IN THE EAST AFRICAN COURT OF JUSTICE

AT ARUSHA

FIRST INSTANCE DIVISION

(Coram: Yohane B. Masara, PJ; Audace Ngiye, DPJ; Charles O. Nyawello; Charles A. Nyachae & Richard Muhumuza, JJ)

REFERENCE NO. 17 OF 2018

PROF. PAUL KIPRONO CHEPKWONY ..... APPLICANT

VERSUS

THE ATTORNEY GENERAL OF THE REPUBLIC OF KENYA ..... RESPONDENT

28th SEPTEMBER 2022

JUDGEMENT OF THE COURT

A. INTRODUCTION

1. **Prof. Paul Kiprono Chepkwony** ("the Applicant") filed this Reference against the Attorney General of the Republic of Kenya ("the Respondent") on 11th September 2018. The Application was preferred under Articles 6(c) and (d), 7(2), 8(1), 27(1), 29(1), 30(1) & (2), 73 and 138(3) of the Treaty for the Establishment of the East African Community ("the Treaty") and Rules 8, 17(1), 50(5), 67, 69, 74(2), 111 and 112 of the East African Court of Justice Rules of Procedure, 2013 ("the 2013 Rules"). This Reference was filed before coming into force of the East African Court of Justice Rules of the Court, 2019 ("the Rules"). Pursuant to Rule 136 of the Rules, the Rules shall apply to the Reference *mutatis mutandis*.

2. The Applicant identifies himself as a Kenyan citizen and Governor, Kericho County (as at the time of filing). He preferred the Reference in his private capacity and on behalf of the children (minors) and primary school pupils from families evicted from farms adjacent to the Mau Forest between June 2018 to August 2018, acting on the consent and authority given to him by the parents and/or guardians of the pupils. His address of service for the purposes of this Reference is **J.K. Bosek and Company Advocates, Social Security Building, Block A, Ground Floor, Western Wing, Bishop Road, P.O Box 49482-00100, Nairobi**.

3. The Respondent is the Attorney General of the Republic of Kenya, sued on behalf of the Government of the Republic of Kenya, a Partner State of the East African Community. His address of service for the purposes of the Reference is **Attorney General's**

Chambers, Harambee Avenue, Sheria House, P.O Box 40112-00100 Nairobi, Kenya.

B. REPRESENTATION

4. Mr Bosek Kimutai, Ms Claire Kituyi and Ms Viola Odhiambo, learned Advocates, appeared on behalf of the Applicant. The Respondent was represented by Mr Oscar Eredi and Ms Fatuma Ali, Chief State Counsel and State Counsel, respectively.

C. THE APPLICANT'S CASE

5. The Applicant's case is contained in the Statement of Reference, in the Affidavits of Prof. Paul Kiprono Chepkwony filed on 11th September 2018 and in the Witness Statements and oral testimonies of Mr Godfrey Kipchirchir Sang; Mr Christopher Kiplangat Bore; Mr Aron Korir; Mr Stephen Kosge; Mr Eric Kiplangat Arap Bett; Ms Bornice Kemei; Ms Rihna Chebet Tonui; Dr Stephen Kibet Koskei and Prof. Paul Kiprono Chepkwony.

6. In the Statement of Reference, the Applicant avers that he brought the Reference on behalf of more than 5000 primary school pupils (minors) of the Mau Forest evictees from about 23 Pre-Primary and Primary Schools in parcels of land adjacent to Mau Forest which were allegedly destroyed or closed. He mentioned the said schools to include:

    a) **Osotua Primary School;**
    b) **Kiboron Primary School;**
    c) **Kiletien Primary School;**
    d) **Indianit Primary School;**
    e) **Kabarak Primary School;**
    f) **Olabai Primary School;**

g) Kitoben Primary School;

h) Naserian Primary School; and

i) Tebeswet Primary School.

7. The Applicant stated that the minors he represents were residing in the eviction area with their parents or guardians, some of whom had certificates of titles to the lands they inhabited and some were squatters but who had lived in the area for decades.

8. That on or about June 2018 onwards, the Respondent, through its officers and/or agents, particularly one Mr George Natembeya, the Regional Commissioner (at the time of filing the Reference), along with the Ministry of Environment and Forestry and the Kenya National Police Service, embarked upon a program of forcible eviction of thousands of occupants and minors from their homes in the farms adjacent to the Mau Forest. That the eviction was done in *the most insensitive, cruel, horrifying, degrading, traumatising and inhumane manner, with complete disregard for the due process of the law and principles of good governance.*

9. The Applicant further alleged that, in the course of the evictions, several women were raped by officers and or agents of the Respondent, sometimes in front of their children and husbands. That men were also tortured in front of their families and were forced to burn their own houses. That the said officers or agents destroyed the homes and properties without any compensation.

10. That due to the said eviction, more than 5000 minors have been forced out of schools, because the schools have either been unregistered or destroyed, and or the children have been barred from accessing and attending the schools and sitting exams in a meaningful way. Further, that as the minors' parents were chased

several kilometres from the schools, it has been impossible for the minors to continue their education.

11. That, the victims have been evicted from their ancestral homes and farms adjacent to the Mau Forest and are now squatting in temporary camps, which are overcrowded and without adequate food, shelter, sanitation, medical care and education. That the Respondent has not mitigated these circumstances by establishing alternative schools, nor has it taken any other meaningful measures.

12. The Applicant, therefore, prays for the following, reproduced verbatim:

a) A Declaration that the eviction of population from the Mau Complex and denial of the minors' education violate the provisions of the Treaty on good governance, rule of law and protection of human rights;

b) A Declaration that the unlawful demolitions of schools in areas adjacent to Mau Forest and denying the minors access to their schools have infringed on their right to education;

c) A Declaration that the minors are entitled to free education offered to other children in Kenya and that they should not be discriminated against;

d) A Declaration that the minors have been subjected to discrimination and therefore entitled to immediate relief;

e) The Respondent do act forthwith and provide adequate facilities and materials to support the minors' education;

f) **The Respondent be ordered to ensure that the children report back to their schools and refrain from interfering with their education and take positive measures in ensuring that their education is not interfered with;**

g) **The Respondent be and hereby ordered to refrain from engaging in any activity and policy that will adversely affect the children's welfare and particularly their education;**

h) **General damages be awarded;**

i) **Aggravated and or exemplary damages be awarded;**

j) **Costs of the litigation be awarded; and**

k) **This Honourable Court be deemed fit and apt to grant further and any other relief.**

D. WITNESSES AND EVIDENCE FOR THE APPLICANT

13. To complete the Applicant's case, we find it apt to summarise the evidence provided in order to prove the same. We summarise witnesses' evidence albeit not in the order in which they attended in Court for cross-examination.

14. **Prof. Paul Kiprono Chepkwony** ("Prof. Chepkwony") testified that he filed the Reference on behalf of several minors whose parents or guardians were forcedly evicted from within farmlands adjacent to the Mau Forest Complex in Narok County, Kenya. It was his evidence that the said parents or guardians were landowners of the areas they were evicted from and that the Government of Kenya was unreasonable in claiming that they had infiltrated the Mau Forest.

15. Prof. Chepkwony went on to state that the land inhabited by the evictees was not part of the Mau Forest but trust lands which were held in trust by the defunct County Councils under the repealed Constitution. That after the evictions, the victims made distress calls to all well-wishers whereby he was asked to assist. That, the Respondent severely restricted the evictees from establishing camps several kilometres outside their farmland. To him, the move by the Government had a political undertone and had everything to do with the 2022 elections. Prof. Chepkwony went on to state that the evictees had filed a matter against the Respondent in the Nakuru Environment Court revolving around ownership of parcels of land.

16. It was Prof. Chepkwony's further evidence that he was compelled to file this Reference before this Court due to his strong belief that the Government of Kenya has deliberately ignored, neglected and or failed in its responsibility of providing:

    a) ***Free and compulsory basic education in line with its responsibility under the Constitution of Kenya, the Treaty, the Basic Education Act and a number of international instruments;***
    b) ***To provide good structures and or learning facilities and materials for the minors;***
    c) ***Post trained and qualified teachers through the Teachers Service Commission; and***
    d) ***Financial resources towards the education of the minors, yet education constitutes the bulk and takes the lion's share of public expenditure in the country.***

17. That, the failures above stated have led to the minors being discriminated and made to settle with their parents in deplorable conditions contrary to the tenets of good governance enshrined in

the Treaty. That, the majority of the minors dropped from schools and the Respondent has not prepared a comprehensive list thereof for provision of compulsory basic education or alternative learning.

18. In his view, the evictions had nothing to do with conservation and that the eviction violated due process of the law as the Government did not initiate the process of compulsory land acquisition as provided for in the law.

19. In cross examination, Prof. Chepkwony informed the Court that he is the incumbent Governor of Kericho County, elected under the Jubilee Party, which is the current ruling party in Kenya, but that he filed the Reference in his private capacity. Regarding the minors he represents, he stated that he did not prepare the list himself and that the list missed essential facts that would enable proper identification of those mentioned. He also confirmed that he did not seek further particulars and information regarding the minors from the relevant Ministry.

20. Regarding titles to the evicted area, Prof. Chepkwony stated that only 10 evictees' certificate of titles to the parcels of land they were evicted from were traced as some lost theirs during the eviction fracas, while others were squatters. He added that the gist of the Reference was not about land but about children's rights. He also stated that he did not know where any of the 5000 minors affected by the evictions were residing as they dispersed.

21. Regarding injustices, Prof. Chepkwony admitted that the National Land Commission of Kenya had dealt with the matter and provided favourable recommendations; which, however, are yet to be implemented. He also stated that there were pending matters before the United Nations and Kericho and Narok Land Courts on the same

matters. He further confirmed to be aware of some Reports which recommended removal of people from the affected areas but that the said evictions ought to have been done in accordance with the law.

22. The second witness for the Applicant was **Ms Bornice Chemutai Kemei**, a resident of Narok County but born in Bomet County. She informed the Court that after separating with her husband, she bought a plot of land Number 1147 measuring ½ an acre where she built 3 houses for her sons, a kitchen and a main house. She also made a grain store and a poultry structure. That she has 6 children, the last one being Elisha Kipngetich, a Standard 7 pupil who was studying at Kebenet Primary in Sierra Leone, Tendwet Sub location, Segamian Ward.

23. Ms Kemei went on to state that Government askaris destroyed all her properties and that at the time of giving testimony she was staying at a temporary makeshift camp with her children and other families who had been rendered homeless. She complained in her statement that the Government has constantly subjected them to harassment and intimidation. That, the Government does not allow them to put up structures even in individuals lands several kilometres outside their farmlands. That they are being told to go back to their ancestral homes, but they do not have alternative homes.

24. Regarding her youngest son, she stated that he was unable to go back to school, although the school was not destroyed, as it is difficult for him and other pupils to operate from the appalling conditions they are at the moment and that she cannot afford a boarding school for him.

25. She also stated that she was aware of several women who were raped by police and forest guards during the evictions, but that the said women are stigmatised and unwilling to make reports to the same officers who perpetrated the crimes.

26. She mentioned George Natembeya as the person behind the evictions and that the Government needs to recognise their right to own land and allow the children to go back to schools. That they have been made destitute while they committed no wrong.

27. In cross examination, Ms Kemei, while admitting that there is free primary education in Kenya, averred that she could not afford other associated costs such as books and uniforms. That out of her six children, one of them reached University level, while only one graduated from primary school. Ms Kemei stated that she could not recall the name of the person who sold to her the ½ acre piece of land as she could not trace the Sales Agreement after her house was burnt.

28. Ms Kemei informed the Court that in the year 2005 they were ordered to vacate the land on the pretext that it was part of the Forest but later, President Uhuru informed them that the land was trust land so they continued to live there. That in 2018 they did not receive any notice asking them to vacate the land, they only saw soldiers demolishing their houses.

29. On further prodding, she confirmed that they were given a 60 days oral notice to vacate and that they left before the expiry thereof although they continued to live there because they had some plants in the farms. Later on, she recanted that she had left within the notice period as she did not know where to go. She also confirmed that she is party to a case pending at Narok Land Court.

30. The Applicant also procured a witness statement from **Mr Christopher Kiplangat Bore** of Sayamian Location and Ward, Narok County. This witness was also born in Bomet County in 1954 but moved to Sayamian location in 1975 where he bought a 4 acres piece of land and later bought another piece of land Cismara/Ilmotiok/3750 for which he possesses a title deed.

31. His statement also revealed that it was through the order of George Natembeya, the County Commissioner, that the evictions were carried on. That he had served as a Chief of Sagamian location and was therefore aware that the land from where they were evicted from was part of Trust Land. That many of the evictees had bought land from original owners and some possessed title deeds. That within the said areas there were schools constructed by parents and later on the Government also gave funds for the construction or improvement of the said schools. He mentioned the said schools, which are now closed, as Primary Schools of: Chepirpelek, Senetwet, Sapetet, Ogilgile, Chorwet, Kapsilipwo, Nosagam, Lelechwet, Chepitet, Ndianit, Kabarak, Kitopen, Kirobon, Olapa and Koitabai.

32. Mr Bore confirmed that the minors from those schools have not been given alternative schools and are staying in open fields with their parents.

33. Responding to questions from Counsel, Mr Bore informed the Court that he was previously evicted from his land in 2005 without notice. He had bought his land and became a member of Sisiyan Group Ranch but could not recall the person who sold it to him. He was later given a title deed to the land. That the 2005 evictions were done by Narok Municipal Council on the ground that the area was

part of the Mau Forest. That they went back to the land after the former Presidents intervened and by the order of the Court.

34. Another witness for the Applicant was **Mr Stanley Kiprono Langat** from Oleshabani Location, Melelo Ward, Narok County. He stated in his written statement that he was born at Sigor Location, Bomet County. That in 1989, he bought a property in Enosokon Group Ranch from a previous owner. In 1996, he was issued with a title deed document by the Government. His title Number is Cismara/Olulunga/3364. That his land measured 7 acres.

35. Mr Langat stated further that during or about the year 2012, he was appointed a board member of Enosokon Primary/Secondary School and was later made the chairman of the Board of Governors of the said school. In that capacity, therefore, he was quite familiar with the education status of the area. Like the previous witnesses, he considered the evictions to be arbitrary, cruel and degrading on them.

36. He confirmed the contents of the Reference to be a true and correct reflection of the situation on the ground. That the Government was discriminatory on the minors and their parents. That the Government was not deploying trained teachers in the named schools as it was doing in other parts of Kenya. That the Government officials and police officers did not only intimidate and harass them, but they also raped women and assaulted several men in front of their children and their wives.

37. In his view, the evictions are politically motivated as the Government is hell bent on ensuring that they move out of Narok County before the 2022 general elections. That the move has

nothing to do with environmental protection as contended because the areas they were evicted from do not form part of the Forest.

38. The Applicant also lined up **Mr Godfrey Kipchirchir Sang** (Mr Sang) as his witness. In the written statement made on 19th December 2019, he informed the Court that he is a scholar who has written several academic works, including, *"The Brief History of the Maasai section of the Mau Forest"*. He stated that between August and September 2018, he visited farm lands adjacent to the Mau Forest Complex in Narok Country and discovered that more than 9 primary schools had been destroyed and closed. That the said schools were not formally registered by the Ministry of Education and that the Government was not sending trained teachers; instead, parents of minors were responsible for paying untrained or retired teachers.

39. It was also Mr Sang's evidence that he carried out interviews with a number of minors and their parents or guardians who informed him that the Government of Kenya under the authority of the then County Commissioner, carried out forceful evictions and demolitions. He prepared a list of parents and children, which he handed over to the law firm of Counsel for the Applicant. He also interviewed Patrick Mutai, the Head Teacher of Osotua Primary School who informed him that although his school was not demolished, the number of students drastically went down after the evictions as the displaced students could not find ways and means to attend school and prepare for exams. He also took some photographs, the description of which was attached to the Statement.

40. In cross examination, Mr Sang informed the Court that he is the head researcher and writer with Gavman Publications and a

resident of Nairobi. That at the time of evictions he was at the area working on a book project about the history of the Mau Forest. That he was at Karuni, Olulunga and Mkoben areas on 23rd August 2018. That those areas were the heart of the evictions. That as part of his research, he had looked into adjudication records of the areas in question. Regarding the acreage of Reiyo Group Ranch, he admitted that his records differed with the one issued by Director of Land Adjudication.

41. **Mr Aron Korir** also testified for the Applicant. The gist of his evidence was that at the time of the 2019 evictions he was a standard eight pupil at Koitabai Primary School. That the said school was not a government registered school and therefore had to register to sit the KCPE at Saire Primary which was very far. That his class had 27 students and the school was partially destroyed due to its concrete structure.

42. Describing what befell them, Mr Korir stated that on the fateful day they were in class when about thirty Kenya Forest Service officers dressed like military officers and carrying big guns came to their class and shouted to them to move or migrate as it was part of the forest. They tried to run to their homes, only to find that the homes had been burnt too. At the time of recording his statement, he stated that they were living in a makeshift camp with his siblings who had been pupils in the same school.

43. Mr Korir stated that he sat for his KCPE exam and scored 250 marks and was hoping to continue his education in a county secondary school. His fear, however, was whether his parents could afford the fees considering that they were no longer able to do farming.

44. In cross examination, Mr Korir stated that he was a form one student at Saire Secondary School in Narok County. His response to questions appeared a bit incomprehensible, probably because he insisted on speaking in English, which he did not appear to master very well. As to why he did not perform well after repeating Class 8, he stated that he did not have a place to live well to enable him to do the exam.

45. **Ms Rihna Chebet Tonui** (Ms Tonui) was also a witness for the Applicant. Her evidence was that her parents bought 3 acres of land in 1997 at a place called Sierra Leone within Narok County. That she could not finish school due to the demise of her parents and guardians. That as the only child of her parents, she inherited the piece of land; which, after her marriage, she occupied along with her husband.

46. Ms Tonui further stated that her seven children were going to school at Chepirbelek Primary School which was affected by the 2019 evictions. That, her home was also burnt in October 2019. On the fateful day, she saw KFS officers, which made her to run away, hoping that they will pass and she will return. She later realised that they were burning houses, including hers which was burnt completely. They were forced to move to a makeshift home at Saptet area.

47. In cross examination, she stated that the title deed to the land she inherited was in a group, it was yet to be divided into personal title deeds. That she went to school up to class 8 at Kebenetya Primary School, she could not finish High School as her parents died. That she and her husband were doing 'kibarua' jobs for others. After the eviction of October 2019, she was forced to stay at Saptet Camp where there are no schools nearby.

48. Ms Chebet, likewise, confirmed that she did not get notice to leave her land until after eviction when she heard it over the radio.

49. **Mr Eric Kiplangat Arap Bett,** a retired airman with the Kenya Airforce, also testified for the Applicant. That he had bought 26 acres of land from the affected area in which he constructed houses for himself and for his children. That he had title deeds for the land. That he was affected by both the evictions of 2005 and of 2019. That the last eviction took place at 8am in October 2019 while they were having tea. He was forced to leave with nothing and all his properties were destroyed by the uniformed Kenya Forest Services officers. He lost property worth 6.5 million Kenya Shillings. He was forced to buy a quarter of an acre in Narok where he now stays.

50. Mr Arap Bett further contended that before the eviction he was the school chairman of Noosagami Primary School for almost 5 years. That the evictions were unlawful as he had all titles and the place is not a forest and no procedure for compulsory acquisition were followed.

51. Responding to questions by Counsel, Mr Arap Bett stated that before buying land in 1989, he used to stay at Trans-Nzoia County. The land he bought is Cismara/Ololunga/8790 measuring 3.7 hectares, Cismara/Ololunga/8927 measuring 2.7 hectares and Cismara/Ololunga/9160 measuring 3.1 hectares. The parcels of land were from the former Ngaronei Group Ranch. As to why he returned to the land after the 2005 eviction, he informed the Court that they were allowed by the former president to return as their titles were valid. When asked about whether the evidence he was giving about 2019 related to the Reference at hand, he responded that it was, as he was evicted in November 2019 or there about. Further, although there was notice from the County Commissioner to vacate

the land, no reasons were given. That he was not aware of any tribal clashes in 2018.

52. **Mr Stephen Kosge** was the last witness for the Applicant. He stated that he was a trained teacher who was transferred to Narok District in 1999 where he taught at Noosagami Primary School, a registered school and a KCPE examination centre. That on 10th June 2005 the first eviction was conducted by Narok County Council rangers. That at the time he was the Head teacher of the school whereby the school was burnt on the ground that it was part of the Forest. It had several teachers and about 620 students. He disputed the assertion that the school was in the forest as he knew it to be part of the Trust Land which was later adjudicated and given to Nkaroni Group Ranch.

53. That the said evictions led to deployment of teachers and families were sent away. He was then transferred to Nkaroni Primary School, shortly thereafter, they were allowed to go back to Noosagami. That the community raised funds and later the Government assisted but no trained teachers were sent nor was it assigned a new registration Code.

54. Mr Kosge retired in 2008. He owned 7 acres where he was farming and raising cattle. His land was registered and a Title deed issued. That he had a brick house with six rooms where he lived with his wife and six children and had a borehole for water. That in October 2019, the Kenya Forest Service Officers destroyed his home whereby he was sent away with his family. He was not given time to remove any of his belongings causing him a loss of about 2 million Kenya Shillings.

55. Mr Kosge further stated that the evictions were not preceded by any formal notice, other than radio announcements. That whereas he lived in a purely Kipsigis area of Narok County, the Maasai were his neighbours but none of them was evicted. He was forced to live in a makeshift accommodation. That the eviction affected his family, including his children whose KCSE results were affected, yet they could have performed much better. The eviction also affected his earning ability to the extent that he could not afford to pay for his children's continued education.

56. Responding to questions from Counsel for the Respondent, Mr Kosge stated that he got his land from a willing seller named Chelogoi and had a Parcel number 7945. That at the time he bought the land he did not look at the adjudication records. That while the government advocates for compulsory primary education, it failed in its duty as it did not take any action to ensure that children affected by the evictions got education.

57. Mr Bosek summed his case by filing written submissions to support the Applicant's case. We will deal with the submissions when dealing with issues.

E. THE RESPONDENT'S CASE

58. The case for the Respondent is contained in the Response to the Reference filed in Court on 30th October 2018 and the Witness Statements and oral evidence of Ms Purity Christine Mwangi; Mr Evans Kegode; Mr Thomas Mumu and Ms Nereah Olick.

59. In the Response to the Reference, the Respondent contested the allegations contained in the Reference and contended that:

a) **This Court has no jurisdiction to hear and determine issues raised in the Reference, especially issues of a criminal nature raised by the Applicant. Further, that there are no reported incidents to the local authorities of criminal offence related to the alleged heinous acts of rape, torture, inhuman and degrading treatment;**

b) **The Reference does not disclose a cause of action against him or the Republic of Kenya or any officer of the Republic of Kenya and that the facts pleaded by the Applicant are unfounded and, thus, do not constitute any of the matters contemplated under Article 30(1) of the Treaty; and**

c) **That there is an existing dispute over the Applicant's encroachment into the Maasai Mau Forest reserve which is a vital water tower and that the dispute is pending before the Environment and Land Court of Kenya at Narok (ELC Petitions Nos 12 and 13 of 2018) where the issues raised by the Applicant herein are being litigated by the Applicants therein.**

60. The Respondent further denied all allegations contained in the Reference; in particular, the Respondent denied the allegations that the Government of Kenya through its security organs carried out forceful evictions of civilians from their dwelling places and carried out rape, physical torture, destruction of property and homes and violated the rights of children; and generally acted without regard to the due process of the law and in contravention of the Treaty that binds a Partner State to adhere to principles of good governance, accountability, social justice, rule of law and human rights or any Treaty obligation.

61. It is also the Respondent's case that the Government of Kenya, following due process of the law, removed illegal encroachments and settlements into the forest in an endeavour to contain wanton plunder and destruction of the Maasai Mau Forest reserve; but that no evictions whatsoever have been done on parcels of land adjacent to the forest as claimed by the Applicant.

62. That the Government of Kenya, in removing the unlawful encroachment, strictly adhered to Municipal and international rules governing the conduct of evictions and the process was carried out in a humane and lawful manner following public consultations. That adequate notices were issued beforehand and were obeyed by the evictees who vacated the forest and returned to their original homes and that no evictee is residing in any displacement camps.

63. That after the evictions, unrelated communal clashes occurred in some parts of Narok and Nakuru Counties and some people were affected including students and minors; however, that the Government moved in to restore and secure peace and provided alternative schools and examination centres to the affected pupils.

64. The Respondent further averred that the Government of Kenya has satisfactorily discharged its mandate of providing education under the Treaty, the Constitution and the laws of Kenya.

65. It was the Respondent's further contention that the Reference by the Applicant is unfounded as the Applicant has not exhausted local remedies which are available to them under the laws of Kenya and that the Reference is an abuse of the process of this Court and thus ought to be dismissed with costs.

F. WITNESSES AND EVIDENCE FOR THE RESPONDENT

66. The Respondent summoned four witnesses to prove its case. Like the Applicant, no affidavit evidence was filed in Court. Witness statements were filed followed by cross examinations and re-examinations of the makers of the statements. We hereunder reproduce their evidence, but not exactly in the order they were summoned in Court.

67. **Ms Purity Christine Mwangi** ("Purity") was the first witness for the Respondent. In her written statement, this witness informed the Court that she was the Senior Deputy Director, Land Adjudication and Settlement from the Ministry of Lands and Physical Planning. She categorically denied the averments made by the Applicant and stated that those evicted had encroached on the Mau Forest Reserve by extending boundaries of several Group Ranches, which act led to wanton destruction of the forest, the forest ecosystem, flora and fauna as well as affecting its function as water catchment area leading to drying of rivers that originate from the said water tower.

68. She informed the Court about the different adjudication sections adjacent to the Mau Forest Complex and their registers. That at the completion of adjudication, the adjudication record for Reiyo Group Ranch was 26 hectares; Enoosokon Group Ranch had 155 hectares; Sisiyian Group Ranch had 447.5 hectares; Enakshomi Group Ranch had 844.5 hectares while Nkaron Group Ranch had 1597.5 hectares. Making a total of about 4000 hectares.

69. That the five group Ranches subdivided their land upon application to the Registrar of Group Ranches. That the encroachment into the Maasai Mau Forest resulted from irregularly increasing the sizes of

the five Group Ranches that bordered the forest far in excess of their registered areas during the subdivision.

70. In Cross Examination, Ms Purity stated that the adjudication land was community land, not government land. She was not sure whether before the eviction or the Ministerial Taskforce there were reports from National Environment Management (NEMA) or National Land Commission. Further, that the additional acreages shown in the mutation regarding Reyio Group Ranch was disputable as one S.M. Muketha, a licensed land surveyor, is deemed to have colluded with one Joseph Mukhoti to increase the area of Narok/Cismara/Mkoben/34 from 26.0 hectares to 878.59 hectares on 4th August 2003. That it is not possible for a subdivision or mutation exercise to increase acreages.

71. The next witness for the Respondent was **Mr Evans Kegode**, Head of Survey and Mapping, Kenya Forestry Service. His evidence related to Ol Pusimori Forest adjacent to Maasai Mara Forest. That Maasai Mara Forest is a forest under the jurisdiction of Narok County government by dint of Section 30(3) of the Forest Conservation and Management Act, 2016.

72. Mr Kegode stated that, whereas the Service was not responsible for the Maasai Mara Forest, he was aware of the encroachments and the government's measures to conserve the forest as a catchment area through **"Operation Okoa Msitu wa Mau"**. That conservation of the forest is in the public interest.

73. In Cross examination, Mr Kegode stated that his jurisdiction covered all public forests and not only national forests. That before working for Kenya Forest Services he worked for the former Forests department. He relied on the map of the Maasai Forest Complex

dated 2008 prepared by Survey of Kenya with the support of Kenya Forest Service and Kenya Wildlife Services.

74. The other witness for the Respondent was **Ms Nereah Olick,** the Director of Primary Education, Ministry of Education. Her evidence was that those evicted from the Mau Forest were squatters who had their homes elsewhere and were just indulging in some economic activities in the areas they encroached. That after the evictions, those persons returned to their original homes; which means that there are no internally displaced persons or displacement camps elsewhere adjacent to the forest. That the affected students, if any, were schooling elsewhere.

75. Ms Olick stated further that the allegations made by the Applicant regarding destruction of schools were false and that with the exception of Osotua Primary School, all other mentioned schools were unregistered and were not authorised to register students nor were they examination centres. That, in her knowledge, none of the registered public schools were affected by the said eviction other than Osotua Primary School which was affected by communal clashes in Narok and Nakuru Counties.

76. Moreover, that the Government made arrangements for those affected students to do their exams and that after the situation returned to normal, the affected students went back to their schools. She averred that the government did not violate the rights of the students as alleged and that the right to education as enshrined in Article 53 of the Constitution is highly respected.

77. In cross examination, she stated that the list of purported minors affected by the evictions could not be confirmed as it did not contain necessary details such as NEMIS codes and birth certificates. She

also clarified on the process used in registering schools and that there are guidelines to that effect. Regarding the affidavit of the head teacher of Osotua Primary School, the witness stated that the names mentioned could not be verified for lack of a letter head, NEMIS codes or birth certificate numbers of the minors mentioned. She reiterated that the Respondent was not aware of any minor who was at relocation camps or any that could not access compulsory Primary education as schools were everywhere within a radius of not more than 3 kilometres from each other. Further, as they used to receive quarterly reports from schools, Sub-counties and Counties, the Ministry of Education would have known if there were a significant number of students out of education in Narok South.

78. The last witness for the Respondent was **Mr Thomas Mumu**, the Director Governance and Co-ordination of Kenya Water Towers Agency. His written statement was to the effect that due to degradation of the Maasai Mara Forest many task forces, assessments and academic studies by the government were formed including: Ole Ntutu Boundary Commission of 1986, Hon. Sambu Taskforce on Gazettement of Narok Forests of 1996, Commission of Inquiry into the illegal/irregular allocation of Public Land (Ndung'u Land Commission) of 2004, Mau Taskforce of 2008 and others. That the reports agreed on one thing, '*that those who have encroached on the forest must be removed and the original boundaries restored*'.

79. He went on to state that the encroachment of the Maasai Mau Forest resulted from irregularly increasing the sizes of the five group ranches bordering the forest far in excess of their registered areas. That the Applicant's allegation that evictions were undertaken in areas adjacent to the forest is false. That no schools were demolished during the eviction.

80. Mr Mumu stated that in 2018 the Government noted that despite having previously removed unlawful encroachment into the forest in 2005, the Applicants had returned to the forest during the intervening period, especially during general election years. The Government decided to ask the invaders to leave the forest. That it did so in two phases. The first phase involved those who did not have documents while the second phase involved those who had invaded the forest purportedly on the basis of titles of land acquired from the group ranches. That the Applicants were affected by the second phase and that they left voluntarily before the expiry of the notice issued by the government through the media. He concluded that no forceful evictions were conducted.

81. Mr Mumu also informed the Court about steps taken by the Government and other stakeholders to rehabilitate and conserve the forest. He presented in Court a number of reports and documents to back up his evidence.

82. In response to questions from Counsel for the Applicant, Mr Mumu stated that a 60 days' notice was issued to the encroachers through mass media followed by public barazas held across the areas that surround the forest. Records thereof were not supplied to Court. He also testified that Maasai Mau Forest was one of the water towers gazetted in 2012 by Kenya water Towers Agency. That title deeds issued to people in the forest were illegal as they were issued illegally. That the government filed a suit at Narok to have those titles rescinded.

83. Mr Mumu stated that, in the course of removing people from the forest, the National Land Commission was not involved as the land was not registered. That, he has been to the area where the evictions took place but could not see any camps around the area

and that there were no schools at the area before the evictions. Regarding whether they compiled a list of evictees, Mr Mumu stated that they did not as those persons left voluntarily. Mr Mumu refuted the allegations that houses and other structures were burnt down. He, however, confirmed that after people left voluntarily, all the structures remaining were put down to avoid people coming back there or those structures being turned into hideouts. He also confirmed that he was a party to the team that coordinated and carried out the operations. That, although some of the evictees showed titles to the lands they occupied, those titles were illegal as they were in an area forming part of the forest and no adjudication had been carried out there.

G. ISSUES FOR DETERMINATION

84. At the Scheduling Conference held on 19th November 2019, the following issues for determination were agreed upon:

a) **Whether or not the Court has jurisdiction to entertain and determine this Reference under Articles 6(d), 7(2), 27(1), and 30(1) & (2) of the Treaty for the Establishment of the East African Community;**

b) **Whether the Reference herein is sub-judice and or raises similar issues of law and fact as the Nakuru ELC Petition 12 of 2018 (Originally the Narok ELC Petition 12 of 2018 and Petition 13 of 2018), such that it proscribes or prohibits this Reference;**

c) **Whether or not the alleged evictions are lawful;**

d) **Whether or not a cause of action has been disclosed by the Applicant;**

e) **Whether the Respondent has fulfilled its duty, without discrimination, to provide free basic education, and that the minors' rights thereto are upheld, as required by:**

i. **The principles of good governance and adherence to the rule of law as defined in the Treaty for the establishment of the East African Community, especially in Articles 6(d), 7(2), 8(1) and 27(1);**

ii. **The principles of human rights as enshrined in the African Charter on Human and Peoples' Rights ("Charter"), especially Article 17(1); and**

iii. **The Constitution of the Republic of Kenya, especially Article 53, and the laws of the Republic of Kenya, including the Basic Education Act (No. 14 of 2013), Parts IV, IX, X and XII and the Children's Act (No. 8 of 2001); and**

f) **Whether the Parties are entitled to the Remedies sought.**

85. The last outlined issue is not contained in the Scheduling Conference Notes filed in Court. However, during the Scheduling Conference, parties agreed to its inclusion. It has therefore been included for completeness of the issues for determination.

H. COURT'S DETERMINATION OF THE ISSUES

ISSUE No. 1: Does the Court have Jurisdiction to entertain and determine the Reference?

86. The Respondent submitted that the Court does not have jurisdiction to entertain and determine this Reference due to the fact that the Applicant did not exhaust available local remedies before preferring the Reference to this Court. He cited a number of authorities which provide that an international court or tribunal should only be approached after the Applicant has explored all available domestic remedies. In that respect he made reference to the International Covenant on Civil and Political Rights, American Convention on Human Rights and the African Charter on Human and People's Rights.

87. The Respondent further contended that the Applicant had in fact preferred a similar dispute before the Courts in Kenya when he filed Narok ELC Petitions Nos 12 and 13 of 2018 which are still pending determination. In his view, the Applicant ought to have awaited determination thereof and exhausted all avenues provided therein before instituting this Reference.

88. The Respondent also submitted that the Reference raises some issues of a criminal nature which the Court has no jurisdiction to hear and determine. Counsel concluded that as the Court was approached before domestic remedies were exhausted the Reference is premature and inadmissible.

89. On his part, Counsel for the Applicant submitted that the Reference was properly filed before the Court as the Court has concurrent jurisdiction with the High Court of Kenya on matters of this nature.

Further, that nothing in the Treaty imposes a requirement for the exhaustion of local remedies.

90. Counsel for the Applicant averred, correctly in our view, that as the Reference cited violations of the Treaty; in particular, Articles 6(d), 7(2) and 8(1) of the Treaty, the Court has jurisdiction to determine the Reference. That, Article 23 of the Treaty confers jurisdiction on this Court to determine matters complained of relating to good governance, social justice and the rule of law. In his view, forceful, inhuman and degrading eviction of the Applicants and violation of their children's rights fall in the purview of the African Charter on Human and People's Rights and hence within the jurisdiction of the Court.

91. We have examined the pleadings, the evidence and the submissions of the parties. We do agree with the Applicant's Counsel that the Court's jurisdiction cannot be ousted merely because a party did not exhaust local remedies. The Court has in a number of decisions held that its jurisdiction will not be ousted merely because a party whose cause of action may have had a remedy in his local jurisdiction opted to forego that window and came straight to Court alleging infraction of the Treaty provisions.

92. The jurisdiction of this Court is stated in Article 27(1) of the Treaty as follows: **"The Court shall initially have jurisdiction over the interpretation and application of this Treaty."**

93. Further, Article 30(1) of the Treaty provides for References to the Court by legal and natural persons as follows:

> **"Subject to the provisions of Article 27 of this Treaty, any person who is resident in a Partner State may refer for determination by the Court, the legality of any Act,**

regulation, directive, decision or action of a Partner State or an institution of the Community on the grounds that such Act, regulation, directive, decision or action is unlawful or is an infringement of the provisions of this Treaty."

94. From the two provisions of the Treaty cited above, this Court has jurisdiction to interpret and apply the Treaty in the case of a Reference by a legal or natural person that is resident in any of the Partner States, where the impugned act is an act, regulation, directive, decision, or action of a Partner State or an institution of the Community, on the grounds that such impugned act is unlawful or is an infringement of the provisions of the Treaty.

95. With utmost respect, the first limb of the Respondent's submission on jurisdiction, which suggests that this Court's jurisdiction hinges on the exhaustion of local remedies by a party is misconceived in the context of the Treaty and the Rules of this Court and ought to be corrected upfront. Whereas the obligation to exhaust local remedies is a tenet of customary international law, it is not a prerequisite for filing any matter or seeking remedies in this Court under the Treaty. (See **Attorney General of the Republic of Rwanda vs Plaxeda Rugumba, EACJ Appeal No. 1 of 2012**). The Treaty provides no requirement for exhaustion of local remedies as a precondition for accessing it.

96. We also note the contention by Counsel for the Respondent regarding criminal allegations imputed on the Respondent and that this Court has no mandate to deal with such matters. Whereas it is true that this Court has no criminal mandate, we see nothing from the evidence and the reliefs sought to suggest that the cause of action by the Applicant aims at asking the Court to exercise a criminal mandate. The Applicant merely asked this

Court to declare certain acts attributed to the Respondent's agents to be in contravention of the Treaty. We must also add that, this Court's jurisdiction cannot be ousted merely because the dispute brought by a party relates to acts of a criminal nature. If such acts constitute an abrogation of the Treaty provisions, this Court will not shy away and will deal with the matter as the same falls in its mandate.

97. Notably, while responding to questions from the Bench, Counsel Eredi appeared to shift gears on the issue of jurisdiction when he contended that the issue was more of admissibility than jurisdiction. This assertion has no factual basis as it was not pleaded and could not be raised during submissions highlights.

98. Consequently, we hold that the Court has jurisdiction to entertain and determine the Reference.

ISSUE 2: <u>Is the Reference before the Court *Sub-judice*?</u>

99. Counsel for the Respondent submitted that the Reference should not be entertained as it was filed in contravention of the *sub-judice* rule. In their view, as there were matters similar to the ones in Court filed at the Narok Land and Environment Court, the matter before this Court was *sub-judice* and ought to be stayed. Counsel made reference to Section 6 of the Kenya Civil Procedure Act (Cap. 21) of the Laws of Kenya which provides that:

> **"No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating**

under the same time, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the reliefs claimed."

100. The Respondent also made reference to the decision of this Court in **Anthony Calist Komu vs the Attorney General of the United Republic of Tanzania, EACJ Reference No. 7 of 2012,** where it was stated that the doctrine of *sub-judice* was not applicable because the suit before the High Court in Dodoma Tanzania was not identical to the one in Court. In their view, this Reference is different as the facts in this matter are identical to those in Narok ELC Petition 12 of 2018: **Joseph Kimeto Ole Mapelu & others vs Cabinet Secretary, Ministry of Lands, Housing and Urban Development & 10 others** and Petition 13 of 2018, **Prof. Paul Kiprono Chepkwony vs The Cabinet Secretary, Ministry of Lands, Housing and Urban Development & 7 others**.

101. Regarding the Applicant's petition, Counsel for the Respondent contended that the Applicant filed the Reference in his private capacity and on behalf of various private land owners, who are members of the former group ranches of Reiyo, Enakishomi Sisiyan, Enoosokon and Nkaroni. That it relates to the allegations that sometime in the month of July 2018, the Government embarked on a forceful eviction exercise of the occupants of those parcels of land. That the petitions which were consolidated were heard to finality and that judgment was scheduled for 9th June 2022.

102. Counsel, thus, submitted that as the subject matter in those petitions relates to Maasai Mara Forest Reserve and as parties

are the same, filing of this Reference contravenes the doctrine of *sub-judice* and is thus an abuse of the Court process.

103. On his part, Counsel for the Applicant disputed the Respondent's assertion. In his view, whereas the EACJ and Narok cases have similar background information, the "claimants" are different, the cause of action is different and subjects of determination are different. That the Narok cases involve unlawful eviction and violation of the right to own property by legitimate land owners of Mau farms; conversely, the Reference relates to abrogation of the principles of good governance towards its citizens especially minors. That they only used the aspect of free basic education *'as a point of reference to demonstrate poor governance'*. Further, that the Reference is on the rights of the children of Mau to basic education and the impact of the Government's action of evictions on the children.

104. During hearing of the submissions highlights, Court asked Counsel from both sides to clarify whether any records or evidence regarding the cases in the Kenyan Court were availed to this Court. Mr Bosek said there was none and added that he was surprised why Counsel for the Respondent alleged that Prof. Chepkwony was a party to the Narok cases. His position was that the Applicant is neither a witness nor a party at those proceedings. Counsel Eredi for the Respondent contested the assertion and referred the Court to page 284 of the typed proceedings of this Reference where the Applicant confirmed to have filed a case in Narok, which was still pending.

105. Having examined the records before us and the submissions made thereof, we are unable to conclude that the matter at hand is *sub-judice* as parties did not sufficiently prove that consolidated

Petitions Nos 12 and 13 of 2018 pending at Narok ELC is on all fours with the matter before this Court. In the absence of such evidence, it will not be in consonance with the Treaty to abdicate from determining the matter filed in Court alleging infringement of the provisions of the Treaty.

106. It is our view that the doctrine of *res sub-judice* has been raised wrongly. The Applicant's cause of action in this matter relates to violations of specific provisions of the Treaty. It also relates to the rights of minors whose parents were evicted from the Mau Forest Complex. Unless it can be proved to the satisfaction of the Court that the same subject is pending before the Narok ELC, such defence appears to us to be rather mis conceived.

107. We thus answer the second issue in the negative.

ISSUE NO. 4: <u>Has the Applicant disclosed a Cause of Action?</u>

108. We find it pertinent to deal with this issue before issue No. 3 as the same is in the nature of a preliminary objection and, thus, has to be determined prior to dealing with the substantive issues.

109. Counsel for the Applicant did not distinctly address this issue in his submissions. He only made a passing statement of the same while concluding his submissions on the issue relating to *sub-judice*. For him, *"the statement of Reference is very clear and the cause of action particularly the reliefs sought under paragraphs 20 (i)-(x) of the Statement of Reference all of which (sic) to compel the Government in the Spirit of good governance to guarantee education to the children of Mau and to provide alternative schools, and facilitate learning for these children without any interference."*

110. Similarly, Counsel for the Respondent, while submitting on this issue, resorted to an encapsulation of why they believe that the Applicant failed to prove violation of the rights of the minors or unlawful eviction. They did not state why they think that a cause of action had not been proved.

111. This Court has on a number of occasions held that a cause of action for the purposes of coming to Court is proved upon a party citing a Treaty provision that he alleges to have been violated. In ***British American Tobacco (U) Ltd vs Attorney General of Uganda, EACJ Application No. 13 of 2017,*** this Court stated as follows:

> **"Under EAC Community law a cause of action is considered to exist where the Reference raises a legitimate legal question under the Court's legal regime as spelt out in Article 30(1); more specifically, where it is the contention therein that the matter complained of violates the national law of a Partner State or infringes any provision of the Treaty. Causes of action before this Court are grounded in a party's recourse to the Court's interpretative and enforcement function as encapsulated in Article 23(1) of the Treaty, rather than the enforcement of typical common law rights."**

112. We find no reason to depart from this position. As the Statement of Reference cited specific provisions of the Treaty and those of the Constitution and laws of the Respondent's State allegedly violated by the action of the Respondent, that suffices as a cause of action for the purposes of instituting a Reference before this Court, the absence or insufficiency of evidence to prove the same notwithstanding.

113. The fourth issue is therefore answered in the affirmative.

ISSUE NO. 3: <u>Were the alleged evictions Lawful?</u>

114. Mr Bosek submitted that unlawful evictions was the central issue of this Reference and that the Respondent had not denied that it carried out the evictions in its evidence and responses.

115. Counsel for the Applicant submitted arduously that the eviction of the "Claimants" was done in violation of the law and in complete disregard of the Government's duty and responsibility towards the evictees and especially the minors affected. Counsel stated that the demolition of schools, on account that they were not registered without inviting public views or consulting parents, pupils, teachers and communities, violated the right to fair administrative action under Article 47(2) of the Constitution of Kenya and section 5 of the Fair Administrative Action Act.

116. Counsel further stated that even if the evictions were justified, the same were done against the express provisions of the law and thus violated the principles of the Rule of Law and Good Governance, which the Treaty seeks to protect.

117. On the other hand, Counsel for the Respondent contended that the evictions were lawfully conducted and in strict observance of the law. That there was 'massive' sensitization and that the evictions were preceded by a notice and that before the notice period ended the people who had encroached on the forest obeyed and vacated the forest peacefully.

118. Counsel for the Respondent stated further that on realising that there was massive invasion of the Maasai Mau forest, the Government constituted a number of taskforces which confirmed

that there were encroachments and thus evictions were done in 2005. That despite the evictions of 2005, the evictees did not go away, they encroached back. That, it was untrue that the evictions were undertaken in areas adjacent to the forest and that there was no proof of demolition of schools.

119. Counsel contended further that in 2018, the Government noted the unlawful encroachments on the forest and in its resolve to conserve the Maasai Mau Forest Complex decided to remove all the encroachers and that the Government complied with the necessary laws which protect evictees. In his view, the evictions were lawful and did not occasion a violation of human rights.

120. In further justification of the Respondent's position, Counsel stated that it was their case that the encroachers may have put up physical amenities like schools, markets etc. in order to justify their claim over the forest land and that the Applicant is merely using this case to perpetuate unlawful activities in the forest. He concluded his submissions by asking the Court to dismiss the Reference as there were no unlawful evictions and that, in any case, no right can be anchored on an unlawful action.

121. Mr Bosek, in rejoinder, did not press on with the evictions issue.

122. We have taken cognizance of the evidence adduced in Court and the submissions relating to the issue as to whether the alleged evictions were lawful or otherwise. We have no doubts in our minds that the evictions took place as alleged; the only relevant question is whether this Court should delve into the legality or otherwise of the evictions. We think not for the following reasons.

123. One, the Applicant, in Paragraph 1 of the Statement of Reference stated categorically that he was filing the Reference in his individual capacity and on behalf of the Minors after getting consent of the parents of the minors.

124. Two, none of the Minors is said to have been the owner of a piece of land subject of the evictions. As such, their entitlements in the Application, derivative from their parents or guardians as it may appear, remain to be those rights attributable to minors, the right to education being one of them.

125. We further note that, from the evidence tendered, evictions took place even after this matter was filed in Court; that is, between October and November 2019. Ideally, the Applicant should have stuck on the 2018 evictions, as the subsequent evictions were not pleaded and no amendments to the pleadings were sought and granted in that regard.

126. As alluded to earlier, the issue of lawfulness of evictions or otherwise would require proof at the required standards. The Respondent made it clear in his evidence, that the cause of action before this Court hinges on the abrogation of the rights of the minors whose parents were evicted. As the minors were not owners of the land from which the evictions took place, canvassing the issue of lawfulness of the evictions or otherwise by this Court may not be necessary.

127. We say so because it is uncontroverted that after the evictions, the affected parties filed disputes before competent Courts in the Respondent's State. The evidence before us suggests that the Government moved to cancel the certificate of titles held by some of the evictees and, conversely, that the evictees sought

reparations or restoration of the parcels of land they allegedly lawfully occupied before they were evicted.

128. Although some title deeds were shown to Court and a few witnesses testified to have been lawful owners of the pieces of land they were evicted from, it is our concerted position that the information and evidence before us is insufficient for the Court to make an informed determination of the issue of evictions.

129. Consequently, the third issue is answered in the negative for the reasons above.

ISSUE NO. 5: **Has the Respondent fulfilled its duty, without discrimination, to provide Free Basic Education and uphold the rights of the Minors thereto as required by the Treaty, the African Charter on Human and People's Rights and the Constitution and laws of the Republic of Kenya?**

130. From the pleadings, the oral and written evidence and the written and oral submission of Counsel, this appears to be the crux of the issues that this Court is tasked to determine.

131. Submitting on behalf of the Applicant, Mr Bosek made it clear that this Reference *'has been brought because of the failure on the part of the Kenyan Government to protect the educational and other interests of the children, subject of this proceeding.'* That compulsory basic education being a government duty, the same was not extended to the Children evicted from the Mau Forest Complex.

132. Specifically on the issue at hand, Counsel Bosek intimated that the Respondent violated the express provisions of the African

Charter on Human and People's Rights (Articles 2, 5 and 17 thereof) by burning houses and schools within the Mau Complex without providing alternative homes and schooling facilities. That the Respondent was duty bound to register the schools erected therein.

133. Learned Counsel also stated that the Respondent's act of demolishing unregistered schools without providing alternative avenues, contravened Article 53 of the Constitution and Section 28 of the Basic Education Act, both of which enjoin the Government of Kenya to respect the right of every child to basic and compulsory education. Further, that Kenya being a signatory to the UN Convention on the Right of the Child (UNCRC), it violated the same when it failed to establish or register schools within the Mau Complex and failed to provide alternative housing, education, livelihood and psychological support of the children after the evictions.

134. Mr Bosek concluded that the action of the Respondent to collectively and forcefully evict both parents and children from their houses in the Mau Forest, without putting in place safeguards for children, on account of alleged forest encroachment by parents, constituted collective punishment and thus violated the basic rights of the children of Mau.

135. Responding to the Applicant's submission, Counsel for the Respondent refuted the assertion that the Respondent violated the Treaty or any domestic or international law thereof, or, that it failed in its duty towards the minors as contended by the Applicant. Counsel reiterated its evidence that the schools listed by the Applicant were not registered by the Ministry of Education and therefore not recognised as learning institutions. That the

reclamation of the Maasai Mau Forest Complex was done lawfully and procedurally and that no forced evictions took place.

136. Learned Counsel for the Respondent stated further that after completion of the evictions, unrelated communal clashes arose between several communities residing in some parts of Narok and Nakuru Counties which possibly affected some school going children. In mitigation, the Respondent contend that the Ministry of Education mapped out twenty-five low-cost boarding primary schools located outside the areas affected by the clashes in Narok County where candidates were accommodated to sit for examinations in case the conflicts recurred, persisted or escalated. That all candidates in Narok South sat for their national exams in 2018 and 2019.

137. The Respondent therefore submitted that the Government did not infringe, declined to protect or failed to provide education, since it is a right of every Kenyan child envisaged in Article 53 of the Constitution of Kenya, 2010. That, consequently, the Respondent was not in violation of the Treaty.

138. The Applicant made submissions in rebuttal of the Respondent's written submissions. Mr Bosek reiterated what he had previously submitted and also countered some of the assertions made by Counsel to the Respondent. In his view, the Government's action and inaction amounted to gross failure to guarantee good governance and equality of the children of Mau contrary to the provisions of the Treaty.

139. Mr Bosek also stated that the Respondent failed to adduce sufficient evidence to controvert the assertions by the Applicant. That the Respondent failed to avail any records or evidence,

ordinarily in their immediate control and custody, to demonstrate that the Government took action to secure the welfare of the children affected by the evictions. That, as the Applicant provided names of minors who are out of schools, it was the onus of the Respondent to rebut the evidence and submission thereof as it has in its possession a National Education Management Information System (NEMIS) wherein all pupils are registered and issued with a Unique Personal Identifier.

140. In conclusion, Counsel for the Applicant urged the Court to note that the Reference *'goes beyond seeking mere reparation/compensation to victims for violation of certain rights but goes to calling out the Government of Kenya (a Partner State of the EAC) to take cognisance and consideration for the welfare of its citizens in the spirit of good governance even for future government action.'*

141. Prior to the filing and highlighting the submissions, both parties paraded witnesses and evidence in an attempt to persuade the Court to decide in their favour. As it can be gleaned from the synopsis of the evidence outlined above, some of the Applicant's witnesses testified that the evictions had adverse effects on the minors whose parents were forced to vacate their homes which were allegedly within the Mau Forest.

142. It was part of the evidence of Prof. Chepkwony that he was compelled to file this Reference due to his strong belief that the Government of Kenya has deliberately ignored, neglected and or failed in its responsibility to provide free and compulsory basic education in line with its responsibility under the Constitution of Kenya, the Treaty, the Basic Education Act and a number of international instruments. That the Government was also at fault

for not providing good structures and or learning facilities and materials for the minors, for not posting trained and qualified teachers through the Teachers Service Commission and failure to provide financial resources towards the education of the minors.

143. Ms Bornice Chemtai Kemei, for example, informed the Court that she had a child who was in Standard 7 during the evictions. That thereafter, although the school was not destroyed, he could not go back to school due to the appalling condition they were living in and that she could not afford a boarding school for him. Her evidence was augmented by that of Mr Christopher Kiplangat Bore who stated that within the area where the evictions took place there were unregistered schools constructed by parents and that after the evictions the Government did not provide alternative schools.

144. Further, there was the evidence of Mr Stanley Kiprono Langat who stated that he was a Board Member of Enosoken Primary and Secondary School which was within the area of evictions. He stated that the Government was not sending trained teachers in those schools. This evidence was corroborated by the evidence of Mr Sang, a researcher, who stated that he visited the affected areas after the eviction and observed that 9 unregistered schools had been destroyed and that in his interviews, he learned that the government was not sending trained teachers in those schools.

145. The last set of witnesses for the Applicant comprise of Mr Aron Korir, Ms Rihna Chebet Tonui, Mr Eric Kiplangat Arap Bett and Mr Stephen Kosge. Relevant as their evidence might be, they proffered evidence relating to the evictions that took place in October or November 2019. That is about a month or so after the

current Reference was filed in this Court. As the Applicant had not applied for amendment of the Reference to include the 2019 acts, such evidence cannot be taken to have any probative value in this case.

146. On the other hand, the Respondent's witnesses provided evidence to oppose the assertions made by the Applicant's evidence. Ms Purity Christine Mwangi, from Land Adjudication, for example, testified that the evictions of 2018 were meant to protect the forest ecosystem and that those evicted had encroached the forest. The same evidence was given by Mr Evans Kegode, the Head of Survey and Mapping at Kenya Forests Services, and Mr Thomas Mumu, the Director of Governance and Co-ordination, Kenya Water Towers Agency.

147. According to Mr Mumu, a 60 days-notice was given for the forest encroachers to vacate the forest and that before the notice expired the encroachers willingly vacated. That, although some of them had title deeds, those titles were illegal as they were given contrary to law. He stated further that when he visited the area, as he was part of the people involved, he did not see any school that was demolished nor any makeshift camp adjacent to the Mau Forest Complex. His evidence tallies with the evidence given by Ms Nerea Olick, the Director of Primary Education in the Ministry of Education. Ms Nerea stated that the people who were evicted were squatters and had other homes elsewhere. That after the evictions, those persons were not put in displacement camps in areas adjacent to the forest as they returned to their original homes. On the plight of minors who were allegedly schooling in facilities supposedly demolished, it was Ms Nerea's evidence that if there were any pupils affected by the removal from the forest,

those pupils were schooling elsewhere as there were no registered schools there. That the only registered school that was affected was Osotua Primary and that it was not affected by the evictions but by the communal clashes and that the pupils affected were relocated to other schools so that they sit for exams.

148. Regarding the list of affected pupils, Ms Nerea testified that the same could not be confirmed because it lacked essential details including NEMIS codes or birth certificate numbers of the named pupils. That to the best of her knowledge, there were no mass drop outs of pupils in the affected areas.

149. We have considered the rival submissions and evidence of the parties regarding this issue. We do note that both parties are in agreement that Kenyan children are entitled to free basic education as per the Constitution of Kenya, 2010 and the Basic Educations Act. They, likewise, agree to the fact that children's rights are not only protected by the Kenyan domestic law but also international instruments relating to the rights of the child to which the Respondent is a party.

150. The main point of disagreement is whether the Respondent fulfilled its mandate in the aftermath of the 2018 evictions from the Mau Forest Complex. Evidence from both sides confirms that minors have been in some ways affected by the evictions. However, we do not find sufficient evidence to suggest that the Respondent reneged from its duty to provide free basic education to the Mau children as contended by the Applicant.

151. It is common ground that within the area where the evictions took place there were no registered schools and that pupils in such facilities, if any, had alternative schools where they could

easily register for the exams. Further, there was overwhelming evidence from the Respondent that outside the affected areas there were public schools within a radius of a few kilometres from one another. No cogent evidence was provided to suggest that such public schools could not be accessed by any of the named pupils.

152. We also note that, although there was a long list of names of the affected pupils, the Applicant did not present any of the said persons. The Applicant brought only one witness, Mr Aron Korir, who at the time of testimony was 19 years of age and who testified that he was a standard 8 pupil at the time of the evictions. It is unfortunate that this witness was not testifying regarding the evictions subject of this Reference but of subsequent evictions of 2019. His plight, if any, cannot, as already alluded to, be taken to be sufficient proof of the allegations contained in the Reference. Plus, he confirmed that he was able to sit for his KCPE examinations at Saire Primary School despite living in a makeshift camp and that he was a secondary school student.

153. The duty to prove, on the balance of probability, the plight of the minors and the abdication of duty by the Respondent is on the Applicant. In **British American Tobacco (U) Ltd. vs the Attorney General of Uganda** (supra at para 74) it was held:

> **"In International Courts such as the EACJ, as in National Courts, the burden of proof is on whoever asserts a fact or proposition of law essential to the success of his/or her case. This rule of adjective law is subject to an exception which covers admissions, presumptions, judicial notice and estoppel as may be appropriate (see Union Trade Centre Limited (UTC) vs The Attorney General of Rwanda,**

[Appeal No. 1 of 2015] [unreported] and Henry Kyarimpa v The Attorney General of Uganda, [Appeal No. 6 of 2014] [unreported]. And we are in agreement with the submissions of Counsel for the Appellant that the normal standard of proof in the civil causes canvassed before our Court is on the balance of probabilities, also referred to as the preponderance of evidence."

154. In **Henry Kyarimpa vs The Attorney General of Uganda, EACJ Appeal No. 6 of 2014,** it was stated that "the burden of proof is on the one who would fail if no proof was offered". See **also Dr. Mpozayo Christophe vs the Attorney General of the Republic of Rwanda, EACJ Reference No. 10 of 2014; Manariyo Desire vs the Attorney General of the Republic of Burundi, EACJ Appeal No. 1 of 2017** and **Garang Michael Mahok vs the Attorney General of the Republic of South Sudan, EACJ Reference No. 19 of 2018**.

155. We hold that the Applicant did not surmount this duty at the required standards. While we agree with him that an eviction, whether lawful or unlawful, may have attendant consequences on the victims, whether adults or minors, we find it difficult, in the absence of cogent evidence, to agree with him that the Government of Kenya reneged on its noble duty or discriminated the Mau minors as alleged. The burden of proof lies on the Applicant to prove to the required standards that the Government of Kenya overtly or covertly discriminated against the children whose parents or guardians were subject of the 2018 evictions from the Mau Forest Complex or areas adjacent thereto. This burden does not shift to the Respondent as Counsel for the Applicant urged this Court to decide.

156. Further, the Court could not comprehend the reasons that made the Applicant to summon four witnesses whose evidence related to the eviction which took place after the Reference was filed in Court. Such evidence, in our view, does not support the cause of action for the Applicant. On the contrary, that evidence may be taken to be supportive of the Respondent's contention that there has been repeated encroachment on the Mau Forest Complex despite the evictions and the Government's resolve to protect the forest.

157. The Applicant was at liberty to exercise the rights provided for under Rules 48 to 51 of the Rules in case he wanted the October 2019 evidence to be part of his case. As he failed to exercise that option, the evidence remains inconsequential.

158. The Applicant's own witnesses attest to the fact that there is free basic education in Kenya consistent with the Constitution and other legal provisions. Witnesses also confirm that most places within Narok South County have public schools where the affected pupils could be admitted to pursue or continue their education. Despite evidence that some parents were unable to meet boarding or transport costs of their children after the evictions, no evidence was led to suggest that the Government was aware of the predicaments of such minors and took no measures. To the contrary, the witness from the Ministry of Education informed the Court of the steps they took to mitigate the negative impact on minors following community clashes around the area. It would also appear rather incomprehensible that the Government could not have noticed the drop out of over 5000 school going children.

159. Consequently, we find nothing in evidence to support the Applicant's assertions that the Respondent failed to fulfil its duty, without discrimination, to provide Free Basic Education and uphold the rights of the Minors thereto as required by the Treaty, the African Charter on Human and People's Rights and the Constitution and laws of the Republic of Kenya. We thus answer this issue in the affirmative. That is, **the Respondent fulfilled its duty, without discrimination, in providing Free Basic Education and upholding the rights of the Minors thereto as required by the Treaty, the African Charter on Human and People's Rights and the Constitution and laws of the Republic of Kenya**.

ISSUE NO. 6: **Are the Parties entitled to the Remedies sought?**

160. A number of declaratory orders and other remedies were sought by the Applicant as shown in Paragraph 12 hereof. As stated in the preceding paragraphs, the Applicant failed to substantiate his entitlement to the reliefs sought. On the other hand, the Respondent prayed that all claims made against it by the Applicant be dismissed with costs. In our determination of the issues, we concluded that the Applicant was unable to prove any of the claims and is thereby not entitled to the reliefs sought. Consequently, we are unable to grant any of the reliefs sought.

161. Before we conclude, we find it relevant to comment on the manner in which Counsel for the Applicant prosecuted this Reference. It is on record that the Applicant, after closure of the evidence by both parties, indicated that he intended to file a formal application so as to reopen the evidence and admit expert evidence. Mr Bosek filed an Application in Court which was later

withdrawn. On 10th June 2022, after both parties had highlighted their written submissions, Mr Bosek informed the Court that he had filed another application (Application No. 19 of 2022) seeking to reopen the case so as to allow the Applicant to file an expert report prepared by Eden Therapy Centre.

162. It should be noted that Application No. 19 of 2022 was filed in our Nairobi Registry on the 10th June 2022, the same day that hearing of submissions highlights was proceeding in Court. The Court had no prior information regarding the Application and Counsel for the Applicant proceeded with the hearing without alerting Court of his indication to file such an application. As the Application was not before Court and hearing had been concluded, the Court proceeded to conclude the hearing and scheduled the same for judgment.

163. The Court Rules allow a party to file documents after closure of pleadings by leave of the Court. The Rules, however, do not envisage reopening of evidence after closure of hearing. The Applicant preferred the Application under Rule 44(1) of the Rules. For clarity, we reproduce Rule 44 in its entirety. It provides:

> **"44. (1) After the close of the written proceedings, no further documents may be filed to the Court by either party except with leave of the Court.**
>
> **(2) The party desiring to produce a document after closure of pleadings shall deposit, at the registry, the original or a certified copy thereof and shall be responsible for serving a copy thereof to the other party and shall file a return of service in the registry.**

(3) The other party shall be held to have given its consent if it does not lodge an objection to the production of the document within seven (7) days of service.

(4) In the event of objection, the Court may, after hearing the parties, authorize production of the document if it considers production necessary.

(5) If a new document is produced under this rule, the other party shall have an opportunity of commenting upon it and of submitting documents in support of its comments.

(6) No party may, during the oral proceedings, refer to the contents of any document which was not produced as part of the written proceedings or in accordance with this rule.

(7) <u>The application of this rule shall not in itself constitute a ground for delaying the opening or the course of the oral proceedings</u>." (Emphasis added)

164. We do not think the above provision envisages the situation raised by the Applicant in the intended application. The latest that the report could have been filed was after closure of pleadings before oral hearing. The basis for this is to allow the other party a chance to bring evidence against or comment on the contents of the new evidence or document filed late. The Application, having been filed after closure of hearing, falls out of the ambit of Rule 44 of the Rules. We take cognizance of the fact that in exceptional circumstances, the Court may admit evidence after closure of hearing, but that has to be in very exceptional circumstances. This Reference was filed in September 2018. The Applicant had all the time to prepare his case and submit any evidence or reports. The evidence needed concerned events that took place in 2018.

Hearing of oral and documentary evidence ended in September 2021 whereby the matter was fixed for filing of written submissions. We do not therefore see any exceptional circumstances that would make this Court consider admitting new evidence brought after hearing was finalised.

165. We are mindful of the legal maxim which says: "*interest rei publica ut sit finis- litium*". That is to say, it is in the public interest that litigation comes to an end. The Court reiterated this position in the case of **Angella Amudo vs the Secretary General of the East African Community, EACJ Application No. 4 of 2015**, where it said: *"were this permissible "litigation would have no end except when legal ingenuity is exhausted." That would be totally "intolerable and prejudicial to public interest," which demands an end to litigation.*"

166. In the circumstances, we have no flicker of doubts in our minds that Application No. 19 of 2022 was an afterthought only meant to delay the course of justice. It is on that basis that we declined the Application to have the Reference stayed pending admission of an expert report made on behalf of the Applicant which is aimed at reopening the hearing and admission of new evidence.

167. Ordinarily, we would be inclined to grant costs to the successful party, in this case the Respondent, in accordance with Rule 127 of the Rules. However, taking into consideration the nature of the dispute before us and that the Applicant approached this Court as a representative of the rights of minors, granting costs against him will not serve the interest of justice.

I. CONCLUSION

168. In the event, we decline to grant the orders sought by the Applicant. The Reference is hereby dismissed in its entirety.

169. Considering the circumstances of the matter herein and in exercise of our judicial discretion, we direct that each Party bears their own costs.

Dated, signed and delivered in Arusha this 28th day of September 2022

.....
Hon. Justice Yohane B. Masara
PRINCIPAL JUDGE

.....
*Hon. Justice Audace Ngiye
DEPUTY PRINCIPAL JUDGE

.....
Hon. Justice Dr Charles O. Nyawello
JUDGE

.....
Hon. Justice Charles A. Nyachae
JUDGE

.....
Hon. Justice Richard Muhumuza
JUDGE

***[Hon. Justice Audace Ngiye retired from the Court in the end of June 2022 but signed this Judgment in terms of Article 25(3) of the Treaty.]**