenous forest in Kenya. It covers over 400,000 hectares, is the largest of the country's five water towers as well as the largest closed-canopy forest ecosystem. The forest borders Kericho County to the West, Narok to the South, Nakuru to the North and Bomet to the South-West. It is divided into twenty two blocs comprising South-West Mau (Tinet), East Mau, Olposumoru, Transmara, Maasai Mau, Western Mau, Eburru, Molo, West Molo, Londiani, Mount Londiani, Mau Narok, Lembus, Maji Mazuri, Metkei, Chemogorok, Tinderet, Kiplombe Hill, Timboroa, Nabkoi, North Tinderet and Southern Mau.

The Queen's Commonwealth Canopy, which is an initiative to save and conserve natural habitats involving 54 countries of the Commonwealth, is viewed by indigenous communities like the Ogiek of Mau Forest with suspicion that it will disenfranchise them of their rights to their ancestral forests. The Ogiek fear that they will continue to lose control of the forest not just from the government but also from foreign parties which are laying claim.

## The law and Indigenous Peoples living in protected areas

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Kenya has numerous laws on protection and management of conservation areas. There have been tremendous reforms from the colonial conservation laws which were reviewed and adopted. However, these laws only sought the protection of the natural landscapes and biodiversity while largely ignoring the role of the communities in conservation. These laws declared as illegal the communities' existence and livelihood in the forests such as living in the forest, farming, hunting and grazing. It resulted in the criminalization of indigenous communities who suffer from arrests, displacements and even killings whenever they are in conservation areas, which are actually their home.

However, with the enactment of the 2010 Constitution of Kenya, a lot of changes were achieved in terms of the progressive Bill of Rights that recognizes minorities and marginalized communities. Further, there was a review of conservation and land laws to conform to the Constitution. The laws in Kenya were revised to conform with the new constitution enacted in 2010. Some of the laws reviewed include the Wildlife and Conservation Act, Forest Management and Conservation Act, Land Act, among others. The Forest Management and Conservation Act and Kenya Wildlife Act recognize the role of community in conservation but there is still much to be done to protect the rights of indigenous communities in conservation areas.

The African Commission report identified 14 indigenous communities in Kenya whose attachment to land and natural resources was a key factor to their existence. These communities comprising the indigenous hunter gatherers (Ogiek, Watta, Sengwer, Yaaku) and pastoralists (Maasai, Samburu, Elmololo, Turkana, Rendille, Borana, Somali, Gabra, and Pokot Endorois) are known to live in the rangelands, highland forests, and coastal scape which remain largely undocumented.

For instance, the ancestral land of the Ogiek is in the Mau Forest which is a water tower of national significance in terms of conservation. The Endorois community has the Lake Bogoria ecosystem as their ancestral lands but government started to take over the conservation of these ecosystems while evicting the indigenous communities and accusing them of destruction. This move has been protested in local court and the African regional courts.



In the Ogiek case at the African Court of Human and Peoples' Rights,<sup>3</sup> conflict is between government's interest to protect conservation areas and indigenous communities' claim to be the owners and custodians of forest resources. The government argued that the Ogiek were encroaching on the Mau Forest which is a protected area hence justifying evictions of the Ogiek from the forest. However, court findings led to the judgment that legitimizes the Ogiek's right to occupy and use the land in the Mau Forest Complex, declaring as illegal, their eviction from the forest.

The government was applying the forest law that prohibits presence in a forest between 7 pm to 6 am unless taking part in a cultural, scientific or recreational activity or using a recognized road or footpath. Local communities like the Ogiek actually live in the forest which means their daily existence in the forest is deemed illegal. The law also prohibits the erection of any building or livestock enclosure, allowing livestock in the forest, or clearing any part of the land for cultivation. These prohibitions imposed have violated the lives of the indigenous forest communities (Sengwer and Ogiek) who cannot legally build houses for shelter, keep livestock or cultivate their lands for food. Their leaders, traditional leaders i.e. Council of Elders, political leaders and activists have always been targeted whenever they raise these issues to the world through press, advocacy protests and petitions. Many times they face arrests, attacks and even murder.

Below is a description of laws and policies in conservation and their objectives. These laws, though progressive in terms of conservation, fail to recognize Indigenous Peoples and their livelihood and contribution in the conservation areas. They seek to limit and deny access of these communities to their forests and natural landscapes.

## **Constitution of Kenya, 2010**

- i. Preamble: Respectful of the environment, which is our heritage, and determined to sustain it for the benefit of future generations.
- ii. Article 42: Every person has the right to a clean and healthy environment, which includes the right to have the environment protected for the benefit of present and future generations.
- iii. Article 60 (1): Land shall be managed in a manner that is equitable, efficient, productive and sustainable, including protection of ecologically sensitive areas.

- iv. Article 69 (1&2): The State shall ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits. Every person has a duty to cooperate with state organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.

### **Wildlife Conservation and Management Act of 2013**

- Applies to all wildlife resources on public, community and private land, and Kenya territorial waters, and recognizes conservation of wildlife on community and as a land use.
- Recognizes wildlife conservancies and sanctuaries, wildlife scouts, community wildlife associations.
- Promotes ecosystem-based planning and effective participation of the public in wildlife management.
- Encourages equitable sharing of benefits from wildlife to offset costs and devolution of wildlife conservation to those owners and managers of land where wildlife occurs.
- A person who engages in hunting for the purposes of subsistence commits an offence and shall be liable of conviction to a fine of not less than thirty thousand or imprisonment for a term of not less than six months or to both such fine and imprisonment.
- A person who engages in hunting for bushmeat trade, or is in possession of or is dealing in any meat of any wildlife species, commits an offence and shall be liable on conviction to a fine of not less than two hundred thousand shillings or to imprisonment for a term not less than one year or to both such fine and imprisonment.

### **Community Land Act, No. 27 of 2016**

- Recognizes and secures community land rights in former Group Ranches and Trust Lands.
- Formalizes stronger democratic decision making on community land.
- Promotes wildlife conservation and natural resource management on community land.

## **Forest Management and Conservation Act of 2016**

- This policy exists to provide for the establishment, development and sustainable management, including conservation and rational utilization of forest resources for the socio-economic development of the country. For instance, in sections 46 and 47, it provides for participatory forest management where the local communities are allowed to participate in the management of the forest. However, the same law in section 39 provides for declaration of natural reserves and prohibition of livelihood activities depended upon by communities e.g. grazing, fishing hunting and honey collection. It further requires these groups of people to obtain permission and even pay fees to access these resources.
- The forest has been used many times to deprive forest communities of their livelihoods through eviction where the government refers to them as encroachers or illegal settlers.

## **Environmental Management and Coordination Act No. 8 of 1999**

The Environmental Management and Coordination Act (EMCA) prohibits persons from putting up any structures in protected areas without a valid Environmental Impact Assessment (EIA). It follows that local communities cannot build houses as residence in protected areas. In the first instance, they cannot obtain EIAs to build proper structures as residence. Indigenous Peoples are found in the conservation areas without EIAs which they do not obtain by virtue of their being indigenous to the forest.

In cases where, out of necessity local communities construct structures for shelter, frequent evictions are often accompanied by destruction of property and structures that always impact them negatively. For instance between January 2020 and June 2021, about a thousand members of the Ogiek and several hundreds of the Sengwer were evicted in the Mau Forest and Embobut Forest, respectively. The right to housing of indigenous communities is enshrined under Article 43 of the 2010 Constitution. The fact that indigenous communities cannot legally put up housing structures in areas that they ancestrally call 'home' subjects them to perpetual denial of their right to housing.

Section 43 of the EMCA 1999 is of particular importance since the Act provides for protection of traditional interests. Under section 43, a notice in the gazette may be issued by the Cabinet Secretary in charge of environment matters declaring the traditional interests of local communities who ordinarily live in or around

protected areas. The same section shows that authorities in Kenya admit that local communities have traditional interests in forests, yet not even one gazette notice has been issued recognizing traditional interests of local communities in or around forests.

### **Conservation laws and specific section criminalizing the subsistence livelihood**

Law and policy	Section that criminalizes the community
Forest Conservation and Management Act No. 34 of 2016	<p>64. Prohibited activities in forests</p> <p>(1) Except under a license or permit or a management agreement issued or entered into under this Act, no person shall, in a public or provisional forest—</p> <ul style="list-style-type: none"> <li>(a) fell, cut, take, burn, injure or remove any forest produce;</li> <li>(b) be or remain therein between the hours of 7 p.m. and 6 a.m. unless using a recognized road or footpath, or is taking part in cultural, scientific or recreational activities;</li> <li>(c) erect any building or livestock enclosure, except where the same is allowed for a prescribed fee;</li> <li>(d) smoke, where smoking is by notice prohibited, or kindle, carry or throw down any fire, match or other lighted material;</li> <li>(e) de-pasture or allow any livestock to be therein;</li> <li>(f) clear, cultivate or break up land for cultivation or for any other purpose;</li> <li>(g) enter any part thereof which may be closed to any person;</li> </ul>

Law and policy	Section that criminalizes the community
	<p>(h) collect any honey or beeswax, or hang on any tree or elsewhere any honey barrel or other receptacle for the purpose of collecting any honey or beeswax, or enter therein for the purpose of collecting honey and beeswax, or be therein with any equipment designed for the purpose of collecting honey or beeswax;</p> <p>(i) construct any road or path;</p> <p>(j) set fire to, or assist any person to set fire to, any grass or undergrowth or any forest produce;</p> <p>(k) possess, bring or introduce any chain saw or logging tools or equipment;</p> <p>(l) damage, alter, shift, remove or interfere in any way whatsoever with any beacon, boundary mark, fence notice or notice board.</p> <p>(2) Any person who contravenes the provisions of subsection (1) of this section commits an offence and is liable on conviction to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding six months, or to both such fine and imprisonment.</p> <p>Local communities like the Ogiek live in the forest which implies that their daily existence in the forest is illegal since they are in the forest between 7 pm and 6 am without licenses.</p> <p>The prohibitions imposed mean that effectively, the Ogiek cannot legally build houses for shelter, keep livestock or cultivate their lands for food.</p> <p>Section 63 makes it illegal to enter any forest, collect honey from a forest or construct any road in a forest.</p>

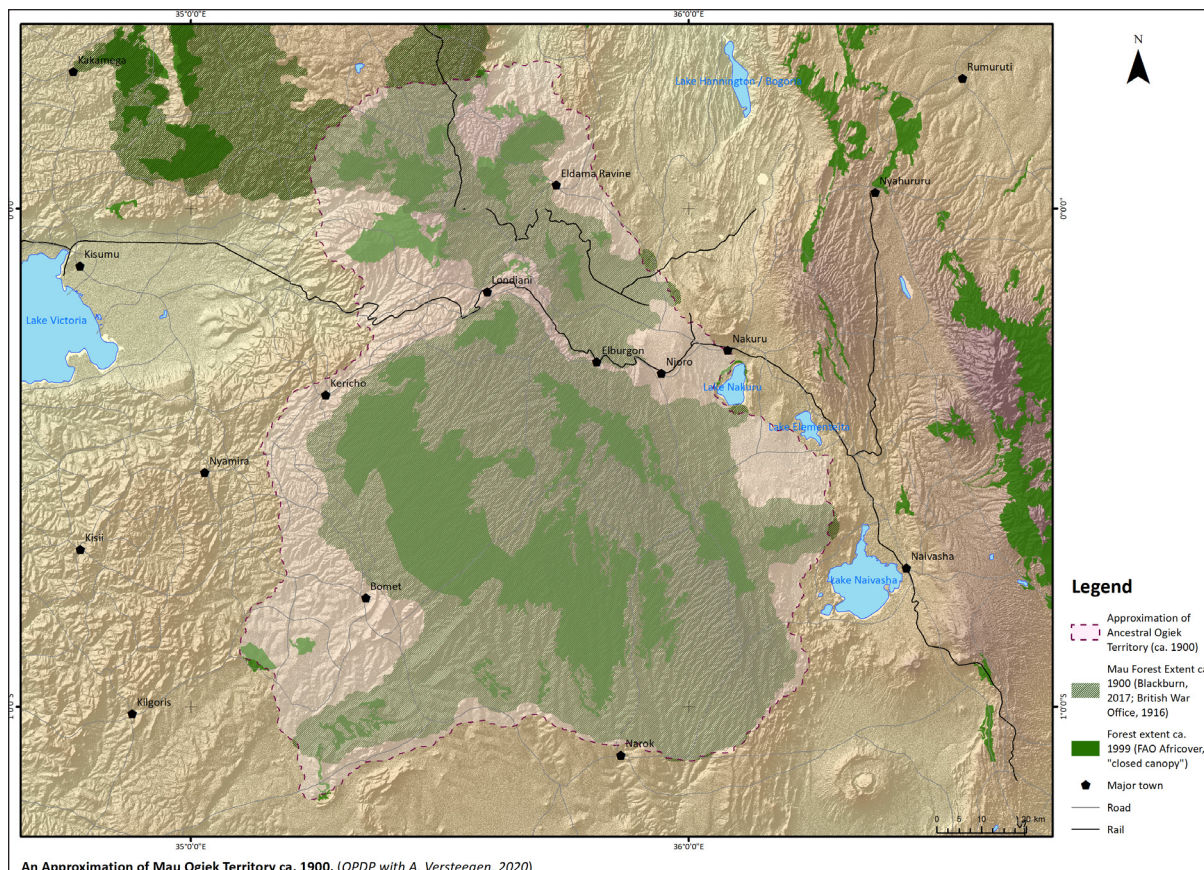


Law and policy	Section that criminalizes the community
Wildlife Management and Conservation Act of 2013	<p>Section 95. Any person who keeps or is found in possession of a wildlife trophy or deals in a wildlife trophy, or manufactures any item from a trophy without a permit issued under this Act or exempted in accordance with any other provision of this Act, commits an offence and shall be liable upon conviction to a fine of not less than one million shillings or imprisonment for a term of not less than five years or to both such imprisonment and fine.</p> <p>97. A person who engages in hunting for the purposes of subsistence commits an offence and shall be liable on conviction to a fine of not less than thirty thousand or imprisonment for a term of not less than six months or to both such fine and imprisonment.</p> <p>98. A person who engages in hunting for bush meat trade, or is in possession of or is dealing in any meat of any wildlife species, commits an offence and shall be liable on conviction to a fine of not less than two hundred thousand shillings or to imprisonment for a term not less than one year or to both such fine and imprisonment.</p> <p>102. (1) Any person who (a) enters or resides in a national park or reserve otherwise than under license, permit or in the course of his duty as Offences relating to compensation relating to failure to comply with a lawful order. Breach of protected area regulations of 1307 2013 Wildlife Conservation and Management Act;</p> <p>(b) sets fire to any vegetation in any wildlife protected area or allows any fire lighted by himself or his servants to enter a wildlife protected area; (c) carries out logging in a national park or reserve; (d) clears and cultivates any land in the national park or reserve; (e) willfully damages any object of geological, prehistoric, archaeological, historic, marine or other scientific interest within a wildlife protected area, or knowingly removes or attempts to remove any such object or any portion in the course of his duty thereof from wildlife protected areas;</p>

Law and policy	Section that criminalizes the community
	<p>(f) conveys into a protected area or is found within a protected area in possession of any firearm, ammunition, arrow, spear, snare, trap or similar device without authorization; (g) undertakes any extractive activity in marine protected areas; or,</p> <p>(h) undertakes any related activity in wildlife protected areas contrary to the provisions of this Act: commits an offence and is liable on conviction to a fine of not less than two hundred thousand shillings or to imprisonment of not less than two years or to both such fine and imprisonment.</p> <p>(2) No person shall enter a national park with any livestock for any purpose without authorization.</p>

## Criminalization of indigenous communities

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## The Ogiek community

The indigenous communities have remained victims of a legal system that refuses to protect their rights and in fact criminalizes their existence in their ancestral homes in the name of 'protected areas.'

About four months since Covid-19 was reported in Kenya, the government started evicting communities in the Eastern Mau forest. This was despite the moratorium on Covid-19 containment requiring people to stay and work from home.

From June through July and August 2020, land conflict ensued in Eastern Mau when the government started evicting<sup>4</sup> over a thousand members of the Ogiek and the Maasai communities who were living in the forest and using the forest for grazing in the Logoman and Kiptunga forest blocks.

These evictions happened in the cold and wet months of July and August 2020 when the communities didn't have anywhere to go, thus resorted to makeshift shelter by the roadside. The evictions and the conflicts caused massive human suffering with several murdered, dozens injured and hundreds displaced. Distressed families sought refuge in schools, trading centres, and at friends' or relatives' places.

In September 2020, members of the Ogiek Council of Elders started to engage with the government's Interior Coordination Department over the confusion in land claims that created conflicts. They called to halt the eviction with respect to human rights and implementation of the African Court on Humans and Peoples' Rights ruling of May 2017 that recognizes Ogiek rights. Their call, however, was ignored necessitating them to file a petition that stopped the evictions.

By September 2020, the whole Eastern Mau area experienced heavy para-military presence. In as much as their mission was to restore normalcy, they were excessive and alleged to be involved in the killing of two Ogiek young men (ages 16 and 22) in their homes.

Continued police brutality prompted Ogiek women and children to hold a protest action against police killings but they were denied audience by authorities, thus they addressed the media at Njoro trading centre.

There were also attacks on human and land rights defenders from the Ogiek community such as Sara Osas, a woman human right defender in Mau who was born in Kiptunga in 1970 in Elburgon Sub-county and a resident of Mariashoni. She narrated her ordeal in 2016, 2018 and 2020 when she was targeted for being a defender and faced losses when her house was burnt and her property lost. She was arrested and heavily fined due to her steadfastness in standing as a strong Ogiek woman. She had previously vied for a political seat at ward level in 2017 but lost.

She said, "In 2019 and 2020 we were moved from the forest. In 2020, inter-community conflicts between the Ogiek and their neighbours ensued that led to the death of seven members of the Ogiek community. I was arrested and accused of inciting the community to violence, but this was to intimidate me because of my work as a human right defender. I was remanded for two weeks. There was no evidence and I was released. I still feel I am pursued by the police. These problems persist since the matters of our land haven't been concluded. Ogiek are undermined and continue to be disposed by persons using fake documents." Land grabbers have been obtaining land documents which they use to defraud and dispose land from members of the community.

Osas recalls that these incidents took place during the Covid-19 pandemic and women bore the greatest burden of suffering with some being pregnant and in need. During evictions, it is women who are often left to care for the children, surviving in makeshift shelter. They go through difficult times looking for food to sustain their families.





Women from the Ogiek community led the march in protest over the killing of a 16-year-old boy by the police.

From the interviews and forums is the case of Mrs. Emily Chemutai Kipruto, a widow who is a victim of human right violations. She was arrested in 2020 along with her four children (3 boys and 1 girl) for defending her land right. Her children's education was affected as they were taken to Molo's children homes for about three months. She couldn't afford bail terms then her son, aged 16, committed suicide due to frustration. She has been consistent with her defense of her inherited land and was able to obtain a court order allowing her to live in the land. However, she is still being frustrated by the perpetrators and has not been receiving support from the administration and security agents. She has sought protection from security forces against the attacks and intimidation, but to no avail.

The homes of another land rights defender, Fredrick Kilagui Sumuni and his kins were invaded on March 12, 2020 at around 6 am. The situation escalated when close to 20 people in the company of three police officers were purported to be carrying out an eviction order. Other members of his family who are targeted along with him include Thomas Kibilo Sumuni, Dennis Kibilo, Wellington Kibilo Sumuni, and Agnes Sumuni Kibilo. They were targeted for supporting Fredrick Kilagui Salimu in deterring the actions of the land grabbers. They were shown letters of auction of his property. The invaders tried to take his eight cows

and 10 bags of maize from his granary as they wanted him and his family out of the farm. Commotion and chaos erupted when the police fired in the air to scare away Fredrick and the larger Kibilo family. This attracted the attention of the neighbours who came to rescue Fredrick and his family. The resistance was successful as the grabbers failed to take away the cows and maize when they left.

During the eviction, the grabbers said that they will kill Fredrick, thus he now lives in fear for his life and is on the run for his safety and that of his family too. He is a land defender and since 2014, has been fighting land grabbing by corrupt government officials who intimidate him through the use of police and court processes to take away his farm. Since the March 20 incident, Fredrick and members of his family have gone into hiding to avoid attacks and harassment. This was also to help him recover from distress he was undergoing from the continuous harassment, and to help him reach out to people who could support him in his situation.

Kuresoi Patrick, aged 45, is a resident of Ngongongeri but is presently displaced and living in Njoro town state after a series of arrests and intimidations. "I have nine court cases where I have been sued in about three counties totalling to about 27 cases. The cases range from the accusation of attempting to kill, creating disturbance, to stealing. I have won about all these cases but I'm still being pursued. The Directorate of Criminal Investigations is even ordering that I should not be arrested." He recalls and states that for the nine cases, he spent nine times in the police cells and had been remanded for about a month without justice in 2020. He further adds that in September 2020 and March 2021, he was arrested for arson and charged with burning of six houses causing a loss of 8 million KES and bail of 500 000 KES with similar surety. This cost was too heavy for him and he was bailed out by a friend.

From Kiptunga village, Dennis Kibilo narrates about the harassment of his community when the land they (Ogiek) were occupying was considered a wetland by the state which made them victims of eviction from time to time. "On one hand, we are displaced by the state from our ancestral forest, and on the other hand the only remaining arable land is up for grabs by perpetrators who work in cahoots with land officials, denying us of not only the means to live but also our existence as a collective group." Dennis describes the situation in the focus group discussions and disclosed a list of other members of the Ogiek suffering from eviction and criminalization. They live miserably and are in fear of their lives since they face frequent intimidation due to their role in defending the existence of the community in their ancestral lands and forest of Kiptunga. Kiptunga forest is a section of the eastern Mau Forest. Occupied by members of the Ogiek, it is considered a wetland and source of the Mara River that sustains





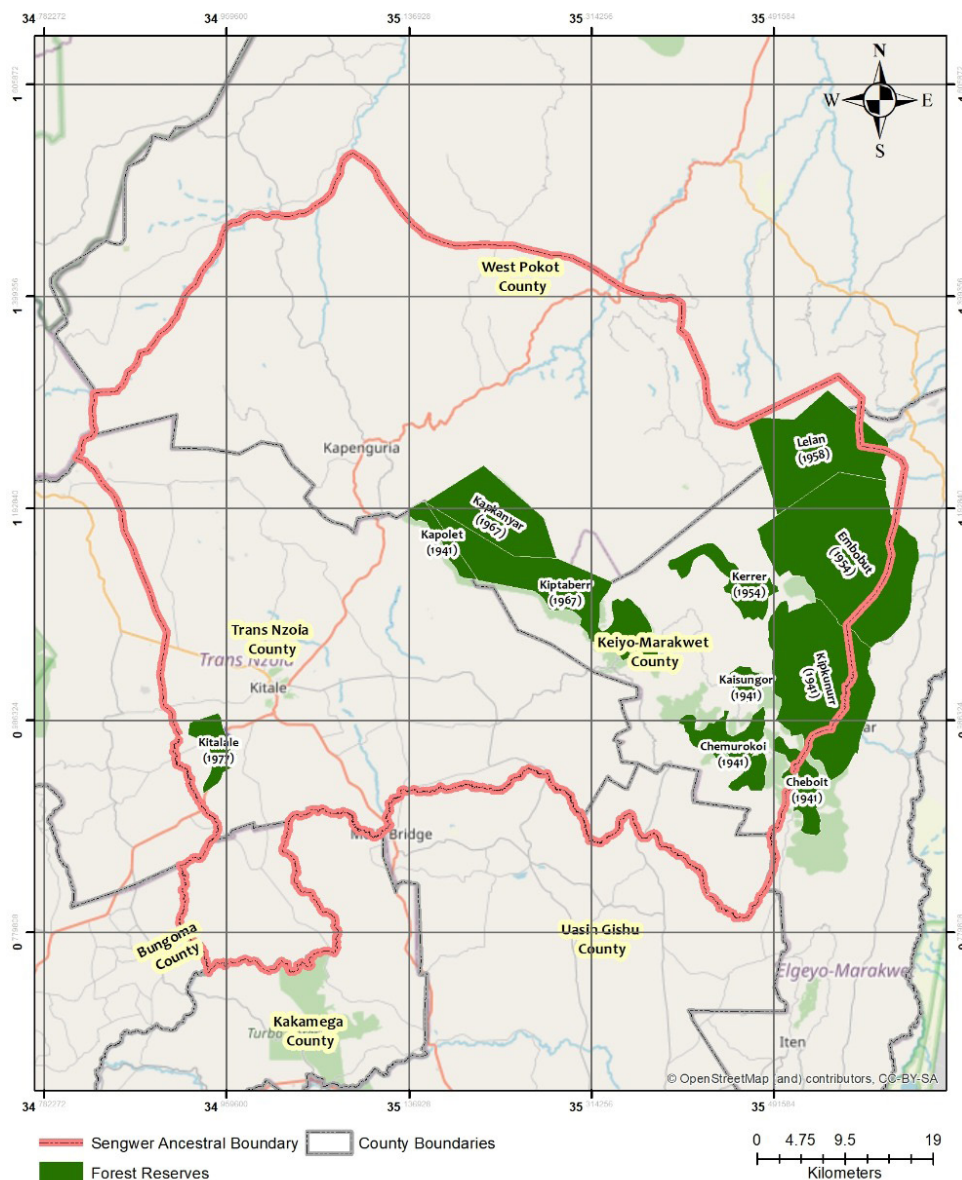
the Maasai Mara game reserve known for the popular wild beast migration that contributes significantly to the foreign revenue from tourism industry.

Ogiek leaders are being hunted down and those arrested are charged with incitement to violence and are fined heavily. All these were done to intimidate and force them to abandon their land rights activism.

A police station was established along with three other camps of paramilitary units at Nessuit (Korofio), Messipei, and Ndoswa with each having at least 30 officers assigned. In an area of about 4,700 sq. km. and a population of 15,000, there are around 200 police forces or one officer per 75 civilian, or a police-civilian ratio of 1:450.<sup>5</sup> These police officers and paramilitary continue to intimidate, harass and even extort money and confiscate the people's properties causing the latter to flee from their homes.

In early 2021, the government further imposed a maize ban affecting the areas occupied by the Ogiek. The ban was a measure to stop land conflicts since it was believed that maize plantations were used as hideouts by warring communities. This was pointless given the government machinery deployed in the area numbering hundreds of well-equipped officers. It was viewed merely as a way of intimidating and impoverishing the communities. This policy enforced by the stationed officers was causing human suffering with the lack of food particularly maize, which the people largely depended on. The Ogiek protested the policy by engaging media and legislators who raised the matter in parliament until the ban on maize farming was lifted.

## SENGWER ANCESTRAL LANDS GAZETTED AS FOREST RESERVES



### The Sengwer community

The Sengwer is an indigenous community of hunters and gatherers living in the Cherangany hills ecosystem which touches the three counties of Elgeyo Marakwet County, West Pokot County and Trans Nzoia County. Cherangany hills is one of the five major water towers critical for preservation of water and biodiversity. The Sengwer population is estimated at 33,000.

The criminalization of the Sengwer community started with the introduction of the Conservation Law that locked them out of the forest. In 1895, Kenya was made a British protectorate where all the forests were declared to be under British administration. Then the 1902 enactment of the East African Forestry Regulations and the 1954 Forest Policy gave the Forest Department power to close all forests.<sup>6</sup>

“Our forefathers started it with the 1930 Land Carter Commission and protested the killing of the Sengwer identity. During independence, the spirit for land redistribution continued but the Sengwer were lumped with other communities. We were not recognized as our lands changed from communal lands to farmlands and conservation areas,” the interviewee narrated. He said that they had to defend their rights and their identities with the forest since the violation of their rights is the violation of their forest and vice versa.

“They went to court to contest the eviction in 2013. In recent times (2020-2021), violations escalated and the Sengwer experienced the worst eviction in history. The evictions were brutal and there was no consultation. We could yield to eviction process, but the government singled out key leaders spearheading the Sengwer struggle. The government imposed curfew on our land. The media and civil society organizations were prevented from entering the Sengwer forest to amplify their issues. The best thing I could do was to procure a camera and I started documenting. I felt we had been closed in to be smoked out with the knowledge of the world.”

In 2018 the Sengwer were attacked and evicted<sup>7</sup> from their ancestral home in Embobut forest with the government terming it as a move aimed at conserving the forest. Makeshift houses by the local communities were burned by members of the Kenya Forest Service (KFS). In a span of four years (2018 to 2021), the Sengwer indigenous community was forcefully evicted from their ancestral home in the Embobut forest Kapkok glade, Elgeyo Marakwet County.

In the recent evictions<sup>8</sup> in 2020 and 2021, non-forest dwellers took advantage of the Sengwer eviction to further worsen the situation by attacking and stealing their cattle. The Sengwer have been evicted even during the time of COVID-19 restrictions (curfew and county lockdown) causing severe harm to the community.

Between January and May 2021, over 20 Sengwer houses were raided and burnt down by alleged bandits facilitated by powerful politicians. The human rights defenders from the Sengwer community were threatened and intimidated against speaking about these violations aside from restricting their movements in activism.

“Conservation funds are the reason for our criminalization. Our suffering is because of the European- funded water tower project,” one of the interviewees said.

In January 2018, a group of 40 KFS rangers approached Paul Kibor Kiptuga and shot him as he was preparing to attend a stakeholder’s meeting that was



organized by the European Union and the Kenya Forest Services to discuss the water tower project in their forest. He dodged the bullet, dashed into the bush and managed to attend the meeting where he spoke against the harassment and his prevention from participating in the crucial meeting.

Still in 2018, another Sengwer by the name of Robert Kiroich was shot dead and a host of others sustained injuries. A day after, the community wrote to the EU to suspend the funds for the water project and the funding was suspended which angered the government. The following year, another community member, Richard Kiroich was beaten and his leg broken with crude objects from which he suffered permanent disability. The government agencies' investigations on the attacks on members of the Sengwer community have been futile likened to sheep seeking justice in a hyena court.<sup>9</sup>

The period between 2018 and 2020 saw the Government of Kenya engage the Sengwer, urging them to withdraw their complaint with the EU through their appointed representatives so that the suspended funds can be unlocked. However, according to the community, the dialogues were characterized by deceit, intimidation, threats, and divide and rule tactics. The county government of Elgeyo Marakwet was also blamed, because as custodian of community land, it led in advancing the interests of the state instead of finding the cause as to why the European Union funds were suspended.

The government has continued to compel the Sengwer community to accept the suspended funds to be unlocked but it has not been able to guarantee security of tenure for the Sengwer of the Embobut forest in the context of implementing the conservation project in Embobut forest.

The Sengwer are being labeled as criminals and targeted to be flushed out through government operations, and as armed cattle rustlers\* in Embobut with the view that anyone found inside the forest is a criminal.<sup>10</sup> County Commissioner Dr. Ahmed Omar Ahmed on July 7, 2020 during committee meeting to discuss unlocking of EU suspended funds was overheard saying, "Embobut is an armory for criminals and bandits in Marakwet East." Criminalizing the residents is used to justify eviction of Sengwer community from their ancestral homes. The Sengwer of Embobut are found in the middle of the conflict between the Marakwet and the Pokot communities who often engage in raids and stock theft.

The Sengwer evictions are viewed as geared towards weakening their demands for the restitution of the ancestral lands in the Embobut forest. The Sengwer community has been in solidarity for the implementation of the ruling

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\* A cattle rustler is a person who raids another community and steals cattle. This has been a tradition by the pastoralists stealing cattle from one another. Many times the rustlers have been termed dangerous for using guns in their raids.



Sengwer huts before the evictions in 2014 at Kapkok Glade. (inset) Members of the Indigenous Sengwer community look into what remains from their huts after they were burned in July 2020. (Photos: *Elías Kĩmaiyo*)

concerning the Ogiek and participated in the 2018 -2019 Task Force hearings on the implementation of the Arusha ruling. Members of the Sengwer were also incorporated in the implementation when the mandate of the Task Force was expanded to address the issues of indigenous communities in Kenya.

In 2019, the Sengwer community staged a 400 km Walk for Justice<sup>1</sup> to ask for recognition of their ancestral land rights in the Embobut forest. The walk from Embobut to Nairobi was to seek audience with the Office of the President. The Sengwer were joined by the media and the Ogiek community in solidarity as they marched to Nairobi where they were also joined by a Senator for Elgeiyo Marakwet County. They were received by the officials of the Harambee house\* to whom they presented their issues including the call to halt eviction from their forest and full recognition of their land rights to Embobut in the larger Cherangany forest.

Burning of houses, looting and destruction of properties characterized the forceful eviction spanning four decades. These led to the loss of cultural heritage rendering the community socially dead because all the cultural ceremonies and rites are carried out and shrines are found inside the forest. Sengwer economy was simply destroyed together with the community autonomy, language and traditional lifestyle. Community members were forcefully evicted from their ancestral homes in Koropkwen, Kaptirbai and Kapkok glades in Embobut forest forcing them to live in caves, holes, in trees trunks and makeshift houses.

\* Harambee House is the building that houses the office of the Presidents of the Republic of Kenya in Nairobi.





A section of the Suswa Kedong fence with chain-link and a deep trench around it lock community and livestock. The investor uses all means to evict the Maasai Kedong from this land.

## The Kedong Maasai community

Kedong is the name of the Maasai clan in the Suswa area. They are a unique Maasai community in the intersection of Nakuru, Kajiado and Narok counties and they are in a situation which complicates their land claims in terms of administration. They occupy the stretch from the Lake Naivasha area Ol Karia within the Hell's Gate National Park, Mount Longonot and Mount Suswa conservancy. They are estimated at 30,000 people with about 4500 households and are claiming about 30,000 hectares of Kedong land to be restored to their ownership and control.

According to Kerenke Raphael, Kedong community leader, their struggle dates back to 1895 during the construction of the Kenya-Uganda Railway when his people were moved to pave way for the railway. The railway workers/caravan took the wives of the Maasai warriors who had gone grazing. Conflicts ensued and many Maasai warriors were killed by gun shots.

The Maasai of Ol Karia have a historical claim to the Hell's Gate National Park since its establishment in 1984. The establishment of the park led to their first relocation when the Kenya Wildlife Service (KWS) began leasing the land for geothermal power generation.<sup>12</sup> KWS which "owns" and manages Hell's Gate Park, leased part of the land to the state-owned Kenya Electricity Generating Company, KenGen, to undertake extractive processes for the generation of geothermal energy. The Maasai who are sandwiched between Mt. Longonot, Hells Gate Park, and Lake Naivasha, are being forced out again. The Ol Karia geothermal plant<sup>13</sup>



which is in its fourth phase of development is funded by the World Bank and supported by the UN Environmental Program. With each new phase, the Maasai were evicted from their homes without their Free, Prior and Informed Consent. Since 1980, more than four power stations have been built by the geothermal generating companies i.e. Ol Karia I - Ol Karia IV power stations.<sup>14</sup> To explore and extract geothermal energy meant that the Maasai of Ol-Karia had to move. They are forced to choose between resettlement or eviction when they resist to move asserting their claim of ancestral ownership.

The Maasai went to court and were awarded 4,000 acres but they continue to live in 12,000 acres. To access the park, one has to be cleared by the security forces, complicating the way the Narasha community interacts with the outside world.

Another conflict driven by geothermal exploration involves the Kedong Ranch which is historically claimed by the Maasai community when they acquired and hence managed by Kedong 32 Ranch Ltd. The company acquired 74,000 acres of ancestral Maasai land but the Maasai who are now regarded as squatters, still



Maasai sand harvesters mobilize against Kedong Company and the police in November 2020. (Photo: William Sipai.)

continue to occupy and use the land for grazing their animals. From time to time, the community is involved in conflicts with the company owners who are trying to eject them from the land but the community continues to fight for their land through court battles.

Kedong is a wildlife corridor between Mt. Suswa, a community conservancy and Mt. Longonot, a national park. The fencing of the Kedong areas completely interferes with the migration and interactions of the wildlife. The same land the Kedong are occupying is being leased for mega-projects like the Standard Gauge Railway\* (SGR) and the construction of Inland Dry Port<sup>15</sup> which further complicates the process of claiming their land. Human rights violations involve their displacement and limiting of human and livestock movement since the area is fenced with strong chain-link and surrounded by 10 feet deep trench. These trenches have not only killed their livestock and wildlife but resulted in the death of a 9-year-old girl who fell in the trench.

Previous efforts by the Kedong community through demonstrations have minimally and superficially addressed the matter. Women who have been part of the demonstrations suffered attacks and police brutality. Kedong key leaders were arrested in 2019 and 2020 for organizing the community and defending their land, leading to petitioning the state to drop the charges against Maasai human rights defenders.<sup>16</sup> They claim to be intimidated and trailed by unknown persons causing them to fear for their lives. In June 2021, members of the Kedong community approached the African Commission on Human and Peoples' Rights for redress given the nature of their issues whose path to justice was unduly prolonged in the Kenya justice system.

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\* The Standard Gauge Railway (SGR) is a flagship project of the Government of Kenya as a transport component aimed at delivering Vision 2030, making Kenya a middle-income country by 2030. The Kenya Standard Gauge Railway is a railway system that will connect Kenyan cities and link the country to the neighboring country. The SGR is intended to replace the old, inefficient meter-gauge railway system.





Members of the Indigenous Wayu Community looks on their sacred mountain. They have been denied access after the place was declared a reserved area.

## The Wayu community

The Wayu of Marsabit living in Northern Kenya and the Coastal Region are hunters and gatherers practicing minimal hunting. The Wayu are 3,761 in number occupy 9 counties including Marsabit, Isiolo, Tana River, Mandera, Garissa, Lamu, Kilifi, Taita Taveta and Kwale. The prohibition of hunting stated in the Wildlife Conservation and Management Act No. 47 of 2013 caused them to digress into farming, livestock and small businesses. The Wayu suffer discrimination from other communities including the Gabbra, Borana, Orma, Somalis, and other Coastal tribes who consider them inferior because of their hunting and gathering practices. Since hunting is outlawed, the Wayu community is left impoverished and they have to rely on trading centers doing charcoal burning and other income generating activities that they are not used to.

The Wayu people have been restricted from accessing their ancestral lands of Mount Marsabit (Borole) since the site's creation as a national reserve in 1949 for the protection of wildlife. The people currently own no land of their own and are



excluded from experiencing their cultural heritage. The community fears their disappearance, being absorbed by the dominant Borana community who has influence on their language and culture.

The Wayu community, like the rest of the hunter gatherer minorities, faces social and political discrimination in terms of access to education for their children, and representation and access to economic opportunities. Many young people drop out from school, get into early marriages and child labor. The exclusion from decision and policy making structures leaves them in precariously poor situations.

## Conclusions and recommendations

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The effect of criminalization is clear on the human right defenders, their families, as well as the community at large. Some of these effects have far reaching impact due to increased intimidation and attacks,<sup>17</sup> toll on families and relationships, financial and income losses, and the psychological stress and trauma. Communities also end up in inter-communal conflicts over unresolved land tenure issues like the case of the Ogiek of Mau and the neighboring communities over the occupation of the Mau Forest which is ancestral to the Ogiek but declared a national forest reserve by the government. These trends call for multi-faceted approaches by a multiplicity of stakeholders to ensure that all underlying factors that lead to land conflict in conservation areas are addressed both in law and practice.

It is also necessary to create and improve the capacity and operating environment of indigenous leaders for them to optimally work and address human rights issues in their communities without being targeted and intimidation.

It is evident that the indigenous minorities such as the Ogiek and Endorois in Kenya have been applying the regional and international legal mechanisms and using the African justice system to supplement their quest for a just society that respects their indigenous rights to their land and resources.

The constitution of Kenya article 2(5) provides that international laws form part of the Kenya law and are thereby required to conform to the standards of the transnational legal norms. Though international laws are taken to be part of the Kenyan law, there exist challenges in their implementation, especially those on the Indigenous Peoples, thereby bringing some hurdles in the full respect and protection of indigenous communities in their lands.

Some of the emerging issues with the indigenous communities in conservation that require immediate redress are:

Land tenure security. Indigenous communities have uncertain and contested tenure to their lands. They are at risk of land dispossession, displacement and eviction from actors ranging from state agents and private entities. The insecure tenure places the community in constant conflicts and legal battles between

the state and the concerned peoples, eventually build mistrust, and lead to criminalization of the communities and their leaders.

The government should affirm the rights of Indigenous Peoples to their territories, including in the conservation areas, by implementing national legislations to the letter like the Community Land Act, and ratifying international instruments such as the ILO 169, among others. Likewise, the government should uphold constitutionalism and rule of law by respecting and honoring the implementation of key decisions e.g. government task force recommendations and court rulings that affirm Indigenous Peoples' rights. For example, Mau Task Force 2009 asserted that Mau is ancestral to the Ogiek and the 2017 African Court ruling also recognized the Ogiek and their existence in the Mau Forest.

The donor community in conservation like the European Union delegation in Kenya, UNDP, and the World Bank should have implemented their safeguard policies to prevent harm and losses to the Indigenous Peoples. When funded projects fail to apply safeguards, Indigenous Peoples suffer the consequences. Policies should be geared towards empowering rather than disenfranchising them.

"Conservation is Indigenous Peoples' way of life. It is likened to fish in an aquatic environment. The simplest rule of protection of trees from logging is to equate this to cutting the umbilical cord between a mother and child," said Elias Kimaiyo.

The Indigenous Peoples in conservation areas including forest and game reserves need to be heard and be provided with access to their land and forest to secure their livelihood. Those with traditional ownership should be supported to actualize those rights and manage the landscape as they have done for decades.

The role of local communities in ensuring sustainable environment conservation<sup>18</sup> has, in recent times been emphasized. It is said that since local communities have long historical knowledge of forests and the resources therein, then they are the best protectors of the forest and therefore it is important for local communities to be involved in sustainable environment conservation.

Indigenous Peoples' culture and livelihoods should be recognized, embraced and protected given the significant role they play in the conservation of biodiversity. Restrictions and criminalization of indigenous communities' culture, livelihood, and interaction with their conserved land are a disservice to the global conservation efforts which identify communities' role as a significant contributor in nature conservation.

Indigenous Peoples' culture is known to support conservation and therefore there is a need to revise laws criminalizing their livelihoods like hunting and grazing and other cultural activities. Historically, hunter-gatherer communities have been known to hunt sustainably by taking measures such as sparing the young or pregnant animals to ensure continuity.<sup>19</sup> Indigenous communities should be consulted and involved in policy review for equity and preservation of rights.

The government should grant members of the indigenous communities in Kenya community land tenure rights and security according to their wishes to allow for their self-determination in terms of development and cultural preservations. The implementation of the Ogiek court ruling will allow them secure tenure rights and end the displacement of the Ogiek community from their land.

Government should consider members of the indigenous communities in the local leadership like in the creation of special constituency and recruitment of chiefs.

The situation of human rights defenders is worsening when the role of this group should be appreciated and supported. They need linkages with other human rights defenders and organizations for them to benefit from counselling and human rights trainings to support their communities.

There should be safe homes for the traumatized land right defenders to provide them enough recovery.

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