

ARIZONA JOURNAL OF ENVIRONMENTAL LAW & POLICY

VOLUME 14

SPRING 2024

SPECIAL ISSUE

SKewed CONSERVATION POLICY AND THE STATE VALIDATION OF LAND DISPOSSESSION OF INDIGENOUS PEOPLES IN KENYA

Washington Barasa Kiptoo^{1*}

Abstract

Protected Areas are an existential threat to the existence and survival of the Indigenous Peoples of Kenya. From the colonial era to the present, Indigenous Peoples have had to endure a century of land and natural resources dispossession despite regime changes. It is agonizing to note that some areas currently occupied by indigenous peoples have been registered as government lands. Thus, the indigenous occupiers become squatters in lands they inherited from their ancestors and are possible subjects of violent evictions by Kenya Forest Service Rangers and Kenya Wildlife Service, who are the agents of government with the mandate to enforce conservation measures.

Indigenous lands registered as protected areas were not subjected to free prior and informed consent (FPIC) nor were the Indigenous owners compensated as required by law. This note will demonstrate how some indigenous communities, through support from human rights lawyers and NGOs, have successfully litigated against such injustices. Still, the government of Kenya has remained unresponsive in implementing recommendations and judgments calling for the restitution of illegal land deprivation.

This paper documents instances in which protected areas, created in lands overlapping with unceded Indigenous Peoples' territories and forming part of ongoing and previous court litigations, have been targeted by the government to implement mega infrastructural projects and private ecotourism. This paper thus brings to the fore the irony of the government of Kenya using conservation to justify the deprivation and discrimination of Indigenous Peoples' right to property, development, and equality before the law.

^{1*} Barasa W Kiptoo is an SJD candidate at the University of Arizona Indigenous Peoples Law and Policy Program. He is an advocate admitted to the Bar in Kenya with an accomplished background in indigenous human rights. He's from the Endorois people and started his legal career as a legal assistant with the Centre for Minority Rights Group International (MRG), working on the Endorois Community v. the Republic of Kenya (2010) case. Kiptoo also worked as a Senior Human Rights Officer for the Kenya National Commission on Human Rights. While at the University of Arizona, Kiptoo has been assisting in research for the office of the United Nations Special Rapporteur on the Rights of Indigenous Peoples.

INTRODUCTION	2
I. POOR LAND GOVERNANCE AS AN AID TO THE EXPROPRIATION OF INDIGENOUS PEOPLES TERRITORIES.	5
A. PUBLIC VERSUS CUSTOMARY TENURE.	5
B. ERODING CUSTOMARY TENURE.	5
II. THE HISTORY OF PAST AND ONGOING DEPRIVATION OF INDIGENOUS LANDS IN KENYA.	6
III. STATE IMPUNITY IN LAND ADMINISTRATION.	7
IV. THE DOUBLE-STANDARDS IN PROTECTED AREAS AND THE CONSERVATION ENTERPRISE.	8
V. OTHER MEGA INFRASTRUCTURAL PROJECTS IN THE PROTECTED AREAS	9
A. Lamu Port South Sudan Ethiopia Transport Corridor – LAPSSSET Project	9
B. THE ITARE DAM IN MAU FOREST	10
CONCLUSION	10

INTRODUCTION

Indigenous Peoples are not opposed to conservation. On the contrary, they have been recognized as experts in preserving flora and fauna by utilizing their indigenous traditional knowledge² and practices passed down through generations. Scholars and scientists have equally affirmed the relevance and utility of this indigenous knowledge with respect to achieving conservation goals, while recognizing that 80% of the world's remaining biodiversity is found on Indigenous Peoples' land and territories.³ However, conservation efforts modeled on "protected areas"⁴ or "fortress conservation"⁵ have had detrimental impacts on the human rights and freedoms of Indigenous Peoples worldwide.⁶ Governments, especially in Sub-Saharan Africa, with the support of multinational conservation agencies, such as the World Wildlife Fund for

² International Council of Science, *Science and Tradition* (Mar. 2002), <https://council.science/wp-content/uploads/2017/05/Science-traditional-knowledge.pdf>. The International Council of Science (ICSU) characterizes traditional knowledge (TK) as “a cumulative body of knowledge, know-how, practices, and representations maintained and developed by people with extended histories of interaction with the natural environment. These sophisticated understandings, interpretations, and meanings are part and parcel of a cultural complex encompassing language, naming and classification systems, resource use practices, ritual, spirituality, and worldview.”

³ Anna Fleck, *Indigenous Communities Protect 80% of All Biodiversity*, Statista (May 2022), <https://www.statista.com/chart/27805/indigenous-communities-protect-biodiversity/>.

⁴ UN. Human Rights Council Special Rapporteur on Rights of Indigenous Peoples Report by Special Rapporteur Victoria Tauli-Corpuz (21 July 2016) UN Doc A/HRC/33/42/Add.1. According to the United Nations Special Rapporteur on the Rights of Indigenous Peoples Annual Report of 2016 (A/71/229) to the General Assembly Victoria Tauli-Corpuz defined – Protected Area – is a geographically defined area that is designated or regulated and managed to achieve specific conservation objectives. One Protected area consists of many different conservation modalities, among them national parks and forests, wildlife refuges, marine areas, private and non-governmental organization (NGO)-governed preserves, indigenous peoples' protected areas, community lands, and other areas where the protection of nature and the practice of sustainable livelihoods foster ecosystem integrity.

⁵ "Fortress Conservation" is the mistaken belief that successful conservation outcomes require "pristine wilderness" free from human inhabitants. *See: Sage encyclopedia of Environment and society (Robbins 2007)*.

⁶ Amnesty International, *Protected Areas and Indigenous Peoples' Rights*. 2 (2022), <https://www.amnesty.org/en/wp-content/uploads/2022/06/IOR4054812022ENGLISH.pdf>.

Summer 2024

Nature (WWF), among others, continue to implement such programs, leading to violence and devastation in the lands and territories of Indigenous Peoples.

The endemic nature of the human rights violations that Indigenous Peoples have been subjected to, as a result of protected areas, continues to elucidate concerns within United Nations Human Rights Mechanisms, National Human Rights Institutions, Judicial mechanisms, and even areas of research within academia⁷.

In 2022, The United Nations Special Rapporteur on the Rights of Indigenous Peoples report to the General Assembly notes,

Indigenous Peoples across the globe have overall not seen a concrete improvement in the realization of their rights in the context of conservation initiatives since the issuance of the relevant thematic report by the previous mandate holder in 2016. The Special Rapporteur continues to receive a high number of communications with allegations of alarming violations in Protected Areas. Indigenous Peoples are denied their rights to land and resources, self-determination, autonomy, and cultural heritage., and suffer from forced eviction, killings, physical violence, and abusive prosecution. Such violations have had particularly negative impacts on women, and girls, who are primarily responsible for gathering food, fuel, water, and medicine and are therefore exposed to risks of sexual violence at the hands of militarized security forces, park rangers, and law enforcement. The ability of Indigenous Peoples to maintain and transmit their knowledge is also impacted by limited access to natural resources and sacred sites.⁸

The United Nations Special Rapporteur on Human Rights and Environment, in the 2021 policy brief, traces the shortcomings of fortress conservation to the failure to acknowledge Indigenous Peoples and other rural right holders who successfully steward vast portions of the world's biodiversity. He argues that Indigenous Peoples are a vital conservation partners whose human, land, and resources rights must be recognized and respected if biodiversity loss is to be stopped and reversed⁹. The Western concept of conservation, which is premised on wilderness

⁷ See Indigenous Law & Policy, *The Initiative*, https://indigenous.arizona.edu/about/initiave_ The Indigenous Peoples Law and Policy of the University of Arizona, for instance, began a robust study on Indigenous Rights and Protected Area Initiative as a follow-up on the Implementation of the Recommendations formulated by the former and current Special Rapporteurs on the Rights of Indigenous Peoples to among other objectives raise public awareness and further provide technical and legal guidance to Indigenous Peoples and NGOs affected by protected areas and conservations.

⁸ U.N. G.A. Report by Special Rapporteur José Francisco Cali Tzay, 77th Sess., UN. Doc A/77/238 at p7 (19 July 2022).

⁹ Boyd, D.R & Keene, S, *Human Rights Based Approaches to Conserving Biodiversity: Equitably Effective and Imperative*,(2021, August). <https://www.ohchr.org/sites/default/files/Documents/Issues/Environment/SREnvironment/policy-briefing-1.pdf>.

conservation, has brought immense suffering to Indigenous Peoples, such as forced relocation, impoverishment, human rights abuse, and a breakdown of traditional systems of resource management¹⁰. The United Nations Committee on the Elimination of Racial Discrimination, for example, has articulated rules that apply to the establishment of 'protected areas' in the territories of Indigenous Peoples. "No decision directly relating to the rights and interests of Indigenous Peoples can be taken without their informed consent"¹¹ in relation to both the establishment of national parks and how the management of those parks is carried out effectively

The Convention on Biological Diversity with the global support of 196 state parties focuses on Indigenous Peoples' rights concerning protected areas specifically Article 8 (j) refers to the knowledge, innovations, and practices of Indigenous Peoples for the conservation and customary use of biological diversity. Article 10 (c) provides that state parties shall protect and encourage indigenous peoples' customary use of biological resources in accordance with traditional cultural practices¹². This sentiment was echoed by the Kunming-Montreal Global Biodiversity Framework, adopted during COP 15, in which goal C states, in part, that:

Traditional Knowledge associated with genetic resources is appropriately protected thereby contributing to the conservation and sustainable use of biodiversity in accordance with internationally agreed access and benefit-sharing instruments.¹³

Kenya presents an important example of how African countries must balance conservation efforts with the protection of the rights of Indigenous peoples. This paper aims to demonstrate how a weak and multiple land tenure system has compounded the shortcomings of fortress conservation with respect to the enjoyment of rights by Indigenous Peoples. Additionally, the paper will examine Kenya's commitment to climate action in light of ongoing global initiatives. The paper will highlight situations where large-scale infrastructure projects have overshadowed environmental protection inside protected areas. Such instances put to the test Kenya's dedication to implementing its biodiversity protection and climate action commitments. This paper is, thus, a contribution to the ongoing discourse about how to balance the need for environmental conservation without prejudicing the protection of Indigenous Peoples' rights.

¹⁰ Colchester, M. (1996). *Beyond 'Participation': Indigenous Peoples, Biodiversity Conservation, and Protected Areas Management*. Unasylva -No. 186 Forest-dependent people.

¹¹ United Nations Convention on Elimination of Racial Discrimination (2002) Concluding Observation of the Committee of Racial Discrimination: Botswana. 23/08/2002.

¹² See. Articles 8 (j) and 10 (c) of the Convention of Biological Diversity.

¹³ Convention on Biological Diversity, *COP15: Nations Adopt Four Goals, 23 Targets for 2023 in Landmark UN Biodiversity Agreement (Dec. 2022)* <https://www.cbd.int/article/cop15-cbd-press-release-final-19dec2022>.

I. Poor Land Governance as an Aid to the Expropriation of Indigenous Peoples Territories.

A. Public versus Customary Tenure.

Kenya, like many African nations, is home to various tribal and ethnic groups that have historically migrated across the country due to inter-clan conflicts, search for grazing fields, and diseases. After gaining independence, certain ethnic groups have remained autochthonous and endeavored to preserve their respective cultures. These groups self-identify as indigenous peoples in accordance with the United Nations Universal Declaration on the Rights of Indigenous Peoples (UNDRIP)¹⁴ and ILO Convention 169.¹⁵ The management and use of land within Indigenous territories was, and still is, primarily communal in nature. Societies are able, at different levels of organization, to direct the use of resources to the needs of the present without compromising the ontological demands of the past and the heritage of the future generation. Okoth Ogendo describes such a tenure system as the commons.¹⁶ He argues that commons are not constituted merely by territoriality but by a social hierarchy, organized in the form of an inverted pyramid with the tip representing the family, the middle representing the clan and lineage, and the base representing the community.¹⁷ There are decision-making levels designed to respond to issues regarding the allocation, use, and management of resources within the commons based on scale, need, function, and process. Decision-making is based on common values and principles. The base of the pyramid requires responsibility for the protection of the territory of the group, a function that does not entail appropriation of the radical title to the commons. The location of the radical title always was and remains in all members of the group as a corporate entity.

The above view of the commons does not conform to the Western perspective and understanding of commons which dictates firstly that property rights must derive if not directly but ultimately from a sovereign. Secondly, the modern individualized tenure system continues to hold the view that indigenous communities do not have a legal persona and that a tenure system that accords access based on inclusivity or collectivity cannot also define boundaries and exclude others. To put it into context, Indigenous or customary tenure is deemed open to all and thus inferior when compared with individual (modern) tenure.

B. Eroding Customary Tenure.

In 1901, the East Africa (Lands) Order in Council was passed. It vested Crown Lands in the East Africa Protectorate (Kenya) in the Commissioner and Consul-General to be held in trust of the Majesty.¹⁸ The Commissioner was empowered to make grants or leases on such terms and

¹⁴ Article 33 of UNDRIP.

¹⁵ Article 1 (2).

¹⁶ Okoth-Ogendo. *The Tragic African Commons; A Century of Expropriation, Suppression and Subversion*. (2003). 1 UNIV. Nairobi L.J.

¹⁷ *Ibid.*

¹⁸ E.S. Atieno-Odhiambo, *The Colonial Government, the Settlers, and the "Trust" Principle in Kenya*, *Transafrican Journal of History* Vol.2. p. 94-113 (1972).

conditions as he might think fit. In 1902, the Crown Land Ordinance redefined Crown Lands to include lands occupied by native tribes and land reserves. It was made clear that Africans had no right to alienate any land whether they occupied it, or it was reserved for their use. In 1920, Kenya was made a colony making the British the sole allocator of land in Kenya. This system, created by the colonial government after Kenya gained independence in 1963, still exists today albeit with minimal amendments.¹⁹

II. The History of Past and Ongoing Deprivation of Indigenous Lands in Kenya.

In summary, the colonial administration in Kenya failed to understand the African customary land tenure systems. As such, the incidences of colonialism date back, generally, to the scramble for Africa via the Berlin conference of 1885. What we experience in the present is the continuation of a tragic history of land deprivation and dispossession²⁰. During independence, Kenyan communities that had embraced Western education and Christianity were deemed capable and better equipped to run the government. It was this group of post-independence African elites that subsequently took charge and redistributed land among the members of their communities. However, indigenous peoples' lands, mainly forested or arid, were viewed as unproductive and considered wastelands. These lands were held in trusteeship arrangements and remained unregistered, making them available for gazettelement as public lands inform of conservancies or forests.²¹

Since then, Kenya has had a multitude of overlapping and conflicting cross-sectoral laws. This continues to be experienced despite the passing of the Land Policy 2019. The statutory laws failed to recognize customary land rights, and where customary land rights were impliedly provided such provisions were not observed. Customary land and resource rights were eliminated in reserves with no compensation or FPIC. These factors contributed to tenure insecurity and the rising conflicts over land and resources. The enactment of the Community Land Act in 2016 is experiencing a deliberate inertia from the National government, who have yet to set aside funds to commission the process of registering all community lands. The National Land Commission, established in 2010, has found it difficult to address existing historical land cases. In her article on Land, Liz Wily notes:

Kenya's Community Land Act, 2016, as the framework through which customary holdings are to be identified and registered. A main conclusion is that while Kenya's law is positive and even cutting-edge in respects, legal loopholes place communities at risk of their lands not being as secure as promised ahead of formalization, and at risk of losing some of their valuable lands during the formalization process. This is mainly due to overlapping claims by national and local government authorities. Political will

¹⁹ Report of the Commission of Inquiry into Land Law System of Kenya. (2002) also termed as the Njonjo Commission Report.

²⁰ Tom O. Ojienda, *Principles of Conveyancing in Kenya: A Practical Approach*. 41 (2007). https://ayerangagodfreyblog.files.wordpress.com/2016/07/ojienda_book-conveyancing-principles.pdf.

²¹ Francis Kariuki & Raphael Ngetich, *Land Grabbing, Tenure Security and Livelihoods in Kenya*, *Africa Journal of Legal Studies* (2016), https://brill.com/view/journals/ajls/9/2/article-p79_1.xml?language=en.

Summer 2024

to apply the law is also weak. The truism that the law is never enough on its own to secure social change is illustrated.²²

III. State Impunity in Land Administration.

To date, Indigenous Peoples in Kenya are facing the ongoing expropriation of their lands and territories. Some groups, such as the Ogiek of Mau and Mt. Elgon Forests, Sengwer of Embobut Forest, and the Endorois of Lake Bogoria, have experienced forced evictions from land gazetted as *protected areas*. Despite winning significant cases at the African Commission on Human and Peoples Rights²³, and the African Court on Human and Peoples Rights,²⁴ the Endorois and the Ogiek have not received restitution for their land.

Claridge Lucy the Lead Counsel in the above cases while summarizing the Ogiek case judgment posits:

In a case brought by the indigenous Ogiek of Kenya, the court stated that Ogiek could not be held responsible for the depletion of the Mau Forest and that preservation of the ecosystem could not justify their eviction from or the denial of access to their land. Although Kenyan institutions have still failed to remedy Ogiek rights, the Ogiek have identified a pathway for the government of Kenya to follow to reconstitute Ogiek land following principles of conservation and symbolizing the central role that Indigenous Forest dwellers can and should play in forest management.²⁵

In Kenya, land is categorized as either public, private, or community land²⁶. Private and public lands are titled or demarcated, but community land is unregistered and held by county governments in a trust relationship with the indigenous communities²⁷. Indigenous Peoples are calling for community lands to be granted collective community titles and trusteeship arrangements to be abolished. Unfortunately, Indigenous Peoples' lands continue to be targeted. For example, UNESCO is listing various sites as world heritage sites in consultation with the

²² WLiz Alden Wily, *The Community Land Act in Kenya Opportunities and Challenges for Communities*, MDPI *Journal* (2018).

²³ Endorois Welfare Council v. Kenya. Case No. 276 / 2003, ACHPR, <https://www.escri-net.org/caselaw/2010/centre-minority-rights-development-kenya-and-minority-rights-group-international-behalf>.

²⁴ African Commission on Human and Peoples' rights v. Republic of Kenya, Case No. 006/2012 (26 May 2017), <https://www.african-court.org/en/images/Cases/Judgment/Application%20006-2012%20-%20African%20Commission%20on%20Human%20and%20Peoples%E2%80%99%20Rights%20v.%20the%20Republic%20of%20Kenya..pdf>.

²⁵ Lucy Claridge & Daniel Kobei, *Protected areas, Indigenous rights, and Land restitution: The Ogiek Judgment of the African Court of Human and Peoples Rights and Community Land Protection in Kenya*, Oryx 57 Issue 3 (2023).

²⁶ Article 61 (2) Constitution of Kenya.

<https://www.klrc.go.ke/index.php/constitution-of-kenya/117-chapter-five-land-and-environment/part-1-land/228-61-classification-of-land>.

²⁷ Article 63 (3) Constitution of Kenya.

county government in Baringo,²⁸ without adequate consultation and the free, prior, and informed consent of the Indigenous Peoples, who are the rightful owners of the land.

IV. The Double-Standards in Protected Areas and the Conservation Enterprise.

It is now evident that Protected Areas established in Kenya on Indigenous Peoples' lands, during and after the colonial era, were created without their free, prior, and informed consent or adequate compensation. Indigenous Peoples who have no other place to go have refused to leave these areas and have, therefore, become squatters or internally displaced persons within these unceded territories. The Kenyan government deployed security agencies and Eco guards, such as the Kenya Forest Services (KFS) and Kenya Wildlife Services (KWS), who have then set up camps and outposts in the protected areas. The KWS and KFS rangers are by law tasked with enforcing conservation measures including fortress conservation²⁹. The Act provides the KWS with overarching powers to conserve and manage national parks and conservation areas. These powers include the provision of security to wildlife and visitors, but exclude indigenous communities whose territories overlap with conservancies³⁰. KWS always demanded access to such areas for various reasons including access to sacred sites. KWS uses such laws to arrest and charge indigenous Peoples as trespassers or even poachers. It is therefore accurate to say that Indigenous Peoples are their primary target, as investors have been exempted from such measures and allowed to set up ecolodges and, in some cases, engage in game hunting. For example, Beyond and Bateleur Camp owned by Joss Kent is a safari luxury hotel inside Maasai Mara National Reserve. Mr. Kent also owns the Ngorongoro Crater Lodge where Maasai People are being violently evicted by Tanzania. Beyond Group³¹ has more safari hotels in South Africa, the Okavango Delta in Botswana, and the Amazon and Asia. The KWS and KFS rangers have been accused of committing grave human rights violations against Indigenous Peoples when found to have 'trespassed' into the protected areas. For instance, if a Maasai herder attempts to drive his cattle into the Maasai Mara National Park to graze during a dry season, his cattle would be confiscated, and he would be arrested and charged. The herder will thus lose the cattle, even though the park has enough green pasture to sustain both the cattle and wildlife during such times of need.³²

²⁸ Brian Kwatsima Andala, *Baringo Great Rift Valley UNESCO Global Geopark*, Storymaps (2023), <https://storymaps.arcgis.com/stories/7a4c67706e4147bba5d229cddcbf80e5>.

²⁹ Section 7 of the Wildlife Conservation and Management Act 2013. <http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/WildlifeConservationandManagement%20Act2013.pdf>.

³⁰ Lara Dominguez & Colin Luoma, *Decolonising Conservation Policy: How Colonial Land and Colonial Ideologies Persist and Perpetuate Indigenous Injustices at the Expense of Environment*, *Mdpi Land Journal* (2020), <https://www.mdpi.com/2073-445X/9/3/65>.

³¹ *andBeyond CEO Joss Kent on creating luxury in the wilderness*, LUX, <https://www.lux-mag.com/andbeyond-founder-joss-kent/#:~:text=Joss%20Kent%20is%20a%20born,run%20luxury%20travel%20company%2C%20andBeyond>.

³² Lotte Hughes, *Rough Time in Paradise: Claims, Blames and Memory Making Around Some Protected Areas in Kenya* *Conservation and Society*, Vol 5, No. 3 p. 307-330 (2007).

V. Other Mega infrastructural Projects in the Protected Areas

A. Lamu Port South Sudan Ethiopia Transport Corridor – LAPSSET Project

In 1976, the Government of Kenya declared the Boni Dodori Forest Complex a protected area. This decision was made despite objections from the Aweer Indigenous People, who had lived there for generations and considered it their ancestral land.³³ Today, the forest complex is part of the Kiunga Boni Dodori Conservancy area and the greater East Africa Coastal Forest Ecoregion. The Aweer people traditionally lived as hunters and gatherers, though some have since adopted farming as a means of livelihood. They still rely on the Boni Dodori Forest for wild honey, medicinal plants, bush meat, and building materials. Unfortunately, the government banned game hunting around the same time the forest complex was declared a protected area, which has put a strain on the Aweer's existence. The Aweer have been forced to set up villages at Bothai Junction, which is adjacent to the Boni Dodori Forest Reserve. As a result, they are unable to freely access the forest as a sacred site and a place of historical importance. Places such as Pate town, Takwa Ruins, and Siyo Fort hold significant cultural and historical value for the Aweer people and are essential to their identity.

Although Boni Dodori Forest Reserve has been declared a protected area, the Kenyan government is targeting the region for mega infrastructure projects, which is detrimental to its ecological integrity.³⁴ This raises concerns about whether the government views protected areas as easily available lands for development projects. According to the management plan from 2013-2023,³⁵ that was developed with the support and funding of the USAID and WWF, the government plans to establish ecolodges at Mkokoni, Munira, Kiu, Mwongo, Shariff, and Ngazini. Additionally, the government has set up airstrips at Mkokoni and Bodhei to serve tourists and KWS/KFS. The government also intends to build dams at Hadhi in Boni Kibuthoni and Kiangwe. Furthermore, the Kenyan government has initiated another mega infrastructure project in Lamu County, which is within the Kiunga Boni Dodori Conservation Area, called the Lamu Port-South Sudan-Ethiopia Transport Corridor (LAPSSET). The project includes 32 Berth ports, interregional highways, a crude oil pipeline, an interregional standard gauge railway, three international airports, three resort cities, and the multipurpose highway Grand Falls Dam.³⁶ These projects will be carried out in an area that has been gazetted as a forest reserve and claimed by the evictees of Aweer origin.³⁷ These are mega infrastructural projects that will

³³ Jenny Springer & Fernanda Almeida, *Protected Areas and the Land Rights of Indigenous Peoples and Local Communities: Current Issues and Future Agenda* Rights and Resources Initiative p. 14 (2015), https://rightsandresources.org/wp-content/uploads/RRIRReport_Protected-Areas-and-Land-Rights_web.pdf.

³⁴ Mohamed Athman & Hadija Ernst, *Supporting Diverse Communities to Respond to LAPSSET with one Voice*, NAMATI (2016) <https://namati.org/news-stories/lamu-case-study/>.

³⁵ Kenya Wildlife Service, *Kiunga-Boni-Dodori Conservation Area Management Plan (KBDCA)* (2013), <https://www.kws.go.ke/file/1467/download?token=2Uy7CjIA#:~:text=Five%20natural%20resource%20use%20zones,Use%20Zone%2C%20and%20Influence%20Zone>.

³⁶ LAPSSET Corridor Program (2013), <https://lapsset.go.ke/>.

³⁷ Cheti Praxides, *New Port Bad News for Aweer, Lamu's Last Forest Community*, STAR (14 April 2015), <https://www.the-star.co.ke/sasa/2015-04-14-new-port-bad-news-for-aweer-lamus-last-forest-community/>.

permanently alter the landscape of the Boni-Dodori Forest. There is no doubt that the government could find an alternative land, however, the forest belongs to it on paper, and it can therefore make unilateral decisions as to its use.

B. The Itare Dam in Mau Forest

The Mau Forest Complex, also known as Mau Water Tower, is a crucial watershed area in Kenya. It consists of 22 forest blocks, 21 of which are managed by the Kenya Forest Service (KFS), while the Maasai Mau Forest block is a trust land forest managed by Narok County. The total area covered by the Mau Forest Complex is approximately 416,542 hectares. The Kenyan government has gazetted the Mau Forest, making it a protected area. However, the Ogiek people, who consider the Mau Forest their ancestral home, have been living inside the forest as a forest-dwelling community for generations. The gazettement of the Mau Forest without the free, prior, and informed consent of the Ogiek people, reflects the colonial legacy of rendering the entire landmass in Kenya crown land held by the British monarch. The Ogiek people are a hunter-gatherer community with a population of around 40,000. In 2009, the KFS ordered the eviction of the Ogiek people, giving them only 30 days' notice. The Ogieks had filed a suit at the High Courts of Kenya in Nakuru and Nairobi, where the courts granted injunctions.³⁸ However, the joint security team went ahead and forcibly evicted the Ogiek people.³⁹ Minority Rights Group (MRG) petitioned the African Commission on Human and Peoples Rights (African Commission) on behalf of the Ogiek people. In 2012, the Commission referred the case to the African Court on Human and Peoples Rights (ACtHPR), which ruled in favor of the Ogiek people. The court found that the Kenyan government had violated the Ogiek indigenous peoples' rights to property, including their ancestral land, their right to dispose of their wealth and natural resources, and their right to religion and culture. The court also found that the Ogieks required special protection from the state as indigenous people. In June 2022, the African Court ruled on reparation and ordered Kenya to compensate the Ogiek for monetary and non-pecuniary damages. The Ogiek people continue to live in the area around Kiptunga forest block, which is conserved. However, other forest blocks have been invaded, and some have been excised by the state, which has issued concessions to timber companies to harvest timber. The Kenyan government is currently constructing a large reservoir dam inside the protected area. The Itare dam has already excised about 280 hectares of the Mau Forest and will have a devastating effect on changing water courses. This is another example of the state prioritizing development over indigenous rights and climate action.

CONCLUSION

Protected areas have become a source of concern for indigenous peoples due to the way they are managed. The government considers the lands already designated as protected areas to be reserved land that can be used to meet its development objectives. This is happening despite Kenya's participation, as a responsible partner, in global climate action. The protected areas are established in unceded lands belonging to various indigenous peoples of Kenya. For these

³⁸ See: *Kalyasoi Farmers' Co-operative Society & 6 Others V. County Council of Narok HCCA Case No. 664 of 2005 and Joseph Kimetto Ole Mapelu & Others v. County Council of Narok. HCCA Case No. 157 of 2005.*

³⁹ Caroline Chebet, *Kenyan Government Again Evicts Ogiek Communities from Mau Forest*, MONOGABAY (2023), <https://news.mongabay.com/2023/11/kenyan-government-again-evicts-ogiek-communities-from-mau-forest/>.

Summer 2024

communities, protected areas are like battlefields where they must fight the government for their rights to be recognized and respected. This struggle has been going on for generations and may continue until their rights are fully upheld.