

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS (ACHPR)

V.

REPUBLIC OF KENYA

APPLICATION No. 006/2012

JUDGMENT ON REPARATIONS

A DECISION OF THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

Arusha, 23 June 2022: The African Court on Human and Peoples' Rights (the Court), today, delivered a Judgment on reparations in the case of *African Commission on Human and Peoples' Rights (ACHPR) v. Republic of Kenya*.

In its Application, the African Commission on Human and Peoples' Rights (hereinafter "the Applicant" or "the Commission") alleged that, in October 2009, the Ogiek, an indigenous minority ethnic group in the Republic of Kenya (hereinafter referred to as "the Respondent State"), had received a thirty (30) days eviction notice, issued by the Kenya Forestry Service, to leave the Mau Forest. The Commission filed the Application after receiving, on 14 November 2009, a Communication from the Centre for Minority Rights Development and Minority Rights Group International, both acting on behalf of the Ogiek of Mau Forest. In the Application, the Commission argued that the eviction notice failed to consider the importance of the Mau Forest for the survival of the Ogiek leading to violations of Articles 1, 2, 4, 8, 14, 17(2) and (3), 21, and 22 of the African Charter on Human and Peoples' Rights (hereinafter "the Charter").

The Court delivered its judgment on the merits of the Application on 26 May 2017. In its Judgment, the Court found that the Respondent State had violated the rights of the Ogiek under Articles 1, 2, 8, 14, 17(2) and (3), 21 and 22 of the Charter. It also decided that it would rule on reparations in a separate judgment and invited the Parties to file submissions on reparations.

In its judgment on reparations, the Court first had to consider three objections raised by the Respondent State. Firstly, the Respondent State argued that there was no basis for a claim for compensation for any violations before the year 1992, when it became party to the Charter. It further contended that “any claim for financial compensation can only be computed from 26 October 2009 and only in relation to the notice given to the Ogiek to vacate the South Western Mau Forest.” In disposing of this objection, the Court recalled that this issue was already resolved in its merits judgment when it confirmed its temporal jurisdiction in this Application. The Court also noted that the violations alleged by the Applicant, which the Court established in its judgment of 26 May 2017, remained unaddressed up to time it was considering reparations. Given the preceding, the Court held that comprehensive reparations needed to take into account not only events after 10 February 1992 but also events before that so long as the same could be connected to the harm suffered by the Ogiek in relation to the infringement of their rights as established by the Court. The Court thus found that there was nothing barring it from considering events that occurred prior to 10 February 1992 in determining the reparations due to the Ogiek.

Secondly, the Respondent State submitted that the Court should consider ordering an amicable settlement in line with Article 9 of the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples Rights (hereinafter “the Protocol”). The Applicant, however, opposed this submission and submitted that a genuine and efficient amicable settlement procedure was extremely doubtful. The Court after noting the Parties’ disparate positions on the possibility of an amicable settlement held that a key prerequisite for an amicable settlement is that the Parties must be willing to engage in the process. In the present Application, given the failure of an amicable settlement procedure at the merits stage, and also the Parties’ failure to agree on the procedure at the reparations stage, the Court held that the conditions for an amicable settlement were not satisfied. The Respondent State’s prayer was thus dismissed.

Thirdly, the Respondent State objected to the involvement of the Centre for Minority Rights Development (hereinafter “CEMIRIDE”), Minority Rights Group International (hereinafter “MRGI”) and the Ogiek People’s Development Programme (hereinafter “OPDP”) in the present proceedings on the basis that these organisations were not representative of the Ogiek. The Applicant, however, countered the Respondent State’s objection by highlighting that CEMIRIDE, MRGI and OPDP were all duly authorised to act on behalf of the Ogiek and that this fact had been duly communicated to the Respondent State’s agents. In disposing of this objection, the Court recalled that the question of the

representation of the Ogiek in this Application was not arising for the first time. At the merits stage, the Respondent State had raised an objection relating to the involvement of the “original complainants” before the Commission in the litigation before this Court. The Court held that the Applicant before it was the Commission rather than the “original complainants” that filed the case, on behalf of the Ogiek. The Court, therefore, held that since the “original complainants” were not appearing before it as Parties, it had proper Parties to enable it dispose of the Application.

In respect of reparations, the Court recalled that the wrongful acts generating the international responsibility of the Respondent State were the violation of Articles 1, 2, 8, 14, 17(2) and (3), 21 and 22 of the Charter. The Court then proceeded to consider the claims for both pecuniary reparations and non-pecuniary reparations.

The Court noted that the Applicant had claimed compensation for both material prejudice as well as moral prejudice. In respect of material prejudice, the Applicant prayed for compensation to be awarded to the Ogiek as a result of the human rights violations suffered by the Ogiek. The Applicant submitted that for compensation to the Ogiek to be proportional to the circumstances, it should cover all damage suffered as a result of the violations of their right to development and the loss of their property and natural resources. In a bid to substantiate its claim, the Applicant submitted a report from a community survey which attempted to quantify the loss suffered by the Ogiek. In response, the Respondent State submitted that the Applicant’s claim for pecuniary damages was fanciful, had no basis in law or practice, and if it were to be awarded alongside other forms of reparations, it would be manifestly disproportionate and would constitute unjust enrichment contrary to principles for reparations under international law. The Respondent State prayed the Court to dismiss the community survey report submitted by the Applicant.

The Court acknowledged that compensation is an important means for effecting reparations. However, it also highlighted that it is not enough for an Applicant to show that the Respondent State had violated a provision of the Charter, it is also necessary to prove the damage that the State was being required to indemnify. In respect of the community survey report submitted by the Applicant, the Court found that, and as conceded by the Applicant, that the report was marred by limitations. The Court thus held that it was not bound by the community survey report.

Nevertheless, having considered the Parties' submissions, as well as those by the *amici curiae* and independent experts, the Court, in the exercise of its equitable jurisdiction, ordered that the Respondent State must compensate the Ogiek with the sum of KES 57 850 000. (Fifty seven million, eight hundred and fifty thousand Kenya Shillings) for the material prejudice suffered. In making this finding, the Court affirmed its finding that the Respondent State, being responsible for the violation of the rights of the Ogiek, bore the responsibility for rectifying the consequences of its wrongful acts.

As for compensation for moral prejudice, the Applicant prayed for the payment of compensation for the moral prejudice as a result of violations related to the principle of non-discrimination (Article 2), the right to religion (Article 8), the right to culture (Article 17) and the right to development (Article 22) of the Charter. According to the Applicant, the Ogiek suffered routine discrimination at the hands of the Respondent State, including the non-recognition of their tribal or ethnic identity and their corresponding rights. Additionally, the Ogiek had not been able to practice their religion, including prayers and ceremonies intimately connected to the Mau Forest, to bury their dead in accordance with traditional spiritual rituals, and access sacred sites for initiation and other ceremonies. They also had been denied access to an integrated system of beliefs, values, norms, traditions and artefacts closely linked to the Mau Forest, and have had their right to development violated due to the Respondent State's failure to consult with or seek their consent about their shared cultural, economic, and social life within the Mau Forest.

The Respondent State disputed the Applicant's claims for moral prejudice. Specifically, it reiterated its objection to the admissibility of the compensation analysis report filed by the Applicant and averred that all the information contained in the report was incorrect and without any factual basis. In respect of the alleged violation of Article 2 of the Charter, the Respondent State averred that its Constitution of 2010 provided a solid legal super structure which seeks to address the structural and root causes of violations of Article 2 and that the Ogiek's principal grievance lay with the period before the 2010 Constitution was adopted. As for the violation of Article 8 of the Charter, the Respondent State submitted that the Court in its judgment on merits proposed reparation by means of allowing access to the Mau Forest and government interventions, including sensitization campaigns, collaboration towards maintenance of sites, waiving fees, which the Respondent State had demonstrated willingness to observe and it was currently only structuring the how to. As for the violation of Article 17 of the Charter, the Respondent State submitted that it has already addressed the issue of eviction and access to the Mau Forest. In relation to the violation of Article 21 of the Charter, the Respondent submitted that the Applicant had misinterpreted the Court's judgment on merits. According to the

Respondent State, “the Court did not determine that the Ogiek were the owners of Mau Forest ...” and that the Applicants had misapprehended the findings of the Court and placed emphasis on ownership rather than the right to access, use and occupation of the land.

The Court confirmed that moral prejudice includes both the suffering and distress caused to the direct victims and their families, and the impairment of values that are highly significant to them, as well as other changes of a non-pecuniary nature, in the living conditions of the victims or their family. In so far as the question of causation for moral prejudice is concerned, the Court held that the causal link between the wrongful act and the moral prejudice suffered, may result from the violation of a human right, as an automatic consequence, without any need to prove otherwise. In terms of quantification of damages for moral harm, the Court, reaffirmed that such a determination should be done equitably, taking into account the specific circumstances of each case.

In the present Application, the Court noted that while it was not possible to allocate a precise monetary value equivalent to the moral damage suffered by the Ogiek, nevertheless, it could award compensation that provided adequate reparation to the Ogiek. In determining reparations for moral prejudice, the Court confirmed that it takes into consideration the reasonable exercise of judicial discretion and bases its decision on the principles of equity, taking into account the specific circumstances of each case. In the exercise of its reasonable discretion in equity, the Court ordered the Respondent State to compensate the Ogiek with the sum of KES100 000 000 (One hundred million Kenyan Shillings) for the moral prejudice suffered.

The Court then considered the Applicant’s claims for non-pecuniary reparations covering the claims for restitution of Ogiek ancestral lands, recognition of the Ogiek as an indigenous people, the request for a public apology, the prayer for the erection of a public monument, the prayer for an order directing effective consultation and dialogue over matters affecting the Ogiek and the prayer for guarantees of non-repetition.

The Applicant, relying on the Court’s finding of a violation of Article 14 of the Charter, submitted that a natural consequence thereof is the restitution of the Ogiek ancestral lands. According to the Applicant, this violation can be remedied by the recovery of the ancestral lands through delimitation, demarcation and titling or otherwise clarification and protection of all such land. The Applicant submitted that all processes in this regard should

be undertaken within a timeframe of one (1) year of notification of the reparations order with the full participation of the Ogiek.

The Respondent State opposed the Applicant's prayer for restitution of Ogiek ancestral land by means of delimitation, demarcation and titling. The Respondent State reiterated its position that the Applicant had misinterpreted the findings of the Court in relation to the ownership of the Ogiek ancestral land. It emphasised that the Court's judgment on merits did not pronounce that the Ogiek were/are the owners of the Mau Forest. According to the Respondent State, the Applicant had erroneously emphasised ownership rather than the rights of access, use and occupation which the Court granted the Ogiek in its judgment on merits. The Respondent State submitted that ownership is not a *sine qua non* to the utilisation of land and any process of demarcating forests and titling for indigenous communities would set a dangerous precedent across the world.

After conducting a survey of the applicable international law, the Court held that, in international law, granting indigenous people privileges such as mere access to land is inadequate to protect their rights to land. What is required is to legally and securely recognise their collective title to the land in order to guarantee their use and enjoyment of the same. The Court also emphasised that given the unique situation and way of life of indigenous people, it is important to conceptualise and understand the distinctive dimensions in which their rights to property like land can be manifested. According to the Court, ownership of land for indigenous people, therefore, is not necessarily the same as other forms of State ownership such as the possession of a fee simple title. At the same time, however, ownership, even for indigenous people, entails the right to control access to indigenous lands. The Court emphasised the role of duty bearers, like the Respondent State, to attune their legal systems to accommodate indigenous peoples' rights to property such as land. While reiterating the Ogiek's right to land that they have occupied and used over the years in the Mau Forest, the Court held that in order to make the protection of the Ogiek's right to property, in this case land, meaningful, there must be more than an abstract or juridical recognition of the right to property. For this reason, therefore, the Court held that the physical delineation, demarcation and titling of Ogiek ancestral land is important. The Court thus held that the Respondent State should undertake an exercise of delimitation, demarcation and titling in order to protect the Ogiek's right to property, which in this case revolves around their occupation, use and enjoyment of the Mau Forest and its various resources.

The Court further ordered that, where concessions and/or leases have been granted over Ogiek ancestral land to non-Ogiek and other private individuals or corporations, the Respondent State must commence dialogue and consultations between the Ogiek and/or

their representatives and the other concerned parties for purposes of reaching an agreement on whether or not they can be allowed to continue their operations by way of lease and/or royalty and benefit sharing with the Ogiek in line with the Community Land Act. The Court also ordered that in cases where land was allocated to non-Ogiek and where it proves impossible to reach a compromise, the Respondent State must either compensate the concerned third parties and return the land to the Ogiek or agree on appropriate compensation for the Ogiek.

On the recognition of the Ogiek, the Court recalled that in its judgment on the merits, it had already recognised the Ogiek as an indigenous population that is part of the Kenyan people having a particular status and deserving special protection deriving from their vulnerability. Following from this recognition, the Court, therefore, ordered that the Respondent State must take all necessary legislative, administrative and other measures to guarantee the full recognition of the Ogiek as an indigenous people of Kenya in an effective manner, including but not limited to according full recognition and protection to the Ogiek language and Ogiek cultural and religious practices within twelve (12) months of notification of this judgment.

In respect of the Applicant's prayer for a public apology, the Court reaffirmed that a judgment can constitute a sufficient form of reparation and also a sufficient measure of satisfaction. In the instant case, the Court held that its judgments, both on the merits and reparations, are a sufficient measure of satisfaction and that, therefore, it was not necessary for the Respondent State to issue a public apology. The Applicant's prayer was thus dismissed.

As for the prayer for the erection of a public monument, the Court confirmed that commemoration of the victims of human rights violations by way of erecting a memorial or even by way of other acts of public acknowledgment of the violations, is an accepted form of reparations in international law. It, however, reiterated the fact that a judgment of itself can constitute sufficient reparation. Having considered all the circumstances of the case, especially the other orders on reparations that the Court made, it held that it was not necessary for the Respondent State to erect a monument for the commemoration of the violation of the rights of the Ogiek. Resultantly, the Court dismissed the Applicant's prayer.

On the prayer for effective consultation and dialogue, the Court recalled that in its judgment on merits it found that the Ogiek had been continuously evicted from the Mau Forest without being effectively consulted. As the Court established, the evictions had adversely impacted on the Ogiek's economic, social, and cultural development. The Court

also found that the Ogiek had not been actively involved in developing and determining health, housing and other economic and social programmes affecting them. Given this context, the Court confirmed that it is a basic requirement of international human rights law that indigenous peoples, like the Ogiek, be consulted in all decisions and actions that affect their lives. The Court thus granted the Applicant's prayer and ordered that the Respondent State must take all necessary legislative, administrative or other measures to recognise, respect and protect the right of the Ogiek to be effectively consulted, in accordance with their tradition/customs, and/or with the right to give or withhold their free, prior and informed consent, with regards to development, conservation or investment projects on Ogiek ancestral land and to implement measures that would minimise the damaging effects of such projects on the survival of the Ogiek.

In respect of the prayer for guarantees of non-repetition, the Court ordered the Respondent State to adopt legislative, administrative and/or any other measures to avoid a recurrence of the violations established by the Court, including, *inter alia*, by the restitution of the Ogiek ancestral lands, the recognition of the Ogiek as an indigenous people, and the establishment of mechanisms/frameworks for consultation and dialogue with the Ogiek on all matters affecting them.

Having pronounced itself on all the pecuniary and non-pecuniary reparations, the Court then considered the question of the establishment of a development fund for the Ogiek. The Court began by noting that the population of the Ogiek in the Mau Forest was approximately forty thousand (40 000) and that they had suffered violations over a substantial period of time. It thus took the view that the establishment of a fund could be one mechanism for ensuring that all the Ogiek benefit from the outcome of the litigation. The Court thus ordered the Respondent State to establish a community development fund for the Ogiek which should be a repository of all the funds ordered as reparations in this case. It was further ordered that the community development fund should be used to support projects for the benefit of the Ogiek in the areas of health, education, food security, natural resource management and any other causes beneficial to the well-being of the Ogiek as determined from time to time by the committee managing the fund in consultation with the Ogiek. The Respondent State was thus ordered to take the necessary administrative, legislative and any other measures to establish this Fund within twelve (12) months of the notification of this judgment.

In terms of administration of the community development fund, the Respondent State was ordered to coordinate the process of constituting a committee that would oversee the management of the fund. The Court directed that this Committee must have adequate representation from the Ogiek with such representatives being chosen by the Ogiek themselves.

The Court also ordered the Respondent State to submit, within twelve (12) months from the date of notification of this Judgment, a report on the status of implementation of all the Orders. The Court also held that it would conduct a hearing to receive submissions from the Parties on the status of implementation of the orders made in this judgment on a date to be appointed by the Court twelve (12) months from the date of this judgment.

As for costs, the Court ordered each party to bear its own costs.

Justice Blaise Tchikaya appended a Separate Opinion to the Judgment.

Further Information:

Further information about this case, including the full text of the decision of the African Court, may be found on the website at: <https://www.african-court.org/cpmt/details-case/0062012>

For any other queries, please contact the Registry by email: registrar@african-court.org

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