BASELINE STUDY ON INDIGENOUS PEOPLES’ LAND RIGHTS IN NAKURU COUNTY

By: Nyang’ori Ohenjo & Madiha Majid

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Acknowledgement

This study on indigenous peoples’ land rights in Nakuru County provides a baseline for the VOICE project; whose aim is to strengthen the voice of Minorities, and Indigenous Peoples (MIPs), so as to not only enable them to voice but also articulate their land rights at the national, regional and international levels.

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<thead>
<tr>
<th>Acronym</th>
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<tr>
<td>ACHPR</td>
<td>African Commission on Human and Peoples Rights</td>
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<td>CEMIRIDE</td>
<td>Centre for Minority Rights Development</td>
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<td>CFA</td>
<td>Community Forest Association</td>
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<td>CIDP</td>
<td>County Integrated Development Plan</td>
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<td>EWC</td>
<td>Endorois Welfare Council</td>
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<td>International Covenant on Civil and Political Rights</td>
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<td>Indigenous Peoples</td>
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<td>Initiative for Sustainable Landscapes</td>
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<td>Kenya Forest Services</td>
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<td>KNBS</td>
<td>Kenya National Bureau of Statistics</td>
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<td>LAPSSET</td>
<td>Lamu Port-South Sudan-Ethiopia-Transport Project</td>
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<td>MIPs</td>
<td>Minority and Indigenous Peoples’</td>
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<td>MRG</td>
<td>Minority Rights Group</td>
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<td>NAWASSCO</td>
<td>Nakuru Water and Sanitation Service Company Limited</td>
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<td>NARUWASSCO</td>
<td>Nakuru Rural Water and Sanitation Company Limited</td>
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<td>NLC</td>
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<td>Organization of African Unity</td>
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<td>OPDP</td>
<td>Ogiek Peoples’ Development Program (OPDP)</td>
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<td>PWDs</td>
<td>Persons with Disabilities</td>
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<td>SNV</td>
<td>Stichting Nederlandse Vrijwilligers (Netherlands Development Organisation)</td>
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<td>TJRC</td>
<td>Truth, Justice and Reconciliation Commission</td>
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<td>UDHR</td>
<td>Universal Declaration of Human Rights</td>
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<td>UN</td>
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<td>UNDRIP</td>
<td>United Nations Declaration on the Rights of Indigenous People</td>
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Indigenous peoples’ land rights have been a subject of concern not only for the MIPs but also for the Kenyan government over the years. As a result, they have attracted a lot of public interest leading to litigation and guided community presentations at various commissions that have been set up in the country with the aim to hear and try to resolve indigenous land ownership claims by the MIPs. However, despite these efforts, nothing has been achieved in terms of redressing the injustices with regards to land that these communities have faced since independence.

The clear lack of commitment on the part of the Kenyan Government to resolve these challenges and tackle the issues that have been raised about the contested ancestral land is truly worrying. The MIPs, including the Ogiek, the Endorois, and the Maasai have won many court cases against the Government in relation to their land rights grievances. Despite winning the court cases, however, the decisions are either not being implemented and remain simply victory on paper or the implementation is too slow. This situation has largely contributed to tension between these MIPs and their neighbours thus providing a fertile ground for incitement.

This report discusses the challenges and difficulties that the MIPs in Nakuru County and by extension, across the country face, in the fight to reclaim their land and land-use rights. As noted above, their efforts have seen these communities visit various Kenyan courts, as well as the highest court in Africa; the African Court on Human and Peoples’ Rights seeking justice. The report captures the sentiments of the communities (Ogiek, Maasai and Endorois) on the legal and policy processes within the context of their cry for justice that is yet to be addressed by the relevant authorities.

An analysis of the existing literature shows that MIPs in Kenya have always been easily dispossessed of their lands, mainly because laws initially favoured individual title holding rather than communal titles. Although the Constitution of Kenya (CoK), 2010 now provides for community land titling, there appears to be reluctance on the part of the National Land Commission (NLC) to facilitate a framework within which this can be quickly realised—a situation that has led to a scramble for MIPs lands. A case in point is that of the Ogiek land in the Mau Forest Complex, which has attracted many land speculators.

The report is divided into four main sections: The introduction gives a snapshot of the problem, identifies the objectives/purpose of the study and explains the methodology that was used in data collection and analysis. The study covered Molo, Njoro, Kuresoi North, Kuresoi South, Rongai and Naivasha sub counties within Nakuru County, which are the areas occupied by the Ogiek, Maasai, and Endorois peoples. In these areas, these communities are considered as indigenous people.

The second part of the report gives a historical background, which provides a brief overview of the MIPs land rights in an attempt to highlight the genesis of the problem so as to put the current situation into perspective as well as capture some of the efforts that have been employed to try and resolve the issues.
Section three details the current land regime in Kenya after the promulgation of the Constitution of Kenya, 2010. It highlights the provisions of the constitution on the land rights of MIPs.

Data analysis and findings form the fourth section of this report. The study finds that MIPs in Nakuru County still experiences wide range of land rights violations, notwithstanding the Constitution of Kenya 2010 in place. The provisions in the CoK 2010 were meant to address the cases of historical injustices, however, they have not been fully implemented. This lack of implementation has exposed the MIPs to further cases of land dispossession. Due to the fact that most MIPs are not financially endowed, the legal system has failed them as they cannot defend themselves in the court of law.

This has been exacerbated by lack of effective representation of MIPs in key political and administrative government institutions. Further, MIPs Women, children and persons with disabilities are in a far worse situations due to inaccessibility to land, resulting to poor healthcare, poor education and general low standards of living. The initial study design planned to use data from three Nakuru County MIP communities, the Ogiek, Maasai and Endorois. However, the field site for the Endorois, Solai, that was visited for the study did not provide a good context for comparison purposes, as the land claims that emerged were not of communal nature, but rather a commercial transaction gone wrong that involved individuals from a mix of communities.

The final section of this report is followed by the conclusion and recommendations. Specific recommendations are addressed to the National Government, the County Government of Nakuru, the International community and the IP organisations.

These recommendations include; enactment of new laws, implementation of court decisions, enhancement of community capacity building activities, adherence to policies set by the international community and strict implementation of MIPs rights to tackle the problems that have been highlighted in the report.
A look around the world shows that Minority and indigenous peoples (MIPs) suffer various forms of marginalisation and discrimination in many places and varying settings. Ranging from the Rohingya in Myanmar and the Batwa in Central Africa; MIPs face attack in one form or the other. In East Africa, MIPs like the Ogiek, the Endorois and the Maasai face various forms of discrimination, such as access to political power, discrimination and sometimes-violent eviction from their ancestral lands (Wesangula, 2018). This has had a negative impact on their livelihoods, consigning many members of these communities to severe poverty, illiteracy, poor health and hence a life of destitution.

This baseline study which was commissioned with the main objective of analysing the prevailing situation of MIPs in Nakuru County, Kenya in relation to their land rights, has been funded through the VOICE project; a three-year initiative being implemented by Ujamaa Community Resource Team in Tanzania, Kenya, Uganda and Rwanda. The Ogiek Peoples’ Development Program (OPDP) implements the VOICE project’s “United 4 Land Rights in East Africa” project looking in particular at the land rights of Minority and Indigenous Peoples (MIPs), in Kenya.

Since the colonisation of Kenya in the 1900’s, MIPs in Kenya have lost land under various land regimes. Due to their pastoralist and/or hunter-gatherer socio-economic livelihoods they have had to respond to the different climatic seasons they encounter by moving from time to time, in search of water, food and pasture. This is sometimes for prolonged periods of time. Consequently, these communities have come back to find their communities’ lands having been labelled as ‘protected lands’ or ‘unoccupied lands’ as a result of which they have been taken over by successive governments. In other instances such as the case of the Maasai in Olkaria-Naivasha, the discovery of commercial levels of minerals have led to the pushing away of the community without either consultation or requisite compensation.

As noted in the executive summary, MIPs in Kenya have fought for their land rights through various fronts, including through the local Kenyan Courts as well as at the regional level. For example, in 2003, the Endorois Community presented their case to the African Commission on Human and Peoples’ Rights (ACHPR) claiming various violations of their rights, as a result of forced evictions (Endorois Decision, 2010). They argued that they had experienced displacement from their ancestral land; a failure to adequately compensate them for the loss of their property; disruption of the community’s pastoral enterprise; violations of the right to practise their religion and culture, as well as experiencing negative impact on the overall process of their development (Endorois Decision, 2010). Similarly, in their case at the African Court on Human and Peoples’ Rights, the Ogiek demanded justice for the violations of their rights (African Commission on Human and people’s Rights v Republic of Kenya, 2012). In both cases, the courts ruled in favour of the communities and proffered some remedies. However, the implementation of the recommendations resulting from the decisions/ rulings has been painfully slow.

Introduction
Study Area

Source: Google Maps
Map of Nakuru County showing the geographical areas where MIPs (Ogiek, Endorois and Maasai) are resident,

Before 2000, Kenyan land tenure and land use had been a major problem, especially when it came to land ownership (Rutten, 2015). Many communities found themselves dispossessed of their lands, through various schemes, as well as declaration of some places normally occupied by the communities as protected areas. Since 2000 however, Kenyan land policies have undergone tremendous change. At the heart of these developments have been ancestral land rights claims by indigenous communities in Kenya.

Pastoralist communities and hunter-gatherers identify themselves as minorities or indigenous peoples on the basis of their lifestyles or mode of social and economic organization (Makoloo, 2005). They argue that the regime of land, legal structures and values, which are necessary for their existence as communities, are not permitted by the state, and have demanded the recognition of communal land tenures (Makoloo, 2005). Their sense of marginalisation is aggravated by what they perceive as historical injustices, witnessed through various forms of discrimination such as lack of access to political power and different socio-economic related services, as well as indiscriminate evictions from their ancestral lands without adequate resettlement schemes resulting in landlessness.
Kenya has experienced development initiatives such as various infrastructure projects, for instance: the Lamu Port-South Sudan-Ethiopia-Transport Project (LAPSSET), (LAPSSET Authority, 2016, European External Action Service (EEAS), 2018). This is designed to include a seaport, a train track, and refinery, roads, airports and resort cities. Other initiatives include irrigation projects and conservation of water towers. The implementation of these projects has put the government on a collision course with some indigenous peoples and their land rights because it has sanctioned or caused the involuntary displacement of these communities from their land to facilitate the projects.

On grounds of eminent domain, the Kenyan government has evicted a number of communities, violating the community’s right to land. In response to community protests, the European Union temporarily put on hold its 35 million Euros funding of the Water Towers Protection and Climate Change Mitigation and Adaptation Programme, which was seen as violating the rights of the Sengwer hunter-gatherer community (EEAS, 2018). In June 2016, the Ogiek suffered yet another violent eviction when they were forcefully removed from the slopes of Mount Elgon in Western Kenya which is one of their ancestral lands (Guardian, 2016).

Despite the challenges that indigenous communities still face, the policy and legal environment relating to their land rights in Kenya, over the last 30 years, has vastly improved. This period has seen the adoption of the Kenya National Land Policy 2009; the Constitution of Kenya 2010, which recognises the rights of indigenous communities; Sessional Paper number 8 of 2012 on Arid and Semi-Arid Lands; and the Community Land Act, 2016. These have been followed by subsequent processes such as the constitution of the Climate Change Council, under the Climate Change Act 2016, in which indigenous peoples are supposed to be represented (The Constitution of Kenya, 2010); the National Land Use Policy; the county specific rangeland management policies; and climate change policies and laws which are amongst some of the legal frameworks that have a bearing on land rights on indigenous peoples.

All these processes affect indigenous peoples’ rights in various ways. Most importantly, they recognise the existence of MIPs in Kenya, and attendant to that, their historical land rights claims. Nevertheless, in spite of the existence of a friendlier constitutional and policy environment for indigenous peoples in Kenya, these communities still face discrimination. When drafting policies and legislation specifically targeting indigenous communities, it has been noted that these very communities are excluded from consultation and decision-making processes. Such a lack of meaningful involvement and inclusion has often led to the violation of their land rights through actions such as evictions, justified by the existing jurisprudence and legal frameworks, since their voices are crucially absent from the decision-making table.

In 2017, Kenya passed Sessional Paper No. 1 of 2017 on National Land Use Policy, which is the first time the Government of Kenya attempted to regularise the different land use systems in Kenya. In a clear departure from the Constitution of Kenya, 2010 and the Community Land Act, 2016, this policy while attempting to address land issues related to indigenous communities both fails to recognise that indigenous communities have inherent rights to lands that they occupy, and also excludes them from governance and representation mechanisms that have been put in place. For instance, under the section on land and livelihoods, the policy notes that, “patterns of land use and ownership ... cause large areas of land to remain as dead capital, as these lands are not placed into productive use, and are not used as capital in the financial markets” (Sessional Paper No. 1, 2017).
For example, a Senior Official of Lamu Port-South Sudan-Ethiopia-Transport (LAPSSET) Corridor project was quoted in a letter to the Editor of a national daily newspaper saying “almost all of the land, 97 per cent, is unoccupied, which will make the process of resettling project affected persons, easier’ (Wario, 2018). It should be noted that there is a major misconception that these lands are unoccupied and unproductive just because there has not been a continuous human or infrastructural presence. This therefore, requires the lands to be ‘reclaimed’ through multiple government development planning documents.

The genesis of this situation is rooted in the premise that land ownership is about physical occupation and structural development, which ignores the importance of these lands for the production of livestock through seasonal grazing (Wario, 2018). This is in total disregard of the fact that pastoralism and hunter-gatherer economies and livelihoods largely depend on these large tracts of land. Thus interfering with them by converting them to other land uses, such as residential or other purposes, clearly disrupts these livelihoods.

For instance, in the Endorois case against the Government of Kenya the community argued that as a pastoralist community, their concept of “ownership” of land was never one of ownership by paper, but rather the land in question was always known to be “Endorois” land, belonging to the community as a whole and used by it for habitation, cattle, beekeeping, as well as religious and cultural practices (Wario, 2018; Ohenjo, 2018).
Methodology

This study took a two-phased approach, which was designed to target a cross-section of the MIPs communities. Firstly, literature review was undertaken to establish the current land rights regime within which the target communities operate; and secondly, field research, which included a number of focus group discussions. These focus groups were community-based and were established to determine the existing situation at community level. Various focus groups were identified, and they included men, women, elders and the youth. The groups’ representatives were then interviewed (Ohenjo, 2018). Further, informant interviews were conducted with some Civil Society Organisation representatives (CSOs) and state officials. The objective of the interviews was to understand the state’s point of view and the justification for issues existing in Nakuru County. This hybrid approach helped us obtain a more in-depth appreciation of the current land issue in Nakuru within a real-life context.

This approach was adopted particularly because of its ability to exploit qualitative methodologies geared towards capturing explanatory information on ‘how’, ‘what’ and ‘why’ questions (Whitehead, 2016) It offers in-depth insights into what gaps exist in the participation and influence of the MIPs men and women, in the policy-making of laws relating to land rights in Kenya which have a direct impact on their livelihoods. This approach also allows for the capturing and amplification, as well as the projection of voices of the MIPs regarding their land rights.

A brief historical context of Minorities and IPs land rights in Kenya

Recognition of Indigenous Peoples in Kenya

Indigenous People’s Rights were not treated as a real Human Rights issue until the 1970s. However, a number of international Human Rights instruments; including the United Nations Declaration on Human Rights (UDHR), 1948, the International Labour Organization’s (ILO), Indigenous and Tribal Peoples’ Convention (The International Labour Organisation, Convention 169, 1989), the International Covenant on Civil and Political Rights (ICCPR), 1966 and the United Nations Declaration on Rights of Indigenous People (UNDRIP), 2007, have all encompassed the rights of indigenous people in one way or the another.

Regionally the African Charter on Human and Peoples’ Rights, (OAU, 1981) and the East African Community Charter/Treaty both seek to protect the indigenous communities in Africa. Indigenous peoples’ fundamental rights including the rights to self-determination (United Nations, 1945) and unrestricted collective land and resources have also been recognised.

Pastoralist and hunter-gatherer communities in Kenya identify themselves as minorities or indigenous peoples on the basis of their lifestyles or mode of social and economic organization (Makoloo, 2005). They argue that the regime of land, legal structures and values, which are necessary for their existence as communities, are not permitted by the state, and demand the recognition of communal land tenures (Makoloo, 2005). Their sense of marginalisation is aggravated by what they perceive as historical injustices. This is witnessed through various forms of discrimination such as lack of access to political power, different socio-economic related services, as well as indiscriminate evictions from their ancestral lands without adequate resettlement schemes, which has left them landless.
The Kenyan government however, has repeatedly denied the existence of indigenous peoples. At the African Commission on Human and Peoples’ Rights (ACHPR), the Kenyan Government disputed that the Endorois are a distinct community in need of special protection. To prove indigenousness and distinctiveness, the government wanted the Endorois to distinguish themselves from the Tugen sub-tribe or indeed the larger Kalenjin tribe (Makoloo, 2005). On this issue, the African Commission (read African Commission on Human and Peoples Rights - ACHPR) held that the African Charter recognised the rights of ‘peoples’ (Makoloo, 2005). The African Commission noted that though the terms ‘peoples’ and ‘indigenous community’ aroused emotive debates, some marginalised and vulnerable groups in Africa suffered particular problems. Many of these groups had not been accommodated by dominant development paradigms and in many cases, they were being victimised by mainstream development policies; and their basic Human Rights had been violated.

Similarly, the government argued against the Ogiek’s during their claim in the African Court on Human and Peoples’ Rights claiming that the Ogiek’s are not a distinct ethnic group but rather a mixture of various ethnic communities (Vigiliar, 2017). While it admitted that the Ogiek’s constitute an indigenous population in Kenya, the government argued that the Ogiek’s of today are different from those of the 1930s and 1990s having transformed their way of life through time and adapted themselves to modern life and would currently be constituted like all other Kenyans, hence it would not be accurate to regard them as indigenous peoples. The Court in this instance held that the Ogiek’s were an indigenous population that were a part of the people of Kenya having a particular status and deserving special protection that is derived from their vulnerability (Vigiliar, 2017).

This position was informed inter alia by the fact that Ogiek’s have suffered from continued subjugation, and marginalisation “…as a result of evictions from their ancestral lands and forced assimilation and the very lack of recognition of their status as a tribe or indigenous population…” (Vigiliar, 2017). It is clear that landlessness and lack of recognition are two major challenges faced by MIPs. However, despite recognition and numerous international instruments protecting and confirming indigenous community rights, not much of the landlessness has changed.

Dispossession of land and natural resources is a major Human Rights problem for indigenous peoples. The establishment of protected areas and national parks has impoverished indigenous pastoralist and hunter-gatherer communities, made them vulnerable and unable to cope with environmental uncertainty and in many cases, even displaced them. This loss of fundamental natural resources, is a serious violation of the African Charter (Articles 21(1) and 21 (2)), which state clearly that all peoples have the right to natural resources, wealth and property (Endorois Decision, 2010).

The common thread amongst the MIPs in Kenya is poor access to resources and opportunities, insecurity of tenure and alienation from the state politics and administration. They generally have a weak voice in governance hence their inability to address most of these issues. This is as a result of social exclusion, a by-product of the socio-economic order imposed by British colonialism, which embraced western economic, social, organizational, linguistic, religious and cultural traits. These traits distinguish, to varying degrees, Kenya’s dominant population from the Minorities and Indigenous Peoples (MIPs). The MIPs suffer from low levels of income, poor health and nutrition, low literacy, poor educational performance, and weak physical infrastructure. The developmental gaps tend to increase between the highlands and the lowlands; the latter occupied largely by minority or indigenous communities (Makoloo, 2005).
Historically, Kenyan MIPs have been forcefully dispossessed of their ancestral lands and in many cases have had their rights of possession, occupation, use/utilization of land violated in contravention of Article 26 (2) of the United Nations General Assembly Declaration 61/295 on the Rights of Indigenous Peoples (UNDRIP) adopted by the General Assembly on 13 September 2007. Most of the lands belonging to the MIPs in Kenya have been appropriated, either by reason of being ‘unoccupied’ especially as is the case for nomadic pastoralists, where vast lands are unused at certain periods to allow regeneration for their livestock; or due to lack of recognition of some communities like the Ogiek and the Endorois, which has allowed their lands to be converted into protected areas such as game reserves and forests, denying them access to the communal lands and ecosystem products essential for their livelihoods.

The Ogiek’s quest for recognition dates back to the colonial period, where their request was rejected by the then Kenya Land Commission in 1933, asserting that “they [the Ogiek’s] were a savage and barbaric people who deserved no tribal status” and consequently, the Commission proposed that “they should become members of and, or, be absorbed into the tribe in which they have the most affinity” (MRG, 2016). Denial of their request for recognition as a tribe also denied them access to their own land as, at the time, only those who had tribal status were given land as “special reserves” or “communal reserves” (MRG, 2016).

From the colonial days, the Kenyan MIPs have lost their lands through a raft of laws that generally did not recognise communal or ancestral land ownership. These included treaties of forceful conquests, such as the Maasai Agreements of 1904 and 1911 (Makoloo, 2005). The British also passed several land laws to support the acquisition of these lands, including the Crown Lands Ordinance of 1902 and 1915. After independence in 1963, the systematic application of the colonial political and socio-economic systems left indelible marks on the young state. Thus, Kenya enacted the Constitution of Kenya, 1969 (as Amended in 1997), the Government Lands Act Chapter 280, Registered Land Act Chapter 300, Trust Land Act Chapter 285 and the Forest Act Chapter 385, which, with very few amendments prior to 2010, provided the Kenyan government and political leaders with the legal basis to continue the unabated violations of the land rights of the Kenyan MIPs.

**Indigenous peoples in Kenya and land rights post 2010**

The Kenyan land tenure and land use policies have undergone an overhaul in the recent past. The ancestral land rights claim by indigenous communities in Kenya has been at the heart of these developments. Several Task Forces and Commissions on land in Kenya have generally acknowledged the historical land claims of the MIPs, and the injustices visited upon them. For example, the Njonjo Commission listed the Ogiek as one of the groups with historical claims based on colonial and/or recent expropriations.

The Ndungu Commission went further and identified the Ogiek as a leading example of indigenous minorities whose lifestyles depend on the forest habitats but which ‘have been systematically displaced from their ancestral lands by the government through protectionist policies that do not recognise historical claims of these people to the forest areas.’ And the government Task Force on the Conservation of the Mau Forest declared, “…the Mau Forests Complex is the home of a minority group of indigenous forest dwellers, the Ogiek …” (Ochieng’, 2016)

It is therefore, evident that MIPs in Kenya have been on many occasions violently uprooted from their habitats, in many cases leading to destitution and indignity. The right to freely dispose of natural resources
is of crucial importance to indigenous peoples and their way of life. It is only through this that the dignity of MIPs, as provided for by the The Constitution of Kenya, 2010 (particularly Articles Art 10 (2), 19 (2), 20 (4) 24 and 28), can be achieved.

It is worth of note that in spite of the challenges that minorities and indigenous communities still face to date, their land rights situation has vastly improved in the last 20 years. This period has seen the adoption of the Kenyan Land Policy, the Constitution of Kenya, 2010, Sessional Paper number 8 of 2012 on Arid and Semi-Arid Lands and the community land Act, all of which recognise the rights of indigenous communities as far as land ownership and land use is concerned. There have been other processes after this such as, the constitution of Climate Change Council, in which indigenous peoples are supposed to be represented. - These are some of the legal frameworks that have had bearing on land rights on indigenous peoples; Truth, Justice and Reconciliation Commission Act, 2008; the National Land use policy, the county specific rangeland management policies and climate change policies.

The current Kenyan land regime

Before the current land regime came into force, there had been several efforts to try and address land injustices, especially for MIPs. In 2008, the Kenyan National Dialogue and Reconciliation and Mediation team recommended the creation of the Truth, Justice and Reconciliation Commission (TJRC). Established under the Truth, Justice and Reconciliation Commission Act, 2008, its role was to investigate historical land injustices. (The Truth, Justice and Reconciliation Commission Act, 2008) Its mandate was to recommend reparations as well as investigate restitution cases. However, no mechanisms were put in place to facilitate this. The commission published a report outlining land and conflict in Kenya which unfortunately it had no powers of implement.

The National Land Policy (NLP) which preceded the Constitution of Kenya, 2010 and from which Chapter 6 on Land under the Constitution was heavily borrowed, specifically articulated the rights of MIPs to land (Karanja, n.d). The National Cohesion and Integration Commission was established under the National Cohesion and Integration Act, 2008. Its main objective was to promote equality in opportunity and outcome between different communities in Kenya.

This is in line with the Act’s intention of outlawing discrimination on ethnic grounds. The Commission of Inquiry into the Land Law System of Kenya (Njonjo Commission, 1999) recognised the rights of MIPs to their natural habitats and noted that in spite of the fact that over the years settlement schemes had been established in forest areas to resettle indigenous minorities, these communities were not settled but instead displaced by government authorities without regard to their livelihoods or compensation. The Ogiek in Marioshoni allege that once land for their settlement was set-aside for them, individuals in government invited their relatives and allocated them this land. This same experience is recounted by Ogiek communities living in Ndoinet, Kuresoi South, Nakuru County (FGD with Ogiek Community Members on 12th July 2018 at Ndoinet).

The current Kenyan land regime is administered by various progressive legal and policy mechanisms. The Constitution of Kenya, 2010 provides that the State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless in public interest (Art 40 (3), and where land is concerned, just compensation must be paid even where those who can prove ownership of such land have no titles to such land (Art 40 (4). Article 63 (1) (d) provides that
community land is among others, land that is (i) lawfully held, managed or used by specific communities as community forests, grazing areas or shrines; or (ii) ancestral lands and lands traditionally occupied by hunter-gatherer communities. Article 67 empowers the National Land Commission (NLC) to initiate investigations, on its own initiative or in response to a complaint, into present or historical land injustices, and recommend appropriate redress. (Constitution of Kenya, 2010)

The country has made progress and has enacted the Community Land Act, 2016. Two sections of this Act are of interest for MIPs regarding claims to ancestral ownership of their lands; whether these lands have already been allocated to private individuals or are declared public land. Section 24 (1) provides that public land may be converted to community land by allocation by the Commission in accordance with the Land Act, 2012. Section 25 provides that private land may be converted into community land by (a) transfer; (b) surrender; (c) operation of the law in relation to illegally acquired community land; or (d) operation of any other written law. These provisions in law provide a strong basis for communities like the Ogiek, Maasai or Endorois to pursue redress.

Data presentation and findings
The current legal and policy framework

The Kenyan jurisprudence with regard to indigenous people’s land claims has been limited. The Endorois, Ogiek and the Maasai have since early 1990s sought remedy before the African Commission, the African Court, and local courts, through cases that placed the MIP land rights at the centre of the country’s debates. The ACHPR in the early 2000s started a dialogue to try to understand indigenous people’s rights in Africa (African Commission, 2005). In 2005, the African Commission (AC) adopted a report on this subject, recommending a domestication of international laws relevant to indigenous peoples in the national legal framework (Kenya: Mission Working Group Indigenous Population/Communities, 2010). The Endorois case pushed Kenya to try and amalgamate international and national laws on indigenous people’s rights. (Endorois Decision, 2010). These provisions are outlined in Appendix 1.

The MIPs of Molo, Njoro, Kuresoi North and South, Rongai and Naivasha being part of the Kenyan State operate within the confines of the established political and policy frameworks that came into effect in and after 2010. This means that all their issues as they relate to land tenure and rights, as well as political representation, are to be handled within the guidelines provided by the Constitution of Kenya, 2010, the Lands Act, 2012, the National Land Policy, the Community Land Act, 2016 and Kenya Forests Act and Kenya Mining Act. Through Article 56, the Constitution of Kenya, 2010 sets the tone for protection of Kenya’s indigenous peoples, including the Maasai, the Ogiek and the Ilchamus of Nakuru County. Articles 56 specifically require that the state ensure representation of minorities and that marginalised communities participate and are represented in governance and other spheres of life (Constitution of Kenya, 2010)

Land is central to the socio-economic and cultural lives of the indigenous peoples, as already demonstrated by the various court rulings both locally and regionally. Against this reality, it was expected that after the promulgation of Kenya’ Constitution, representatives of these communities, elected by the communities themselves, would represent them at the various agencies and institutions, to ensure the protection of their rights and that their concerns would be taken into consideration when making decisions, especially related to land. This is not the case currently, as all the nominations, one in the Parliament (Senate) and four in the County Assembly (Nakuru County), were done by people outside the community without the community’s input to simply fill in the slots for marginalised representation.
In Kuresoi North, predominantly occupied by the Ogiek, the story of loss of their land dates back from around 1911-14, during the colonial period when they were kicked out. Indigenous communities have not been able to stem the encroachment of their land through successive governments to date, even with a totally different constitutional dispensation and land regimes, including court decisions in their favour. The Ogiek, for instance, have on several occasions won reprieve and orders issued for them to be given land around the Mau Forest to settle on. However, every time this has happened, it has been alleged that senior people in government and politicians have instead changed the plans and settled their own relatives, friends and community members instead.

*We have known no peace since I was born. I am landless and I have a family. Why is happening to only the Ogiek is something I am unable to comprehend. Over the years, people have come from Bomet, Trans Mara and Kericho and have been given land. This was very prevalent in 1995 to 1997 here in Marioshoni. Our Ogiek members have been given land but without titles. . . of what use is such land?* (Interview with an Ogiek elder, at Marioshoni, Mau Forest, on 11th July 2018).

Land problems of the indigenous communities in Kenya, characterised by involuntary evictions, started immediately after independence and peaked in the 1980s, during which time there was a sharp decline in democratic governance and respect of the rule of law. Both President Kenyatta and Moi used land as a means of political patronage to reward or buy loyalty (Amutavi, 2009). Other identifiable causes of indigenous peoples’ involuntary and uncompensated displacement from their ancestral lands include changing demographics and hence pressure on land available for settlement, agriculture, development and logging.

For the communities in Nakuru County, this was exemplified through expansion of neighbouring Kikuyu and Kipsigis communities, as well as government projects. Land hungry political and economic elite who used their political influence to push for either excision of land mainly from forests or simply to push away communities with ancestral claim to the land worsened these pressures.

In March 2014, a High Court Judge in Kenya found that the eviction of the members of the Ogiek from Marioshoni, Nakuru County in the Mau Forest complex, was in contravention of their right not to be discriminated against under Article 27 and 56 of the CoK, 2010 as it had resulted in their being unfairly prevented from living in accordance with their culture as farmers, hunters and gatherers in the forests (Joseph Letuya & 21 Others v Attorney General & 5 Others, 2014).

Consequently, the National Land Commission was directed to within one (1) year of judgment identify and open a register of members of the Ogiek Community in consultation with the Ogiek Council of Elders, and identify land for the settlement of the said Ogiek members who were to be settled in the excised area in Marioshoni and have not yet been given land in line with the recommendations in the Report of the Government Task Force on the Conservation of the Mau Forest Complex published in March 2009 (Joseph Letuya & 21 Others v Attorney General & 5 Others, 2014; Eburru, 2018). With the National Land Commission not acting to implement the court decisions, members of the Ogiek community went back to the Environment and Land Court sitting in Nakuru, through Petition No. 43 of 2016, to compel the NLC to implement the ruling. This case is ongoing.
Kenya’s violation of basic human rights on the right to land in relation to MIPs lands

The CoK 2010, through Article 40 confers on Kenyans including communities, the right to own property including land. In Article 10, the CoK, 2010 provides the national values as human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised. The treatment that has been meted to the MIPs in Nakuru County since the CoK, 2010 came into force is nothing other than a violation of these values and a manifestation of impunity by state officers. Members of these communities have been humiliated, some killed, their property destroyed, children forced to drop out of schools in the name of forced evictions out of ‘public land’ in total disregard of existing court rulings and orders. Narrating the ordeal they have endured to date, the Ogiek of Eburru in Mau recall:

In 2010, after Ken Gen started their work here on geothermal wells, they inhumanely dug up the graves of a family where the current well is placed. This caused a lot of psychological trauma to the family whose relatives’ remains were dug up, and not able to live this this kind of humiliation, the family left without a trace. Later we sat severally with the Rhino Ark people, who were championing the fencing of the land around here and were promised land. Since 2012, we have never seen the report of the survey that we undertook together with them, and have only come to conclude recently that we were lied to (FGD with the Ogiek in Eburru Forest, on 14th July, 2018)

It is incomprehensible that the MIPs in Nakuru have suffered several violent evictions occasioning loss of property and lives. This is despite both court rulings and several government decisions to excise land for them. As most of these communities narrated, corrupt politicians and individuals in government always disrupted several attempts to have them settled on excised land. An Ogiek community elder in Kuresoi North recollects:

After several discussions with former President Moi, we were to get land on which to settle…. a census was conducted, and it was established that the Ogiek were 976 families. We had suffered violent evictions in 1966, during which I lost my wife who had just delivered. She was thrown into a police lorry like a sack of cereal, without any care in the world, even after the police had been informed that she had just delivered. They did not care. In 1981, after a lot of suffering, the then District Commissioner called Ogola declared all land around here on the edge of the forest to belong to the Ogiek community, and said that documentation will be processed. However, the then Provincial Commissioner would hear none of it! He insisted that we must mix with other communities and when we resisted, we were once more violently evicted. This trend continued through 1986 when the then President, Daniel Arap Moi ordered that our claim to the land that we previously occupied be recognised. However, this directive was again interfered with when government officials, instead of setting up a reserve for the Ogiek, decided to have a settlement scheme, so as it provide opportunities for settling people from other communities.

The treatment of the Maasai in Olkaria, Naivasha, is also a demonstration of impunity where most MIPs are subject to blatant violations of their human rights and consequently indignity. In both cases of Olkaria, community rights were violated flagrantly, and even after the authorities acknowledged this, efforts for redress have been painfully minimal. A case in point is that of the Narasha community, where a court decision giving ownership of the land to the community was ignored, and government officers tried to forcefully evict the community on 26th July, 2013 (FGD with Ogiek community members at Elburgon on 12th July, 2018)
Section 2 of the Land Act, 2012 provides that community land can only be converted to either public or private land in accordance with the laws on community land enacted pursuant to Article 63 (5) of the Constitution of Kenya, 2010. While the Community Land Act, 2016 is yet to be operational as it awaits the enactment of regulations, the Land Act, 2012 section 111 provides that for land acquired compulsorily, just compensation must be paid to the people with determined interest in such land. Further, section 120 of the Act clearly stipulates that such land compulsorily acquired cannot be formally taken, before compensation has been fully made. (Land Act, 2012). As a result of the existing court decision, conferring ownership of the land in dispute to the Narasha community, any change of this status would have required the invoking of relevant provisions and due process followed to compulsorily acquire the land.

Members of the Ogiek, Maasai and Endorois communities in the study area have had to endure poverty and lack of social amenities like schools and hospitals because of displacement from their lands and ecosystems without due compensation. For instance, in the Mau Forest, every time there has been violent eviction of the Ogiek, the children have suffered immeasurably because their school life is abruptly cut short. On the other hand, community members cannot access medical facilities in times of need. Locked out of their natural pharmacies (the forests) and unable to access medication elsewhere, they have been exposed to many preventable deaths as explained by some members during an interview in Elburgon.

When the Maasai community of Kedong ranch were relocated to their current place, they lost a lot. There were several schools from where they were relocated, a cultural centre and a dispensary at the cultural centre. The cultural centre was adjacent to Oljoruba Gorge, which was a tourist attraction. The gorge also had a lot of historical significance to the community, lots of sites, fish towers, vulture’s caves, caves that warriors used to eat meat from during ceremonies, hot springs, as well as red ochre that was used for smearing the heads of the warriors. The relocation irreversibly affected the community’s business. This gorge was very significant to the community, as many had established businesses.

After the relocation, it would cost them Ksh. 800.00 per day to go and come back; hence, it was no longer commercially viable. Community members also lost their animals, because the land they were given was smaller. Some had more than 400 cattle, which they could not keep, in the new homes, because of the galleys into which their animals fell and died and wild animals like hyenas that attacked their sheep. They ended up more poor than they were initially. The land that they were relocated to was also fenced, and Ken Gen started drilling new wells next to the community’s homes. Worse still, another company has come in to start drilling on the southern side.

Apart from being fenced in like animals, they are now surrounded by new wells and threatened with pollution, which forced their initial relocation. There is a threat of another relocation, which is continuity of disturbance not forgetting that these people were not compensated for the initial disturbance. They were only given a house with nothing inside dealing them a heavy blow economically (FGD with Ogiek community members at Elburgon on 12th July, 2018).

Underpinning the Kenya Land Policy of 2010 was the question of historical land injustices, which included evictions and lack of compensation of indigenous communities. This also informed the provisions of the CoK Kenya, 2010 largely, especially Article 60 which requires that land in Kenya be managed and used in a manner that is equitable, efficient, productive and sustainable, as well as articles 66, 68 and 69 that provide for regulation of land use, revision of sectorial laws on land use and sustainable exploitation, utilization, management and conservation of the environment and natural resources. Many of these
violations have continued, particularly justified on the basis of government claims on the need to mitigate climate change and protect the water towers projects that directly touch on lands with ownership claims by indigenous peoples like the Ogiek, or investments in renewable energy like in the Olkaria and Eburru geothermal stations. This is in spite of the fact that various courts, both in Kenya and regionally have found indigenous peoples to be conservators of their environment, and hence the efforts of restoration of lost habitats would best be served if the government proactively sought to involve the MIPs in its programmes.

Indigenous communities vehemently refute allegations of destroying forests and on the contrary, accuse corrupt government officials who continue to excise the forest land for occupation by members of communities from outside the area, as well as allow indiscriminate logging of trees in the area. Daniel Prengei, Kiptunga Forest Chief Scout trained by Ogiek Peoples’ Development Program (OPDP) to support the protection of the forest observes that, Ogiek have never been destroyers of the forest. He says that on the contrary, they were serious conservators of the forests because they depended on them for their livelihoods (Interview with Daniel Prengei at Marioshoni on 11th July, 2018).

**Leshwari Kimungen avers:**

“Our food was honey and meat. We never touched trees. In fact, our community had subdivided the forest to every clan for protection and conservation.” (Interview with Leshwari Kimungen, 65, at Marioshoni, Mau Forest, for this study on 11th July 2018)

In the decision on African Commission on Human and Peoples’ Rights v Republic of Kenya at the African Court on Human and Peoples’ Rights in Arusha, the Court held that the most salient feature of most indigenous populations was their strong attachment with nature, particularly, land and the natural environment; their survival … depended on unhindered access to and use of their traditional land and the natural resources thereon. It further held that the Ogiek’s, as a hunter-gatherer community, had for centuries depended on the Mau Forest for their residence and as a source of their livelihood. This is also clearly captured in the Civil Case 238 of 1999 Kemai & 9 others v Attorney General & 3 others. one of the country’s gazetted forests is their ancestral home where they derive their livelihood; where they gather food, hunt and farm, and they are not going to go away; they do not know any other home except this forest: they would be landless if evicted. … (They) depend, for their livelihood, on this forest, they being food gatherers, hunters, peasant farmers, beekeepers, and their culture is associated with this forest where they have their residential houses. … Their culture is basically one concerned with the preservation of nature so as to sustain their livelihood. Because of their attachment to the forest, it is said, the members of this community have been a source of the preservation of the natural environment; they have never been a threat to the natural environment, and they can never interfere with it, except in so far as it is necessary to build schools, provincial government administrative centres, trading centres, and houses of worship. (Kemai & 9 Others v Attorney General & 3 Others)

From the observation made by the members of MIPs, arguably more than 80 percent of them live in abject poverty as they cannot afford a decent meal a day (Ogiek, 2018). This is mainly because after being displaced from their ancestral lands, they are unable to access and utilise the forest and other ecosystem products like they used to. In very few places, like Eburru, the community are running beehive and tree seedling projects, but they are unable to easily access markets due to a number of challenges. Literacy levels within the communities are very low making it challenging for any of them to be appointed to senior government positions, even if such positions were made available.
Policies, laws and practices affecting MIPs access to and control of land as well as benefits sharing in Kenya

Kenya has a totally new land regime following the promulgation of the CoK, 2010. With it are three recognised land tenure systems - community, private and government. These tenures define the general ownership and anticipated benefits of this ownership. The provision of community land, currently governed by the Community Land Act, 2016 was an attempt to recognise and protect communal ownership of land as especially practiced by many minority and indigenous communities in Kenya, which thrives under customary and traditional institutions that provide the specific conditions of resource use and sharing. Previous studies have shown that between pastoralist and hunter-gatherer communities, land use decision-making takes place in a context of both traditional and formal government institutions (SNV, 2016). At the traditional level, communities make decisions about certain elements of grazing patterns, water management, and other natural resources such as fuel wood (SNV, 2016).


Article 56 of the CoK, 2010 provides that the State shall put in place affirmative action programmes designed to ensure that minorities and marginalised groups (a) participate and are represented in governance and other spheres of life; (b) are provided with special opportunities in educational and economic fields; (c) are provided with special opportunities for access to employment; (d) develop their cultural values, languages and practices; and (e) have reasonable access to water, health services and infrastructure. This was in recognition of the fact that over the years, indigenous communities in Kenya had suffered marginalisation that not only led to difficulties for them to be able to practice their livelihoods, but they were also deprived of the benefits that they have normally accrued from utilising the ecosystem products within their environments. Culture is the fabric that holds the Ogiek together. Rael Kibilo from Tinet forest had this to say during an interview: ‘Before our forests were cut down, we had our culture and tradition … anyone who is destroying our forest is destroying our culture.’ (Ohenjo 2003)

Displacement from the forests that are their cultural and spiritual temples, therefore, erodes Ogiek culture and violates international Human Rights standards, some of which Kenya is a signatory to (e.g. Article 15 of the International Covenant on Economic Social and Cultural Rights, which Kenya has ratified) (Ohenjo, 2003). Before the CoK, 2010, the government controlled Ogiek (and other indigenous communities) ancestral lands through three Acts of Parliament: the Government Lands Act (1970, revised in 1986), the Forests Act (1957, revised in 1964) and the Wildlife (Conservation and Management) Act (1977, revised in 1985) (Ohenjo, 2003). These lands are gazetted as government forests or national game parks/reserves. Once this happened these communities’ access to and advancement from natural resources were curtailed, affecting them negatively.

We were born in this Eburru forest and we have known no other home. When the colonialists came, they moved us out of the forest next to roads and hospitals that they had constructed around here. In 1932, the forest was gazetted as a reserve and we were given restricted access to it. This interfered with our livelihoods since we had our homes and burial sites inside the forest. We had to re-establish... (FGD with the Ogiek in Eburru Forest, on 14th July, 2018)
These violations continued after independence. As a result of outcry from Ogiek for lack of land to use, in what was originally their land now gazetted as government forest, the government introduced the shamba system in 1996, but the same was done away with in 2000. The shamba system of agriculture allowed communities living near forest reserves and parks to farm in and around the forest while not cutting trees. This was in recognition of the arguments, mainly by the Ogiek then, that the indigenous communities near such resources and who depended on forest resources were the best conservators. However, immigrant communities, who came and cleared huge chunks of the forests for farming, destroyed the ecosystem. (FGD with the Ogiek in Eburru Forest, on 14th July, 2018)

...from around 2002, after the shamba system was abolished and we were kicked out of the forest, we experienced acute food shortage… some people were forced to move out and start living with relatives in far off areas, while others ended up as labourers for people from other communities. The level of destitution was without measure! (FGD with the Ogiek in Eburru Forest, on 14th July, 2018)

The CoK, 2010 is clear on the issue of natural resource and ecosystem benefits sharing. Through Article 69, the Constitution provides that the State shall ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; and protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities. Subsequent legislations have provided mechanisms through which MIPs can effectively participate in the management and exploitation of natural resources. For instance, the Forest Conservation and Management Act, 2016 provides for establishment of community forest associations that among others are expected to formulate and implement sustainable forest programmes that shall be consistent with the traditional forest user rights of the relevant forest community, as well as protect sacred groves and protected trees.

On the other hand, there is also the Community Land Act, which communities can lay claim on and reserve for community conservation, cultural and heritage sites, or any other purposes as may be determined by the community, respective county government or national government for the promotion or upgrading of public interest.

The challenge however, is that many community members are unaware of the existence of such provisions and hence have been unable to take advantage of them, to not only claim ownership of their community lands, but also user rights with regards to the natural resources in their areas.

However, according to the members of these communities, more than 95 per cent of their population are ignorant of such provisions due to high levels of illiteracy and hence have not been able to exploit them. For instance, the Ogiek in Eburru forest, rather than running a registered Community Forest Association (CFA), only have a Community-Based Organisation. A CFA would have given them much more leeway and possibility of funding, but lack of knowledge has hindered its establishment. In all the communities that were part of this study, community members who were interviewed were not even aware that the Community Land Act, 2016 had been signed into law and many communities had not began organising their community land committees as they await the enactment of the regulations that will operationalise the Act.

The use of community scouts, as evidenced in various communities in Mau Forest, is one sure way of ensuring better benefits in sharing of natural resources with MIPs. This model needs to be institutionalised
and the community members who are engaged placed on payroll to ensure that they live dignified lives. Daniel Prengei illustrates:

My work involves protecting the forest from destruction and generally I guard against charcoal burning and other destructive practices like people encroaching into the forests. If I get anyone burning charcoal, I can arrest that person, using my other scouts, after which I will inform the Forester to assist in the prosecution of such an individual. Members of the Ogiek community have a lot of experience in forest conservation and protection because as a community, they diligently protected these forests. The government found unadulterated forests because of the Ogiek conservation skills of my forefathers. I am not however paid for this work, am just volunteering even though I have been trained by OPDP and Kenya Forest Service (KFS) (Interview with Daniel Prengei at Marioshoni on 11th July, 2018)

On the other hand, with a number of development projects being undertaken in areas where these communities are found, like road and dam construction, geothermal development, and oil exploration, it is important that the government comes up with a very clearly outlined policy of how local communities, other than through compensation for displacement and disturbance, are supposed to benefit. The CoK, 2010 in Article 66 (2) provides that the government must ensure those investments in property benefit local communities and their economies. However, there is a lack of legislation to enforce this and so communities are left at the mercy of investors who end up exploiting them for maximised profit.

Following an outcry over the manner in which Kedong Ranch relocation was implemented, Ken Gen ended up constructing four churches, a school and 150 houses for displaced families. They later added five more houses. The water supply project is incomplete and the roads were not done well. Persons with disabilities (PWDs) were given some money to enable them take off, while a few people who did not benefit from the houses were given cash, about KES 200,000 and told to vacate their old homes. Clearly this amount was not enough to resettle these people.

In addition to this, the community lost their socio-economic livelihoods, as the tourism businesses that they were undertaking earlier on could not continue. Further, the area they were moved to could not support pastoralism or farming. These socio-economic losses constitute a violation of the community’s right to an adequate livelihood. It would therefore, have been important for Ken Gen to support the community to recoup economically, by considering an offer of employment to some members of the community, including in management positions. This never happened as there are only 4 people from the community employed on the rig, as labourers, while there is no one employed at the management level. (Interview with Jackson Shaa of Masai at Olkaria on 20th July, 2018)

The lack of equitable benefit sharing mechanisms or structures in protected lands with multiple land use frameworks that allow human settlement and wildlife conservation to co-exist means that to a large extent MIPs are not involved in decision making in land and natural resource management. This ultimately weakens the resilience of the communities to climate change impact realities that are becoming more evident, especially with indicators like general health, illiteracy and unemployment and hence high rates of poverty. Among the Ogiek and Endorois communities, for instance, very few people out of an estimated population of about 80,000 have university education. It is difficult to correctly estimate the population due to lack of ethnically disaggregated data on these communities. This may only be possible in the scheduled 2019 census as both communities now having ethnic codes that will enable the recording of their demographics by the Kenya National Bureau of statistics (KNBS).
You know, if we had real independence like other communities, we would have organised ourselves and the government would have allowed us ownership of our lands. This would have helped us organise ourselves and get into business and even diversify into farming of horticultural crops, get income and develop like other Kenyans. To date we do not own any land, as we have nothing to prove we own the places that we currently stay in. This has stunted our development, actually, it has regressed it since lack of proof of ownership has occasioned our forced evictions, and arbitrary arrests and we live like slaves in our own country. My children have not gone to school properly because of this. This is because I do not have sustainable income since I depend on goodwill of people to volunteer their pieces of land for me to farm so as to get some little money to clothe and educate my children. If I owned my own land, I would have been able to better organise myself. But because of this my first born dropped out of Class 7 and got married and right now he has five children, who also because of instability, their education is frequently disrupted. My two other children are in Class 7 and another one Class 6. But they are learning through difficulties. The school they attend is more than two kilometres away, and most of the time they go without lunch. It is a hard life. (Interview with Wilson Warionga at Marioshoni on 11th July, 2018)

It is quite discernible from the experience of the MIPs that the action of the government forcefully possessing what used to be community land and declaring it protected areas on argument that these communities are encroaching and hence destroying water catchment areas has clearly negatively impacted on the MIPs. Throwing these communities out of their natural habitats and destroying their livelihoods not only makes them vulnerable to the impact of climate change, but also to other pressures of development, driving them into poverty.

There is therefore, need for a clearly defined concept of protected lands, that is; a ‘clearly’ defined geographical space, recognised, dedicated and managed, through legal or other effective means, with effective involvement of MIPs, to achieve the long-term conservation of nature with associated ecosystem services and cultural values (Biodiversity Information System of Europe, Protected Areas - Definitions, 2018).

The CoK, 2010 requires equitable sharing of accrued benefits from natural resources. These resources are largely found in ‘protected’ lands, which used to be natural habitats of MIPs, either under the Wildlife Management and Conservation Act, 2016 or Mining Act, 2016. Equitable benefit sharing thus becomes important in ensuring not only that these communities’ rights are not violated, but also because it essentially supports the MIPs resilience levels to climate change.

**Representation**

Lack of representation in key government institutions and exclusion in decision-making underpinned the grievances by the MIPs during the debate for changing the Constitution of Kenya. Since independence, some communities in Kenya face exclusion in most aspects of their lives. While there has been strong economic growth, the gap between the poor and the rich continues to widen. This exclusion has been seen over the years, in areas such as public employment and full rights of citizenship. Reports prescribe that the problem of lack of political representation may be tackled by fully implementing public participation in public affairs (CEMIRIDE, 2005).

The CoK, 2010 addresses specific concerns of MIPs involvement in the institution of governance by: representations in political parties, county government, creating mechanisms empowering of MIPs. In particular, article 56 (a) of CoK, 2010 provides for the representation and participation of minority groups in governance. (The Constitution of Kenya, 2010).
However, implementation of the laws remains a challenge. Lack of political participation, discrimination and weak protection of their rights to development are the Ogiek people’s reality. According to members of the Ogiek community, even where they have one of them nominated to represent them in any position, as rare as it may be, the nominated or appointed individual may not do much to support the community to address their concerns, since he/she will be forced to pay allegiance to the nominating power (Interview with Wilson Warionga of Marioushoni on 11th July, 2018). These representatives, according to community members, therefore, simply become silent representatives with no influence whatsoever.

The table below shows the current status of representation of Ogiek, Maasai and Endorois in Nakuru County in key administrative and decision-making institutions. As it can be seen, the representation of these communities is practically negligible to affect or impact on any decisions in a meaningful way that can be of practical help to the community.

| Status of representation of MIPs in Nakuru County in key National and County Government Institutions |
|-------------------------------------------------|------------------|------------------|------------------|
| Position                                         | Ogiek | Maasai | Endorois |
| MP National Assembly                             | 0     | 0      | 0       |
| MP Senate                                        | 1 (Nominated) | 0      | 0       |
| MCA                                              | 2 (Nominated) | 0      | 0       |
| Member County Public Service Board               | 0     | 0      | 0       |
| County Executive Committee Members               | 0     | 0      | 0       |
| County Chief Officers                            | 0     | 0      | 0       |
| Ward Administrators                              | 1     | 0      | 0       |
| County Land Board                                |       |        |         |
| Members of Town or Municipality Boards           |       |        |         |
| Nakuru Municipality                              | 0     | 0      | 0       |
| Naivasha Municipality                            | 0     | 0      | 0       |
| Rongai Town                                      | 0     | 0      | 0       |
| Njoro Town                                       | 0     | 0      | 0       |
| Mau Narok Town                                   | 0     | 0      | 0       |
| Nakuru Water and Sanitation Services Company Ltd (NAWASSCO) | 0 | 0 | 0 |
| Nakuru Rural Water & Sanitation Company Nakuru Rural Water and Sanitation Company Limited (NARUWASCO) | 0 | 0 | 0 |
| Nakuru County Referral Hospital Board            | 0     | 1      | 0       |

The inclusion of MIPs in political decisions has been a challenge. Despite having domesticated international laws and having provided for MIPs in various aspects of laws – the Ogiek, Endorois and Maasai communities in Nakuru County, like other MIPs in the country, suffer from under-representation in politics and governance. This under-representation or exclusion is common, leading to discrimination against MIPs, which violates their right to development. It is important that these laws are implemented
strictly so as to ensure effective representation of these communities on the decision-making table to not only ensure that their voices are heard in decision-making but also that their concerns are heard and addressed.

It is thus arguable from the foregoing that MIPs have suffered land dispossession as a result of lack of political representation from the grassroots to the national level. Many members of these communities, during the interviews for this report, lamented that the lack of strong political representation compounded their problems. In very few instances there have been some of their members recruited to serve in the government, for instance at the level of chiefs and other administrative offices, or to represent them in negotiations.

However, instead of effectively representing them, they have instead ‘turned to be their tormentors’. A good example is the experience of Ogiek of the Mau Forest Complex. In forming the National Government 17-Member Task Force to implement the African Court ruling, the Ogiek community were not consulted and are not represented in it. (Interview with Joseph Towett, and Ogiek Elder and Rights Advocate for this study on 22nd August 2018). This is despite several requests to the Attorney General to participate in this process, which directly affects the community. (Interview with Joseph Towett, and Ogiek Elder and Rights Advocate for this study on 22nd August 2018). The task force has the mandate to recommend measures to provide redress to the Ogiek claims, including restitution, compensation or the provision of alternative land, inter alia.

The effect of lack of representation is also well demonstrated with the Maasai community of Narasha in Olkaria. Even though the Maasai are a populous community across several counties, in Nakuru, they are predominantly found around Olkaria in Naivasha. The migrant communities, especially the Kikuyu, currently outnumber them. They are unable to elect a representative at either the county or national level. The end result was that a committee of members of parliament was formed to settle the land dispute involving the members of the Narasha Community (Maasai) and Ngati Community (Kikuyu). The Maasai MPs in the committee were forced to drop out as it was argued by their counterparts that they were not elected members from Nakuru County. The Maasai community was thus left at the mercy of representation that favoured the interests of their Kikuyu counterparts. A Maasai community member of Narasha community narrates their ordeal:

Our problems started in 1970s when the efforts to evict the community begun surfacing. Several District Commissioners (DCs) tried to resolve the issues of land ownership but did not succeed. Mostly when they came, they had orders to evict the community as they had been made to believe that the Narasha community was illegally occupying another community’s land. However, whenever they came they found that this community was permanently and legally settled hence they could not evict them. When the use of government administrators failed to yield the desired results, in 1996 Ngati farm sued the Narasha community.

In 2000 the court ruled in favour of the Maasai community through adverse possession given that they had lived on the land for more than 20 years without disturbance. Ngati farm members appealed in 2000 and in 2004 the appeal was dismissed. Our biggest mistake as the Maasai community was not to follow up on the ruling and ensure transfer of the title to the community. We naively thought that once the ruling was in our favour that was it ...

In 2013 Ken Gen developed interest in the land for various projects such as Olkaria Seeds and Industrial Parks. Due to this interest, community representatives were summoned to a meeting at Enashipae Hotel, Naivasha by the then County Commissioner Nakuru. Over 40 elders attended it. The objective of the meeting was to inform the community members that they were required to move out of the land because the land was being bought from...
Ngati Farm. The community was offered KES 31 million. The community objected noting that the money would not be able to buy equivalent land and cater for disturbance allowance. The community was threatened with eviction.

On 26th July 2013, over 300 youth and more than 40 police and invaded the village from 8 am from which time they burned houses to 5 pm. The Maasai houses are made of cow dung and when dry they burn very easily burnt. All properties were razed. Some animals died especially sheep and goat kids. Two elders were injured in the process trying to stop the burning. We held continuous protests for 7 days from that day. MPs, Cabinet Secretaries came to visit and on the last day the President came. The President assured the community that whatever happened will never happen again. He also gave his assurance that the community would be compensated. The President formed a parliamentary committee that included the MPs from Narok, Kajiado and MPs from Nakuru.

There were differences among the MPs, and after the 1st meeting the some MPs dropped out. The meetings continued, and the remaining MPs recommending that Ngati farmers be paid off and the damaged properties of the community be compensated. They did not deliberate on what would happen to the Maasai community after compensation. Ngati Farm members were paid 500 million and quietly disappeared. Several times, Ken Gen staff has even tried to drill even within our homes. We threatened them so they have kept off. They have tried to bribe and divide us, but having learnt from the other communities we have remained united and hence have been able to speak with one voice (Interview with a Maasai Community member, at Olkaria on 20th July 2018)

It could be argued that communities in Nakuru County continue to experience challenges with regard to their land's rights due to continued lack of representation especially at the various crucial political platforms. Political representation is particularly important since most mediums to high-level positions, are secured through political lobbying. With lack of political muscle to push for some of these appointments in their favour, MIPs have remained largely as helpless spectators because many decisions by individuals in powerful positions violate their land tenure rights. Communities like the Ogiek have during this time seen land that would have been allocated to them, get allocated to individuals from other communities. Political representation ensures for instance that issues that are of concern to the members of a particular community can be escalated to higher levels of governance.

The country is currently governed through a devolved system that is dependent on the political parties. Most importantly, the community land governance structures have been devolved, and even the National Land Commission (NLC) has fully constituted offices in all counties. Representation within such key institutions is usually a decision of those in politically powerful positions. Such representation, for instance in the County Land Boards, and County NLC structure is crucial in ensuring the integration of the voices and concerns of minorities and indigenous peoples into decisions related to land in these localities.

Impact of land ownership of indigenous peoples in protected areas especially to MIPs women

For many indigenous communities, as demonstrated in the cases of the Ogiek (African Commission on Human and People’s Rights v Kenya, 2016) and the Endorois (Endorois Decision, 2010) at the African Court and Commission respectively, there is a strong correlation between land dispossession and poverty. This land dispossession clearly disadvantages these communities, and directly violates several of their human rights including the right to education, shelter and health. The extent of the negative impact on MIPs due to their residence in protected lands that promote exclusive wildlife conservation, as well as other developments clearly show the differential impact on women and men. As narrates an Ogiek woman:
The problems of Ogiek women as a result of these evictions are very many. The lack of a settled life has regressed women to a level we do not even have celebrated women leaders in the community. Because of frequent evictions we have been unable to properly parent our daughters and especially provide them with proper formal education. Consequently, we do not have women leaders in the community like Members of County Assembly or even a village elder. We live in fear and perpetual sadness. Always thrown all over with unnecessary and inhuman evictions, we are forever with our children on our backs crying... we also need a peaceful life and to progress like women from other communities...Our daughters are married early, because we have nothing to offer them. If we had gone to school, we could have afforded them a better life. We would not have married early. For instance, I was married when I was around 13 or 14 years of age; it was not my wish. It is because we lived a life of problems, so because of being a burden to my mother, I decided to get married. But in the process, I destroyed my life ... but did I have a choice? Of course not!(FGD with members of Ogiek Community in Kuresoi North on 12th July, 2018)

The foregoing narration aptly captures the challenges faced by the Ogiek and by extension the MIPs women in Nakuru county. Due to the patriarchal nature of the societies, women have ended up bearing the biggest brunt of the frequent displacements, as evidenced by deaths due to poor health and trauma, as well as lack of educational and other self-development opportunities.

According to the community members, the Ogiek community has also experienced many marriage break ups ostensibly as a result of early marriages. As a result, the girls loose of respect in the society, which is largely patriarchal. The educated girls are also facing challenges like unemployment especially in this era of sexual exploitation by potential employers. Poverty is also on the increase compared to earlier years, when the community prided itself in having a lot of livestock (cattle, goat and sheep), which they would sell so as to buy grains and other requirements.

However, both livestock keeping and cultivation have sharply declined due to frequent evictions, which have also consigned them to be perpetual squatters on land that is historically theirs or elsewhere. The net effect of this is that the community has become poorer. This has negatively affected the girl child, since with the declining economy, and increasing poverty, there is a tendency for families to favour the boy child for education while the girl child is consigned to early marriage. This has led to the loss of many girls during childbirth due to complications, as their bodies are not fully developed to undergo the rigours of childbirth. This is compounded by the fact that the hospitals are far off, and the road network is very poor. Those who survive the ordeal carry psychological scars forever.

**Data Summary and Conclusion**

The information gathered from the field study reveals a persistently disturbing trend of harassment and discrimination of MIPs by either state officers or politically connected individuals in total disregard of the existing laws and/or Court Orders. This has in effect subjected the members of the communities to untold psychological torment and in extreme cases, has led to death. One community member in Nessuit recalled:
“We have really suffered persecution … Strangers come to our land with papers to claim it. What we are wondering is where these title deeds are coming from. Others (non Ogiek) are even selling land without proper documents worsening the land situation in this area. In several of these instances we have found ourselves in court having been accused of occupying our own land illegally. And without our own resources for retaining lawyers, we have witnessed a number of us die of stress and depression” (FGD with members of Ogiek community at Nessuit on 12th July 2018)

According to most members of the communities, due to lack of legal protection, they have been persistently harassed by individuals from other communities claiming ownership of the same land that was ‘allocated’ to them. In the face of this harassment, some members of the communities have tried using local legal mechanisms to seek redress, but in many cases to no avail. A community member for instance narrated how even after he went to court in 1997, this did not stop other people from being illegally allocated land in the contested Ogiek areas in the Mau Forest.

The results of the study clearly demonstrate impunity and the deliberate disregard of the country’s laws by well-connected individuals and corrupt government officials. This has been demonstrated, and has resulted in not only loss of life and property through violent evictions, but also underdevelopment of the Ogiek, Endorois and Maasai communities in Nakuru County.

Conclusion

MIPs hold a crucial key to achieving sustainable development in Kenya. This is because, while they may be seen as small pockets of communities with small populations, put together they could easily add up to almost 30 per cent of the country’s population. However, MIPs in Kenya do not have data on which to base their advocacy. The government also does not possess crucial data with which to plan the country’s socio-cultural and economic development. Therefore, lack of disaggregated data and hence programmes that are MIP specific have contributed significantly to the exclusionist programmes and policies by the government.

As long as these communities continue to be marginalised, discriminated against and their rights violated with impunity, Kenya will never achieve its intended development targets. Viewed as individual communities, they appear small in numbers, but aggregated together, MIPs contribute to a huge population of the country. This means that improving their demographic indicators, especially well-being, is crucial to ensuring that Kenya meets its outlined targets of development, as encapsulated in Vision 2030.

It is indisputable that over the years, because of their unique attachment to and dependence on natural resources, which were hitherto declared public property, MIPs have suffered marginalisation and discrimination perpetrated by authorities during different political regimes. A number of efforts have been mooted to try and resolve their situation by setting aside land for them, but available evidence suggests that, unscrupulous politicians and well to do or well connected individuals have always sought to take advantage of their situation and gain by acquiring land otherwise intended for the MIPs resettlement, as recounted by an Ogiek elder below:

After independence when President Kenyatta told everyone to go back home, we came back to this place in 1964. We simply followed what Kenyatta told us, that everybody should go back to his or her land. We were very happy so we came back to our land that we had been kicked out of in 1942. But later, the then Provincial Commissioner had a change of heart and insisted that there was no way people from only one community, the Ogiek would be
given land. That we must mix up with other communities. Then in 1966 we were suddenly attacked by GSU, who burnt our homes and arrested people. My wife had just delivered and as much as she pleaded with them, they did not listen. My wife and the infant were thrown into the lorry like a sack of maize. Hitting the side of the lorry, they both died. The Ogiek members disappeared into the forest once more and it has always been a game of hide and seek. In the intervening period, members from other communities came in to occupy what was initially our land. To date we have never got justice (FGD with members of the Ogiek community at Ndoinet on 12th July, 2018)

This situation has been replicated almost everywhere. In Olkaria for instance, even after the Court ruling to give ownership of a disputed piece of land to the members of the Maasai community of Narasha, the government, in total disregard of the court ruling, still went ahead and paid out compensation money to a group of individuals who literally did not own the land, and proceeded to destroy the property of the Narasha Maasai community, who the court ruled owned the land, in an effort to forcefully evict them(Wesangula, R. O. (2018).)

The CoK, 2010, local courts and regional courts and institutions have on several occasions, as has been demonstrated herein, come to the rescue of the MIPs in Kenya. In its ruling, in May 2017, the African Court on Peoples and Human Rights established that Kenya’s decision to evict the Ogiek community from the Mau Forest was in violation of its rights as an indigenous community and that it ought to have protected and effected these Rights as under the African Charter on Human and Peoples’ Rights. It consequently ordered the Kenyan government to take all appropriate measures within a reasonable time frame to remedy all the violations established and to inform the Court of the measures taken within six (6) months from the date of the Judgment. (Judgement for Application No. 006/2012, African Commission on Human and people’s Rights v Republic of Kenya) Earlier in 2014, the Kenyan High court ruled that the eviction of the members of the Ogiek community from areas that they occupied in the Mau Forest Complex is a contravention of their right not to be discriminated against under section 82 of the previous constitution, and Article 27 and 56 of the CoK,2010, as it has resulted in them being unfairly prevented from living in accordance with their culture as farmers, hunters and gatherers in the forests.

The Court directed the National Land Commission to within one (1) year of the date of the ruling identify and open a register of members of the Ogiek community in consultation with the Ogiek Council of Elders, and identify land for the settlement of Ogiek members who have not yet been given land in line with the recommendations of the report by the government Task Force on the Conservation of the Mau Forest Complex which was published in March, 2009. However, The NLC did not implement the orders within the one year given and the Ogiek have gone back to court to seek further directions.

In March 2018, the Environment and Forestry Cabinet Secretary Keriaoko Tobiko appointed Principal Secretary Charles Sunkuli as chairperson of a 17-member task force that was formed to implement the decision of the African Court on the Ogiek Community land rights in Mau Forest. Established in November 2017, the task force, which had an operation period of six months, and was expected to inter alia recommend measures to provide redress to the claims of the community such as restitution to their original land or compensation with alternative land.
The team was also expected to prepare interim and final reports to be submitted to the African Court on Human and Peoples’ Rights in Arusha, Tanzania and examine the effects of the judgment on other similar cases in other areas in the country. Further it was to conduct studies and public awareness on the rights of indigenous people and also get views of the members of the public. By the time of doing this study no reports had been developed; the composition of the Task Force was however changed and its time limit extended.

With all these positive developments, it would be hoped that MIPs in Kenya are destined for better times, with regards to their claims on historical land injustices. However, while things appear to be improving on paper, the reality on the ground is that they seem to remain the same or to get worse for the MIPs in Nakuru County.

Even with the existence of court rulings and orders, as well as the setting up of the task force, government institutions and politically-connected individuals are still harassing the MIPs and threatening them with eviction.

Indeed, the community members are wondering what the role of the task force is, if those interested in the land under dispute cannot wait for the task force to complete its work and submit its report. What is even more worrying is that more than six months since it was formed, the task force has not made any effort to consult the Ogiek and other indigenous communities as mandated.
Recommendations

To the National government

- The government should move fast to enact a law that will give effect to article 69 (2) of the constitution to ensure that there is a formula of ensuring that communities benefit from development projects in their areas.
- The government should constitute an MIPs Commission/Task Force that will advise on the implementation of the rights of MIPs in the CoK, 2010.
- The government should ensure strict adherence to the rulings and judgments of courts of law, as required by the CoK, 2010, so as to ensure that MIPs get justice.
- The government should establish a register of all MIPs with claims to land lost through historical injustices and identify in consultation with the communities, land on which these communities can be resettled, to compensate the communities’ for loss of land and livelihoods next to the protected areas, to ensure that their livelihoods are not disrupted and that they continue contributing to conservation of the environment.

To the County Government of Nakuru

- The County Government of Nakuru should move with speed to develop a proper land use plan for Nakuru county, ensuring the protection of critical biodiversity and ecosystems which takes care of Minorities and Indigenous Peoples Rights.
- The County Government of Nakuru should legislate on the Rangelands Management Act to ensure the sustainable management of the County’s rangelands, which will enhance the protection of the pastoralist communities in the county as they depend on the rangelands for their livelihoods.

International community

- Development actors and donors like the World Bank, International Development Bank, UN agencies and other international organisations like Initiative for Sustainable Landscapes (ISLA), should insist on and ensure strict adherence to their safety policies and standards to ensure that the rights of MIPs are not violated as a result of projects funded by them.
- The development actors and the donor community should lobby the government to implement decisions of the African Commission on Human and Peoples’ Rights and the African Court on Human and Peoples Rights’ as well as the Kenyan courts relating to MIPs.

To the Minority and Indigenous Peoples Organisations

- Organisations like OPDP should step up their community capacity building activities to support the MIPs in Nakuru county to understand the changing political and legal landscape and existing opportunities for the communities that they can use to address their land issues; such as the Community Land Committees or the Community Forest Associations.
- MIPs organisations should support the simplification and dissemination of the court rulings on the land cases and educate members of the communities on their impact.
- MIPs organisations should step up their lobbying and advocacy for government to implement the various court decisions that are yet to be implemented.
## Appendix I

### An analysis of legal, policy and institutional frameworks and opportunities of MIPs

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<th>Legal, policy and Institutional framework</th>
<th>Provision</th>
<th>How it applies</th>
<th>Opportunities for MIPs</th>
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<tr>
<td>The Constitution of Kenya (2010)</td>
<td>Article 10 on National Values; 10(2) (b): “…human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised.”</td>
<td>The CoK, 2010 binds all state officers, state organs and public officials from discrimination against MIPs.</td>
<td>MIPs can petition against inhuman treatment to institutions like Commission on Administration of Justice (CAJ/Ombudsman), Kenya National Commission on Human Rights, the National Parliament (National Assembly or Senate).</td>
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<td>Article 21(3): “…duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalised communities, and members of particular ethnic, religious or cultural communities.”</td>
<td>State organs have a duty to address the needs of vulnerable groups. For instance; the loss of land of a particular indigenous community would be a need and the government must address it.</td>
<td>MIPs should use this particular provision to petition specific government agencies, especially the Chiefs, Ward Administrators, Sub County Commissioners, County Commissioner, and the National Land Board on the various cases about their loss of land.</td>
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<td>Article 56: Minorities and marginalized groups</td>
<td>Article 56 is specifically designed for the MIPs. This article ensures the survival of MIPs in terms of access to water, health services and infrastructure. It further ensures MIPs have special opportunities in education employment and economic fields. This Article ensures that MIPs voices are heard through participation and representations in governance. It further recognises, due to their endangered nature, they need the extra support to develop their cultural values and language.</td>
<td>This is the most important Article of the Constitution, because read together with Article 260, provides the identification criteria for marginalised communities and affirmative action areas that need attention, as result of historical marginalisation and injustices. MIPs should lobby for a law that will guide the proper implementation of this Act. There is already debate about the new definition of marginalisation under the just approved marginalisation policy for purposes of accessing the equalisation fund. MIPs need to join up to ensure that the gains under this provision are not eroded.</td>
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<td>Article 63: Community Land</td>
<td>The CoK recognises community land identified on the basis of ethnicity, culture or community interest. Community Land Act 2016 has been enacted and what is remaining are the regulations. Key in the community land Act is the provision that a customary right of occupancy on any community land subsisting before the commencement of this Act shall upon the commencement of this Act be a recognisable right of occupancy (s, 14). Further, it provides that The community shall elect between seven and fifteen members from among themselves to be the members of the community land management committee as provided in section 15, who shall come up with a comprehensive register of communal interest holders.</td>
<td>MIPs should push for the enactment of the regulations for the Act. MIPs should also use the Community Land Act to push for ownership of community lands on the basis of occupancy. In deed they can force the government through court injunction to stop any land transactions in disputed areas until such disputes are settled through mechanisms established by the court. The communities should also start familiarising themselves with the Act and start forming Committee members to manage their community lands. At the very start, community registers should be developed.</td>
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<td>Article 100: Promotion and Representation of minorities and marginalized communities</td>
<td>This Article provides that Parliament enacts legislation to promote the representation in Parliament of; (a) women; (b) persons with disabilities; (c) youth; (d) ethnic and other minorities; and (e) marginalised communities.</td>
<td>This law has never been enacted and it is a high time that MIPs pushed for its enactment. This could provide a very good platform for MIPs across the Country and in County specific situations to gain a political foothold and be able to ventilate their issues much more strongly.</td>
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<td>174. The objects of the devolution of government</td>
<td>Among the objects of the devolution of government is the protection and promotion of interests and rights of MIPs (174 (c)). However, there is lack of clear provisions on how this protection will be achieved, and what exactly the interests are. Read together with other relevant provisions like Articles 56 and 100, there is need for a very clear-cut policy framework to guide the county governments on how to achieve the protection of the rights of minorities and or marginalised communities in their Counties. It is important to point out that in some counties this concept would not necessarily apply and hence there is need for distinction to avoid its misuse.</td>
<td>8 years after the CoK 2010 it is important that MIPs lobby for the enactment of a policy to clearly identify minority and marginalised communities’ interests that should be protected under devolution. It would be critical that a conversation revolving around issues of recognition, ethnic codes and community demographics take place with a view to putting mechanisms in place to ensure that these are achieved, to guide investment and development planning.</td>
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<td>Article 177: Membership to County Assembly</td>
<td>The number of members of marginalised groups, including persons with disabilities and the youth, prescribed by an Act of Parliament; and</td>
<td>This clearly provides that the Marginalised communities must be represented, through election or nomination, in the County Assemblies. This provision provides an opportunity for the MIPs, through various platforms to lobby for their representatives to get to the party nomination lists, and especially ensure that they occupy prominent slots. Given that Independent Electoral and Boundaries Commission (IEBC) has the final say on who gets nominated, the MIPs need to forge a very close working relationship with the IEBC to ensure that their interests are being taken care of with regards to party nominations at the County Assemblies.</td>
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<td>Article 201: Provides for principles shall guide all aspects of public finance in the Republic</td>
<td>This Article provides that public expenditure (Public and County) shall promote the equitable development of the country, including by making special provision for marginalised groups and areas. Read together with Article 174, this article provides an important avenue to secure public funding for the development of MIPs areas in Kenya and at the Counties.</td>
<td>The MIPs need to organise themselves and isolate priority areas, in line with the Government Medium Term Expenditure, and ensure that their issues, including issues related to land adjudication and land use plans ownership are budgeted for at the National and County levels. They should thus familiarise themselves with the Budget Making cycle and partner with organisations like International Budget Partnership, Institute of Economic Affairs, Society for International Development amongst others to ensure that some of their priority areas are captured in the budgets. MIPs in Nakuru County should also ensure effective participation in the County Integrated Development Plan (CIDP) is effective and this determines the development priorities for the county on a five year cycle.</td>
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<td>The County Governments Act 2012</td>
<td>Section 35: Appointment of county executive members</td>
<td>Article 35 provides that the County Assembly shall not approve nominations for appointment to the executive committee that do not take into account among others the representation of the minorities, marginalized groups and communities</td>
<td>With lack of representation in the CEC, and other critical County bodies/ institutions of MIPs in Nakuru County, it is clear that this provision is being violated. MIPs through their organisations should petition the Senate, and or the judiciary, to ensure the implementation of this provision.</td>
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<td>Section 51: Establishment of the office of the Ward</td>
<td>Ward administrator shall coordinate, manage and supervise the general administrative functions in the Ward unit, including, among others, the development of policies and plans and coordination and facilitation of citizen participation in the development of policies and plans and delivery of services</td>
<td>This is a critical position in the devolution architecture as it brings the participation of people in development at the lowest possible level. MIPs organisations can thus working with relevant county government offices, coordinate with the Ward Administrators to ensure that the voices of MIPs are captured in the development in an all-inclusive and effective participatory process.</td>
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<td>Section 87: Principles of Citizen Participation</td>
<td>This section provides the principles of citizen participation in county governments as being protection and promotion of the interest and rights of minorities, marginalized groups and communities and their access to relevant information and legal standing to interested or affected persons, organizations, and where pertinent, communities, to appeal from or, review decisions, or redress grievances, with particular emphasis on persons and traditionally marginalized communities, including women, the youth, and disadvantaged communities</td>
<td>MIPs should invoke this section, read together with the Articles 56 and 174 of the CoK 2010 to ensure that they are able to effectively participate in the decision making process in the County. This would ensure that the decisions made have their input since they have the ability of influencing and or objecting to certain propositions as communities of interest. Beyond this, if they are dissatisfied they can still move to court for arbitration on arising issues.</td>
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| Section 97: Inclusion and integration of minorities and marginalised groups | This is a very elaborate provision for the protection of MIPs in the Counties and the MIPs should ensure that they fully utilise this provision, especially where nominations and appointments to public positions, or investments in their areas are concerned. The Act provides that a county government, public and private organisation and private individual, shall observe the following principles—
- (a) protection of marginalized and minority groups from discrimination and from treatment of distinction of any kind, including language, religion, culture, national or social origin, sex, caste, birth, descent or other status;
- (b) non-discrimination and equality of treatment in all areas of economic, educational, social, religious, political and cultural life of the marginalized and minority groups;
- (c) special protection to vulnerable persons who may be subject to threats or acts of discrimination, hostility, violence and abuse as a result of their ethnic, cultural, linguistic, religious or other identity;
- (d) special measures of affirmative action for marginalized and minority groups to ensure their enjoyment of equal rights with the rest of the population;
- (e) respect and promotion of the identity and characteristics of minorities;
- (f) promotion of diversity and intercultural education; and
- (g) promotion of effective participation of marginalised and minority groups in public and political life.

| Part XI: County Planning | MIPs and their organisations have an opportunity to interrogate how this provision has been effected by their county governments. In Nakuru for instance, this provision has arguably been flouted going by the number of nominations or appointments of MIPs in key public institutions (the numbers are negligible). Through this analysis, the MIPs can take their county governments to task and approach relevant institutions to lobby for the enforcement of these provisions. Most importantly, there is an interpretation by the Courts on what should constitute the punishment for public institutions or staffs who flout or violate regally provided for rights of MIPs |

<p>| Land Act 2012 | In lobbying for the protection of their land rights, including historical injustices, MIPs should invoke this provision, read together with relevant provisions of the Land Policy 2009 and CoK2010 especially Articles 10, 56 and 63. | Section 2: Values and Principles |
| This section provides for the commission and states’ values, which includes but is not limited to non-discrimination and protection of the marginalised communities | |</p>
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<th><strong>Community Land Act 2016</strong></th>
<th><strong>Section 2: Interpretations</strong></th>
<th><strong>The Act defines Community land within the provision of Article 63 (2) of the CoK 2010, and community land tenure “community tenure system” means unwritten land ownership practices in certain communities in which land is owned or controlled by a family, clan or a designated community leader.</strong></th>
<th><strong>This provision is very critical to the MIPs especially where ownership of community land has been contested. It is important that the MIPs in their contestations be able to prove “community land tenure” and the customary structures that defined and regulated such use. This will be critical in ensuring that the communities are able to reclaim tenure rights, compensation or restitution over violated rights.</strong></th>
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<td><strong>Section 15: Management of the Community Land</strong></td>
<td><strong>This section provides for the management of the community lands in Kenya. The Apex institution is the community Assembly comprising of all adults (men and women) members of the community. The community is also expected to elect a Community Land Management Committee of between 7-15 members whose responsibility will be to among others, manage and administer registered community land on behalf of the respective community</strong></td>
<td><strong>While the Community Land Regulations as required by s.48 are yet to come into effect, it is important that the MIPs immediately start organising themselves under the provisions of the Community Land Act and more specifically: Define themselves under the provisions of s. 2 of the Community Land Act, and each community so identified constitute itself into a Community Assembly for purposes of claiming and administration of community land. Constitute Community Land Committees in accordance with the Community Land Act in readiness to move with speed and register such land, or reclaim lost land under the provisions including land that may have been procedurally acquired and converted into either private or public use.</strong></td>
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<td>Section 4: Concerns public and community involvement in management of forests</td>
<td>This section outlines the principles of the act which includes good governance, public participation and community involvement, protection of indigenous knowledge pertaining to forest resources, and management of forests.</td>
<td>Read together with several court decisions/rulings either locally or regionally, this section recognises the existence of indigenous communities and hence the need for mainstreaming of indigenous knowledge in the management and exploitation of forest resources. This places MIPs at the highest level of consideration regarding the development of institutional frameworks around the management of forests in Kenya. MIPs should interrogate all existing frameworks to ensure that they respond to the principles of good governance, public participation and community involvement and protection of indigenous knowledge pertaining to forest resources.</td>
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<td>Section 9: Kenya Forest Service shall be managed by a Board of The Board Directors</td>
<td>Section 9 (1) (g) (ii) provides that the membership of the Board shall comprise of, among others, one person appointed by the Cabinet Secretary, nominated by the a national body representing community forest associations</td>
<td>All MIPs who were visited for the purpose of this study did not have Community Forest Associations as envisaged under this Act and this undermines their ability to be able to effectively participate and influence policy related to the management of forests and most crucially enforcement of the benefits sharing accrued from forest resources. It is instructive that most lands of MIPs under question fall the definition of forests, be they government and or community. By forming many CFAs, MIPs will increase their representation at the national association of CFAs and hence have a bigger voice on who is nominated to represent them at the Board which is the highest policy making institution.</td>
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| Section 30 (3): Definition of Community Forests | This defines community forests to include; forest on land transferred, registered to a community, or declared by an act. Community forests will be vested in the community. In that, the community can then register the land and apply for any technical advice on management or funding. | Read together with Community Land Act 2016, s. 20, MIPs are expected to establish:
(a) measures to protect critical ecosystems and Habitats;
(b) Incentives for communities and individuals to Invest in income generating natural resource conservation programmes ;
(c) measures to facilitate the access, use and co-management of forests, water and other resources by communities who have customary rights to these resources;
(d) procedures for the registration of natural resources in an appropriate register; and
(e) procedures for the involvement of communities and other stakeholders in the management and utilization of land-based natural resources. |
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<td>Section 32: Community Forest Associations (CFAs)</td>
<td>This section of the act is a blueprint showing how a community can apply and participate in a community forest association. Further, it outlines the requirement for establishing a community forest association, which includes but is not limited to: list of members, constitution of the association, area of forest proposed for conservation, proposal concerning not only method of conservation to be used but also method of monitoring and protecting the wildlife.</td>
<td>This is a very important provision especially for MIPs with regards to forests that they have tenure rights. It is important that MIPs, especially those around the Mau Forest, as well as those close to forest areas to ensure that they fully exploit this provision and form CFAs in their areas to bring on board their voices in forest conservation and management.</td>
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<td>Wildlife Conservation and Management Act 2013</td>
<td>A “community” according to the Act means a group of individuals or families who share a common heritage, interest, or stake in unidentifiable land, land based resources or benefits that may derived therefrom;</td>
<td>Many MIPs easily fit into this description and therefore can form into “community wildlife association” as provided for under s.40 of the Act.</td>
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<td>Section 8(f): Representation on the board</td>
<td>This sections requires two representatives, who shall be of opposite gender and from community managed wildlife areas, nominated by an umbrella wildlife conservancy body to the National Board of Trustees.</td>
<td>This is another area that MIPs should organise and mobilise around to ensure that they have their voices at the highest level of policy decision making regarding wildlife conservation and management. This is because more than 90 per cent of tourist attraction areas are found in MIPs areas in Kenya, and thus it is important that as communities they directly benefit from the resources that are generated as they actively participate in conservation and management of wildlife. By doing this they will not only be working towards securing their rights to their culture and livelihoods, but also to protection of indigenous knowledge and intellectual property rights.</td>
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<td>Section 40: Community wildlife association and managers</td>
<td>Gives authority to landowners and/or community representatives to form a community wildlife association.</td>
<td>Community Wildlife Associations (CWAs) are expected through s 42 to membership protects, conserves and manages wildlife conservancies and sanctuaries under their jurisdictions pursuant to their respective approved management plans. This is especially relevant for hunter gatherer and pastoralist communities in Kenya as this has long been part of their culture and livelihood, and provides an extra level of protection to community owned resources for community benefit. MIPs should thus find ways to exploit this provision and form the CWAs and subsequently have them recognised and registered by the relevant authorities.</td>
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<td>The Mining Act, 2016</td>
<td>Section 38: Minerals on Community Land</td>
<td>While through S.6 the Act provides that all Minerals are owned by the Government of Kenya, through s. 38 prospecting and mining on community land is restricted unless relevant authority is obtained. This section provides that a prospecting and mining rights shall not be granted under this Act or any other written law over community land without the consent of the authority obligated by the law relating to administration and management of community land to administer community land; or the National Land Commission in relation to community land that is unregistered.</td>
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<td>Section 47: Preference in Employment</td>
<td>This section, read together with S.46, which requires for an employment plan for Kenyan citizens to be approved by the Cabinet Secretary, provides that preference for employment by the mineral rights holder shall be given to members of the community. This section further provides that the mineral holder in case of a large operation, facilitate and carry out social responsible investment for the local communities and implement a community development agreement as may be prescribed in Regulations.</td>
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Bibliography


Daniel Prengei, Interview with Ohenjo, July 2018, Marioshoni, Mau Forest

EEAS. EU suspends its support for water tower in view of reported Human Rights abuses.

European Commission. < European Union Ambassador condemns the killing of a member of the Sengwer community and underlines that both indigenous people’s rights and Kenya’s water towers need protection> <https://eeas.europa.eu/delegations/kenya/38343/eu-suspends-its-support-water-towers-view-reported-human-rights-abuses_en>


Endorois Decision, 276 (2010).

FGD with Ogek Community, August 2018 (Interviews)


University of Oslo, Norwegian Centre for Human Rights

Kemai & 9 Others v Attorney General & 3 Others (HC).


Njonjo Commission (1999)

Ochieng, M., (n.d). Strategies for achieving justice for the Ogiek


