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The Fate of Aboriginal Habitation of Gazetted State Forests in Present Day Kenya: A Case Study of the Agitation by the Ogiek and Sengwer Traditional Communities

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Abstract

Two of Kenya's few traditional communities, the Ogiek and the Sengwer, have for decades now been agitating, and even presently continue agitating to be allowed to enter and inhabit gazetted state forests (government forests) despite the protected status of these forests. They in their agitation claim an aboriginal "entitlement" to such habitation, which in this paper is referred to as "aboriginal habitation". They argue that these forests are their traditional ancestral lands that were in the primordial to pre-colonial times inhabited by their long-departed ancestors. Their agitation, which has persisted for a long time without end, has been resisted by the Kenya government which argues that these forests are government forests that are under state control and protection, and habitation of which is prohibited by law. Besides, of Kenya's land area of approximately 582,600 km^2, only about 7.4 percent is under forests. Of this, gazetted state forests (also called public forests) occupy a mere 4 percent land area. Yet, it is these particular forests (state forests) that the two traditional communities are agitating to be allowed to inhabit. This paper presents the findings of a 12 months study that set out to interrogate these rival arguments as well as establish whether aboriginal habitation of such forests is supportable, and has a place in the present day Kenya. It answers the question whether under Kenya's existing laws and circumstances, traditional communities should under aboriginal "entitlement" be allowed to enter and inhabit these forests. It is a case study of the said two traditional communities; for reason that they are the ones that have been agitating for their perceived aboriginal "entitlement" to habitation of such forests. Notably, this agitation has not only been through political activism, but also through litigation in national and even regional courts of law; and without success or go-

vernmental endorsement. This paper concludes that whereas historically the Forest was at some point in history the ancestral home of humankind and place of human abode, that can no longer be the case in the circumstances and realities of the present day Kenya. The country's state forests should continue to be protected from habitation, even if such habitation is based on perceived aboriginal "entitlement", such as the one agitated by the Ogiek and the Sengwer communities. Whereas these communities claim to still be traditional forest dwellers (or forest peoples), they have in reality at the present time long abandoned and transformed from the typical aboriginal life as we know it, and adopted modern lifestyles akin to other contemporary communities. Some of the government officials interviewed by this author believe, this aborigineness is a tag they wear or card they play whenever it suits them or whenever it suits the circumstances.

Keywords

Aboriginal Habitation, Gazetted State Forests, Traditional Communities, Forest-Dwellers, Indigenous Peoples, Traditional Ancestral Lands, Hunter-Gatherer, Traditional Customary Uses of Forests, Forest Benefits, Forest uses, Ogiek, Sengwer, Mau Complex, Embobut, Kapolet, Mt Elgon, Chepkitale, Water Tower, Litigation, Laws

1. Introduction

This paper interrogates a highly contentious and emotive issue, i.e. whether traditional communities in the present day Kenya can still practice aboriginal habitation of gazetted state forests. In the context of this paper, the phrase "aboriginal habitation" refers to occupation of land by traditional communities claiming an aboriginal "entitlement" of habitation of these forests based on primordial occupation, existing from earlier times and arising from old traditional customs. It is the traditional customary occupation of forests, by traditional communities claiming that such forests are their traditional ancestral lands or places of abode. The word "agitation" is used in this paper to mean persistent public clamour for a cause. The paper adopts a cross-cutting and interdisciplinary approach transcending several disciplines, majorly: law, history, anthropology, sociology, public policy, and environmental conservation.

There is a long-standing primordial relationship between forests and humanity, dating back to time immemorial, backwards into the pre-historic times. Indeed, the importance of forests to humanity need not be over-emphasized, as there is an inextricable relationship between forests and humans. Historically, and from an anthropological standpoint, the Forest was the ancestral home of humankind, and the cradle of human existence. Notably, almost all the races in the universe trace their ancestry to the Forest; in terms of not only hunting and gathering, but in some isolated cases also aboriginal habitation of forests. This is evidenced by the presence of aboriginal forest people in virtually all the conti-

nents of the universe, although in isolated cases. This account is true of Kenya's past as well. In the pre-historic Kenya, humans lived in caves located in the forests. For the pre-historic human, the Forest was his home and dwelling place where he lived with his family, living in social bands based on kinship (Plog et al., 1980). The Savannah Forests of Eastern Africa, for instance, are reported to have been home of the pre-historic human (Sharman, 1999).

From time immemorial, people co-existed with forests and even inhabited them. They exploited them as they wished, and with no formalized regulations, except for informal traditional customs and taboos. With the advent of colonialism things changed, formal laws were imposed to regulate society.

Whereas historically, the Forest was once inhabited by humankind as its place of abode, in present times almost in the entire world this is no longer the case, except in regions that still have pockets of aboriginal forest peoples. These include the Aborigines of Australia, the Tribal Traditional Forest Peoples in India, and the Pigmies of the Congo Forest, etc. The decline in the commune and bands of forest aboriginal peoples across the world is attributable not only to socio-cultural transformations, but has also been ordained by the existing formal laws that have extinguished or continue to extinguish or even proscribed and abolished habitation of protected public forests otherwise referred to in this paper as gazetted state forests—these are basically forests that are owned and/or controlled by the government. In many parts of the world these forests are part of the protected area conservation estate. Their protected area status means that they are under state protection and control, with legal restriction on access and legal proscription of habitation. Their legal status is usually declared by law. In Kenya it is by way of a Notice (called a Legal Notice) published in the official Government Gazette called the Kenya Gazette. The legal restrictions and proscriptions attendant to forests of this status pose a problem to communities that would like to continue or resume aboriginal habitation of them. In Kenya, such attempts have been stemmed by way of persecution through forcible evictions from such forests, and even arrests and prosecution in courts of law.

This is an issue steeped in controversy, a controversy that this paper seeks to disentangle. Since it is usually more practical to think globally and act locally, this paper has opted for a case study of Kenya. There are four reasons for choosing Kenya as a case study for this paper. First, the author is Kenyan and is addressing a Kenyan problem. Secondly, Kenya's law has outlawed and criminalized two key aboriginal lifestyles, namely: hunting, and forest habitation such that it is illegal in Kenya to be a hunter or forest dweller. Thirdly, unlike in many parts of the world where the agitation for aboriginal forest habitation have been merely through political activism such as protests and lobby efforts, in Kenya it has been agitated both by these political means and also through litigation in courts of law (at the national and even regional level) which is commendable as the judiciary is the seat of justice. The fourth reason is that the Kenya government has in its Constitution expressly recognized not only the need to conserve forests (Article 62 & 69), but also recognized the protection of the minority and

marginalized groups (Article 10).

This is a paradoxical matrix that puts such groups and communities on the horns of dilemma. It was important to interrogate the question whether it is a case of the law giving with one hand, and taking with the other? This is the elephant in the room, and this paper endeavours to answer the question whether under the present law in Kenya, communities can still practice aboriginal habitation of gazetted state forests. It focuses on two traditional indigenous Kenyan communities, namely the Ogiek and the Sengwer, for the reason that they are the ones that have been at the forefront of asserting and agitating for their perceived "entitlement" to aboriginal forest habitation. They are also the only communities that have filed lawsuits in courts of law to claim an aboriginal "entitlement" to inhabit public forests (gazetted state forests). Apart from claiming to be traditional forest people, they are also the only communities in Kenya claiming to be hunter-gatherers. This paper is therefore of monumental value and significance.

2. Research Methodology and the Study Area

The Republic of Kenya comprises 47 administrative units called Counties. However, the research for this paper was conducted in only four Counties namely: Nakuru County, Elgeyo-Marakwet County, Trans Nzoia County, and Bungoma County. The reason for selecting only these four being that they are the ones in which the forests that the two traditional communities (the Ogiek and the Sengwer) want to inhabit are situated. The forests are: The Mau Forest Complex, Embobut Forest, Kapolet Forest, and Mount Elgon Forest including the Chepkitale part. The research for this paper was conducted between July 2019 and June 2020. It was conducted using informal conversations, semi-structured interviews, focus group discussions, self-administered questionnaires, and literature survey. However, from the onset of the COVID 19 pandemic in March 2020, only telephone and virtual interviews were used; with no physical contact being made with the Respondents through actual meetings or even written questionnaires. Even though this would have been a real setback on the original research methodology, it was not, as it was mitigated by the fact that by that time most of the data had already been collected.

A total of 49 respondents were either interviewed or contacted, or responded to the author's questionnaires. They were through purposive sampling selected from diverse target groups as follows: 20 members of the Ogiek community; 20 members of the Sengwer community; two senior Kenya Forest Service (KFS) officials; four leading scholars comprising one from environmental and natural resource management, one from forestry, one from public policy and one from anthropology; and three activists comprising one from environmental conservation, one from human rights, and one from public policy. The data collected was collated and analyzed against the main research question; which is, whether aboriginal habitation should be allowed in gazetted state forests. Since the data collected was primarily qualitative in character, the author employed qualitative

methods of data analysis to analyze it. From the said analysis, the paper has drawn certain conclusions and made certain recommendations.

3. Kenya's Forest Estate

The Republic of Kenya has a total land area of approximately 582,600 km^2, and is located on the Eastern side of the African continent (Ogendo, 1972). It currently has a population of over 47 million people (KNBS 2019 National Population Census Report). At present, only about 7.4 percent of Kenya's vast land area is under forests. In the year 2001, for instance, it was less than 2 percent. Even the present forest cover that has been painstakingly achieved by the country from the protection and reforestation efforts being undertaken in all the gazetted state forests is still below the internationally recommended and constitutional requirement of 10 percent under Article 69(1) (b) of the Constitution; so there is a deficit of 2.6 percent. Of the 7.4 percent, gazetted state forests (also called public forests) comprise 4 percent while the remaining 3.4 percent is occupied by community forests and private forests. While this forest cover of 7.4 percent is a far cry from the internationally recommended and constitutional requirement of 10 percent, gazetted state forests comprise on 4 percent of these. Yet it is these particular forests that two of the country's traditional communities (the Ogiek and the Sengwer) who claim to be Kenya's aborigines, have been and continue agitating to be allowed to inhabit; claiming an "entitlement" to aboriginal habitation! This is despite those forests being under protected status by virtue of their gazettement, and despite also the country's scanty forest cover of less than 10 percent, and that of gazetted forests being even scantier.

The Forest Conservation and Management Act of 2016 (also referred to as The FCM Act), which is Kenya's principal forestry legislation, classifies the country's forests into three categories, namely: public forests, community forests, and private forests. For public forests also called government forests, it adopts the definition given to them by Article 62 (1) (g) of the Constitution. They are in this paper referred to as "gazetted state forests", for the reason that they are forests which have been gazetted in the country's official government gazette (the Kenya Gazette). The Act establishes the Kenya Forest Service (hereinafter KFS) as a governmental agency with the mandate of conserving, protecting and managing these forests. Community forests for their part, are under the Act defined to include forests on ancestral lands and land traditionally occupied by hunter-gatherer communities. Private forests for their part are those on privately owned land (private land). The forest classification in the Act is thus according to ownership, management, and control (Ototo & Vlosky, 2018).

Forests whether under state management or community or private status, are important ecosystems and habitats for various flora and fauna that should be preserved as part of the country's biodiversity for the present generation and posterity. Some of them are water catchment areas for several rivers, hence should be protected from human habitation. As already noted above, only about 4 percent of

the country's current forest cover is under gazetted state forests (public forests) controlled by the government; the rest being either community forests or private forests on private land. A recent Report by the Kenya Forest Service has reported that the unimpressive state of Kenya's forestry currently witnessed in the country, is attributable mainly to encroachment and degradation of these forests by people (including traditional indigenous communities), multinationals, rogue government officials, and even government institutions (KFS Report, 2018a). On this, Boitt (2016) reports that "Despite their immense importance, the country has witnessed substantial loss of forest cover in the recent past both within forests, trust lands as well as in the private lands." With this dismal state of affairs, aboriginal habitation or any genre of habitation of gazetted state forests, such the one that is agitated by the Ogiek and the Sengwer communities, can if permitted or legalized, only exacerbate and compound this problem.

The FCM Act in its third Schedule lists a total 304 gazetted state forests. A KFS Report of the year 2018 puts the number at 372 and lists them (KFS, 2018b). Under the said Act, the Minister in charge of Forests may by a Notice in the Kenya Gazette declare any forest to be a gazetted state forest; which if it happens now, will increase the land area occupied by such forests. Some of these gazettements have in some instances removed some forests from the community (community forests) and from private hands (private forests) and vested them in the hands of the government to be under the control and management of the Kenya Forest Service (KFS) under powers given to it by said Act. As already stated in this paper, the Act restricts entry into such forests as will have been gazetted, and proscribes any aboriginal or other manner of habitation of them (including aboriginal habitation).

Forests with this status are protected by the Kenya Constitution 2010, the Forestry legislation, and even international instruments to which Kenya is a party. Their control and management is vested in the Kenya Forest Service as a statutory body having the mandate of protecting and managing Kenya's forest estate. This mandate includes establishment of Forest Rangers outposts for effective patrolling and policing as well as ensuring that any person or community (including these traditional communities) inhabiting or attempting to inhabit any forest of this status, is/are vacated from it.

4. The Ogiek and Sengwer Agitation for Aboriginal Habitation of Some of Kenya's Gazetted State Forests

Of Kenya's 44 indigenous communities, only a handful of them are can be described as traditional communities, for reason of them predominantly practicing traditional cultural practices or certain attributes of traditional customary lifestyles. Of these, only two are persistently claiming to be aboriginal forest people and asserting an aboriginal "entitlement" to inhabit gazetted state forests despite their protected status. These two are the Ogiek and the Sengwer. While the Maasai, another Kenyan traditional community has also been laying claim on

the Ngong Forest another of Kenya's gazetted state forests, their claims even though have also been taken to the courts of law, have been of ownership and subdivision (claim to title) rather than mere aboriginal occupation otherwise referred to in these paper as "aboriginal habitation". This study therefore focuses on the Ogiek and the Sengwer. As already observed above, presently, only 7.4 percent of Kenya's said total land area is under forest cover.

4.1. Who Are the Ogiek and the Sengwer Peoples?

The Ogiek, are also called Okiek, Akiek, Agiek or Ogiok (or sometimes referred to as the *Dorobo* or *Ndorobo*; which are derogatory terms meaning the poor people without cows) (Sifuna, 2009). Nonetheless, this community is an indigenous traditional community that was previously hunter-gatherer, but whose present lifestyle although having some remote similarities with that of the typical traditional forest dwelling communities, has changed remarkably. Its population currently stands at about 30,000, scattered in various parts of Kenya, but the majority of whom live in Nakuru County and the adjoining Counties of Kericho, Bomet and Narok, in southern Kenya (Towett, 2004). The others reside in Koibatek area of Baringo County, Burnt Forest in Uasin Gishu County and Mt Elgon area in western Kenya; and Samburu in northern Kenya (Towett, 2004). The ones in Nakuru County reside particularly in parts lying in the larger Mau Forest Complex, particularly the Tinet and Marishoni areas of the County. Although Towett, 2004 reports that there are other Ogiek living in other parts of East Africa outside Kenya such as Tanzania, there is hardly any evidence for this assertion.

As for the Sengwer (also called the Cherengany), they are also an indigenous traditional community who like the Ogiek were previously a hunter-gatherer community, but whose present lifestyle although like that of the Ogiek, has some remote similarities with that of the typical traditional forest dwelling communities, has changed as they have adopted farming (Rotich, 2019). Its population, which also currently stands at about 30,000 is mainly domiciled in the Embobut Area of Elgeyo-Marakwet County in the western part of Kenya, but with pockets of them scattered in parts of the neighbouring counties of Trans Nzoia and West Pokot.

The Ogiek and the Sengwer, who, as already stated above, claim to be hunter-gatherer forest communities, have been and continue to lay claim on four of Kenya's gazetted state forests that deserve to be conserved and protected for Kenya's present and future generations. The four forests are: 1) The Mau Forest Complex in southern Kenya, Mt Elgon Forest (in the case of the Ogiek), and 2) Embobut Forest and Kapolet Forest in western Kenya (in the case of the Sengwer). These forests are within three of Kenya's five major water towers, namely: The Mau Complex, Cherengany Hills and Mt Elgon. In the context of this paper, a water tower is an elevated geographical area comprising mountains, hills, and plateaus where the topography, geology, soils and vegetation support reception,

retention, infiltration, and percolation of precipitation and storage of groundwater, that is eventually released through springs, streams, rivers, swamps, lakes, and oceans to sustain connected biodiverse ecosystems and is harnessed for use (The Kenya Water Towers Conservation and Coordination Bill, 2019). The KFS current Strategic Plan defines water towers as "forested areas that form the upper catchment of rivers" (KFS, 2018c). These water towers are important for the country's water sufficiency; hence have to be protected from human activities such as human settlement including aboriginally claimed habitation.

4.2. The Ogiek and Sengwer Agitation for Aboriginal Habitation of Gazetted State Forests

1) Ogiek Claim on the Mau Forest Complex and Mt Elgon Forest

The Mau Forest Complex is the largest forest in the country. Boitt (2016) reports that it is also the largest indigenous montane forest in East Africa, covering an expansive land area of approximately 273,300 Ha. It is located in the southern part of Kenya, mainly in Nakuru County, but also straddling three other counties, namely: Kericho, Bomet and Narok. What is referred to as the Mau Forest Complex consists of three forests, namely: the South Western Mau Forest (covering approximately 89,678 Ha), Western Mau Forest (covering approximately 19,667 Ha) and Southern Mau Forest (covering approximately 134 Ha) (Ojiambo, 1978). These three forests comprising the Mau Forest Complex are gazetted state forests, that were gazetted in the Kenya Gazette (The Government's Official Gazette) in the year 1932 (KFS, 2018b).

The Complex is also the largest water catchment area in Kenya (Chrispine et al., 2016), with the area having one of the highest rainfall levels in the country (Boitt, 2016). It is located in the Mau Water Tower which is the source of several rivers. These rivers include: the Ewaso Nyiro River; the Njoro River; the Mara River which flows into the Maasai Mara Game Reserve in Kenya and the Serengeti National Park in Tanzania.; and also the Yala, Sondu Miriu, Nyando and Nzoia rivers that flow into Lake Victoria (WWF, 2004; Boitt, 2016). Apart from being an important Water Tower and water catchment area for several rivers, it also forms the Mau Ecosystem, which is an important ecosystem and habitat for various flora and fauna.

As stated above, apart from the Mau, the Ogiek also lay claim on the Chepkitale part (Chepkitale National Reserve also referred to as Chepkitale Forest Reserve) of the expansive Mt Elgon Forest in western Kenya, straddling parts of Bungoma County and Trans Nzoia County (KFS, 2018b). This larger forest together with the Chepkitale part are gazetted state forests. Mt Elgon Forest Block measuring approximately 90,930 Ha (Ojiambo, 1978), was gazetted in the year 1932, while Chepkitale was gazetted in the year 2000 (KFS, 2018b). Both form what is known as the Mt Elgon Water Tower which is the source of several rivers, namely: the Suam River which flows northwards and becomes the Turkwel River downstream and drains into Lake Turkana; Kuywa River which flows

southwards joining Nzoia River that flows further south and drains into Lake Victoria, Malakisi River which flows westwards and enters Uganda (Kenya Water Towers Agency, 2020). Apart from being an important Water Tower and water catchment area for several rivers, it also forms what is known as the Mt Elgon Ecosystem, which is an important ecosystem and habitat for various flora and fauna.

2) The Sengwer Claims on the Embobut Forest and Kapolet Forest

Embobut Forest, an expansive forest occupying 21,930 Ha (approximately 54,200 Acres), is situated in Elgeyo-Marakwet County in the North Rift region of Kenya. It was gazetted as a state forest in the year 1954 (KFS, 2018b). Therefore, it is neither a community forest nor community land. This is because by virtue of it having been so gazetted, it is a government forest hence public land. It is one of three major gazetted state forest blocks forming the Cherengany Hills Water Tower. The others are Kapolet Forest (Kapolet Forest Block) in Trans Nzoia County, and the Lelan-Kapkanyar Forest Block in West Pokot County. Kapolet was gazetted in 1941, Lelan in 1958 and Kapkanyar in 1967 (KFS, 2018b). Apart from being an important Water Tower and water catchment area for several rivers (E.g R. Kapolet, R. Solwo, R. Kapora, R. Kaptanit and R. Kapsara), the Cherengany Hills Complex also forms the Cherengany Ecosystem; an important ecosystem and habitat for various flora and fauna.

5. Whether the Kenya Government Should Allow Aboriginal Habitation of Its Gazetted State Forests by Traditional Communities

This section answers the question whether the Kenya Government should allow aboriginal habitation of its gazetted state forests by traditional communities such as the Ogiek and the Senger. In answering this question, the author approaches the issue from multiple perspectives, namely: the socio-cultural perspective, the environmental perspective, and the legal perspective.

5.1. The Socio-Cultural Perspective

While aboriginal habitation of forests existed in the pre-historic and antecedent primordial society, it cannot be beneficially or practically practiced in present day Kenya. It has with the passage of time been outmoded and is currently almost becoming merely of archival value. Aboriginal habitation of public forests is a practice that can under the prevailing socio-cultural transformational reality of the present day Kenyan society as well as the existing laws no longer be practiced. Such is a pragmatic and realistic position as opposed to the abstract and idealist or utopian position taken by these two communities and their supporters. The stark reality is that Kenyan communities that claim to be traditional forest dwellers (or forest peoples) have as at the present time long abandoned primordial traditions such as the hunter-gatherer lifestyles, and transformed from the typical aboriginal life as we know it, and adopted modern lifestyles akin

to other contemporary communities. Indeed, some of the Kenya government officials interviewed by this author believed these two communities only use the aboriginal tag and play the aboriginal card whenever it suits them or whenever it suits the circumstances. These communities have in effect lost, or are fast-losing, their uniqueness that used to give them an aboriginal or pseudo-aboriginal identity and their being associated with indigenous forests. In fact many of the public forests that they claim are full of exotic tree species, hence are no longer typically indigenous forests that they are reported to have aboriginally inhabited in the long-gone past.

As already stated above, forests were historically the ancestral home of humankind, and almost all the races in the universe, including here in Africa, trace their primordial ancestry to them. For Africa, and Kenya in particular, this is even truer for two reasons. First the Savannah Forests of Eastern Africa are considered to be the home of the pre-historic human (Sharman, 1999); savanna being a vegetation of shrubs and trees, usually deciduous, standing in a tall growth of grass (Ojany & Ogendo, 1973). The second reason is that Kenya has in her Constitution expressly recognized not only the need to conserve forests and strive to attain and maintain a 10 percent forest cover (Article 69), but also the need to protect the marginalized and minority communities (Article 10). Such communities include: the Masaai, the Ogiek and the Sengwer peoples of the Rift Valley region of the country. This paper, however focuses only on the Ogiek and the Sengwer, for the reason that their claims on the forests have been for aboriginal habitation, unlike the Masaai, whose claims have been of ownership and subdivision of these forests, rather than aboriginal habitation. In the court case of **Ledidi Ole Tauta & Others v. Attorney General & 2 Others [2015] eKLR**, for instance, some members of the Maasai community filed a constitutional petition in the High Court of Kenya, claiming that Ngong Hills Forest, which is a gazetted state forest, is their ancestral land that was taken by the government from their fore-fathers hence it should be reverted back to the community as their community land. Dismissing the case, on a Preliminary Objection, the Court observed as follows:

"*To conclude, this court notes that Ngong Hills Forest has not been degazetted as such and its boundaries have not been varied to make it available for alienation to the Petitioners. In our view the petitioners ought to have petitioned the Minister through the Kenya Forest Service Board to consider whether any basis existed to have the Ngong Hills Forest degazetted to accommodate their interests. The Forest Act provides a procedure and mechanism for community participation in forest management under section* 46 *but does not make provision for individualized ownership of land that had been brought under the operation of the Act.*"

In rejecting the claim and dismissing the petition *in limine*, the court held that the Forest being a gazetted state forest, the community's claim was overtaken and foreclosed by the said gazettement; and that the petition had therefore been overtaken by events and was, in the absence of a degazettement, unsustainable;

and that Ngong Hills Forest land being in a gazetted state forest was therefore not available for allocation to the community. The court further observed that instead of laying claim on the said forest land, the community should be pursuing degazettement, which under the law is not a function of the court, but the government. From these facts, the claim in that petition not being one asserting aboriginal habitation of the forest is outside the scope of this paper. This is because unlike the Maasai who in that petition were saying "give us the forests, so that we may subdivide it and share out amongst ourselves", the Ogiek and the Sengwer for their part say, "let the forest retain its status as a gazetted state forest alright, but allow us to inhabit it in the exercise of our birthright to aboriginal habitation".

Therefore the Ogiek and the Sengwer seem to be the only notable communities in Kenya still hanging on the aboriginal tag, and especially the aboriginal habitation of public forests (gazetted state forests). Otherwise the rest of the communities in Kenya, long moved on and adopted contemporary lifestyles. In such a way that those traditional aboriginal practices and lifestyle are, as a result of a combination of several factors, largely staring at extinction. These factors include: the existing laws and policies, as well as socio-cultural transformations of modernity. Of these factors, the one that is a major driver is the laws and policies, which have by virtue of their proscriptive regiment, abolished or extinguished most of these aboriginal practices, and forest habitation in particular. Of these, the latter is perhaps the most contentious, hence the subject of this paper. This has resulted in remarkable conflict between governmental authorities and the communities in agitating their perceived "entitlement" to reside in and inhabit forests that are hitherto gazetted state forests falling within the protected area estate.

5.2. The Environmental Perspective

Forests have several environmental benefits and are of significant importance to our environment. They play an important role ecologically in terms of: being a gene bank for the preservation of genetic material, hence are important in preserving biodiversity; soil conservation, for instance in terms of nitrogen-fixation and soil erosion control; being carbon sinks through carbon sequestration; their role in rain attraction and climate regulation; noise absorption; being water catchment areas. Apart from these benefits as well as other socio-cultural and economic benefits, they are also a common good that should be conserved to be available for the present and future generations. Human habitation of forests will therefore have an impact on the several environmental services and benefits that forests offer.

5.3. The Legal Perspective

As already stated in this paper, Kenya's gazetted state forests are government forests that are by law designated and placed under state protection and control.

They are protected by a legal framework comprising: the Constitution, other municipal laws, international instruments, as well as judicial decisions by the courts and other judicial organs. Any enterprise or practice touching on such forests, for instance their aboriginal habitation therefore has legal implications. These implications are discussed in the part that follows below.

1) The Constitution and Other Laws

Kenya has an ensemble of laws relating to forests and forestry. This normative pyramid is peaked by the Constitution as the supreme law from which all the other laws derive legitimacy (under Article 2 of the Kenya Constitution); with the principal legislation being The Forest Conservation and Management Act of 2016 (also referred to as The FCM Act). This Act was promulgated in the year 2016 to replace the Forests Act of 2005, and came into force on 31st March 2017. The Kenya Constitution, which was promulgated in the year 2010, expressly recognizes and provides for forest conservation. It in Article 62 (1) (g) singles out public forests which it refers to as government forests, designates them as public land, and then vests them in the hands of the government. It is these forests that are in paper referred to as state forests.

On general forestry, Article 69 (1) of the said Constitution obligates the State to work to achieve and maintain a tree cover of at least 10 percent of the country's land area. For its part, the FCM Act in its *preamble* states that it is to give effect to Article 69 (1) of the Constitution with regard to forest resources. It classifies forests in Kenya into three categories, namely public forests, community forests and private forests (section 30). For public forests it adopts the definition given to them by Article 62 (1) (g) of the Constitution, which is that, they are government forests. Under it, community forests are defined to include forests on ancestral lands and land traditionally occupied by hunter-gatherer communities. Private forests are those on privately owned land (i.e. on private land). The Act then establishes the Kenya Forest Service (herein also referred to as KFS) as a governmental agency with the mandate of conserving, protecting, controlling and managing all public forests.

The Act empowers the Minister for the time being in charge of forestry to gazette a particular forest as a gazetted state forest, thereby putting it under protected area management and setting it aside for forestry development and conservation. Under the Act, such gazetted state forests are public forests (also called government forests). Which means therefore that they are under the mandate of the KFS, hence cannot be community forests. Their legal status as protected government forests in effect forecloses any aboriginal habitation claims to them by traditional communities such as the Ogiek and the Sengwer. The Act then in section 64 enumerates activities that are prohibited in these gazetted state forests. One of these prohibited activities is any person(s) being in there between the hours of 7 pm and 6 am, or erecting any building or home in there. The Act criminalizes these activities and prescribes a sentence of a fine of Kenya Shillings 100,000 = (Equivalent to approximately 1000 USD) or six months imprisonment, or both.

Surprisingly, Kenya has no has no legislation nor legislative provisions specifically addressing and protecting indigenous peoples. Therefore currently, protection for these peoples can only be extrapolated from provisions protecting the marginalized groups and minority groups. There is need therefore for future legislative reforms to have legislative provisioning in this regard. Besides, in Kenya unlike in India, there is neither formal nor legal recognition of aboriginal forest habitation. India has The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006. This legislation, also called the Forest Rights Act or The Tribal Rights Act, is an Act of Parliament intended to address the historical injustices committed to the traditional forest dwellers and other tribal communities by imposition of colonial forest laws and policies. It in its Preamble states that it is an Act of Parliament to recognize and vest the forest rights and occupation in forest land in forest dwelling of Scheduled Tribes and other traditional forest dwellers who have been residing in such forests for generations, but whose rights could not be recorded, and to provide for a framework for recording the forest rights so vested and the nature of evidence required for such recognition and vesting in respect of forest land.

Kenya has no similar express legal provisioning in either her Constitution or her legislation and statute books. Without express normative arrangements or juridical pronouncements by national and regional courts, there is no legal protection for aboriginal forest habitation or traditional forest dwelling as is known in India. Lawsuits by the Ogiek and the Sengwer for this "entitlement" have not found much support in the normative structure nor in the courts; and these lawsuits have received from the courts outright rejection or at best merely cosmetic rhetoric, short of affirming or shy to assert a traditional "entitlement" to occupy, reside and dwell in gazetted state forests; as this will be contrary to legislative provisions that have criminalized residing in such forests, and prescribed criminal penalties for infraction.

This is compounded by the fact that the Kenyan communities that claim to be traditional forest dwellers (or forest peoples) such as the Ogiek and the Sengwer, long abandoned and transformed from the typical aboriginal life and adopted modern lifestyles akin to other contemporary communities; hence in effect losing their cultural uniqueness that used to give them an aboriginal identity or semblance of it. Interestingly, while Forests in India have millions of traditional forest dwellers inhabiting them, in Kenya the situation is different, in that, apart from pockets of remnant segments (the Ogiek and the Sengwer) claiming an "entitlement" to aboriginal habitation of gazetted state forests, Kenyan communities that were previously regarded as traditional forest dwellers or hunter-gatherers have adopted new lifestyles incompatible with forest dwelling. They are, for instance, practicing cultivation of crops on small and medium scale. Some of them are even large-scale farmers of cash crops such as tea, coffee, maize, sugarcane, etc. This is in sharp contrast with the claimed hunter-gatherer lifestyle that is invariably fashioned on traditional subsistence farming for domestic consumption and localized barter trade.

Apart from Acts of Parliament, which are called parent legislation, the executive arm of government in exercise of the powers and authority given to it under such legislation, is empowered by legislation to issue regulations and other executive orders in order to implement or meet the legislative objectives of such legislation. They do these by issuing Regulations (subsidiary legislation) or issuing Executive Orders; usually published in the Kenya Gazette by way of Legal Notices. One such Notice is Legal Notice No. 120 of 1977, by which the Kenya Government banned all forms of hunting in Kenya (Sifuna, 2011). The ban has never been lifted, hence remains in force to date. This means that in Kenya, hunting is all this time illegal and there can therefore be no persons, group(s) of persons or communities lawfully practicing hunting, even as a traditional way of life. Ironically, it means Kenya has no hunters! Where therefore does this leave the claim by the Ogiek and the Sengwer peoples that they are hunter-gatherer communities? For that reason, until this ban has been lifted, no person(s), no group(s) of persons, and no community, can be lawfully practicing traditional or any form of hunting.

Under the law, they may, with a permit of the Chief Conservator or his designated Officers in the KFS, only enjoy any other traditional benefits in government forests, such us collecting fuelwood, harvesting honey, harvesting herbs for traditional medicine, or accessing such forests (public forests) for socio-cultural and religious purposes such as worship or traditional rites of passage.; but not occupying and/or residing in them.

2) International Treaties & Instruments

Treaties are binding on the parties to them (Brownlie, 1998; Crawford, 2012). Under international law and Kenya's municipal law, the mere adoption and signing of a treaty, is not enough to bind her, unless later followed by ratification. This is done by depositing the ratification instrument with the treaty's repository. Article 2 the Kenya Constitution 2010 states that under it, any general rules of international law, and any treaty or convention ratified by Kenya, shall form part of the Kenya's law. While there exist a number of international treaties and instruments whose application may promote the rights of these traditional indigenous communities such as the Ogiek and the Sengwer, the one that directly addresses the protection of the rights of such communities is The United Nations Declaration on the Rights of Indigenous Peoples (also known as UNDRIP) adopted by United Nations General Assembly (UNGA) Resolution 61/295 on 13th September 2007.

This was the first international treaty to comprehensively address the rights of indigenous peoples, including: their right to their traditional lands and natural resources; the right to their traditional medicines; freedom from discrimination; and their right to their traditional way of life. Notably, Kenya is not a party to this treaty; having abstained from it at the time it was adopted. Nevertheless, the question that is pertinent to this paper is whether Kenya's gazetted state forests can be said to be the traditional lands of traditional indigenous communities

such as the Ogiek and the Sengwer. The answer is NO. These forests are protected public forests (government forests) that are under the control of the state, hence cannot be said to be traditional lands or communal land. They were gazetted through legal notices in the government's Official Gazette (The Kenya Gazette) after an elaborate process that included a Notice of the government's intention to declare them state forests and thereby put them under state protection.

Many of these forests were gazetted in the colonial times before independence, as early as 1920s, 1930s, 1940s and 1950s. Most of them were gazetted under the Colonial Ordinances, while many others were gazetted under the now repealed Forest Act of 1942 as amended in 1982 (Cap 385 Laws of Kenya). Under those laws, before the government declared an area as a gazetted state forest, it issued a notice of 28 days within which any person(s), group of persons or community opposed to the intended gazettement would lodge their objection to it. Where objections would be raised, the same would first be addressed before the gazettement; and where there were no objections the Minister in charge of forestry would then proceed to publish a Legal Notice in the Kenya Gazette declaring the said land as a gazetted state forest. Communities such as the Ogiek and the Sengwer that are now claiming these forests to be their ancestral or traditional or community lands did not raise objections then. Their failure to object or their having had no objections then, foreclosed their present claims of ownership or of occupation (habitation), whether under aboriginal title or otherwise. They ought to have raised objections, if any, before these forests being by Legal Notices gazetted as state forests. These communities are claiming the forests long after they were gazetted, in some cases several decades after gazettement!

3) Judicial Decisions—What the Courts Have Said?

On a contentious and controversy-ladden issue such as the alleged "entitlement" to aboriginal habitation of gazetted state forests such as the one being asserted by the Ogiek and the Sengwer communities, it is important to also know what the courts of law have said i.e. judicial pronouncements. Indeed, judicial decisions that courts and other judicial organs make in the exercise of judicial functions of adjudicating disputes are an important source of law. In the context of this paper, the term "source of law" refers to where the law can be found, as opposed to where the law came from. Notably, the two communities have agitated their perceived aboriginal "entitlement" to inhabit forests, not only through political activism, but also through litigation in lawsuits they have filed in national and even regional courts. This trail of litigation is discussed and in the part that follows.

a) Litigation by the Ogiek

i) Francis Kemai & 9 Others V. The AG & 3 Others (2006) 1 KLR (E&L) 326 (In the High Court of Kenya)

This case, also referred to in this paper as The Francis Kemai Case, and which was filed in the 1990s, was perhaps the first case in Kenya to be filed by a tradi-

tional community, claiming an "entitlement" to aboriginal habitation of a gazetted state forest. It was filed in respect of the Mau Forest. It was filed in the High Court of Kenya in Nairobi in 1999, on behalf of the Ogiek Community, by Francis Kemai and nine other members of the Community who alleged to be aboriginal inhabitants of the said forest and claimed the right to reside in it. They were mainly seeking a declaratory order of the court, declaring their community (the Ogiek community) to be are a hunter-gatherer indigenous forest-dwelling community whose ancestral home is this forest and that they were therefore entitled to occupy and reside in it. This case was dismissed. In dismissing it, the Court observed that allowing the Ogiek to have Mau Forest would have mischievous consequences for the country and could lead to prodigious vexatious litigation and interminable suits by other communities; and that there is no reason why the Ogiek should be the only favoured community to own and exploit at source our natural resources, a privilege not enjoyed or extended to other Kenyans.

Despite the said dismissal of their case, the Ogiek Community did not give up their clamour for aboriginal habitation of the Mau still arguing that they are a traditional forest dwelling community whose rightful home is Mau Forest. They continued this agitation politically as well as through lobbying the international donor community and non-governmental organizations. While these efforts continued, Kenya in the year 2010 promulgated a new national Constitution (The Constitution of Kenya, 2010) and repealed the old Constitution (the Independence Constitution) that was promulgated in the year 1963 when Kenya gained her independence from colonialism and ceased being a British colony. The new Constitution, unlike its predecessor, was a more progressive Constitution, that inter alia, expanded the fundamental freedoms and rights; with express recognition of marginalized communities (Article 10). Unfortunately, not even this new Constitution defined or expressly provided for the rights of the indigenous peoples. It is surprising that such a progressive Constitution of a native African country such as Kenya can lack such crucial provisioning yet of its about 44 indigenous communities, there are a handful that can be described as indigenous peoples.

ii) Joseph Letuya & 21 Others V. Attorney General & 5 Others [2014] eKLR (In the High Court of Kenya)

This was the second case filed by the Ogiek community to assert their perceived "entitlement" to aboriginal habitation of the same Mau Forest that was a subject of The Francis Kemai Case. It was a constitutional petition filed in the year 2012, which was two years after Kenya had in the year 2010 promulgated the new Constitution of 2010 to replace the old Constitution (The Independence Constitution of 1963). Given that The Francis Kemai Case was litigated under the legal regime of the old Constitution, the Ogiek community saw a window of hope in the new constitutional dispensation ushered in by the new Constitution. It is with this new impetus that the community again through its members filed

this new case, and this time round banking on the provisions of the new Constitution, and particularly Article 63(2) (d). This was The Joseph Letuya Case; filed by 22 members of the community, namely Joseph Letuya and 21 others.

In this case, just like in The Francis Kemai Case, the petitioners described the Ogiek community as a hunter-gatherer traditional forest-dwelling community. They were still asserting the community's perceived habitational "entitlement" over Mau Forest, arguing that the forest is their ancestral land and that they are a traditional forest-dwelling community entitled to occupy and reside in it. Relying on Article 63(2) (d) of the Constitution as stated above, they argued that the Forest is their ancestral land. They also complained that members of their community have for long been subjected to evictions from the said forest by both the colonial and pre-colonial governments, and that the Kenya government was at the time still hell-bent on evicting them. They further argued that removing them from the said forest was tantamount to taking away their means of livelihood and which by extension amounts to a violation of their right to life guaranteed under the Constitution.

In a judgment that was delivered in March 2014, the Court found in favour of the community but only partially. In the judgment the Court distinguished this new case from The Francis Kemai Case, stating that it having been decided in the year 2000, which was more than 12 years before then, was decided under totally different circumstances. That these circumstances were that, that case was decided under the old Constitution and the old forest legislation i.e. The Forest Act of 1942 (Cap 385 Laws of Kenya), while the new case was being decided under the new Constitution 2010 and the new Forest Act (The Forests Act of 2005). Also that unlike in the year 2000, this time round there was a Report of a Government Task Force on the Conservation of the Mau Forest Complex which had been submitted in the year 2009. The Court in its judgment declared that the forcible evictions of members of the Ogiek community from Mau Forest Complex was a violation of their right to life, their economic and social rights, and their right not to be discriminated against. It also directed the National Land Commission (the governmental organ in charge of government land) to, within one year from the date of judgment, identify alternative land outside the Mau Forest on which to resettle the community.

Admittedly, the judgment was not an outright victory or an unequivocal success, in that the Court failed or declined to hold and declare that the Mau Forest Complex was the ancestral home of the Ogiek community which they had an aboriginal "entitlement" to inhabit. Therefore, the Court did not make a finding that the Ogiek were entitled to aboriginal habitation of the said Forest. Whereas the decision in The Joseph Letuya Case was not an outright dismissal like that in The Francis Kemai Case, this author is of the view, that even in this second case, the Court did not give the Ogiek a judgment in terms of the prayers in their petition. It would have been expected that incase the Court agreed with their claim for aboriginal habitation, it could have entered judgment in terms of the orders

sought by them in their filed pleadings and granted their prayers. It would have entered judgment in terms of the prayers in the petition. Had the Court found that the community had an "entitlement" to aboriginal habitation of the forest, which was not the case, it could have directed that the community be allowed to enter the forest and permanently reside and inhabit it. This it did not.

With this second judgment in hand, which judgment was a partial win as opposed to the previous outright dismissal in the first case, the community through the African Commission on Human and Peoples Rights (ACHPR), proceeded to file a third case. This time round in The African Court on Human and Peoples' Rights (ACHPR). This is a regional court formed under the aegis of the African Union, AU (formerly, Organization of African Unity, OAU). It is established under Article 1 of the Protocol to the African Charter on Human and Peoples' Rights (also known as the Banjul Charter) and has its headquarters in Arusha, Tanzania.

iii) ACHPR Application No. 006 of 2012 African Commission on Human and Peoples' Rights V. Republic of Kenya (In the African Court on Human and Peoples Rights)

The case was filed on the community's behalf by the African Commission on Human and Peoples' Rights, against the Republic of Kenya. In this case the community raised the same issues, claims and arguments as in the two previous cases. In a judgment that was delivered in the year 2017, the Court recognized the cultural, religious and other rights of the Mau Ogiek over the Mau Forest, which it stated the Republic of Kenya violated during the forceful evictions from the Forest. Relying on the African Charter on Human and Peoples' Rights as well as the UN Declaration on the Rights of Indigenous People, the Court in its judgment observed that traditional possession by indigenous people has equivalent effect as state-granted full property and entitles them full recognition and registration of property rights and that even where they are no longer in possession of their traditional land, voluntary or otherwise, they still maintain their property and are entitled to restitution.

Notably, the Court did not rule that the Ogiek even as a traditional indigenous and formerly endemic hunter-gatherer community, was essentially entitled to aboriginal habitation of the Forest and should be allowed to occupy and reside in it. It was rather on the manner in which the community had over the years been treated by the State and its agencies, and especially the manner of forcible evictions that the community had alleged to have been severally subjected to. Be that as it may, the Court's said judgment has nevertheless been lauded by many in the human rights movement, as being remarkably progressive. Sadly, in arriving at this decision the Court failed to give due consideration to environmental conservation. Humans being part of the environment, this paper takes the view that where human rights conflict with environmental conservation imperatives, as was the case in this litigation, environmental conservation imperatives should prevail.

There is also the issue of legality. Article 26 of UN Declaration on the Rights of Indigenous People, recognizes the right of indigenous people to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership. The Court failed to consider the now changed circumstances of the present times as opposed to the primordial times and the fact that overtime, the Ogiek, just like other communities in Kenya, has generally undergone remarkable socio-cultural transformations. Undeniably, the Ogiek and even its counterpart the Sengwer of the present times have lifestyles that are different from those of their long-departed ancestors. Notably, the decision in The Joseph Letuya Case and the one of the African Court on Human and Peoples Rights were more on the manner in which the government had been accused of conducting the evictions of the community's members from the Forest, rather than whether they have a right of aboriginal habitation. This paper in the part that follows examines how the Sengwer have on their part fared in their court cases.

b) Litigation by the Sengwer

i) James Kaptipin & 43 Others V. The Director of Forest & 2 Others [2014] eKLR (In the Environment and Land Court of Kenya)

This was the first case to be filed by the Sengwer. It was a constitutional petition filed in the year 2012 in the Environment and Land Court (ELC), under the provisions of Kenya's new Constitution 2010. It was brought by 43 members of the Sengwer community claiming the right to occupy and inhabit Kapolet Forest which is one of Kenya's gazetted state forests. In its judgment, the Court dismissed the petition. In dismissing the petitioners' claim, the Court observed as follows:

"*There is no doubt that the Sengwer Community is one of the indigenous communities. The community was traditionally known to be a hunter-gatherer community. I am aware that there have been sustained global efforts to have the Sengwer community given its rightful place in society. The Constitution of Kenya recognizes community land which was traditionally occupied by hunter-gatherer communities. This is under Article* 63 *of the Constitution. Parliament was mandated to enact a legislation which will give effect to Article* 63 *of the Constitution. Parliament was given* 5 *years within which to do so from* 27/8/2010 *the time of Promulgation of the constitution. Parliament has not yet enacted the said Act. I hope that once the contemplated legislation is enacted it will shed light on the position of communities such as the Sengwer. Before that happens, courts have a duty to determine any claim based on the law available What the petitioners are claiming requires a delicate balancing act, an act which requires that granting one right does not negatively affect other rights. The right to a remedy is a fundamental attribute of the rule of law. Without this right, there cannot be rule of law. The Kapolet forest is a very important forest ecologically. It is a catchment area for among others, River Kapolet, River Kapora, River Kaptanit and River Kapsara.*

"*If part of the forest was to be cleared for settlement, it will spell doom for these rivers. The slope areas will be susceptible to landslides. The petitioners are not asking for part of the forest to conserve it as they go on with their traditional way of hunting and gathering. They instead want it for settlement full with titles in individual names. About* 100 *years ago, it was possible for the Sengwer to live as hunter-gatherer community. The circumstances have now changed. Population has grown and a number of people are fighting for scarce natural resources. The people have adopted modern farming which is not conducive to sustainable development and conservation of forests. Forests are being cleared for firewood and timber. People are putting up permanent structures in the forests. It is therefore not tenable that we can go back to the old days of hunter-gatherer lifestyles. There are legal ways in which the community can be allowed back into the forest to harvest honey without affecting the environment. The Director of Forest is empowered by the Act to allow people into forests to undertake certain regulated activities. The Sengwer community should embrace this in efforts to conserve the environment for the present and future generations.*

The delicate balancing act dictates that no further forest land should be excised for purposes of settlement. I am aware that the Government is making efforts to re-settle people removed from forests such as Mau forest. The case of the Sengwer is a unique one. Efforts should be made to settle the Sengwer people in accordance with international pleas to the government to do so particularly from the World Bank which is at the forefront of agitating for recognition of the Sengwer people's rights and their settlement. All is not lost for the Sengwer People. New legislations are coming which will address their historical problems. Some of these laws are in place and more will come.

"*For the sake of protection of the Environment for present and future generations, For the sake of protection of the Environment for present and the future generations, Kapolet forest should not be carved out for settlement of the Sengwer community. It is on this basis that I find that this petition cannot succeed. As I had already found that the criminal charges facing the* 44 *petitioners have not infringed on their constitutional rights, I will dismiss the petition and order that each party shall bear their own costs.*

ii) David Kiptum Yator & Others V. Attorney General & 4 Others (*As Consolidated with* Elias Kibiwott & Others V. Kenya Forest Service & Others & Katiba Institute As Interested Party [2019] eKLR (In the Environment and Land Court of Kenya)

These two constitutional petitions although filed five years apart, were consolidated and decided together. They, like the second Ogiek case (The Joseph Letuya Case), were filed under Kenya's new Constitution 2010, but in the Environment and Land Court, in the years 2013 and 2018, respectively. They were filed on behalf of the Sengwer Community of Cherengany hills and Embobut Area. The community had in these two petitions claimed that it is an indigenous marginalized community whose ancestral land is Embobut Forest; reason for

which it should have an exclusive "entitlement" to occupy and reside in it as its community land. The Court in a consolidated judgment dismissed both petitions. In dismissing the petitions, it held that the gazettement of the said Forest as a gazetted state forest put it under the ownership, management and control of the government, to be managed and controlled in accordance with the provisions of the Forest Conservation and Management Act 2016 which prohibits habitation of gazetted state forests. Further, that such forests cannot be community land in terms of Article 63(2) of the Kenya Constitution and Section 2 of the Community Land Act, and that the forest had not been registered as "community land".

6. What Therefore Is the Fate of Aboriginal Habitation of Gazetted State Forests in Present Day Kenya?

People, whether they belong to traditional communities or other communities do not have to inhabit and reside in public forests in order to enjoy their benefits. Admittedly, there are many non-residential uses of such forests. The members of such communities, for instance Patrick Towett of the Ogiek Welfare Council, have argued that these communities insist to inhabit forests because "by their culture they are forest conservators" (Towett, 2004). Conversely, the clamour to inhabit public forests should not be misunderstood to be an affinity for forest conservation. It is in fact inherently destructive should other communities or even future generations follow suit and likewise demand to inhabit these forests. Notably, not every forest inhabitant is a forest conservator. There is no guarantee that such people if allowed to inhabit public forests, they will conserve them. On the Contrary, they will multiply and out-pace the regenerative capacity of such forests; after all like all land, forest land is fixed and can neither multiply nor expand in size unless increased through the addition of more land or the gazettement of more forest land. Yet with procreation, the populations of these communities increase by day. For instance a decade ago, the respective populations of the Ogiek and the Sengwer were a mere 10,000 each, but have in only ten years each tripled and currently stands at about 30,000 each (Kenya Bureau of Statistics (KNBS), 2019). With such exponential population growth, it is neither advisable nor reasonable to allow human habitation of the few available public forests. While the internationally recommended forest cover per country is 10 percent of the total land area, Kenya's public forests (gazetted state forests) as already stated in this paper, occupy a mere 4 percent of the country's land area.

Won't it be illogical to allow this already scanty and deficient forest cover to be inhabited by humans or subject it to habitation by communities, even if they be traditional communities? Kenya's cumulative forest cover (of public forests, community forests and private forests together) is presently a mere 7.4 percent of the total land area, meaning that the remaining 92.6 percent of the country's land area is occupied by humans, water and other landforms. How logical can it

be, to allow the human population to spread into the said only 7.4 percent that is occupied by forests, or even worse, the only 4 percent that is occupied by gazetted state forests?

As already noted in this paper, it is illegal and in fact criminal, under Kenya's forestry law, for any person or community to enter and inhabit a gazetted state forest. For that reason, aboriginal habitation of such forests is criminalized and no longer lawful in Kenya. Apart from it being illegal and unlawful, this lifestyle or practice has over the years been progressively relegated to the backyard, by the social-cultural transformations attendant to modernity and western traditional lifestyles. Indeed, except the isolated pockets of a few members agitating for return to that life, a larger segment of the members of the until recently aboriginal communities (such as the Ogiek and the Sengwer) have since adopted new lifestyles in tandem with modernity as well as religious, technological and legal realities of the present times. This therefore leaves aboriginal forest habitation in the annals of history and anthropology for historians and anthropologists to document. And as these communities reminisce it with nostalgia. The stark reality is that currently, Kenyan tribes and communities that claim to be traditional forest dwellers (or forest peoples) have actually abandoned and transformed from the typical aboriginal life as we know it, and adopted modern lifestyles akin to their compatriots. As already observed in this paper, it is believed the aboriginal tag is used by them whenever it suits them or whenever it suits the circumstances. These communities have in effect lost, or are fast-losing, their supposed uniqueness that used to give them an aboriginal identity or semblance of it.

Ironically, they are still widely, even internationally, regarded as still practicing or having a strong and deep-seated affinity for a primordial way of life; and are therefore considered, and wrongly so, as being uniquely distinct from the rest of their compatriots. This has remarkably earned them special attention and treatment, even internationally, to the extent of considering themselves as more vulnerable or venerable than other communities. Such an attitude is inimical to national integration, and unless checked, can retrogress the national agenda, including environmental protection in general, and forest conservation in particular. A case in point is their rejection of the Community Forest Associations (CFAs) programmes of these forests they claim. Such programmes are through their benefit-sharing structures aimed at harnessing non-residential as opposed to residential or habitational forest utilization. By insisting on being on their own, these already maginalized indigenous traditional communities are likely to further marginalize themselves from the mainstream of the national as well as societal life. This lack of co-operation and participation is inimical to the overall national agenda such as the management of public commons, for example public forests.

These public commons need to be protected and managed for the common good of all, and collective benefit(s) of the present generation and the future

generations, in line with the concept and principles of sustainable development and, its goals (Sustainable Development Goals, SDGs) with regard to forestry. The term sustainable development refers to development that meets the needs of the present generation, without compromising the ability of future generations to meet their own needs (WCED, 1987). The concept although popularized by the World Commission on Environment and Development (WCED) in its Report titled "Our Common Future" (also called the Brundtland Report) was existing before then, especially in the context of natural resource management. With regard to forestry, this concept had long usage in forest management paradigms, particularly ideas on sustainable forest management. There is need that in their utilization of forests, the present generations be mindful of the need for these forests to be available and passed on to future generations. This is an obligation that requires the co-operation of all the communities and segments of this generation.

It should be noted however, that the co-operation required from traditional communities such as the Ogiek and the Sengwer, or indeed any other communities, cannot be effectively achieved exclusively through the command-and-control prescriptions of the law, but supplementally through democratic interactions as well. These include: civic education, lobby efforts, as well as meaningful consultation processes. Such an approach has the potential to arouse in these hitherto obstinate traditional communities, the willingness to participate and be part and parcel of the mainstream national agenda, including forest conservation. With regard to the legal proscription of aboriginal habitation of gazetted state forests, the best way is to secure voluntary compliance of the communities rather than using militarized enforcement. The dictates of the law can be better served by encouraging these communities to voluntarily vacate those forests rather than using force and violence. This can be done through sustained civic education, advocacy programmes, and lobby efforts. The notably obstinate defiance by these traditional communities so far witnessed among their members, can be associated to lack of information as a result of marginalization and lack of exposure. A situation that is largely attributable to their preferring to live in tribal cocoons. These traditional communities need to break out of those ethnic "shells" and cocoons and partake in the mainstream national life.

Admittedly, due to their endemic indigenous knowledge systems, they can be a crucial partner in the environmental or forest conservation agenda. With such information and knowledge systems, they can if main-streamed be invaluable partners in the government's broader national goals, programmes and agendas. With regard to forest conservation, they can be crucial partners in the implementation of the government's forestry policies and laws. This is as opposed to the current state of affairs where with regard to forestry, they are by their defiance and belligerent disposition considered saboteurs or antagonists in the forest conservation agenda. With a proper democratic and peaceable strategy, the government can slowly win them for forest conservation and make them key

drivers in the country's forest conservation agenda. This is the way to go, if we have to remove them from the abyss of marginalization (both external and self), self-isolation and ethnic chauvinism, associated with their pursuit of uniqueness and an aberrated cultural identity.

Notably, unlike the San (also called the Basarwa: a derogatory term meaning the poor people without cows) of Kalahari Desert in Southern Africa and the Pigmy of Congo Forest in the Democratic Republic of Congo, that have physical distinctness, Kenya's traditional communities for their part have no physical distinctness that makes them physically distinct from other communities. Hence their perceived uniqueness is largely attitudinal.

Sadly, these communities are among the country's marginalized minorities that have been marginalized by other communities as well as themselves. This has also resulted in their being among the least economically endowed segments of the Kenyan society. To attenuate this, the Kenya government can address this iniquity through socio-economic and political empowerment programmes, aimed at empowering these communities. These can be mounted side by side with affirmative action programmes in terms of Article 58 of the Constitution, targeting these communities, in terms of: education; healthcare; job opportunities; business and investment opportunities; and even political representation such as reserving political seats for them in Parliament and in the County Assemblies. Such efforts will ensure they are effectively integrated and participate in all spheres of the Kenyan life. This will also enable them gradually abandon their "aboriginal" (actually pseudo-aboriginal) ways of life so that they meaningful commune in the mainstream national life. When that is achieved, these communities will instead of insisting on restitution of and/or resumption of aboriginal habitation of gazetted state forests and other deleterious aboriginal practices, focus on the many other desirable traditional customary uses of these forests, over and above the conventional uses.

Opening up Kenya's gazetted state forests for habitation by these traditional communities or any other communities will lead to degradation and further loss of forest cover and will spell doom for the country's environment and even economy. There will be loss of the climatic as well as ecological services and even economic and scenic benefits that these forests provide. Such a move will also most likely spur a scramble by other communities and future generations to inhabit the forests, hence open floodgates for plunder and decimation of Kenya's already scanty forest cover. As already noted above, there are many desirable, and lawful traditional customary uses that these traditional communities and other communities may enjoy in Kenya's gazetted forests. However, such uses are outside the scope of this paper, they have been emphasized by being only summarily enumerated in the part below. These are however the subject of an on-going research by this author.

7. Other Traditional Customary Forest Uses

As already observed above, there are many other traditional customary uses that

communities, including the hitherto traditional communities such as the Ogiek and the Sengwer, can enjoy in gazetted state forests. In the context of this paper, "traditional customary uses" are uses arising from old traditional customs existing from earlier times, as opposed to modern uses (Sifuna, 2012). As already discussed earlier in this paper, forests from time immemorial have always been a valuable resource for the human society, both in its traditional setting and in its modern form. Unlike the rather pristine traditional setting, the modern setting has been influenced by western traditional values (from the traditions of the Europeans and other white communities in the west) as a result of colonialism and modern lifestyles resulting from socio-cultural transformations (Sifuna, 2012).

While forests (including gazetted state forests) have some conventional and universal uses to society, there are some forestry uses that are anthropologically unique to the traditional African way of life. One such use being that, historically, the forest was once upon a time a shared habitat and dwelling home for both animals and human beings. While that was typically in the primordial society and hunter-gatherer stage of life, even in present times there are pockets of traditional forest-dwelling communities in some parts of the word, whose actual home and habitat is the forest. Notably, there are also presently some traditional communities, such as the Ogiek and Sengwer traditional communities of Kenya, that claim traditional "entitlement" to inhabit the forest (aboriginal habitation of forests) and agitate to be allowed to enter, occupy and reside in public forests, despite their having been gazetted as state forests.

Notably, the traditional African customary forest use values are in terms of both intrinsic use values (non-consumptive) and consumptive use values. For instance, socio-cultural, spiritual and religious use of forests for witchcraft, magic, worship and traditional rites, is essentially non-consumptive yet it is of tremendous sentimental value to the African people. This is unlike traditional African customary wildlife use values that are invariably consumptive in nature (Sifuna, 2009). As reported by this author in an earlier study on wildlife, in the typical traditional African customary perspective with regard to wildlife value, the intrinsic value of wildlife is no value at all, and only consumptive wildlife uses and benefits have value (Sifuna, 2012). Conversely, with regard to forestry, the traditional customary benefits are construed in terms of both consumptive and non-consumptive uses.

Under Kenya's policy and legal framework, there are many traditional customary forest uses that communities and their members can within the parameters of the existing policies and laws, lawfully enjoy in forests, including gazetted state forests. They are both consumptive ones and non-consumptive ones. Notably, many of these uses are in the present life either declining or being abandoned, or merely being steadily relegated to the background as a result of modernization and socio-cultural transformations in the society. There are others (e.g. aboriginal forest habitation) that have been proscribed or otherwise outlawed by the existing government policies and laws. Under Kenya's laws for in-

stance, hunting and habitation, despite having for long been traditional customary forest uses, are under the existing policies and laws presently prohibited and criminalized, with harsh criminal penalties such as fines and imprisonment prescribed for infraction. So what traditional customary forest uses can be lawfully enjoyed or practiced by communities in present day Kenya? Although they fall outside the scope of this paper, they nevertheless deserve to just be mentioned as they can be the subject of another research all together; a lacuna that this author hopes to fill in an on-going study.

They include the following: Use for socio-cultural purposes; religious uses; use as a source of fuel wood for cooking and heating; use for food and nutrition; use in folk medicine for treatment and cure of diseases and ailments; use as raw-material in construction as well as the making traditional furniture, traditional tools, traditional items, traditional equipment, traditional music instruments, and traditional emblem and royalty items such as royal stools, royal gear and royal sceptre for traditional and even political leaders. Under Kenya's existing forestry policies and laws governing gazetted state forests, these use values may be enjoyed in a structured manner under the Participatory Forest Management (PFM) Model run by the Kenya Forest Service (KFS). Under this programme, local communities in the areas around gazetted state forests may form Community Forest Associations (CFAs) through which they participate in the management of these forests, and also enjoy benefits from them. These benefits are both the conventional ones as well as the lawful traditional customary benefits such as the ones enumerated above.

8. Conclusion

While aboriginal habitation of forests existed in the primordial society, it has no place in present day Kenya. This situation is ordained by progressive socio-cultural transformations in the Kenyan society, as well as the existing laws. Such is a pragmatic and realistic position as opposed to the abstract and idealist or utopian position taken by supporters of this traditional customary practice. The stark reality is that Kenyan communities that claim to be traditional forest dwellers (or forest peoples) have at present time abandoned and transformed from the typical aboriginal life as we know it, and adopted modern lifestyles akin to other contemporary communities, and as already stated, it is believed they only play the aboriginal card and wear the aboriginal tag whenever it suits them or whenever it suits the circumstances. These communities have in effect lost, or are fast-losing, their unique attributes that characterized their yester-years that tended to accord them an almost aboriginal identity. Besides, Kenya has a scanty forest cover that cannot allow it to let such communities, or indeed any other communities or groups of people to enter, occupy, erect settlements and reside in her gazetted state forests.

This study established that of Kenya's total land area of approximately 582, 600 km^2, only 7.4 percent is presently under forests. Of this, gazetted state forests

(also called public forests or government forests) comprise 4 percent while the remaining 3.4 percent is occupied by community forests and private forests. Further, while this forest cover of 7.4 percent is a far cry from the internationally recommended and constitutional requirement of 10 percent, two of the country's traditional communities (the Ogiek and the Sengwer) who claim to be Kenya's aborigines, have been and continue agitating to be allowed to inhabit several of these gazetted state forests, claiming an aboriginal "entitlement" of habitation. This is despite those forests being under protected status by virtue of their gazettement, and despite the country's scanty forest cover of less than 10 percent.

Conflicts of Interest

The author is an environmental and natural resources law scholar, consultant and practicing attorney at law. Apart from teaching and researching environmental law and conservation issues, he has, as attorney, represented some parties in some of the court cases cited in this paper. He has also consulted and offered legal opinions and advice in other cases involving other indigenous communities such as the Endrois and Maasai of Kenya, as well as the San (Basarwa) and Yei of Botswana. The views expressed in this paper are his own opinions as an environmental law scholar and are not necessarily those of the clients he has represented, or of the courts in which he has appeared; and neither is he speaking for them. He has also in this paper endeavored to be as objective and as temperate as humanly possible despite his professional participation in the said litigation and his commitment to environmental conservation.

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