

International tribunals — African Court on Human and Peoples' Rights — Jurisdiction — Temporal jurisdiction — Date of entry into force of Protocol to African Charter on Human and Peoples' Rights on Establishment of African Court on Human and Peoples' Rights, 1998 — Continuing nature of alleged violations — Personal jurisdiction — Territorial jurisdiction — Admissibility of application — Exhaustion of local remedies — Provisional measures of protection

Human rights — Indigenous peoples — Right to freedom from discrimination — Right to life — Freedom of religion — Right to property — Right to culture — Right to disposal of natural resources — Right to development — Kenyan Forest Ministry issuing eviction notice requiring removal of Ogiek community from the Mau Forest Area — Whether Kenya violating Articles 1, 2, 4, 8, 14, 17(2) and (3), 21 and 22 of African Charter on Human and Peoples' Rights, 1981

Treaties — African Charter on Human and Peoples' Rights, 1981 — Protocol on Establishment of African Court on Human and Peoples' Rights, 1998 — Jurisdiction of Court — Whether extending to acts occurring before entry into force of Protocol

Treaties — African Charter on Human and Peoples' Rights, 1981 — Protocol on Establishment of African Court on Human and Peoples' Rights, 1998 — Order for Provisional Measures — Whether court having prima facie jurisdiction

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS
v. REPUBLIC OF KENYA¹

(OGIEK CASE)

(Application No 6/2012)

African Court on Human and Peoples' Rights

Order on Request for Provisional Measures. 15 March 2013

¹ The applicant was represented by Hon. Professor Pacifique Manirakiza, Mr Bahame Tom Nyanduga, Mr Donald Deya and Mr Selemani Kinyunyuu. The respondent was represented by Ms Muthoni Kimani, Mr Emmanuel Bitta and Mr Peter Ngumi.

2 AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS
 183 ILR 1

(Akuffo, *President*; Ouguergouz, *Vice President*;
 Ngoepe, Niyungeko, Ramadhani, Tambala, Thompson,
 Oré, Guissé and Aba, *Judges*)

Merits. 26 May 2017

(Oré, *President*; Niyungeko, Ramadhani,
 Tambala, Thompson, Guissé, Ben Achour,
 Bossa and Matusse, *Judges*)

SUMMARY:² *The facts*:—The applicant, the African Commission on Human and Peoples' Rights, received a communication from the Centre for Minority Rights Development and Minority Rights Group International on behalf of the Ogiek community of the Mau Forest in Kenya. The communication opposed an eviction notice issued by the Kenyan Forest Service in October 2009 which required the Ogiek community to leave the Mau Forest area within thirty days. The applicant issued a provisional measures order suspending the eviction notice. In July 2012, the applicant filed this application under Article 5(1)(a) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights, 1998 ("the Protocol") before the African Court on Human and Peoples' Rights ("the Court"), having received no response from Kenya, the respondent, on the provisional measures order.

The applicant alleged that the respondent had violated the rights of the Ogiek community as an indigenous people under Articles 1,³ 2,⁴ 4,⁵ 8,⁶ 14,⁷

² Prepared by Ms S. Slehria.

³ Article 1 of the Charter provided that: "The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them."

⁴ Article 2 of the Charter provided that: "Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status."

⁵ Article 4 of the Charter provided that: "Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right."

⁶ Article 8 of the Charter provided that: "Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms."

⁷ Article 14 of the Charter provided that: "The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws."

17(2) and (3),⁸ 21⁹ and 22¹⁰ of the African Charter on Human and Peoples' Rights, 1981 ("the Charter"). It maintained that the respondent had failed to consult the Ogiek community before issuing the eviction notice. It contended that the Ogiek had faced eviction measures since the colonial period and that the eviction notice was thus a perpetuation of a historical injustice against the Ogiek people. The applicant also requested the Court to issue an Order for Provisional Measures to forestall the implementation of the directive issued by the respondent's Ministry of Lands limiting the restrictions on transactions for areas of land measuring 5 acres or less in the Mau Forest Complex Area.

Order on Request for Provisional Measures

Held (unanimously):—The applicant's request was granted. The respondent was to reinstate the restrictions.

(1) Prior to ordering provisional measures, the Court had to satisfy itself, *prima facie*, that it had jurisdiction. Article 3(1) of the Protocol provided that the Court's jurisdiction extended to all cases and disputes concerning the interpretation of the Charter, the Protocol and any other relevant human rights instruments ratified by the States concerned. The respondent had ratified the Charter, which had come into force on 21 October 1986, on 23 January 1992 and deposited the instruments of ratification on 10 February 1992. The respondent had also ratified the Protocol, which had come into force on 25 January 2004, on 4 February 2004 (paras. 16-18).

(2) There was a situation of extreme gravity and urgency as well as a risk of irreparable harm to the rights of the Ogiek community under Articles 2, 17(2) and (3), 3, 4, 14 and 22 of the Charter. Therefore, the Court had *prima facie* jurisdiction, and provisional measures should be granted under Article 27(2) of the Protocol. This order was provisional in nature; it did not in any way

⁸ Article 17 of the Charter provided that: "... (2) Every individual may freely take part in the cultural life of his community. (3) The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State."

⁹ Article 21 of the Charter provided that: "(1) All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it. (2) In case of spoliation, the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation. (3) The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law. (4) States parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity. (5) States parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practised by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources."

¹⁰ Article 22 of the Charter provided that: "(1) All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. (2) States shall have the duty, individually or collectively, to ensure the exercise of the right to development."

prejudge the findings on jurisdiction, admissibility or the merits of the case (paras. 20-4).

(3) The respondent was to reinstate immediately the restrictions it had imposed on land transactions in the Mau Forest Complex and refrain from any act or thing that would or might irreparably prejudice the main application until its final determination. The respondent was to report to the Court within fifteen days on the measures it had taken to implement this order (para. 25).

Judgment on the Merits

The applicant alleged that the respondent had not complied with the Court's Order. The respondent challenged the jurisdiction and admissibility of the case before the Court. It argued that the eviction notice had been issued lawfully since the land was part of a reserved water catchment zone and was government land under the Government Land Act. The respondent also argued that the Ogiek were consulted in the process. Furthermore, the Ogiek community was not a distinct ethnic group and was not therefore protected under the Charter as an "indigenous people".

Held (unanimously):—The respondent had violated the rights of the Ogiek community under Articles 1, 2, 8, 14, 17(2) and (3), 21 and 22 of the Charter; the respondent had not violated Article 4.

(1) The Court had personal jurisdiction. Pursuant to Articles 2 and 5(1)(a) of the Protocol, the question as to whether the respondent had made the declaration under Article 34(6) of the Protocol had not arisen. There was no requirement to make such a declaration for the applicant to file applications before the Court (paras. 58-61).

(2) The Court had temporal jurisdiction. The respondent became a party to the Charter on 10 February 1992 and a party to the Protocol on 4 February 2004. While the evictions by the respondent leading to the alleged violations had begun before these dates, the evictions were continuing, particularly the eviction threats in 2005 and eviction notice of 26 October 2009. Thus, the alleged violations of its international obligations under the Charter were continuing and the matter fell within the Court's temporal jurisdiction (paras. 64-6).

(3) The Court had territorial jurisdiction since this had not been challenged by the respondent. The alleged violations had, however, occurred within the territory of the respondent, a Member State of the African Union that had ratified the Protocol (paras. 67-8).

(4) The application was admissible. The matter was now before the Court, not the Commission. No preliminary examination was necessary; procedures were distinct from the Commission. Objections that the author was not the aggrieved party and non-exhaustion of local remedies were rejected.

(5) The concept of "indigenous population" was not defined in the Charter and there was no universally accepted definition of the term in other international human rights instruments, although recourse had been made to

the criteria provided by the African Commission on Human and Peoples' Rights Working Group on Indigenous Populations/Communities and the United Nations Special Rapporteur on Minorities. On this basis, relevant criteria were deduced that reflected the normative standards by which to identify indigenous populations in international law. These criteria were the presence of priority in time with respect to the occupation and use of a specific territory; a voluntary perpetuation of cultural distinctiveness, which might include aspects of language, social organization, religion and spiritual values, modes of production, laws and institutions; self-identification as well as recognition by other groups or by State authorities that they were a distinct collectivity; and an experience of subjugation, marginalization, dispossession, exclusion or discrimination, whether or not these conditions persisted. These criteria were applied to the application based on Articles 60 and 61 of the Charter, and the Ogiek were recognized as an indigenous population that was part of the Kenyan people, having a particular status and deserving special protection deriving from their vulnerability (paras. 105-12).

(6) The respondent had violated the Ogiek's right to property guaranteed under Article 14 of the Charter, which had to be interpreted in light of Article 26 of the United Nations General Assembly Declaration 61/295 on the Rights of Indigenous People. With particular reference to Article 26(2), this provision was different from the classic concept of property, emphasizing the rights of possession, occupation and utilization of property and not the right of disposal. The respondent had not disputed that the Ogiek community had occupied the area since time immemorial. The Ogiek thus had the right to occupy, use and enjoy their ancestral lands. Although Article 14 of the Charter envisaged a restriction on the right to property based on public interest, the continued denial of access and eviction of the Ogiek from the Mau Forest was not necessary or proportionate to the respondent's purported justification of preserving the ecosystem of the Mau Forest (paras. 125-30).

(7) The respondent had violated Article 2 of the Charter guaranteeing the right to freedom from discrimination and respect and enjoyment of all other rights and freedoms protected in the Charter. This right was related to the right to equal treatment by the law under Article 3 of the Charter. The expression "other status" under Article 2 of the Charter encompassed cases of discrimination that could not have been foreseen at the time of the adoption of the Charter. The denial of recognition of rights of the Ogiek and grant of the same rights to the Ogiek as to the other groups in the same category of communities, due to their way of life as a hunter-gatherer community, had amounted to distinction based on ethnicity and/or "other status". The respondent's purported justification that the evictions of the Ogiek were to preserve the natural ecosystem of the Mau Forest was not a reasonable or objective justification for the lack of recognition of the Ogiek indigenous status (paras. 136-46).

(8) The respondent had not violated Article 4 of the Charter which guaranteed the right to life. The right to life could be enjoyed by anyone irrespective of the group to which they belonged and it was the cornerstone on which the realization of all other rights and freedoms depended. It was necessary to distinguish between the classic meaning of the right to life and

the right to decent existence of a group. Under Article 4 the right related to a physical rather than existential understanding of the right to life. The applicant had failed to establish the causal link between the evictions and the deaths in the community that took place due to lack of necessities (paras. 147-56).

(9) The eviction measures and the regulatory requirements which had been put in place by the respondent limiting the access of the Ogiek to the Mau Forest had interfered with the freedom of worship of the Ogiek population guaranteed under Article 8 of the Charter. The right to freedom of worship offered protection to all forms of beliefs (regardless of denominations, theistic, non-theistic and atheistic beliefs), as well as the right not to profess any religion or belief. Particularly in indigenous societies, freedom to worship and to engage in religious ceremonies depended on access to the land and natural environment, and any interference with that access would have repercussions on the enjoyment of freedom of worship. Restrictions on this right were permissible if they were needed for the maintenance of law and order, but such restrictions had to be reasonable. The respondent's measures were unjustified, as it could have taken less onerous measures to achieve its goals (paras. 162-9).

(10) The respondent had violated Article 17(2) and (3) of the Charter which guaranteed the right to culture. This Article provided for an individual's participation in the cultural life of their community and obliged the State to promote and protect traditional values. Reference was made to Article 6 of the Cultural Charter for Africa, 1976, which obliged States to adopt a national policy which created conditions conducive to the promotion and development of culture. It was particularly important in the case of indigenous people that their culture be preserved. The United Nations Declaration on the Rights of Indigenous People, 2007 ("UNDRIP") provided that indigenous peoples and individuals had the right not to be subjected to forced assimilation or destruction of their culture and States were obliged to provide mechanisms to prevent the same. The Ogiek population had their own distinct culture and the respondent had interfered with their enjoyment of the right to culture. The respondent's purported justification of preserving the natural ecosystem was held to be unnecessary (paras. 176-84 and 187-90).

(11) The respondent had violated Article 21 of the Charter, as the Ogiek had been deprived of their right to enjoy and freely dispose of food produced by their ancestral lands. The Charter had not defined the notion of "peoples" and the task of fleshing out the Charter had been left to the human rights protection bodies. It was generally accepted that, in the context of struggle against foreign domination in all forms, "peoples" in the Charter denoted populations of the countries struggling to attain independence. The rights in the Charter given to peoples could be extended to include sub-State ethnic groups and communities that were part of that population, provided that such groups or communities were not calling into question the sovereignty and territorial integrity of the State without its consent (paras. 195-201).

(12) The Ogiek community had the right under Article 22 of the Charter to enjoy their right to development. Article 22 of the Charter had to be read in

light of Article 23 of UNDRIP. In the present case, the Ogiek had been continuously evicted without being effectively consulted and this had had an adverse impact on their economic, social and cultural development. Thus, the respondent had violated Article 22 of the Charter (paras. 207-11).

(13) By having enacted its Constitution in 2010, the Forest Conservation and Management Act No 34 of 2015 and the Community Land Act No 27 of 2016, the respondent had taken some legislative steps to ensure the enjoyment of rights and freedoms protected under the Charter. However, these were recent steps and the respondent had failed to recognize the Ogiek, as it had done for other similar groups, as a distinct tribe. The respondent had violated various rights under the Charter. It had also not demonstrated that it had taken other measures to give effect to these rights and therefore had violated Article 1, which required the respondent to take adequate legislative and other measures to give effect to the rights enshrined in the Charter (paras. 212-17).

(14) With respect to Article 27(1) of the Protocol, reparations and costs were to be ruled on in a separate decision pursuant to Rule 63 of the Rules of the Court. The parties were to file further submissions on reparations and costs (paras. 222-6).

(15) The respondent was to take all appropriate measures within a reasonable time frame to remedy all the violations established and inform the Court of the measures taken within six months from the date of the judgment (para. 227).

The text of the judgment on the merits commences at p. 11. The following is the text of the order on provisional measures:

ORDER ON PROVISIONAL MEASURES

Whereas,

1. The Court received, on 12 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;
- Recognise 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 practise their religion and culture;

6. On 13 July 2012, the Registry acknowledged receipt of the application, in accordance with Rule 34(1) of the Rules of Court; and on 25 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 25 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 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 21 October 1986, on 23 January 1992 and deposited its instruments of ratification on 10 February 1992; and further that Respondent ratified the Protocol, which came into force on 25 January 2004, on 4 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 Articles 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;