



Kenya National Commission on Human Rights

**AN INTERIM REPORT OF THE HIGH-LEVEL
INDEPENDENT FACT-FINDING MISSION
TO EMBOBUT FOREST IN ELGEYO
MARAKWET COUNTY
A KNCHR REPORT**

APRIL 2018

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS (KNCHR)
P.O.BOX 74359-00200 NAIROBI

TRANSMITTAL LETTER

**HON. KERIAKO TOBIKO,
THE CABINET SECRETARY,
MINISTRY OF ENVIRONMENT AND FORESTRY,
NHIF BUILDING, 12TH FLOOR
NAIROBI**

Dear Hon. Keriako Tobiko,

RE: SUBMISSION OF THE REPORT OF THE INDEPENDENT FACT FINDING MISSION ON EMBOBUT FOREST

The Kenya National Commission on Human Rights (KNCHR) is an Independent National Human Rights Institution (NHRI) established under Article 51 of the Constitution and operationalized through the KNCHR Act 2011 with the mandate of promoting and protecting human rights in Kenya.

The KNCHR is mandated under section 8 of the KNCHR Act 2011 to carry out investigations and research on the basis of complaints lodged or on its own motion on any allegations of human rights violations and report on the findings and make recommendations on redress measures. The KNCHR in fulfilling its oversight and watchdog role carried out an independent High-Level Fact-Finding Mission in Embobut Forest following allegations of human rights violations with an overall aim of finding a lasting solution to the problem through a win-win arrangement for all the sides involved.

Sir, find attached to this transmittal letter, the mission report with the findings and recommendations which, if implemented, will go along way in protecting and promoting the rights of the affected communities while paying attention to the conservation efforts.

Please, accept the assurance of our highest regards.



Kagwiria Mbogori,

Chairperson, Kenya National Commission on Human Rights.

Preface

The Kenya National Commission on Human Rights (KNCHR) is an independent Constitutional Commission established by the Constitution of Kenya 2010 under Article 59 (4) and subsequently operationalized through an Act of Kenya Parliament (*The Kenya National Commission on Human Rights Act No. 14 of 2011 and revised in 2012*).

The Kenya National Commission on Human Rights is the National Human Rights Institution (NHRI) whose operations are guided by the 1993 United Nation's approved principles on establishment and functioning of independent Human Rights Institutions referred to as the *Paris Principles*. The Kenya National Commission on Human Rights is an accredited "A" Status National Human Rights Institution.

Kenya National Commission on Human Rights broad mandate is:

1. To promote Constitutionalism by advising and supporting public and private actors in Kenya to promote the respect, protection and realization of fundamental human rights (*promotion mandate*)
2. To protect the Sovereignty of the People by advising and moving the Kenya towards a human rights state; one that respects and promotes the rights of all Citizens (*protection mandate*) and
3. To secure the observance of human rights and freedoms of all State organs, including national security and private institutions.

These mandates are implemented through various strategies including research, advocacy, lobbying, public education and training, outreach, receiving complaints, investigations, issuing advisories and publications and through partnership building and networking.

Pursuant to the mandate above, KNCHR deployed a High-Level Independent Fact- Finding mission into the allegations of inhumane and violent evictions against forest dwelling communities, and particular members of the Sengwer Community, in relation to Embobut Forest. The said violent evictions have resulted in wanton destruction of property, bodily harm and deaths and also caused a significant strain in the relationship between Forest Communities and the Government of Kenya.

The High-Level Fact-Finding Mission was carried out from 14th to 23rd March 2018 under the leadership and stewardship of KNCHR Commissioners George Morara and Chivusia Shatikha, and the CEO Dr. Bernard Mogesa. The Mission richly benefited from the participation of Amnesty International, National Coalition of Human Rights Defenders-Kenya, Katiba Institute, Kenya Human Rights Commission and the African Commission Working Group on Indigenous Populations who joined as Observers to the Mission.

The main objective of the High-Level Fact-Finding Mission was to establish the veracity of the allegations of human rights violations in Embobut through evidence-based findings and thereafter provide clear recommendations within a human rights based approach for purposes of advising the Cabinet Secretary Ministry of Environment and Forestry, the Hon. Keriako Tobiko, relevant duty bearers and other stakeholders on the way forward in addressing the situation. The Embobut Mission also assessed the viability of the European Union Funded WaTER Project that aimed at improving livelihoods of those within the larger Cherangany Hills Ecosystem where the Embobut Forest falls.

The Embobut Mission also aimed at establishing allegations of human rights violations of the Indigenous communities, such as the Sengwer, with regard to their ancestral land claims which lie within the Embobut forest as provided for in the Constitution of the Republic of Kenya and also the Community Land Act.

This report highlights pertinent issues of concern and proposes various recommendations which can be used to address the perennial problem in Embobut Forest and thereby setting the foundation for the establishment of a long-lasting and sustainable approach to conservation in Kenya.

The Commission believes that the findings and recommendations will assist the Cabinet Secretary in designing a *win-win* formula for the forest dwelling Communities, forest neighboring Communities and the Government of the Republic of Kenya's conservation efforts.

Dr. Bernard Mogesa,
**Chief Executive Officer/ Commission Secretary,
Kenya National Commission on Human Rights**

Acknowledgement

The Kenya National Commission on Human Rights (KNCHR) would like to most sincerely acknowledge the contribution of all those who led to the successful completion of this High-Level Fact Mission.

The Commission acknowledges the communities within the Embobut Forest who shared their experiences and participated in both community forums and key informant interviews that provided the required content for this report.

The various State agencies led by the Ministry of Environment and Forestry and the Kenya Forest Service are also acknowledged for providing the necessary authorizations to access the forest, facilitating the indepth interviews and creating time for the guided tour of the expansive Embobut Forest.

The efforts by the various Community Based Organizations and individual human rights defenders that have put their lives on the line in the promotion and protection of human rights within the forest range and for the useful information provided to the fact finding team cannot be gainsaid.

The Kenya National Commission on Human Rights also takes cognizance the positive input by the County Government of Elgeyo Marakwet, led by H.E. Governor Tolgos for the useful engagement with the Fact-Finding Team in the day-long consultative meeting, as well as the various efforts being undertaken by the County Government on matters affecting the Embobut Forest.

The input of representatives from partner institutions such as Amnesty International, Katiba Institute and National Coalition for Human Rights Defenders is also acknowledged.

The Commission further acknowledges The European Union for their immense and invaluable support towards the success of this mission leading to the final publication of this fact-finding report.

The KNCHR staff who participated in the fact finding mission led by Messrs Kibet Kurgat, Cyrus M. Maweu, Washington Barasa and Ms Mercy Aseyong are recognized and much appreciated.

Special mention goes to Samson Omondi who led in the conceptualization and the drafting of the initial report and Dominic Kabiru, Jude Boy and Martin Pepela for proof-reading and editing.

The steadfast leadership of the KNCHR CEO, Dr. Bernard Mogesa, towards the success of the High-Level Independent Fact-Finding Mission is highly appreciated.

Finally, we take this opportunity to appreciate the stewardship of the Chairperson of KNCHR Commissioner Kagwiria Mbogori, Vice Chairperson Commissioner George Morara, Convenor of the North Rift Regional Office Commissioner Shatikha Chivusia and Commissioner Jedidah Wakonyo during the entire fact-finding mission period. We sincerely thank them for their invaluable comments and the technical editing of this report.

Table Of Contents

Preface	2
Acknowledgement	4
Abbreviations	8
Summary of The Key Findings of The High-Level Independent Mission to Embobut Forest	9
About the Kenya National Commission on Human Rights (KNCHR)	13
Terms of Reference	14
Methodology	15
Background to the High-Level Fact-Finding Mission	16
The Legal and Normative Framework on Conservation	20
The Constitution of Kenya and other Relevant Statutory Laws and Policies	20
The African Charter on Human and Peoples Rights (ACHPR)	22
Reports of the African Commission Working Group on Indigenous Populations/ Communities	22
United Nations Declaration on the Rights of Indigenous Peoples (UNDRIPs)	23
The Rio Declaration on Environment and Development (1992)	23
ILO Indigenous and Tribal Peoples Convention (Convention 169)	24
The United Nations Convention on Biological Diversity (COB)	24
The Right to Self-Determination	25
Reports of the UN Special Rapporteur on the Rights of Indigenous Peoples	25
The Sengwer as an Indigenous People	27
Who are the Sengwer?	27
The History of the Sengwer People	28
The Livelihood of the Sengwer People	29
The Sengwer of Embobut Forest	30
Embobut Forest Destruction and the Genesis of the Evictions	32
The Embobut Forest Restoration Task Force and Compensation	33
The Court Cases on the Embobut Forest Matter	37
The Water Tower Protection and Climate Change Adaptation Programme (the WaTER Project)	40
Key Findings In Relation To The Mission's TORs	42
The Death of Robert Kiroich, the Injury to David Kosgei Kiptikesi and the Confrontation Between the Locals and the KFS.	42
The Veracity of the Forced Evictions Claims	43

Influx of Small Arms and Light Weapons into the Forest.....	46
Impact of the Various Actions.....	47
Environmental Degradation	47
The Specific Human Rights Violated.....	49
Conclusion and Recommendations.....	51
Recommendations to the Government of Kenya.....	51
Recommendations to the Kenya Forest Service.....	54
Recommendations to the County Government	55
Recommendations to the Forest Dwelling Communities.	55
Recommendations to the Donors.....	56
Annexe 1: Forest Conservation Best Model Practice.....	57
Annexe 2: Independent Fact Finding Mission Photographs.....	62

Abbreviations and Acronyms

ACHPR	African Commission on Human and Peoples Rights
ADR	Alternative Dispute Resolution
AI	Amnesty International
CFA	Community Forest Association
CIPDP	Chepkitale Indigenous Peoples' Development Project
COB	The United Nations Convention on Biological Diversity
EC	European Commission
EU	European Union
FPIC	Free Prior and Informed Consent
GoK	Government of Kenya.
ILO	International Labour Organization
KARI	Kenya Agricultural Research Institute
KFS	Kenya Forest Service
KNCHR	Kenya National Commission on Human Rights
MoEWNRS	Ministry of Environment, Water and Natural Resources
NLC	National Land Commission
NRMP	Natural Resource Management Program
REDD	Reducing Emissions from Deforestation and Forest Degradation
TORs	Terms of Reference
UNDRIPS	United Nations Declaration on the Rights of Indigenous Peoples
WaTER	The Water Tower Protection and Climate Change Adaptation Programme

Summary of The Key Findings of The High-Level Independent Mission to Embobut Forest

1. **Finding on the EU-Funded WaTER Project:** The Mission was informed that EU commissioned a Mid Term Review of the project and that the report of the review was submitted on 15th March 2018. The review recognized the different perceptions on forest degradation and conservation from the Ministry, the Counties, the civil society and communities. It proposed ensuring participation of all major stakeholders in the re-designing of the project to mainstream a rights-based approach to forest conservation and align it to the new constitutional and governance situation in Kenya¹. The Mid Term Review of the WaTER Project recommends fundamental changes to the project based on an accurate analysis of the changing context for forest conservation and management including reference to the Constitution of Kenya 2010, recognition of community land rights, and the African Court on Human and Peoples' Rights ruling in the Ogiek case². It also calls on KFS to review its approach to forest conservation and management in light of the provisions of the Constitution, the Forest Management and Conservation Act 2016, and the Community Land Act 2016. It further proposes KFS draws lessons from past programmes such as the World Bank's NRMP, and from international expertise, in order to propose new approaches such as piloting of forest conservation efforts from a rights-based approach³.

Recommendation: The Fact-Finding Mission welcomes the recommendations of the Mid Term Review of the Project and calls upon the EU to resume the funding of the WaTER Project in line with the Recommendations of the review. In particular, the Fact-Finding Mission appreciates the recommendations calling for wider stakeholder analysis and consultation. It is our view that the consultations must include members of the project-affected Communities, and in particular the Sengwer, who must be viewed as 'partners in conservation' as opposed to being branded as 'enemies of conservation' to be evicted from their ancestral lands.

¹ Mid – Term Review of the WaTER Programme which can be accessed from the European Union Delegation to Kenya.

² Application No. 006/2012 African Commission on Human and Peoples' Rights V Republic of Kenya

³ Mid – Term Review of the WaTER Programme which can too be accessed at the European Union Delegation to Kenya

2. **Finding on the Death of Robert Kirokich and injury to David Kosgei Kiptilkesi:** The evictions that commenced in December 2017 led to loss of life and injuries. The death of Robert Kirokich and injury to David Kosgei Kiptilkesi was the climax of these violations leading to the suspension of the WaTER project by the European Union. The KFS were directly accused of having committed the offences. The Government through its Spokesperson committed to ensure that the alleged perpetrators of the crime were held to account. However, very little has been done to date.

The independent fact-finding mission established that Robert Kirokich and David Kosgei were in the company of others herding their animals on 16th January 2018 in Embobut Forest. While seated and with their tools of trade of herding the animals (Pangas and Sticks) they heard gunshots from behind them. In panic mode, they ran away from the gun shots which persisted leading to the shooting of Robert Kirokich on the shoulder. The deceased fell down and lost his life in the process. David Kosgei was shot on the leg and could not move and was later rescued by the KFS who administered first aid and carried him for about 16 Kilometers to Kabiemet Sub – County Hospital where he was admitted.

The other community members who were herding with David and Robert consequently informed the next of kin of the incident and they went for a search in the forest and found the body of Robert Kirokich which was then carried home at night. This was then followed by the KNCHR's intervention to have the body picked up by police from Chesoi Police Station and the body was taken to Kapsowar Mission Hospital mortuary. A post mortem was consequently carried out by the Hospital pathologist who concluded that Robert Kirokich died from excessive bleeding that was caused by a gunshot wound that had both entry and exit points and caused rupture of muscles and vessels leading to his death.

Recommendation: The KFS Rangers in Embobut played a role in the death of Robert Kirokich and occasioned the injury suffered by David Kosgei. We call upon the ODPP, the KPS and the KFS to carry out thorough and speedy investigations to establish the individual officers who are responsible for the death of Kirokich and the injury to Kosgei. Action must be taken against the responsible officers in accordance with the law.

3. **Finding on Human Rights Violations in Embobut Forest:** The Fact-Finding Mission established that a number of human rights violations had taken place in the Embobut Forest. Some of these include forced evictions, burning of houses, harassment of human rights defenders and a raft of violations of the rights of minorities and marginalized groups broadly recognized in our Constitution as well as relevant Regional and International Human Rights instruments. The KFS Rangers are the principal violators of these rights. The Mission also established that some of the violations (especially forced evictions) took place even when there were conservatory Court Orders in place barring the same.

Recommendation: The on-going forced evictions and harassment of Human Rights Defenders as well as the continued commission of human rights violations in Embobut Forest must stop forthwith. The KFS should stop invoking the argument that everybody who was living in the Embobut Forest had been compensated following the recommendations of the 2009 Taskforce. The Fact-Finding mission found out that the work of the Task Force was fraught with numerous challenges, with some people claiming that the bona fide beneficiaries were left out of the compensation exercise. Besides, the KFS should respect on-going Court processes and put a moratorium on the forced evictions.

4. **Finding on Indigenous Peoples Rights and Conservation:** Drawing from the decisions of the African Commission on Human and Peoples Rights, the African Court on Human and Peoples Rights, reports of the African Commission Working Group on Indigenous Populations/Communities as well as reports of the UN Special Rapporteur on Indigenous Peoples Rights, provisions of the CoK 2010 as well as a number of other legal and policy documents, the Fact-Finding mission found out that the Rights of Indigenous Peoples are well recognized and protected in these various human rights instruments. The Commission is of the view that the rights of indigenous communities are likely to be violated by fortress conservation and climate mitigation strategies. Noteworthy was the existence of abundance literature that adaptation conservation approaches, which incorporate the indigenous peoples in conservation efforts, yield the best outcomes in conservation. The Mission found out that the KFS has adopted a high-handed eviction model which is inimical to long-term conservation efforts.

Recommendation: Indigenous Communities must be seen as integral in conservation efforts. Working with all actors, KFS in particular, these Communities should be supported so that they are in the front-line of conservation efforts. The Sengwer of Embobut have been recognized as an Indigenous People, with an ancestral claim to the Embobut Forest and they must be treated as such. We call upon the Government and the KFS to allow the Sengwer settle in the Kapkok, Kaptirbai and Koropkwen open glades in Embobut Forest as a more effective strategy towards conservation as opposed to the current zero-sum approach adopted by the KFS in conservation. Such settlement can start on a pilot basis and formalized when the requisite structures of land tenure and conservation are in place. Additionally, so as to ensure that we have complete data on all the indigenous people in Kenya for purposes of ensuring better guarantees and protections of their rights, we call upon the Government to have a distinct category for capturing data on indigenous peoples in the upcoming 2019 census.

About the Kenya National Commission on Human Rights (KNCHR)

1. The Kenya National Commission on Human Rights (KNCHR) is an independent Constitutional Commission established by the Constitution of Kenya 2010 under Article 59 (4) and subsequently operationalized through an Act of Kenya Parliament (the Kenya National Commission on Human Rights Act No. 14 of 2011 as revised in 2012). The Kenya National Commission on Human Rights is a National Human Rights Institution (NHRI) whose operations are guided by the 1993 United Nation's approved principles on the establishment and functioning of independent Human Rights Institutions referred to as the Paris Principles. The Kenya National Commission on Human Rights is an accredited Status "A" National Human Rights Institution.
2. The KNCHR is mandated under Section 8 of the KNCHR Act 2011 to carry out investigations and research on the basis of complaints lodged or on its own motion on any allegations of human rights violations in Kenya. The Commission publishes its findings in reports that outline recommendations and redress measures to be taken by specific duty-bearers on the identified human rights violations.
3. The KNCHR broad mandate is:
 - i. To promote Constitutionalism by advising and supporting public and private actors in Kenya to promote the respect, protection and realization of fundamental human rights (promotion mandate);
 - ii. To protect the Sovereignty of the People by advising and moving Kenya towards a human rights state; one that respects and promotes the rights of all Citizens (protection mandate); and
 - iii. To secure the observance of human rights and freedoms of all State organs, including national security and private institutions.

Terms of Reference

4. The KNCHR led a High-Level Fact Finding Mission to the Embobut Forest from the 14th to the 23rd March 2018. The main objective of the Mission was to gain a clearer understanding of the circumstances that led to the death of Robert Kiroich and the injury to David Kosgei after a reported wave of fresh victions in Embobut Forest. Additionally, the Mission was to establish whether human rights violations had been committed, compile a report on the same and provide recommendations from a human-rights based approach as a pre-condition for the resumption of the suspended EU-Funded WaTER Project. The resumption of the EU Project is critical. The project is deemed as key to sustaining the livelihoods of all the communities living in the larger Cheranganyi Hills Ecosystem within which the Embobut Forest falls. The following were the specific Terms of Reference for the High-Level Fact-Finding Mission.
 - a) Establish the circumstances surrounding the death of Robert Kiroich and injury to David Kosgei Kiptilkesi by the KFS and ascertain the veracity of claims of forced evictions of members of the Sengwer Community from Embobut Forest;
 - b) Assess the nature and extent of the reported evictions including establishing the identity of the affected persons and their localities;
 - c) Initiate dialogue on redressing human rights violations in Embobut Forest with duty bearers, and in particular, the County Government of Elgeyo Marakwet, the County Commissioner, the local leaders, the National Police Service and the KFS;
 - d) Seek views from the different communities affected by the situation in Embobut and record cases of human rights violations; and
 - e) Drawing on lessons from best-practices on forest conservation, make recommendations to relevant duty-bearers and stakeholders on the way based on a win-win formula as the basis for the resumption of the suspended WaTER Project.

Methodology

5. The High-Level Independent Fact-Finding Mission adopted the following methodology in carrying out its work:
- a) A review of the legal and normative framework governing the rights of indigenous peoples in Kenya; a perusal of past reports and documents on indigenous peoples rights and an examination of previous initiatives undertaken towards conservation efforts with a focus on the latest conflict in Embobut Forest. Some of the reports and documents reviewed include the 2009 Task Force Report on Embobut Forest, Court Records, the Mid Term Review (MTR) Report of the Water Towers Programme Document and the Mid-Term Evaluation Report of the WaTER Project among others⁴.
 - b) Meetings and interviews with the non-state actors working in the larger Elgeyo Marakwet County who have in the past engaged on various initiatives and interventions on the Embobut Forest issue.
 - c) Meetings and interviews with the relevant duty-bearers who included the Elgeyo Marakwet County Governor, the County Commissioner, the Chief Conservator of Forests both at the National and the County levels, the County Assembly and the relevant Departmental Committees dealing with the Embobut Forest issue;
 - d) Meetings and interviews with communities affected by the evictions from the glades of Kapkok, Sinen, and Kaptirbai which drew the participation of the affected Sengwer community as well as other communities in Embobut Forest such as the larger Elgeyo Marakwet County.
 - e) Undertaking of both ground and aerial views of the forest to ascertain claims of settlement; the extent of the destruction of the Embobut Forest as well as the conservation the efforts by the local communities and the KFS aimed at restoring the Embobut Forest.

⁴ Marakwet East District, Embobut Forest Task Force Report 2009/2010 submitted to the Minister for Forestry and Wildlife Hon. Dr. Noah Wekesa on 6th June 2010 and can be accessed from the Ministry of Environment and Forestry. The Financing Agreement between the European Commission and the Republic of Kenya can be accessed at the European Union Delegation to Kenya and the Report of the Mid – Term Review of the WaTER Programme which can also be accessed at the European Union Delegation to Kenya.

Background to the High-Level Fact-Finding Mission.

6. The Fact-Finding Mission to the Embobut Forest was deployed after the suspension of the EU-Funded WaTER Project on account of alleged human rights violations that been reported in the Embobut Forest⁵. Following the suspension of the project, Hon. Keriako Tobiko, the Cabinet Secretary in charge of the Ministry of Environment and Forestry, held a meeting with the KNCHR where it was agreed that the Commission would constitute an independent High-Level Fact-Finding Mission to ascertain the actual human rights situation in Embobut Forest. The meeting with the Cabinet Secretary was attended by the KNCHR Chairperson Commissioner Kagwiria Mbogori, the Vice Chairperson Commissioner George Morara, the CEO and Secretary to the Commission Dr. Bernard Mogesa as well as Staff Members who included Kamanda Mucheke, Samson Omondi, Patience Nyange and Lynesther Mureu.
7. The Cabinet Secretary, Hon. Tobiko, informed the KNCHR delegation that he had held a meeting with the EU Mission to Kenya over the suspension of the WaTER Project and that there was consensus on the need for the resumption of the same based on a ‘win-win’ formula where the rights of the forest-dwelling communities would be upheld while at the same time promoting the imperative duty and responsibility of conserving, not only the Embobut Forest, but the entire Cherangany Hills Water tower complex. It was therefore expected that the proposed ‘win-win’ formula would be formulated through the findings of the High-Level Fact-Finding Mission. However, it is important to note that prior to the deployment of the High-Level Fact Finding Mission, the KNCHR had, on its own motion, carried out a number of interventions on the Embobut forest matter as enumerated hereunder:
 - **January, 2014:** The KNCHR deployed a Fact-Finding Mission to Embobut Forest following various allegations of forced evictions of forest dwellers reportedly carried out by the KFS. The KNCHR established that the KFS had used excessive force and forceful evictions had been conducted. The KNCHR further established that the

⁵ Daily Nation. January 18, 2018. *European Union withholds Sh3.8bn for Water Project*. Available online at: <https://www.nation.co.ke/news/European-Union-withholds-Sh3-8bn-for-water-project/1056-4267634-10rlrt2/index.html>

forced evictions had been on-going based on the strength of the findings of the report of a 2009 Taskforce for the Restoration of Embobut Forest that had recommended *inter alia* compensation before evictions⁶.

- **April 19th 2016:** A KNCHR Fact-Finding Mission, led by Ms Patricia Nyaundi, the then KNCHR Chief Executive Officer, sought to visit members of the Sengwer community living within Embobut Forest but this was not possible as the Mission was denied access to the forest by the Kenya Forest Service Rangers. Following the access-denial, the KNCHR in conjunction with the the National Lands Commission engaged the community and other stakeholders and in particular, the Sengwer Community within Embobut Forest and the Elgeyo-Marakwet County Government on the various issues affecting the forest dwellers with a view to coming up with possible solutions to the identified problems. The discussions centered on eviction of members of the Sengwer Community who assert indigenous forest dwellers' rights to Embobut Forest. It was reported then that the evictions conducted by the Kenya Forest Services within the Embobut Forest had led to a number of violation of human rights. The evictions were said to be illegal as the Community had obtained a conservatory court order barring the KFS from conducting any evictions until a case filed at the Eldoret Law Courts was concluded.
- **July 13th to 15th July 2016:** The KNCHR participated in a National Dialogue Forum meeting held in Nanyuki and organized by the NLC and Reconcile, where the NLC undertook to look into the issue of forest dwelling communities and find a sustainable solution. The meetings were meant to consolidate the position of the different forest dwelling communities with a view to finding a sustainable and broad-based solution to address their grievances. As a result of the National Dialogue, a roadmap was developed whose ultimate goal would be, "*Resolving the tenure conflict by*

⁶ The Taskforce had profiled 2,874 persons who were to be compensated at Kshs 410,000 @ household. The profiled beneficiaries included 1,216 Sengwer families, 770 permit holders, and 889 landslide victims (Cherangani). However, it is important to note that during the High-Level Fact Finding visit, the Mission was informed by various actors, and in particular some of the project affected communities and persons, that the compensation exercise did not sufficiently address their needs as it was fraught with numerous challenges. For instance, the High-Level Fact Finding Mission received complaints that the profiling of beneficiaries was shrouded in secrecy and that it lacked proper beneficiary-identification due to lack of a sound and competent public participation framework.

formalising as community lands current forest areas that are recognised by the Constitution as "the ancestral lands and lands traditionally occupied by hunter-gatherer communities (in line with Article 63 2(d) ii of the Constitution of Kenya)" through "community tenure on conservation conditions".

The National Dialogue Forum also came up with the following specific recommendations:

- a. That there was a need to initiate a process of relationship-building between traditional forest communities and Government bodies and agencies in order to incrementally develop and put in place pilot conservation projects in which communities' ownership of and right to live in and conserve their lands is recognized.
 - b. That there was a need for "community sustainability by-laws, governance structures and scouts to be recognised as the basis for forest conservation and land use planning, with crucial support from the key government agencies".⁷
- **August 16th to August 18th 2016:** The KNCHR undertook investigations on reported forceful eviction of the Sengwer Forest dwellers from Kapkok Glade in Embobut Forest, Elgeyo Marakwet County. The investigations documented several human rights violations among them destruction of property, arbitrary arrests and forceful eviction of the Sengwer community members.
 - **December 15th 2016:** The KNCHR joined the NLC in an aerial view of the Embobut Forest on a Ground-Truthing Mission to Resolve the Ancestral Land Right Claims of Forest Dwellers. After the aerile view tour, the NLC held a public forum at Kapyego, Elgeyo Marakwet County, during which the affected communities presented a memorandum to the NLC Chairman Dr. Muhammad Swazuri. The memorandum highlighted several concerns ranging from negligence, failure and reluctance by the Kenya Government and the Kenya Forest Service as well as other authorities to abide by national, regional and international human rights principles and treaties and standard procedures with respect to forceful evictions of populations. Responding to community concerns, Dr. Muhammad Swazuri observed that whereas the community had raised pertinent issues concerning their eviction

⁷ Nanyuki National Forum Report - Roadmap to securing forest dweller land & Resource Rights in Forest Conservation 13-15 July 2016. NLC & Reconcile

from the forest, it was important for the community to come to terms with the fact that the Government was not going to allow them settle back into the forest but that they would be granted user rights only.⁸ Dr. Swazuri's statement was not taken kindly by the affected community members present and many of them saw it [the statement] as going contrary to the recommendations of the Nanyuki National Dialogue Forum.

- **February 2nd to February 5th 2018:** The KNCHR deployed a Rapid Response Mission following reported cases of a fresh wave of evictions of the forest dwellers leading to the death of Robert Kiroich and the injury of David Kosgei. After this mission the KNCHR recommended an initiation of independent and thorough investigations into the various allegations against KFS and its involvement in various acts of human rights violations as well as the need for wider consultations on the then ongoing evictions.

8. Apart from the various deployments to the Embobut Forest captured above, the KNCHR has also urged that Alternative Dispute Resolution (ADR) methods be sought to resolve the outstanding complaints from the project-affected communities. The KNCHR has made the proposal for ADR through several avenues that have included meetings with the Principal Secretary, Ministry of Land and Urban Development, the Chief Conservator of Forests, Kenya Forest Services and meetings with the Principal Secretary Ministry of Environment and Natural Resources.
9. Through its engagement with the Ministry of Lands and Urban Development, the KNCHR is aware of the fact that based on the recommendations of the 2009 Taskforce on Embobut, the Ministry has taken the position that the National Government had already settled the issues in Embobut Forest and any claims relating to forest dwelling communities, and in

⁸ Limited to grazing of animals, collecting of firewood, cultural and other traditional rites and any other legal acts within the forest permitted by Kenya forest Act and Community land Act. However, it should be noted that the Community Land Act can create the conditions for securing Sengwer community land rights as the basis for supporting them to conserve their forests.

particular, the Sengwer Indigenous Community Members. The Ministry urged the KNCHR to be careful not to re-open a process that had otherwise been concluded. However, the view that the issue of land had been settled was strongly opposed by the forest dwelling communities, and in particular the Sengwer, who lay claim to the Embobut Forest as their ancestral land. The communities have further contended that the Report of the 2009 Taskforce on Embobut cannot form the basis of settling their land rights claims, arguing that the work of the Taskforce was fraught with numerous challenges and shortcomings.

10. The KNCHR has made a proposal with a section of the Sengwer community on the need for ADR and the community has in turn acknowledged the need to have structured engagements to ensure proper identification and profiling of the right people who qualify to be regarded as forest dwelling communities. On its part, the Kenyan Government has, through its various line Ministries and Agencies, expressed its willingness to ensure structured and regulated access of forest communities into forests to carry out rituals and other traditional activities. It is important to note that the Sengwer of Embobut Community leadership, (*which is appointed by the leadership of the three glades of Kapkok, Kaptirbai and Koropkwen by consensus and endorsed by the whole community to lead them*), have made it clear that they remain willing to engage in structured dialogue with other key actors in the on-going WaTER Project. However, they intimated to the KNCHR that through experience, KFS Officers are known not to turn up for dialogue even when invited (A quoted case in point: *Invitation by the Elgeyo-Marakwet County Government on 22nd February 2018*).⁹

The Legal and Normative Framework on Conservation

The Constitution of Kenya and other Relevant Statutory Laws and Policies

11. At the National Level, the legal and normative framework guiding conservation efforts is the Constitution of Kenya 2010 as well as other relevant Statutory Laws and Policies. Chapter Five of the Constitution sets out an elaborate framework on matters of Land and the Environment.

⁹ 'Securing Embobut as Community Land subject to Conservation Rules', Sengwer of Embobut Community Leadership Proposal to Elgeyo Marakwet County Joint Committee on 22 February 2018

12. The Rights of Minorities and Marginalized Groups to develop their cultural values, languages and practices are set out in Article 56 (d) of the Constitution of Kenya. Article 63 (2) (d) of the Constitution of Kenya recognizes as community land, *ancestral lands and lands traditionally occupied by hunter-gatherer communities*.¹⁰ The National Land Commission is required, under Article 67 (2) (e) of the Constitution, to come up with recommendations on redressing present or historical land injustices. The foregoing constitutional recognition of Minorities and Marginalized Groups forms the basis of not only the land rights claims, but also, a host of other rights claimed by the Sengwer Community as well as other indigenous communities in Kenya.
13. The Forest Conservation and Management Act, 2016, at Section 4, provides for public participation and community involvement in the management of forests and calls upon the State to draw from international best practices in the management and conservation of forests among other guiding principles. The Environmental and Land Court Act, 2011, the Community Land Act 2016, the National Land Commission Act 2012 (Revised 2016), the IDPs Act, 2012, the National Land Policy of 2009 and the National Land Use Policy of 2018 all provide a sufficient legal and policy framework capable of supporting forest conservation and management efforts within a human rights framework.
14. Principle 5 of the IDPs Act, 2012 calls upon all authorities and international actors to respect and ensure respect for their obligations under international law, including human rights and humanitarian law, in all circumstances, so as to prevent and avoid conditions that might lead to displacement of persons. Principle 6 (1) of the IDPs Act, 2012 states that: *Every human being shall have the right to be protected against being arbitrarily displaced from his or her home or place of habitual residence*. Broadly speaking, the IDPs Act, 2012 as well as the other Acts and Policies outlined in Paragraph 13 above provide a robust national legal and legislative policy framework for environmental conservation efforts which fully support the respect of the rights of indigenous peoples in conservation efforts within the context of a ‘win-win’ formula.

¹⁰ Article 63 (2) (d) provides that Community Land consists of land that is— (i) lawfully held, managed or used by specific communities as community forests, grazing areas or shrines; (ii) ancestral lands and lands traditionally occupied by hunter-gatherer communities but not including any public land held in trust by the county government under Article 62 (2).

The African Charter on Human and Peoples Rights (ACHPR)

15. The ACHPR recognizes and protects the rights of indigenous communities. In the *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya case*—popularly known as *the Endorois case*, the African Commission on Human and Peoples Rights reaffirmed its commitment to promoting and protecting the rights of indigenous peoples when it ruled that Kenya had failed to recognize and protect the Endorois’ right to their ancestral lands and had refused to pay adequate compensation or grant restitution of their land, all in violation of the African Charter. In the *Ogiek of Mau case*, the African Court on Human and People’s Rights in applying the provisions of the ACHPR, found that the Government of Kenya’s “*purported reason of preserving the natural environment cannot constitute a legitimate justification for the [Kenyan State’s] interference with the Ogiek’s exercise of their cultural rights.*”¹¹

Reports of the African Commission Working Group on Indigenous Populations/Communities.

16. A number of reports generated by the African Commission Working Group on Indigenous Populations/Communities have expressly called upon African States and Governments (Kenya included) to take measures to respect, protect and fulfill the rights of indigenous peoples in their respective territories. The Working Group reports have recognized the unique socio-economic and political position of marginalization and vulnerability suffered by indigenous peoples and gone ahead to make a raft of recommendations aimed at promoting the fullest enjoyment of human rights for indigenous peoples.
17. Quoting an earlier (2003) report of its predecessor, the African Commission’s WGIP 2010 Mission to Kenya¹² summarizes the characteristic features of indigenous peoples in Africa as:

“To summarize briefly: the overall characteristics of the groups identifying themselves as indigenous peoples: their cultures and ways of life differ considerably from the dominant society and their cultures are under threat, in some cases to the extent of extinction. A key characteristic for most of them is that the survival of their particular way of life depends on access

¹¹ See Judgment dated 26th May 2017 in Application No. 006/2012 African Commission on Human and Peoples’ Rights V Republic of Kenya at Paragraph 189.

¹² Research and Information Visit to Kenya: Report of the African Commission’s Working Group of Experts on Indigenous Populations/ Communities, 1-19 March 2010).

and rights to their traditional land and the natural resources thereon. They suffer from discrimination as they are being regarded as less developed and less advanced than other more dominant sectors of society. They often live in inaccessible regions, often geographically isolated and suffer from various forms of marginalization, both politically and socially. They are subject to domination and exploitation within national political and economic structures that are commonly designed to reflect the interests and activities of the national majority. This discrimination, domination and marginalization violates their human rights as peoples/communities, threatens the continuation of their cultures and ways of life and prevents them from being able to genuinely participate in deciding on their own future and forms of development” (**Report of the African Commission’s Working Group of Experts on Indigenous Populations/Communities, 2003:89**).

United Nations Declaration on the Rights of Indigenous Peoples (UNDRIPs)

18. Article 10 of the UNDRIPs provides that Indigenous People shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.
19. Article 19 of the UNDRIPs requires the State to obtain the Free Prior and Informed Consent (FPIC) of the Indigenous Peoples concerned through their own representative institutions before adopting and implementing legislative or administrative measures that may affect them. The State must also obtain the Indigenous Peoples’ FPIC before the undertaking of projects that affect the Indigenous People’ right to land, territory and other resources (Article 32).
20. Articles 25, 26 and 27 UNDRIPs affirm the right of indigenous peoples to own and control their lands. Article 28 of the UNDRIPs entitles Indigenous People to restitution or other appropriate redress in the event that they have unwillingly lost possession of their lands when such lands are “*confiscated, taken, occupied or damaged*” without their FPIC.

The Rio Declaration on Environment and Development (1992)

21. Although a non-binding, or "soft law" instrument, the Rio Declaration provides important principles of International Environmental Law, especially on sustainable development. The relevant principles are highlighted hereunder:-

Principle 10: provides that Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

Principle 22: Acknowledges the critical role of indigenous people and their communities in conservation and urges states to recognize and appreciate that critical role.¹³

ILO Indigenous and Tribal Peoples Convention (Convention 169)

22. The Convention recognizes that Self-identification as indigenous or tribal groups shall be regarded as a fundamental criterion for determining the groups to which the Convention apply. The Convention (Article 6) obligates states to consult indigenous peoples through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly. The consultations should be formal and exercised in good faith. The Convention in Articles 14 to 19 enshrines land rights for Indigenous People. Article 16 of the Convention provides that Indigenous People shall not be forcibly removed from their lands unless they have provided their FPIC and entitles them the right to fair reparation including restitution and compensation and where possible the option of returning to their lands whenever such violations occur.

The United Nations Convention on Biological Diversity (COB)

¹³ Principle 22 provides that "Indigenous people and their communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development"

23. The COB has recognized the valuable contribution that indigenous peoples and local communities' ways of life play in conservation. The COB requires state parties to protect and integrate the rights and way of life of indigenous and local communities into the processes of biological conservation¹⁴.

The Right to Self-Determination

24. Self-determination is considered an overarching right to indigenous peoples because of its cross-cutting nature and because it affirms their right to freely pursue their economic, social and cultural development. It is crucial to the issue of land conservation efforts because of its links with land rights and the right to participate within processes and decisions affecting them, such as the establishment and management of protected areas.¹⁵
25. The right is provided for under the International Covenant on Civil and Political Rights (1966, article 1) and the International Covenant on Economic, Social and Cultural Rights (1966, article 1). It is included in the United Nations Declaration on the Rights of Indigenous Peoples (2007, Article 3). Human Rights Treaty Bodies, notably the Human Rights Committee, the Committee on Economic, Social and Cultural Rights and the Committee on the Elimination of Racial Discrimination, have affirmed that States must recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands and to participate in the management and conservation of the associated natural resources.¹⁶

Reports of the UN Special Rapporteur on the Rights of Indigenous Peoples

26. The UN Special Rapporteur on the Rights of Indigenous Peoples has, through various reports, urged States to respect the rights of indigenous peoples. In her 2017 Report, the Special Rapporteur noted that, *"the Indigenous peoples are among those who have least contributed to the problem of climate change yet are the ones suffering from the worst impacts of this. They are disproportionately vulnerable to climate change because many of them depend on ecosystems that are*

¹⁴ See Articles 8 (j) and 10 (c).

¹⁵ See Report of the Special Rapporteur of the Human Rights Council on the rights of indigenous peoples, Victoria Tauli-Corpuz (A/71/229) July 2016

¹⁶ See Committee on the Elimination of Racial Discrimination general recommendation No. 23; concluding observations for Sri Lanka, in A/56/18, para. 335; see also CERD/C/DEC/SUR/1; CCPR/C/KEN/CO/3; E/C.12/KHM/CO/1.

*particularly prone to the effects of climate change and extreme weather events such as floods, droughts, heat waves, wildfires and cyclones*¹⁷

27. The Special Rapporteur further notes that there is a correlation between secure indigenous land tenure and positive conservation outcomes. She gives the example of the Brazilian Amazon results which show that in areas where the State recognised the forest rights of indigenous peoples, the deforestation rate was 11 times lower compared to the forests where their rights were not recognised. What is more, the Special Rapporteur notes that community-owned and managed forests deliver both superior community benefits and greater carbon storage. She concludes that strengthening indigenous peoples rights to their forests is an effective way for governments to meet climate goals¹⁸.
28. In her 2017 Report, the Special Rapporteur avers that Indigenous Peoples are not simply victims of climate change. On the contrary, she argues that Indigenous peoples have an important contribution to make to address climate change. She notes that due to their close relationship with the environment, indigenous peoples are uniquely positioned to adapt to climate change. It is therefore important that indigenous peoples be viewed as *'friends of as opposed to enemies of conservation'* as they are repositories of learning and knowledge on how to successfully cope with local-level climate change and effectively respond to major environmental changes and natural disasters. Indigenous peoples play a fundamental role in the conservation of biological diversity, protection of forests and other natural resources, and their traditional knowledge of the environment can substantively enrich scientific knowledge and adaptation activities when taking climate change-related actions¹⁹.
29. On climate financing, the Special Rapporteur raises concerns that most of funding is geared towards climate mitigation as opposed to climate adaption strategies. She notes that climate mitigation strategies tend to exclude effective participation of Indigenous Peoples thereby providing an avenue for the violation of their rights. She further notes that some of alleged human rights violations arising out of climate mitigation strategies include evictions and forced displacements, suppression of the freedom of expression and assembly, arbitrary

¹⁷ A/HRC/36/46. Report of the Special Rapporteur on the rights of indigenous peoples. Human Rights Council. Thirty-sixth session. 11 - 29 September 2017.

¹⁸ Ibid

¹⁹ Ibid.

arrests and extrajudicial executions. Indigenous Peoples (and in particular, Human Rights Defenders) who defend the rights to their lands are increasing coming under threat and being persecuted in the context of investment projects, which may include climate change mitigation measures. As a result, projects may come to a halt and result in the withholding of financial support by multilateral funds, as was the case in Honduras [and recently in Kenya's EU-Funded WaTER Project]²⁰

The Sengwer as an Indigenous People²¹

Who are the Sengwer?

30. The Sengwer (also referred to as Cherangany, a nickname given to them by the Maasai) are hunter-gatherers, who live in the Trans-Nzoia, Marakwet and West Pokot Districts in and around the Cherangany Hills. In a letter to the Constitution of Kenya Review Commission, the Sengwer outlined in detail the boundaries of their ancestral land, which covered most of the Cherangany hills and the lowland of the region²². The majority of them live in the Cherangany Hill Catchment area. The published data of the 1999 census did not provide information on their ethnographic distribution. However, at the time of the foregoing census, the Sengwer themselves claimed to have been numbering between 40,000 (Tiampati 2002:63) and 60,000 (Kiptum 2001) members. No scientific material could be located to authenticate this claim²³.

²⁰ Ibid.

²¹ The contents of this section have been largely drawn from a Government of Kenya of 2006 on, *An Indigenous Peoples Plan*, prepared by the Kenya Agricultural research Institute (KARI) prior to the implementation of *the Kenya Agricultural Productivity and Sustainable Land Management Project (KAP-SLM)*.

²² The Sengwer made the following submission to the Review Commission as to the boundaries of their ancestral lands: "The ancestral land of the Sengwer commences from Kiporoom River in Uasin Gishu District. It extends along Kapsumbeywet river through Ziwa (Sirikwa) Centre, Moiben Posta and Kose Hills in Uasin Gishu. From Kose Hills, it goes down to join Moiben river. The boundary goes up river Moiben to the confluence of Ko'ngipsebe and Kimowo streams. It turns eastwards to cover areas of Maron sub-location in Emboput [Embobut] location in Marakwet District. Turning to the west it then goes to Kamolokon along Marakwet/West Pokot and Marakwet boundary. From here it drops to Sebit, Somor, then to Kongelai and up along Swom river. From Swom river to the confluence of Swom and Cheptenden river. From Cheptenden river to the confluence of Cheptenden river and Moiben river where these two rivers confluence with Kiboorum".

²³ The subsequent census of 2009 did not capture the ethnographic profile of the Sengwer as well as other indigenous populations in Kenya. We at the KNCHR strongly believe that this data should be captured as the basis of offering better human rights guarantees to the Sengwer and other indigenous peoples in Kenya. We

The History of the Sengwer People

31. Oral history traces the history of the Sengwer back to a man called Sengwer, who is considered to be the mythical first inhabitant of the Cherangany hills. It is said that he had two sons named Sirikwa (elder) and Mitia, whose children formed the clans: Kapchepororwo, Kapchepar (Kaptoyoi), Kapumpo, Kaptogom, Kapcherop, Kaki-sango, Kimarich (Kamosus), Kapsormei (Kapseto), Kapteteke, Kipsirat, Kamengetiony (Kopoch & Kapkotet), Kaplema and Kamesieu. Each patrilineage is said to have had their portion of land running from the highlands to the plains. The elders said that before the advent of the colonialists, the Sengwer lived during the rainy season in the vast plains of what is today Trans-Nzoia and during the dry season in the forest on the mountain slopes of the Cherangany hills. It is said that the Sengwer lived in good relation with their neighbours as they were not competing for the same resources, but were mostly involved in the barter trade of honey and dry meat for food crops and/or milk.
32. As was the case with so many other ethnic minorities and indigenous peoples, the interests of the Sengwer were considered by the British to be served best if they were forced to assimilate with their dominant neighbours. As a consequence of the foregoing British colonial government decision, the traditional structure of the Sengwer was not recognised and integrated as an independent ethnic group in the system of Britain's indirect rule approach. Instead, for purposes of governance and administration, they were considered to be sub-structure of their neighbours. As their land in the plains of Trans Nzoia turned out to be the best area for agricultural production in Kenya, they were displaced entirely from there to make way for white farmers. A minority stayed behind as farm workers, but the majority went up into the forests [including Embobut Forest] of the Cherangany Hills.
33. When the Colonial Government started to protect the water-catchments and forests in the 1920s and 30s as forest reserves, they acknowledged the presence of the Sengwer in the Embobut Forest and provided them with all usufructuary rights for this area as well as the right to farm on the openings in the forest. They enjoyed these rights until the 1970s, when a new model of conservation recommended that all hunting should be prohibited and forests cleared of people. The 1970s decision further exacerbated the plight of the Sengwer people in

are currently working in close collaboration with the Kenya National Bureau of Statistics to have this data captured in the up-coming 2019 national census.

so far as land rights claims are concerned. For instance, since the Sengwer were not considered to be an independent ethnic group, they were also not invited to join the settlement schemes in which the independent Kenya redistributed the white farms to the farm workers and the dominant ethnic groups of the area. The 2006 KARI report noted that while most Sengwer are officially landless, some few Sengwer, especially in the northern parts of the Cherangany Hills received some land, even though this same land was hotly contested.

The Livelihood of the Sengwer People

34. Before the colonial time, the Sengwer lived predominantly as hunters and honey-gatherers. However, following their contacts with the Arabs and the Maasai, some adopted small scale agriculture (shifting cultivation) and/or livestock rearing, but it is said that hunting remained their main source of livelihood until the 1920s. The Sengwer employed collective as well as individual hunting techniques. During the *Sakas* (collective hunting) a group of people would try to circle large animals such as elephants and buffalos on the plains and spear or arrow them down. In contrast, the *Kwo* (individual hunting) was carried out by a nuclear family and mostly based on the use of poisoned baits and/or traps.
35. Gathering of fruits and other non-timber-forest-products is mostly done by women, while honey collection from beehives as well as from natural places such as holes in trees etc. is traditionally a male activity. Honey has—beside eating—a variety of uses for the Sengwer as outlined below:
 - It is mixed with water as a daily drink (breakfast) and used to brew beer;
 - Honey plays a major role in marriages and other ceremonies. Before marriage, honey is given to the mother of the bride as part of the dowry. The night before marriage, the wife to-be and husband to-be smear honey on their future house, each starting in a different direction until they meet and unite.
 - Honey has also medicinal value and use. People apply it to their body to drive away mosquitoes and to relieve muscle pains.

- Another smelly mixture of honey is spread around the compound to keep wildlife at away.
36. The Sengwer inherited Millet and Sorghum from the Arab as the “traditional” crops mostly planted in the lowlands. These days, the Sengwer also grow maize, potatoes, beans and a variety of other vegetables. Before land became scarce, the Sengwer used shifting cultivation patterns and changed their farms every three years. The Sengwer learned to keep animals, especially cattle, from the Maasai, when these arrived in the area in the context of their expansion from the north.
 37. Most of the ancestral land of the Sengwer is occupied either by other ethnic groups or demarcated as forests, which prohibit legal settlements or agriculture. The 2006 KARI reported noted that around only 20% of the Sengwer have legal access to land, but that these plots are on average only 2.5 acres per household, i.e. very small. The majority of members of the Sengwer community members are landless. The KARI report also noted that significant parts of the ancestral lands of the Sengwer had been demarcated as forests as follows: Kapkanyar 70,000 acres; Kipteber 57,000 acres; Kapolet 10,800 acres; Chemurgoi 9,800 acres; Sogotio 8,800 acres; Kerer 5,340 acres; Kaisingor 2,680 acres and Embobut 8,000 acres.

The Sengwer of Embobut Forest.

38. When the KARI Team visited the Embobut Forest in 2006 in the then Marakwet District, local sources at that time stated that there were approximately 5,000 Sengwer living in the Embobut forest. These members of the Sengwer Community claimed to have arrived in the area in the 1930s when they were displaced from the plains of Trans-Nzoia. The KARI team noted that the Sengwer settlements were located right on top of the highest lines of the Cherangany hills, with a view into the Rift Valley and the plains of Trans-Nzoia on either side, but without roads, schools, health infrastructure as it is officially considered as forest. The people who took refuge there reported of ongoing conflicts with forest officials and neighbouring communities. They commonly stated that the forest guards would arrive every three to four years to burn and destroy their houses and farms in the name of forest conservation and to loot their property.

39. The Sengwer of the Embobut forest made clear it clear to the KARI Team then that the local and central administration did not react to any of their complaints against the evictions, with the argument that the Sengwer were illegally in the forest area and that as a result, they were not entitled to any protection from the state and the county council. It was further noted that the constant taking of land and the constantly increasing restrictions of the access to natural resources had further increased the sedentarisation, marginalisation, social discrimination and impoverishment of the Sengwer as well as other indigenous peoples like the Ogiek and Ilchamus. The KARI team also noted that the Sengwer, who are more dependent on forests as their main source of livelihood than their neighbours were—often in total disrespect and disregard of their legal utilisation rights—forced out of the forest with little or no compensation and with little or no land to go to or resources to live on.
40. For the Sengwer people living in Embobut Forest²⁴, although we now have a robust constitution as well as a number of supporting national and international legal and human rights instruments, it's sad to note that not much has changed in terms of ensuring that their rights as an indigenous people are not only respected but also promoted and fulfilled. As is clearly captured elsewhere in this report, when the KNCHR High-Level Fact-Finding team visited the area in 2018, twelve years later after the 2006 report published by the KARI Team, the rights of the Sengwer people continue to be violated, and more so, within a context where they are seen as 'illegal intruders' as opposed to 'rightful claimants' of their ancestral land, which is the Embobut Forest. We align ourselves with the sentiments expressed by the KARI Team in 2006 by re-stating that, the Sengwer (and indeed all the other indigenous peoples in Kenya) are:

Citizens equal to all other Kenyans, but they have neither the same access to land, resources and protection against land grabbers and cattle rustlers as other groups, nor the same influence, legal status, organizational, technical or economic capacities as other citizens of Kenya²⁵.

²⁴ The Fact-Finding Mission was told of the following sub-clans of Sengwer who call Embobut Forest home: 1. Kakisang 2.Kapsolit 3. Kakimesai 4. Kakimut 5. Kakasiwat 6.Kacheplitau 7. Kapkut 8. Kapkuna 9. Kaptoyoi 10. Kapsuma 11. Kakimong 12. Kapsaniak 13. Kakibo 14. Kakanawa 15. Kapchemwelel 16. Kapkures 17. Kamoluje 18.Kamasomei 19. Kalotukor 20. Kachelekeu 21. Kalembug

²⁵ Supra Note 18

Embobut Forest Destruction and the Genesis of the Evictions

41. The Embobut Forest is situated in Elgeyo/Marakwet County in the Rift Valley. It borders Trans Nzoia and Uasin Gishu to the West, Kerio Valley to the East, and West Pokot to the North respectively. The forest extends from Latitude 0 51 to 10 19 North and from Longitude 35 29 to 35 43 East thus forming an area of approximately 1,638 km square. Embobut Forest covers an area of 21,933.5 hectares. The forest was gazetted through Proclamation Order 26 of 6th November 1954 and declared a central forest vide a subsequent legal notice. Embobut Forest has major significance not just for Elgeyo Marakwet County but for the Country as it forms part of the Cherangani Water Tower which is important for water catchment, and sits astride the watershed between the Lake Victoria and Lake Turkana basins.
42. Streams to the West of the Embobut Forest watershed feed the Nzoia river system which flows into Lake Victoria and streams to the East of the Forest flow into the Kerio river system. The Cherangani Forest ecosystem is a source of several rivers that include: Nzoia, Morum, Kapoiet, Saiwa, Embobut, Siga and Weiwei. Within the ecosystems, these rivers originate as small streams that gradually combine to form the rivers. They eventually drain into either Lake Victoria through River Nzoia or into Lake Turkana through Kerio River to the east. This is a significant natural occurrence that calls on various efforts to be undertaken to ensure proper conservation.
43. Embobut Forest has had a history of human settlement by the Sengwer, who identify themselves and are recognised as indigenous peoples. They are traditionally hunter-gatherers and forest-dwelling peoples occupying the forests and glades of Embobut as well as a much larger lowland area, which was also part of their land before colonization. The Embobut Forest is also occupied by the Marakwets and the Pokots who also use the forest areas to graze cattle. While the Colonial Government failed to recognize the ancestral land claim of the Sengwer to the Embobut Forest, it nevertheless went ahead and issued the Sengwer and some of the Marakwets with permits to graze within Embobut Forest during the dry season. The two communities were required to move out when pasture was available in the native lands. These movements in and out of the forest resulted into some form of semi-permanent settlements in the forest.

44. When the permits were initially issued to the Sengwer and Marakwet, farming activities were not allowed and as a result, the forest remained intact. Over the years, the descendants of the Sengwer hunters and gatherers and Marakwet pastoralists had multiplied to a population of about 19,500 people by 2013 occupying 16,000 ha. of Embobut Forest. The rapid population growth was fueled by forest neighboring communities who left their farms in search of more fertile areas in the forest for grazing, farming and settlement.
45. The large population pressure in the forest resulted in opening up of areas for agricultural crop farming and permanent settlement that led to massive forest degradation with far-reaching effects on the forest that include: reduced water catchment capacity for the region, low quality of discharge into the rivers, reduced wildlife habitat, limited supply of forest products such as timber and honey, increased land degradation through increased soil erosion, accelerated possibilities for more land-slides on the escapement and valley, reduced forest biodiversity as a result of poaching of high market value forest products such as timber, charcoal and game meat and increased conflict on access to natural resources within the forest.

The Embobut Forest Restoration Task Force and Compensation

46. During the 1980s, it is reported that Kenya had a forest cover of up to 12%. However, due to various factors, the forest cover experienced a decline from 7.89% in 1990 to 5.90 % in 2000. Consequently, there was public outcry and concern in the early 2000's over the environmental impacts of deforestation that resulted in the revision and updating of both the forest policy and legislation aimed at improving governance of forest resources and reversing the trend in forest degradation and destruction. Various reforms have seen a spike of the forest cover up to 6.99% in 2010. The aim of the government is to achieve a 10% forest cover according to Kenya Vision 2030. To this effect, revision of policy regarding the management of forests has been done, as well as legislation on the same.
47. The policy of seeking to conserve Embobut Forest by evicting the forest dwelling communities, rather than supporting them to use their governance structures to enforce their community by-laws with assistance from KFS was accelerated in 2009 through a meeting held on 4th April 2009 at Moi Girls Secondary School, Kapsowar. The meeting, which was attended by 173 people and comprised of leaders from the Sengwer and

Marakwet communities as well as Government representatives, agreed among others on a common decision that all people encroaching in the forest shall leave immediately and be temporary settled in seven glades of Sinen, Kewabus, Kapkok, Kamalogon/Kabusien, Kessom, Koropkwen/Moyokwo and Kaptribai²⁶. The inhabitants in the glades were to be supported by the Government with food and non-food items which was initially implemented but later stopped after five months as it was not sustainable.

48. The Kapsowar meeting made further resolutions towards the conservation of the forest which included among others the need for long term solutions and plans for forest protection and conservation, the need for the constitution of an all-inclusive taskforce to look into the forest issues to ensure its proper protection and conservation, the removal of populations who had settled deep in the gazetted forest with immediate effect and all the community leaders and community to fully participate in the rehabilitation and reforestation of degraded forest areas. The Kapsowar meeting led to the evacuation of about 12,000 households and 11,500 cows and 26,700 sheep being removed from 11,000 ha of recovered forest land. Majority of the animals moved and relocated to Kapolet area with the evictees moved into three (3) glades awaiting resettlement and their activities being limited to grazing and with no cultivation activity. However, the terms of the re-settlement were not clear as both the Government and the forest dwelling communities maintained their different interpretations on the same. For the Government, resettlement meant the removal of the forest dwelling communities from Embobut Forest, whereas for the forest dwelling communities, resettlement meant agreeing with the Government on the boundaries where the forest dwelling-communities, and particularly the Sengwer, would securely live in Embobut Forest glades.
49. It is the Kapsowar meeting and the subsequent engagement that led to the establishment of a Task Force by the then Ministry of Forestry and Wildlife in 2009 to, among others things, investigate, profile and determine genuine landless community members removed from the forest and make recommendations on their permanent resettlement and on the conservation efforts to be undertaken. The Task Force was mandated to investigate and determine the genuine people living in Embobut Forest and make recommendations to the Minister on

²⁶ See Annex 3 to this report. The minutes of the Kapsowar Meeting can be accessed at the KNCHR offices as well as with the KFS Zonal Manager based at Kapsowar.

their permanent resettlement with the overall goal of finding lasting solutions for the restoration of the degraded and encroached forest. The specific TORs for the Task Force were:

- i. To enquire and determine the categories of squatters affected by eviction and verify those with genuine right for alternative settlement;
- ii. To collect and collate through public barazas and other sources the number and categories of vetted genuine squatters to be presented to the government for alternative resettlement consideration;
- iii. To find convenient temporary resettlement sites as holding grounds for genuine squatters while waiting for a decision on permanent alternative resettlement to be made and
- iv. To take inventory of public utilities in the forest land below the road towards Kerio Valley with a view to proposing action to be taken.

50. The Task Force delivered its final report to the appointing authority, Hon. Dr. Noah Wekesa, the then Minister for Forestry and Wildlife on 6th January 2010 with a raft of findings and recommendations on the restoration of the Embobut Forest. However, the High-Level Fact-Finding Mission wishes to report on the following shortcomings of the Task Force:

- i. The Task Force in its profiling continued to label the Sengwer/Kimala as ‘squatters in the forest’ and like all other previous interventions in Embobut Forest, failed to recognize their ancestral land claim. As a result, it continued to rely on the permits issued the Sengwer/Kimala and the victims of landslides that had been affected by natural calamities as the only bonafide people for compensation. Apart from failing to recognize the land rights of the Sengwer, the permit-holders approach technically locked out many potential groups that were occupying the forest and were thus equally eligible for the proposed compensation;
- ii. The Task Force recommended the compensation of the above described project-affected person with alternative land for settlement. However, the Government in implementing this recommendation opted to have this compensation done in

monetary terms as opposed to the recommended land which was not well received by the recipient communities;

- iii. The monetary value provided for the compensation of Kshs. 410,000 per household was not enough to provide any reasonable resettlement land for the various households. This meant that majority of the households ended up using the money for other purposes and especially upkeep since the money could not acquire an acre of land;
 - iv. The profiling done for the compensation had only considered the heads of the households who are male as per the forest dwelling community norms and this followed that it is only the males that were paid the Kshs.410,000. The fact finding mission was informed that majority of the male who received this money disappeared upon receipt of the money and only came back to their homes upon using all the money. Some of them were infected with HIV/AIDS and upon their return ended up infecting their partners; and
 - v. The Task Force had recommended for the compensation of the forest dwelling communities with alternative land and not as monetary value compensation. The forest dwelling communities thus considered the monetary compensation as “a token” for the various injustices that had been meted out on them by the Government and not compensation for leaving the forest. Consequently, a section of the forest dwelling communities have proposed for a way out of “paying back“ the Government to allow them settle on their ancestral land, or for those who received the money consider accepting it as compensation for past harm suffered arising from the burning of their homes.
51. The analysis above points to the fact that the continued refusal to recognize the ancestral lands of the Sengwer in Embobut Forest and the failure by the Government to implement the section of the report that called for alternative resettlement land for the forest dwelling communities, is partly to blame for the continued degradation of the forest and the continued presence of those communities without ancestral claims in the forest. Any future resettlement initiatives must be guided by an approach that distinguishes between those who have rights to remain on their community land under Article 63 (2) (d) (ii) of the Constitution (and who can have their land rights registered under the Community Land Act

2016, and who Government agencies can support to conserve the forest) and encroachers for whom compensation may be appropriate.

52. As a result of the unsatisfactory manner in which the Taskforce handled the Embobut Forest Restoration matter, a number of legal proceedings ensued as listed below.

The Court Cases on the Embobut Forest Matter.

53. The long drawn conflict pitting the KFS against members of the Sengwer community and other communities in Embobut Forest has resulted into numerous court cases. Some of the Court Case in the Embobut Forest matter include:

A. David Kiptum Yator & 2 Others (Suing as leaders and Representatives of Sengwer Community) Vs. The Kenya Forest Service, KFS zonal Manager ELC. Petition No. 15 of 2013

This matter involved the members of the Sengwer Community who petitioned the Court and made prayers that the Court makes:

- i. A declaration that the violent attacks, burning of houses, destruction of property, eviction of the members of the Sengwer Community from Embobut and threats of evictions is a violation of the Sengwer rights under Articles 26,28,29,40,42, 44 and 56 of the Constitution;
- ii. A declaration that the actions of the County Commissioner and the KFS and its officers in burning houses, destroying property was a violation of values and principles of governance under Article 10, especially because it is inimical to the values of human rights, rule of law, good governance and protection of minorities and marginalized group, Bill of Rights and Public Officers Ethics Act;
- iii. A declaration that the KFS is in violation of right to property of the Sengwer community of Embobut in regard of their community land protected under Article 40 as read together with Article 63 (2)(d) of the Constitution and
- iv. An order for a permanent injunction restraining KFS and their agents from interfering with enjoyment of life and property of the Sengwer Community of Embobut through either harassment, destruction of property or evictions.

54. In the matter above, the Court made an order that status quo be maintained until the final hearing and determination of the case. The 26th March 2013 Court injunction prohibited the Respondents “*from interfering with the petitioner’s occupation, control and quiet enjoyment of the land they and the members of the Sengwer community live on at Embobut forest*”. However, in complete violation of the Court Order, the KFS went on with violent evictions of members of the Sengwer Community from Embobut Forest. The community later went to the same court and made an application for contempt of court against KFS for failing to maintain the status quo by stopping evictions.
55. The court ruled on 18th February 2015, that although the application for contempt could not succeed on technical grounds (because the Community Advocates had not effected personal service on those accused of contempt), nevertheless it was, “*...evident that some members of the Sengwer community were evicted and or vacated at the expense of the conservatory orders in place. This was not to happen given the fact that status quo was to be maintained pending this petition in court*” (see page 61 of the Ruling).
56. However, a different Judge interpreted the ‘*status quo*’ as contained in the orders mentioned in paragraph 14 above to mean that at the time of making the order, the Sengwer were already evicted and none of them resided in the forest. To this Sengwer, this latter interpretation of the Court Order seemed to flatly contradict the ruling of 18th February 2015. For the KFS, this latter interpretation then appeared to validate the continued evictions of the Sengwer from the Embobut Forest. The Sengwer community immediately made another application seeking for the recusal of the Judge citing lack of independence on the part of the said Judge. This application is yet to be determined.

B. Petition Number 3 of 2018

57. This petition is pending before the Environment and Land Court, in Eldoret and is based on a similar cause of action save for the increase in the number of petitioners and respondents to twenty (21) and twelve (12) respectively as opposed to the initial number of three(3) petitioners and five (5) respondents. In this petition the petitioners sued the respondents jointly and severally for previous and recent evictions and criminal attacks by KFS guards that started on Christmas Day December, 25th 2017 on members of the Sengwer Community

where one person was killed by the KFS Rangers and many others injured and property destroyed.

C. Joseph Kisang & Two (2) Others Representing twenty seven (27) members of Sinen Glade, Eldoret High Court Constitutional Petition No. 3 of 2014

58. The petitioners in this matter identify themselves as Marakwet members of the Sinen Glade, belonging to the Sambirir sub-clan of Marakwet. They sued the defunct Ministry of Special Programmes in 2013 in relation to matters of compensation, on the grounds that:
- i. Names of twenty seven (27) persons were deleted from the compensation list compiled by the Task Force formed by the Minister for Forestry and Wildlife to investigate and identify genuine squatters in Embobut forest;
 - ii. The Petitioners also identify themselves as permit-holders like the rest of the squatters at Sinen Glade and that they are a total of four hundred and fifty one (451) people; and
 - iii. That as from 15th November, 2013 payments were made and the KCB Kapsowar Branch Manager informed them that their names were deleted on 18th November, 2013 and substituted with other names.
59. This petition failed to proceed and the Petitioners cited political interference. The Petitioners alleged that people who wield political power went ahead to threaten and intimidate their advocate who ceased handling the petition. The Petitioners claim they are expecting that the Government will compensate them with Ksh. 410,000 like the rest. They are now squatters at Cheptobot trading center which is adjacent to Sinen Glade.
60. It is the ongoing stand-off and conflicts as identified above in regards to the Embobut Forest restoration project that have led to the continued violations of human rights in the Embobut Forest, ultimately leading to the suspension of the EU-Funded WaTER Project for the restoration of 11 water catchment towers in Kenya. However, it is instructive to note that the WaTER Project as taken note of some of the drivers of the conflict and adopted measures for redressing the same within the Mid-term review framework of the project as elaborated next.

The Water Tower Protection and Climate Change Adaptation Programme (the WaTER Project)

61. The WaTER Project is an estimated EUR 31,000,000 project to be implemented over a 72 months period, funded by the European Union and implemented by the Ministry of Environment, Water and Natural Resources (MoEWNRs) through its various implementing agencies. The project aims to improve the quality of the ecosystem services provided by Kenyas' water towers through improved landscape and natural resources management and waste management systems leading to increased benefits to the communities from forest, agriculture and agroforestry land use systems. The project identifies several cross – cutting issues for achievement of its objectives that include climate change, environmental sustainability, gender equality, good governance and human rights. The contract of this project was signed on 12th March 2014 by the European Commission and on 24th September 2014 by the Cabinet Secretary, National Treasury.
62. The project had a phased implementation approach on the key results areas and the activities implementation schedule. The Mid Term Review whose report was submitted on 15th March 2018 recognised the different perceptions on forest degradation between the Ministry, the Counties, the civil society and communities. It proposed ensuring participation of all major stakeholders in redesigning the programme to mainstream rights based approaches to forest conservation and align it to the new constitutional and governance situation in Kenya²⁷.
63. The Mid Term Review identified the existence of weaknesses in the context and stakeholder analysis at the project inception stage and thus the various unforeseen issues such as the conflict between the Sengwer and the KFS were not mentioned in the project document. While the WaTER programme did not cause the conflict between KFS and the forest dwelling communities(*particularly the Sengwer*) , which has been simmering for a long time, it did not learn from the previous World Bank Natural Resource Management Project in the same area. Rather than addressing how the forest dwelling communities could be used as a vehicle to secure forest conservation, it continued the conditions for setting the two entities into conflict. The Sengwer of Embobut community leadership rightly recognised that a

²⁷ Mid – Term Review of the WaTER Programme which can be accessed from the European Union Delegation to Kenya.

programme funded by the EU would be sensitive to human rights claims, and has sought to advance their claims including through EU frameworks.

64. The Mid Term Review of the WaTER project recommends fundamental changes to the project based on an accurate analysis of the changing context for forest conservation and management including reference to the Constitution of Kenya 2010, recognition of community land rights, and the African Court on Human and Peoples' Rights ruling in the Ogiek case²⁸. It also calls on KFS to review its approach to forest conservation and management in light of the Constitution, the Forest Management and Conservation Act 2016, and the Community Land Act 2016. It further proposes KFS draws lessons from past programmes such as the World Bank's NRMP, and from international expertise, in order to propose new approaches such as piloting forest conservation rights-based approaches²⁹.
65. The partial suspension of the project in January 2018 and the developments following the appointment of the new Cabinet Secretary, Hon. Keriako Tobiko who has shown commitment to conservation of natural resources is key to the success of this project. These include the need to address the findings of a *Report on Forest Resources Management and Logging Activities* set up by the Cabinet Secretary, to address the recommendations of the *EU Mid Term Review's report* and adopting the role of Traditional Forest Dwelling communities in conserving indigenous forests such as those at Embobut, in conjunction with KFS. Further, the findings and the recommendations of the *KNCHR-led Fact Finding Mission* will contribute to a meaningful and structured national debate on the changing context for forest conservation in Kenya in general and specifically to the WaTER project.

²⁸ Application No. 006/2012 African Commission on Human and Peoples' Rights v Republic of Kenya

²⁹ Mid – Term Review of the WaTER Programme which can too be accessed at the European Union Delegation to Kenya

Key Findings in Relation to the Mission's TORs

The Death of Robert Kiroich, the Injury to David Kosgei Kiptikesi and the Confrontation Between the Locals and the KFS.

66. The evictions that commenced in December 2017 led to loss of life and injuries. The death of Robert Kiroich and injury to David Kosgei Kiptikesi was the climax of these violations leading to the suspension of the WaTER Project by the European Union. The KFS were directly accused of having committed the offences. The Government through its Spokesperson committed to ensure that the alleged perpetrators of the crime were held to account. However, very little has been done to date.
67. The KNCHR High-Level Independent Fact-Finding Mission was informed that Robert Kiroich and David Kosgei were in the company of others herding their animals on 16th January 2018 in Embobut Forest. While seated and with their tools of trade of herding the animals (*Pangas and Sticks*) they heard gunshots from behind them. In panic mode, they ran away from the gun shots which persisted leading to the shooting of Robert Kiroich on the shoulder. The deceased fell down and lost his life in the process. David Kosgei was shot on the leg and could not move and was later rescued by the KFS who administered first aid and carried him for about 16 Kilometers to Kabiemet Sub-County Hospital where he was admitted.
68. The other community members who were herding with David and Robert consequently informed the next of kin of the incident and they went for a search in the forest and found the body of Robert Kiroich which was then carried home at night. This was then followed by the KNCHR's intervention to have the body picked by police from Chesoi Police Station and the body was taken to Kapsowar Mission Hospital mortuary. A post mortem was consequently carried out by the Hospital pathologist who concluded that Robert Kiroich died from excessive bleeding that was caused by a gunshot wound that had both entry and exit points and caused rupture of muscles and vessels leading to his death.
69. The independent and swift investigations promised by the Government spokesperson is yet to yield any results and thus makes it difficult to ascertain the perpetrators and circumstances of the shooting incident that led to death and injury. However, with the

available information, the KNCHR can confirm that the death and injury were occasioned by gunshot wounds and thus the KFS rangers and other security agencies involved in the operation on the said date stand accused for their various acts of commission or omission in the death and the injury.

The Veracity of the Forced Evictions Claims

70. The period around December 2017 saw heightened evictions by the KFS almost on a daily basis and it spread to all the Glades within the larger Embobut Forest. These evictions are described by KFS as being conducted in order to restore the forest but are seen by the Sengwer community as human rights violations that remove the conditions of peaceful co-existence that can allow the Sengwer, with support from Government agencies, to protect and restore the forest. The fact finding mission established that massive forest degradation has taken place. Both ground and aerial view confirmed the massive destruction of the forest. Apart from the question of whether the evictions help or hinder attempts to conserve the forest, and whether they violate court orders and Article 63 (2) (d) (ii) of the Constitution, the evictions have largely lacked a human face and have not been executed in line with human rights standards. This has led to various human rights violations. Some of the reported evictions from December 2017 include³⁰:

On 29th December 2017, about one hundred (100) armed KFS rangers burnt over forty (40) houses in Kababasi. The burning continued for the next two days on 29th and 30th December 2017 leading to destruction of property and deaths of some livestock in the area.



Between 2nd and 8th January 2018, armed KFS rangers invaded several villages within Kapkok Glade such as Kapsoyei, Chepukat, Kapchorwo, Koponoporowo, Kakuna, Kipsitona and Marichor. They were involved in burning houses, destroying fences and animal sheds within the forest. It is reported that a total of a hundred and twenty (120) houses were burnt over this period.

³⁰ The chronology of evictions provided herein is strictly based on the information gathered by the fact finding team based on the interviews with the affected members as well as community leaders and may thus not be conclusive.

On 9th January 2018, about eighty (80) KFS rangers invaded Kapkok village of Kapkok glade, ambushed and shot at one community member and burnt several unknown number of houses.



Between 10th and 13th January 2018, KFS rangers invaded Kapsoyei, Kapchowo and Kipstona villages and destroyed fences and animal sheds and also burned houses. A total of twenty (25) houses were burnt..



On 16th January 2018, about sixty (60) KFS rangers invaded Kipstona and Kapkok villages of Kapkok Glade and ambushed Sengwer community members leading to the killing of one person and injury to two others.



On 23rd January 2018, about forty (40) armed KFS rangers invaded Koponoborowo village of Kapkok Glade and destroyed fences, animal shades and burned houses. The number of burnt houses were not ascertained.



Between 24th – 25th January 2018, armed KFS rangers invaded Chebukat village of Kapkok Glade and burned one house, destroyed several fences and animal shades.



Between 28th – 30th January 2018, armed KFS rangers descended on Kapchorwa and Kaptuna village of Kapkok Glade and burned several fences and animal shades.



On 5th February 2018, armed KFS rangers invaded Kamoyokwo village of Kapkok Glade burned forty two (42) houses, fences and animal shades.



On 6th February 2018, about eighteen (18) armed KFS rangers invaded Marichor village of Kapkok Glade burned several houses, fences and animal sheds.

From **14th to 16th February 2018**, about forty (40) armed KFS rangers invaded Kapchorwo and Kipsitona villages, burned several houses, fences and animal sheds.



On **17th February 2018**, about forty (40) armed KFS rangers invaded the border of Chebilat and Kamelei settlements destroying fences and animal sheds.



On **19th February 2018**, about thirty five (35) armed KFS rangers invaded Kabakasi village burned several houses and destroyed fences and animal sheds. The burnt houses had just been erected after the previous ones had been burnt down.



On **22nd February 2018**, unknown number of armed KFS rangers invaded Kasoyei village of Kapkok Glade burn one house and destroyed fences and animal shades.



On **26th February 2018**, armed KFS rangers went to Kapchorwo burned houses and destroyed fences

71. The chronology above shows a sustained operation mounted by the KFS in carrying out evictions in several villages and at different Glades across the forest. The provided chronology of invasions above is consistent with KFS' own admission of carrying out sustained operations within the forest as part of their conservation efforts, and which they say is in line with the Kenya Forest Management Act 2016 that mandates the KFS to conserve, protect and manage forests. While the evictions can be viewed in the context of delivering on this mandate, it has been faulted for lacking a human dignity.
72. These vicious evictions have continued even after the fact-finding mission and albeit the KNCHR's call for a halt of the same as the stakeholders work towards getting a permanent solution since the evictions have had far reaching negative effects on the forest dwelling communities.

Influx of Small Arms and Light Weapons into the Forest

73. The period around April 2017 saw increased evictions as described above. Similarly, it also saw increased attacks to the KFS rangers by armed gangs that are alleged to be operating from the forest and that have been categorized by the KFS as cattle rustlers using the forest as a hideout after cattle rustling missions. This has been affirmed by intelligence reports based on the meetings with the County Chief Conservator of Forests, the KFS County Commandant and KFS Officer in charge of the Tangul Forest Camp. Some of the documented attacks that have been attributed to the influx of these firearms include:

On 20th February 2015, two forest community scouts were attacked by a group of twenty (20) people at Tirich block while on their way from the forest. They were harassed, beaten and stripped naked and their clothes burnt.



On 16th September 2016, a five (5) members of the patrol team comprising three KFS Rangers and two community scouts was attacked where one member of the scout was killed and the other along side one KFS Ranger were injured.



The attack and burning down of the KFS Rangers camps with sophisticated weapons and complete burning down of two camps including one land cruiser, two motorbikes and one rifle. The attackers also made away with one rifle which was later recovered by police. An official motorbike for the area Chief was also burnt. The KFS lost property worth over Ksh.14 million including academic certificates of the KFS Rangers leading to temporary closure of the two camps until December 2017 when operations resumed.

74. The sustained attacks on the KFS and other security agencies in the forest either while carrying out evictions or undertaking their ordinary duties have created a situation where the Embobut Forest is described by the KFS as an “armory”. This provides the KFS with fodder for use of excessive force and firearms in their day to day activities in the forest that has had very negative effects on the local communities.

Impact of the Various Actions

75. The various activities undertaken both by the KFS in their efforts to conserve the forest as well as by the forest dwelling communities in their efforts to conserve the forest and their way of life through their ancestral claims to the forest land have had various effects on either sides. These impacts are as follows.

Environmental Degradation

76. Communities and the KFS have both had a hand in the massive destruction of the forest as was witnessed through the aerial view as well as the ground visits. The destruction on the KFS can be attributed to the evictions methods that have been used by KFS actors which have largely entailed use of fire which at times spreads even to other places thus causing more destruction to the forest ecosystem than the conservation which they purport to be engaged in. This uncontrolled burning has been blamed for large scale destruction that has been witnessed in various sections of the forest including within the Glades that had traditionally been accepted as human settlement.
77. The second instance during which the KFS has been accused of destruction of the forest is their participation in illegal logging. The fact finding mission was informed of cases in which the KFS has colluded primarily with adjacent forest communities to participate in logging and selling some of the timber to entrepreneurs. This has further extended to transporting the timber under the escort of armed KFS guards which then provides safe passage to the illegal business. The KNCHR is in receipt of names of KFS Rangers that have allegedly been involved in these acts of illegal logging in conjunction with the members of adjacent forest communities.
78. The findings of the Mission, that some KFS Officers are involved in environmental degradation, are supported by similar findings from the recent report of the Government's Task Force (2018³¹) shedding light on key factors behind forest destruction. The Taskforce recommended among others that the:

³¹ A report on Forest Resources Management and Logging Activities in Kenya. April 2018.

“Management of the Kenya Forest Service to be sacked and some of its staff investigated for alleged corruption which it said had allowed for illegal logging and significant destruction to forests.”

79. The 2018 Taskforce also found KFS largely responsible for the reduction of Kenya’s forest cover, and concluded that:

“The board and management of the Kenya Forest Service has been unable to stem and in some instances have directly participated in abated and systemized rampant corruption and abuse of office”.

It is therefore very important to recognize and appreciate the fact that some of the officers of the very KFS that is charged with the management of our forest resources have to a large extent contributed to the degradation of the same natural resource.

80. The community on the other hand has had its fair share of blame in the forest destruction despite the long held attempts to conserve the forest. Although the fact-finding mission did not witness any conservation efforts by the forest dwelling communities, the fact-finding mission opines that seeking to conserve forests in a situation where forest dwelling communities have their homes in the forest and which homes are regularly burnt by KFS, necessitates the cutting-down of trees to rebuild temporary shelters, thus making conservation activities next to impossible for any community. The fact-finding team authoritatively reports the existence of homesteads within the visited glades in Kapkok, Kaptirbai and Koropkwen, with a series of livelihood activities including livestock rearing.
81. The second front of destruction has been the paddocking of the forest land by a section of the forest communities. The paddocks, which ranges from 1 acre to over 200 acres, have been converted into “private land” with the owners claiming ‘exclusive rights’ over the paddocked area including ‘safeguarding it from intruders’. The referred intruders include the other fellow forest dwelling community members. The paddocked areas are then used as cowsheds and homes for the forest dwelling communities. The paddocked areas have caused massive destruction in the forest as all the areas under the paddocks are now considered ‘private land’ within the forest. This paddocking practice goes against the Community Land Act 2016 that calls for the community land to be held by the whole community.

82. The third front of destruction is the illegal logging within the forest. The illegal logging has been brought about by two major factors; the use of the logs for paddocking within the forest as well as selling of the timber to private businessmen operating within the environs of the forest.
83. The fourth front of destruction is the use of the forest as herding ground for the livestock herds that were seen by the fact finding team during the mission. It was further reported that some section of forest adjacent communities as well as the forest dwelling communities surrounding the forest, and who do not stay in the forest, have hired and armed herdsmen to take care of their livestock that are kept in the paddocks within the forest. The destruction of the environment within Embobut forest has affected all those who depend on the forest, and these include the forest dwellers, the forest adjacent users who are not ordinarily forest dwellers and the communities living around the forest as well as those located downstream.

The Specific Human Rights Violated

84. The numerous eviction missions that have been carried out over time have impacted on the enjoyment of fundamental human rights for the affected communities. The specific rights that have been affected include:

Right to Adequate Housing

85. The use of fire as the main *modus operandi* by the KFS in effecting the evictions from Embobut has contributed to massive destruction of the homes of the forest dwelling communities. This has further extended to the right to property as well as destruction of other chain of economic and cultural rights.

Right to Education

86. The continuous evictions have seen the right to education adversely affected for the forest dwelling communities. A total of sixty seven (67) public institutions including Early Childhood Development schools, religious institutions and schools have been burnt down over the last thirty seven (37) eviction exercises. This has in effect rendered a big proportion of the children unable to acquire education which would have long term effects on the forest dwelling communities.

Right to Identity

87. The constant evictions and the destruction of homes by fire has seen the forest dwelling communities lose some of their most precious items and documents and in particular the National identity cards and the forest access permits. The process of renewing the identity cards has proven cumbersome with majority opting to stay without them. The permits have no known process of renewal. The loss of these important identification documents has technically rendered their holders "squatters" thus reducing the chances of participating in important national functions such as the right to vote or be voted, and allowing them to be described as "squatters" by those evicting them, as if they are encroachers rather than people deeply connected with their ancestral lands.

The Right to Culture.

88. The continued destruction of the forest by the forest dwelling communities as well as the continued evictions by the KFS have both had a negative effects on the cultural rights of the forest dwelling communities. The community shrines that have traditionally been used by the forest dwelling communities for offering sacrifices have continued to be destroyed which has made these communities lose their cultural identity. This is connected to the fact that Sengwer cultural identity is bound with their relationship to their forests and Glades. Being permanently evicted from their land leads to the destruction of Sengwer cultural identity.

The Right to Peace and Security

89. The continued evictions and the resultant lack of shelter has hindered the community from accessing their basic right to security and a clean environment. The absence of security has provided an opportunity where the forest dwelling communities have been exposed to a series of violations that go with the right to security. The vulnerable within the community especially the women and children have undergone untold suffering during the evictions that have extended to sexual and gender based violence.
90. Further, the absence of security and the continued fear of being attacked by the KFS has made this group of vulnerable members of the community unable to undertake some chores that is required of them. For scholl going children, there has been school drop out as

majority of the children fear being attacked by KFS while on their way to or back from school and thus the net effect of high illiteracy amongst the forest dwelling communities.

Conclusion and Recommendations

91. The High-Level Fact-Finding mission team concludes by stating that the nature of destruction witnessed within the forest requires immediate and decisive action to protect this important natural resource. However, all efforts in conserving the forest must respect human rights, respect the rule of law and respect the rights of the forest dwelling communities. The various efforts in the recent past by the Cabinet Secretary of Environment and Forestry such as the setting up of a Task Force, changes at the Kenya Forest Service and the temporary ban on logging are welcome and should be done in strict conformity with the law to ensure sustainability.
92. A win-win approach that will ensure protection and conservation of the natural resource while protecting and promoting human rights is imperative. Further, the KNCHR appreciates that the contentious issue of Embobut Land Ownership is a matter pending before the Land and Environment Court in Eldoret and thus avoids making any findings and recommendation on Embobut land ownership. The KNCHR submits this report shortly after the submission of the report of the *Task Force to Inquire into the Forest Management and Logging Activities in Kenya* that has made far reaching recommendations on different aspects of forest conservation. It is the KNCHR's considered view that the recommendations of the Task Force report should be implemented hand in hand with the recommendations in this fact finding mission report.

Recommendations to the Government of Kenya

93. The ADR meetings that the KNCHR had earlier engaged in as part of finding solutions to the Embobut Forest issue had acknowledged the existence of a problem and the need to have structured community engagement to find a sustainable solution. To this end, the KNCHR calls upon the Government to explore and consequently initiate structured community engagements to ensure, among others, that proper identification and profiling of the right people who qualify to be regarded as forest dwelling communities. Proper

identification is key to finding a sustainable solution and this can be done by enumerating all indigenous peoples in Kenya in the upcoming 2019 census.

94. The State has expressed willingness to ensure structured access of forest communities into forests to carry out rituals and other traditional activities. This willingness by the State must be in good faith and should be explored as part of finding a lasting solution that reaches much broader than issues of access only; it must also embrace be open to implementing in Embobut Forest, the win-win approach being pursued at Chepkitale, Mt. Elgon Forest. The dialogue to accommodate the Sengwer in the Embobut Forest should be pursued with utmost good faith, be all encompassing, transparent and agreed upon by the parties in terms of its form and content. The attached framework in Annexure 1 on best *forest conversation models* that have been adopted in Chepkitale and Lembus Forest both in Kenya can provide a guide to initiate this conversation.
95. The human resettlement within the various Glades must be re-visited as part of the forest conservation efforts. While the Glades were considered as temporary holding grounds, the long stay by the various communities have made it *their home* and thus the forest dwelling communities claim ownership over the Glades as part of their historical ownership to the forest. Some of the communities lay ancestral claims to the Embobut Forest and such claims cannot be simply wished away. The claims must be addressed within our national and international human rights obligations that call for the respect of the rights of indigenous peoples. What is more, the Mission was of the view that lack of secure land tenure for the Sengwer as well as the encroachment into the Embobut Forest by other actors and interests who do not lay any ancestral claim to the forest has escalated the destruction the forest. It is on the strength of the foregoing that the KNCHR recommends that as part of breathing life into and giving meaning to ancestral land rights claims for the Sengwer in Embobut Forest, the government pilots the same by settling them within the Kapkok, Kaptirbai and Koropkwen glades as a model which could then be replicated in other glades for sustainable conservation efforts. A framework for the resettlement in the glades should be developed to guide this process.
96. The National Government should institute proper investigations into the various human rights violations that have been committed in the forest by various State Agencies. These

investigations should lead to an accountability and compensation framework of the violations committed against the affected communities. Further, the members of the KFS who have been adversely mentioned as having been involved in illegal logging activities ought to be investigated and held to account for these crimes. In addition, there is urgent need to institute investigations into the death of Robert Kiroich and injury to David Kosgei Kiptilkesi with the goal of punishing those involved as per the established law.

97. The Mission received numerous complaints of loss of livestock and other items during the forced evictions. There should be an agreed framework for the compensation of lost livestock and property to the forest dwelling communities. The State should introduce measures such as branding/marketing of the cattle within the forest to allow easy identification (*of the cattle within the forest*) and avoid influx of excessive cattle from the forest environs. This compensation should further be extended to some of the squatters in Sinen Glade that have expressed their willingness to accept an alternative land for settlement as a pre-condition to leaving the forest. Using compensation for those whom compensation is sufficient recompense can make sense in the Marakwet case of '*Joseph Kisang & 2 Others Representing 27 members of Sinen Glade*'. However, the compensation aspect should be approached cautiously so that it does not come a cropper considering the various shortcomings of similar past exercises.
98. The State must train the various agencies undertaking the operation in the Embobut Forest that includes the Kenya Forest Service, the Kenya Police and the Anti-Stock Theft Unit so that they have a clear understanding of human rights, the need to protect human rights and how securing community rights can be the basis for securing the forests. Without this, any empowerment in terms of better equipment (such as bullet proof vests, raincoats, several pairs of boots, necessary food, reasonable accommodation, timely payment of allowances among others) would simply fuel the conflict.
99. Once KFS Policy is restructured to work with Traditional Forest Dwelling communities, and with the training of KFS officers on human rights and modern community forestry, then their operations can become an important undertaking in conserving the forest and it will thus be important to have their welfare and interests well taken care of.

100. The State should not use the banner of compensation as a justification for the forced eviction from the Community's ancestral land considering the various controversies surrounding the compensation process and the ancestral claims to the land. As outlined earlier, the State should devise and implement mechanisms to guarantee meaningful engagement and constructive *win-win* policy, in line with the African Court Ruling on the Ogiek of Mau case, international best practices and the EU Mid Term Review of the WaTER project.
101. The National Government should inject more financial, human and technological resources (e.g drones) into forest conservation if meaningful progress is to be made. The State should consider steering away from using the old conservation methods that yield very little results.
102. The State should support the various initiatives and strengthen sustainable livelihoods projects like bee keeping for forest communities
103. The State should establish a framework/law/policy that will enable payment for environmental services as incentives for Counties to conserve their forest cover.
104. The State should initiate a National Dialogue on ancestral claims to Water Towers *vis-a-vis* indigenous communities rights to their ancestral lands such as in Cherengani, Mau Forest, Mt. Elgon among others. This dialogue should be aimed at providing a sustainable framework to dealing with the emerging conflicts like the one in Embobut Forest.

Recommendations to the Kenya Forest Service

105. The KFS and by extension the Government should forthwith stop the forced evictions and destruction of property to provide an opportunity for the much needed dialogue on various conservation efforts. This dialogue cannot be carried out under the current environment where the local communities and the KFS rangers have a very hostile relationship.
106. As part of discharging its mandate, the KFS should take a lead role be in the various conservation efforts. This will however be effective once there is a very clear difference between how KFS approaches its mandate to make a profit (*in productive forests*) and to support traditional forest communities to conserve their forests (*in indigenous forests*). This will ensure KFS and local communities work together, including identifying those KFS staff and

any community members who have been engaged in forest degradation activities such as illegal logging and collusion on other matters of forest destruction.

107. The KFS should exercise restraint and act within the law. The KFS is one of the law enforcement agencies in Kenya and must thus operate in line with the various laws, such as the Guidelines on Use of Force and Fire Arms as well as the Prevention of Torture Act 2017. Failure to uphold these should lead to the application of the relevant laws and seeking of individual accountability on the concerned officers. Further, any element of criminality must be dealt with within the confines of the law. The KFS should thus train its officers to fully and properly appreciate Human Rights Law.

Recommendations to the County Government

108. The County Government of Elgeyo Marakwet, where Embobut Forest is situated, needs to pass the necessary legislations at the County level towards conservation efforts of natural resources within their jurisdictions. For example, the Elgeyo-Marakwet County Government has already embarked on the process of developing County policy and legislation on Natural Resource Management.
109. The County Governments should actively be involved in conservation efforts within their jurisdictions including the donor-funded projects such as the just suspended WaTER Project and the upcoming REDD+ Project.
110. The County Government should initiate and strengthen sustainable livelihoods projects like bee-keeping for forest dwelling communities.
111. The County Government should establish and strengthen an Inter-Counties Committee comprising of counties that benefit from Embobut Forest to encourage them to allocate significant resources for conservation and improvement of livelihoods for the communities in Embobut Forest.
112. The Elgeyo Marakwet County Government should include the marginalized peoples, particularly the Sengwer, in County Government decision-making structures

Recommendations to the Forest Dwelling Communities.

113. The forest dwelling communities should continue to give the much needed dialogue a chance to help in finding a sustainable and lasting solution to the Embobut Forest issue. They should continue to develop their governance structures and community sustainability by-laws so that they can work closely with Government agencies in monitoring and managing the situation at Embobut, including arriving at jointly agreed zoned areas for habitation, forest management and restoration.
114. The forest dwelling communities should clearly and evidently engage in conservation of Embobut and not use KFS actions as a pretext not to conserve or undertake activities that destroy the forest. The forest dwelling communities should establish clear decision making structures and work cohesively as a team.

Recommendations to the Donors

115. All the donor funded projects targeting forest conservation must have a strong component on human rights protection and promotion. A Midterm Review of the WaTER Project funded by the EU has identified the need to discontinue projects in areas where conflict becomes inevitable. It highlights the need to take a new approach in the light of the changing context for forest conservation and management, in the light of the Constitution, the recognition of community land rights and the African Court Judgment in the Ogiek case.
116. Projects targeting implementation in areas occupied by Indigenous Persons should be preceded by *Free Prior and Informed Consent* of the Indigenous Persons.
117. There is need for broad stakeholders consultation in the context of public participation before the roll-out of any donor funded project. The broad consultation will be useful in dealing with various concerns raised by the stakeholders that would have adverse effects.

Annexe 1: Forest Conservation Best Model Practice.

A. Chepkitale Forest.

Introduction.

The Ogiek community is an indigenous community that resides in Kenya. This community claims that their ancestral land is in Chepkitale forest in Mt. Elgon, which is located in the Rift Valley region. Ever since the establishment of the colonial government, this community has been subject to evictions from one forest land to another but would eventually revert back to Chepkitale Forest in Mt. Elgon. Between 2000 and 2009, the Ogiek community faced forceful evictions from the government and thereby sought assistance from the Forest Peoples Programme (FPP). In 2011, the FPP began working with the Ogiek organization, Chepkitale Indigenous Peoples' Development Project (CIPDP), and the International Union for Conservation of Nature (IUCN) to pilot the Whakatane Mechanism. The aim was to analyse the relationship between indigenous or forest-dwelling communities and the agencies in charge of the protected area, propose solutions where such communities have been negatively affected and implement the solutions given.

Whakatane Mechanism.

This program brings together all stakeholders on one table. The stakeholders may include the indigenous or forest dwelling community, the government, forest regulatory bodies, representatives of the international community, civil society, interested donors and any other party with a substantial interest in the forest.

On that table, all the stakeholders are engaged in high-level dialogue with the aim of coming up with a common strategy that would address conservation of the particular protected area and resolve any

conflict therein (present or potential). After a common strategy is adopted, what is left is its implementation, follow up and monitoring.

Successes.

According to a report by the CIPDP in 2016, the Whakatane Assessment in 2011 involved bringing many key actors to the ground at Chepkitale to see the situation for themselves (this included KWS, KFS, IUCN, FPP, World Bank, County Council, and many others). They arrive at the conclusion that the Ogiek remaining on their ancestral lands would not only respect their rights, but also mean the Ogiek would be able to help protect the elephants, as well as the forest their bees depend on, and would mean the county could have the potential to make revenue from cultural ecotourism among other things. The application of the Whakatane Mechanism led to the reverting of the land back to the community in 2013. In that same year, it is reported that the Ogiek documented their customary by-laws to ensure the continued conservation of their ancestral lands and the natural resources found therein. The report also recognizes the arrest of several charcoal burners and elephant poachers as a result of the conservations acts by the Ogiek. In 2016, KWS is reported to have successfully trained Ogiek community rangers.

Conclusion

The Chepkitale Forest conservation and management program has been termed as a success and even used as an example in countries like the DRC where the pygmies are a forest-dwelling community and have a cultural and religious affiliation to the forest in which they dwell. The above goes to show that it is possible to achieve conservation and even more so without necessarily causing an injustice to an indigenous or forest-dwelling community. It should be noted that this approach is very different to the Kenya Forest Service establishment of various Community Forest Associations which concern access to forests by forest adjacent communities, and do not concern community tenure for traditional forest dwelling communities on the basis that their community tenure is made possible by the Community Land Act 2016, and can be the best basis for forest conservation. The security and long term interest established by community tenure means forest dwelling have the capacity and motive to restrict activities by insiders and outsiders that are detrimental to the forest. As is clear in the recent Task Force report, systems like CFAs and PELIS can often be simply a way that outsiders can access and exploit resources that they have no long

term interest in protecting. It is clear that if the respective stakeholders are willing to engage and dialogue, it is possible to not only find a balance between the national and global interest of forest conservation and the rights of indigenous and/or forest dwelling communities, but to ensure these interests can strongly support each other.

B. Lembus Forest.

Introduction.

Lembus forest is located in Koibatek which is in Eldama Ravine within Baringo County. This County is located within the Rift Valley region of Kenya. The IUCN partnered with the Kenya Forest Service and the County Council of Koibatek to launch the Lembus Forest Integrated Conservation and Development Project. This initiative aims to strengthen community management of the Lembus forests to ensure they meet local, ecological, social and economic needs by involving the Lembus Council of Elders and other stakeholders.

Lembus Forest Integrated Conservation and Development Project. (LFICDP)

The forest is a large area and is divided into three blocks which facilitate its management. Each block is a CFA on its own and has a management committee whose leaders are chosen by members. The general management of the CFA is in line with the legal regulations as required under the Forest Act of 2005 and the Participatory Forest Management Guidelines. The members of the CFAs pay an annual membership fee of Kshs.100. In addition to the existence of the CFAs, the KFS has introduced the PELIS programme.

The PELIS programme works under the KFS. In this programme, the KFS allocates forest land to members of the CFA to cultivate crops and plant trees for 3 years. This supplements the efforts of reforestation and afforestation as well as increasing conservation efforts. This

Despite the above, the CFAs are required by law to formulate agreements with the respective stakeholders with the aim of conserving the forest and its management at the very least. These agreements give a detailed account on how exactly conservation activities will be done.

Success

The Lembus Forest increased its land-cover as a result of forest recovery efforts.

Challenges

The participatory forest management model is designed to work amongst several stakeholders so that all parties can complement one another and achieve the set goal. According to studies, the greatest challenge that has impeded growth of the program is lack of proper funding. This has manifested itself with the poor availability of seedlings. This can be avoided where investment into the project is done.

In addition to that, the formulation of the agreement between the CFAs and KFS took a long time and its implementation remains another struggle on its own.

Conclusion

The Lembus case study goes to show that Participatory Forest Management is possible but will only succeed if all stakeholders will come together and each play their part. However, as noted earlier, it is in the recent Task Force report, that systems like CFAs and PELIS can often be simply a way that outsiders can access and exploit resources that they have no long term interest in protecting.

The EU Mid Term Review of the WaTER project points out that there need to be a clear distinction between how the KFS operates in areas where it is required to make a profit from productive forests and where it needs to work with forest dwelling communities in conserving indigenous forest. In the same way, there needs to be a clear distinction between places like Lembus Forest where the issue concerns access to resources by forest adjacent communities (whether through PELIS or CFAs), and places like Chepkitala or Embobut where the presence of traditional forest dwellers can help protect the indigenous forests. International best practice and evidence, as well as our own experience of what has happened so far at Embobut or Chepkitala, makes clear that this is not

possible in the context of forced evictions, but it is possible where a community's right to live on and protect their ancestral lands is not only permitted but encouraged.

Annexe 2: Independent Fact Finding Mission Photographs



Picture 10: KNCHR Commissioner Chivusia addressing members of the Sengwer Community during the fact finding Mission in Embobut Forest. (Photo: Courtesy KNCHR 2018)



Picture 11: The KNCHR CEO Dr. Mogesa having a discussion with Sengwer Community Members. (Photo: Courtesy KNCHR 2018)



Picture 12: KNCHR Commissioner Morara addressing Members of the Marakwet community at Sinen Glade in Embobut. (Photo: Courtesy KNCHR 2018)



Picture 14: An Elder from Sengwer presenting a memorandum on their grievances to KNCHR commissioner Morara (Photo: Courtesy KNCHR 2018)