
Following God's constitution: The gender dimensions in the Ogiek claim to the Mau Forest Complex in Kenya

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To three important people in my life:

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Declaration

I declare that this is my original work and has not been presented for any study programme in any university or college or for any other thesis. The ideas and views except where expressly indicated are strictly my own and I take responsibility for them.

Sign.....date.....

Acknowledgement

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UDHR	Universal Declaration of Human Rights
ICESCR	International Convention on Economic, Social and Cultural Rights
CEDAW	Convention on Elimination of All forms of Discrimination against Women
ICCPR	International Convention on Civil and Political Rights
CRC	Convention on the Rights of a Child
ILO	International Labour Organization

Abbreviations

OWC	Ogiek Welfare Council
ORIP	Ogiek Rural Integration Projects
OPNA	Ogiek Peoples National Assembly
OPDP	Ogiek Peoples Development Programme
ODECECO	Ogiek Development, Cultural and Environmental Conservation Organization
KWFG	Kenya Forestry Working Group
NEMA	National Environmental Management Authority
NGO	Non Governmental Organization
NEAP	National Environmental Action Plan
KIFCON	Kenya Indigenous Forest Conservation.

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CHAPTER ONE

Introduction

In this chapter, the background of the research and why the topic and the Ogiek were chosen for this research is discussed. It talks about the objective of the research, the assumptions made and research questions formulated as well as the demarcation of the study.

Background to the problem

When I set out to do this research I had in mind the issue of women and access to natural resources, in particular to forests. I thought of small tribes or communities in Kenya and, in particular, the Dorobo who, I remembered from media reports, had taken the state to court on forest issues several times. I did not know much about them but then that is the essence of research. Having set my mind on this area, I prepared my topic – ‘An examination of the impact of forest policies on the Ndorobo women in Tinet forest in Nakuru District, Kenya’. I then formulated assumptions based on that topic, focusing mostly on the forest and access to it by the women.

At the beginning, during the desk research, I unearthed some literature on the Dorobo/Ogiek. The issue of their name is discussed later in this chapter and in more detail in the chapter on literature review. Armed with the desk information I set out to collect data in the field. On the ground, issues that the Ogiek felt strongly about kept emerging. Access was not the focal point instead I noted the following:

- Rights to recognition by the state as indigenous people
- Recognition of their culture
- Complaints of marginalization by the state
- Land rights
- Indigenous right over the ownership and control of the forest.

These issues in certain instances resulted in various court battles that are discussed in the law review chapter.

In the midst of this, at the time of doing this research Kenya was engaged in a constitutional review process in which the Ogiek community presented their strong views. Also pending was a new forest bill that was going to have an impact on the Ogiek as forest dwellers. After distilling the issues it became important to go back to the drawing board. I had to change my topic and add some assumptions to take into account the emerging issues that were too important to ignore. The literature and interviews with both men and with a welfare organization working with this community (run by men) appeared to romanticize their old lifestyle but the women in the community had different views that I would not have discovered without the grounded approach to this study. This is discussed in chapter four. I considered this the essence of grounded theory as a methodology –women’s lived realities from their own perspective.

This research therefore looks at the broader issues emerging from the Ogiek claim to the forests around them, notably what is referred to as the Mau forest complex. It focuses on the gender dimensions at play in the Ogiek cause. Initially, the proposal had been to investigate the women living in Tinet forest but my research revealed that Tinet forest makes up part of a large area of forest known as the Mau forest complex. The complex is divided into four main blocks; Eastern Mau, South-West Mau, West Mau and the Maasai Mau. Emphasis was given to Eastern Mau covering Nessuit and Mariashoni and also part of Tinet and Olenguruone. Kenya has a total area of approximately 649,049 square kilometres of which about 571,416 is dry land while 77,633 square kilometres is surface water. The Kenyan area is divided by the Great Rift Valley into nearly equal parts, in a north-south direction that extends from Lake Turkana on the Ethiopian border in the north, to Lake Norton on the Tanzania border. Kenya's average rainfall is 567mm per year, which converts to approximately 322.77 billion cubic metres of water per year. The highest rainfall is on the western side of the rift valley, with the mean annual rainfall of 7.30 billion cubic metres of water. This is largely attributed to the Mau complex, which is a major water catchment area for the country.

Forests are central to catchments conservation but they have several other commercial, social, medicinal and industrial uses. Formal designation and eventually gazettelement of areas as forests in Kenya started as a reaction to the practice by the European settlers of clearing large forest and bush grassland areas for agricultural cultivation and other forms of land use, notably cattle ranching.¹ Currently the gazetted area covers some 1.7 million hectares, corresponding to approximately 2.9 per cent of the nation's land area. There are, in addition, areas of forest under the jurisdiction of councils and private ownership. The Mau complex is part of the gazetted forest owned as state property.

Kenya's population is approximately 30 million and considering its area, settlement and land are major concerns as most of northern Kenya is arid and semi-arid.

In Kenya the Ogiek tribe is associated with this forest as they consider themselves as forest dwellers. According to Joseph Sang², the tribe regard themselves as the only truly indigenous tribe of Kenya who did not migrate there. They are scattered within the rift valley from Mount Elgon in north Uganda up to the northern part of Tanzania. They are known to be hunters and gatherers and live close to the forests. They number around 20,000. The Ogiek in Kenyan history have been referred to as Dorobo but, as Joseph Sang explained, *Dorobo* is a Maasai word meaning poor. The Maasai who were their neighbours referred to them as such because they did not own cattle. This study had initially also referred to them as such but I have since changed to their correct name *Ogiek*. According to Mr Taptich,³ an elder, the word *ogiek* means 'caretaker of the universe'.

In recent times the government has excised vast areas of the Mau forests for settlement. Many other tribes as a result have now settled in the area. The government at the same time has attempted to evict the Ogiek from the forest to resettle them in other areas but they have strongly resisted these attempts. The allocation of part of the forest to individuals who are not members of the Ogiek tribe has diluted the Ogiek way of life so that from being hunters and gatherers they are now attempting to farm. Inter-marriage is also reducing the numbers of authentic Ogiek and a great animosity has emerged between the Ogiek and the government in the way the forest has been handled. In allocating forestland, the state did not give priority to the Ogiek. In May 1999 the government threatened to evict

¹ Okidi C O and Kameri-Mbote.P. Dr:The making of a framework.Environmental law in Kenya .ACTS Kenya 2001

² Co-ordinator of Ogiek Welfare Society interviewed on 16th October 2003

³ interview done on 24th October 03

between 5,000 and 10,000 of the Ogiek community from Tinnet Mau on the grounds that they were illegal squatters in the forest. Supported by the Roman Catholic church, they contested the eviction. In a ruling finally given in March 2000, the Nairobi High Court ruled that the Kenyan government was within its rights to evict the Ogiek. The judgement even denied that the Ogiek were indigenous to Mau Tinnet.⁴

Experts say that reducing forestland would have dangerous environmental consequences. The Mau forest complex is a vital water catchment area, absorbing water during the rainy season and gradually releasing it during the rest of the year. According to scientists the forests provide about 40 per cent of the nation's water supply. The Eastern Mau, in particular, is the main catchment area for Lake Nakuru, Nakuru town and surrounding farmland. Lake Nakuru is the second most visited national park in Kenya and a major tourist attraction because of its flamingo birds.

The government has exempted three powerful companies from a logging ban and allowed them to continue harvesting wood in Mau forest thereby destroying the Ogiek ecosystem in which the indigenous groups gather honey, selectively hunt animals and grow vegetables.

Successive governments have systematically ignored the Ogiek's ancestral land rights when dealing with the Mau forest. Even though Kenya has ratified several international treaties related to protection of rights of indigenous peoples – for example the International Convention on Economic, Social and Cultural Rights and the International Convention on Civil and Political Rights – the recommendations have not been respected when concrete policies are being formulated and implemented.⁵

To date there are several cases in court on forests and the Ogiek filed by the Ogiek Welfare Society and other interest groups who are fighting against degazettement and excision of Kenya forests by the state.

The research problem

It is against this background that this study seeks to investigate and examine the gender dimension in the Ogiek claim to the Mau forest complex – the interest of Ogiek women. In the unfolding events men have canvassed issues of marginalization of the tribe. Women have not been in the forefront, the gender issues in this scenario appear from my interviews with the community and policy makers as an issue that is of no priority at the moment. This research has sought to look at the women from this community from the following perspectives:

- a) Their relationship with the forest and how they consider it to be a resource;
- b) What value they attach to the forest,
- c) The activities exclusively carried out by women in relation to the forest and to what extent these activities are harmful to the forest;
- d) Whether women's interests are taken into account when formulating forest policies;

⁴Bob Wong. Racism and administration of justice

Kenya indigenous Group Faces October 1 Court Case-written in World Rainforest Movement Journal at pg 1-
<http://www.wrm.org.uy/bulletin/62/Kenya.html>

⁵ Kenya: Local peoples' land rights ignored in World Rainforest Movement bulletin no., 40, November 2000 at
<http://www.wrm.org.uy/bulletin/40/Kenya.html>

- e) To what extent the forest policies have taken into account the indigenous rights of the women in this community as embodied in several international instruments to which Kenya is a signatory;
- f) What is the extent to which the state has performed its statutory obligation to protect property rights, and the rights of claim over the forest for indigenous women?
- g) Whether women participate in community development, management and decision making in the general forest matters;
- h) Whether there is such community management is in place;
- i) The women's views on the scenario as a whole.

Justification for the research – why the Ogiek?

I was interested in access to forest resources by women as the focal point in my research. I wanted to find out whether the forest is a resource to women and the factors that have influenced their access, use and ownership. I could not just pick any group of women. I had to identify women who live close to the forest or within it. The Ogiek women became the most suitable choice because I was aware that the community was already fighting for forest rights. Their fight for rights as an indigenous group and right to culture brought to the forefront the issue of women and culture. The Ogiek women have been portrayed as still strongly controlled by culture and it was therefore of interest to find out their lived realities. It would be my task to distil the women's voices as became apparent when I changed the topic to incorporate the gender dimension of the claim. What did the claim to the forest mean for the Ogiek woman? The Ogiek were also chosen because they are the only community currently demanding recognition as an indigenous group attached to the claim to the forest. Furthermore, I live within easy proximity of a section of this community.

The objectives of the research

- 1 To assess the impact of government policies on forests with particular reference to the Ogiek women and how their access, use and management of this forest has been affected;
- 2 To bring out the views of the women in the Ogiek community claim to the Mau forest complex;
- 3 To suggest possible ways in which the women's views could be incorporated in the cause;
- 4 To make proposals and recommendations on policies for better use, access and management of the forest by the Ogiek women.

Assumptions

I made the following assumptions before commencing the research:

- 1 The policies on resettlement of the Ogiek community have failed because they did not address the relationship between the Ogiek and the forest.
- 2 The excision of part of Eastern Mau forest has greatly affected the Ogiek women's access to the forest.
- 3 Vesting of part of the forest in individuals has greatly impacted on the Ogiek women by denying them access to and livelihood from the forest.

- 4 The forest policies have failed to take into account views of the women living in the forest area and have excluded their interest in this forest.
- 5 The management of the forest has been vested in men and hence women have been locked out of management at decision-making level.
- 6 Putting in place better mechanisms in forest policies that include women will lead to better access, use and management of the Eastern Mau forest as a water catchment area.

When I began the actual data collection, several emerging issues necessitated the following additional assumptions:

- 7 Women share the same views as men in their concern for the Ogiek community as a whole.
- 8 Women are more interested in modern lifestyles than in the preservation of culture.
- 9 The inclusion of women in fighting for the community's rights would help to find a middle ground

Research questions

The following were the research questions based on the above assumptions.

- 1 Have the policies on resettlement of the Ogiek community not succeeded because they failed to address the Ogiek's relationship with the forest?
- 2 Has the excision of part of Mau complex forest affected Ogiek women's access to the forest?
- 3 Has the government's allocation of part of the forest to individuals impacted on the Ogiek women by denying them access to the forest?
- 4 Have forest policies failed to take the Ogiek women's interest in access and use of the forest into account?
- 5 Has vesting forest management in the hands of men locked out the women from decision making?
- 6 Will putting in place better mechanisms in forest policies that include women lead to better access, use and management of Eastern Mau forest as a water catchment area?
- 7 Do women share the same views as men in the concerns impacting on the Ogiek community?
- 8 Are the women more interested in modernity than in preservation of culture?
- 9 Will the inclusion of the women in the cause help to find a middle ground?

Demarcation of the study

The findings in this study are confined to Eastern and a small part of South Western Mau. It is further confined to areas occupied by the Ogiek community. Much of the data was collected from Nessuit, Mariashoni, Tinet and Olenguruone in Nakuru District of the Rift Valley, Kenya

CHAPTER TWO

Law and literature review

The law

Kenya has several pieces of legislation that control and sometimes conflict on forests. These over the following: land, wildlife, agriculture, water, natural resources, settlement, physical planning, timber, local councils, mining and energy, among others. An example of conflicting legislation is that the Forest Act gives the minister wide powers to deal with the forest, while the Environmental Management and Coordination Act requires the minister to act in consultation with interest groups who have a locus to protest against decisions and even take legal action. I will deal with the laws most relevant to the area of research as follows:

The Forest Act

Kenya has a Forest Act brought into force by the colonial government in 1942 before Kenya's independence. It is Chapter 385 of the laws of Kenya. Although there have been reviews of the Act, these have not been significant and the controversies over ownership have not been addressed. The Act provides for the establishment, control and regulation of central forests and forest areas.

It gives the minister power to declare any forest or part of it to be a nature reserve whereby strict preservation of flora and fauna is undertaken. The Act also provides for a Director of Forestry who has wide ranging powers to issue licences for inter alia cutting down trees, erecting buildings, depasturing cattle, cultivation and so on. Under the Act various forest officers are appointed and posted to the forest areas. These foresters as they are called, have under them forest guards whose responsibilities are to patrol the forests and to arrest and prosecute any person considered to be violating the Forest Act. There is a general penalty under the Act for whoever violates these provisions. The offenders are often taken before the local courts and prosecuted by the foresters.

The Environmental Management and Coordination Act (1999)

This is new legislation which came into force on 14 January 2000. Chapter 5 of the Act is concerned with the protection and conservation of the environment, including forests. Section 5(4) in particular provides that the authority shall in consultation with the relevant lead agencies develop, issue and implement procedure, guidelines and measures for the sustainable use of the forests. This is to be done in order to:

- protect water catchments areas;
- prevent soil erosion;
- protect humans settlement; and
- control and regulate the harvesting of natural resources.

Chapter 6 of the Act provides for environmental impact assessment which is defined as 'systematic examination conducted to determine whether or not a programme, activity or project will have any adverse impacts on the environment'. This Act would require therefore that the Ogiek as stakeholders

participate in environmental impact assessment before excision and settlement can take place since they occupy the forest in question.

The Physical Planning Act

The Physical Planning Act is concerned with the preparation and implementation of physical development and development control. The issue of development is defined to include making any material change in the use of any building or land. Section 4 of the Act requires that the director of physical planning advises the government and the commissioner of lands on matters concerning the alienation of land under the government Land Act and Trust Land Act and also on the most appropriate use of land including land management issues such as change of user. The government Land Act and Trust Land Act are the pieces of legislation that govern land owned by the government. The forest is government owned. Should a need arise, therefore, that the forest has to be excised and land invested in individuals, as was the case in Mau forest, the Minister for Physical Planning needed to address the issue of the Ogiek community who were already occupying the forest. The planning, therefore, needed to be done in such a way that the Ogiek lifestyle would be maintained.

The Registered Lands Act

This legislation governs registration of land ownership. It was enacted to consolidate the various native land holding and is the only legislation that gives absolute and freehold ownership. The other land legislation gives leaseholds. Most land in Kenya is registered under this Act. Leaseholds from the government can be converted into freehold titles through what is termed conversion. This is the process that took place within the excised forest in the Mau complex so that the titles that have been given so far are under this Act and give absolute ownership to those already in possession of the title.

Literature review

Who are the Ogiek?

Mr Towett says of them:

‘They are the only community in Kenya that follow God’s Constitution. They live in the forest and maintain it with an inborn knowledge of conservation just the way God made it and wants it to continue to be.’

Early anthropologists referred to the Ogiek as *Dorobo*, a corruption of the Maasai word *itorobo* meaning ‘poor’ or ‘blood-sucking insect’. The Maasai saw the Ogiek as dependent on God to provide for them through the forest or reliant on them (the Maasai) for survival. According to Joseph Sang⁶ the Ogiek are the only tribe in Kenya that did not migrate from outside Kenya. He believes they are indigenous as they can be found settled specifically around the forest area and says of their folklore;

‘Ogiek lived with God in the forest along time ago. When one killed an Elephant, God left the Ogiek and went to Heaven.’

⁶ interview carried out on 21st November 2003

There has been a tendency to date to confuse the Ogiek as being part of the Maasai or the Kalenjin, which are bigger neighbouring communities but they maintain that they are distinct and speak a distinct language known as Ogiek.

The Ogiek as forest dwellers had a lifestyle revolving around the flora and the fauna of the forest and mainly lived around and in forest areas. In early history they were considered as hunters and gatherers though Mr. Towett⁷ says of the anthropologists' term of hunters and gatherers:

‘We have no words for hunting and gathering in the Ogiek language, the word we use is harvesting what is already there – what God had already put for us in the forest.’

They mainly hunted small animals, collected herbs roots and fruits and prepared and kept honeycombs in the forest for honey. The herbs were used mainly for medicinal purposes to treat various illnesses. According to Jane Machani⁸ the Ogiek Welfare Council gender representative living in Eastern Mau:

‘Not everybody knew medicine but while growing up I knew that there are herbs that can treat malaria, joints, stomach pains, coughs and so many other ailments, people hardly ever went to hospital.’

According to an elder Mzee Taptich,⁹ the Maasai being their neighbours had a special relationship with them. They did barter trade with the Maasai giving honey in exchange for hides and skins, spears, knives, bows and arrows.

There was no clear system of leadership but the Ogiek were divided into clans. Mr Sang explains:

‘There existed a council of elders which was supreme with a leader; the last of this organized system was in 1948 when there was a chief called Chief Tiwas who was talking to the colonial government on our behalf and who was closely associated with the founding father of Kenya, Mzee Kenyatta. Currently we have no traditional chiefs only those employed by the government. We have elders but these are more associated with representation of the community in land matters.’¹⁰

According to Mr. Towett:¹¹

‘As the Ogiek population grew, a person who had shown leadership qualities was given a green light to become a leader – like me.’

In the system of leadership, the current tribal elders are closely linked with land claims on ownership and work closely with the chief to deliberate matters affecting the community. All elders are men. Women do not deliberate on community matters.

Historical background

Are the Ogiek therefore claiming the Mau forest complex by virtue of being forest dwellers? Are they claiming only the forest or the land as well? What is the claim based on? What about the state's rights?

⁷ Interview done on 18th November 2003

⁸ Interview done on 22nd September 2003

⁹ Interview on 24th October 2003

¹⁰ Interview done on 21st October 2003

¹¹ interview done on 18th November 2003

This cannot be understood without looking at colonial evolution of land ownership rights in Kenya, how this has continued into the independent government and how this has impacted on the Ogiek.

Colonial factor

The historical evolution of land law and the current land questions have to be understood against the background of colonialism. Kenya was born out of the Berlin Conference in 1886 when the imperialists set to divide the African territories amongst themselves to avoid the scramble for Africa. As a result of this Anglo-German agreement, Britain took over Kenya as a protectorate.¹²

Under the unwritten British constitution, a protectorate was seen as a sovereign state but a colony meant that Kenya would be part of the dominion of the British crown. Hence a series of events began to take place with the main question facing the British government being the acquisition and control over land and the establishment. A summary of the events in brief will suffice.

In 1877, the British government extended to Kenya the Land Acquisition Act of India (1894) to enable them to compulsorily acquire land for the Uganda railway and ten-mile zones on each side of the railway line, to run from the coast in Mombasa to Kisumu, a town next to Lake Victoria shared by the three East African countries. The line passed through Ogiek land and this was the beginning of state acquisition of their land. There was repeated resistance by the Ogiek over the building of this railway line on their land.

In 1901 – the East African (Lands) Order in Council was enacted. This ordinance was used to declare most of Kenya crown land. Crown land was defined as:

‘... all public lands within the East Africa protectorate which for the time being are subject to control of His Majesty by virtue of any treaty, convention or agreement and all lands which have been or may be thereafter be acquired by His Majesty under the Lands Acquisition Act.’¹³

In 1902, a further order in council was enacted giving the commissioner authority to make grants or leases or sell the crown land to settlers hence land that was not seen to be under the occupancy of the native African was considered ‘waste and unoccupied’ land. The idea of ‘waste and unoccupied’ was perceived from the idea that Africans did not comprehend the idea of property ownership of land.

This idea was tested in the case of *Isaka Wainaina vs Murito*¹⁴ when Barth CJ interpreted the effect of the ordinance as having taken away all native rights in land and referred to their occupation as tenants at will to the crown.¹⁵

Attainment of political security became an issue after emergence of African unrest over the colonial approach to dealing with land and the Asian agitation for equal treatment as the Europeans. A solution was found by forming a commission chaired by Morris Carter in 1932. The Carter commission was to look at grievances over land and it was the first such attempt to address the problems of African peasantry created by the preceding colonial policy. Most reference to land in Kenya leads back to this commission.

¹² pg 3 article by Mweseli T.O in Essays on land law-.Ed. by Wanjala S.C.Pub.University Of Nairobi.

¹³ s.15 of Crown land Ordinance 1915.

¹⁴ 1923 (2) KLR at pg 102

¹⁵ Ogendo H.W.O.O Tenants of the crown evolution of agrarian law, 1995 Acts press Nairobi

The Carter commission made several recommendations which were implemented in stages in various ordinances or Acts that were promulgated thereafter.

The net effect was a myriad of regimes of land laws covering native land holding notably:

- The Native Lands Trust (Amendment) Act No. 36 of 1934;
- Crown Lands Ordinance 1938;
- Native Lands Trust Ordinance 1938 Kenya (Native areas) Order in council 1939;
- Kenya (Highlands) Ordinance in Council which exclusively protected the white settlers.

Of importance to this research is that these ordinances helped to create designated areas called reserves for Africans and created what was known as the White Highlands for white settlers.

The native land had to be reserved as much as possible close to their place of origins (ancestral) and this strengthened the concept of ancestral land amongst Kenyans.

The myth of waste and unoccupied land having been created, vast tracts of land were taken by the colonial government on the grounds that they could not be immediately associated with an identifiable persons in occupation.

The Ogiek elders were invited to appear before the Carter commission but the Ogiek believe the commission disregarded their views. Instead the commission recommended that the Ogiek should be settled 300kms away amongst bigger tribes with similar languages to be assimilated by them. The commission recommended thus:¹⁶

‘Whenever possible the Dorobo should become members of and be absorbed into the tribe with which they have most affinity.’

Following the Carter commission recommendation, resettlement of the Ogiek commenced but was unsuccessful as the Ogiek reacted by moving deeper into the forest and those resettled came back after a few months. The Ogiek occupation of the forest was seen as a security threat to the white farmers who feared that their population would increase and they would demand back their land and attack them. A solution was found with the enactment in 1942 of the Forest Act Chapter 385 of the laws of Kenya which saw the Mau forest complex identified as one of the protected areas and bought under state ownership. The colonial government then embarked on replacing the indigenous trees with exotic ones whose effect will be discussed later in chapter four. With the Forest Act in place, the Ogiek became illegal occupants and were considered trespassers. This was the beginning of many attempts at eviction, a situation inherited by the independent government.

Independent government

In the first 15 years of independence, the Kenyan government did not interfere with the Ogiek. Then in 1977, through the local provincial commissioner, the government invaded Mau West forest, torched the houses occupied by the Ogiek, and arrested and arraigned a number of them in court on charges of being illegal squatters in the forest. In 1987, the Ogiek in Eastern Mau were evicted and schools that had been put up by the Catholic church were closed. The reasons given have been that the Ogiek are keeping livestock and farming but the Ogiek argue that these activities are carried out by non-Ogiek

¹⁶ form paper presented by Ogiek parliamentary council to the constitution of Kenya review commission

who have settled in the area. In May 1999 there was a threat to evict the Ogiek from the Tinet Mau but they filed an injunction against the government which they lost and the case has gone to appeal. At the time of the research, the government had issued an eviction order to the Ogiek to vacate the forest area and the order had been extended until 31 March 2004.¹⁷ The war still continues.

Case law

The Ogiek cases against the state

So far the Ogiek community have filed the following cases against the government challenging the excision, distribution and eviction from the Mau forest complex:

- 1 HCCC No.635 of 1997 Nairobi – *Joseph Letuya & Others vs the Attorney General & Others*
- 2 HCCC No.2280 of 2001 Nairobi – *Joseph Letuya & 21 Others vs The Minister for Environment & Natural Resources*
- 3 HCCC No.2380 of 1999 Nairobi and Appeal No.98 of 2000 – *Francis Kemei & 91 Others vs Attorney General & three Others*
- 4 Narok Civil Case No.19 of 1997– *Simon Kiwape & 19 Others vs Muneria Naimodu & 2 others*
- 5 Narok Misc. Application No.7 of 1999 – *Murinwa Sagoo & Ololoigeno Families vs Isaiah Cheluget Rift Valley Provincial Commissioner*
- 6 HCCC No.421 of 2002 (Judicial Review) – *Representative vs Ministry of Environment & Ministry of Lands*

The unfortunate part about these cases is that they have not been finalized. I will discuss two of the cases to highlight the claims they have made therein

Nairobi HCCC No.635 of 1997

This is perhaps one of the most significant of the cases. The community has sued the government challenging the legality of the demarcation and alienation of their ancestral land. The suit is seeking for prerogative orders. The pertinent issues in this case are that a decision reached will have to address the concept of ancestral land in Kenya, the issues of indigenous claims not only for the Ogiek but other communities like the Maasai, the government's ownership over land with customary claims by the community – looking at statute law vis a vis the customary law – and the recognition of a people's right to their culture and a need to consult them in terms of natural resources that tie in closely with their cultural lifestyle. Perhaps some of the statutes already discussed can be given interpretation that addresses itself to the reality on the ground other than a theoretical framework where courts make decisions based on law and legal arguments without taking into account the reality on the ground. This case was unfortunately still pending when this research was carried out but it is hoped that all facts and research work will be brought before the court so as to make the court understand the issues at play.

Nairobi HCCC No.238 of 1999

This is a suit in which the Ogiek living in Tinet Mau challenged an order for eviction from the forest. This case unfortunately was determined at an interlocutory stage where they had sought a temporary injunction against the government. As a result, the ruling was based on legal arguments rather than

¹⁷ From a letter dated 9th January 2004 by the Ogiek Welfare Council to the president of Kenya

viva voce evidence that may have helped to strengthen the case. The application was heard by a two-judge bench on the grounds that it was a constitutional matter. On the argument that Ogiek were hunters and gatherers the judges said:

‘Hunting is illegal in Kenya. The eviction is for the purpose of saving the whole of Kenya from possible environmental disaster and it is being carried out for the common good within the statutory power since the Ogiek can make a living outside the forest.’

On the issue of a claim of dependence on the forest as a source of their livelihood for beekeeping, the judges said:

‘There is no reason why the Ogiek should be the only favoured community to own and exploit our natural resources, a privilege not enjoyed by or extended to other Kenyans.’

My reading of the ruling revealed that no international instruments were referred to nor did the judges address themselves to the fact that the other Kenyans do not use the forest in the same way the Ogiek do. No argument on their knowledge of conservation was canvassed. Perhaps if the lawyers had made more effort in their research or opted for a full hearing, the ruling would have been different as the state did not have strong arguments.

The issues in these cases from a gender perspective

These cases have been filed on behalf of the community and the issues being canvassed have been discussed in the findings as sub-topics. Perusal of the court files revealed that no woman is a plaintiff in any of the suits. The plaintiffs are men and the pleadings are coached in male terms. Gender has not been canvassed in the suits. What has come out clearly is culture and recognition of their claim to the forest as indigenous people with a customary holding. Even while opposing eviction, the issues being argued are based on the recognition of the above. In the meantime, the effect of constant eviction, lack of land ownership and protection of rights of women to found a family and live in peace, their children’s right to education and their right to live in safety and freedom from discrimination are not addressed. The cases proceed as though matters being decided involve men who are busy hunting and destroying the forest while the reality on the ground is that there are several settlements where women keep homes and children attend school. The community attend their cases in large numbers and sometimes women accompany them but I did not detect their voices in any of the arguments. The state has a duty to protect such rights but this argument is not canvassed, particularly in the Civil Case No.238 of 1999. However it has been claimed by the Ogiek activist that the state had an interest in the case and the community was going to lose either way. Towett claims they were waiting for a change of government to pursue the pending cases.

CHAPTER THREE

Methodology and methods

Methodology

I used at least four methodologies in trying to explore the issues relating to the research during the study. These included:

Grounded theory

When setting out to do this research I did not know much about the community despite the fact that I lived in a town near to them. As a lawyer I wanted to research on a topic outside the conventional law and particularly on women's access to natural resources. I was interested in the women's relationship with the forest, particularly from the ecofeminist perspective that women by nature of their biology are closer to nature. I prepared the statement of the problem, the objectives of the research, assumptions and research questions that would guide my findings. Before going to the field I did read the related literature.

There is no published literature on the community but I started with an internet search and was surprised at the literature I accessed. It revealed that this was a community that considered itself injured and they were fighting for justice and there was so much networking on the internet. This helped because when I got to the field I was able to evaluate the data objectively. I had a picture of a community still living and practising their tradition of hunting and gathering and not yet exposed to modernity. Yet when I went to the field I saw a different lifestyle. I saw maize plantations, modern houses, livestock and people with a different lifestyle from what my literature reading had led me to believe. This was the initial challenge I faced.

My initial interviews were conducted mostly with men and also with women who supported the views of the majority of the men. At the end of each field day I had to try and reconcile the information I was given and my own observations. I realized that I had to change my tactics to elicit information reflecting the reality on the ground. This entailed reframing my questions, incorporating the emerging themes and analysing the new category of data collected. Using grounded theory I was able to change my topic easily to incorporate all the emerging issues which were pertinent to this research. It entailed patience, keen observation, creating friendships and working according to their time. I occasionally had to attend some of the community meetings if I was to meet a women's group. One's entry point is equally important. If I went as a researcher per se and as a stranger to collect data then I would either get the information they thought I wanted to hear or none at all. So I had to inculcate friendship as well. I was able to understand from this methodology that what was coming out as a community concern was supported by women but their points of emphasis were different from the men's. This will be discussed in the finding chapters. The most beneficial aspect of grounded theory as a methodology is that it requires you to go to the field to collect data which is very worthwhile. One has to exercise patience and avoid taking everything at face value and if one interacts with the respondents, particularly women, one tends to get better information when it is unsolicited. An example is when I took my supervisor Dr Tsanga to meet a women's group. After the interview they offered us tea and during the tea they began to ask Dr Tsanga questions about Zimbabwean women. As I translated I began to understand their thoughts and capture more of their views.

Grounded theory is not all academic; there is an adventurous side to it. On the day I took my supervisor to the field, the co-ordinator of the Ogiek Welfare Council asked me to drop some cement at his home which was within my area of research. I protested that I was with my supervisor but he said, 'She is a lady like you, she will not refuse you to do me a favour.' But when we were delivering the 'patriarch's' cement, it rained heavily and the area has no tarmac roads so we ended up pushing the vehicle for some distance in the rain. The mud splashed all over Dr Tsanga but we were able to laugh at the end of the day and blame it on patriarchy. However from the incident we had experienced the lived realities of coping with poor infrastructure, amongst other things.

Keeping a diary was an important aspect of this methodology, helping me to plan programmes and appointments, make comments, ask myself questions and plan for a follow up; it was one of the most important documents I carried around. For me grounded theory as a methodology was effective. In using grounded theory the aim is to engage empirical knowledge about gender relations and the local practices and procedure in a constant dialogue with theoretical generalization and concept building. Legal concepts and their theories need to be critically analysed through the medium of women and men's lived experience.¹⁸ I have explained how I was able to put the methodology into practice, especially with regard to my topic which sought to distil the gender dimensions in the community's claim to the forest. I was able to find on the ground that the men in this community appeared to have more attachment to the forest than the women by the nature of their cultural gender roles

Legal pluralism

The concept of legal pluralism was useful in my research. In many modern post-colonial African states, the general law made up of the imported common law of the European colonizers and statutory law operate side by side and interactively with customary laws of different ethnic groups.¹⁹ I had in mind a community that was still strongly practising their culture and who claimed ownership of the forest by virtue of their customary holding and a government that claimed ownership of the same forest by virtue of colonial received statute law.

The control over the forest operated side by side with both customary and statute law. The colonial type of ownership recognized state ownership over its people, and as well as individual ownership so that when it came to allocation of the forest land this was given to individuals. The Ogiek customary ownership did not recognize state ownership over the people and only recognized communal ownership so that the men in the community have argued that in giving out the forest land, customary holding should have been recognized by giving the land to the community as opposed to individuals or strangers. This methodology helped me to understand where the Ogiek were coming from in terms of their claim over the forest. It made more sense to me when I looked at it from the women's perspective. If the community were to get customary holding, what would the women's position be in terms of the cultural or customary practices regarding women and ownership of property?

Were these issues being taken into account in this cause? Again, how was the concept of customary, communal ownership going to fit into the wider concept of the human rights and statute law right to individual ownership by both men and women? This approach helped me to see the competing ownership in the sense that the government used the Forest Act to claim ownership but the Act came into effect when the community was already living within the forest. To date the community continues to live there despite constant eviction and use of the statute laws to block access and use of the forest,

¹⁸ Weiz Benton et al .Pursuing grounded theories at pg 25

¹⁹ Weiz Benton et al ,Pursuing grounded Theories at pg30

so that there has emerged ownership by occupation and not by law and ownership by law, and not by occupation. A scenario of competing interests in different systems of law living side by side.

Women's law approach

I wanted to research environmental issues and I chose to focus on forestry but I could not ignore my background as a student of women's law and had to embrace the concept of women's law as methodology throughout my research. Women's law as a methodology takes women's lives as a starting point. In a community where the voices are those of men and their cause is so involving, it is easy to get caught up in the whole scenario.

However with the women's law approach I had to look out for the views of the women not only from the women themselves but from the men as well. One of the elders, for example, when asked about the status of women referred to them as children, so it was easy to form a picture of the status of women in the community. If I had not had the women's law methodology in mind, I would have taken most of the information at face value. Women's law as a methodology also helped me to appreciate that women are not homogenous; their views will vary depending on their age, marital status, religion, education and exposure. This came out well during the discussion on land ownership; women had differing views. The dominant one has been taken in this thesis to represent the women's views in the Ogiek community but the small voices have equally been included because they are also important.

The methodology was important in the sense that not only could I identify the different voices but I could look at the written law and the concepts on culture and compare them with the women's lived reality as I found it on the ground

The narrative format

I realized from the start that I was researching a small community not well known in Kenya and so part of my responsibility was to engage the reader in their story and their background. As I collected data much of the history on the community was gleaned from the respondents. That way I aimed to get the history first-hand rather than through reading, though there is scant literature anyway. This history is shared in a narrative form and it is hoped that at all stages, when issues are identified, the reader understands the background as well. The problem with this format is that much of the data may appear repetitive but the issues are so intertwined that it was difficult to separate them because the main theme or focus is actually women and culture.

Methods

The approach I used for collecting data from the field was multifaceted. Given that the study intruded on a sensitive tribal matter, no single method would be effective. I therefore used different methods to get a wider scope of data. The following were the methods used

In-depth interviews

Family friends who live in Nakuru town, whom I discovered just before doing my research were members of the Ogiek community, organized a few families at their homestead so I could interview them. At the beginning of the research after interviewing a key witness in Nairobi, she gave me a contact of the Ogiek welfare Council (a non-governmental organization), which was significant in my research. Through the council, I met Zachary Keah, a programme officer and who took me to the field and made it easy for me to identify respondents and their area of residence. I also did random selection which included people I met at the chief's office and those I met at the Ogiek welfare offices. I had my

questionnaire which I kept working on as I went along depending on the answers I got from previous questions. This enabled me get exhaustive information. From this method, I was able to interview eight women and twelve men. Men were easier to find since it was the rainy season and most women were out in the fields trying to harvest the maize before it got spoiled. Most men in this community do not farm and are easily found at the local shopping centres seated outside the shops with no particular activities, they also did not appear to be in a hurry and it was possible to interview them without prior arrangement.

Key informants

These had already been identified before going to the field but in any given research it is possible to come across others who can be added to the list. The key informants are the people I identified by virtue of their position in society as opinion leaders. I had prepared interview guidelines prior to the appointed interview date. The area of research is part of the wider issue of environment and therefore it was important to identify persons renowned in environmental issues in the country. The research also involved sensitive issues of land and animosity between communities and it was important to select key informants carefully.

I identified the provincial commissioner Rift Valley Province as that was the office dealing with the distribution of land in Mau forest as well as maintaining security. The assistant minister for environment is a renowned environmentalist and so her input was going to be useful to this research but unfortunately for reasons beyond my control I was unable to meet her due to a tight schedule.

Others included the forest officer in Nessuit, the local chief, the local elders, three directors of local logging companies, the local magistrate, three women leaders in the area, and the local councillor. This group were on the ground and from them I collected data on current activities. It was also important to identify any non-governmental organization or group dealing with issues affecting the Ogiek community and I identified a programme officer with KFWG (a non-governmental organization concerned with forests, their conservation and management; from them I could get information about Mau forest); the chairman of the National Environmental Management Authority concerned with listening to grievances on environment degradation; a consultant on environmental training programmes and a representative of the Catholic Diocese of Nakuru which emerged as an interested party in the Ogiek issue. The Ogiek welfare Council was one of the non-governmental organizations added to the list as they were the mouthpiece of the community. I therefore added the gender representative, the co-ordinator, the vice chairman and one programme officer. I made appointments to meet these informants recorded their responses in my diary and after each meeting made comments in my diary.

Group discussions

I organized group discussions with the help of Mr Keah from Ogiek Welfare Council. Perhaps my most fruitful find was Keah because as it turned out he was the programme officer in the area of my research and was in charge of several programmes the council had on the ground. He dealt with several women's groups and had good rapport with the local chief and the elders in the area. Being a man was of great significance because they appeared to have confidence in him; after listening to the purpose of my research most men thought I had gone there to incite their wives but Keah was able to allay their fears. With the various programmes on the ground, it was therefore possible to meet these groups. The chief was equally instrumental in organizing an elders' meeting for me. I was able to have four group discussion groups that included the 18 clan elders, four forest guards, four women representatives of the local women's group and the four women groups as well. Through my family

friends I also met one women's group from a distant area of my study. Group discussions worked better than individual interviews because it was easier to get the women in their groups than individually as they appeared very busy. I also realized they had several programmes on so when I engaged one she always felt she was missing out being with the other women. Group interviews can be useful because they make it easier to elicit different voices or a uniform voice at the same time. However, while collecting data there was sometimes peer or group pressure where people said what they thought they should. This explained why initially I was getting only one voice until I went back again and again using different questioning approach so that I was then able to distil the women's voices from that of the men.

Library research

At the commencement of my research I first and foremost did an internet search on my topic (since I am now computer literate). I was able to get information that gave me an insight into what I was going dealing with. I was able to see that the community was agitating for some rights for recognition as an indigenous community and they had networking both locally and internationally. I then began to see emerging themes immediately. Though there is literature on the internet about the community, there are no published works and I did not easily come across any literature on the women in the community. The community also has a newsletter published by Ogiek Welfare Council which was useful reading as it contained current news on the community. It was therefore my task to try and distil the gender dimensions from this literature. I looked at literature on environment as well and learnt about the various environmental non-governmental organizations concerned with the environmental campaigns and read their various papers. I was able to learn that there is a new forest bill in the pipeline and that though it is not in use yet, various projects have been put in place in other forest areas of Mount Kenya in line with this intended new forest bill. It appears from this desk research that the forest is a contentious issue in Kenya as it ties up closely with the issue of land ownership in which tribal sentiments and politics has emerged. This method helped me to understand the many dynamics at play in this research.

Guided interview questions

Before embarking on the research, I prepared sample questions of what I thought would guide me in the collection of data. The questions had to fit within the topic being researched. During the interviews, however, I realized that though they were good for guidance purposes, they did not work well. This is because I was getting uniform or standard responses from the respondents. The community, as I have pointed out, was agitating for some rights against the state and so most answers sounded like some rehearsed songs of what they thought the community out there should know about them. In some instances, therefore, I adopted the strategy of chatting to the respondent about issues appearing unrelated to my research and after creating a rapport I elicited spontaneous information that helped to distil the women's views from the commonly held opinions of the community. The guided questions however worked in interviews carried out with established systems like consultants or those in formal sectors. As I went on I amended the original questions to take care of emerging themes from the respondents I had spoken to. There was also need to revisit the assumptions and the research questions while conducting the interviews so that as much as possible was covered in terms of my starting point.

Court records

I established that the Ogiek had several cases which are discussed in the law and literature review chapter. A reading of the pleadings in these cases helped me to establish their claim against the

government. I was also able, using the gender lens, to distil the gender dimensions in the suits when I saw the absence of women or any specific claims relating to their interests.

Observations

I found observation to be the most effective tool. My first observation came as a shock when I saw what appeared to be the mass destruction of the forest. In Eastern Mau where this research was carried out, the area has obviously only been recently settled. One woman respondent informed me that her crop of maize was the first she had planted. I was able to observe that though the area is near Nakuru, a major town, there is no major development. Driving in and out of the area when I went to the field, I noticed the different economic activities going on – denser population and more vehicles in areas occupied by other communities compared to in the Ogiek area which appeared relatively quiet with no activities. I observed that the Ogiek are a community that is accommodating, not aggressive and one that has easily adapted to their stronger neighbours. As already mentioned, observation made it possible to link the data collected from the respondents and what I observed from the ground; an example of this is that the community gave the impression that they liked their old lifestyle of hunting and gathering, yet my observation saw a people already embracing a modern life style. I was then able to put this issue across to them. Observations helped to fill in many gaps from the direct interviews.

Reflections on collected data

At the end of each field day I sat down with the data, previous emerging themes noted, my questionnaire, assumptions and diary, reflected on the data collected and compared it with my observations and the other information mentioned. This was a way to pick out emerging themes, redraft questions and strategies and devise a programme for the next course of action. It also helped me stay on track with my research because one so much information may sometimes lead to a different direction not relevant to the scope of the study.

Limitations of the study

Time

Three months was not long enough to collect and follow up on data, particularly where it was obvious some people in group discussions had different views which I had not properly captured. After reading some of the court cases I wanted to meet the coordinator Towett to discuss the cases in details. Time was shorter particularly because the research was done towards the end of the year when students sit examinations and it is also harvesting time; most of the respondents were busy and I had to make appointments to meet them at their convenience. This was time consuming as well. Also, being before the December and other public and religious holidays, time went very quickly.

Transport

I had initially thought I would restrict myself to a particular area but on the ground I found the community I was investigating was scattered in the same district but at far distances. The roads were mainly earth roads used by timber lorries. The public transport was unreliable and did not reach some places. This forced me occasionally to use private transport and since it rains a lot in the forest area, I risked getting stuck in the mud several times. In the end I did not cover as much of the area as I would have wished.

Language

The Ogiek insist they have a distinct dialect from other similar tribes and because there are few of them, one could not get a translator from outside. My guide who works with the Ogiek Welfare Council was not an Ogiek and so we communicated in the national language Swahili and occasionally in English. They were not very good at either and this meant that translation of certain names for things such as vegetables, trees and weapons was omitted.

Bureaucracy

In most instances one cannot walk into a village and start collecting data, nor can one do the same at an office before getting clearance from the person in charge. At times I never got the person in charge on the date designated for the research and so I had to go back the next day or when the person was available. When I first met the area chief, for example, I saw an old woman at his office whom I wanted to speak to but he told me he would organize a proper day for me to come back when he would have summoned the elders to be present. He promised me the woman would be present but that was not to be. At the provincial commissioner's office it proved difficult to meet him even with appointments because of urgent meetings that cropped up suddenly. When I finally succeeded I found the current commissioner had just been transferred to the station and would need time to familiarize himself with my issues by which time I was already on my way back to the Women's Law Centre. This was also the time that the Minister for Environment announced over the national radio that he had dismissed all the forest officers and so even the forest guards I encountered on the ground were reluctant to give any information.

CHAPTER FOUR

Findings

A struggle for control of and preservation of the Mau forest complex

This chapter looks at the findings and analyses the Ogiek cause vis a vis the state authority and control over the forest and the impact of such activities on the community. The chapter looks at the manner in which the state has dealt with the forest and how the Ogiek have reacted. It looks at how in the process the community has identified areas in which they feel the state has marginalized them. Finally, the chapter looks at these issues in the context of the relevant framework of the law and the human rights framework.

The Ogiek feel their claim to the forest is based on their fear that the destruction of the forest will bring an end to their identity as a community since the forest holds them together. Their fight for ownership and control is by virtue of their occupation. They argue that historically their conservatory measures have contributed to the preservation of the forest and consequently they are stakeholders in any decisions made in dealing with the forest. In the process there is a fight for control over the forest; the state is using the statute law as a starting point in dealing with the forest and the Ogiek is using customary holding to resist the state's rights over theirs. The Ogiek argue that as a result of this animosity, the government has marginalized them as a community and has failed to consult with or take into account their interest in the forest.

What is Mau forest complex?

The Mau forest complex has been partly described in the introduction. The forest covers about 290,000 hectares of land and is about 250 kms from Nairobi. It is one of the largest continuous indigenous forests in Kenya. As a water catchment area, the forest traps, stores and releases rainwater thus regulating stream flows. There are several streams from the forest that drain into Lake Victoria and Lake Nakuru. Lake Nakuru is closest to the forest and has been fenced off as a game park with wildlife and flamingos. It is big tourist attraction. One of the big rivers that is fed from this forest is Sondu miriu, on which currently a power plant is under construction. In terms of timber, Mau forest is one of the largest timber producing forests in Kenya and has created several small timber industries in the area.

The Mau forest is a combination of forests on high hills and valleys and the downstream regulation has resulted in fertile soils for agriculture – tea and pyrethrum as export crops are planted in the area. As a source of livelihood, particularly for the community living in the area, the forest provides firewood, fibre for baskets, small animals for food, honey and herbs for medicinal purposes. The forest has also been responsible for much of the rain in the country. This background serves to highlight the impact that the activities carried out by both the government and the people occupying or using this forest has had on the forest and what it would mean to destroy it. It helps explain why there is so much conflict over this forest.

The role of the state in the management of the Mau forest complex

How valuable then is the forest to the state? The state may have ownership over the forest but has it ensured its survival? A few activities that have taken place or are still taking place are discussed below and will help to answer these questions.

Excision of the forest

Sometime in January 2001, the Kenya government, through the *Kenya Gazette*, gave legal notice of its intention to excise 67,000 hectares of the Mau forest complex. The irony of this was that the intended excision was to give credence to an exercise that had already taken place. The forest had already been given out to individuals. During the allocation of land and the various suits filed by the Ogiek it transpired that legal procedures had not been followed. The government had not divested itself of the forest before it distributed it to individuals and this raised a legal technicality. The gazette notice was therefore an attempt to rectify the situation. Unfortunately a new legislation on environment management had been passed at this time and various environmental organizations reacted to the legal notice by writing letters to the Minister for Environment and, after finding no reasonable solution, a few of them have gone to court.²⁰

The suit essentially argues that the ministers concerned with environment, physical planning and land, did not follow laid-down procedures. There is no indication that any laid-down procedures were followed before the gazette notice was published. The plaintiffs in this suit argue that as at the year 2001 when the gazette notice was published, no compliance with the Environmental Management and Coordination Act had been made and consequently the interest groups had not participated. This suit is still pending and there is an injunction against the relevant ministers sued which means that the land from the excised forest already allocated is illegal and the few people with titles have no ownership in law and those with no titles will not be given them.

Mr Towett says that initially only 27,000 hectares had been earmarked for allocation but it appears that political allies and a few other individuals who were to benefit, caused an increase to 67,000 hectares. He concedes that a only a few Ogiek were allocated land but does not sympathize with the current impasse. In his view the forest has been destroyed and this has greatly affected the Ogiek community, if the settlers cannot get titles it will serve the community's cause. On the ground in East Mau, for example, the rate of forest excision can be shown by statistics of forest cover which are as follows: in 1986 – 89 per cent, in 1990 – 81 per cent, 1995– 80 per cent, 2000– 50 per cent and 2003 – 47 per cent .²¹

Mr Towett's view may not necessarily be the view of the rest of the men in the community but assuming that the men would see the unfolding events as a positive step towards the community's claim over the forest, what impact does the same situation hold for the women in the community? Five of the women interviewed said they had titles, and eight had joint titles with their husbands but the other forty-five did not have any. Given that women appear to have adapted to the new lifestyle of farming and are mainly interested in putting up homes, their hard work is at risk of being wasted if they cannot get title to the land.

²⁰ Nairobi HCC NO 421. OF 2003. Kenya Forestry Working Group & Others Vs Minister for Environment & Others

²¹ Source-Swiss National centre of Competence in Research North-South

Logging in Mau forest

‘The state looks at the forest through the eyes of timber.’

Liz works with the Kenya forestry working group and having studied the various forest policies, that is how she saw the state’s stand.

At the time I was carrying out this research – towards the end of November 2003 – I heard over the radio that the Minister for Environment had sacked the 800 forest officers in Kenya. At the time of doing this write-up, most of them are still out of work as the condition given was that they had to reapply. What were their sins? They had encouraged illegal logging and had done nothing to prevent or protect the forest from logging. Since then logging has been banned by the minister.

There are several logging companies licensed in Mau complex, the notable ones being Timsales, Sokoro and Raiply. These companies belong to politically correct individuals. There are several other small sawmill owners who are licensed to log. One of them, Mr Koigi, who owns Samkoi sawmill, had this to say:²²

‘We are licensed to log but the area we are given is very small and the price per tree is higher compared to the other big companies.’

Asked whether there are reforestation programmes for the logging companies, Mr Mathaai of Mathaai Timber responded:²³

‘How can we replant trees when our licences are always under threat of revocation and in any case it is not as if we have large areas given to us?’

Mr Mokuia an assistant manager at one of the large logging companies, Timsales collection yard (called Biston) next to the forest had this to say:

‘We do carry out reforestation. We have nurseries and our policy is to plant as many trees in the forest as possible.’

My observation was, however, different; there appeared to be no tree nursery at the Biston log collection area or any tree planting activities on the ground.

Is the Ogiek part of the sawmill owners? Mr Towett says:

‘Never, the Ogiek are culturally trained not to fell trees, besides they are too poor to engage in such business.’

There was only one woman called Njeri who owned Njeri Sawmill near the town around the area of my research. However I was unable to interview her because she was ill and her sawmill had been closed down. I went to several sawmills around the area and found that mostly men are employed at the sawmills because the work involves carrying huge logs and operating splitting machines which the sawmill owners claim women cannot do. Women are only employed in management departments, catering or in the company dispensary; these are usually very limited job positions and again women do not gain from the forest when it comes to logging.

²² interview held on 26th November 2003

²³ interview done on 29th November 2003

The role of the forest department

At the forest office, I met three forest guards who were reluctant to give me any information at first. They kept informing me that I should wait for the forest officer to give them permission to talk to me. While seated in the office contemplating what to do, I looked around to see if I could make any useful observations.

I observed a notice board on which names of previous forest officers had been entered since 28 February 1950. I also observed that the forest officers were of British origin up to the July 1962. None of them were women. While driving in this Eastern Mau forest, it is quite obvious that the forest has been destroyed. One can easily observe the demarcation of where the forest was previously. After some time I realized I could not just stare around because the forest officer appeared not to be forthcoming so asked one of the guards casually what the name of the forest was. Mr Kurgat (I learnt that was his name) said:²⁴

‘This area is called Nessuit forest station. There used to be a big forest here called Nessuit forest but now only a small portion remains compared to the part the government has excised.’

Are they consulted before excision is done? Mr Macharia, a senior forest guide in the area, chipped in:

‘No, our work is to remove beacons from the forest boundaries once we have been advised of the excision.’²⁵

Their duties as forest guides are to protect the forest, to evict people who have settled there, to prevent any buildings or burning of charcoal and to prosecute the offenders in the local courts.

What about logging? This is done by licensed people but the license is issued from a different department and the officers on the ground have no say. There are no community programmes on the ground and in the event that information needs to be passed on to the community, the forest officer uses the chief’s office who uses the *Baraza* to give information to the community. The forest officer concedes that though some people know the forest belongs to the government, some of the older Ogiek think it belongs to the community and it becomes difficult to take old men to court.

Says Macharia:

‘We are aware that the Ogiek love the forest and keep their beehives there but sometimes it is difficult to apply different standards to different communities. The forest policies in use are out of tune with matters on the ground – we are still using the 1962 policy where anybody found in the forest is immediately arrested.’

According to the forest officer of the area, both men and women destroy the forest though they do not consider beekeeping destructive. Women collect firewood but men fell logs and burn charcoal. There is no planting of trees going on because of the settlement process. They have no particular programmes that target women.

Zachary Keah the programme officer with Ogiek Welfare Council feels the Ogiek are good forest managers and the forest officers and their guards should not harass them because they are unlikely to

²⁴ Interview done on 16th December 2003

²⁵ Interview done on 16th December 2003

destroy the forest. He blames the forest officers for being uncooperative because they keep claiming that they have to follow the law instead of dealing with issues as they find them on the ground.

There was no woman forest guard or forest officer in my area of research. Macharia informed me that it is only recently that a few women forest guards are being trained but then they are employed at the headquarters where there are no forests. The forest officer was of the view that they have never considered training local women in forest management because they appeared very busy with farming activities and also that it was not their work to only protect the forest.

I found that the forest officers had no programme on the ground to educate the community on forest management, tree plantation or any form of community participation. This meant that the interaction between the community and the forest employees was limited to executing the legal process. The forest officer confirmed this when I pointed this out to him that when people walking near the forest saw a forest guard they ran away. This relationship alienates the community from participating in activities that could be beneficial to them and the forest officers are also losing by failing to tap the local people's knowledge on forest conservation.

How sensitive have the lobby groups in the environmental campaigns been on gender issues?

There are a number of environmental groups in Kenya and environmental issues are at the forefront in most forums. I was only able to meet with the chairman of NEMA, an environmental consultant, a programme officer from KFWG and the programme officer at the Ogiek Welfare Council. Generally an interview with them revealed that environment is the main issue rather than women being environmental managers. Liz who is a programme officer at the KFWG says they carry out many workshops to sensitize the community in forest management. Mau forest is one of their interest areas although they are still trying to establish their work around the Mount Kenya region in the Mount Kenya forest. They target mainly community-based organizations, government officers, opinion leaders and women's groups. Of women she said:

‘We try to include women as participants but the problem we encounter is that women never have time either because of community beliefs or too much work. The more sensitized the women are, the better. We have only succeeded in Tumutumu area because of the Green Belt movement that has been in the area for a long time.’

Liz says the problem they encounter sometimes is that they have no direct access to the people and they have to work through the forest officers. Also, most of the forest policies are outdated as they are based on the Forest Act which is old legislation and implementation of new policies takes time. Another problem is getting people to be interested in forest preservation because they consider it government's responsibility. Her non-governmental organization has been crucial in the new draft Forest Bill which she says is now gender sensitive. They have also strongly opposed the excision of Mau forest and have filed the suit Nairobi HCCC No.421 of 2003 against the Minister of Environment and the Attorney General.

Dr Smoking Wanjala who is instrumental in NEMA and is the chairman of the Public Complaints Committee on Environment set up under EMCA says he has received many complaints related to Mau forest on logging and excision. The complaints have not yet been processed. The complaints have been brought mainly by groups and not individuals, so it is not easy to identify the women in the group. He participates in policy formulation and says the new laws follow the trend of the draft constitution and are being drafted with gender in mind. He says that in drafting the intended Kenya

Wildlife Services Bill, they have taken cognisance of the community rights and use of the forest. I asked about sensitisation and whether they ensure women attend their workshops and he said:

‘We do not ensure women participate, we rely mainly on our contact persons who organize the workshops and people who attend are usually from organizations (both private and public) and of course men are usually in the majority. In any case we are working on so many issues and although gender is one of them it is not at the forefront.’

Mr Keah of Ogiek Welfare Council on the other hand works on the ground in the target areas. He has tried to incorporate women in his programmes and his work has been discussed variously in this thesis.

One would say therefore that the use of the environment to preserve cultural and customary rights and natural resources for the protection of women is still a grey area in Kenya. The idea that women are good environmental managers is yet to be acknowledged and the obligation to preserve the environment for them is still not given priority.

The impact of government activities in the forest on the Ogiek community

The forest has many values and especially to the community that live within or next to it. While men hunted and kept honeycombs, it cannot be said that women had no use for the forest. They clearly had indirect benefits as well as direct ones like collection of vegetable berries, medicine, firewood and fibre for weaving baskets. The clearing of the Mau forest inhabited by members of the Ogiek has had several impacts on the community and among them I have identified the following:

- a) Rivers flowing from the escarpment have less water and some have dried up. For women this means water scarcity and more work in terms of accessing water;
- b) Plants and wild animals have been lost, both in terms of having substituted indigenous trees with exotic varieties and in terms of forest destruction. Medicinal uses derived from indigenous trees are a pertinent issue to the women given that health facilities are not adequate and there is no maternal health care in the area. As Ms Machani explained, they rely heavily on herbal medication and few of them go to the hospital which is about 30kms away;
- c) Indigenous knowledge of medicine can no longer be taught due to the diminishing forest – most women have opted for lifestyles in which traditions and traditional knowledge have been abandoned for new approaches;
- d) Loss of indigenous trees also means loss of quality honey. Exotic trees do not support honeycombs and so loss of forest means loss of traditional methods of beekeeping;
- f) Ecological balance has been disturbed and this has affected humans as well as animals and plants negatively.

The legal framework and the inherent gaps

The shortcoming of the Forest Act is that it is colonial legislation that ignored the rights of the local community and their use of the forest. The Forest Act has not only invested the right of ownership of the forest in the state but has made provision for proper supervision so as to exclude any unmonitored access to the forest.

A community like the Ogiek argue that they have lived in the Mau complex since time immemorial and that by gazetting the forest, the colonial government ignored their right of ownership. To them the forest belongs to the Ogiek and not the government. The Act has also ignored community participation

in forest management making it an onerous task on the part of the state and thus alienating the local community's sense of ownership and belonging. The system of management put into place has totally ignored the fact that the local community depended on the forest for their livelihood.

The whole structure of the Act has completely alienated women from participating in forest management since the composition of management is purely males and furthermore, males who are government employees and not local. There was need to re-examine the Forest Act and so a new bill has been drafted and is awaiting the parliament process. It appears, though, that it has not been made a priority matter given the controversy now surrounding the excision of the forest by the government.

The constitution does not recognize any indigenous ownership of natural resources so when the Ogiek fight for conservation of the forest in the Kenyan scenario, they fight as any interested party with the issue of their locus standi likely to be raised and this has already happened in one of their cases. When it comes to national legislation, settlement has already taken place on the part of the excised forest prior to the legal excision process being initiated. This has denied Kenyans the right to express their views on the proposed excision. The situation now is that the forest still exists on paper but not on the ground. Kenya has several forest policies which exist on paper and don't seem to be implemented. Mau forest complex was gazetted in 1932 as a 'watershed protection forest'. It cannot have ceased to be so now.

The Kenya forestry master plan in 1994 required all concerned ministries to refuse all current and future excision of forests and to increase forest and tree cover in order to ensure protection of basic needs for present and future generations. The national environmental action plan (NEAP) 1994 recommended that there should be no further degazettement and excision of indigenous forests. In 1996, the cabinet approved another forest policy that stated:

'...all gazetted indigenous forests, woodlands, bush lands and mangrove should remain reserved and to increase forest cover and conserve the remaining natural habitats and the wildlife therein'.

Noble ideas which appear not to apply to the Mau forest complex.

In terms of the human rights framework, Kenya is signatory to a number of international conventions, treaties and agreements. For example, the African Convention of Nature and Natural Resources²⁶ which requires state parties to adopt scientifically-based conservation, utilization and management plans for forests and the Convention on Biological Diversity²⁷ which requires each party to promote the protection of ecosystems, natural habitats and maintenance of viable populations of species in natural surroundings. The Convention on Biodiversity was adopted by the United Nations conference in 1992 and also requires state parties to respect, preserve and maintain knowledge, innovation and practices of indigenous people embodying traditional lifestyles relevant for the sustainable use of environmental biodiversity.²⁸

Articles 21 and 24 of the African Commission on Human and People's Rights (ACHPR) gives rights to people to the use and enjoyment of their natural resources. All the legal framework enumerated above places a responsibility on the government to preserve the forests and the environment and to engage the communities that live within them to practice proper use. However, more often than not

²⁶ Kenya became a signatory on 9th October 1969

²⁷ Ratified by Kenya on 26th July 1994

²⁸ Article 8 of CB

there are gaps that impede implementation. These gaps are brought about by lack of policies that include the women in the community yet they are often more active in matters concerning the community. The Ogiek knowledge of conservation, for example, could be tapped if the government fulfilled its obligations by including the community rather than alienating them from the forest.

A marginalized group

The Ogiek have struggled for a long time for state recognition concerning various issues. They feel marginalized and have attempted to put forward issues that they believe entitle them to special treatment, distinct from other communities.

The Ogiek argue that while other tribes of Kenya long enjoyed the fruits of independence, they are yet to see any.

Mr Towett says:²⁹

‘We fought the white man but when our own brother took over, we did not benefit, the government of Kenyatta sidelined us, Moi’s government (immediate former President) was the worst. It spent most of its time evicting us and taking our land away from us, it appears we are still fighting for our liberation.’

Njoro, Nessuit and Mariashoni where I did my research are a few kilometres away from Nakuru town, one of the major towns in Kenya and where most of the Ogiek are to be found. The area strikes one instantly as neglected in terms of utilities and undeveloped compared to close by areas occupied by other communities (who are also early settlers in the area). A visit to these areas reveals lack of hospitals, police stations, administrative offices (except for the chief’s small office), schools, post offices and there is no dispensary. The roads are hardly passable during rainy seasons.

An observation of this area lends credence to this complaint. While the government has programmes in most areas for farmers or small-scale business, none exists where the largest community of Ogiek live in Nessuit, nor are there any progressive non-governmental organizations in the area. Nessuit is one of the forests forming part of Eastern Mau complex and there is in place a fully-fledged forest station complete with forest guards. This is surprisingly the only presence of an organized government infrastructure in the area. While other communities have occasionally been able to come together and fundraise for certain projects, the Ogiek’s level of poverty and lack of political leadership has precluded this taking place within their community.

According to the elders in the group discussion in their many years of living in that area, the only government programme they have seen is the destruction of the forest and giving it to ‘foreigners’ who have come to settle on their ancestral land. The Ogiek claim that the government has not given them recognition and, according to the Chief Rotich:³⁰

‘The official Kenyan tribes have for a long time been 42 and each has a code number. The Ogiek are not amongst them. We are now fighting to be included. The number should be 43 or more, this is being sidelined.’

²⁹ Interview done on 3rd November 2003

³⁰ Interview done on 24th October 2003

Education and the Ogiek community

The level of illiteracy in the community is high and this relates to the government's constant threats of eviction and closure of schools. The community has never been able to settle peacefully and enjoy the benefits of education. At independence few Ogiek were going to school but the number of schools in Mau forest increased, mostly put up by the Catholic Church particularly in south Mau. In 1987, however, virtually all schools were closed by the government as part of the attempt to force the Ogiek out of Mau forest leaving about 500 children out of school. Constant eviction has definitely affected education and it was only towards 1992 in the dawn of multiparty politics that the schools were reopened. However, no secondary schools serve the community and the primary schools are scattered at long distances of about 12 kms. Says Mr Sang:

'Our level of education is low because until recently few Ogiek took their children to school up to secondary level; no schools are available locally and most Ogiek are unable to afford to take their children to far off schools due to financial constraints.'

Lack of schools may not be the only issue hampering the education of the Ogiek children. Part of the problem is cultural practices like initiation into adulthood which places emphasis on adulthood and creates burdens for young boys who are still school going age and for girls who are pressurised to marry. The chief says that the level of poverty is so high that most parents are having their daughters betrothed at early ages of even 10 years. This hinders the progress of women to any level for lack of education.

Currently, there is free education being offered by the government. When I asked the chief about this he said:

'What does it matter if education is free if you have no school to go to? The nearest school is ill equipped and is only lower primary; the next one is 25 kms away. Most children, particularly girls, give up early, it is not the issue of free education, it is the issue of the government making it easy to access these schools by building them for the community.'

All respondents interviewed from the Ogiek community had this complaint. They have no opinion leaders who stress the importance of education. One elder, Mzee Koros, says:³¹

'Although we see the Ogiek life is changing, special consideration should be given to us by the state in terms of education for our children, loans, training, employment, development projects but unfortunately, none of them that has been done.'

Employment opportunities

On employment appointments, the chief, smiling, said:

'I am one of the most highly appointed Ogiek. The office of the chief is the highest an Ogiek has attained as office – a civil servant.'

According to the chief, the Ogiek are part of Nakuru district, which has many other tribes who have either come for employment or left their own ancestral homes to settle there. When issues like employment opportunities arise and there is a quota for each district, the other tribes tend to gain both

³¹ Interview held on 9th of December 2003

in Nakuru district and their home districts. The Ogiek, whose only homes are within Mau, are outnumbered and stand no chance of getting into the district quotas.

Their lamentation is that the state has not bothered to address these issues or to apply affirmative action.

On the issue of politics, Mr Sang said the highest politicians from the Ogiek community are two councillors who are men. What about women? Sang, the activist, says:

‘Ha! If the men are not featuring anywhere, who can think of or elect a woman?’

They argue that appointment posts in the civil service and those of nomination should be given to the Ogiek as a priority because they are few and outnumbered and are hardly able to compete effectively with other tribes.

What was the view of the women? The women shared their sentiments but felt that their men were partly to blame, says Regina Kipkemoi,³² one of the women interviewed:

‘Most of our men are uncooperative, they have refused to adopt to the new lifestyle after the forest has been destroyed, they spend most of the day doing nothing, they have refused to farm and so the children do not go to school because of lack of support from the husbands, how do you expect to progress if you have no education?’

Generally, they felt the men were not facing reality. Most neglect their family responsibilities and spend their time drinking and expecting food whose source they do not know. This resulted in constraints in the families and children lacking school fees.

According to the women, the men are burying their heads in the sand thinking about hunting and keeping bees while these have become impossible, yet they have refused to learn farming methods, leaving the full burden to the women.

The men’s views, unlike the women’s, were paradoxical. They talked about preservation of their old lifestyle and in the same breath talked about marginalization of the tribe. Mr Towett says fighting against marginalization is one of the objectives of the Ogiek Welfare Council as an organization and to fight for affirmative action for the community.

Activism as a tool to fight for rights

To counter marginalization, the Ogiek have employed several methods to champion their cause: presenting their cases before various commissions; forming pressure groups for the community; becoming members of local and international forums on environment and cultural preservation; litigating; and publishing material about their cause. The pressure groups include OWC, ORIP, OPNA, OPDP, CIPDP and ODECECO – all acronyms for their names that represent the various clans and groups from the community. Suffice to say all the members are men.

Of the pressure groups, the most active that deserves mention is Ogiek Welfare Council which has offices in Nakuru town within the Mau region and as headquarters of the Rift Valley Province. It has a staff of 23 of which four are women. Except for the gender representative, the other women are only

³² Interview done on 9th December 2003

contact persons and do not participate in the organization's decision making. Ogiek Welfare Council is a donor-funded non-governmental organization, has projects on the ground and publishes newsletters on the community. The projects on the ground include introduction of new honeycombs which are still expensive for the people, keeping tree nurseries and learning new methods of farming. Women have not been included in the leadership of any of the forums and there is no specific group for them. So, if women are not participating, then what are they (women) doing? One of the greatest achievements the pressure groups made was to present their views to the Constitution of Kenya review commission (CKRC). A few of the pertinent points presented to CKRC are worth mentioning:

- 1 Recognition of the indigenous community in Kenya by inclusion in the constitution of peoples with collective rights, distinct from the mainstream national society;
- 2 Restitution of the indigenous people's land;
- 3 Direct benefit from natural resources found in these areas such as forests, wildlife and so on;
- 4 Protection from environmental degradation of their area;
- 5 Cultural recognition;
- 6 Inclusion and participation of indigenous people in policymaking and management of the natural resources;
- 7 Inclusion of small communities in affirmative action seminars. The Ogiek have got support from them in terms of court cases or joined in their suits as interested parties.

The human rights framework

Article 25 of the draft United Nations Declaration on the Rights of Indigenous Peoples states:

'Indigenous peoples have a right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources whether they have traditionally owned or otherwise occupied or used them and to uphold their responsibilities to future generations.'

Article 6 of the same draft requires that the government include indigenous people's participation at all levels and seek their opinions while dealing with natural resources considered to belong to them. The draft has no legal force but it recognizes the need to incorporate the rights of such a people. These, however, do not specifically deal with women's rights within the same scenario.

Regina (42 years) said she was not aware of any women's rights or even about the courts and her sentiment was shared by some others. They take their cases to the chief and when they get no help, they go back home with their problems. They have not seen or met any group who have sensitized them about their rights and they have no ideas on what type of family cases they can take to court or whether there is such a thing as court fees or legal expenses. In spite of this one can easily identify the kind of human rights that they have been denied as a result.

Right to freedom from harassment and discrimination

Evictions and constant harassment are clearly a violation of their human dignity and a right to life. They believe that they have not been treated as other Kenyan communities and hence have been discriminated against. Articles 1 and 2 of the Universal Declaration of Human Rights and articles 2 and 4 of the African Charter on Human and Peoples' Rights and articles 2 and 6 and 9 of the International Covenant on Civil and Political Rights are relevant here. They provide for freedom from

discrimination, equal treatment and freedom to life and human dignity. The evictions have also interfered with the women's right to form and found a family because of constant disturbance.

Education and health

Because of numerous evictions the Ogiek children and in turn the community and the women have been unable to get proper education since they live in fear of moving. Closing of schools by the government has equally affected education. There are no secondary schools in the Ogiek area to date and the available primary schools are too far away, consequently the women and men have been denied access to education. Article 26 of the Universal Declaration of Human Rights and article 13 of the International Covenant on Economic, Social and Cultural Rights and article 17(1) gives the state an obligation to provide for education for its citizens. Article 10 of CEDAW and article 28 of Convention on the Rights of the Child specifically makes that provision for both women and children. So the obligation is on the government to ensure the Ogiek children have adequate schools and attend these schools. Article 12 of CEDAW specifically requires that state parties provide adequate health facilities for the women but, as already stated, the Ogiek occupied area lacks health facilities and women depend mainly on herbal medication.

Right to economic growth

The Ogiek argue that their livelihood is derived from the forest and that therefore access to the forest, especially for beekeeping, is very important for their economic income. They have seen the replacement of indigenous trees with exotic ones as a ploy to rob them of their beekeeping activities, as beehives do not thrive in the exotic trees. This in turn has affected their right to economic growth. Lack of public utilities and infrastructure and poverty has impeded women in terms of farming or marketing their crops. There is the issue of land being given to other communities without regard to the need of the Ogiek women for land or a specific programme to ensure the women at least have access to the land being allocated. Articles 13 and 14 of CEDAW have placed a responsibility on state parties to ensure rural women and women as a whole have equal access to social and economic growth and participate in planning and implementation of programmes aimed at improving their economic and social welfare. The Ogiek women do not benefit from the forest in terms of hunting as a natural resource or logging by big companies neither is their interest taken into account when policies for environmental preservation leading to economic growth are taken into account.

Final thoughts

Perhaps one of the weaknesses of the Ogiek community in terms of fighting against marginalization, as the chief says, is that community development has been difficult because they are a small group, yet scattered. Lack of exposure has not seen them unite. Groups like Ogiek Welfare Council may be making progress but the community looks at them as a source of employment and financial assistance rather than as groups that need their grassroots support.

The community also lacks strong political leadership. In a country where powerful politicians are connected with development projects in their areas, the Ogiek with no such leaders, have been left behind.

Another of their weaknesses in my view is the failure to include women in the fight for their rights.

To quote Sembene Ousmane a renowned Senegalese novelist and film maker:

'Women are the future of Africa. Yet too often they are ignored.'

Often the silent person may hold the solution to a problem. Women make good agents of sensitization in the community. Including them may open certain paths, even if these may come in form of outside assistance to the women, the whole community stands to gain.

CHAPTER FIVE

Indigenous claims and cultural identity

In one of the publications of the Ogiek newsletter,³³ when describing the men who represented the community in presenting the Ogiek views to the Constitutional Review Commission of Kenya, the OASIS team wrote:

‘There were four Ogiek sons. Assembly member Mr Charles Sena, a soft spoken man in his early thirties who has **unmatched hunting qualities** besides being a shy **honey eater**, Dr. Johnson Chengeiyo in his early forties, also soft spoken, a serious **honey eater** besides being **a professional hunter**, Kamaiyo Towett an outspoken gentleman in his early thirties, a **shy honey eater** and a firm believer in the integrity of **creation** and finally David Mpoiko Kobeil, a professional and a serious believer in **Ogiek empowerment**.’

The emphasis is mine. A reading of this description reveals how strongly the men view their cultural identity. This chapter looks at their claim to special treatment and preservation of their culture. It points out that while the community is entitled to this claim there are certain cultural practices that ought to be looked into, in that they impact negatively on women. The effect of certain practices in some instances leads to discrimination against women. This chapter analyses the impact of this amongst the community themselves. It also looks critically at the international instruments and how these have been used by the Ogiek to advance their cause.

A claim to indigenous rights

The Ogiek believe that by virtue of being forest dwellers and not easily identified with other tribes of Kenya, their lifestyle is also distinct and they fall under the category of indigenous community similar to the San people of South Africa, Maori of New Zealand or Aborigine of Australia.

The Kenyan constitution does not recognize indigenous people. The current draft, in spite of the Ogiek presentation of their views, has not made provisions for this either. Dr Smoking Wanjala³⁴ a lecturer at the University of Nairobi, faculty of law summarized the position when he said:

‘The characteristics of the Ogiek do not strictly qualify them as indigenous. This argument is a mixture of activism – all tribes belong to Kenya at least after colonialism no tribe can claim a better ownership than the other.’

John Mutakha, one of the commissioners in the review process, shared that view. He says that although the constitution needs to recognize certain group rights, one has to be careful to avoid a situation where some groups have been singled out as having better claims to land than others. He says that many other groups, including the Maasai, presented that opinion but this would result in discrimination at a time when Kenya needed a constitution to promote national unity.

Liz, a programme officer with KFWG a non-governmental organization, had this to say:³⁵

³³ The Oasis. Issue No.3.october 2003

³⁴ Interview done on 16th October 2003

‘When they (Ogiek) go to international forums, or when we invite them in our meetings, they are treated as indigenous people but the government here has not recognized them as such.’

Mr Towett and Mr Sang of the Ogiek Welfare Council both at the outset were very emphatic that the Ogiek way of life should be maintained, that the Ogiek do not know any other lifestyle and are being forced to adopt modern ways.

What distinguishes them from other communities?

Mrs Susan Chepkwony Tanui an outspoken lady from Tinnet had this to say:³⁶

‘When God created man, each person was accorded his special way of living. This depended on the environment. The Ogiek had a unique way of survival. They have sustained their way of life for years in the natural forests without destroying the environment, something which other tribes have failed to do.’

The Ogiek way of life is said to be self-sustaining; the value of the forest to them is high because they have lived there for a long time. Unlike other tribes that farm and keep livestock, the Ogiek until recently have done neither. Their food consisted of honey and meat and their main activities were hunting and keeping beehives. The Ogiek believe they were created with the forest; this is because they are the only tribe that lives in the forest in Kenya. To the Ogiek, the forest is their ancestral home. Chief Rotich says they were used to animals and were never attacked; the only accidents were those of falling from a tree when checking on the hives.

According to one Elder Chepkoros:³⁷

‘If a person hunted an animal considered taboo to hunt, like the elephant, or hunted in the territory not his or if a man destroyed the forest by being careless while using the fire for the beehive, he was severely punished by being forbidden to hunt or keep a beehive for some time.’

For the Ogiek therefore, this unique lifestyle of dwelling in the forest and practising unique conservation measures, entitles them to a claim to be considered an indigenous people.

The forest as a symbol of culture

What are these cultural practices and how do women fit in the scenario? The forest is of high value to the Ogiek because of their lifestyle. They consider their connection to the forest as spiritual and most of their ceremonies like initiation, birth, death and marriage are linked to the forest. The use of herbs for spiritual purposes and ceremonies is pertinent here. They prayed with the sunrise and the sunset and believed in a superpower. There is a belief that God dwelt with them in the forest but when one of them killed an elephant God became angry and went to stay in heaven. At initiation, both girls and boys are circumcised or to use the current description, female genital mutilation is still practised in the community. The ritual of passage into adulthood is emphasised because one is considered an adult

³⁵ Interview done on 17th October 2003

³⁶ interview done on 4th November 2003

³⁷ Interview done on 24th October 2003

thereafter. This happens between the age of 15 to 16 years for both girls and boys. Many boys begin to feel the burden of adulthood and as one woman put it:

‘At this stage the mother finds it difficult to discipline or control the boy yet he is still going to school and sometimes the father has absconded from his parental responsibility so some of our children abandon school – our girls have been getting married as well immediately thereafter.’

In an article done by Solomon Kones³⁸ one of the editors of the OASIS newsletter on Ogiek matters, he posed the question: *Are pupils getting proper guidance?* He described how he visited Mariashoni area and found young initiates who had just done their primary examinations spending all their day and most of the night at the local shopping centre. They went there carrying clubs, knives, swords, a torch and a sheet to cover themselves. These were boys aged 16 to 18 years who still needed parental care but according to Kones the young initiates and probably the community, had misunderstood the word ‘adult’. He argues that circumcision should not be interpreted to mean adulthood – there are other communities where this done when children are as young as one or five years. It is clear that some of these emphases need shifting by the community in their claim to a right to their culture so that this culture is not viewed negatively.

Labour was divided along gender lines. Men hunted and kept bees for honey and also collected medicine and women gathered by collecting herbs as well as roots and carrying the hunted animals and honey harvested by the men. The women also worked on the skins to make clothing or ornaments, gathered firewood, cooked and generally waited for the return of their men. Men would hunt for long hours or days in the forest. They adhered strictly to traditional birth control. Says Mzee Taptich:³⁹

‘A man was trained to be respectful; he kept away from his wife particularly if she had a small child. He lived separately from his wife. When the wife was ready for another child, she would send the elder child with a gourd of honey to the man; the man would know that the woman is inviting him to her house.’

Usually spacing was about five years. This meant that a couple had between four and five children who would be kept in some hiding place when the parents were away.

The Ogiek culture did not recognize women as adults. Mr. Taptich an elder said:⁴⁰

‘Women in the community are children, what can children discuss with me? I do not see why we should bother them with issues of importance like land.’

This view continues to hold although gradually a few women like Susan Tanui are recognized as women representatives and others like Helen Tieptoo Kiptiony have attempted to join politics by vying for councillorship but they still do not wield any powers and decision making within the community.

Helen Tieptoo Kiptiony decided to be brave enough to take on seven men in the contest for councillorship in the country’s election in December 2002. Amongst the hurdles she had to face were: the community’s concept that a woman was property; the idea of a proper dress code which regards

³⁸ The Oasis. Issue No.5, September 2003

³⁹ Interview done on 24th October 2003

⁴⁰ interview done on 24th November 2003

wearing of trousers as a taboo; the belief that women should not stand in front of men to address them as it is disrespectful; the belief that a young lady (she was 28 years) should not greet an older person; financial incapacity since she did not own any property; that fact that she was a born again Christian and was told politics was a dirty game and strictly for men. How did she go about it?⁴¹

‘It was a very difficult time in my life. I got encouragement from fellow women and I tried to overcome the taboos by always starting my speeches by apologizing to the men, particularly the elders, and asking for permission to address them, as for dressing, I forgot about the trousers.’

What made her join politics?

‘When I was young my *mum* taught me to be responsible so that I could stand up for myself and also people in my community in leadership do not use their position to assist the community, especially in education.’

Helen did not win the election but at least she made a mark and hopes to try again. She believes women in the community should be encouraged to overcome the cultural stigma that keeps them sidelined.

A case of the old versus the new

How do men and women spend their time, particularly since they have been forced into the modern lifestyle? I took a random selection of men and women and asked them what they did from waking to sleeping on a normal day. I will give only three accounts from each sex:

Story 1

Mzee Taptich, aged about 65years, calls himself a retired hunter:

Wakes up at 6am, ‘I have not much sleep at my age,’ he says. He ensures all members of his family are awake so they can go to school or to the farm, takes breakfast and sits outside his house most of the day if it is not raining to wait for people who may want to consult with him, he says. As one of the elders, he sometimes joins other elders at the chief’s office to deliberate on matters concerning the community. Most afternoons he sits with other elders to have a drink, eat meat, if available, with honey. At his age nobody expects any active participation in work, he says.

Story 2

Jackson Singoe, aged 34, married with four children.

He wakes up at about 7am, takes breakfast at this time and he is probably the only one left in the homestead.

‘I did not go far in my education and I can’t get employment, the government is mistreating us we cannot hunt and it is not giving us jobs.’

After breakfast, he goes to the local shopping centre to catch up with the ‘current affairs’ and spends his whole day there with friends. Occasionally, if he has money, he goes to

⁴¹ OASIS of October,2003

town, goes back home late to have dinner and sleep. He can't help his wife with housework. It is taboo amongst the Ogiek. 'People will think I am bewitched,' he says.

Story 3

Joseph Rotich, middle aged, is the chief of the area.

He goes to the office at least by 9 am. Carries out administrative work which includes implementing government directives and administering to his people. Sometimes he has to go to town to meet his boss:

'I try to encourage my people (men) to engage in useful activities but most have abandoned their responsibilities and engage in drinking alcohol. If we had development programmes here it would help.'

Story 4

Jane Machani, aged 32 years, is married with three children and is employed by Ogiek Welfare Council as the gender representative.

'Other than my employment, I farm, teach girls in the church and I am a chairlady of our women's group.'

Her day starts at 4.30 am if she has to accomplish all her day's work. Other than doing the domestic chores she sometimes has to travel out of town for the gender work but she says the council understands. They give her time during the busy planting and harvesting seasons. She sleeps after midnight every day.

Story 5

Mary Chepkwony, aged 40 years, is separated and has four children.

'I wake up very early to go to farm. During planting, weeding and harvesting seasons we are very busy. We rest when the crop has been weeded but we have to do small vegetable cultivation, one finds oneself on the farm most of the time. I have grown-up sons but they don't help me in any work. They refused to go to school. I also did not have enough money to pay fees. In the afternoons if I am not attending church or a women's meeting, I sell vegetables at the roadside. I am trying to roof my house with iron sheets so I have to work hard to get money. The work is time consuming and I sleep past midnight most of the days.'

Story 6

Regina Kipkemoi, aged 39 years, is married with three children.

'The girls help me with work but soon I think they will get married. The elder one is about 15 years she is about to be circumcised and she will be married thereafter. The work I do from the time I wake up is too much, other than farming our own land; we also have to help each other in our women's group to farm our individual farms and the group farm. We have many meetings we attend in the afternoons which we take as leisure times but only when it is not the busy farming season. I sleep past midnight every day. I have never thought that I

overwork myself – that is the woman’s life. These men are just drinking – who will feed your children if you start thinking the work is a lot?’

In another scenario of changing times, the chief Joseph Rotich says they have a strong bond with the forest but the settlement of other tribes is resulting in the assimilation of the Ogiek. The forest has now been destroyed and the male activities of hunting and keeping bees have been hampered. Farming is now the main occupation but it is only done by women.

Mzee Taptich believes modernity has disrupted their lifestyle because evictions have forced other Ogiek people from east towards the west while their belief was that they only moved westwards in case they died.

During my interview with Mr. Towett, and after I had listened to a lot of romanticism from men about their position, I asked him what would happen if the Ogiek were given the forest control, would they go back to their old lifestyle? He was quick to say:

‘I can say the Ogiek are good chameleons, they can always go back to their old lifestyle, we have a strong bond with the forest but settlement of other tribes in the area is now resulting in assimilation of the Ogiek.’

What were the women’s views in this scenario? At first, when the interviews commenced, I noticed women started by echoing the men’s view, but thereafter it became obvious that they had different views although with varying reasons.

In the group’s interview held with the local women’s groups, they were emphatic that the old lifestyle could not work any more because there are no longer forests to live in. Men talk about forest all the time but women do farming which they considered better because they now did not have to wait for men who may have gone hunting for days to bring home food.

Teresa Chepkoech (42) was more explicit:⁴²

‘We do not have any business – women never used to hunt – how can we sit to wait for men to hunt in a non-existent forest? What will happen to our children? We are interested in farming we have learnt to farm from our neighbours. Our men don’t farm but at least the family will not go hungry.’

One woman, Chepkerich Kiptiony, aged about 60 years, was of the view that it would be better if men maintained the old lifestyle of hunting because it gave them something to do. Women can then carry on with the farming.

These stories are not selected to denigrate any one sex but because they are true life stories that demonstrate the changing dynamics of gender roles and how culture in abstract differs from culture in real life. This is a community that feels strongly about culture and about the maintenance of the forest as symbol of their culture in which they can hunt and keep bees as a source of livelihood yet the reality shows that the women are now in the forefront of economic activities rather than the men. This is not to say that men in this community are not in active employment or are not engaged in income-generating activities because my data was limited to those I found at the shopping centre and at home. There are undoubtedly those in employment and away from home. However, my observation of the area reveals no industries or offices. Women appear generally to be more in touch with reality than

⁴² Interview done on 24th October 2003

men who are still holding onto their romantic idea of their life in the past. This is not to dismiss culture and the right to preserve it but my argument is coloured by the women's point of view which was the dominant voice. Nevertheless, during my interviews, I met both men and women whose views were not necessarily that of the majority. What surprised me was that the older men appeared to hold onto the past but were willing to concede the need for modernity and change. They saw it as way for progress for the community. The younger men in the age group of between 29 to 45 years appeared enthusiastic about maintaining their cultural lifestyle. Culture can be preserved at the same time as embracing modernity and changing times and, particularly, discarding practices that may discredit the culture.

A look at the international instruments and what they mean for the Ogiek women

The Ogiek believe that they are a community distinct from others and their lifestyle separates them from the other Kenyans. Their population is small compared to other communities although Mr Sang says of the population of the Ogiek:⁴³

‘We are a big group contrary to people's beliefs that we are a small community. We number about 20,000 of which 8,000 are to be found in Eastern Mau, that is around Njoro, Nessuit, Mariashoni, and Olenguruone near Nakuru town, 3,000 are scattered in pockets in Nandi, Koibatek, Mt Elgon and part of Northern Tanzania. About 1,000 are in Tinet region but these are mixed as a result of intermarriages.’

As stated, the Kenyan constitution does not recognize any indigenous groups so the Ogiek have relied heavily on international instruments while fighting their cause for indigenous and cultural rights. Article 15 of the International Convention of Economic Social and Cultural Rights (ICESCR) refers to the right of everyone to take part in cultural life, enjoy the benefits of scientific progress and its application and to enjoy the protection of literary or artistic works. Article 22 of the African Charter talks of rights to develop a cultural identity. Article 27 of the International Convention on Civil and Political Rights talks of rights of a person belonging to ethnic, religious or linguistic minorities to enjoy their own culture, to profess and practice their own religion or use their own language in community with other members of their group. In 1992 the United Nations made a declaration on the rights of persons belonging to national or ethnic religious and linguistic minorities.⁴⁴

The Ogiek now believe that they have been subjected to human rights abuse and have attempted to have their voices heard at international forums. They refer to themselves, although they are not recognized as such by their government, as indigenous people. They have identified themselves as an indigenous people, as defined in Article 1(b) of International Labour Organization Convention No.169 and the United Nations and the African Commission on Human and Peoples' Rights have recognized them as such members.⁴⁵ Convention No. 169 stipulates that indigenous people shall have the right to retain their own customs and institutions where these are not incompatible with fundamental rights defined by the national legal systems and with internationally recognized human rights.

⁴³ Interview done on 21st October 2003

⁴⁴ General Assembly Resolution 47/135 of 18th December,1992

⁴⁵ Kenya's Castaways: The Ogiek and National Development Processes in <http://minrights.org.dev/Kenya/mrg-pf.htm> October 2003

Rodolfo Stavenhagen has argued that cultural rights, particularly those pertaining to the preservation of cultural heritage, the cultural identity of a specific people and cultural development are in certain circumstances considered as 'people's rights'.⁴⁶ The states have obligations to ensure the respect, protection and fulfilment of each of these rights and these should be spelt out in the case of cultural rights and their various interpretations.

It would appear that cultural rights, by the nature of their description, cannot be exercised individually but only jointly with others within the community. It equally appears that these rights, if understood in the African concept, create more duties than rights. Using my culture as an example, one appears to constantly relate one's behaviour to the expectations of others and what the society demands from one.

Fighting for cultural rights and recognition by the Ogiek in terms of rights intertwined with the forest places upon them the duty to practice these rights to justify the continuance of the claims over the forest. Yet, as pointed out, cultural practices like the emphasis on adult obligation placed on initiation into adulthood without proper continuance of the community's obligation to guide the initiates, do not justify the claim to cultural rights, nor does female genital mutilation. In a community where culture dictates that a woman is considered a child or property, this creates the situation of discrimination of sexes. The issue of *de jure* equality as opposed to *de facto* equality comes into this claim to cultural rights. Article 5 of CEDAW, however, provides for member states to modify culture so as to avoid discrimination against women based on stereotyping of gender roles. Article 2 of the African Commission on Human and People's Rights provides for the enactment of legislation that prohibits harmful practices which endanger the health and general wellbeing of women. This in particular would apply to the female genital mutilation performed on the Ogiek girls. This, if applied by Kenya appropriately, may justify the protection of culture. A claim to culture may not necessarily be completely negative to women if it is tied to recognition that they be treated as special people. In this way focus can be placed on them which may lead to positive liberation from negative cultural practices.

The concept of ancestral land and land ownership

The excision of the forest by the government to settle landless people has resulted in the Ogiek's claim for the forest land. This chapter looks at the unfolding events taking place in the Mau forest complex, how other communities have been settled into the area, why the Ogiek have objected to this process and what it means for the Ogiek women, in terms of land ownership, within the community's claim for ancestral land. This chapter looks at the relevant land statute in Kenya and how applicable it is to the Ogiek women. The international frameworks are also examined in terms of how useful they can be to the community and, particularly, to the women.

So who owns the forest?

'What is the purpose of excising and subdividing the land into five acres to give to the Ogiek? Allocating land to the Ogiek is like stealing a motor vehicle from someone then giving them the logbook instead of the motor vehicle. The land belongs to us in the first instance so why should it be allocated to us?'⁴⁷

⁴⁶ Cultural rights: A social science perspective published in Cultural Rights and Wrongs .UNESCO 1998

⁴⁷ Towett in an interview done on 3rd November 2003

The Ogiek argue that because of their relationship with the forest and their lifestyle, the forest is their private property. The Ogiek feel they are more entitled to the forest land than other communities and believe that the forest belongs to them as a matter of right. They claim to have been in the forest from time immemorial and that by virtue of being forest dwellers, the area occupied by the Mau complex forest is their ancestral land and the government should recognize this right just like it has recognized those of other communities in Kenya. They argue that they are the only community in Kenya without a recognized ancestral land

The enactment of the Forest Act in 1942, they argue, did not take away their usufruct rights or their customary ownership of the forest. They argue, correctly, that the colonial government should have negotiated with them, as it had done with the neighbouring Maasai community and the Forest Act does not confer any ownership to the independent government. This argument has been used to justify the continuous claim to the forest as a source of economic income. To the Ogiek, more significance was placed on the resources that could be derived from land rather than the land itself. Emphasis was placed on access and use rights rather than exclusive ownership. Now that the environmental changes are yielding negatively to them, they have adopted their neighbours' life style of farming and keeping livestock. This has now made them see the value of land. The problem now is the government's excision and allocation of land to other communities without their consent or initial consideration.

Settlement of other communities

Nevertheless, other communities have settled on this land and active settlement began some time in 1993. After eviction of the Ogiek in 1987, most of the Ogiek tribe had been forced to live in the local forest station. A consultant group known as KIFCON was commissioned to go on the ground and collect names of the Ogiek to be resettled. The exercise was conducted through the local administration. According to Mr Towett of the Ogiek Welfare Council, KIFCON'S list when presented to the provincial commissioner included 1800 names of which only 20 belonged to the Ogiek. After presentation to the provincial commissioner the list was doctored to include 3500 names of which only 230 were Ogiek. This, he explained was because of the manner in which the exercise was carried out. When the first list was prepared a green book was opened that listed people's names. The Ogiek complained about the list and a white book was then opened which contained the second list. However, when it came to distribution of land the green book was used although further resettlement has currently been suspended. The Ogiek reacted by filing a constitutional reference in court in 1997.⁴⁸ The government argued that other landless Kenyans needed to be resettled as well. Who are these landless Kenyans? When interviewed the chief and the clan elders were categorical that the claim of settling landless Kenyans was a political ploy at the dawn of the introduction of multiparty politics in Kenya, where land was used as a bait to garner support for the ruling party. One elder, Mzee Taptich, felt that invaders would take away all their land eventually and they have now introduced competition in terms of farming while the Ogiek know only about subsistence farming. They have started intermarrying which the Ogiek feel will erode their culture and they have brought with them new cultures that are likely to override those of the Ogiek.

He was particularly upset that since these other communities do not practise natural family planning like the Ogiek, they were likely to increase and outnumber them. Their major concern also includes the fact that, unlike the Ogiek, these communities have no knowledge of forest conservation and the first activity they engaged in was cutting down trees in the allocated land and yet they planted none. The Ogiek complaint, and one has to agree, is that the state has severally attempted to evict them from

⁴⁸ Nairobi HCC No.635 of 1997 Joseph Letuya & 21 others Vs The Attorney General

the forest on the grounds that it is a water catchment area and they are degrading it yet in the same move the state has excised large tracts of the forest allegedly for resettlement of landless Kenyans. The members of the community in the forefront claimed that they have rejected any attempts to allocate them five acres of land each because they want the whole area recognized as the community holding. Any excise land should be given to the community and not individuals and if any individual ownership of land is given, it should be given only to men from the Ogiek community and not to outsiders.

Mr Macharia who has been a forest guard in the area for 15 years says he knows that the Ogiek are the original inhabitants of the area but the issue of settlement is sensitive because of the hostility against the outsiders. Some of them have opted to lease their land rather than settle in the area as a result.

Mr Towett whom I have already described as an activist was more vocal:

‘We cannot allow them (other tribes and the government) to take our land, we have hunted peacefully in the forest for over 2000 years, and our lifestyle must be preserved and protected.’⁴⁹

Most of the respondents interviewed who had land allocated to them did not have the titles. Only about 12 women had titles, three in their names and the rest in joint ownership with their husbands. Most of the rest (about 45 altogether) did not have any titles. The reason given was that the government had halted the settlement programme and so no titles were being issued in respect of the land. Male respondents interviewed believed that women should not be given titles. One elder said that women who had title would leave their marriage or marry other men from outside the community. Women had the problem of land being registered in the man’s name only because they said men can be careless and may sell the land any time, giving them no security in ownership, use and access. And so while the community is fighting to own their land exclusively, others settlers, including their women, are farming and trying to find better survival techniques. An open letter written to the president by the Ogiek leaders poses some questions (in part).⁵⁰

‘Do the Ogiek have native title to the land? What would constitute acquiescence into legitimate claims of the government of Kenya as the legitimate owner of the land in Mau forest? And how long should a group’s history be tied to a defined territory for them to successfully claim it to be ancestral land and therefore their identity tied to that land.’

This letter confirms that there is an ongoing battle for ownership of the forest in which the community is now drawing the direct attention of the head of state.

Distilling the women’s voice in the claim for land

Mrs Susan Chepkwony Tonui had this to say:

‘We have to learn new farming methods, the problem we have is that land is being given to other communities and not us, if we had land, farming would be easier.’

Women had differing views concerning the ownership of land although the final message was that women wanted direct control over the land and assurance that their farming efforts were not in vain and would in the end uplift their economic status and that of their families.

⁴⁹ Interview held on 18th November 2003

⁵⁰ letter dated 9th January written by the Ogiek to president Mwai Kibaki

One woman, aged 53 years, had this to say:

‘Other people have their own ancestral land so they should not settle in ours. We should be left alone to continue with our old lifestyle, land should be owned by the community and women should be allowed to farm it.’

Regina, aged 39 years and married, says it is better if land is registered in the joint names of the spouses. That way she says men will not sell the family land and the women can be confident in farming.

Mary, separated, said:

‘I was lucky I got allocated land in my name but I think it was because I was already alone with no husband but I feel even married women should have land in their names to safeguard their interest and those of the children in case of separation.’

Jane, aged 32 years and married, prefers the title to land to be in her name because she says women in the community have put a lot into farming and it would be better to give them assurance that this is not in vain as women think more about the family than men do.

Yet Chepkerich, aged 29 years and married, said:

‘I don’t mind if the title is in my husband’s name, provided I can farm and I have a say on how we should deal with the land.’

At Nessuit, women had formed groups in which they did farming – they tilled a common group farm where they planted maize and vegetables and they helped each other to till their own land. They sold the produce from the common farms and used money to help themselves. The Ogiek Welfare Council has been instrumental in the women’s progress in the Ogiek community, particularly in East Mau. Programmes run on the ground include formation of men and women’s groups and encouraging those already existing; improving socio-economic activities, like farming for women and keeping of beehives using modern technologies. Planting of trees is also encouraged particularly in the women’s groups that prepare and maintain tree nurseries. Women’s groups meet at least once a week with the programme officers. Mr Keah, one of the programme officers, meets the women’s groups on a weekly basis and sometimes twice a week, depending on what is happening. He has concentrated his activities in Eastern Mau:

‘We carry out environmental programmes and in addition we have realized women are keener on doing farming so we encourage them to grow maize and vegetables to boost their income, we are introducing new movable combs as opposed to the old ones and some women have shown interest in them.’⁵¹

Mr Keah says that he finds women more active, and ready to share and learn, than the men. The men view these activities along gender lines and believe they should concentrate on forest activities and leave farming to women, as they consider farming part of domestic work.

Mrs Regina Kipkemoi says of their decision to engage actively in farming:⁵²

⁵¹ interview done on 19 November 2003

⁵² Interview done on 4th December 2003

‘Farming is better although we may not know the best ways but it is better than relying on a man to bring food which is not forthcoming; their hunting they are talking about even in old days – men would go hunting for days and you waited for them, you either ate leaves or slept hungry. Sometimes he was not successful but now with farming, we can rely on ourselves.’

The women identified their current problems as:

- 1 Lack of farming knowledge and lack of training on modern farming methods;
- 2 Lack of land and titles to land;
- 3 Lack of finances to help them do large-scale farming;
- 4 Lack of support from their husbands;
- 5 Lack of markets to sell their goods;
- 6 Lack of education, especially in business transactions;
- 7 Lack of health facilities and essential services in the area.

Land ownership and what it means for women’s human rights

It has been argued by the government that Kenya belongs to all and that specific persons cannot claim better rights than others. The move to excise the forest was to settle landless Kenyans, the Ogiek included. However, the Ogiek have argued that the other communities, through no fault of their own (Ogiek), have other homes they call ancestral homes. Why then should they have two homes?

There are several land statutes in Kenya as a result of the colonial government’s attempts to separate native land holdings from the white settlers and the state. Kenya has about eight statutes that deal with and control land. The Registered Land Act is the one that has consolidated native land holdings described in the review chapter and it is the only statute that gives a freehold land holding. This is the statute under which excised land in Mau forest complex was being issued. For those who already have the titles, it means that they now have absolute ownership. Section 147 of the Act, provides that first registrations, even if by fraudulent means, will not be challenged. Sections 27 and 28 confirm that registration of the title shall be proof of ownership of the land. For a person holding a title in the settlement scheme within Mau complex therefore, it does not matter whether you belong to the Ogiek community or not, your ownership is protected by law.

The legal technicalities about the government not having divested itself of the property before giving it out will have to be interpreted by the court vis a vis the provisions of the Registered Lands Act. What this means for the women where land has been registered in the husbands’ name is that they have no control over the land no matter how much work they put into it. Section 27 and 28 allow the husband to dispose of the land any time he wishes to without her consent, hence the feelings expressed by the women that land may either be registered in their names or jointly with their husbands. The Act does not expressly recognize any ownership as a holding in trust for the unregistered parties.

The constitution on the other hand provides for equality of all sexes and a right to own property but the usual rider that allows for discrimination in matters of personal law comes in. In the Ogiek community where women are regarded as property, it will not be easy for ‘property to own property’ hence efforts should be made to encourage ownership of property by women in the community. Article 13 of CEDAW gives women the right to obtain family benefits and bank loans and financial

credits so this would mean that women should be allowed to own property and giving them land would be a positive step towards this. This gap in the law needs to be addressed.

CHAPTER SIX

Conclusion and recommendations

Conclusion

Looking at the Ogiek cause it is easy to understand their situation. They feel marginalized. Their rights have not been recognized by either the colonial government or the independent government. Presently they are facing several threats of eviction from the forest which the government has failed to recognize as part of their heritage.

Their claim is genuine considering that the state took ownership while they were in occupation and they are still in occupation to date. The situation has been worsened by the manner in which the state has dealt with the forest – replacing indigenous trees with exotic varieties thus affecting the quality of their honey and beekeeping activities from which they earn their living. Exotic trees also do not have medicinal value. They believe that their lifestyle is so intertwined with the forest that destroying it is destroying their legacy.

They have complained that the constant evictions are not genuine if the same government excises the same forest to allocate it to individuals who are not members of the community and without consulting them, giving them first priority or recognizing their customary rights of ownership. The eviction has also exposed them to what they term human rights abuses because it has denied them the right to peace, property, culture and education or any development programmes.

They have argued that since their lifestyle is so distinct from other communities they should be recognized as indigenous which status the government has denied them. It is easy to sympathize with their situation particularly since the country has been independent for 40 years now and other communities have advanced in terms of development. One empathises with them because as a small community it has not been easy fighting this war.

Kenya is a signatory to most of the international instruments and though the Kenyan constitution does not recognize cultural and indigenous rights, the state is under an obligation to honour and protect these rights by virtue of being a signatory to them. However, one needs to look at the issues at play by addressing the many community players and the diverse interests that need to be canvassed as well. Activism has not been in vain, it is useful for environmental preservation, land and educational reasons.

This research looked at the Ogiek claims from a gender perspective, particularly from a women's law perspective, and data collected was done so with a view to finding the women's voices. There has therefore been an attempt to distil the women's voices because, as is already obvious, the voice of the community was actually the voice of men who believe they speak for the good of the community. Women have not been in the forefront and it is important that their voices be heard as well. We have seen that part of the claim for the forest is so that the community lifestyle of hunting and beekeeping is continued and preserved but women in the community do not hunt or keep honeycombs nor is there any intention to incorporate them into these activities.

We see a claim for preservation of the forest as a preservation of culture, yet some current cultural practices are detrimental to women. These need to be addressed so that the negative practices are

discarded and the positive practices promoted. This is easier to suggest than to put in action. The initiation into adulthood, for example, is referred to as circumcision for both boys and girls to make it sound as though there is equal treatment of both sexes yet the reality, as has already been described in the finding chapter, is that the initiation for girls is different. It is a mutilation of the body which is life threatening and breaches a girl's right to life. The society's expectation of her will not set her free because she is afraid of being ostracized for failing to conform. The concept of women as minors or as property leads to sex discrimination on the ground and the dominance of sexes is clear here. The claim for cultural rights in this scenario is purely a restatement of patriarchy.

A claim for land is a noble claim but how will women benefit if they are treated as minors in the community? We have seen that women are ready to embrace modernity and have already learnt new farming methods. All they need now is encouragement and access to resources in terms of land, skills and finance. If the men feel that land should be given as a community holding or to men only, then clearly they have not taken into account that the women may have different ideas – not necessarily negative ones but positive for the progress of the family and the community as whole. It is obvious that women are ready to face modernity because they did not actively engage in the forest and, moreso, because matters have already changed and they have to deal with the current situation. They find that engaging in farming gives them a better economic position where they can take care of the family. In a way, gender roles have changed and most women have become the family providers.

This study found that in terms of marginalization of the community, the women fully supported the complaints but the problem is the emphasis on the public utilities required. Health, for example, may only be seen by men in terms of putting up a dispensary but there has to be adequate maternity health care, and that it may not be enough to put up schools if the community is not ready to give the girl child the freedom to learn. Women have not sat back to complain about marginalization and done nothing, they have organized themselves into groups to support each other in providing labour and financial support.

It would be beneficial if the men, who have international contacts, incorporate women so that women's groups have access to assistance from the various non-governmental organizations or form their own. In failing to co-opt women in their activism, only one voice will be heard. It is hoped that if this research is read by the community representative, women will be given some consideration. Perhaps in the unfolding events one may say the Ogiek is fighting primarily as a community and gender issues can wait but this is the right time to advance the women's cause so that the battle is not fought twice. Women will have to be at the forefront and be ready to take their place and participate fully in all projects in the future.

Finally I can conclude that my assumptions proved true: women have been left behind when canvassing or formulating policies or strategies in dealing with the Mau forest complex.

Recommendations and the way forward

The constitution

The current constitution only guarantees civil and political rights but does not make provision for social, economic and cultural rights. The draft constitution has also failed to recognize indigenous rights and customary or community landholding. The constitution should expressly provide for these

rights but with a rider by adopting the protocol of the African Charter on Women⁵³ to promote positive cultural practices and discard the negative ones and to include the right to own property. The draft constitution has recognized the need to promote only positive culture but there is no description of what is considered positive and negative.

Domestication of international instruments

International instruments should be domesticated to reinforce the state's duty to recognize and protect these rights. The new Forest Bill, already in the pipeline, should expressly provide for access and enjoyment of the natural resources of the community living within the forest.

Community participation

An incentive in community participation where the community engages in conservation measures and in return benefits through access and use should be incorporated in the Forest Act. Management committees should include women as a matter of course. In carrying out community management programmes, the government should tap the indigenous knowledge of the people in preserving forests

Affirmative action for development

Government projects should target areas with no development projects to ensure, as much as possible, equality amongst all citizens. This can be done in formulating policies with affirmative action.

Consultation with and priority to the community

The excision of the forest for settlement, if necessary, should be done in consultation with the community in occupation and priority should be given to that community.

In allocation of land to the Ogiek, they should be involved in the settlement programmes so that they propose names of those they consider bona fide members of the community rather than depending on outsiders. The community spokesperson should at the same time involve women in their forums.

Reforestation

Part of the excised forest should be put back under a forestation so as to preserve the ecosystem of the Mau complex and the country as well. If consideration for settlement is to be given to the Ogiek, the 67,000 hectares need not be excised as they are a relatively small group. Provision for compensation can be made for land to be reclaimed for aforestation.

Harmonization of local statutes

There should be harmonization of statutes dealing with land, planning and forestry so that they do not conflict with each other. There should also be express requirements that such matters are done in consultation with all the ministries concerned as well as all interested parties, taking into account women's interests by involving them at decision making forums.

⁵³ Article 17 of the Protocol to the African Charter on Human and Peoples Rights of Women in Africa. July 2003.

Completion of cases

Ogiek have several pending cases, priority should be given to all sensitive cases touching on group rights so that they can be dealt with expeditiously.

Implementation of community-based programmes

Community-based programmes should be introduced and mostly involve training Ogiek women and giving them skills to farm like the other communities. Providing them with technology and financial assistance to engage actively in farming and ensuring that they have ownership of the land being distributed will enhance the value of community improvement activities.

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