

INDIGENOUS NEGOTIATIONS CASE STUDY

Creation of the Chepkitale National Game Reserve on Community Land

Prepared by Mr. Martin Simotwo

Martin is from the Ogiek community of Mt. Elgon and is also the Director for Chepkitale Indigenous People's Development Program (CIPDP), a local non-governmental organization.

1. The Negotiation Challenge

Among the indigenous people of Africa, land customarily belonged to the community which could be in the form of a clan or ethnic community. Access to the land was guaranteed by customary rules. The ownership to land was therefore communal and rights were communal.

The coming of colonial powers introduced new land tenure systems in Africa, through introduction of land policies and land laws. The colonial land policies and laws set the stage for the community land dispossession. Communities have lost land through privatization of land, creation of wildlife protected areas and putting land under government management.

When Kenya attained independence, the colonial policies and land laws continued to be used. This resulted in communities continuing to loss access to lands they had customarily had access to. Communal land tenure was seen to be less superior system compared to private ownership, where titles are provided as approve of ownership.

With most lands in Kenya converted to private ownership, the land that has remained available to communities are community lands. Community lands of late are under serious threat from the state and private developments, oil exploration, as well as from the creation of protected areas and mining.

Another threat to communities' rights of access to land comes from the creation of wildlife protected areas. Among the impacts are:

- Denial of land rights - Land ownership among the Ogiek of Mt. Elgon, like other indigenous communities, is still communal. Creation or conversation of community land to a game reserve or any other form of government management itself amounts to loss of land rights to the entire community
- Loss of livelihoods - Land supports the livelihoods of the Ogiek community directly. The community is still relying on hunter-gatherer and pastoralism activities as a primary mode of production, which heavily relies on land. Loss of land means the source livelihoods are lost also.
- Denial of use of and access to natural resources – As communities are denied access to lands they've always known as theirs to use, the new land mangers set up systems of "enforced illegality." Communities trying to access resources become 'poachers,' 'encroachers' and 'squatters' on their own land and are subject to petty tyrannies by park guards.
- Disruptions to the social fabric of the community – When access to lands are restricted, customary settlement patterns are disrupted. This causes disruptions to kinship systems and to informal social networks, which help drive economy in the community. Conversion from communally-held to government held land can result in forced resettlement, which further

stresses social bonds in the community. As symbolic ties to the land are broken, cultural identity can be weakened and traditional leadership systems destroyed.

Most of the communities that have lost land have ended up in serious poverty, because most of their sources of livelihood – such as beekeeping, pastoralism and hunting/gathering – are lost with their loss of access to lands, and consequently communities are deprived of their wealth.

It has been estimated that, as a result of these policies, some 1 million km² of forests, pasture and farmlands were expropriated in Africa to make way for conservation but equivalent statistics are lacking of the number of people displaced as a consequence (Nelson and Hossack, 2003).

International instruments like the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) also prohibit government from undertaking forceful evictions of indigenous peoples. Article 10 of UNDRIP states that:

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Despite this, many governments continue to evict their citizens from their ancestral lands without due regard to the existing protocols on indigenous people and their rights to land. Creation of conservation areas by the exclusion of indigenous peoples has also been seen to undermine the objective of its creation as observed by Carey:

Loss of traditional rights can reduce peoples' interest in long-term stewardship of the land and therefore the creation of a protected area can in some cases increase the rate of damage to the very values that the protected area was originally created to preserve . . . Putting a fence around a protected area seldom creates a long term solution to problems of disaffected local communities, whether or not it is ethically justified (Carey et al., 2000, p. 25).

On Mt. Elgon, located at Kenya's western edge bordering Uganda, the Ogiek peoples of the Chepkitale community have made their home for generations. This land fell under trust status, a designation in Kenya where county councils hold and manage the lands. In 2000, community members noticed a gazette notice on their lands, stating that the area was going to be turned into a game reserve. The Mt. Elgon County Council, through a minute of full council, had made recommendations and requested the minister in the Office of the President to gazette Chepkitale community land into Chepkitale National Game Reserve. In June 2000, through a gazette notice, Chepkitale community land was converted to Chepkitale National Game Reserve, which limited the rights of the community in the use of the land. This was done without the free, prior and informed consent of Ogiek. The community decided to enter into negotiations with the county council, the landholders, to resist the gazette notice of their lands as protected areas.

2. Context

People and Communities

The Ogiek peoples of Mt. Elgon are a hunter and gatherer community who have lived on the slopes of Mt. Elgon for centuries. The Ogiek rely on the wild fruits, honey and products from cattle, sheep and goats as source of livelihood. The Ogiek graze their cattle, sheep and goats on the high Chepkitale moorland of Mt. Elgon and into the forests and the mountain. The forest is also important for honey production. The clan system, council of elders, community by-laws and indigenous traditional knowledge ensure sustainability of the resources and environment in general.

The population is approximately 25,000 people, with a 1:1 ratio of male to female. The Ogiek of Mt. Elgon live in Bungoma and Transoia counties of Kenya.

Like many other countries, the Kenyan educational system has three segments: primary, secondary and tertiary education. While the government controls the formal education, the Ogiek still have informal education systems, which are guided purely by traditional guidelines and are passed to generations through community structures like the age sets, cultural ceremonies like circumcision, marriage and other rights of passage, and through channels like story telling. Traditional education is what has kept the community for centuries before the introduction of formal education.

With the introduction of formal education, the community has embraced it. At the moment 0.01% have attained university education, 20% attained secondary education, and 30% attained primary education. 49.09% of the community are illiterate or have not completed primary education. The community has five primary schools, with no secondary school and colleges. This means the children have to travel far to get secondary education.

For decades, the Ogiek community have lived on hunting and gathering. With the growth of population, climate change, diminishing forests and interactions with other communities' sources of livelihood has changed to beekeeping, basketry by women and pastoralism. The community still rely on the primary level of production and therefore are hugely affected by the climate change and loss of land rights.

Governance and Decision-Making

There are two forms of governance that relate to the Ogiek community: traditional governance and modern governance.

Traditional Governance

The Ogiek are organized into families that in turn form clans. A clan is a group of families that are related. Each clan is headed by the clan chairman. All the clan chairmen together form the council of elders, which then elect the executive committee of the community, which is headed by the council chairman. The council of elders is the voice of the community on social, political and economic issues.

The community has developed community by-laws which stipulate how each member of the community should interact with other members of the society and nature. It also stipulates the punishment that should follow when one goes against the by-laws.

At the community level most decisions are handled at the clan level and are escalated to the council of elders if the clan is unable to handle. For issues that affect the entire community, the council of elders handle it on behalf of the entire community.

Formal Governance

Formal governance consists of both national level and county governments.

COUNTY GOVERNMENT

County government is composed of the executive and legislative arm. County government has duties and functions that are assigned by the 2010 Constitution of Kenya, which exclude defense and security. The executive structure has representatives up to the village level, which is equivalent to a sub location in the national government. At the moment, Chepkitale is designated as a village, but the county government has not sent an officer and the village council has not be constituted.

County government has some responsibility over the community lands and environment under which this negotiations case is about.

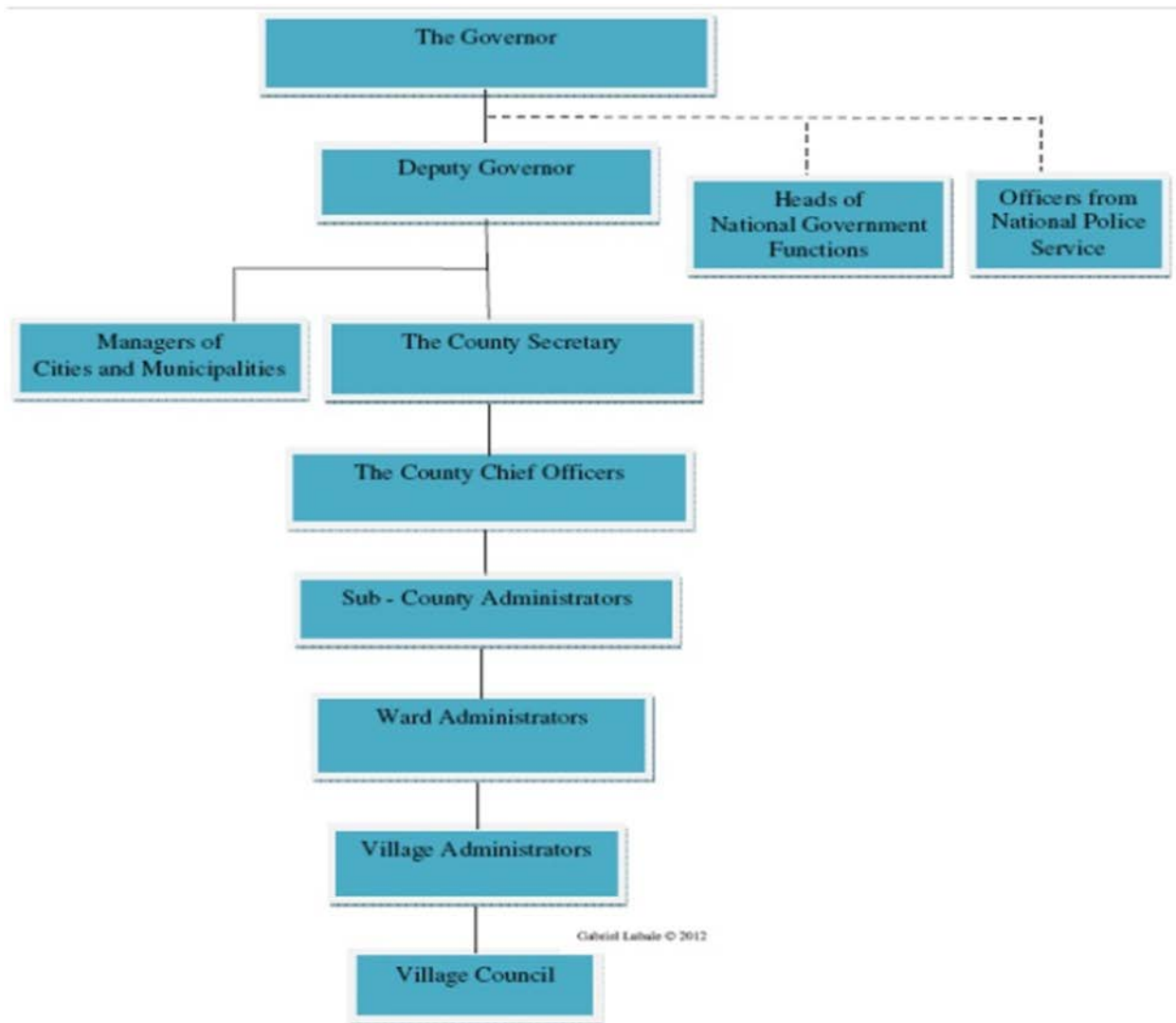


Figure 1: Kenyan Country Government Structure

The Kenyan Constitution assigned the county government the following functions, which relate to the case study:

“Implementation of specific national government policies on natural resources and environmental conservation, including—

- (a) soil and water conservation; and
- (b) forestry” (Kenyan Constitution 2010 Fourth Schedule).

NATIONAL GOVERNMENT

The Kenyan national government has three arms: executive, judiciary and legislative. The executive arm has representatives up to the smallest unit, which is the sub location which is headed by assistant chief.

The 2010 Kenyan Constitution bestows the following functions that relate to the case study to the national government:

“Protection of the environment and natural resources with a view to establishing a durable and sustainable system of development, including, in particular—

- (a) Fishing, hunting and gathering;
- (b) Protection of animals and wildlife;
- (c) Water protection, securing sufficient residual water, hydraulic engineering and the safety of dams; and
- (d) energy policy” (Kenyan Constitution 2010 Fourth Schedule).

This makes the national government have responsibility over land, minerals, wildlife and forests, although there are some overlaps between national government and county government.

Legal Framework

Conversion of Chepkitale trust land to Chepkitale National Game Reserve took place in 2000. During this period, Kenya was a previous version of the constitution which stands at the moment repealed. The old constitution provided for the framework on the management of the trustlands. Section 114 (a) and (b) of the repealed Kenya constitution provides the description of the trustlands in Kenya. Section 115(1) of the repealed Kenya constitution provides for the trustland to vest on the county council. Further, section 115(2) states that the county councils shall hold the trust land for the benefit of ordinary residents.

Section 117 provides for setting apart of trust land for public use, which is more elaborated in the repealed Trust Land Act of 1938. Section 7 of the repealed Trust Land Act provides for the setting apart of trust land at instance government. Section 8 of the repealed Trust Land Act provides for how compensation should be undertaken, section 9 of repealed Trust Land Act provides for appeals for the compensation. Section 11 of the repealed Trust Land Act provides for payment of compensation awarded. A key provision is section 12 of the repealed Trust Land Act, which provides for any dissatisfied member of the community to move to the high court to seek redress in case the process was not handled according to the law. Further section 13 of the repealed Trust Land Act of 1938, sets the procedure of setting a part of the trust land.

To create a national game reserve, the Wildlife (Conservation and Management) Act, cap 376 (Repealed), section 18, empowers the minister in charge of wildlife to gazette any area to be a game reserve based on the advice from the county council.

Historical Context

Before the establishment of British rule in 1895, Kenyan communities occupied certain portions of land where they lived either as pastoralists, cultivators or as hunters and gatherers, while some communities cultivated and fished. Their land laws were the customary laws. After the British rule was established in 1895, the Crown asserted it was the sole owner of all the land and defined the rights that were to be recognized. This was made clear in the Crown Lands Ordinance of 1902.

Initially, the Crown Lands Ordinance respected the customary land rights to some extent, and this made the colonialists unhappy. The 1915 amendment of the Crown Lands Ordinance facilitated the dispossession of the Africans of their land. It was during this time that some parts of Mt. Elgon Forest

were recognized as Crown Lands. In most cases, the indigenous owners of the confiscated land became laborers of the British farmers.

The history of Kenya between 1918 and 1939 is one of trying to increase indigenous people's security of tenure. The British government appointed the Kenya Land Commission, which was chaired by Chief Justice Morris Carter, which inquired into the land issue and made its recommendations in the Kenya Land Commission Report of 1934. They made a far-reaching recommendation that resulted into establishment of African Native Reserves through the Native Land Trust Ordinance of 1938.

In 1938, Chepkitale Native Reserve was gazetted officially as an African Native Reserve following the recommendation of the Kenya Land Commission of 1932- 1934. Immediately after independence the African Native Reserves were converted to trustlands which later turned community land following the enactment of the 2010 Kenyan Constitution. In 1969 Mt. Elgon National Park was created in part of the forest and part of Chepkitale community land. This meant that the community lost all the rights to utilize the land set aside for the national park.

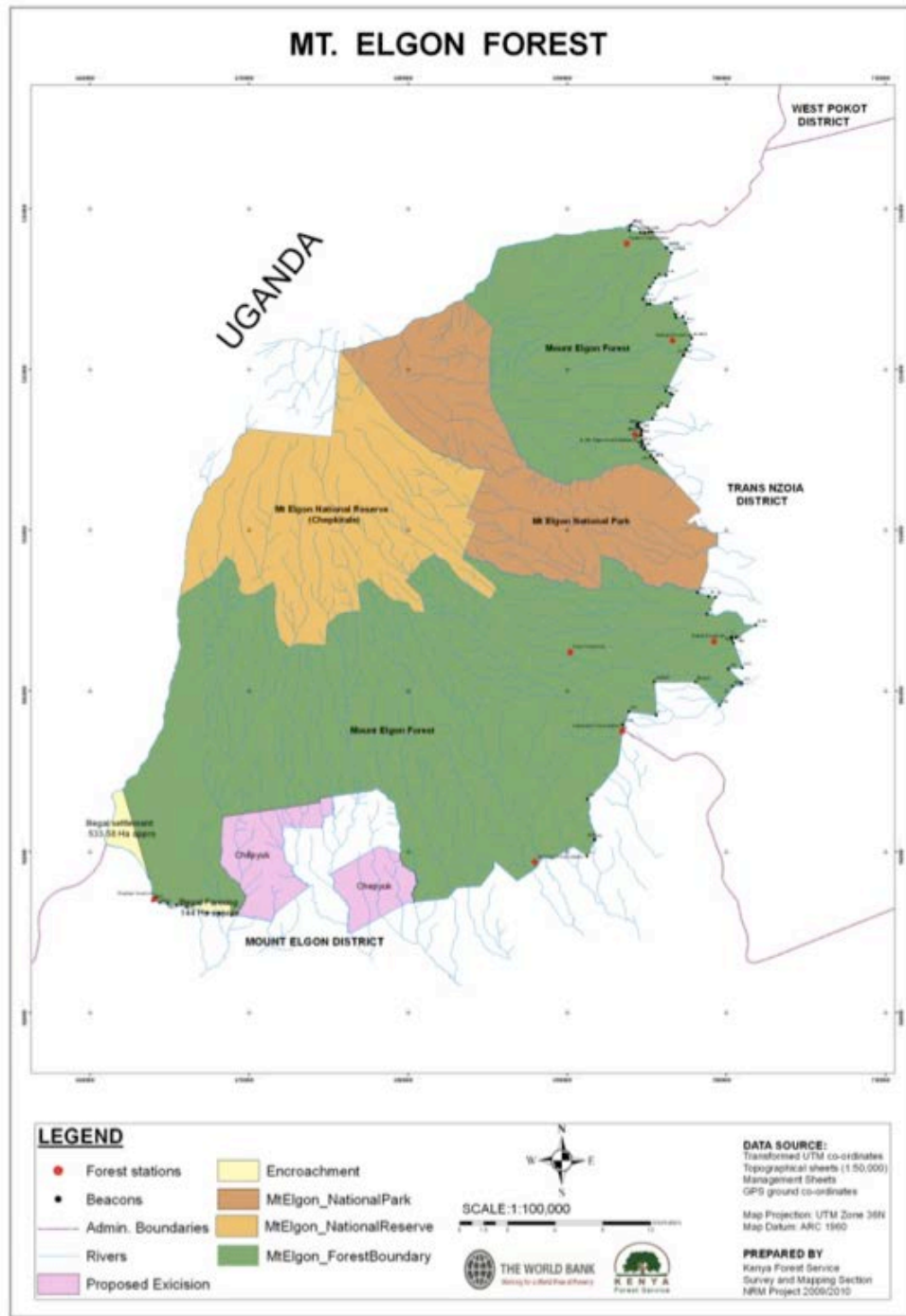


Figure 2: Current status of land ownership on Mt. Elgon

3. The Negotiation Process

In 2000, Mount Elgon County Council, with the help of the International Union for Conservation of Nature (IUCN), came up with a proposals to create a national game reserve over top of Ogiek traditional lands. Chepkitala is ideal for tourism and the County Council thought of coming up with a national game reserve so that private investors could put up resorts and hotels deep inside the Ogiek land. The aim of

the County Council was to raise its revenue base through collection of taxes. The project was conceptualized in 1997. In 2000, the Mt. Elgon County Council, through a minute of full council, made recommendations and requested the minister in the Office of the President to gazette Chepkitale community land into Chepkitale National Game Reserve. Gazettement of Chepkitale came into effect in 2002. Beginning in 2006, the Mount Elgon Regional Ecosystem Conservation Programme (MERECP), with the help of the government of Norway and Sweden, took over the assistance of the county council in financing.

The Ogiek community has preserved the environment and cultural practices of Mt. Elgon for decades. With the implementation of this project, the community would have lost their land rights, their source of livelihood through loss of grazing rights, as the areas were going to be opened up for various investments and cattle movements would be restricted. On the other hand, the proponents of the project argued that a few community members would have benefitted from job opportunities from the investments that would be done. It was believed that investors would have been invited to put up hotels in the community land and hotels would offer job opportunities to some members of the community as hotel waiters, guards, and housekeeping attendants.

Preparations

When the gazette notice that converted Chepkitale community land to Chepkitale National Game Reserve came out, the community through the council of elders invited community elites to come and explain to the community the consequences of the gazette notice. During the community discussion, it emerged that some of the community members supported the conversion of the community land to a game reserve. Some members of the community did not. From the community discussion the majority decided that a letter be written to the minister in the Office of the President. After one month the community got a reply from the minister in the Office of the President, who distanced himself from the process by urging the community to consult the Mt. Elgon County Council.

From the response from the minister in the Office of the President, the community was now sure that Mt. Elgon County Council is the institution to deal with. To start the discussions with the Council, the Chepkitale community formed two teams: one was a group of professionals to do research and provide technical assistance on the problem and the other was a group of elders who formed the complainants and negotiators. At this stage, there was no external ally or partner the community had identified. As the community was preparing to engage the county council, it should be noted that some community members supported the county council on this project.

The community is organized into a clan system and therefore one elder was picked from every clan to form the negotiating team. In addition to the elders, professionals from the community and some women were added to the team. Since most of the members lacked capacity to understand the issues, the community engaged a land and conservation expert to provide technical expertise. The funds to support the experts were contributed by the community members.

The Ogiek Governing Council is another structure we created to support the community in general management of the area, especially enforcing the community byelaws. The Ogiek Governing Council converts the traditional management system into a written system. For example, it sets the penalties for stealing a cow, cutting a tree, harvesting someone's beehive, setting fire on pasture or forest etc. the elites also have an informal association of professionals, from those of us educated in the community, to consult each other.

The process of consultations and negotiations can be divided into two:

- 2000 to 2008
- 2008 to date

During the first phase of consultation, the community realized, it was difficult to move on with consultation and achieve what was anticipated without proper support. With help of the community professionals, the community formed a local non-governmental organization called Chepkitale Indigenous Peoples' Development Project (CIPDP) in 2003. It should be realized that during this period, it was illegal to hold meetings without license from government, so the community registered CIPDP to be used as a convener organization during community meetings. It was also to be used for resource mobilization, creating alliances and partnerships. It is difficult for the community members to get support as individuals but easy to get support through an organization.

Negotiation Part 1: 2000-2008

During this period, the community was confronted with very serious issues. For many years the community had rested assured that their land right to Chepkitale was assured. When the gazette notice came out, professionals from the community did some research to understand the implications of the gazette notice on the community land rights. During the research work the professionals involved some youth who are university graduates in the research. To understand the legal implications community members had to understand the laws that govern trustlands. In short, professionals from the community had to be paralegals.

Following extensive research, the community found out that a section of the community and a local representative (councilor) at the local authority (Mt. Elgon County Council) had sanctioned the process. After getting the facts, the professionals shared the facts with the council of elders. From this stage, the council of elders convened a community meeting to explain the happenings to the community. Out of the two consultations, the community realized that their land had been taken away irregularly. From the community, professionals were asked to write to the office that did the gazette, which was done. The community got a response indicating that it was Mt Elgon county council that made the request.

After several community consultations, the community mandated the council of elders and professionals to engage the Mt. Elgon County council. The community requested for a meeting with the county council, which took many months to schedule. This first meeting took place in county council premises and was chaired by the chairman of county council. The community registered their displeasure over how their land was irregularly converted to a national game reserve. The county council insisted that the process was sanctioned by the community representative and some community members and that the national game reserve was going to be beneficial to the community. Several discussions with the county council were done with little success, since the council continued to hold that the council did the right thing.

At this stage there was no neutral convener or arbitrator and travel expenses would be catered for by the county council. The community insisted that the gazette did not follow the former Trust Land Act which recognized the community participation, on the other side the Mt. Elgon County Council insisted that some community members endorsed the gazette. The consultations did not yield any fruits and the community was forced to seek court intervention. The community contributed cash for the first

county filling. Before the case started, the lawyer that the community had engaged disappeared with community evidences and cash paid. The community had to get a second lawyer to handle the case. When the county council realized the community had gone to court, the Mt. Elgon County Council again requested for out of court settlement, which takes us to the second phase of negotiation.

Negotiation Part 2: 2008-2012

In this phase of the negotiation, the community was negotiating for three things:

1. County council was to pass a minute to return the land back to the community
2. Kenya Wildlife Service was to degazette the area from a game reserve
3. Kenya Wildlife Service was to help train the community scouts so that the scouts could help in the community land and wildlife conservation

When the county council realized the community had gone to court, it requested for an out of court settlement. This provided a good opportunity. In 2011, through CIPDP, the community approached Forest Peoples' Programme (FPP), an NGO supporting indigenous peoples, and the International Union of Conservation of Nature (IUCN), a conservation group. FPP provided financial and technical support while the IUCN become convener of the consultation under the Whakatane Mechanism, an initiative designed to bring together stakeholders and resolve disputes over protected areas. This project brought together local stakeholders to discuss. The stakeholders that were involved included the Chepkitale Ogiek community, the county council, Kenya Forest Service, Kenya Wildlife Service, the Ministry of Environment, and the National Environmental and Management Authority. In a round table meeting, the Mt. Elgon County Council agreed that they were going to pass a minute to revert back the land to community. True to their word, the county council voted and passed a vote to degazette Chepkitale as a national game reserve.

4. Current Situation on the Ground

Though the degazettement has not been done, the community has enjoyed the benefits of being able to access their customary lands, without much disturbance. Additionally, the Kenya Wildlife Service accepted the community's request to train community members as wildlife scouts, and community members are now able to help in community land and wildlife conservation activities.

5. Broader Implications

With most lands in Kenya converted to private ownership or government management, the land that has remained available to indigenous peoples are communally held community lands. Community lands of late are under serious threat from the state and private developments, extractive industries, as well as from the creation of protected areas. Historical record shows a trend that as communities have lost land, they have ended up in serious poverty, because most of their sources of livelihood are lost with their loss of access to lands. Loss of access to land also leads to disruptions on the social fabric of the community, and a decline or loss of cultural identity. Communities who can defend their rights to land through negotiation have a greater chance of avoiding these negative impacts, and there are a number of lessons to be learned from the successful negotiations example of the Mt. Elgon Ogiek peoples:

- Creating support for the community position: Even when the community cannot be 100% in agreement, the community can push on so long as a majority support. As community

professionals and a council of elders, we had to educate and explain to the community the implications of the conversion of land from trustland to national game reserve. This would make a majority of the community to support the cause.

- Strong community structures: Strong community internal structures like a council of elders helped in pushing the negotiation forward.
- Being fully informed; Proper research on the project made it possible for a breakthrough. Professionals and young university graduates were tasked to undertake proper research on the matter. This was done on volunteer bases. Having correct information helped the community to argue their case well.
- Importance of partnerships: CIPDP cultivated strategic relationships with other organizations that provided financial, technical, political, and social support. Before engaging on any organization to partner with, a proper background check is done to avoid organizations that could sabotage the work.