

**Territory — Indigenous people — Endorois community in Kenya — Kenya forcibly removing Endorois from ancestral land to create game reserve — Endorois community seeking redress — Whether Endorois distinct community — Definition of indigenous peoples — Consideration of subsidiary sources of international law or general principles in determining rights under African Charter — Relevant criteria — Sacred relationship to land — Self-identification — African Charter on Human and Peoples’ Rights, 1981 recognizing rights of peoples — Indigenous rights — Whether Endorois having collective rights — Right to practise religion — Right to property — Right to culture — Right to free disposition of natural resources — Right to development — African Charter on Human and Peoples’ Rights, 1981, Articles 8, 14, 17, 21 and 22 — Whether Kenya violating African Charter by forcibly removing Endorois from ancestral lands without proper consultation and adequate compensation — African Commission’s recommendations**

**Human rights — Right to practise religion — Whether Endorois’ spiritual beliefs and ceremonial practices constituting a religion under African Charter and international law — Whether Kenya interfering with Endorois’ right to religious freedom by its actions or inactions — Whether Kenya violating Article 8 of African Charter on Human and Peoples’ Rights, 1981**

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**Human rights — Right to culture — Requirement for State to protect and promote culture — Whether Kenya creating major threat to Endorois’ pastoralist way of life by displacement from ancestral land — Whether Kenya violating Article 17(2) and (3) of African Charter on Human and Peoples’ Rights, 1981**

**Human rights — Right to free disposition of natural resources — Ownership of natural resources — Consultation — Participation**

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**in benefits — Prior environmental and social impact assessments — Requirement of adequate compensation or restitution of land — Whether Kenya violating Article 21 of African Charter on Human and Peoples' Rights, 1981**

**Human rights — Right to development — Whether Kenya providing adequately for Endorois in development process — Whether consultation adequate — Whether Endorois effectively participating — Whether adequate compensation — Whether Endorois accorded land of equal value — Whether Endorois having equitable share in benefits from game reserve — Whether Kenya violating Article 22 of African Charter on Human and Peoples' Rights, 1981**

CENTRE FOR MINORITY RIGHTS DEVELOPMENT ("CEMIRIDE")  
(KENYA) AND MINORITY RIGHTS GROUP INTERNATIONAL ON  
BEHALF OF ENDOROIS WELFARE COUNCIL *v.* KENYA

(ENDOROIS CASE)

(Communication No 276/2003)

*African Commission on Human and Peoples' Rights*

*Merits.* 4 February 2010

(Alapini-Gansou, *Chairperson*; Malila, *Vice-Chairperson*; Bitaye, Tlakula, Kayitesi, Atoki, Maiga, Yuen, Khalfallah and Fayek, *Members*)

**SUMMARY:** *The facts:*—The complainants filed a complaint on behalf of the Endorois community alleging that the Respondent State, the Republic of Kenya, had violated the rights of the Endorois by forcibly removing them from their ancestral lands around Lake Bogoria within the Rift Valley Province in Kenya for the creation of a game reserve.

The Endorois, a community of approximately 60,000 people, had lived in the Lake Bogoria area for centuries; they had sometimes been classified as a sub-tribe of the Tugen tribe of the Kalenjin group. The complainants claimed that their forcible removal was without proper prior consultations, or adequate and effective compensation, and violated the African Charter on Human and Peoples' Rights, 1981 ("African Charter"), national law and the Constitution of Kenya. The complainants sought a declaration that Kenya had violated

Articles 8,<sup>1</sup> 14,<sup>2</sup> 17,<sup>3</sup> 21<sup>4</sup> and 22<sup>5</sup> of the African Charter, restitution of their land with legal title and clear demarcation, and adequate compensation.

The complaint was held to comply with Article 56 of the African Charter and the communication declared admissible. Kenya's request to reopen arguments on the communication's admissibility was declined.

The complainants argued that the Endorois were an indigenous people entitled to the protection of collective rights under the African Charter. They alleged that Kenya had violated Article 8 of the African Charter since expulsion from their ancestral land had meant that the Endorois were unable to access Lake Bogoria and surrounding areas to conduct religious rituals and ceremonial practices thus preventing the practice of their religion. They maintained that the Endorois had a right to property with respect to their ancestral land, its possessions and cattle, despite lack of formal title recognition, and that Kenya had violated Article 14 by its actions. They contended that the Endorois' cultural rights had been violated in contravention of Article 17(2) and (3) since Kenya had systematically restricted access to cultural sites and damaged their pastoralist way of life. They also alleged that Kenya had violated Article 21 since their eviction had prevented access to vital natural resources and Article 22 in failing to involve the Endorois adequately in the development process.

Kenya disputed that the Endorois were a distinct community entitled to protection under the African Charter. It asserted that there was no recognition of economic, social and cultural rights or group rights in the Kenyan Constitution and that Kenya had not ratified the International Labour Organization Convention No 169 concerning Indigenous and Tribal Peoples in Independent Countries, 1989 and withheld approval of the UN Declaration on the Rights of Indigenous Peoples. With respect to Article 8 of the African Charter, Kenya argued that the complainants had not shown that the gazetting of the game reserve to conserve the environment and wildlife failed the constitutional test of reasonableness and justifiability. Kenya denied that the Endorois community had a right to property with respect to ancestral land, which was in fact trust land. It asserted that there was access to forest areas subject to administrative procedures and that political issues were sometimes disguised as cultural. With respect to Article 21, it contended that the Endorois had benefited greatly from tourism and mineral prospecting activities. With respect to development, Kenya argued that communities should contribute to society's well-being as a whole within participatory democracy, that the Endorois had also benefited from programmes for the rural poor and that they were well represented in the decision-making structure.

<sup>1</sup> For the text of Article 8 of the African Charter (right to practise religion), see para. 75 of the decision.

<sup>2</sup> For the text of Article 14 of the African Charter (right to property), see para. 85 of the decision.

<sup>3</sup> For the text of Article 17 of the African Charter (right to culture), see para. 114 of the decision.

<sup>4</sup> For the text of Article 21 of the African Charter (right to free disposition of natural resources), see para. 119 of the decision.

<sup>5</sup> For the text of Article 22 of the African Charter (right to development), see para. 124 of the decision.

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*Held:*—Kenya was in violation of Articles 1, 8, 14, 17, 21 and 22 of the African Charter.

(1) From all evidence, the Endorois were a distinct indigenous community. While there was no universal and unambiguous definition, all attempts to define indigenous peoples, also using subsidiary sources of international law and general principles in accordance with Article 61 of the African Charter,<sup>6</sup> required a sacred relationship to land and self-identification. The Endorois culture, religion and traditional way of life were intimately intertwined with their ancestral lands. The members of this pastoral community enjoyed and exercised rights, such as the right to property, in a distinctly collective manner from the Tugen sub-tribe or the larger Kalenjin tribe. As such, the Endorois had 'people' status warranting collective rights protection under the African Charter (paras. 144-62).

(2) Kenya had violated Article 8 of the African Charter.

(a) The Endorois' spiritual beliefs and ceremonial practices constituted a religion under the African Charter. Their cultural and religious practices, centred around Lake Bogoria, were of prime significance to all Endorois. As recognized by the Human Rights Committee, religion was broadly construed under the International Covenant on Civil and Political Rights, 1966 (paras. 165-8).

(b) By forcibly evicting the Endorois from their ancestral lands, Kenya had interfered with their right to religious freedom. Denied access to Lake Bogoria, it was virtually impossible for the Endorois to maintain religious practices central to their culture and religion. This severe restriction was disproportionate to the goal of economic development or ecological protection and thus unlawful. The limitations placed on the State's duties to protect rights had to be viewed in light of the African Charter's underlying sentiments (paras. 163-73).

(3) Kenya had violated Article 14 of the African Charter.

(a) It was clear that the land surrounding Lake Bogoria was the Endorois' traditional land. African Commission jurisprudence considered land as property for the purposes of Article 14; property rights included undisturbed possession, use and control as well as access and freedom from encroachment. Under international case law official title deeds were not necessary for ownership of ancestral land.<sup>7</sup> The acknowledgement that traditional African communities' rights, interests and benefits constituted property under the African

<sup>6</sup> For example, the working definition proposed by the UN Working Group on Indigenous Populations read with the 2003 Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities, which formed the basis of this definition, and also the definition in International Labour Organization Convention No 169 concerning Indigenous and Tribal Peoples in Independent Countries, 1989. The Inter-American Court on Human Rights had not hesitated in granting collective land rights to an Afro-descendant community outwith the Americas traditional understanding of indigenouness (*Moiwana v. Suriname*, judgment of 15 June 2005, Series C No 124 and *Saramaka v. Suriname*, judgment of 28 November 2007).

<sup>7</sup> *Mayagna (Sumo) Awas Tigni Community v. Nicaragua* (Inter-American Court of Human Rights), 136 ILR 73; also *Doğan and Others v. Turkey* (European Court of Human Rights).

Charter and might require special measures to secure was the first step in their protection (paras. 174-90).

(b) Kenya was obliged to protect as well as to respect the right to property under Article 14. Special measures of protection were owed to tribal community members to guarantee the full exercise of their rights.<sup>8</sup> Kenya was obliged to establish mechanisms to give domestic legal effect to that right; positive discrimination was permitted under international law to redress imbalance (paras. 191-8).

(c) The property of the Endorois was severely encroached upon by Kenya, in particular by the expropriation and effective denial of their ownership of the land. The trust land system had proved inadequate protection; *de jure* ownership was required. International committees, commissions and courts found forced evictions to be gross violations of human rights, in particular the right to adequate housing. The encroachment failed to meet the conjunctive test of proportionality to public need and compliance with national and international law, a test more stringently applied with respect to indigenous land rights. The creation of a game reserve did not justify forcible displacement, destruction of home and possessions, and denial of property rights; these were not the least restrictive measures possible. Neither were forced evictions legal. Kenya's failure to consult and compensate resulted in the violation of property rights. The Kenyan Constitution required full and prompt compensation. There was also a fair compensation requirement in the UN Declaration on the Rights of Indigenous Peoples and Article 63(1) of the American Convention. The failure to guarantee effective participation and adequate compensation also violated the right to development (paras. 199-238).

(4) Kenya had violated Article 17(2) and (3) of the African Charter. By forcing the Endorois to live on semi-arid lands without access to medicinal salt licks and other resources vital for livestock health, Kenya had created a major threat to their pastoralist way of life. The very essence of their right to culture had been denied, rendering it virtually illusory. Kenya had a duty to promote as well as to protect that culture, strongly associated with ancestral land and having an individual and collective nature (paras. 239-51).

(5) Kenya had violated Article 21 of the African Charter. The Endorois had never received adequate compensation or restitution of their land as required under Article 21(2) in case of spoliation. Since the right to natural resources contained within their traditional lands vested in indigenous people,<sup>9</sup> the Endorois had the right freely to dispose of their wealth and natural resources in consultation with Kenya. Ownership of natural resources, as with land, was necessary to prevent their extinction as a people. Kenya had a duty to consult with them regarding any proposed mining concession, allowing reasonable

<sup>8</sup> For example, *Saramaka v. Suriname* (Inter-American Court of Human Rights).

<sup>9</sup> *Ogoni* case 2001 (African Commission). The Commission referred to cases in the Inter-American Human Rights system to understand this area of the law. Since there was no right to natural resources in the American Convention, this right was read into the right to property and similar limitations applied: see for example *Saramaka v. Suriname* (Inter-American Court of Human Rights).

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participation in any benefits and conducting prior environmental and social impact assessments (paras. 252-68).

(6) Kenya had violated Article 22 of the African Charter. Kenya did not adequately provide for the Endorois in the development process with respect to compensation, benefits or grazing land. Both procedural and substantive elements had to be fulfilled to satisfy the right to development. It involved the freedom of choice. Consultation was inadequate; the Endorois did not participate effectively<sup>10</sup> and had an unequal bargaining position due to illiteracy and a different understanding of property use and ownership. Development should have resulted in the community's empowerment rather than a decrease in well-being. Compensation was not in accordance with the law since the Endorois were not accorded land of equal value or an equitable share in benefits from the game reserve in the face of substantive losses (paras. 269-98).

(7) Kenya was recommended inter alia to recognize rights of ownership to the Endorois and restitute their ancestral land, ensure unrestricted access to Lake Bogoria and surrounding sites for religious and cultural rites and for grazing cattle, pay adequate compensation to the community and royalties from existing economic activities and ensure benefit from employment opportunities within the reserve (p. 88).

The following is the text of the decision of the Commission:

### SUMMARY OF ALLEGED FACTS

1. The complaint is filed by the Centre for Minority Rights Development (CEMIRIDE) with the assistance of Minority Rights Group International (MRG) and the Centre on Housing Rights and Evictions (COHRE—which submitted an *amicus curiae* brief) on behalf of the Endorois community. The Complainants allege violations resulting from the displacement of the Endorois community, an indigenous community, from their ancestral lands, the failure to adequately compensate them for the loss of their property, the disruption of the community's pastoral enterprise and violations of the right to practise their religion and culture, as well as the overall process of development of the Endorois people.

2. The Complainants allege that the Government of Kenya in violation of the African Charter on Human and Peoples' Rights (hereinafter the African Charter), the Constitution of Kenya and international law, forcibly removed the Endorois from their ancestral lands around the Lake Bogoria area of the Baringo and Koibatek Administrative Districts, as well as in the Nakuru and Laikipia Administrative Districts within

<sup>10</sup> Article 2(3) of the UN Declaration on Development provided that the right to development included "active, free and meaningful participation in development".

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the Rift Valley Province in Kenya, without proper prior consultations, adequate and effective compensation.

3. The Complainants state that the Endorois are a community of approximately 60,000 people<sup>11</sup> who, for centuries, have lived in the Lake Bogoria area. They claim that prior to the dispossession of Endorois land through the creation of the Lake Hannington Game Reserve in 1973, and a subsequent re-gazetting of the Lake Bogoria Game Reserve in 1978 by the Government of Kenya, the Endorois had established, and, for centuries, practised a sustainable way of life which was inextricably linked to their ancestral land. The Complainants allege that since 1978 the Endorois have been denied access to their land.

4. The Complainants state that apart from a confrontation with the Masai over the Lake Bogoria region approximately three hundred years ago, the Endorois have been accepted by all neighbouring tribes as *bona fide* owners of the land and that they continued to occupy and enjoy undisturbed use of the land under the British colonial administration, although the British claimed title to the land in the name of the British Crown.

5. The Complainants state that at independence in 1963, the British Crown's claim to Endorois land was passed on to the respective County Councils. However, under Section 115 of the Kenyan Constitution, the County Councils held this land in trust, on behalf of the Endorois community, who remained on the land and continued to hold, use and enjoy it. The Endorois' customary rights over the Lake Bogoria region were not challenged until the 1973 gazetting of the land by the Government of Kenya. The Complainants state that the act of gazetting and, therefore, dispossession of the land is central to the present Communication.

6. The Complainants state that the area surrounding Lake Bogoria is fertile land, providing green pasture and medicinal salt licks, which help raise healthy cattle. The Complainants state that Lake Bogoria is central to the Endorois religious and traditional practices. They state that the community's historical prayer sites, places for circumcision rituals, and other cultural ceremonies are around Lake Bogoria. These sites were used on a weekly or monthly basis for smaller local ceremonies, and on an annual basis for cultural festivities involving Endorois from the whole region. The Complainants claim that the Endorois believe that the spirits of all Endorois, no matter where they are buried, live on in the

<sup>11</sup> The Endorois have sometimes been classified as a sub-tribe of the Tugen tribe of the Kalenjin group. Under the 1999 census, the Endorois were counted as part of the Kalenjin group, made up of the Nandi, Kipsigis, Keiro, Tugen and Marakwet among others.



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Lake, with annual festivals taking place at the Lake. The Complainants further claim that the Endorois believe that the Mochongoi Forest is considered the birthplace of the Endorois and the settlement of the first Endorois community.

7. The Complainants state that despite the lack of understanding of the Endorois community regarding what had been decided by the Respondent State, the Kenyan Wildlife Service (hereinafter KWS) informed certain Endorois elders shortly after the creation of the Game Reserve that 400 Endorois families would be compensated with plots of "fertile land". The undertaking also specified, according to the Complainants, that the community would receive 25% of the tourist revenue from the Game Reserve and 85% of the employment generated, and that cattle dips and fresh water dams would be constructed by the Respondent State.

8. The Complainants allege that after several meetings to determine financial compensation for the relocation of the 400 families, the KWS stated it would provide 3,150 Kenya Shillings per family. The Complainants allege that none of these terms have been implemented and that only 170 out of the 400 families were eventually given some money in 1986, years after the agreements were concluded. The Complainants state that the money given to the 170 families was always understood to be a means of facilitating relocation rather than compensation for the Endorois' loss.

9. The Complainants state that to reclaim their ancestral land and to safeguard their pastoralist way of life, the Endorois petitioned to meet with President Daniel Arap Moi, who was their local Member of Parliament. A meeting was held on 28 December 1994 at his Lake Bogoria Hotel.

10. The Complainants state that as a result of this meeting, the President directed the local authority to respect the 1973 agreement on compensation and directed that 25% of annual income towards community projects be given to the Endorois. In November of the following year, upon being notified by the Endorois community that nothing had been implemented, the Complainants state that President Moi again ordered that his directives be followed.

11. The Complainants state that following the non-implementation of the directives of President Moi, the Endorois began legal action against Baringo and Koibatek County Councils. Judgment was given on 19 April 2002 dismissing the application.<sup>12</sup> Although the High Court

<sup>12</sup> *William Yatich Sitetalia, William Arap Ngasia et al. v. Baringo County Council*, High Court Judgment of 19 April 2002, Civil Case No 183 of 2000, p. 6.



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recognised that Lake Bogoria had been Trust Land for the Endorois, it stated that the Endorois had effectively lost any legal claim as a result of the designation of the land as a Game Reserve in 1973 and in 1974. It concluded that the money given in 1986 to 170 families for the cost of relocating represented the fulfilment of any duty owed by the authorities towards the Endorois for the loss of their ancestral land.

12. The Complainants state that the High Court also stated clearly that it could not address the issue of a community's collective right to property, referring throughout to "individuals" affected and stating that "there is no proper identity of the people who were affected by the setting aside of the land . . . that has been shown to the Court". The Complainants also claim that the High Court stated that it did not believe Kenyan law should address any special protection to a people's land based on historical occupation and cultural rights.

13. The Complainants allege that since the Kenyan High Court case in 2000, the Endorois community has become aware that parts of their ancestral land have been demarcated and sold by the Respondent State<sup>13</sup> to third parties.

14. The Complainants further allege that concessions for ruby mining on Endorois traditional land were granted in 2002 to a private company. This included the construction of a road in order to facilitate access for heavy mining machinery. The Complainants claim that these activities incur a high risk of polluting the waterways used by the Endorois community, both for their own personal consumption and for use by their livestock. Both mining operations and the demarcation and sale of land have continued despite the request by the African Commission to the President of Kenya to suspend these activities pending the outcome of the present Communication.

15. The Complainants state that following the commencement of legal action on behalf of the community, some improvements were made to the community members' access to the Lake. For example, they are no longer required to pay Game Reserve entrance fees. The Complainants, nevertheless, allege that this access is subject to the Game Reserve authority's discretion. They claim that the Endorois still have limited access to Lake Bogoria for grazing their cattle, for religious purposes, and for collecting traditional herbs. They also state that the lack of legal certainty surrounding access rights and rights of usage renders the Endorois completely dependent on the Game Reserve authority's discretion to grant these rights on an ad hoc basis.

<sup>13</sup> Depending on the context, *Kenyan Authorities* and *Respondent State* are used in this text interchangeably to mean the Government of Kenya.

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16. The Complainants claim that land for the Endorois is held in very high esteem, since tribal land, in addition to securing subsistence and livelihood, is seen as sacred, being inextricably linked to the cultural integrity of the community and its traditional way of life. Land, they claim, belongs to the community and not the individual and is essential to the preservation and survival as a traditional people. The Complainants claim that the Endorois health, livelihood, religion and culture are all intimately connected with their traditional land, as grazing lands, sacred religious sites and plants used for traditional medicine are all situated around the shores of Lake Bogoria.

17. The Complainants claim that at present the Endorois live in a number of locations on the periphery of the Reserve—that the Endorois are not only being forced from fertile lands to semi-arid areas, but have also been divided as a community and displaced from their traditional and ancestral lands. The Complainants claim that, for the Endorois, access to the Lake Bogoria region is a right for the community and the Government of Kenya continues to deny the community effective participation in decisions affecting their own land, in violation of their right to development.

18. The Complainants further allege that the right to legal representation for the Endorois is limited, in that Juma Kiplenge, the lawyer and human rights defender who was representing the 20,000 Endorois nomadic pastoralists, was arrested in August 1996 and accused of “belonging to an unlawful society”. They claim that he has also received death threats.

19. The Complainants allege that the Government’s decision to gazette Endorois traditional land as a Game Reserve, which in turn denies the Endorois access to the area, has jeopardised the community’s pastoral enterprise and imperilled its cultural integrity. The Complainants also claim that 30 years after the evictions began, the Endorois still do not have full and fair compensation for the loss of their land and their rights on to it. They further allege that the process of evicting them from their traditional land not only violates Endorois community property rights, but spiritual, cultural and economic ties to the land are severed.

20. The Complainants allege that the Endorois have no say in the management of their ancestral land. The Endorois Welfare Committee, which is the representative body of the Endorois community, has been refused registration, thus denying the right of the Endorois to fair and legitimate consultation. This failure to register the Endorois Welfare Committee, according to the Complainants, has often led to illegitimate consultations taking place, with the authorities selecting particular