MAA CIVIL SOCIETY FORUM.

A CASE OF HISTORICAL AND CONTEMPORARY INJUSTICES

A MEMEORANDUM PRESENTED

TO

THE SPECIAL RAPPORTEUR ON THE SITUATION OF HUMAN RIGHTS AND FOUNDAMENTAL FREEDOMS OF INDIGENOUS PEOPLES

DECEMBER 2006

By

Maa Speakers from:

Kajiado, Narok, Transmara, Nakuru, Samburu, Laikipia, Isiolo, Baringo and Marsabit.

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INTRODUCTION

It is a recognized fact that the pastoralist communities in Kenya have in time immemorial lived under harsh conditions in the semi – arid grazing lands. Primarily, their livelihood revolves around grazing and keeping large herds of livestock. Unfortunately, the semi – arid lands have very limited resources that would be of significance to economic diversification and exploitation by the pastoralists.

Despite this sorry state of affairs, the pastoralist land have been infiltrated and exploited by other communities at their own expense. In the recent past, the pastoralist land has come under immense pressure from other land use systems as the population in the high potential areas has grown

leading to the greater numbers of people from these areas migrating to the arid and semi arid areas.

The laws and policies on the pastoralist land in Kenya have been extremely devastating and exploitative. They have not been sympathetic to the plight of the pastoralist. The policies are not sensitive to the livestock nor the pastoralist lifestyle. There has been a deliberate misconception of the pastoralism and livestock socio – economic lifestyle. This lifestyle has been viewed as being primitive and unproductive.

There has been a concerted move by greedy politicians and senior government officials to eradicate the pastoralist by grabbing their land for collateral reasons – secure money from financial institutions or for commercial purposes and interests- by selling them at the market to any willing buyer. For instance, whereas the Government has established various ministries which are strategies for implementation of specific development initiatives, in a long while there have never been a Ministry of Livestock within the Government administrative machinery. Yet livestock has been a major income earner in this country in terms of the meat, milk, leather, manure products and as employment provision in different sectors.

“Development” of the arid areas has been seen to mean the settlement of the choice parts of the land by farmers or members of farming communities.

If at all the Government has assumed control and management functions for pastoralist land, much of it has been given over to commercial agricultural production or national parks and game reserves. The consequence to the attitude is two fold:-

Firstly, the pastoralists continue to lose access to one of the few assets bestowed on them – land. The land acts as an area for sustaining and grazing large size of livestock. It is also a multi – faceted means for natural resources such as wood, water, building materials, traditional medicinal herbs and for the conservation and preservation of wildlife and environment.

Secondly, the adjudication and demarcation of the pastoralist rangelands into small uneconomic units is detrimental. The livestock are not accessible to adequate grazing land and hence poor quality of milk and meat hence indicators of poverty. Consequently, and for survival reasons, the pastoralists are compelled to dispose off the land and migrate to the urban areas and take up extremely lowly occupations such day and night guards for the very capitalists who purchase their land. A typical of serfdom system is created.

Who are The Maasai ?

The Maasai are a unique people group who live in vast areas of Kenya and Tanzania. Their uniqueness is derived from their culture and attachment to livestock.

The Maa speaking people are pre – dominantly from the Rift Valley in the East African region. These people comprise mainly of the *Il*maasai (Maasai), Il sambur (Samburu), Njemps (ILchamus) and *Il*molo (Ilmolo) in Kenya, while the majority of the Maa speakers are found in Tanzania. The linguistic evidence and oral traditions of the Maasai point to the Nile Valley, somewhere in the Sudan – Uganda border area being the original birth place of the Maasai" called *El Bagaza.*

The dialect Maa gives them a common bond despite living in various parts and with other communities between them. The country in which the Maasai live is often referred to Maasailand or Maasai country and is characterized by picturistic landscapes, which include the Great Rift Valley and abundant wildlife. Their way of life is predominantly pastoralism which involves movement of people and their livestock in search of water and pasture

The Maasai identify themselves as indigenous peoples whose cultures and ways of life differ considerably from the domain society, and that their cultures are under threat, and in some cases face extinction.

Pastoralism has been recognized as a way of life. It encompasses livestock keeping, grazing, nomadism and utilization of natural resources by the people and their animals. It is a way households manage land, labour and capital.

It is a demanding occupation, requiring the ability to withstand physical hardships, walk long distances, enter strange territories without fear and work as a team with large number of people and livestock.

Therefore the Maasai are people who make a living by keeping livestock that act as a direct intermediate between man and his natural environment, the pastures. The livestock are the source of milk, meat, fat and blood for human consumption and/or provide an indirect source of income through the sale or barter of animals and their produce including wool, hides and skins, manure and horns.

Like hunting and ranching, pastoralism belongs to the main categories of rangelands utilization. Nomadism is a system where the whole household moves long distances during the year, often returning to the same general

area in the dry season. Pastoralist nomads normally have livestock economy, although one may also find hunter/gatherers and nomadic farmers.

The Social – Economic Characteristics of Maasai.

A key characteristic of most of them is that the survival of their particular way of life depends on access and rights to their traditional and natural resources thereon[1]

Pastoralists have certain common socio – cultural characteristics.
The following are the common features that bestow on all the pastoralists within the East African Region. These are namely:-

a). Common historical origins;
b). Living in arid and semi – arid unpredictable climatic conditions.
c). Maximization of herds during good seasons to offset stock mortality during drought;
d). Strong sociological attachment to livestock & natural resources; with livestock being used extensively in cultural practices such as payment of bride – wealth, initiation, etc;
e). Sustained nomadic lifestyles in order to exploit the wet grazing areas moving from one area to another in pursuit of grazing ground and water;

f). Subsistence orientation of the economy; with pastoralists keeping livestock to feed the extended family and being opposed to commercialization;

g). Decentralized governance patterns – leadership in which traditional systems and structures are upheld e.g. Elders councils; judicial and conflict resolution structures etc;

h). Individualized ownership of livestock, which is grazed in communally owned pastures.

Some Misconceptions about Pastoralists and the Maasai.

As pastoralists, the Maasai have been misunderstood and their way of life stereotyped by the so called mainsteam communities.
They have been referred to as backward, uncivilized, primitive and an embarrassment to development. Such has made marginalization, exclusion discrimination and dispossession legitimate in Government policy making circles. This has a left of suffering among the pastoralists and minorities contrary to ***Article 5*** of the African Charter which states that every individual shall have the right to respect for the dignity inherent in human being and ***Article 19,*** which states that all peoples shall be equal, enjoy the same respect.
This discrimination and domination threatens the continuation of their culture that gives them identity and sense of belonging and deprives them opportunities for self expression in matters affecting their own development.

The Maasai and the Land Rights situation in Kenya

At present, Kenya has three categories of land, namely, Government Land, Trust Land and Private Land.

Government Land: Outside the ten -mile coastal strip, the colonialism had relocated *Radical Title* from indigenous communities to the imperial sovereign thus making the former *de jure* tenants at will of the latter - Land was vested

in Her Majesty with delegated powers to the Governor of Kenya Colony - it was “Crown Land”. After independence, all the land previously vested by the colonial government was transferred to the Government of Kenya in 1964. It became “Government Land” Government land consist of all un-alienated land in the country including gazetted forests, national parks, rivers and lakes, public roads and reserves, the territorial sea bed, protected areas and land occupied by government or quasi-government institutions and installations. This category also includes all land held under private titles, i.e., freeholds, government leaseholds and absolute ownership through land registration created under the Act. As a form of tenure, the classification of land as “Government”, tended to be interpreted to mean that such land is “private” to the Government, and has been in practice, used and disposed of as such.

Trust Land: consists of land held by County Councils/Local Authorities on behalf and for the benefit of persons ordinarily resident on that land.
These comprises mainly communal/pastoral lands, e.g., land owned by the Maasai Community.

Private Land: is all land with registered title in accordance with any registered statutes. It refers to individual/ private tenure where land is owned exclusively by individuals or companies. It is either freehold where the holder has absolute ownership or leasehold, i.e., for a term of years subject to the payment of rent and certain conditions on development usage.

The Commission of Enquiry into the Land Law System in Kenya recommends that the Constitution should classify all land, simply as public, commons or private.

The Draft Constitution recommends that classification of all Kenya land be designated as ***public***-that is land that was unalienated as government land; Trust Land becomes ***community land*** - held by communities identified on the

basis ethnicity, residence or community of interest; and ***private land-*** includes any registered land held by any person under a freehold tenure, and any other land that may be declared private land under an Act of Parliament.

Land and other resource rights are collective among the Maasai while the individual ownership of livestock is highly recognized and respected.

While Pastoralists own resources collectively, lack of recognition of their livelihood systems by the state and the deliberate marginalization at the expense of the much more preferred systems which is agro based.

In Kenya, dominant communities have marginalized the pastoralists and Minorities by legislation which disposed them of their lands and territories. Many communities have historical claims over land that they lost to the colonialist and post independence African regimes.

The Genesis dispossession of Maasai Land.

In 1904, the white settlers started penetrating Maasai land from Laikipiak district (*Olomuruti*). About 48 European settlers had shown interest in settling in East Africa. They beseeched the Maasai to let them settle there as the land was extremely fertile and Conducive for practising agriculture and ranching. It was obvious that the Maasai with their roving habits and warlike traditions were not desirable neighbors to the white settlers and so their presence along the recently constructed railway was hardly consistent with the public interest.

Notably, by this time, in 1890 Mbatian, the Massai Oloiboni (the ritual expert) had died leaving his succession in dispute between his two sons – Senteu and Olonana. The two brothers were divided among two rivaling sections of the Maasai. The community was also being compounded by calamities such as East Coast fever, rinderpest, draught and famine. The settlers saw the opportunity to

penetrate the region. On their own oblivion, the British Colonial Administration misinterpreted and regarded Olonana as being a hereditary 'Chief" of the Maasai people and gave him the requisite support. He was elevated and/or assumed to be the administrative chief of the Maasai. It will be noted, "*Oloiboni*" was just a traditional medicine man. He neither had administrative roles nor responsibilities.

Hence, on 15th August, 1904, the Maasai were cunningly induced into signing an agreement with the colonial administration, The infamous Anglo- Maasai Agreements of 1904 and 1911. It is held that Olonana represented the Maasai State as a sovereign power and Governor Sir. Donald Stewart acting on behalf of Her majesty the Queen, was representing the British Colonial Administration. In accordance with the terms and conditions of the Agreements, it is held that the Maasai decided of their "...***own free will…that it is for our best interests to remove our own people, flocks and herds into definite reservations away from the railway line and away from any land that may be thrown open to European settlement under this agreement".***

Due to this treaty, about 11,200 Maasai community members and their 22 million herds of cattle were moved across the railway line southwards. Indeed, two reserves were established measuring 4,770 square miles and 4,350 square miles south of the railway line in Kajiado and Narok districts respectively. This was to pave way for the white settlers in the deserted area. The southern area was less potential, full of livestock diseases. In the White Paper on the Maasai, Deputy Commissioner Jackson had said:-

*"…..**Let those who advocate for (taking of) the Kedong Valley and the south of it visit the country in the dry weather. No sane European would accept a free gift of 500, 000 acres in such a place. Why, then, try to force such a place on the Maasai? Higher ground, and considerable area of it, is absolutely necessary, and it is impossible to deny that the Maasai are entitled to it"***

To some extent one would say that the 1904 Agreement was signed “in good faith” and indeed a clause was included, which stated that:-

“We would, however, ask that the settlement now arrived at shall be enduring so long as the Maasai shall exist and that European or other settlers shall not be allowed to take up land in the settlement”.

Indeed, Sir Stewart added the following prophetic note:-

“The Laikipia lands are well known to the Maasai and will suit them well; They are a good way from the railway and not tempting to the present settlers, though in future it is quite possible that when the Maasai have grazed down the grass and got it sweet, envious eyes will again cast in their lands and so I cannot express how strong on the absolute necessity of making these Laikipia lands an absolute reserve for the Maasai and that no application for land will be entertained within the limits of this Maasai Reserve”

As fate would have it, after awhile, the above prophecy came to pass. In 1911, the white settlers became more greedy and felt the need to expand their horizon. Furthermore, they discovered that the area where the Maasai had moved to was more fertile and conducive for settlement. There was a continuous influx of settlers who were calling for rapid opening of these “unsettled” areas. They quickly proceeded to hoodwink a section of the Maasai community into signing another agreement. Under this agreement, the people were required to abandon their newly acquired settlements and move further into the Arid North. This was to be the 2nd Anglo-Maasai Agreement. As a matter of fact, it was unbelievable that the Maasai could accept to the Colonialists’ offer. Her Majesty’s Commissioner, Sir.Sadler who succeeded Sir Stewart, is quoted to have remarked:-

*"…..**No European in the country imagined for a moment that the Maasai of Illaikipiak wished to leave it. The area, though small, is fine piece of a country as there is in Kenya, with rich soil and perennial streams, vastly superior in every way to the country's south of Rift Valley".***

While in the south, thousands of cattle died of East Coats Fever, pleuro – pneumonia and rinderpest. And hundreds of young people in particular succumbed to bouts of flu, malaria and pneumonia. This is borne out in the colonial records, but various Maasai elders also remember these happenings as they retort - "The soldiers who escorted the move said " Go to the south and die of ECF and hunger''…drop dead". They used guns and force to compel them to move. Many people died during the move due to sleeping sickness, anthrax, cold on the Mau, lack of food and water for cattle and food, water and milk for humans. Proportionately, the total herds allegedly lost as a result of all the causes cited above were 97, 910 cows and 298, 829 sheep, a total value of not less than Pound 200, 000.00. The total depreciation of stock was set at approximately Pounds 100, 000.00. The Laikipiak land was valued at Pound 1 Million.

Challenging the treaties.

The Ole Njogo and Others versus The Hon. Attorney General and 20 others Civil Case No. 91 of 1912 (E.A.P. 1914), 5 E.A.L.R. 70.

Emanating from the injustices of the above stated treaties, certain elders led by Murket Ole Nchoko (whose name the British misspelled as being Ol Ole Njogo) felt aggrieved and decided to confront justice by filing a suit to challenge the move by the British Colonial Administration. The parties brought a suit for the breach of the 1904 agreement on the ground that the Agreement was a civil contract, which was still subsisting, the Agreement of 1911 not having been

made with Maasai elders capable of executing decisions that are binding on the whole tribe. Damages were also claimed in tort for the wrongful confiscation of some of the herds of cattle.

It was their case that this was not a treaty in the real sense as there was no way the British Colonial Administration could enter into such an agreement with its subjects. The capacity of Olonana as a medicine man was questioned as he had no authority to enter into an agreement on behalf of the Maasai community. Additionally, the agreement was unilateral as there is no way the Maasai elders, being illiterate could possess the same bargaining power in a an agreement of such magnitude with an enlightened British Governor.

The aggrieved parties claimed the 1911 agreement was void on the following five (5) reasons. That;-

- ✓ The Plaintiffs and other Maasai had never consented to it or authorised the Maasai defendants or anyone to agree to it on their behalf;

- ✓ The Defendants had no authority to alienate the interests of minors and unborn children of the Laikipia Maasai in Laikipia district.

- ✓ It was not for the benefit of the Maasai generally nor of the Maasai of Laikipia. The government was also in a fiduciary position to the Maasai (that is, they were trustees, as a result of the 1904 Agreement and later declarations of the Secretary of State) and had thereby gained financially;

- ✓ The Maasai, particularly the signatories, had not been imparted with independent legal advice before signing it;

In the meantime, the warriors (*Ilmoran)* threw gauntlet to the older generation. They held that the Maasai elders had no authority to deal with land. According to

the Maasai customs, the Maasai elders can only give advice but the actual decision-making rests with the warriors. The pertinent questions could have been;- if power admittedly lay with the warriors, why had the government not signed treaties exclusively with them? Why had it engaged with dealings of a political nature with spiritual leaders who had no political/administrative authority?

Arising from this, the elders sought for the following relief:-

(a) That the Southern Reserve to which their stock was being moved was infected with East Coast Fever (E. C. F) and tsetse flies in many places;

(b) That the cattle moved had depreciated and the total depreciation estimated at Sterling pounds 100, 000.00;

(c) That the Agreement was not binding on the Maasai people.

A preliminary objection was raised by the British Crown on a point of law to the effect that local courts had no jurisdiction to hear and finally determine the suit. It was their contention that, the Agreements of 1904 and 1911 were treaties and not mere contracts and the alleged confiscation was an Act of State and therefore, they were not cognizable in a municipal court.

The Maasai elders were represented by a white counsel – Mr. Morrison, in a suit presided by a white judge – Judge Hamilton and a white prosecutor. The case went to appeal before C.J Morris Carter, Bonham Carter and J.J King Farlow in the Court of Appeal of Eastern Africa. The Interpreter was from the Akamba {non Maasai} Community. Obviously, the law applicable was Anglican/English.

The Judgment/ Verdict.

Subsequently, on 26th May, 1913 at Mombasa High Court, the Maasai case was dismissed. Upon hearing the case from both sides, the East Africa appeal court decided that indeed, the 1904 and 1911 agreements respectively were not mere agreements. They were international treaties entered into between two separate sovereign states namely, the Maasai state and the British Colonial Administration as indicated above. The Maasai were regarded as foreigners in relation to the protecting power. The court held that the Maasai were *'subjects of their chiefs or their local government whatever form that government may in fact take".*

The Court relied heavily on the Indian cases and precedents. It quoted Lord Kingsdowne in the Privy Council case of the ***Secretary of State for India Versus Kamachee Boye Sahaba,*** *which states thus*

"….it may have been just or unjust, politic or impolitic, beneficial or injurious, taken as a whole, to those whose interests are affected. These are considerations into which their Lordships cannot enter. It is sufficient to say that even if a wrong has been done, it is a wrong for which no Municipal Court of Justice can afford a remedy"

Hence, it follows in international jurisprudence, such a matter could not be determined within a municipal jurisdiction but had to be filed, heard and finally determined in a court of international jurisdiction. The elders lost the case on technicality basis. The judgment centered on the status of a Protectorate, in which the King was said to exercise powers by virtue of the Foreign Jurisdiction Act, 1890.

*"…..**The Crown claimed that British East Africa was not actually British territory and therefore the Maasai were not British subjects with any attendant rights of recourse to British law. But British East Africa being a Protectorate in which the Crown has jurisdiction is in relation to the Crown a foreign country under its protection and its native inhabitants are not***

subjects owing allegiance to the Crown but protected foreigners who in return for that protection, owe obedience….."

The issue of appeal to the Case.

The Maasai were given conditional leave to appeal to the Privy Council in Britain. It is strongly believed that the legality of the Government's actions would have been reviewed by the Privy Council, if only the Maasai had taken their case to Britain. But the elders did not appeal this judgment. Their lawyer stated that *"…I accordingly advised my clients to appeal but I have not yet been able to see them".* The time lapsed when they failed to give security for costs.

There is a theory that the Maasai were threatened with drowning in the sea if they ever sailed to Britain to appeal. They gave up this plan "under heavy pressure".

The reactions by other parties.

The reaction of the Colonial Office was stated by the Permanent Under – Secretary Sir John Anderson:- *"…….I do not like the decision at all….to call the Agreement a Treaty is an abuse of language".* He could not imagine the Privy Council would support the judgment if the case was referred to it in appeal that is.

One Mr. Fredrick Jackson explicitly stated:*"…none of the treaties concluded with African chiefs, councils or tribes by the Imperial British East Africa Company contained anything that was intended to mark, or could be construed as marking the transfer and control over land in African ownership or occupation out of African hands. On the contrary, the IBEA Company's charter spelled out that it must show* "careful regard" *to the lands and goods of the native inhabitants."*

In a recent appraisal of the case, David V Williams in his works "Waitangi – Maori and Pakeha Perspectives of the Treaty of Waitangi" OUP, Aukland, 1989 pp. 68 – 70, he comments *" the Judgments in this case are noteworthy for the adeptness of the Judges in arriving at appropriate legal doctrines to legitimate the spoliations of a colonial Government…The reasoning of the judges was remarkable for ingenuity in ensuring that the plaintiffs obtained no remedy".*

He further holds that there was a contradiction on the face of the judgement. While on the one hand it held that the Maasai leaders lacked the legal capacity to enter into a binding contract with regard to their land, On the other hand, however, it was held that the Maasai leaders did have the capacity to engage in treaty negotiations and to sign treaties. In Maasai society, no individuals are customarily custodians of land or any other resource besides the livestock. Beside, the so-called signatories to the Agreements were not chiefs in any 'traditional' sense. Hence, where did the authority lay – with the council of elders, age – sets spokesmen, warriors, medicine men or prophets? Did they have the powers to give the land away?

The Recommendations.

In view of the foregoing issues and surrounding inferences, the MAA community wishes to make the following two (2) concrete recommendations:-

> **Restitution of the land:**- The MAA community does strongly urge the Government of Kenya not to extend any of the leases, which are at the verge of expiring. Instead, the land should be reverted back to the MAA community. The land is theirs.
>
> The MAA people have a right of restitution of their land, territories and resources, which are rightfully theirs. This is the land they traditionally owned or occupied or used and, which has been confiscated, occupied, used and exploited without their free and informed consent. The so-called

treaty has affected this community from generation to generation. They have been subjected to abject poverty, disease and illiteracy since time immemorial.

Compensation for the atrocities: - The Kenyan and British Governments should compensate the MAA communities for all the historical and contemporary injustices subjected to them. The compensation should be in the form of lands and territories equal in quality, size and legal status to those taken away from them wrongfully. It should also include monies to mitigate their social – cultural welfare such as education, livestock management and markets, amenities and infrastructure. The compensation should be just, prompt and fair to benefit all the population of MAA people.

On August 2004, to mark the 100th year since the signing of the treaties through the auspices of Maa Civil Society Forum, the Maasai organized processions in Nairobi, Narok, Nakuru, Kajiado and Laikipia to draw to the attention of the Kenya Government through a memorandum the fact that there is need to redress the Maasai claim for restitution and compensation for the losses.

The Reactions by the Kenya Government and The British High Commission in Kenya.

The British High Commission- A procession of Maasai men and women took the memorandum to the British High Commission but they were denied audience with the British High Commissioner. A second procession to deliver the memorandum was violently dispersed by the Police terming it illegal. 13 Men were arrested, several injured and personal effects lost during the forceful dispersion of the Maasai by the Police.

The Kenya Government.

The first procession took the Government by surprise and memorandums were delivered to some government offices without any intimidation.
This time coincided when the Maasai were experiencing severe drought which forced them to seek pasture in areas that had grass which happen to be located in the historical Maasai territories but owned by white settlers. The government issued statement sitting incitement by Maasai indigenous CSOs and instructed that the Maasai be dealt with mercilessly. The order was implemented and the first casualty of the government order became **Ntinai Ole Moyiare** who was shot on the back and Killed under unexplained circumstances by guards from Oldaiga farm under the supervision of the police. When the Maasai wanted to know why they are being killed, the government responded by arresting 267 men, women and children in Laikipia and arraigning them in courts in Nanyuki, Nyeri and Nyahururu on fictitious charges.

Testimonies from the arrested people narrated incidences of overcrowding in prison cells, denial of food and water and physical body injuries. While the offences committed were trespass and malicious damage to property which usually attract court fines of between Ksh. 2,000 to Ksh. 5,000,the Maasai were denied bail and when accepted they were allowed bails of Ksh.100,000.
Latter on the government could not sustain the cases and all the arrested were set free.

During the same period Indigenous Community Based organizations which were supporting the Maasai agenda were deregistered, operations criminalized and bank accounts closed by the government apparatus in Laikipia and Kajiado Districts. The leading organizations which were **SIMOO**

from Kajiado and **OSILIGI** from Laikipia stopped operations due to pressure from government.

During the same period, a Maasai lawyer who was leading the research on leases and Treaties the late **Marima ole Sempeta** {RIP**}** was shot dead under unexplained circumstances. To date the government is yet to institute and inquiry into the death.
Investigations were instituted by the government on the activities of many Maasai CSOs with plans to deregister them. This threat is real in that the government has introduced the NGO coordinating act which is meant to control the activities of CSOs which do not subscribe to the aspirations of the ruling elites.

The Maasai of Laikipia continue to undergo untold suffering given the fact that the land they live on is historically theirs but they do not have the rights to it because it was sold to land buying companies at independence or is lawfully owned by white settlers or key people in past and current post independence regimes.

Other Human Rights Issues in Nakuru District.

1. Senseless Killings.

The Maasai community in Nakuru has undergone trying times in Naivasha area of Nakuru district. The killings are perpetrated by state organs and the killers are left off the hook despite common knowledge of who the perpetrators are. Denial of access to grass and water has led to ethnic conflicts between the pastoralist Maasai community and their agricultural neighbors who were given exclusive rights to a communal water source led to the killing of 7 Maasai cattle traders traveling by public means and the burning of homesteads and a chief's vehicle triggered the Maasai to

revenge and Killed several people. The government in the name of restoring peace used brute force with helicopter gun ships to round up Maasai herdsmen, Killed 2 in cold blood, stole and destroyed property while at the same time arresting 46 people.
The Maasai yet again lost one of theirs in the name of Ole Sisina, a game warden who was out on official duty to investigate poachers in one of the Private farms owned by the family of the first settlers in Kenya, Lord Delamere. Ole Sisina met his death in the hands of non other than a grand son of Lord Delamare who was discharged of the murder case despite having known the deceased and actually confessed shooting.

2. Legitimizing Land Dispossession

The Maasai community in Nakuru lives along the stretch from the Kikuyu/ Kijabe escarpment south of the railway line to the shores of Lake Nakuru. They live in clusters with identity and many have lived there for as long as before the colonialists came. Because of the nature of pastoralism which is their life stay, land is owned communally and it should never be sold.

On attainment of independence, the first African regime never settled the displaced Maasai despite living in these areas, land buying companies by people associated with the leaders from central province were formed and finances from the Settlement Trustee used to buy the land in disregard of the Maasai who were living there.
Now the Maasai who number about 10,000 are virtually squatters in the land of their ancestors.

The government is using state apparatus such as the courts and legislations to forcefully evict them from the land by either stressing the legality of title deeds and through courts that are controlled by people from the same ethnic tribes.

a) Namuncha Maasai community

The Namoncha land is situated in Naivasha, Nakuru district. It covers the land reference numbers **378/2**, which according to the official search measures approximately **4875 acres**. Analytically, this parcel land reference emanates from the sub-division of the original parcel of land known as 378 that measured about **5129 acres** granted to and registered in the name of one Mr. Cyril Herbert Mayers on or about 1962.

Prior to this sub division, the land was registered under the registration of Titles ordinance, Grant number **18643 for a term of 943 years** from 1st October 1961. On 1/10/61 the governor and commander in chief of the colony and protectorate of Kenya on behalf of her majesty Queen Elizabeth the second granted the land unto one Mr. Humprey Slade (former speaker to the National Assembly) and James Frederick Hume of P.O. Box 30333 Nairobi as joint tenants.

The parcel of land is situated in the Southern part of Kijabe Township in Naivasha. On the western side of the land is found the Kedong River with the boundary of land passing in the center of the river. The northern side, another Little Kedong River is found once again with the boundaries passing in the center of the river. On the extreme northeastern, are what has come to be referred to as 'the Kikuyu escarpment' forest reserve. In the Eastern, side is the Kikuyu land unit and while the southern part of the land within a radius of 20 feet from the center of trig beacons reserved to the government.

The land was then measured ***five thousand one hundred and twenty nine (5129) acres*** or thereabouts that is to say land reference number 378 which piece of land with dimensions abuttals and boundaries thereof were delineated on the plan on the land survey plan No. 78211. Deposited in the survey records office in Nairobi. It was to be held as joint tenants upon trusts contained in an indenture registered in volume No. 25 Folio 63/10 for a term of nine hundred and forty-three (943) years from the 1st day of October One Thousand Nine Hundred and Sixty One (1st October 1961) subject to the payment of annual land rent – i.e. from 1st October 1961 until 31st December 1999.

Mr. John Mayer is the first-born son of the late Cyril Herbert Mayer. The Mayer Family has lived on the land from 1947. They bought the parcel of land from the Billiard – Leak family who had acquired the land from one Greswold - Williams.

Though the Mayers are of the British origin, they have now acquired Kenya citizens.

In reference to the official records, the parcel of land originally reference number 378 measuring about 5129 acres is indicated as having belonged to Mr. Humprey Slade – the former Speaker to the National Assembly of Kenya and one Mr. Fredrick Hume Hamilton. According to Mr. Mayer (Junior), the two gentlemen were the lawyers engaged by Mr. Cyril Mayer from the present renown law firm of present Hamilton Harrison and Mathews and company advocates.

The Sub – Division of the Land Reference Number 378*:-* It is reported that, sometimes in the early 1960s, there were hashed strategy to intimidate and cause the Mayer's flee the farm. At the stated time, one Councilor lead a team of thugs and police to the farm of the Mayer's and physically threw them out of the land. They roughly bundled the old Lady Mayer into a van

and took her away. It is held that from these incidents of harassment, psychological pressure and coercion, the Mayers were 'forced' to sell the parcels of land to other interested parties.

It has not really been clear where the pressure was emanating from, but certainly all along, the members of the Kikuyu community had been interested in assuming ownership to the land in question.

Hence, in 1962, the parcel of land reference number 378 was sub – divided into three parcels namely ***L.R 378/1; 378/2 and 380.*** The LR 378/1 measuring 260 acres was retained by the Mayer family, the 378/2 is the current Namoncha farm while 380 was acquired by the Rarre Co – operative group – a land buying group belonging to the Kikuyu community.

The Mayers are currently the owners of land reference 378/1 which measures approximately 244 acres. The prime land is situated at the source of river Little Kedong with abundant vegetation and greenery. The conservation and protection of the natural environment is of high standard. Due to this surrounding, the Mayers are coveted by many people. On several occasions, many disgruntled persons wish to forcefully evict them from the land but in vain.

The Namoncha land is camouflaged with intricate issues surrounding ownership, title and interest on the said land. As a result, simmering tension and animosity has been brewing and the eventual consequences may not be impossible to predict. So far, the differences have led to several legal actions being instituted in the High Court with the hope to attain a legal remedy.

Supposedly, the groups involved in the tussle are those from the Maasai and the Kikuyu communities respectively. The two groups inadvertently have made specific claims over the land.

Generally, the Maasai community claim to have been in continuous possession, use and occupation of the Namoncha land from time immemorial without any form of interruption. On the other hand, the Kikuyu community allegedly insists that they are not only the legal owners but bestow the rights and interest as they hold the legal title deed to the land. As far as the Kikuyu community is concerned, whether, they have been in occupation and use is extremely not in issue. In fact, the Kikuyu community contends that they were forcefully evicted from the land during the 1992/94 ethnic 'cleaning' clashes by armed Maasai warriors. All these are issues that will certainly require one to establish beyond any spec of doubt being intricate matters of evidence. This case together with others by the Maasai community against Utheri Wa Lari Land buying Company, Nyakinyua Land buying company and Kedong are in courts awaiting hearings, rulings or judgments**.**

One case was ruled against the Maasai community at Olmara verses Ngati farm another land buying company despite the Maasai community having lived there far back as 1913
The community has now sought redress by appealing to the High Court.

b) Narasha Maasai Community

Narasha is located between Mt Longonot, Hells Gate Park and Lake Naivasha with the Maasai community sand witched between. The community has been subjected to untold suffering through;

- Rampant Land Grabbing by elite individuals and encroachment of Lake Naivasha by horticulture/floriculture farms are dispossessing pastoralists of their ancestral territories and denying them access to the lake by blockading access routes/corridors to water (which is a critical resource). This consequently compromises their inherent right to livelihoods as well raises fundamental environmental concerns. Pastoralists' religious and cultural attachment to the lake resource has also not been considered in the establishment of private land for conservation, tourism and flori/horticulture farms. The incorporation of indigenous systems of ecological management in land use systems is equally missing. There is also a demand-driven plea made by pastoralists to the horticulture/floriculture businesses for increased attention and resources to corporate responsibility, human rights and the conditions of the barracks where some Maasai are now forced to work in order to sustain themselves.

- Pastoralists have been systematically and often forcefully extracted from their traditional grazing lands to pave way for a KenGen Geothermal Power Generation plant and establishment of Hell's Gate National Park in the area. This has occurred without requisite compensation and without the integration of Maasai women and men into decision-making processes. In addition, some Maasai families are confined within the park perimeter and are subjected to curfew-like regulations in their own homelands. There are no mechanisms in pace for compensation for wild animal attacks on humans and livestock.

- There is glaring lack of policy recognition of communal land tenure and access to natural resources as well as pastoralism and the social, cultural, economic and religious aspects. Pastoralism is perceived as "non-productive" and a threat to the ecology, even though it has been a sustainable way of life for centuries.

- Lack of equitable distribution of resources and benefit sharing as well as the somewhat weak capacity by pastoralists to articulate their rights due to prevalent fear of government disenfranchisement and marginalization arising from century long experiences of brutality and suppression by state security machinery.

- Privatization and subdivision/segmentation of land is threatening transhumance pastoralism practiced by the Maasai thus undermining and endangering livestock production, ecological sustainability and communal property rights to land and natural resources in addition to culture and identity.

- One of the specific challenges also faced by Maasai communities is to find a way to empower, strengthen the capacity and access to resources of and empower Maasai women to find locally and gender sensitive solutions. It was noted by both the men elders and the small group of Maasai women that women seem to disproportionately bear processes of marginalization.

- A positive and concrete outcome of the field trip was that the representative of the flower growers' association responded to the challenge posed by Maasai pastoralists by inviting them to write a "Master Plan" concerning access to and restoration of the lake.

Community Initiatives to challenge emerging trends and marginalization

The local community has formed a community-based organization to spearhead activities aimed at mitigating the effects of marginalization

- Increased exchange and networking with other pastoralist communities, and with national, regional and international human rights and indigenous rights bodies. One promising example is a case pending by the Human Rights Task Force of the African Commission regarding the historical claims of the people around Lake Baringo.If judged in the favor of indigenous people, this case will set a precedent for other communities in Kenya and beyond.

Emerging Issues of concern

- The apparent lack of commitment, protection and equitable legislative reforms by the state to give voice to pastoralists' issues has in some cases rendered them "squatters" in their own ancestral lands and restricted access to resources that are critical for their livelihoods. Without these rights to access resources, pastoralist communities face a stark future of continued marginalization and impoverishment
- There is a strong need for policies that supports – and not condemn the rights and lives of pastoralists across Kenya. Pastoralist communities have put forward constructive suggestions like setting up a Parliamentary Committee on Pastoralist Issues, as well as having a policy on Pastoralism.

Dispossession in Maasai Group Ranches-

a) Iloodo- Ariak and Mosiro Group Ranches

Iloodo - Ariak (the Maasai word for a place of "*red waters")* is land situated about 80 Kilometers from the southern part of Nairobi in Kajiado District within the Rift Valley Province. It is approximately 146, 682 Ha. Since time immemorial the land has been occupied and managed by and it is occupied by over 6, 000 indigenous Maasai inhabitants of the *Keekonyokie* clan – who are the ordinarily residents of

the area – with traditional pastoralist activities centered on livestock. By virtue of Section 114 of the Constitution of Kenya, the Iloodo – Ariak was vested in Olkejuado County Council as a Trustee. The County Council was to hold the land in question for the benefit of the persons who were ordinarily residents thereon.

By the declaration notices Numbers ***LA/LDO/1/8*** dated 22nd November, 1978 and ***LND/MOS/56/4*** dated 11th July, 1986 the government declared Iloodo – Ariak and Mosiro respectively land an adjudication sections within the meaning of Section 5 of the Land Adjudication Act (Cap. 284). It was meant for purposes of ascertainment, recording and registering of pre – existing customary rights and interests of those ordinarily residents in the said area. Such residents were to be issued with title deeds. As the main users and occupiers of the land, the Maasai were entitled to expect significant consultation with the adjudication team and positive results from the whole process.

The process of adjudication at Iloodo – Ariak proceeded on until 1989 when it was pronounced complete. The adjudication register was published for inspection and objections invited within the sixty (60) days of it's completion of the register. Consequently, 459 objections were lodged and determined by 1990. Soon thereafter, those recorded as owners of the parcels of land in the section were registered as absolute proprietors of the land and hence issued with the title deeds in respect of the provisions requirements of the Registered Land Act (Cap. 300).

However, the adjudication process was marred with greed, abuse of office, acts of arbitrariness, corruption exhibited by the officials from the Ministry of Land and Settlement who were ostensibly facilitating the adjudication process.

In the course of the alleged adjudication process, available evidence indicates that many of The Government officials were recorded as the owners of the land in this area. Further, that a great deal of land was demarcated to people, friends and relatives of these officials who are not ordinarily residents. This did not happen for free or by accident. The non-residents made hefty payments to these

Government officials and land Adjudication Committee members. As a result, the following was the outcome:-

- 362 persons who were (still are) non – neither residents nor members of any of the existing group ranches of this area were nonetheless recorded as owners of the land in the section. They were allotted land and issued with the title deeds. A large number of these non – residents were and still are highly placed politicians, adjudication officials, other senior government and local officials and their relatives, friends, businessmen and associates who had no connection with the area. These people were providing bribes in order to lubricate the process. The officials took advantage of the ignorance and the illiteracy level bestowed by the members of this community.

Definitely, people with no customary claim on the land, but needed such a resources to secure loans for private business ventures.

- Over 2, 000 legitimate and indigenous Maasai families and inhabitants were deliberately and through fraudulent means left out of the adjudication process and were declared to be squatters on the land allotted to other people. These residents were not aware of the demarcation and recording taking place. The community was not made aware of these matters. The same was never effectively communicated to them as required by section 14 of the Land Adjudication Act.

The Maasai residents of both Iloodo-Ariak and Mosiro from Kajiado district undoubtedly lived on this ancestral land from generation to generation. Their case is to protect the land being taken away through unfair, arbitrary and gross abuse of power perpetrated by Government officials. At both the adjudication areas, the rightful and laid down land adjudication procedures was not applied. There was neither publication nor any notices to this effect. These acts of omission and commission were deliberate with intention of

frustrating any efforts to launch and/or lodge of appeal cases with Minister of Lands and Settlement nor the high court as required by the primary Land Adjudication Act.

These developments caused various resentments from the local residents both political and legal. The subsequent activities were as follows:-

The Saitoti Probe Committee of 1991.

In or about August, 1991, the then Vice – President Professor George Saitoti (the area Member of Parliament) established a twelve (12) member Probe Committee. The terms of reference for this Committee were:

- To investigate the complaints of the residents of Iloodo-Ariak area in reference to the adjudication process and;
- To make recommendations thereon.

The Report:-

The Committee developed a report to this effect. Invariably, the findings were sketchy and the recommendations half – baked and half – hearted. The composition of the Committee was dubious and not well - vetted. Majority of its members were non – residents and not beneficiaries. The Committee found out that of the 362 non – residents allotted Title Deeds:

I). 192 resided out of Kajiado District;
ii).14 resided within Kajiado District but Ngong Division;
iii).156 resided within Ngong Division but out of the Iloodariak area.

Recommendations by the Committee – the Committee absurdly made a reconciliatory and worthless recommendation:-

- a) Those residing out of Kajiado district retain ten (10) Ha. Each;
- b) Those residing within Kajiado district but out of the Ngong Division retain twenty (20) Ha. Each; and
- c).Those residing in the Ngong division but out of Iloodo - Ariak area retain fourty (40) Ha each.
- The Probe Committee had no legal status. It's proceedings, findings and recommendations therefore, are devoid of any binding (legal) force. The evidential value of the same is null and void *ab initio* on the grounds of admissibility. The Iloodo – Ariak community vehemently rejected the report by the Committee.

  A subsequent commission called the Ndungu Commission identified this area as one of the unlawfully acquired lands that it was investigating and recommended that the Titles be annulled but up to date the government despite having received the report

b) The Mosiro land case:

Mosiro was declared an Adjudication area on the 11th day of July, 1998. An Adjudication Committee was appointed on the 16th July, 19 86 by the Kajiado District Adjudication Officer.

- The District Adjudication Officer did not give any of the applicants and/or any residents of Mosiro
- The officer demarcated land to people on the map without such maps allocation being preceded by Land Adjudication Section any opportunity to point out or demarcate the boundaries of any land applicants claimed.

- The recording and the demarcation officers did not accord the applicants and/or the residents of Mosiro Land Adjudication Section any opportunity to:-
- Point out or to demarcate the boundaries of any land;
- Make any claims/objections to any particular portion of land in the said land adjudication section;
- Pinpoint and/or demarcate any boundaries of the respective pieces of land claimed;
- The demarcation officer failed to demarcate the boundaries of the respective pieces of land claimed; the demarcation of the respective pieces of land on the ground;
- They allocated on the map some fifty two thousand four fifty two hundred (52, 452) acres of land in Mosiro to persons who are not ordinarily residents of the land and who were not entitled to any land;
- Demarcate or cause to be demarcated the boundaries of any separate piece of land;
- Demarcate and record of allocated land to people on the map without such map allocation being preceded by demarcation of the respective pieces of land on the ground;
- Demarcate and recording of land to persons who are not ordinarily residents o the said section and who are not entitled to any land. These persons had no lawful claim or interest in the land and without the map allocation being preceded by demarcation of each piece of land on the ground.
- Did not display the original or any adjudication Register at a convenient or at any place within the Mosiro Land Adjudication area.

The Survey Officer did:-

- not survey on the ground any of the parcels of land in Iloodo Ariak land adjudication section;

- Prepare a demarcation map without the map preparation being preceded by survey work required to be carried out on the ground in respect of each and every parcel reflected on the said demarcation map;
- The Recording Officers prepared and acted on the forms that are not signed by the Chairman of the Mosiro Land Adjudication section;
- The Land Adjudication Officer did not display the original or any Adjudication register at a time convenient within Mosiro;
- The Director of Land Adjudication and Officers sub – ordinate to him allocated at least thirty one (31) government officials land in the said area.

Interestingly, the people allocated lands do not know where these parcels of land, though recorded in their names, are situated on the ground. This was because no survey was ever carried out and no boundaries were demarcated.

The land Adjudication at Mosiro affected over 1000 residents where more than 52, 000.00 acres of their ancestral land adjudicated.
On May 27 1991, the Permanent Secretary in the Ministry of Lands and Housing appointed an ad hoc Committee to look into the irregularities in Mosiro land adjudication section. The ad hoc Committee submitted its report and findings to the said Permanent Secretary on June 27 1991.

The Findings from the Report:

Accordingly, these were the findings of the report by the Ad Hoc Committee. Upon examining the procedures adopted on the ground by the implementing officers, the Committee found out that:-

1). The implementing officers jointly and fraudulently revised the Committee of Elders and approved lists of claimants to include names of their “friends”. Outsiders were also invited by the committee members to apply verbally or in writing for land in the section;

2). The committee invited and approved applications for land in return for financial and other consideration, particularly from outsiders. It erred by inviting persons who were not "ordinary resident" in the area to apply for land;

3). The committee held a total of four (4) meetings in which 1014 applications were considered and approved for allocation. However, of the 757 approvals done on 18th September, 1990 cannot be established as the same were not confirmed by the chairman as his purported thumb print and the Executive Officer's signature were found to have been a photocopy from the minutes of the previous approval of 16th December, 1988. The list of those whose applications may have been genuinely approved by the committee could not be traced for counter – check;

4). The implementing g officers subsequently covered up by avoiding demarcation on the ground and producing a theoretical Registry Index Map (RIM) instead;

5). They prematurely published Adjudication Register, which may not have been publicly displayed for public inspection;

6). The Committee speeded up the processing of the faulty Adjudication records and maps in the hope that the end would seal the syndicate and the irregular allocation. The speed at which the final process of the adjudication work was undertaken after the expiry of the objection period indicates that there was a cover up by the implementing officers who were harboring dirty tricks. The idea was to benefit from the provision of section 143 of the Registration Land – the notorious First Registration.

For instance, from the date of submission of the field base maps to the District Surveyor by the Land Adjudication officer on 4th December, 1990, to the publication of the R.I.M ten days later, the issuance of certificate, the finality of the adjudication register on 20th December, 1990. On 2nd January, 1991, there was a rush for the title deeds at Kajiado Land Registry; the signing of the register by the claimants facilitated by the

Executive Officer and the Chairman upon the premature publication, was indeed irregular and meant only to fill in the gaps in the relevant certificates;

7). That the High Court nullified the previous purported adjudication of the said Mosiro Adjudication section and the Land Adjudication Officer, through section 5 of the declared Mosiro sub-location of Kajiado district;

The people allocated land do not know where the parcels of land recorded against their names are on the ground in the said Iloodo- Ariak and Mosiro land section as no survey was ever carried out and no boundaries were demarcated.

The certification by the Director of Land Adjudication was made without jurisdiction. This was in that; the certification is not made on the Adjudication Register. Further, there was no duplicate Adjudication Register as required by the provisions of sections 27 (3) (b), 13, 14, 15, 16, 23 (2) (a), 25 (a-c), and 27 (3) (b) of the Land Adjudication Act.

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The Immediate Out – Come after the "Adjudication Process"

Consequently, after the adjudication process these were the outcome:-

1. A total of 362 persons who were and still are not residents of Iloodo - Ariak section were nonetheless recorded and registered as owners of the land

in that section. They were allotted land and issued with the title deeds fraudulently

2. A high number of these non – residents' proprietors were and still are high-ranking government officials (self – allocation). They further allotted land to their relatives and friend, executives, politicians and professionals. They took the advantage of their position to manipulate the unsuspecting illiterate elders for their selfish ends.
3. The situation led to the replacement of all the rightful inhabitants from their ancestral land. It was the beginning of social and economic roadways to poverty for a people who were rangers and used to freely owned up communal lands suitable for nomadic set up and lifestyle. The people witnessed an orchestrated melodrama of land grabbing through fraud and corruption. Paradoxically, an extremely new phenomenon – corruption – was introduced among the Maasai people. On the contrary, those who did not abide by this corruption demands and trends were willfully not allocated any parcels of land and if at all, were granted areas that were extremely unproductive and not strategic places.
4. Over 1200 legitimate/indigenous inhabitants were deliberately left out of the adjudication exercise. Through fraud, they were rendered both land less and with no home.
5. The ordinarily residents were subjected to harassment, intimidation and arrest by the Administration officials who were working in close collaboration with the Land officials. The harassment was designed to cover up and conceal the actual issues pertaining to the adjudication process from emerging.

These residents were not aware of the demarcation and recording process ever taking place. These was because the matters were never effectively brought to their knowledge as required by section 14 of the Land Adjudication Act

The Evidence of Fraud:

Evidence of fraud, breach of trust or fiduciary duty and contravention of legal provisions. The examples are-

a). No warning:- Residents of Iloodo – Ariak and Mosiro adjudication section were not warned of the time and place of which demarcation and recording will be done;

b). Recording and Ascertaining Non – Residents:- The ascertainment and the recording of non – residents as owners of the parcels of land within the Iloodo – Ariak and Mosiro section in or over which they never exercised any rights under recognized Maasai Customary law.

c). Exclusion of the Legitimate Residents: - The deliberate exclusion of the persons ordinarily resident on the Iloodo – Ariak and Mosiro Trust land.

d). The Sale and Transfer of Land before Adjudication: - The sale and/or transfer of land before adjudication is not legally permissible.

e). No Demarcation of Boundaries on the Ground: - The boundaries of the parcels of land were never demarcated on the ground. The government officials took advantage to apportion themselves, their relatives and friends these parcels of land. These were only done on the map.

f). Members of the Adjudication Committee Self-allotment of Land:-

There is evidence where most of the members of the adjudication committee had allotted themselves and their relatives multiple parcels of land.

g). Land Allocated to dubious and Non – existent Groups:

A number of dubious and non – existent unincorporated groups and associations have been recorded as owners of parcels of land in Iloodo – Ariak adjudication and Mosiro Sections.

h). Olkejuado County Council Recorded as owner of Several Parcels of Land:-

The Olkejuado County Council was recorded as owner of fourty – Seven (47) parcels of land in Iloodo – Ariak adjudication section with total of 11, 387.58 acres.

i). **Fiduciary of duty and abuse of power-** The performance by the Government officials is unjust, unfair and a breach of basic equitable principle of fiduciary; conflict of interest; the officials are in fiduciary relationship with those persons whose rights they have the duty and power to ascertain, record and register.

The officials by virtue of their office or position have special opportunity to exercise their power or discretion to the detriment of those persons whose rights are being ascertained, recorded.

The officials did not discharge these obligations. Instead, the Committee members took advantage of their position to enrich themselves. All this was done at the expense of the aggrieved residents of Iloodo-Ariak Adjudication section.

Wildlife Conservation and Natural Resources

It is indisputable that 80 percent of tourism resources are in Maasai lands such world famous tourist destinations as; Maasai Mara, Samburu, Amboseli, Nakuru, Hell's Gate, lake Bogoria and such forests as Mau, Naimina Enkiyio and Samburu fall within Maasai territories. The Maasai for centuries have ensured the survival of wild game but have nothing to show for this even when tourism has turned out to be a blue chip industry in Kenya. The formulation of the Wildlife (Conservation and Management) Act is not only discriminatory but also offensive as it considers the Maasai not the custodian but a threat to the fauna and flora.
The planned development plan for the Maasai Mara which considers moving out the Maasai from areas close to the park and the creation of private conservancies which are no go zones for pastoralists and their livestock is just another indicator of how non pastoralist plan for alternative livelihoods without

considering the fact pastoralism is a system that has co-existed with wildlife and in actual fact support each other.

The Kenya government has not shown the slightest interest in ensuring that the custodians of this resource from which it is reaping a bounty share some of the benefits. The Maasai of Olkaria in Naivasha are confined to a National Park where they observe 12-hour curfew like regulations forming a back ground for the wild life. This is a classic example of government insensitivity in carving out Maasai rangelands and converting them to public lands. Cement manufacturing industries are extracting raw products and destroying the environment without due consideration of the impact the industry has on the lives of the indigenous Maasai community and that of their livestock. In Magadi, the community around the Lake is the poorest in Maasai land, even though the Soda Company exploiting the soda in Lake Magadi is minting billions of shillings annually. This obscenity has been compounded further by the recent extension of the colonial lease by another 50 Years without the option of royalties to the community. The community objection to the machinations behind this fraudulent lease renewal and extension saw about 30 Maasai thrown to jail, miscarriages by pregnant women and brutality. There are covert plans to privatize Siana conservancy in Maasai Mara and lease it out for 99 years. This is a grand scheme to hive off 50,000 acres from the Maasai Mara and put its management in the hands of well-connected shadowy figures from Central Kenya, thereby killing other Maasai conservancies in the area. The purported creation of Narok South district is a scheme by these individuals in government to create an avenue through which to access the Naimina Enkiyio, Mau forest and the crown jewel, - Maasai Mara.

These evil schemers are driven mainly by an insatiable greed for Maasai resources. The Mau is the catchment of a series of Rivers most of which drain into Lake Victoria which is the source of the Nile. Interference with the Mau complex puts Kenya on a collision course with Egypt, which depends entirely on the Nile for survival. It is also the source of the Mara River that waters the

expansive Mara game reserve and Serengeti national park. We deplore the illegal allocation of land in Olkiombo and Oloololo in the Mara to private developers which the government issued title deeds.

It is an infringement of Maasai human rights to be exposed to inhuman treatment during times of drought in Tsavo where our women are exposed to sex for grass despite the knowledge that part of that area was Oloirien group ranch which was annexed to Tsavo without considering that the area was a dry period grazing area for the Maasai of Kajiado

Prior to the recent referendum the government purported to return the Amboseli national park to the Maasai in contravention of 1974 trust land Act. Amboseli is naturally a Maasai resource so purporting to return it is correcting an illegality committed by government upon the Maasai.

Training of foreign armies on Maasai lands and Territories.

The Maasai in Samburu Isiolo and Laikipia have over the years borne the brunt of the British army training in their grazing lands. These trainings have subjected Maasai women to rape maiming of human beings and animals, brutality, death and destruction of the fragile environment. In the recent past Maasai NGOs have put up a gallant fight for reparations that have borne some fruits. However the rape case is proving complex but it is still being pursued. It is disturbing that the government has never even attempted to intervene when foreigners commit atrocities commit heinous crimes on its citizenry whom it has the cardinal responsibility of ensuring their security and well being. It is intriguing that despite these ugly atrocities, the government has covertly proceeded to renew agreements for continued trainings on our brethrens lands without consultations. We DEMAND that the government come out clearly and make the contents of

the agreements public, expeditious conclusion of the Maasai/Samburu rape cases and proper consultations of communities on the ground. We also demand an immediate Impact Assessment of the training fields. Would the government be this indifferent if this was happening for instance in Central Kenya?

Economic marginalization

The Maasai Community and those of other pastoralist communities have no economic resource base policy put in place to foster economic growth. Pastoralism has not been identified as a way of life and a sustainable economy where else agricultural activities have production, processing, storage and marketing of their produce
In essence, the violation of the principle of FPIC (Free, Prior and Informed Consent) stipulates the absence of the benefit sharing concepts that particularly would safeguard both the interest of the government, communities and multinational companies.

In respect to this, the UN Committee on Economic, Social and Cultural Rights also addressed a similar issue in the General Recommendations No. 12 on the rights to food stating that, states must refrain from taking measures liable to deprive anyone access to food (the obligation to respect). This obligation will be violated, for example, if the state arbitrary deprived an individual or group of individuals of their land in a case where the land was the individual or group's physical means of securing the right to food

Even though there are sufficient international human rights instruments to protect and promote human rights, the responsibility by member states in securing this rights have been abdicated and continue to predispose indigenous communities in Kenya to worse consequences of poverty. In the recent past, poverty was often defined as insufficient income to buy a minimum basket of goods and services. Today, the term is usually understood more broadly as the lack of basic

capabilities to live in dignity. This definition recognizes poverty's broader features, such as hunger, poor education, discrimination, vulnerability and social exclusion. The UN Committee on Economic, Social and Cultural Rights notes that this understanding of poverty corresponds with numerous provisions of the covenant. In the light to international bills, poverty may be defined as a human condition characterized by sustained or chronic deprivation of the resources, capabilities, choices, security, and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights. While acknowledging that there is no universally accepted definition of poverty, which reflects the indivisible and interdependent nature of all human rights.

In July 2000, the UN Human Rights Committee concluded that Article 27 of the International Covenant on Civil and Political Rights (ICCPR) requires that, "necessary steps should be taken to restore and protect the titles and interests of indigenous persons in their native lands…" and that, "securing continuation and sustainability of traditional forms of economy of indigenous minorities (hunting, fishing and gathering), and protection of sites of religious or cultural significance for such minorities …must be protected under Article 27

Political Marginalization

Modern democracy is determined by numbers and given the fact that the Maasai community in Kenya is numerically inferior, representation has been marginal and hence decisions on how resources are shared are politically determined, the Maasai community has continued to be marginalized.
A case in point are the Ilchamus of Baringo who because of their numbers, they have continually been represented by other communities. Their quest to take their case to court seeking to have a constituency is a pointer for a community's quest for political space.

Dominant communities have put in place strategies to destine the Maasai political leadership to oblivion by extracting 70,000 non Maasai from the slums of Nairobi to Kitengela in Kajiado North in the name of Jamii Bora project. These machinations are not only a scheme by the dominant communities to destabilize the Maasai social political system but it will also have irreversible negative impacts on the environment and destruction of pasture for both livestock and wildlife. This project which is being supported by the Norwegian government and some political kingpins is yet another scheme of political marginalization of the Maasai community.

The Laikipia community of Yakuu is almost extinct with only 2 elders as the only speakers of their the Yakuu language and landless despite having historical territories in the Laikipia forests.

The Ilmolo Community who live in the southern shores of Lake Victoria are at the brink of extinction and have no representation in any political positions. Their language is extinct and the community is left to adopt languages of other local communities.

Marginalization and isolation by UN Agencies.

While the Maasai have been recognized and identified as indigenous and marginalized, the presence of UN agencies involvement in development among the this community is not evident. Despite poverty levels of above 60%, poor nutrition levels of children and women, rampant drought, the community inmost cases receives relief food. It is also the concern of the community that the role of UNDP in support in improving the livelihoods of the Maasai and other pastoralists be enhanced.

The Resolve of the Maasai Community.

1. Revisiting the Maasai claims on historical and current on land and natural resources.
2. Restitution and compensation from the British and Kenya government
3. Explanation on the circumstances that lead to the deaths of **Ntinai Ole Moiyare, Marima ole Sempeta, Saisa Ole Kipuri, Kimasisa Ole Kunkuru and Ole Sisina** with those involved brought to book to face justice.
4. Put to stop to the cattle rustling in Baringo and Samburu which has claimed lives and property
5. Enactment of legislation to protect pastoralists and their land.
6. Compensate the Maasai community for losses from extraction industries located in Maasai Lands and territories
7. Access to and equal distribution of resources accruing from wildlife and tourism.

Attachments;

- Press statements
- Letters to Government
- Research on Land Leases
- Concept on the Maasai case

MAA CIVIL SOCIETY FORUM

P. O. BOX 7954-00200

NAIROBI

TELEFAX: 020-891-453

9th February 2006

The Minister,

Internal Security

P.O. BOX, 78082-00507
Viwandani,
NAIROBI

Dear Sir,

RE: THREATS AND HARRASEMENT OF INDIVIDUALS AND MEMBERS OF THE MAASAI CIVIL SOCIETY

It has come to the notice of our Member organizations that there are imminent threats to the lives of individuals and member Organizations of the Maasai Civil Society Forum.

These threats are a clear indication that the Government is deliberately harassing and intimidating our people for the stand they took before, during and after the Referendum. Several of our members have had threats on their lives and Maasai Civil Society Organizations threatened with deregistration. Statements on threats on lives of our members have already been recorded with the police.

We wish to make it Known to you that it is the democratic right of every citizen to associate freely and express his or her views without fear. These threats are meant to intimidate, silence and possibly annihilate some of our people because of their continued quest to demand the redress of both Historical and current injustices meted upon the Maasai by successive regimes in this country. There has been murder of our members especially the cold-blooded shooting of our lawyer the late Sempeta Ole Maraima last year whose case remains unresolved. There have been instances of misuse of Police to harass our members in Kajiado. There has also been the trailing and monitoring of Joseph Ole Simel by strange and armed people. Godfrey Ole Ntapayia's life has also been threatened.

We request that your office and those that are under the security docket use the powers bestowed on them by the constitution to protect the lives and guarantee the security and democratic rights of our members and put a stop to the harassment and threats to their lives.

Yours Sincerely

Ben Ole Koissaba
Chair- Maa Civil Society Forum

Cc.
Commissioner of Police,
Minister for Justice and Constitutional Affairs
National Human Rights Commission
American Embassy
British High Commission
Danish High Commission

MAA CIVIL SOCIETY FORUM

P. O. BOX 7954-00200**NAIROBI**
TELEFAX: 020-891-453

PRESS STATEMENT

Maa Civil Society Forum (MCSF) is a conglomeration of Maasai civil society organizations, church, leaders, students and individuals from Marsabit, Samburu, Isiolo, Laikipia, Nakuru, Baringo, Transmara, Narok and Kajiado districts in Kenya. MCSF seeks to consolidate Maa People's efforts for socio-cultural, intellectual and economic development.

For more than two months since the conclusion of the Constitutional Referendum last year, MCSF member organizations and individuals especially the coordinators of the Kajiado based Mainyoito Integrated Development Organization (MPIDO) and the Kitengela Land Owners Association (KILA) have been subjected to intimidation, threats on their lives, trailing by strange vehicles, monitoring of their movements and possible tapping of their phone conversations by strange persons.

Another member organization Simba Maasai Outreach Organization (SIMOO) based in Ngong has had its operations paralyzed due to politically instigated destabilization because of championing the Maasai people's rights. There has been apparent targeting of Maasai Land Rights organizations for intimidation and harassment more so those based in Kajiado North Constituency. This harassment has been extended to our family members and bearing in mind the state of insecurity in Kenya; we are concerned for the safety of our loved ones.

The genesis of these acts is the Maasai rejection of the Wako Draft constitution despite a spirited pro- draft campaign by Kajiado North MP. There has been a perception that the civil society played a key role in handing him a humiliating defeat that he has never experienced in his political career. As such, we know

that he using his political influence, Ministerial powers and most of all his immense wealth to intimidate the Maasai meant to stop them from joining other Kenyans in demanding the resignation of all Cabinet Ministers and Members of parliament implicated in corruption. There is also the fear that the civil society and the Maasai fraternity are pushing for the implementation of the Ndung'u report on Land Grabbing where influential government functionaries corruptly got land in Ilkisumeti, Mosiro and Loodoariak adjudication areas that fall in Kajiado North Constituency. All these machinations are meant to distract the community from seeking exposure and prosecution of the culprits fraudulently disinheriting the Maasai of their ancestral lands.

Maa Civil Society Forums position is the resignation or sacking of all Cabinet Ministers and Members of Parliament especially the controversy ridden Kajiado North to pave way for due process of the law without undue interference and influence.

We are also demanding that the Maasai be left alone especially in this time of ravaging drought to design their collective destiny without threats and intimidation of their civil society organizations and members.

If anything is not done to address these concerns, then MCSF shall be left with no option but to expose and denounce those behind these machinations.

10th February 2006

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EAST AFRICAN PEOPLES STATEMENT TO THE 5TH SESSION OF THE PARMANENT FORUM ON INDIGENOUS PEOPLE, NEW YORK MAY 2006

BY BEN OLE KOISSABA- Chairman Maa Civil Society Forum

A PEOPLE'S CRY FOR JUSTICE AMIDST INJUSTICES

Madan chair, members of the Permanent Forum on Indigenous Peoples, distinguished guests, indigenous brothers and sisters, on my own behalf and on behalf of the Indigenous Pastoralists Maasai community i wish to make the following statement.

Maa Civil Society Forum (MCSF) is a conglomeration of Maasai civil society organizations, church, leaders, students and individuals from Marsabit, Samburu, Isiolo, Laikipia, and Nakuru, Baringo, Transmara, Narok and Kajiado districts in Kenya. MCSF seeks to consolidate Maa People's efforts for socio-cultural, intellectual and economic development.

In regard to Agenda 4, we strongly urge all states to support the latest revised text that has been proposed by the chair's Luis- Enrique Chavez of the intercessional Working Group. I wish to make the following statement as regards the Human Rights abuses meted upon the Maa speakers by the British colonial and subsequent post independence governments

1. **1904-11 ANGLO-MAASAI TREATIES: -THE BIGEST FRAUD IN AFRICA**

According to an old Maasai adage, land and a son are not transferable as such; the purported land transaction between Olonana and the British was by and large illegal and a sham. Olonana was a medicine man and not a politically elected leader. He was a colonialist's paramount chief created to serve their interests since no such office existed in the Maasai administrative hierarchy. The so-called Anglo-Maasai treaties of 1904 and 1911 are thus a farce that was vigorously challenged in court by **Ole Nchoko, Ole Gilisho and others in 1912**. The Maasai suffered loss of lives and livestock and British brutality that ensued the translocation from their prime grazing lands in the highlands into the reserves carved out for them in the disease prone and drought ravaged southern areas. Agreements are normally made on mutual grounds and the 1904 and 1911 pieces of literature were not arrived at on equal footing. The 1912/13 Maasai court case is a true demonstration of the disgust and anger of the community towards this dispossession. This made the Maasai the first people in Kenya to

challenge the British for theft of land and injustices. Although the suit was thrown out on a technicality, it marked the Maasai struggle with the British colonialists. During the 1961-62 Lancaster constitutional Conference in London, the Maasai delegation put a strong case for the return of Maasai lands and restitution for the exploitation and damages suffered. The independent Kenya Kenyatta regime used the money obtained through a grant ostensibly to resettle “Africans” in the former European farms to settle his own tribe. Not a single Maasai was considered for resettlement on their ancestral lands despite the wish of the community to purchase back these lands. This was dispossession invented by the British and perfected by the African regimes. Only recently, the world witnessed the zeal with which the Narc regime comprising remnants of GEMA functionaries that was instrumental in disinheriting the Maasai, sought to defend this historic fraud through wrongful arrests, trumped up charges, murders, rape, intimidation and harassment of the Maasai peoples. This is a confirmation of the extent to which this state would go to covet theft and plunder of Maasai people’s resources. Our resolve as the House of Maa in revisiting these fraudulent pieces of literature and challenging their legality and consequent harm is unstoppable.

2. WILDLIFE CONSERVATION AND NATURAL RESOURCES

It is indisputable that 80 percent of tourism resources are in Maasai lands such world famous tourist destinations as; Maasai Mara, Samburu, Amboseli, Nakuru, Hell’s Gate, lake Bogoria and such forests as Mau, Naimina Enkiyio and Samburu fall within Maasai territories. The Maasai for centuries have ensured the survival of wild game but have nothing to show for this even when tourism has turned out to be a blue chip industry in Kenya. The formulation of the Wildlife (Conservation and Management) Act is not only discriminatory but also offensive as it considers the Maasai not the custodian but a threat to the fauna and flora. The most recent directive that local communalities stop collecting revenues from wildlife trusts will further marginalize the communities and kill conservation in the World famous Serengeti Mara Echo system

The Kenya government has not shown the slightest interest in ensuring that the custodians of this resource from which it is reaping a bounty share some of the benefits. The Maasai of Olkaria in Naivasha are confined to a National Park where they observe 12-hour curfew like regulations forming a back ground for the wild life. This is a classic example of government insensitivity in carving out Maasai rangelands and converting them to public lands. At Olkaria, geothermal power is harnessed but the local Maasai are among the poorest of the poor. In Magadi, the community around the Lake is the poorest in Maasai land, even though the Soda Company exploiting the soda in Lake Magadi is minting billions of shillings annually. This obscenity has been compounded further by the recent extension of the colonial lease by another **50?** Years without the option of royalties to the community. The community objection to the machinations behind this fraudulent lease renewal and extension saw about 30 Maasai thrown to jail, miscarriages by pregnant women and brutality. There are covert plans to privatize Siana conservancy in Maasai Mara and lease it out for 99 years. This is a grand scheme to hive off 50,000 acres from the Maasai Mara and put its management in the hands of well-connected shadowy figures from Central Kenya, thereby killing other Maasai conservancies in the area. The purported creation of Narok South district is a scheme by these individuals in government to create an avenue through which to access the Naimina Enkiyio, Mau forest and the crown jewel, - Maasai Mara. These evil schemers are driven mainly by an insatiable greed for Maasai resources. The Mau is the catchment of a series of Rivers most of which drain into Lake Victoria which is the source of the Nile. Interference with the Mau complex puts Kenya on a collision course with Egypt, which depends entirely on the Nile for survival. It is also the source of the Mara River that waters the expansive Mara game reserve and Serengeti national park. Prior to the recent referendum the government purported to return the Amboseli national park to the Maasai in contravention of 1974 trust land Act. This is reducing the Maasai to beneficiaries of an illegality. The wildlife Bill should be participatory to make it community friendly in regard to compensation and benefit sharing. The proposed division of Laikipia into east and west districts is meant to

disenfranchise the local Maasai. We demand that a constituency be created Maasai for the Maasai to enable the community chart its own destiny instead of relying on strangers whose aim is to oppress and exploit the Maasai. We shall resist capitalistic sponsored move to legalize bird shooting, sport hunting and the preposterous donation our game to Thailand and any other country.

The planned evictions of our brothers from Oldonyiro in Isiolo District to pave way for a holding ground should be stopped and land that was illegally dished out to the affluent in Athi River be reclaimed back instead of harassing peasant pastoralists who are just reeling from a devastating drought

3. TRAINING OF FOREIGN ARMIES ON MAASAI LANDS

The Maasai in Samburu Isiolo and Laikipia have over the years borne the brunt of the British army training in their grazing lands. These trainings have subjected Maasai women to rape maiming of human beings and animals, brutality, death and destruction of the fragile environment. In the recent past Maasai NGOs have put up a gallant fight for reparations that have borne some fruits. However the rape case is proving complex but it is still being pursued. It is disturbing that the government has never even attempted to intervene when foreigners commit atrocities commit heinous crimes on its citizenry whom it has the cardinal responsibility of ensuring their security and well being. It is intriguing that despite these ugly atrocities, the government has covertly proceeded to renew agreements for continued trainings on our brethrens lands without consultations. We DEMAND that the government come out clearly and make the contents of the agreements public, expeditious conclusion of the Maasai/Samburu rape cases and proper consultations of communities on the ground. We also demand an immediate Impact Assessment of the training fields. Would the government be this indifferent if this was happening for instance in Central Kenya?

4.ECONOMIC MARGINALIZATION

The Maasai Community and those of other pastoralist communities have no economic resource base policy put in place to foster economic growth. Pastoralism has not been identified as a way of life and a sustainable economy

where else agricultural activities have production, processing, storage and marketing of their produce, we are yet to hear of a policy that favors our productive system for what we hear now is Idle land in total disregard of the enormous economic gains pastoralism brings to this country

5. **UNRESOLVED COURT CASES AND KILLINGS**

1. Chomolendley Case on the murder of Ole Sisisna
2. Cold blooded murder of Marima ole Sempeta
3. Ntenaai Ole Moiyiare
4. Kimasisa Ole Kunkuru
5. Saisa Ole Kipuri

iii) The Entapipi Community Land Case

iv) The Olkiombo take over

v) Jamii Bora Trust with financial support from the Norwegian Government is setting up 2,000 housing units between two seasonal rivers and blocking the migratory corridor for wildlife between Amboseli and Nairobi parks and its socio-cultural, environmental, security and political impact on the local Maasai community.

vi) Iloodoariak, Mosiro, Ilkisumeti-Illegal and fraudulent expropriation of community Group Ranches bay former Ministry of Lands officials for collateral for huge bank loans while group ranch members must be from the local clans.

vii) Kamarora Conservancy-Grabbed by a capitalistic foreigner in the name of the people without any benefits to the community sparking inter family conflicts

viii) Grass for Rape by Game Rangers during the current drought

ix) Rape of Maasai women by British soldiers

x) Magadi –Arrests of dozens of Maasai for resisting renewal of Magadi lease

xi) Constant threats to the lives of Indigenous Peoples Leaders and Deregistration of Indigenous rights Organizations

6. INTERNATIONAL INSTRUMENTS

The Maasai are indigenous peoples fitting the International Labour Organization (ILO) Convention 169 which defines indigenous peoples as peoples who retain their cultures, values and institutions and who used to live in a territory prior to conquest or colonization, or the creation of the state. The government and those opposed to the Maasai issues must realize that the Maasai are not in isolation due to the provisions of the ILO 169 Articles 14, 15 and 16. The United Nations Draft Declaration on Indigenous Peoples, the African Charter that the Kenyan government has ratified but continues to violate and the general international principles which are: Prior free and informed consent by the community and consultations on all projects that affect their lives.

5. CASES PRECEDENCE

1 The Moab and Maori-Waitangi Case of New Zealand
2 Mama Case of South Africa
3 The Canadian Indians Cases

6. PLEDGE

1 To have all the Bills affecting pastoralists enacted
2 Full involvement in the Constitutional Review Process
3 Involvement in the Land Policy Formulation Process
4 Full adherence to the Environment Management Act
5 Involvement of Maasai in Policy and Legislation in wildlife
6 Objection to creation of new districts for dispossessions
7 Strong collaboration with partners locally and abroad
8 Reinstatement of the Land Adjudication Amendment Act of 1999 meant to revoke fraudulently acquired title deeds which was short down in Parliament

7. APPEAL

Institute a legal suit in due course. Commitment of the Narc regime to address the historical Lands question that was part of the reason why the Maasai and other pastoralists rejected the Wako Draft constitution.

MAA CIVIL SOCIETY FORUM

P. O. BOX 7954-00200

NAIROBI

TELEFAX: 020-891-453

9th February 2006

THE PROVINCIAL COMMISSIONER
P.O. BOX 28-20100
NAKURU

Dear Sir,

REF: PLANNED SETTLMENT OF MAAI MAHIU AND LONGONOT AREA BY THE KIKUYU COMMUNITY

This is to bring to your attention of a planned invasion of the Maai Mahiu area by members of the Kikuyu community in the near future.

This is as a result of a series of meetings that culminated in one held on 28th January 2006, by members of the said community with the full knowledge and

blessings of the Naivasha Member of Parliament. During the said meeting, settlement was meant to have taken place on 3rd February 2006 but was postponed to 16th of February.

It is still vivid in the memory of Kenyans that the area was in the near past engulfed in clashes that resulted in loss of lives. By inciting one community to settle in the area where another community is living is an act of aggression and provocation and a recipe for renewed clashes that may be construed to be caused by the Maasai community.

We do not rule out the involvement of the provincial administration, since such meetings would not take place without their knowledge. These are sinister motives aimed at causing conflict and bloodbath, which the Maasai are not prepared for especially in this time of ravaging famine.

It is our request that you use your office to investigate this case and use all the powers bestowed upon you to stop such a move before it degenerates into an ugly scenario of ethnic strife.

It is also of importance to note that most of the area has cases pending in courts and it will only be prudent if this act is STOPPED before it flares up again. It has also come to our attention that the local leadership of the said community is issuing inflammatory remarks that do not auger well with the peace building process that had started in the area. We urge you to move fast and bring an end to these moves and bring the perpetrators to book.

Kindly accord this the seriousness it deserves to avert another sad repeat of the infamous blood letting in the area.

Yours Sincerely

Ben ole Koissaba

Chairman: Maa Civil Society Forum

For and on behalf of the Members drawn from Nine Districts in Kenya.

CC.

Provincial Police Officer- Rift Valley

Provincial CID Officer, Rift Valley

District Commissioner-Nakuru

Officer Commanding Police Division-Naivasha

Hon William Ole Ntimama (MP)

Hon Joseph Nkaiserry (MP)

Hon Jayne Kihara (MP)

Kenya Human Rights Commission

MAA CIVIL SOCIETY FORUM

P. O. BOX 7954-00200

NAIROBI

TELEFAX: 020-891-453

9th February 2006

THE MINISTER OF STATE IN CHARGE

OF INTERNAL SECURITY AND PROVINCIAL

ADMINISTERATION

Dear Sir,

REF: THREATS AND INTIMIDATION

Maa Civil Society Forum is a conglomeration of NGOs, CBOs, FBOs and individuals from nine districts of Kajiado, Narok, Transmara, Samburu, Laikipia, Nakuru, Baringo, Isiolo and Marsabit whose key objective is to steer and foster both political and social aspiration of the Maasai community.

We wish to bring to your attention the fact that lately our memberships in form of individuals and organization have been subjected to harassment and intimidation

by people in the government simply because of their involvement in activities that border on Maasai Land Claims.

It is common Knowledge that the Maasai Community has continually lost their treasured resources ranging from land, natural resources and intellectual property to individuals, companies and Government institutions with no regard whatsoever to the community's people's right to consultation, ownership and control of the said resources. It is in this regard that we seek assurance from your office that the security and operations of our members is not threatened or organizations put under undue pressure to sabotage and stop their activities.

We are aware that there is a scheme hatched to confiscate travel documents, impound vehicles closure their accounts in order to paralyze their operations their activities and sabotage their projects that is detrimental to our community.

We are well informed that a meeting held at Ngong Shade Hotel on 8th February and Chaired by the Local MP deliberated on possibilities of using all means to silence local NGOs by putting Pressure on the Provincial Administration and the NGO Coordinating Board to curtail activities of the said organizations.

We want to make it known to all and sundry that our quest to inform and deliver our community from perpetual deprivation of their land and exploitation shall continue unabated and no amount of intimidation shall stop us from this. Local leaders who have identified with illegal land grabbers want to use their positions to intimidate our local rights bodies to stop their operations.

These schemes are against the principles of human rights and an infringement to human dignity. It is our wish that your office takes a deliberate move not only to stop government officers concerned from interfering with the activities of the organizations but also to equally ensure that their security is safeguarded.

It is our expectation that your officers within the affected districts do not use arbitrary abuse of office to illegally harass our people.

We are looking forward to seeing justice in play and the threats and intimidation stopped forth with.

Sincerely,

Ben Ole Koissaba
Chair-Maa Civil Society Forum

CC.
Hon William Ole Ntimama (MP)
Hon Joseph Nkaiserry
Kenya Human Rights Commission

MAA CIVIL SOCIETY FORUM

P. O. BOX 7954-00200

NAIROBI

TELEFAX: 020-891-453

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Maa Civil Society Forum (MCSF) a conglomeration of Maasai speakers from Isiolo, Marsabit, Samburu, Laikipia, Nakuru, Kajiado, Transmara, Baringo and Narok districts wish to bring to the attention of Kenyans and the entire world that despite the now obvious debilitating drought ravaging pastoralists' lands, the Kenya government has turned its characteristic cold shoulder upon us.

The recent categorical rejection by Tourism Minister of Maasai pleas to be allowed to graze their emaciated livestock in the national parks was a clear- cut confirmation that according to the government, it is all right for poor pastoralists to face death and devastation as a result of famine despite the significant role they have played for millennia to ensure the existence of the wildlife in our rangelands that constitute the said parks.

It is the cardinal responsibility of government to ensure that none of its citizenry, pastoralists included, succumbs to ravages of famine and drought. From the foregoing, it is apparent that our people are generally a mere national after thought even 40 long years after the so-called independence. The government must come to terms with the cold reality that POVERTY in pastoralists' lands is

perpetuated by a lack of access to natural resources like water and pastures and it therefore makes little sense for the government to claim that it is fighting poverty while its actions are inversely perpetuating it.

We have also witnessed in utter awe the exclusionist government "intervention" whereby some districts like Narok, have been left out completely. In retrospect, the previous government pleaded with ranch owners in Laikipia to allow herders to share their grass and water in times of drought. However, the Narc regime is averse to pastoralists and the dynamics of pastoralism thus the half -hearted intervention and institutional inertia.

The government must learn to listen to pastoralists' leaders and organizations when they raise the alarm on impending catastrophes because the governments' own early warning systems are either dead or unwilling to serve us. We are urging the Narc regime to remove the colonial blinkers for the sake of equity in Kenya by understanding, appreciating and treating all communities irrespective of their socio-economic practices equally. We ask the government to consider waiving school fees for all pastoralists students until the effects of the current calamity wane.

Maa Civil Society Forum on behalf all pastoralists noted with disgust the pre-referendum advert attributed to the Office of government spokesman, implying that the Athi River based Kenya Meat Commission (KMC) factory had been revived. We would like to condemn this sickening information fraud that attempted to misinform pastoralists because if KMC were operational, we would be delivering truckloads of livestock to the factory to avert the current losses. We pose a challenge to the authors of the advert to come out today and tell Kenyans how much livestock have been purchased and processed by KMC in this time of famine.

MCSF also note of the prevailing situation where Relief Food is no longer a Human Right but a tool used by government and its functionaries for purposes of

political rewards and outright patronage. We say that this is a scheme by evil men seeking to perpetuate an unjust status quo and call upon Kenyans not to succumb to these machinations and instead demand for a real order of JUSTICE.

Maa Civil Society Forum is thus asking the President to extend his trip to the southern Maasai rangelands and address critical issues afflicting our communities. We are the custodians of the parks and reserves but we are not allowed to graze there. Therefore, the least the government can do is come in and buy fodder and water for our herds and families. Maa Civil Society Forum calls for urgent intervention and an immediate stop to this culture of capitalizing on disasters for political expediency, as it is not only offensive, but out rightly evil.

Issued on 30th December 2005

Maa Civil Society Forum (MCSF)

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Courtesy Ben Ole Koissaba- Chairman

MAA CIVIL SOCIETY FORUM

THE ANGLO – MAASAI TREATIES LEGAL TASK FFORCE ASSIGNMENT – 30TH OCTOBER 2004

ASSINGNED TOPIC: LEASES

PRELIMINARY QUESTIONS

1. What is the historical Evolution of the transactions leading to the Maasai Agreements and Culminating to the "Leases"?
2. How is the Land currently being held (e.g. Leasehold, freehold, Licenses, e.t.c
3. What is the duration of the Leases (99/999 years, etc)
4. What is the Validity of the Leases (e.g. void, voidable, or valid)
5. What is the current status of the lands held under the Leases (e.g. encumbered, transferred, e.t.c) see Sempeta's Report?
6. What is the right of any 3rd parties in the lands/Leases (e.g. bank, Purchaser e.t.c)
7. What is the effect of 3rd party interests on the Maasai case?

The above question will predominantly preoccupy our discussion of the subject of the leases that are said to exist in relation to lands that were the subject of the

"Maasai Agreements" and on which the Maasai still lay claim today. But first I give you the history:

1. Historical Background:

i) See **Early History of the Maasai.**

ii) **Maasai customary Land Tenure in pre-colonial Kenya**: - Prior to European interference the Maasai, like most other traditional African societies managed and held Land Communally. In this system of communal land tenure, land belonged to no one individual in particular but to the community as a whole. In his article 'The Tragic African commons: A Century of Expropriation, Suppression and Subversion'. Okoth-Ogendo, a leading land law scholar and Professor of public law at the University of Nairobi, describes land held in Africa by way of communal tenure as "the African Commons" whereby the term 'commons' is used to identify ontologically organized land and associated resources available exclusively to specific communities, lineages or families operating as corporate entities.

The commons, are not constituted merely by territoriality or by the temporal aggression of members of any given entity, but are in addition characterized by important ontological factors among which is their permanent availability across generations past, present and future. For those societies, which recognize and depend on them, the commons are the creative force in social production and reproduction.

At the structural level, the commons are managed and protected by a social hierarchy organized in the form of an inverted pyramid with the tip representing the family, the middle the clan and lineage, and the base the community.
The location of radical title in the commons always was and remained in all members of the group past, present and future. Society was thus able, at its different levels of organization, to direct the use of resources to the needs of the present without compromising the ontological demands of the past and the heritage of future generations.

The African commons were the primary economic and social asset individuals and communities drew on and the fountain from which their spiritual life and political ideology sprung. It is primarily for this reason that the commons were not susceptible to *inter vivos* transfer outside each level of social organization even though latitudinal exchange of function-specific rights was common. Transmission of access rights to land and associated resources in *mortis causa*, was always exclusively by way of intestacy and only to a predetermined class of heirs in accordance with common rules internalized at each level of social organization.
Historians have established that at the end of the 19th century land resources in Africa were held, managed and used primarily as commons. As a general rule this is the manner in which the Maasai customarily held land.

During this time, different sections of the Maasai (e.g. the *Illpurrko, Ildamat, Ilkeek Oonyokie, Illmatapato, Loodokilani*, etc) had settled in various areas, which they managed and controlled. Despite their nomadic lifestyle, by mid 19th century the Maasai as a people had generally settled in ascertainable lands in the vast rift valley and what is now Nairobi.

Land to the Maasai was not only sacrosanct but it was also sacred. It is on land that their culture, religion, livelihoods, and existence depended. The Maasai needed land for housing, food, worship, and e.t.c.

The system of communal land tenure under which the Maasai held land is, needless to say, fundamentally different from property notion, in feudal England. The characteristic differences are that in communal land tenure;

- The location of radical title to land is a function of ontology not sovereignty and rests in the community and not an individual or political sovereign.
- Access to land resources is obtained through community membership and not the free market.
- Access rights are transgenerational, hence they carry an obligation of stewardship for the benefit of present and future members of the community.

iii**) <u>The Advent of Colonialilism</u>**: - In 1884 – 1885 the major imperialist power of the West, mainly France, Britain and Germany, met at Berlin and decided to peacefully divide and share Africa amongst themselves

in order to avoid the imminent “Scramble for Africa” and avert the possibility of war.
In the 1886 Anglo-German Agreement wherein both Britain and Germany recognized the Sultan of Zanzibar’s dominions, Britain was allocated what is now Kenya.
In 1887 the Sultan of Zanzibar handed over the administration of the 10 mile coastal strip to the Britain East Africa Company on a concession for 50 years to administer as well as collect revenue. This company was granted a royal charter by the British Crown in 1888 hence becoming the Imperial British East Africa Company (I.B.E.A) and was empowered to administrate the British sphere of influence beyond the coastal strip.

In the Heligoland Treaty of 1890 the Sultan’s dominion were declared a British protectorate.
In 1895 I.B.E.A became bankrupt leading to a direct take over by the British Crown and the formal declaration of a protectorate over Kenya then known as British East Africa was made.

Right from the Berlin conference, it was clear that the real reasons and concerns for colonialism were economic rather than strategic as has been argued by certain apologists. Thus top on the British government’s agenda was tha acquisition of control over land in the Protectorate.

In British constitutional theory however declaration of a Protectorate did not suffice to confer legal jurisdiction for the alienation of land by the Crown. This is because of

an opinion given by the Law Officers of the Crown in 1833 in the **Ionian case** to the effect that Protectorate status did not confer “radical title” to the land in protected territory on the protecting power. This position was further enunciated by the British foreign office in 1896 when the latter was considering issuing Land Regulations in Kenya as follows:

> As regards land regulation, the Secretary of State’s view is that the acquisition of partial sovereignty in a protectorate does not carry with it any title to the soil. The land is foreign soil, and does not become vested in Her Majesty, as is the case in a territory that is actually annexed to the British dominions. It is therefore advisable to avoid making grants or leases or other dispositions purporting to be an alienation of land by the British authorities to whom it does not in fact belong… (**Emphasis supplied**.)

The British government was keen on predicating its action on law and on 1890 there was passed in England the foreign Jurisdiction Act which stipulated the manner in which Protectorates were to be administered. This was to be through Orders in Council.
Notwithstanding the constitutional constraint relating to land acquisition, in 1897 through the East Africa – Order in Council the British government extended to the East African Protectorate the 1894 Indian Land Acquisition Act which was used to compulsorily acquire land for construction of the railway and for government buildings and other public purposes.

The Indian act did not, however provide for the resale of land acquired thereunder and in 1898 the East Africa (Acquisition of Lands) Order-in- Council was passed which provided that land acquired under the Indian Land Acquisition Act vested in the commissioner in trust for the Crown and permitted the former to sell or lease any such lands.

In 1897 the East Africa Land Regulations were passed. These regulations distinguished between land in the Sultan's dominions and land in the rest of the Protectorate. In the former the commissioner was empowered to sell the freehold of Crown land that was not the private property of the Sultan. In the rest of the Protectorate he could only offer certificates of occupancy valid initially for 21 years, renewable for a further 21 years.
In 1898 the term of occupancy under the certificates was extended to 99 years. It is important to note that rights conferred by these certificates were no more than licenses to use lands and although the intention of the land regulations was to secure land for European settlement, few settlers were interested in the licenses obtained thereunder.

With the problem of the Crown's right to land in the Protectorate generally still unresolved, in 1899 the foreign office sought the Law Officers of the Crown's opinion particularly to the Crown's right to "waste land" in the interior of the East Africa Protectorate.

The advice of the law officers of the crown on the matter at this point vividly captures the colonial attitude towards African customary land tenure, which led to the tragic deterioration and destruction of agrarian resources in Africa in the last 100 years.
The opinion of the Law Officers of the Crown read, in past, thus:

> "Sovereignty; if it can be said to exist at all in regard to territory, is held by many small chiefs or Elders who are practically savages and who exercise precarious rule over tribes which have not yet developed either an administrative or a legislative system; even the idea of tribal ownership in land is unknown except in so far as certain tribes usually live in a particular region and resist the intrusion of weaker tribes especially if the intruders belong to another race. The occupation of ground in which a season's crops have been sown or where cattle are for the moment grazing, furnishes the nearest approach to private ownership in land, but in this case the idea of ownership is probably connected rather with the crops and the cattle than with the land temporarily occupied by them… We are of the opinion that in such regions the right of dealing with waste and unoccupied land accrues to Her Majesty by virtues of her right to the protectorate. These Protectorates over territories occupied by savage tribes have little in common with Protectorates over states such as Zanzibar, which enjoy some form of settled government and

> in which the land has been appropriated either to the sovereign or to individuals. Protectorates such as those now under consideration really involve the assumption of control over all lands unappropriated. Her Majesty might, if she pleased, declare them to be Crown lands, or make grants of them to individuals in fee simple or for any term."

This contemptuous denial of the juridical content of African customary land tenure formed the justification for their wanton expropriation and ruthless exploitation by the colonial authorities.

Pursuant to the Law Officer's opinion (supra) the East Africa (Lands) Order in Council, 1901 was passed. This ordinance defined Crown lands as:

> "All public lands within the East Africa Protectorate which for the time being are subject to the control of His majesty by virtue of any Treaty, Convention or Agreement and all lands which have been or may hereafter be acquired by His Majesty under the Lands Acquisition Act, 1894, or otherwise howsoever"

The 1901 Order in Council permitted the Commissioner to "make grants or leases of any Crown lands on such terms and conditions as he may think fit subject to any directions of the Secretary of State.

In 1902, Commissioner Eliot, undirected issued a notice permitting the sale of land at 2 rupees per acre and Leases for 99 years at a rental of 15 rupees per 100. To effectuate the 1901 Order in Council the Crown Lands Ordinance, 1902 was promulgated. This ordinance provided *inter alia*, that:

a) The Commissioner could sell freehold states in land
b) Regard would be had to the needs of the African population in dealing with crown land but that their right was only based on actual occupancy.
c) When land was no longer occupied by Africans it could be sold or leased without the consent of any tribal chief.

In 1904, the Maasai trough their religious head, Olonana (Lenana) purportedly entered into an agreement with the Crown in which they allegedly agreed of their own free will to move their people, flocks and herds into lands reserved for them away from the railway line and from any land that may be known open to European settlement.

Through this “Agreement” thousands of Maasai and millions heads of cattle were moved from the fertile and productive northern Rift Valley (later known as the White Highlands to laikipia and other designated areas south of the Rift Valley.

It was stated in the “Agreement” that the settlement then arrived at was to endure so long as the Maasai as a race

shall exist and that European or other settlers were not be allowed to take up land in the settlements.

However when in 1911 Laikipia was found suitable for European settlement the Maasai were again removed therefrom to the more arid southern Rift valley.
In 1912 one Ole Njogo and 7 other Maasai commenced a representative suit on behalf of themselves and of the Maasai of Laikipia and of the Maasai tribe generally to contest the legal validity of the 1911"Agreement"
Their action in the High Court and Court of Appeal of East Africa was never heard on its merits and an intended appeal to the Privy Council was never to be.
The rest, as they say, is history.

It is not clear why the British authorities chose to alienate Maasai land by way of "Agreement" and not by unilateral expropriation which the Commissioner in 1904 and Governor (with like power) in 1911 were entitled to do under the Crown Lands Ordinance, 1902. This decision may have been influenced by any or all of the following reasons:
i) That the British considered the Maasai as enjoying a "settled form of government" and hence protected by the Law Officers of the Crown's opinion of 1896 and 1899.
ii) That the British considered the Maasai a powerful force that ought not to be unduly disturbed. In his reports dated 10th June 1901 and 18th April 1903 Sir Charles Eliot describes the Maasai as: -

> Perhaps the most remarkable people in East Africa… The spread of law and order has

> somewhat curtailed their exploits, but the men are still all warriors by profession…. It would of course, be unwise to irritate them,…

iii) The British compromised Lenana and took advantage of his cooperation. Sir Charles Eliot in his report of 10th June 1901 says:

> Fortunately for us, Lenana's familiar spirit advised him that he had better make peace with the white men because they were invincible and he has proved our best friend and ally among the natives. In return, he receives 6. 13s. 4d. a month which is a very moderate stipend for a Monarch of such considerable power, both real and imaginary.

Land obtained under the "Maasai Agreement" was by virtue of the Crown Lands Ordinances of 1902 and 1915, Crown land.

The crown Lands Ordinance, 1915 defined crown Land to mean:

> All public lands in the colony which are for the time being subject to the control of His Majesty by virtue of any treaty, convention, or agreement or by virtue of His Majesty's Protectorate, and all land which shall have been acquired by his majesty for the public service or otherwise howsoever and shall include all land occupied by the native tribes of the colony and all lands reserved for the use of the members of any native tribes.

Apart from totally disinheriting the indigenous population by resting virtually the whole territory in the Crown, the

Crown Lands Ordinance, 1915 conferred on the Commissioner the power to make grants of 999-year leases to the settlers.

2. Present Land Tenure of Suit Land

a) Leasehold; *A good number of the lands that formed the basis of the "Maasai Agreements" of 1904 and 1911 and which are the subject of the present Maasai claims are currently being held as leasehold interests in land. In particular, they are mostly fixed period Leases.*

b**) Freehold**; many of the 999-year leases, which had been granted under the 1915 Crown Lands Ordinance, were after independence converted into fee simple Estates *vide* the Conversion of Leases Regulations and Rules, 1960.

In addition, since most whether the leases are valid, void or voidable depends on the validity nullity or voidability of the "Maasai Agreements"

, if not all, of the lands were agricultural, many of these leases matured into freehold estates through the process of enfranchisement. (See s.27 cap 280, Laws of Kenya)-see

Sempeta's Report for case study.

3**. Duration**

The length of time for which the lands were/are to be held depends mostly on whether they are currently leasehold or freehold.

Leasehold: The Leases were initially for 999 years of which almost 900 is still unexpired.

**In law since a lease need only be for a period specified, it is in fact possible and legal to create lease for such an obscene and absurdly duration as 999 years or even longer.*

Freehold: As for the lands that were converted into freehold estates, the same are technically endless in terms of duration for a freehold passes from generation to generation for as long as there are heirs to inherit.

4. **Validity of Leases:** This mainly depends on the validity of the Maasai Agreements of 1904 and 1911 on the basis of which they were secured.

5. **Current Status** (e.g. Encumbered transferred converted, Escheated e.t.c) see Sempeta's Report.

6. **Right of 3rd parties in the land:** - the rights of any 3rd party (e.g. a bank or a 3rd party purchases for value and without notice will depend on the circumstances of each case.

7. **Effect of 3rd party Interests on the Maasai Case**: The effect of the rights of any 3rd parties whose claim is tenable in law or equity is that it will determine the relief sought e.g. it may be more practical and convenient to seek compensation in lieu of restitution, e.t.c

Report prepared by Saitabao ole Kanchory-
Member, Legal Task Force, **Maa Civil Society Forum.**

Presented this 2nd Day of April, 2005
{**It should be noted the Late Marima Ole Sempeta was murdered before the Report was published and that the reference give is from a report given to the team}**

THE PROPOSED MASAI LAND CASE

LEGAL BRIEF

Brief Prepared

By

Saitabao Ole Kanchory

With Technical Assistance From:

Lawyers Crispine Othiambo, Dinah K. Katema And Tony Kabathi

Report Prepared with the Authority of and upon Commissioning

By

The Maa Civil Society Forum (MCSF)

> **It is as a direct result of having been induced to leave the best watered and most fertile areas that the Maasai have endured the recent disastrous famine, following drought and flood, from the effects of which they are still suffering… Being confined to marginal areas of rainfall, whenever the rains fail, they are the first to suffer. <u>Their claims are therefore not only a matter of legal right, but of political survival</u>**. (**Emphasis added**)[2]

DEDICATION

This work is dedicated to the late Elijah Marima Sempeta who gave his life to the Maasai cause and to all those, including the legal team of my fellow Maasai lawyers and all the NGOs, CBOs, FBOs, and other NPOs, that have dedicated their time and resources to this worthy cause and to my great people the Maasai to whom I pledge my continued service and commitment … God Bless Our People.

[2] Memorandum of Maasai Lands tabled at the Kenya Constitutional Conference held at Lancaster House in London in 1962

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'… how far the seising on countries already peopled, and driving out or massacring the innocent and defenceless

natives, merely because they differed from their invaders in language, in religion, in custom, in government, or in colour; how far such conduct was consonant to nature, to reason, or to Christianity, deserved well to be considered by those, who have rendered their names immortal by thus civilizing mankind.'[3]

2.0 SUMMARY

The inequality of Land Ownership in the Kenyan Rift Valley has been described by many commentators as nothing short of shameful. Nowhere is these inequality more glaring than the Laikipia Area, in Kenya's North Rift which has a number of big-holder Ranches[4] mainly owned by Descendants of Colonial Immigrants. In the same region are hundreds of thousands of Pastoralist communities, that have to cope with ever dwindling watering and pasture resources as their population increases, yet plenty can literally be said to be at their doorsteps.

At the genesis of the problem is the colonization of the territory that later came to be known as Kenya starting with the Declaration of Protectorate Status over East Africa on 15th June 1895 by the British Imperial Government. Since the real reasons for the scramble for Africa and the subsequent partitioning and colonization were economic and not strategic as has been argued by some apologists, land as an important aspect of the agro-industrial economy of the time was top on the list of the Imperial agenda. The Maasai being the owners and holders of some of the largest and most fertile swathes of land in the region

[3] Blackstone, Commentaries on the Laws of England (17th edn, 1830), Bk II, p.7
[4] The Privately owned Ranches range in size from a few hundred hectares to several thousands of hectares

were a prime target. With the Declaration of Protectorate, the stage was set for the systematic expropriation and exploitation of native lands. Keen to predicate

their actions on the law the unsolicited protectors imposed the common law on the Protectorate and made laws that purported to legitimize their illegal dealings. In his submissions to the Lancaster House- Kenya Constitutional Conference on March 23rd 1962, Mr. John Keen, one of the Maasai delegates to the conference aptly describes the British Imperial laws superimposed on the protectorate (and later on the colony) and on the natives who inhabited the land as 'tools of oppression and robbery.' "[T]he common law itself (with its feudal doctrine of tenure) took from indigenous inhabitants any right to occupy their traditional land, exposed them to deprivation of the religious, cultural and economic sustenance which the land provides, vested the land effectively in the control of the Imperial authorities without any right to compensation and made the indigenous inhabitants intruders in their own homes and mendicants for a place to live. Judged by any civilized standards, such a law is unjust and its claim to be part of the common law … must be questioned."[5] For the Maasai, the dispossession was mainly done through the instrumentality of the 1904 and 1911 so called Maasai Agreements although the expropriation and exploitation of Maasai land and the suppression of its people was also done by other 'legal' and extra-legal means. With these two Agreements, the Maasai, purportedly acting through their ritual heads, allegedly agreed 'of their own free will' that it was in their best interests to remove their people, flocks and herds from the best-watered and productive lands into lands they knew too well to be arid, unproductive and unfavorable to their way of life away from any land that might be thrown open for European Settlement. The Agreements state that the Maasai 'recognized that the Government in taking up the question of their resettlement, was taking into consideration their best interests' and ' their removal to definite and final reserves was for the undoubted good of the Maasai race'. It is on the basis of these two

[5] Remarks by Brennan J in the Australian case of **Mabo v. Queensland (No 2)** [1993] 1 LRC 194, at page 219

Agreements that the British Crown Officials proceeded to relocate tens of thousands of Maasai and their herds running into millions in conditions that survivors described as appalling, degrading and outrightly inhuman, depriving them of the wide Graze Lands they had occupied for over two centuries and restricting them to confined and non-sustaining Reserves. The 1913 decision in the **Ole Njogo Case**[6]**,** attempted to challenge the validity of these Agreements, but the case unfortunately was dismissed on a preliminary point, namely that the Court of Appeal for Eastern Africa, a Municipal Court, had no jurisdiction to determine a matter that arose from a 'Treaty'.

It is against these Historical Injustices that the Maasai today seek redress. During the 1962 Lancaster House-Kenya Constitutional Conference, Mr. Ole Tipis, one of the Maasai delegates to the Conference, disappointed in the manner the Maasai case they had put before the Conference was handled (see discussion of proceedings of Lancaster House Kenya Constitutional Conference*, infra*.) and realizing that neither the outgoing colonial regime nor the prospective African government was keen on making good the injustice occasioned on the Maasai told the conference that the Maasai 'would continue to struggle for their land'. In the memorandum presented before the Conference the Maasai delegates had warned that if the settlement then being negotiated did not yield fruit the Maasai would be forced to conclude that "their only remedy lied in methods other than negotiation." The Maasai struggle for their land, albeit lacking in alacrity at times, has been incessant. This work is part of that struggle and one that wishes to end it once and for all. This brief focuses on the Probable Legal Options available to the Community as it seeks redress. Particular attention is placed on the interrogation of the obvious lapse of a long period of time, which maybe termed Serious Laches, in seeking the redress and the capacity of the intended applicants in commencing such an action.

[6] (1913) EALR V. 70

Of special importance is also the Constitutional Dimension, considering that Kenya got her Independence in 1963 and under the principle of Transference, the rights and Liabilities of the Colonial Government were taken over by the Independence Government.

"The Maasai treaties and the usurping of Masailands by British settlers, constitutes the greatest injustice done to any single African tribe by the so-called civilizing powers of Europe. The signing of these treaties which must have been under duress or blatant misrepresentation of facts also constitute the height of misuse of international law. In the first place it is unheard of to have treaty relations between the ruling power and its subjugated peoples. Secondly no tribe or nation in its right mind can sign a treaty depriving itself of its very means of livelihood as these treaties purport."[7]

3.0 FACTUAL BACKGROUND

The Facts briefly stated are that by the turn of the twentieth Century, the Maasai occupied large swathes of the fertile Grasslands of the Rift Valley, an area of great interest to the newly arrived European Settlers. It thus became necessary to find ways of removing the Maasai Community who had then established a reputation as powerful and ferocious people; their warrior bands raided hundreds of miles into neighbouring territories to capture the cattle they coveted and to demand tribute from the trade caravans. To do this, the Protectorate Administration decided that it would be best to enter into Agreements with the Community rather than outright conquest.

The First Anglo –Maasai Agreement was signed by Lenana[8], Loibon (Oloiboni) of the Maasai and other Representatives on the one part and one Donald William Stewart (Sir) then the Commissioner for the Protectorate on the other, on August

[7] John Keen' s submissions at the Lancaster House, Kenya Constitutional Conference, 1962
[8] Variant of Olonana throughout this work

15th, 1904. This Agreement provided in part that ***" We the Undersigned … have of our own free will decided that it is in our own best interests to remove our people, flocks and herds into reservations away from the Railway Line and away from any land that may be thrown open to European settlement."*** The Agreement was stated to endure '***so long as the Maasai as a race shall exist, and Europeans and other settlers shall not be allowed to take up land an where in the reserved area'***. Approximately 11,200 Maasai and over two million stock lost their land to 48 European settlers following this Treaty.[9]

Despite the platitudes of the 1904 agreement, when Laikipia was found suitable for European Settlement, the Protectorate Administration found it convenient to 'negotiate' another Agreement to remove the Maasai from the high potential Northern Reserve to the more arid South Rift Valley. By this Second Agreement allegedly signed[10] on 4th of April 1911 by the so-called Paramount Chief of the Maasai and other representatives on the one part and one Edourd Percy Cranwill (Sir), then Governor of the Protectorate of the other. By the Agreement, the Maasai Community allegedly agreed to '***vacate a such times as the Governor may direct the Northern Maasai Reserve which they had hitherto occupied and to remove by such routes as the Governor may notify us, our people, herds and flocks to such area on the South side of the Uganda Railway as the Governor may locate to us.'***

With this later Agreement, the Maasai were boxed into an even smaller area considering that all the Maasai would now have to stay only in the Southern Reserve. The Maasai were never to regain those Territories they lost and indeed, after the declaration of Colony in 1920, the Colonial Authorities continued to blatantly encroach into areas that had in fact been part of the Southern Reserve. During the Independence Talks, it was agreed that the new Government would purchase back Land then owned by Colonial Settlers and return them back to their original communities. This process although carried out in some parts of the

[9] Okoth-Ogendo, **Tenants of the Crown, (**1991) ACTS Press Nairobi at page 30
[10] The original copies of the 'Treaties' have never been produced nor can they be traced

Country, was never conducted with respect to the previous Maasai owned Lands in North and Central Rift. Today the Maasai are effectively excluded from the former Grazing Land both in Central and North rift where a number of descendants of Colonial Settlers continue to own large ranches while the pastoralist Maasai continue to struggle with the challenge of finding Grazing and Agricultural Land.

4.0 ISSUES FOR CONSIDERATION

In considering the Viability of the various options open to the community in seeking restitution for the loss of their land after the 1904 Agreements, it would be necessary to consider:

a) The Legal Regime Applicable at the Material Time
b) The Maasai Native title to the specified Land
c) The Effect of the 1904 and 1911 Agreements on the claims of Title of the Maasai
d) The Effect of the Proclamation of Colony in 1920
e) The Lancaster House, Kenya Constitutional Conference, 1962
f) The Existence and Nature of Maasai Rights which continued after the Agreements and the Declaration of Independence
g) Consequences in law of any breach of Trust or Fiduciary Obligation owed by the Successive Administrations (Protectorate, Colonial and Independence) to the Maasai
h) Nature of any Violations of the Fundamental rights and Freedoms of individual community members or the entire Community of the Maasai
i) The Question of Laches in bringing the Claim
j) The Ole Njogo case Dimension and the Issue of *Res Judicata*
k) Framing of the claim to be made by the Community.

4.1 The Legal Regime Applicable at the Material Time.[11]

[11] See Generally S.C Wanjala et al (Ed.), **Essays in Land Law** at pages 3-60

In 1890 there was passed in England the Foreign Jurisdiction Act, subsequently Amended in 1913, which stipulated the way the power of the Crown was to be exercised in a protectorate. This was to be through Orders in Council. In British Constitutional theory, a protectorate is a sovereign state and the power of the crown is merely equally to that provided under the Articles of Agreement. On the other and, a colony is part of the Dominions of the Crown, whose power is unlimited and the land belongs to the Crown.

The British Declaration of a Protectorate over Kenya in 1897 thus did not confer power to acquire land for British settlers. The Constitutional position stated in 1883 in the **Ionian Islands case** was that exercise of protection over a state does not confer power to alienate land unless the agreement or treaty of protection specifically reserved the right to deal with "waste and unoccupied land" or such rights were vested in the protecting authority. It is in light of this legal position that the Law officers of the Crown gave the following advice to the Protectorate Imperial authorities who were eager to alienate native land to the incoming settlers:

> As regards Land Regulations, the Secretary of State's view is that the acquisition of partial Sovereignty in a protectorate does not carry with it any title to the soil. The Land is foreign soil, and does not become vested in Her Majesty, as is the case of territory that is actually annexed to the British Dominions. It is therefore advisable to avoid making grants or leases or other dispositions purporting to be an alienation of land by the British authorities, to whom it does not in fact belong. Where Native owners exist, it is not, of course desired to interfere with them… (**Emphasis added**)

Despite the above legal impediment to acquisition of land in the protectorate, around 1897, through the East African Order-in-Council, the British Imperial government extended to the Protectorate the 1894 Indian Land Acquisition Act, which was used to compulsorily acquire land for the Railway line and for the ten

mile zone each side of the Railway line for Government buildings and other public purposes.

Obviously unhappy with the 1883 Ionian Islands position which it felt unnecessarily fettered its ability to alienate land, the Protectorate government sought advice of the Law Officers of the Crown on the Crown's rights to land in protectorates, and particularly to "waste land" in the interior of the East Africa Protectorate. In an obvious about turn, perhaps bowing to the apparent pressure, the Law Officers subsequently gave the following advice:

> "Sovereignty, if it can be said to exist at all in regard to territory, is held by small chiefs or Elders, who are practically savages and who exercise a precarious rule over tribes which have not as yet developed either an administrative or legislative system; even the idea of tribal ownership in land is unknown, except in so far as certain tribes usually live in particular region and resist the intrusion of weaker tribes, especially if the intruders belong to another race…. We are of the opinion that in such regions the right of dealing with waste and unoccupied land accrues to Her Majesty by virtue of Her right to the Protectorate."

It is submitted that this position was patently wrong for the at least the following reasons:

Firstly, it did not accord with British Constitutional theory of the time that Protectorate status could not confer power on the crown to alienate any land. Secondly it was based on racial bias against Natives with the claim that they were 'practically savages'. This colonial and racist mentality has since been proved to have been a product of gross ignorance and is now completely untenable. As Brennan J in the **Mabo case (No 2)** (supra):

> The theory that the indigenous inhabitants … had no proprietary interest in the land thus depended on a

> discriminatory denigration of indigenous inhabitants, their social organization and customs. As the basis of the theory is false in fact and unacceptable in our society, there is a choice of legal principle to be made in the present case.

The learned Judge goes on to state that:

> The fiction by which the rights and interests of indigenous inhabitants in land were treated as non-existent was justified by a policy which has no place in [the] contemporary law.

Just before he made these remarks the Judge had warned that:

> … it is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination.

In any case the Maasai had a fairly developed administrative system as acknowledged by, among others, the British themselves.

Nonetheless, the Law Officers' Opinion although outrightly flawed and principally erroneous was legalized by the East Africa (Lands) Order-in Council 1901. This defined Crown lands as:

> "All public lands within the East Africa Protectorate which for the time being are subject to control of His Majesty's Protectorate by virtue of any Treaty, Convention or Agreement, or His Majesty's Protectorate, and all lands which have been or may hereafter be acquired by His Majesty under the Lands Acquisition Act, 1894 or otherwise howsoever"

In 1902 the Commissioner promulgated the Crown Lands Ordinance, 1902 to effectuate the 1901 Order-in-Council. It provided that: a) The Commissioner

could sell freehold estates in land; b) regard to be had to the rights and requirements of the African Population in dealing with the Crown Lands but these rights were seen in terms of actual occupancy only; and c) when land was no longer occupied by Africans it could be sold or leased as if it were 'waste and unoccupied land' and there was no requirement of seeking the consent of any tribal chief before disposition." This remained the Legal policy till 1915

Thus at the time of the Maasai Agreements (1904 and 1911) the Applicable law was that found in the Crown Lands Ordinance of 1902, which recognized that land owned (meaning Occupied) by Africans could not be alienated by the Commissioner. The land that were occupied by the Maasai could thus not be alienated in any way by the Commissioner except by Agreement given that the British Government recognized that it was occupied by Natives. Despite this obvious legal and constitutional restraint by 1903 even before the first Maasai Agreement was entered into 'the British had already alienated to settlers, 614, 213 acres of which 427,350 acres were Maasai land'.[12] The next question is whether the Maasai as a Community had Title to the land that they occupied and which could be asserted against the Crown.

4.2 The Maasai Native title to the specified Land

By the 1902 Order-in-Council, Crown lands were broadly defined to encompass all land that later became known as the Northern Frontier District (comprising the Northern Parts of the current Rift Valley and Eastern Provinces, and the whole of North Eastern Province) were summarily appropriated to the Imperial Government. This was done firstly by re-allocating (and wrongly so) of radical title (meaning ultimate ownership) to land. By asserting that the Crown and not the indigenous inhabitants held radical title to land, the stage was firmly set for the expropriation of land held by indigenous people and its allotment to settlers

[12] John Keen's unchallenged submission at 1962 Lancaster House Kenya Constitutional Conference

and other private agencies who otherwise would not have qualified to receive it under customary law. This course of action was improper as shown herein below.

There is good authority that the strong assumption of the common law was that interests in property which existed under Native law were not obliterated by the act of state establishing a new British dominion (in case of a protectorate) or a colony but were preserved and protected by the domestic law of the dominion or colony after it was established. In **Amodu Tijani v. Secretary, Southern Nigeria**[13] the Privy Council affirmed and applied the "Usual" principle "under British Law" that when territory is occupied by cessation, "the rights of property of the inhabitants are to be fully respected". In **Adeyinka Oyekan v. Musendiku Adele**,[14] the Privy Council expressly held that the assumption that pre-existing rights are recognized and protected under the law of British Colony is a "guiding principle". In a judgment read by Lord Denning, their Lordships said,

> "In inquiring … what rights are recognized, there is one guiding principle. It is this: The Courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected. Whilst, therefore, the British Crown, as Sovereign, can make laws enabling it compulsorily to acquire land for public purposes, it will see that proper compensation is awarded to everyone of the inhabitants who has by native law an interest in it; and the courts will declare the inhabitants entitled to compensation according to their interests, even though those interests are of a kind unknown to English law. " (**emphasis added**)

It therefore follows that the 'guiding principle' which their Lordships propounded is clearly capable of general application to British Colonies in which indigenous inhabitants (such as the Maasai) had rights in relation to land under the pre-existing Native law or custom. It should thus be accepted as correct general

[13][1921] 2 AC 399

[14] cited in Mabo's case ibid.

statement of the common law. For one thing, such guiding principle accords with fundamental notions of justice, indeed the recognition the recognition of interests in land of native inhabitants was seen by early publicists as a dictate of natural law. For another, it is supported by convincing authorities applying to a wide spectrum of British Colonies including Canadian, New Zealand, Nigeria and Rhodesia.

To prove the existence of Native Title, relevant authorities have dealt with the question in different ways. A number of English and Australian authorities have set out two requirements: that the interests said to constitute title be proprietary and that they be part of certain kind of system of rules. Both these requirements are apparent in **Re Southern Rhodesia**[15]. North American courts on the other hand have taken a different approach to the question of proof of the existence of traditional title. In **Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development**[16] , Mahoney J concluded after analyzing Canadian an United States authority that"

> "The elements which the plaintiffs must prove to establish an Aboriginal title cognizable **at common law are: 1)** That they and their ancestors were members of an organized Society; 2) That the organized society occupied the specific territory over which they assert the Native Title; 3) That the occupation was to the exclusion of other organized societies; 4) That the occupation was an established fact at the time sovereignty was asserted by England."

With regard to the Maasai the above elements are easily satisfied. With regard to the first, it is not in question that the Maasai at the relevant time an organized society. This the British themselves acknowledged on numerous documented occasions. Maasailand was even recognized as a Kingdom by Sayyed

[15] [1919] AC 211

[16] Cited in extensor in **Eddie Mabo v. The State of Queensland** (supra)

Bargash[17], the Sultan of Zanzibar (18__-19__). On the second albeit the Maasai led a predominantly nomadic way of life that the occupied and asserted themselves in the relevant lands is not in dispute. It was accepted in the Lancaster House, Kenya Constitutional Conference, 1962 as contained in the '**Memorandum of Maasai Lands in Kenya**' marked '**Confidential**' that:

> "Up to the beginning of the Twentieth Century the Maasai[18] tribe occupied or possessed the rights over a very large single area of what is now Kenya, including much of the best watered and most fertile districts. They included besides the present Kajiado and Narok districts, land from Oldonyo Sapuk to Nairobi and Ngong, Susua, Naivasha, Kinangop, Laikipia, and Nanyuki; Mau, Nakuru, Molo, Solai, Sulukia, Thomson's Falls and on to Sampur, and the Uasin Gishu districts."

It was also accepted in the 'Maasai case' (1913) that prior to 1902 the Maasai remained unmolested "*on both sides of the Uganda Railway from Molo to Naivasha, and on the South side from Nairobi to Kiu."*

As regards the third element in Mahoney J's exposé (supra) regarding whether the Maasai occupation of their land was to the exclusion of other organized societies, I wish to only quote Sir Charles Elliot then Commissioner for Eastern Africa Protectorate when he said:

> "From at least 1850 to early eighties the Masai were a formidable power in East Africa. They successfully asserted themselves against the Arab slave traders, took tribute from all those who passed through their country, and treated other races, whether African or not, with the greatest arrogance."

[17] Alluded to by John Keen at the Lancaster House, Kenya Constitutional Conference, 1962-
[18] Variant of Maasai throughout this brief

As to whether the Maasai occupation was an established fact at the time sovereignty was asserted by England, the purported Treaties are themselves evidence of this fact.

In **United States v. Santa Fe Pacific Railroad Co**., the court noted that

> "If it were established as a fact that the land in question were, or were included in the ancestral home of the Walapais in the sense that they constituted definable territory occupied exclusively by the Walapais (as distinguished from lands wandered over by many tribes), then the Walapais had 'Native Indian title'

4.2 The Effect of the 1904 and 1911 Agreements on the Claim of Title to the specified Land by the Community

In the **Ole Njogo Case** *ibid*., the then East African Court of Appeal in agreeing with the High Court that the municipal courts had no jurisdiction to hear the applicants claim, found that the two Agreements were Treaties and the acts complained of were acts of State which were not cognizable by a municipal Court. The action was in substance one for damages for breach of the Agreement of 1904 between the Government of East Africa and the Maasai tribe, and in respect of stock illegally removed by the said government and for declaration of certain rights under the Agreement.

One view would be that in terms of the two Agreements, the Maasai contracted away parts of their land by treaty and thus are estopped from reclaiming the land. To challenge this position, it would be necessary to challenge the Agreements themselves. For one it is doubtful if the same was made out of free will, so a case for duress may be made out.

Secondly, a case for breach of the terms of the Agreement by the Imperial Government may be argued considering its subsequent conduct. Lastly the subsequent Declaration of Colony status for the country must of necessity and logically brought to an end the binding effect of the Agreements, as at the

Government could then not be said to be capable of entering into a Treaty with its own subjects.

In the celebrated Australian decision of **Eddie Mabo and others vs. The State of Queensland**[19], a very persuasive proposition of law was set out that Common law recognizes a form of native title which, in the cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants, in accordance with their laws and customs, to their traditional lands. Therefore provided that the 19804 and 1911 Agreements can be successfully challenged for having either been voidable or otherwise frustrated by the Declaration of Colony status, the entitlement of the indigenous Maasai community to the material Land can be asserted.

4.4 The Effect of the Proclamation of Colony status in 1920.

In June 1920 the Constitutional Structure changed drastically. The entire Protectorate save for the ten mile coastal stripe was annexed as British Colony. The official name of Kenya was thus changed to *Colony and Protectorate of Kenya* (in recognition of the duality). By this change of status and in consideration of the reasoning behind the Ole Nchoko decision, it can be argued that the position of the Maasai and other indigenous inhabitants changed. The Maasai were no longer foreigners in a Protectorate Court but subjects under the jurisdiction of the Imperial Government. The Agreements of 1904 and 1911 cold therefore be said to have been terminated at that time, for being British subjects, the crown could no longer continue the Contractual relationship it had with the Maasai.

The adverse effect of the Declaration of colony status though was to render Native inhabitants mere Tenants at will of the Crown. This position was

[19] ibid.

confirmed in the case of **Isaka Wainaina wa Githomo and Another vs. Murito wa Indangara**[20]. The facts of the case were as follows: One Wainaina wa Githongo and another, both Kikuyu, claimed that they were entitled to possession of a piece of land in Kabete which they alleged had been subject of a trespass by the defendants. The Attorney General asked to be made party to the suit and subsequently Justice Barth to reframed the question before the Court as folows follows: "having regard to the rights of the Crown, are the plaintiffs entitled to bring this action?". In holding that the plaintiffs not so entitled, the Chief Justice Declared as follows:

> "In my view the effect of the Crown Land Ordinance, 1915 and the Kenya (Annexation) Order-in-Council, 1920 by which no native private rights were reserved, and the Kenya Colony Order-in-Council, 1921….is clearly inter alia to vest land reserved for the use of a native tribe in the Crown. If that be so then all native rights in such reserved land, whatever they were…disappeared and Natives in Occupation of such Crown Land become Tenants at the will of the Crown of the land actually occupied which would presumably include land on which huts were built with their appurtenances and land cultivated by the Occupier – such land would include the fallow."

4.5 The Lancaster House, Kenya Constitutional Conference, 1962

The Lancaster House, Kenya Constitutional Conference, 1962 (herein after referred to as **'the Conference'**) presented a great opportunity for the resolution of the claim of the Maasai on their lands expropriated by the outgoing British colonial government. It was thought that the British, having lost their bid to retain the then lucrative and strategic colony of Kenya were now ready to make some concessions and correct some of their past wrongs.

[20] (1922-23), 9 KLR 102

On their part, the Maasai, not wishing to miss this once in a lifetime opportunity constituted and dispatched a high-powered delegation to London to make their case.

Although the Conference is viewed as an historic event for ushering in a new constitutional order in Kenya, to the Maasai the only thing that mattered was how their land issues could be resolved. Their grievances at the Conference, therefore, revolved around one thing and one thing only: land.
Those that were charged with the onerous responsibility of articulating the Maasai cause included;

Mr. J.K. Ole Sein

Mr. P. Ole Lemein.
Dr. Likimani.
Mr. Partasio Ole Nambaso.
Mr. John Ole Tameno.
Mr. J.K. Ole Tipis.
Mr. J. Keen.
Mr. J.L.H Ole Konchellah.
Mr. P. Rurumban (Observer)
Mr. R.L McEwen (Legal Adviser).

The following is a summary of the proceedings of the Conference so far as they relate to the Maasai case including excerpts of the presentations made by the Maasai delegation and the responses they solicited.

The Maasai Plea

The Maasai delegation led by the young outspoken and fiery John Keen put forward a very strong case on behalf of the Maasai before the Conference. The following were some of their grievances:

(i) **THAT** both the 1904 and 1911 'Treaties' were invalid and defective because they were, *inter alia*, entered into "under heavy pressure from the government", and the 1911 'Treaty' even "had to be implemented by physical force". The institution of legal action to challenge the 1911 Agreement by ole Njogo, *et al*., and the attempts by the majority of the Maasai to resist evacuation from Laikipia and their subsequent attempt to move back to their lands were cited as clear indications of the unwillingness of the Maasai to be bound by these Treaties and as proof of the fact that there was in fact no agreement between the Maasai and the government in relation to the planned movement. It is not without significance that Ole Njogo and seven other Plaintiffs were leading Maasai Morans (warriors), who were the ruling caste as well as the military wing of traditional Maasai government, from across the various sections of the Maasai. The 8th Plaintiff was a chief (olaiguanani) of Morans from one section of the Maasai.

(ii) **THAT** the suggestion to move the Maasai was undoubtedly made in the interest of European settlers and not of the Maasai people.

(iii) **THAT** at most and without prejudice to their right to the reversion, or at all, and subject to their right to full compensation for their land the Maasai were only ready to accept the 1904 Agreement with all the guarantees contained therein. One such guarantee being the fact that the settlement then arrived at would "***be enduring so long as the Masai as a race shall exist, and that Europeans or other settlers shall not be allowed to take up land in the Settlement***"[21]. The Maasai recognized that the guarantees given in the Agreement constituted the sheet anchor of their rights in Kenya and they were the

[21] Masai Agreement, 1904

minimum that they were willing to accept in any future constitutional arrangements. The Maasai however cited cases of abrogation of the 1904 'Treaty' by the British despite the fact that the Maasai had loyally abided by it. Apart from the 1911 Agreement, which clearly went against the 1904 'Treaty' and which arrangement the Maasai found totally unacceptable the British from time to time derogated from the Agreement in total disregard for and oblivion of the interest of the Maasai community. The Maasai delegation cited the Magadi soda case as one such gross violations of the 1904 'Treaty'. The Memorandum of Maasai Lands in Kenya which they presented to the Conference contained the following complaint:

> At the very time of the 1904 Treaty, a lease of land at Magadi, in the center of the Southern Reserve as specified in the Treaty, was signed under which the soda deposits there are worked by a company paying royalties to the Crown. Moreover, a large area of land in the vicinity was designated Crown Land. In the view of the Maasai, this was in clear breach of the treaty.

They also cited the refusal to provide an easement between the two areas reserved by the 1904 Agreement as one of the early incidences of breach of the Agreement. The Agreement had guaranteed the Maasai, *inter alia,* the right of road to access water and keep up communications between the two reserved areas and "the right to retain control of at least five square miles of land (at a point on the slopes of Kinangop to be pointed out by Legalishu (sic) and Masakondi (sic)", whereat and they could carry out their circumcision rites and ceremonies, in accordance with the customs of their ancestors. None of these was honoured.

(iv) **THAT** the 1911 Agreement was illegal, null and void and unacceptable to the Maasai people. Unlike the 1904 Agreement which might be said to have been ratified by compliance, the 1911 "Treaty" never received the approval of the tribe and had to be implemented by means of government orchestrated violence with the inevitable loss in human life and property. The losses in cattle, men, women and children who died while en route to the Southern Reserve escaping from Laikipia, with government sponsored gunmen on horse backs in hot pursuit, and the subsequent carnage that resulted as a direct result of the movement can only be described as a gross violation of human rights; an act of genocide and a crime against humanity.

(v) **THAT** as a result of the movement of the Maasai from their best watered and productive lands into arid and hostile conditions, the once mighty tribe of warriors had since disintegrated and was staring extinction right in the eye. The Memorandum of Maasai Lands tabled before the Conference contains the following disturbing narrative yet the pitiful state of affairs it describes holds true to this day. It reads:

> It is as a direct result of having been induced to leave the best watered and most fertile areas that the Maasai have endured the recent disastrous famine, following drought and flood, from the effects of which they are still suffering. For example, the Idalalekutuk (sic), who used to own Tirran and Nanyuki, have been amongst the worst sufferers. The Ikeekonyokie (sic), Ipurko (sic), Isampurr and Ikaputei (sic), most of whom are now subsisting on famine relief, once owned Kinopop (Kinangop), Naivasha, Laikipia, Nakuru, and Mau Narok. Being confined to marginal areas of rainfall, whenever the rains fail, they are the first to suffer. Their

> claims are therefore not only a matter of legal right, but of political survival. (**Emphasis added**)

The Maasai delegation also complained that:

> The isolation of the Maasai people in the North, South and West of Kenya,…, has resulted in the division of the tribe into small units far apart from each other with a resulting inability to act as one nation, which in fact they are. … The opening of former Maasai territory to these scattered units would enable the tribe to regain its proper position as a coherent whole able to act in the interest of its members, instead of remaining a series of isolated minorities, subject everywhere to a policy of divide and rule.

(vi) **THAT** the area adjoining the Southern Maasai Reserve consisting of Kajiado and Narok which the 1911 Agreement purports to donate to the Maasai had always formed part of Maasailand and could therefore not be donated to its rightful owners as settlement.

(vii) **THAT** Maasai lands alienated for the purpose of European settlement had now been opened for settlement and acquisition by non-Europeans instead of being returned to their rightful owners now that they were no longer needed for the purpose for which they were acquired. The Maasai had had their best lands expropriated without compensation in order to allow European Farmers to settle in them. Now that they were no longer required for this purpose, the Maasai who desperately needed land for resettlement, should have first claim on them. Although the Maasai wished to establish their right to their land, they did not wish to drive out Europeans who had settled in the Highlands following the agreements of 1904 and 1911 but they wanted

it to be quite clear that when such people left their farms, the land would be returned to the Maasai.

(viii) THAT the process of resettlement of natives then ongoing was discriminatory and flawed. On this point Mr. Konchellah lamented at the Conference that:

> …land evacuated by Europeans at Kericho was to be returned to the Kipsigis, to who it had originally belonged, and this was the intention regarding certain lands which were to be allocated to settlement (sic) by the Nandi and, at Nyeri, by the Kikuyu.

While his counterpart, Mr. ole Tipis, added that:

> Land which was formerly Kikuyu was now being handed back to them; it was difficult to understand why Her Majesty's Government was discriminating against the Maasai.

The Maasai Demands

Upon ably making their case the Maasai delegation made the following demands:

1. **THAT** all Maasai land illegally and irregularly expropriated be returned to the community.

   The Maasai recognized that while in principle land owned or occupied by the Maasai people up to the 1904 treaty should revert back to the community, in practice this would not be possible. They therefore proposed the land be dealt with depending on whether it is 'unoccupied', 'leased' or 'developed' in the following manner, respectively:

a) With regard to land that was Unoccupied these they demanded should be returned to the community as it was taken from them without compensation for a purpose which was never effected.

b) Regarding land leased to European settlers the Maasai made it clear that they did not wish to evict the settlers but warned that in the changed circumstances of independent Kenya, they and not the government should own the reversion and receive the rents of such land.

c) On land already developed, the Maasai recognized that certain industrialized areas, especially in and around Nairobi, formerly part of Maasai territory, had been developed to such an extent that it would be unrealistic and unreasonable to consider handing them back. In respect of these the Maasai demanded that instead adequate compensation should be paid.

2. **THAT** adequate compensation be paid for all Maasai land illegally, irregularly and/or forcibly expropriated or otherwise howsoever acquired without compensation. They demanded that the Maasai be paid a sum of £5, 800, 000 as compensation for the loss and injustice caused to them by Her Majesty's government and a further £100, 000 per annum starting from 1904 onwards. The Maasai complained that the Sultan of Zanzibar was getting £16, 000 annually for ceding an area of 10 Miles while the Maasai got nothing from the British for being forced to give up over "10,000 Square Miles of the best land in Kenya". The Maasai delegation however made it clear that their claim for compensation was in addition to and not in lieu of restitution.
3. **THAT** the British government make reparation to the Maasai for the injustices suffered by the Maasai since the advent of British rule in Kenya.

4. **THAT** the Agreement between the Magadi Soda Company and the Crown should terminate forthwith so that the Maasai can renegotiate with the Company.
5. **THAT** all natural resources on Maasai land rightly belong to the Maasai people and that royalties therefrom should be paid to the Local and not the Central government. They cited in particular the case of Magadi soda and the Lolgorien gold mines which were being exploited without any benefit to the community.
6. **THAT** all game rights in wildlife found on Maasai land should vest in the Maasai community. They argued that almost alone among the tribes in Kenya the Maasai have proved themselves capable of preserving wildlife. Elsewhere they said wildlife had been decimated.
7. **THAT** the Maasai be guaranteed of security of tenure to all their lands.
8. **THAT** both the outgoing British colonial and the incoming Independent Kenyan government must admit that the 'Treaties' improperly obtained.
9. **THAT** the original copies of the 'Treaties' of 1904 and 1911 be produced. Strange as this may seem it appears that the British government could not produce the originals of the Agreements or the Maps supposedly attached thereto. John keen while putting the British to task to produce the documents alludes to the fact that such failure to produce attests to the defectiveness and shoddiness of the transactions. He says:

While I am certain that the British government can produce originals of their treaties signed 300-400 years ago and even the Sultan treaty of 1895, I am not surprised to see they could not produce the originals of the Masai treaties because they were only scrap papers. This establishes the facts under which African lands were falsely, forcibly and treacherously acquired.

10. **THAT** both the British and Kenya governments introduce to Maasailand an accelerated development plan and provide the Maasai with educational and economic opportunities to enable them to catch up with the other tribes in Kenya.

11. **THAT** the prospects of introducing mixed farming in Maasailand for commercial purposes be explored and new and better concepts of land utilization be introduced.
12. **THAT** in view of the special problems of development in Maasailand, a development body, the 'Maasai Development Authority', be established to spearhead development in the area. This body, which should be composed of Maasai and representatives from various government departments would have the power to seek assistance, technical or financial, for the furtherance of development schemes in Maasailand.

The Responses/Reactions To The Maasai And Claims By KANU, KADU & The Crown

KADU'S RESPONSE: Represented by Sir M. Blundell, Messrs D. T arap Moi, P. M. Muliro, B. Mate, W. C Murgor, R. G. Ngala, and T. Towett, KADU took the position that "it was wrong to suggest that simply because British Rule was ending good farmers would not be allowed to keep their land". They said that "whatever their nationality, (the farmers) would be allowed to remain since it was upon them that the economic development of the country largely rested".

KADU also held the view that the Agreements between Her Majesty's government and the Maasai must be recognized by future African governments.

KADU however acknowledged and sympathized with the urgent need of the Maasai people for land for resettlement and for the need for the provision of adequate water supplies and other development. It was KADU's position that "[T]he British government should make a substantial sum available specifically for this purpose".

KADU agreed that "[The Maasai people should not be split into isolated groups. They be enabled to live together if they so desired."

KANU'S POSITION: Mr. Kenyatta on behalf of KANU, which was also represented by Dr. Kiano, Messrs Mboya, Mulli, Sagini and Dr Malik, stated that he supported the delegation's request for compensation, which would provide funds for economic development. He however stated that the "*Agreements were between two parties – the Maasai and the British Government - and it was for them to deal with the future of the Agreements."*

Upon being pushed by Ole Tipis to clarify their attitude to the Maasai claims Mr. Mboya said *"KANU agreed that the Maasai lands required urgent development and were prepared to entertain any practicable proposals which the Kenya Government was able to give."*

At this point Ole Tipis objected that *"the KANU land policy was not acceptable to the Maasai"* and asked KANU to "*state clearly whether, in view of the Agreements, the Maasai had a just claim to their Reserve and also to their former land in scheduled areas."*

In answer KANU made it clear that they recognized the rights of the Maasai in their reserve, but felt that they could not be expected to go beyond this *"until Her Majesty's Government had stated its own position clearly".*

Her Majesty's Government Position/Reaction To The Representations By the Maasai Delegation

The Secretary of State for Great Britain gave the following position on behalf of Her Majesty's government:

(a) Regarding the Authenticity and Enforceability of the 1904 and 1911 Agreements

Her Majesty's Government regarded the 1904 and 1911 Agreements as binding on both their Majesty's Government and on the Maasai people. The British government said that their could be no doubt regarding the authenticity of the Agreements and that the Maasai themselves had relied on them in the Ole Njogo Case.

It is important to note here that the Maasai in Ole Njogo's case only relied on the 1904 Agreement and, far from relying on it, they were in fact challenging the authenticity of the 1911 'Agreement'.

(b) On the Rights of the Maasai to the Lands which they occupied in the Reserve

Her Majesty's Government considered that they were under an obligation to ensure that the Maasai continued to enjoy these rights and they firmly intended to honor this obligation. This would be done by incorporating it in the bill of rights as follows:

i) There would be a provision in the Bill of rights to the effect that land could not be compulsory acquired except for public purposes. The provision would specify the public purposes for which land could be compulsory acquired and provide for the payment of full compensation on acquisition, with a right of access to the courts to determine the legality of the acquisition and the adequacy of the compensation.

ii) Transfers of land in the Maasai reserve would be subject to the consent of the Maasai themselves; this would be achieved by a provision in the in the Constitution that control of land transactions should be vested in the appropriate tribal authorities.

(c) On The Magadi Soda Concession Without The Consent Of The Maasai

The Secretary of State stated that this was a difficult question and he proposed to ask the Governor of Kenya and subsequently communicate to the Maasai. This was to the knowledge of the Maasai never done.

(d) ***On The Issue That Certain Arrears Of Land Which Formed Part Of The Maasai Present Reserve Had Since Been Alienated*****;**

The secretary of state proposed to ask the Governor to look into this issue and send him a report. He would then communicate with the Maasai. Again to the knowledge of the Maasai this was never done.

(e) On The Claim That The Maasai Had Rights Persisting In Land Outside Their Reserves

Her Majesty's Government could not agree that the Maasai had rights persisting outside their reserves. It was their case that the Agreements made it clear that under them the Maasai surrendered for all time any claims which they might have to the lands which they vacated. Her Majesty's Government could not accept that they were under any obligations to the Maasai in respect of land outside their reserve.

(f) On The Land Occupied By The Samburu, Mukogando And Njemps in the North and West Of Rift Valley

Her Majesty's Government did not consider that they heard any obligation under the Agreement to these tribes. These groups would have security of tenure under the constitutional proposals for Kenya as would other tribes and that it was not feasible to join the two blocks of land together.

(At this point Mr. John Keen stormed out of the meeting).

CONCLUSION

The announcement by Her Majesty's Government that it did not recognize any rights by the Maasai to land outside their reserves not only confirms the conspiracy to deny the Maasai their right as affirmed by the cautious refusal by KANU and KADU to recognize those rights but it also marked the failure of the constitutional conference as a forum to address the Maasai land claim.

Undoubtedly, the Lancaster House, Kenya Constitutional Conference of 1962 was the most appropriate forum and 1962 the most opportune time to address the Maasai land claims but due to the hard-line position taken by Her Majesty's government and the laxity of KANU and KADU to recognize and support the Maasai cause, the opportunity was completely lost.

4.6 The Independence Settlement

It was expected that that the transfer of power from colonial Authorities to indigenous elites would lead to fundamental restructuring of that legacy. This however did not fully materialize. Instead what happened was a general retrenchment, hence continuity of colonial land policies, laws and administrative structures. Explanation for this lies primarily in the conduct of the decolonization process itself and the opportunity which it accorded the new African elites to gain access to the European economy.[22]

At the first Lancaster House Conference, the Nationalists maintained the position that the claims of land ownership and property rights in the white Highlands were in dispute since the establishment of the the White Highlands. This position was constantly undermined by the Colonial Administration and most of the Native negotiators were eventually steamrollered into granting enormous constitutional and economic concessions to European settlers in exchange for speedy transfer of political power. Recognition of colonial land titles became the bedrock of

[22] See for Instance Waseman, G. "The Independence Bargain: Kenyan Europeans and the Land

transfer of political power. The Nationalist accepted not only the sanctity of private property but also the validity of Colonial expropriations. The independence Constitution immortalized this negotiated position by declaring that there would be no state expropriation without due process.

It was also agreed at the two Lancaster House Conferences that African accession to the white Highlands would only be through under willing buyer, willing seller schemes or through purchase by the post – colonial state through a loan granted to the State by the United Kingdom, the Colonial Development Corporation, West Germany and the World Bank. The resettlement process after Independence has been roundly critized for having been discriminatory, and inadequate. It provided the emergent petty-bourgeois elements with an opportunity to accede to and entrench themselves in large scale Agricultural production.

4.7 The Existence and Nature of Maasai Rights which continued after the Agreements and the Declaration of Independence.

It is greatly tempting to conclude at this stage that any rights over the material Land that the Maasai community might have had were extinguished first when by Treaty they purportedly ceded them to the Imperial Government and secondly when the country was declared a colony and lastly when at Independence, the post-colonial state agreed to respect the sanctity of all private title to property no matter how initially acquired. It is a trite principle of International Law that a Successor state acquires all the rights and liabilities of its Predecessor State (the principle of Transference). The position obtains with even great authority where the two Administrations agree on such a position, which is the case with the Kenyan Independence settlement.

The question of subsistence of previous rights of title or otherwise of native tribes have been considered in a number of decisions in other jurisdictions notably in the Australian case of **Mabo** (*ibid*.)**.** For instance in the Privy Council decision of **Vajesingji Joraavarsingji v. Secretary of State of India** (supra) the Council held that:

> "When a territory is acquired by a sovereign state for the first time, that is an act of State. It matters not how the conquest, acquisition has been brought about. It may be by conquest, it may be by cession following on a treaty, it may be a occupation of territory hitherto unoccupied by a recognized ruler. In all cases the result is the same. Any inhabitant of the Territory can make good in the municipal courts established by the new sovereign only such rights as that sovereign has, through its officers, recognized. Such rights as he had under the rule of predecessors avail him nothing."

Compare the above decision with that of **Amodu Tijani vs. Secretary, Southern Nigeria** (supra) ibid in a case in which the Crown did accord recognition to rights existing prior to the assumption of sovereignty by the Crown. In that case certain Territory, comprising the colony of Lagos, was ceded by the Eleko (effectively the King of Lagos) to the British Crown and the issue to be determined was the basis for the calculation of compensation for land which was taken for public purposes under a local Ordinance. The cession itself was made on the footing that the rights of property of the inhabitants were to be fully respected, although there was no doubt that the radical title to the land vested in the British Crown at the time. These rights included the seigneurial rights of the 'white cap Chiefs' to receive rent or tribute from the occupiers of land allotted to them by the Chiefs, their right to family rights and the communal usufructuary right of the members of the native community to communal rights. This Arrangement of itself would have conferred no rights upon those inhabitants because the municipal courts cannot enforce obligations under a treaty against the sovereign, but it did afford some evidence of recognition of those rights by the new Sovereign. The Privy Council

went on to conclude that the radical title to the land which was then in the Crown as a result of the Cession, was “throughout qualified by the Usufructuary rights of the Communities, rights which, as the outcome of deliberate policy, have been respected and recognized”. In reaching this conclusion, the Privy Council noted that “a mere change in sovereignty is not to be presumed as meant to disturb rights of private owners”.

Analysis of the two decisions show that the Privy Council was only prepared to accept that rights of native inhabitants, mainly usufructuary rights, continued only if the new sovereign had recognized them. While it may be said that the Imperial government recognized the rights of the Maasai at the time of the 1904 and 1911 Agreements, the same recognition is not evidenced after 1920 when the territory was annexed as a Colony.

The Independence government on its part seemed to have accepted that those rights had long been extinguished and undertook to resettle the landless who were ‘politically correct’ through dubious settlement schemes. Most of these were settled on land that was hitherto Maasai.

4.8 Consequences in law of any breach of Trust or Fiduciary Obligation owed by the Successive Administrations (Protectorate, Colonial and Independence) to the Maasai

Another claim that can be made by the Maasai is one of breach of Fiduciary Duty against both the Colonial/British Government and the Independent Government. It can be argued that the Imperial Government on the footing of the Two Agreements owed a fiduciary duty to deal with the Maasai lands in such a manner as to have regard to their traditional rights in them. This is because the Crown in 1920 unilaterally assumed jurisdiction over the Country and undertook to protect and care for the well being of the inhabitants. This duty imposes an obligation on the Crown to first preserve and have regard to the native land rights

of the community, secondly to exercise discretionary powers conferred on it by Statute or otherwise in a manner which preserves or has regard for these rights and to pay proper compensation for any extinguishments or impairment of these rights. The independent government failed to provide redress, compensatory or otherwise.

The content of a fiduciary obligation or constructive trust is usually tailored by the circumstances of a specific relationship from which it arises. But, generally, to the extent that a person (including governments) must act for the benefit of the beneficiaries. A strong case can be made that the British Crown was under obligation to ensure that the traditional title of the Maasai was not impaired or destroyed without the consent of or otherwise contrary to the interests of the title holders. A number of American decisions though place a greater evidential burden in proof of a fiduciary relationship. **Chief Justice Marshall** in **Cherokee Nation v. Georgia** and in Worcester held that the fiduciary relationship between the United Sates Government and the Indian tribes could only be based on the fact that the Indian Tribes were 'domestic dependent nations' rather than individuals abandoning their national character and submitting as subjects to the laws of another, have sought and received the protection of a more powerful government. Thus the United States in dealing with the Indian Tribes, it was noted, is under "**a humane and self imposed policy"** whereby "**it has charged itself with moral obligations of the highest responsibility and trust**". If these American decisions be the test, then the Maasai to succeed must prove that they remained 'a domestic dependent nation' within the Kenyan Colony up to independence. This they clearly did. Nowhere in the purported treaties or ever do the Maasai give up their sovereignty. Although they generally obeyed the colonial authorities they maintained the old structures of governance till independence.

Consideration may also be had to the Canadian case of **Guerin v. the Queen**. In that case part of the Indian reserve set apart for the use of the Musqueam band was surrendered to the Crown by the band "***In trust to lease the same to such***

person or persons, and upon such terms as the Government of Canada may deem most conducive to our welfare and that of our people". The Crown accepted the surrender and entered into a lease upon terms substantially less advantageous than those which had been discussed with the band. The Court found that the Crown was under fiduciary duty towards the Indians with respect to the surrendered land, which, whilst not a trust, made the crown liable in the same way and to the same extent as if a trust were in effect.

4.9 Nature of any Violations of the Fundamental rights and Freedoms of individual community members or the entire Community of the Maasai

The treatment of the Maasai Community notwithstanding the platitudes in the two Agreements has been described by some survivors as truly appalling. Needless to state the conduct of the Imperial Government through its officers amounted to gross violations of the fundamental rights of the communities. Apart from the forceful eviction from Laikipia which resulted in heavy losses both in human life and property, their property was arbitrarily and unlawfully expropriated with no compensation thus destroying their livelihood and exposing them to a life of poverty and deprivation this has led to the community's socio-economic and political marginalisation and to its cultural disintegration. The independent Kenyan Government on its part failed in one major aspect. It failed to provide adequate redress for victims of the Colonial Land policy although it undertook to do so, and had the opportunity (the so called Resettlement schemes were discriminatory and only created African Bourgeois who had not really been victims of land dispossession).

Against this claim would be raised the defense that Modern Human rights law came into force much later (in 1948 with the proclamation of the Universal Declaration of Human Rights) and thus at the time of the alleged violations, the Imperial Government was under no obligation to guarantee or protect the Human

rights alleged. Secondly considering that the victims of the 1904 and 1911 Maasai re-allocations are now nearly all dead, are the descendants competent to bring the present claim. To these two contentions, there are available answers. First it is now a widely accepted norm of international law that Fundamental rights of the Individual are inherent and preceded their Declaration in formal instruments starting with the UDHR. In any case, the British had the Bill of Rights of 1689 which declared the fundamental rights inherent to all British Citizens. To claim that these rights were not to be accorded to inhabitants of other lands especially colonies would betray racial discrimination, out of line with the rule of universality of human rights. Indeed in the recent Advisory Opinion on the Legality of the Testing and Use of Nuclear Weapons ICJ, 1996, the International Court of Justice was of the opinion that there are certain fundamental rights that can rightfully be considered Obligations *erga omnes* and which obligations do not depend on formal instruments for their force. These obligations include the obligation to treat every human being in an humane manner consistent with his/her dignity as a human being.

As to the competency of the present Maasai Community to bring claims on behalf of their forefathers it was stated **in Mabo's case** that:

> "… where an indigenous people (including a clan or group), as a community, are in possession or are entitled to possession of land under a proprietary native title, their possession may be protected or their entitlement to possession may be enforced by a representative action brought on behalf of the people or by a sub-group or individual who sues to protect or enforce rights or interests which are dependent on the communal native title."

The American experience in the Inter-American Court of Human Rights shows that descendants are usually competent to bring such claims especially where

the effects of such violations are still being felt. In the case of the Maasai, the dispossession of the community of the specific land without compensation doubtlessly impaired in a very grave way the livelihood of members of the community, and the effects of such impairment are still being felt today.

4.10 The Question of Laches in Bringing the Claim

Courts of law (both Municipal and International) will not look favourably upon claimants who have slept upon their rights. This is because it is a dictate of justice that a claimant is bound to prosecute his claim without undue delay.[23] Where the claimant seeks equitable relief such as restitution, the court will refuse to aid him where he has slept on his rights and acquiesced for a great length of time.

In determining whether there has been such delay as to amount to Laches, the chief points to be considered are: 1) Acquiescence on the plaintiff's part, and 2) any change of position that has occurred on the defendant's part. Acquiescence in sense does not mean standing by while the violation of a right is in progress, but assent after the violation has been completed and the plaintiff has become aware of it. It is not reasonable to give the plaintiff a remedy where, by his conduct he has done that which might fairly be regarded as equivalent to a waiver of his right to it; or where by his conduct, though not waiving the remedy, he has put the other party in a position in which he would be unduly prejudiced if the remedy were to be granted. In such cases lapse of time and delay are most material.[24]

The chief element in Laches is acquiescence, and sometimes this has been described as the sole ground for creating a bar in equity by the lapse of time.[25]

[23] See Generally Halsbury's Laws of England Vol. 16, paragraphs 1476 – 1483
[24] Halsbury's ibid at paragraph 1479
[25] The court in Life Association of Scotland v. Siddal, Cooper & Greene (1861) 3 De GF & J that "Length of time, where it does not operate as a statutory bar, operates, as I apprehend I, simply as evidence of assent or acquiescence"

Acquiescence implies that the person acquiescing is aware of his rights and is in a position to complain of an infringement of them.[26] Hence acquiescence depends on knowledge, capacity and freedom.

Therefore in order to surmount the hurdle of Latches the Maasai must demonstrate that at no time did they acquiesce to their right to their ancestral lands and that they did not indolently sit on their rights. This is because any action to be brought on behalf of the community has needless to state been inordinately delayed.

It is submitted that Laches should not be a bar to the Maasai claim for the following reasons:

a) The violations of fundamental rights that the community claim upon have no statutory limitation period under Kenyan, and International Law;
b) The community has consistently and persistently attempted through various avenues such as Advocacy, lobbying to get restitution and cannot therefore be said to have acquiesced/let go of their rights;
c) The Maasai claim has in the past been frustrated by unfavorable lego-political circumstances and the economic disadvantage of the community. The past position of the Maasai may be compared to that of a comatose victim of an accident. The time within which to lodge the claim ought to begin to run from the time of regaining capacity
d) The consequences of the injustices are still being felt to date
e) The circumstances of the intended case demand in the interest of justice that the delay be overlooked.

4.11 The Ole Njogo Case Dimension and the Issue of Res Judicata

[26] From the difficulty of concerted action, Laches is readily imputed to class rather than to an individual; A-G v. Proprietors of the Bradford Canal (1866) 27 Ch D 424 at 457

The **Ole Njogo case** was in substance one for damages for breach of the 1904 Agreement between the Imperial Government and the Maasai tribe and in respect of stock illegally removed by the Government. The claim sought Declarations of certain rights under the said Agreement and for injunctions against the then Attorney General.

The plaintiffs claimed as individuals and also on behalf of the Maasai of Laikipia and also on behalf of the Maasai Tribe generally. It was their contention that the 1904 Treaty was still in force and the obligations undertaken therein were still binding on His Majesty's Government. They thus claimed:

1. A declaration against the defendants that they and other Maasai of Laikipia and other members of the Maasai Tribe generally were still entitled to the Laikipia district as equitable tenants in common and to an easement of road between Northern and Southern Maasai Reserves
2. Sterling Pounds 5, 000 in damages against the Government for failing to provide the road as agreed in the 1904 Agreement
3. An inquiry as to damages against the 1st, 20th and 21st defendants; a) arising from the death of stock occasioned by such stock being illegally removed from Laikipia District; b) arising from the depreciation of the value of stock wrongfully removed from Laikipia District
4. As against the 20th and 21st Defendants, an injunction restraining them from preventing the return of the Plaintiffs and their stock to the Laikipia District; and against them compelling any of the Laikipia Maasai and their stock to move from the said Laikipia District.

Whatever the merits of the case, both the High Court and the East African Court of Appeal were agreed that the Municipal Court did not have jurisdiction to hear the matter. It was held in both courts that the 1904 and 1911 Agreements were Treaties and any acts done in removing the Maasai and their stock from Laikipia

had been done in carrying out such Treaties and that both the treaties and the acts of the defendants were acts of state which were not cognizable in a municipal court.

It is therefore submitted here that the substantive issues raised in Ole Njogo, were not and have never been determined. Further, the proposed claim raises other and much wider issues such a s violations of Fundamental Rights, the Validity and effect of the alleged Treaties, the Changed position of parties after the Annexation of the country in 1920, issues which were never raised and determined in the **Ole Njogo's case.** The bar of Res Judicata therefore ought not to succeed against the intended claim.

4.12 Framing The Claim

It is recommended that the claim be made in the following terms:

1. That the Maasai People are and have been since prior to the 1904 Agreement been entitled to the land comprised in Laikipia District and described as …(we should be able to specifically described the land);
2. A Declaration that The 1904 Maasai Agreement was voidable for it was not only obtained by undue outright influence, inducement/ bribery and gross misrepresentation of material facts but also that the same was subsequently breached by the Imperial British Government; and/or
3. A declaration that the 1911 Agreement was illegal, null and void for, *inter alia*, being in abrogation of the 1904 Agreement and by reason of duress and want of capacity.
4. A Declaration that the Maasai people had Native Tile to the specified land which interests survived the Agreements and the Annexation of the Country in 1920.
5. A Declaration that the forcible removal of the Maasai people and their stock and their subsequent confinement in Reserves violated in a serious

way their fundamental Human Rights and the effect of impairment from such violations are still being felt today

6. A Declaration that the Maasai People are entitled to Compensation and/Restitution from the Imperial Government (and its successors) for the forcible and unlawful dispossession of their and for the gross and blatant violations of the their human Fundamental rights.
7. A Declaration that the Imperial Government, and the Kenyan Independence Government have breached fiduciary duty owed to the Maasai people to deal with the Maasai lands in such a manner as to have regard to their traditional rights in them.

This list is by no means exhaustive. Given the mixed nature of the claims, different courts will have jurisdiction include English Courts, Kenyan Court as and the International Courts mainly the International Court of Justice.

7.0 CONCLUSION

Undoubtedly the intended Action faces a number of hurdles ranging from Legal to political to logistical ones. But it is our firm conviction that whoever says that the Maasai do not have a case justiciable before any court of justice would change their mind after reading and appreciating this brief.

We wish to close with the comforting words of Justices Deane and Gaudron in the celebrated case of **Eddie Mabo v.** Queensland (No 2)[27] where they said:

> "If this were any ordinary case, the court would not be justified in reopening the validity of fundamental propositions which have been endorsed by long-established authority and which have been accepted as a basis of the real property law of the country for more than one hundred and fifty years. And that

[27] cited in extensor in this work

would be so notwithstanding that the combined effect of the crown grants, of assumed acquiescence in reservations and Dedications and of statutes of limitations would be that, as a practical matter, the consequences of re-examination and rejection of the two propositions would be largely, and probably completely, confined to lands which remain under Aboriginal occupation or use. Far from being ordinary, however, the circumstances of the present case make in unique. As has been seen, the two propositions in question provided the legal basis for the dispossession of the Aboriginal Peoples of most of their traditional lands. The acts and events by which that dispossession in legal theory was carried out into practical effect constitute the darkest aspect of the history of this nation. The Nation as a whole must remain diminished unless and until there is an acknowledgement of, and retreat from, those past injustices. In these circumstances, the court is under clear duty to re-examine those propositions.." (**emphasis added**)

REPORT PRESENTED

BY

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TO

BEN OLE KOISSABA,

CHAIRMAN, MAA CIVIL SOCIETY FORUM

THIS 20th DAY OF DECEMBER 2005

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