

AFRICAN UNION

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AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS
COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

IN THE MATTER OF
AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

v.

THE REPUBLIC OF KENYA

APPLICATION No. 006/2012

ORDER OF PROVISIONAL MEASURES



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The Court composed of: Sophia A.B. AKUFFO, President; Fatsah OUGUERGOUZ, Vice President; Bernard M. NGOEPE, Gérard NIYUNGEKO, Augustino S. L. RAMADHANI, Duncan TAMBALA, Elsie N. THOMPSON, Sylvain ORÉ, El Hadji GUISSSE and Kimelabalou ABA - Judges; and Robert ENO - Registrar,

In the matter of:

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

v.

THE REPUBLIC OF KENYA

Whereas,

1. The Court received, on the 12th of July 2012, an application by the African Commission on Human and Peoples' Rights (hereinafter referred to as 'the Applicant'), instituting proceedings against the Republic of Kenya (hereinafter referred to as 'the Respondent'), for alleged serious and massive violations of human rights guaranteed under the African Charter on Human and Peoples' Rights (hereinafter referred to as 'the Charter');
2. The application is brought in terms of Article 5(1)(a) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as 'the Protocol');
3. The Applicant, in its application, submits that, on 14 November 2009, it received, against the Respondent, a complaint, on behalf of the Ogiek Community of the Mau Forest asserting that:
 - They are an indigenous minority ethnic group comprising about 20,000 members, about 15,000 of whom inhabit the greater Mau Forest complex, a land area of about 400,000 hectares, straddling about seven administrative districts,

- In spite of the near universal acknowledgement of their dependence on the Mau Forest as a space for the exercise of their traditional livelihoods and as a source of their sacral identity, the Government of Kenya in October 2009, through the Kenya Forestry Service, issued thirty (30) days eviction notice to the Ogiek and other settlers of the Mau Forest, demanding that they move out of the Forest on the grounds that the forest constituted a reserved water catchment zone, and was in any event part and parcel of government land under Section 4 of the Government's Land Act.
4. The Applicant is concerned that the implementation of the eviction notices of the Government of Kenya will have far reaching implications on the political, social and economic survival of the Ogiek Community as their eviction will lead to the destruction of their means of survival, their livelihoods, culture, religion and identity, which amounts to serious and massive violations of the rights enshrined in Articles 1, 2, 4, 14, 17(2) and (3), 21 and 22 of the African Charter on Human and Peoples' Rights as envisaged under Article 58(1) of the same Charter.
5. The Applicant concludes the application by praying the Court to order the Respondent to:
- Halt the eviction of the Ogieks from the East Mau Forest and refrain from harassing, intimidating or interfering with the Community's traditional livelihoods,
 - Recognize the Ogieks' historic land, and issue the community with legal title that is preceded by consultative demarcation of the land by the Government and Ogiek Community, and for the Respondent to revise its laws to accommodate communal ownership of property; and
 - Pay compensation to the community for all the loss they have suffered through the loss of their property, development, natural resources and also freedom to practice their religion and culture.

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6. On the 13th of July 2012, the Registry acknowledged receipt of the application, in accordance with Rule 34(1) of the Rules of Court; and on the 25th of September 2012, the Registry forwarded copies of the application to the Respondent, in accordance with Rule 35(2)(a) of the Rules of Court, and invited it to indicate, within thirty (30) days of receipt of the application, the names and addresses of its representatives, in accordance with Rule 35(4)(a), and further, the Registry invited the Respondent to respond to the application within sixty (60) days, in accordance with Rule 37 of the Rules;
7. By letter dated the 25th of September 2012, the Registry informed the Chairperson of the African Union Commission, and through him, the Executive Council of the African Union, and all the other States Parties to the Protocol, of the filing of the application, in accordance with Rule 35(3) of the Rules;
8. In the application, the Applicant did not request the Court to order provisional measures; and, in view of an Order of the High Court of Kenya of 15 October 1997 in case number 635 of 1997 and the Provisional Measures issued by the Applicant on 23 November 2009, which are still in force, the Court decided at its 26th Ordinary Session held from 17–28 September 2012, not to order further provisional measures *suo motu*.
9. On 31 December 2012, the Registry received from the Applicant a request for provisional measures in the matter, the receipt of which was acknowledged by the Registry's letter to the Applicant, dated 2 January 2013 wherein the Applicant was advised that the request would be submitted to the Court for consideration during its upcoming 28th Ordinary Session scheduled for 4-15 March 2013.
10. In support of the request, the Applicant alleges that, by its letter dated 9 November 2012 and addressed to the Nakuru District Land Registrar, the Respondent has lifted the restrictions on land transactions for all parcels of land measuring five acres or less within the Mau Forest Complex, and this act has great potential to cause further irreparable damage to Ogieks and will serve to "perpetuate and expand the prejudice that is subject" of the Applicant's main application. Pending resolution of its application, therefore, the Applicant prays the Court to order that the Respondent should

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reinstate the ban on transactions of land in the Mau Forest Complex and to follow up on implementation in accordance with Rule 51(5).

11. The request is brought in terms of Article 27(2) of the Protocol and Rule 51 of the Rules of Court. Article 27(2) provides that " In cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary";
12. The Registry served the request on the Respondent by its letter dated 7 January 2013, inviting the Respondent to submit any comments it had regarding the Applicant's request within thirty (30) days of the receipt of the letter. The Respondent received this letter on 17 January 2013.
13. The said time limit expired on 16 February 2013, and Respondent has, to date, not responded to the request for provisional measures.
14. By letter dated 21 February 2013, the Registry informed the Respondent that the Court will, at the 28th Ordinary Session, consider the Applicant's request for provisional measures. Again, the Respondent has not, to date, responded.
15. In dealing with any application, the Court has to ascertain that it has jurisdiction under Articles 3 and 5 of the Protocol;
16. However, before ordering provisional measures, the Court need not satisfy itself that it has jurisdiction on the merits of the case, but simply needs to satisfy itself, *prima facie*, that it has jurisdiction;
17. The Court notes that Article 3(1) of the Protocol provides that "the jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation of the Charter, this Protocol and any other relevant human rights instrument ratified by the States concerned";
18. The Court further notes that the Respondent ratified the Charter, which came into force on the 21st of October 1986, on the 23rd of January 1992 and deposited its instruments of ratification on

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A signature in blue ink, possibly "EJ".
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10 February 1992; and further that Respondent ratified the Protocol, which came into force on the 25th of January 2004, on the 4th of February 2004 and deposited its instruments of ratification on 18 February 2005 and is therefore a party to both instruments;

19. The Court acknowledges that Article 5(1)(a) of the Protocol lists the Applicant as one of the entities entitled to submit cases to the Court, and takes judicial notice that the request before it is for provisional measures, which may be a consequence of the right to protection under the Charter, and which do not require prior consideration of the substantive issues arising from the application;

20. In the opinion of the Court, there exists a situation of extreme gravity and urgency, as well as a risk of irreparable harm to the Ogiek Community with regard to violation of their rights guaranteed under the Charter to, among others:

- Enjoyment of their cultural rights and protection of their traditional values under Article 2 and 17(2) and (3);
- Protection before the law under Article 3;
- Integrity of their persons under Article 4;
- The right to property under Article 14; and
- The right to economic, social and cultural development under Article 22;

21. In the light of the foregoing, the Court is satisfied that:

- *prima facie*, it has jurisdiction to deal with the application; and
- that this is a matter where provisional measures should be granted in terms of Article 27(2) of the Protocol;

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Now Therefore:

22. The Court finds that there is a situation of extreme gravity and urgency, as well as a risk of irreparable harm to the Ogiek of the Mau Forest and also prejudice to the substantive matter before the Court;
23. Consequently, the Court concludes that the circumstances require it to order, as a matter of urgency, provisional measures, in accordance with Article 27 (2) of the Protocol and Rule 51 of its Rules, to preserve the status *quo ante* pending the determination of the Court on the main application;
24. For the avoidance of doubt, the measures the Court will order will necessarily be provisional in nature and will not in any way prejudice the findings the Court might make on its jurisdiction, the admissibility of the application and the merits of the case;
25. For these reasons,

THE COURT unanimously grants the Applicant's request and hereby provisionally ORDERS that:

- 1) The Respondent immediately reinstates the restrictions it had imposed on land transactions in the Mau Forest Complex and refrains from any act or thing that would or might irreparably prejudice the main application before the Court, until the final determination of the said application.
- 2) The Respondent reports to the Court within a period of fifteen (15) days from the date of receipt hereof, on the measures taken to implement this Order.

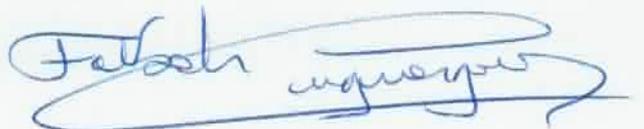
Done at Arusha, this fifteenth day of March in the year Two Thousand and Thirteen, in English and French, the English text being authoritative.

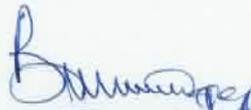
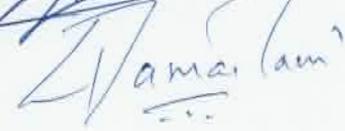
Signed:

Sophia A.B. AKUFFO, President



Fatsah OUGUERGOUZ, Vice-President



Bernard M. NGOEPE, Judge 
Gérard NIYUNGEKO, Judge 
Augustino S. L. RAMADHANI, Judge 
Duncan TAMBALA, Judge 
Elsie N. THOMPSON, Judge 
Sylvain ORÉ, Judge, 
El Hadji GUISSÉ, Judge 
Kimelabalou ABA, Judge; and 
Robert ENO, Registrar 