

276/03 : Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) / Kenya

Summary of Alleged Facts

1. The complaint is filed by the Centre for Minority Rights Development (CEMIRIDE) with the assistance of Minority Rights Group International (MRG) and the Centre on Housing Rights and Evictions (COHRE - which submitted an *amicus curiae* brief) on behalf of the Endorois community. The Complainants allege violations resulting from the displacement of the Endorois community, an indigenous community, from their ancestral lands, the failure to adequately compensate them for the loss of their property, the disruption of the community's pastoral enterprise and violations of the right to practise their religion and culture, as well as the overall process of development of the Endorois people.

2. The Complainants allege that the Government of Kenya in violation of the African Charter on Human and Peoples' Rights (hereinafter the African Charter), the Constitution of Kenya and international law, forcibly removed the Endorois from their ancestral lands around the Lake Bogoria area of the Baringo and Koibatek Administrative Districts, as well as in the Nakuru and Laikipia Administrative Districts within the Rift Valley Province in Kenya, without proper prior consultations, adequate and effective compensation.

3. The Complainants state that the Endorois are a community of approximately 60,000 people¹ who, for centuries, have lived in the Lake Bogoria area. They claim that prior to the dispossession of Endorois land through the creation of the Lake Hannington Game Reserve in 1973, and a subsequent re-gazetting of the Lake Bogoria Game Reserve in 1978 by the Government of Kenya, the Endorois had established, and, for centuries, practised a sustainable way of life which was inextricably linked to their ancestral land. The Complainants allege that since 1978 the Endorois have been denied access to their land.

4. The Complainants state that apart from a confrontation with the Masai over the Lake Bogoria region approximately three hundred years ago, the Endorois have been accepted by all neighbouring tribes as *bona fide* owners of the land and that they continued to occupy and enjoy undisturbed use of the land under the British colonial administration, although the British claimed title to the land in the name of the British Crown.

5. The Complainants state that at independence in 1963, the British Crown's claim to Endorois land was passed on to the respective county councils. However, under Section 115 of the Kenyan Constitution, the county councils held this land in trust, on behalf of the Endorois community, who remained on the land and continued to hold, use and enjoy it. The Endorois' customary rights over the Lake Bogoria region were not challenged until the 1973 gazetting of the land by the Government of Kenya. The Complainants state that the act of gazetting and, therefore, dispossession of the land is central to the present communication.

6. The Complainants state that the area surrounding Lake Bogoria is fertile land, providing green pasture and medicinal salt licks, which help raise healthy cattle. The Complainants state that Lake Bogoria is central to the Endorois religious and traditional practices. They state that the community's historical prayer sites, places for circumcision rituals, and other cultural ceremonies are around Lake Bogoria. These sites were used on a weekly or monthly basis for smaller local ceremonies, and on an annual basis for cultural festivities involving Endorois from the whole region. The Complainants claim that the Endorois believe that the spirits of all Endorois, no matter where they are buried, live on in the lake, with annual festivals taking place at the Lake. The Complainants further claim that the Endorois believe that the Monchongoi forest is considered the birthplace of the Endorois and the settlement of the first Endorois community.

7. The Complainants state that despite the lack of understanding of the Endorois community regarding what had been decided by the Respondent State, the Kenyan Wildlife Service (hereinafter KWS) informed certain Endorois elders shortly after the creation of the game reserve that 400 Endorois families would be compensated with plots of "fertile land." The undertaking also specified,

Indigenous communities have in so many cases been pushed out of their traditional areas to give way for the economic interests of other more dominant groups and to large scale development initiatives that tend to destroy their lives and cultures rather than improve their situation. ¹⁴²

248. The African Commission is of the opinion that the Respondent State has a higher duty in terms of taking positive steps to protect groups and communities like the Endorois, ¹⁴³ but also to promote cultural rights including the creation of opportunities, policies, institutions, or other mechanisms that allow for different cultures and ways of life to exist, develop in view of the challenges facing indigenous communities. These challenges include exclusion, exploitation, discrimination and extreme poverty; displacement from their traditional territories and deprivation of their means of subsistence; lack of participation in decisions affecting the lives of the communities; forced assimilation and negative social statistics among other issues and, at times, indigenous communities suffer from direct violence and persecution, while some even face the danger of extinction. ¹⁴⁴

249. In its analysis of Article 17 of the African Charter, the African Commission is aware that unlike Articles 8 and 14, Article 17 has no claw-back clause. The absence of a claw-back clause is an indication that the drafters of the Charter envisaged few, if any, circumstances in which it would be appropriate to limit a people's right to culture. It further notes that even if the Respondent State were to put some limitation on the exercise of such a right, the restriction must be proportionate to a legitimate aim that does not interfere adversely on the exercise of a community's cultural rights. Thus, even if the creation of the game reserve constitutes a legitimate aim, the Respondent State's failure to secure access, as of right, for the celebration of the cultural festival and rituals cannot be deemed proportionate to that aim. The Commission is of the view that the cultural activities of the Endorois community pose no harm to the ecosystem of the game reserve and the restriction of cultural rights could not be justified, especially as no suitable alternative was given to the community.

250. It is the opinion of the African Commission that the Respondent State has overlooked that the universal appeal of great culture lies in its particulars and that imposing burdensome laws or rules on culture undermines its enduring aspects. The Respondent State has not taken into consideration the fact that by restricting access to Lake Bogoria, it has denied the community access to an integrated system of beliefs, values, norms, mores, traditions and artifacts closely linked to access to the Lake.

251. *By forcing the community to live on semi-arid lands without access to medicinal salt licks and other vital resources for the health of their livestock, the Respondent State have created a major threat to the Endorois pastoralist way of life. It is of the view that the very essence of the Endorois' right to culture has been denied, rendering the right, to all intents and purposes, illusory. Accordingly, the Respondent State is found to have violated Article 17(2) and 17(3) of the Charter.*

Alleged Violation of Article 21

252. The Complainants allege that the Endorois community has been unable to access the vital resources in the Lake Bogoria region since their eviction from the game reserve.

253. The Respondent State denies the allegation. It argues that it is of the view that the Complainants have immensely benefited from the tourism and mineral prospecting activities, noting for example:

a) Proceeds from the game reserve have been utilised to finance a number of projects in the area, such as schools, health facilities, wells and roads.

b) Since the discovery of ruby minerals in the Weseges area near Lake Bogoria, three companies have been issued with prospecting licences, noting that two out of three companies belong to the community, including the Endorois. In addition, the company which does not consist of the locals, namely Corby Ltd, entered into an agreement with the community, binding itself to deliver some benefits to the latter in terms of supporting community projects. It states that it is evident (from the minutes of a meeting of the community and the company) that the company is ready to undertake a project in the form of an access road to the prospecting site for the community's and prospecting company's use.

c) The Respondent State also argues that the mineral prospecting activities are taking place outside