



To:

His Excellency Uhuru Muigai Kenyatta, President of the Republic of Kenya

CC:

Dr. Fred Okengo Matiangi, Cabinet Secretary Ministry of Interior and Coordination of National Security

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Kenya National Commission on Human Rights

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9 July 2020

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Your Excellency,

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ESCR-Net - International Network for Economic, Social and Cultural Rights is the largest global network of organizations and advocates devoted to achieving economic, social, cultural and environmental justice through human rights, consisting of over 280 organizational and individual members in 75 countries.

S'bu Zikode  
*Abahlali baseMjondolo,  
South Africa*

We write to you to express our deep concern regarding the recent attempts to criminalize and intimidate human rights defender Nalengoyo Ole Torome for defending the land of the indigenous Maasai communities in Kedong, Kenya.

Chris Grove  
*Executive Director*

According to credible information, on 21 March 2020, members of the indigenous Maasai Kitet/Suswa communities protested the fencing of their ancestral community land carried out by employees of the Kedong Ranch Limited under the protection of the police. On 15 June 2020, community member Nalengoyo Ole Torome was summoned to the police station to be informed that he had been identified by witnesses as having thrown rocks during the protest and was being charged with causing bodily harm and disturbances. On 26 June 2020, Mr. Torome was once again

summoned to the police station under the guise of having to collect some documents there. At his arrival, he was arrested and held until 29 June 2020, when he was released on bail after pressure from the community. Mr. Torome has affirmed that he was not present at the protest on 21 March 2020 and that the charges against him are false.

Since his release on bail, the harassment against Nalengoyo Ole Torome has continued. Police visited his home looking for him on Wednesday, 1 July, and Friday, 3 July 2020, the second time allegedly accompanied by officials from the Kedong Ranch Limited. Community members are uncertain about the reasons for these visits, but they fear further retaliation against Mr. Torome.

As a member of ESCR-Net member organization Narasha Community Development Group and a leader of the Kitet/Suswa community, Nalengoyo Ole Torome has been involved in the struggle for the ancestral community land of the Maasai since 2010 representing the Kedong community. We are concerned that the charges against Mr. Torome are attempts to intimidate him and the community, and discourage legitimate human rights work to protect the rights of indigenous Maasai communities to free, prior and informed consent and self-determination, including in relation to their ancestral community lands.

It is further concerning to note that these events appear to be taking place in a context of widespread criminalization, harassment, intimidation and other attacks on human rights defenders, including rural land rights defenders in Kenya. According to Protection International (2017), judicial harassment of human rights defenders in Kenya commonly takes the form of arrests, charges and prosecution on crimes related to Freedom of Assembly and Association as well as punitive bail terms.<sup>1</sup>

We understand that this recent incident is taking place in the context of an ongoing conflict related to the ancestral community land of the indigenous Maasai community, now known as the Kedong Ranch. The Maasai have suffered massive land dispossession dating back to colonial times and the practice has continued under post-independence governments.<sup>2</sup> Kedong Ranch Limited, founded by colonial settlers, had established a ranch on the land before Kenyan independence and are currently title holders, while the Maasai claim ancestral ownership of the land.<sup>3</sup>

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<sup>1</sup> Protection International (2017) 'Criminalisation of rural-based human rights defenders in Kenya'

<sup>2</sup> Ben Ole Koissaba (2016) 'Elusive Justice: The Maasai Contestation of Land Appropriation in Kenya: A Historical and Contemporary Perspective'

<sup>3</sup> International Accountability Project (2018) 'Akiira 1 geothermal power plant project. Community-led research and outreach report'

This has led to a land dispute between the indigenous Maasai communities and Kedong Ranch Limited. Since 2010, the two parties have been engaged in a legal case relating to the ownership of the land. In 2015, an initial court ruling found in favor of the Kedong Ranch Limited, but the community appealed the decision and the case is being addressed in an appeals court. In the meantime, the land has been concessioned to various projects including a dry port and several geothermal plants, Akiira 1 and Olkaria VI and V. These have been effected without meaningful consultation of the Maasai communities and in violation of their right to free, prior and informed consent (FPIC).

According to ESCR-Net member International Accountability Project, these projects have already raised concerns relating to serious human rights and environmental violations, resulting in the withdrawal of funding by the European Investment Bank in late 2019. The projects have led to the repeated, forcible displacements of Maasai communities. These displacements have involved the destruction of houses and property, as well as inhibiting the Maasai communities from engaging in their traditional way of life.<sup>4</sup> As pastoralists, the Maasai depend on their land to move their herds of cattle and sheep that are essential for their sustenance. Likewise, as indigenous peoples they have a spiritual and cultural connection to their land that goes beyond the material value it represents.

According to the International Work Group for Indigenous Affairs (December 2019), the geothermal plants have caused environmental destruction, and the toxic gases released by the plants affects the skin and eyes of the residents. The Maasai have noticed an increase in skin disease, stillbirths in cattle and increased premature delivery. The communities have stated that geothermal energy is exploited without any regard for their health and for the environment<sup>5</sup>

In this connection, we wish to recall that the Government of Kenya has the obligation to promote, respect, protect and fulfil human rights in accordance with international standards and national laws.

Specifically, as party to the International Covenant on Civil and Political Rights (ICCPR), Kenya is obliged to uphold the following human rights, among others: the rights to peaceful assembly and of association; the right to liberty and security of person, including freedom from arbitrary arrest or

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<sup>4</sup> International Accountability Project (2019) 'Community campaign leads the European Investment Bank to withdraw from geothermal project in Kenya' <https://medium.com/@accountability/community-campaign-leads-the-european-investment-bank-to-withdraw-from-geothermal-project-in-kenya-2348c76748a2>

<sup>5</sup> International Work Group for Indigenous Affairs (2019) 'The impact of renewable energy projects on indigenous communities in Kenya'

detention; and the rights to due process and equality before the courts, including the entitlement to a fair and public hearing by a competent, independent and impartial tribunal established by law.

Kenya is also party to the International Covenant on Economic, Social and Cultural Rights (ICESCR) and has thus undertaken the obligation to respect, protect, and fulfill the right to an adequate standard of living, including rights to adequate food, health and livelihood. Both covenants mentioned above also state that “in no case may a people be deprived of its own means of subsistence.”

Both covenants include the obligation to protect against human rights violations by third parties including corporate actors. This obligation has been further clarified in the United Nations Guiding Principles on Business and Human Rights.

The African Charter on Human and Peoples’ Rights, to which Kenya is signatory, recognizes the indivisibility of all human rights. The African Charter recognizes the rights of the African peoples to freely dispose of their wealth and natural resources and prohibits the deprivation of these under all circumstances.

Additionally, the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) establishes the right of indigenous peoples to the lands, territories and resources which they have traditionally owned, occupied or otherwise used, and to free, prior and informed consent prior to the approval of any project affecting their lands. The Declaration also recognizes the right of indigenous peoples to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions. UNDRIP serves as a standard for the interpretation of the relevant treaty obligations referenced above.

We also recall the UN Declaration on the Rights of Human Rights Defenders, which establishes the obligations, among others, to take all necessary measures to ensure the protection of everyone against any violence, threats, retaliation or any other arbitrary action as a consequence of his or her actions to defend and promote human rights. This includes prohibiting criminalization of human rights defenders, a well-known abuse of criminal justice systems aimed at suppressing dissent. Such criminalization has been condemned by international human rights bodies.<sup>6</sup>

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<sup>6</sup> See, for instance, Criminalization of Human Rights Defenders, Report, Inter-American Commission on Human Rights, 2015, available at: <http://www.oas.org/en/iachr/reports/pdfs/criminalization2016.pdf>.

Likewise, there is a growing recognition in international law of the right to a healthy environment including in Article 24 of the African Charter on Human and Peoples' Rights as well as Article 11 of the San Salvador Protocol. The former United Nations Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John Knox, has mapped out human rights obligations relating to the environment in a 2013 report.<sup>7</sup> The right to a healthy environment is also guaranteed in articles 42 and 70 of the Constitution of Kenya.

In light of the gravity of the situation, we call on the Government of Kenya urgently to take all necessary steps to:

1. Undertake prompt, effective, independent and impartial investigations into the circumstances leading to the charges against Mr Nalengoyo Ole Torome, including investigation into any undue corporate influence which has led to the criminalisation of his lawful activities to defend and promote human rights.
2. End criminalization and harassment of Nalengoyo Ole Torome and all human rights defenders in Kenya and guarantee an enabling environment where human rights defenders can work free from attacks.
3. Take all possible steps to limit corporate capture of the State and the undue corporate influence over the police, other government institutions and public processes, including via effective legislative, policy and judicial enforcement mechanisms which enable the state to safeguard the human rights of its population, regardless of any business interests at-stake.
4. Uphold human rights and environmental sustainability, including the right of indigenous peoples to free, prior and informed consent over any prospective development project affecting them, their ancestral lands, territories, and natural resources, and enable people to sustain their livelihoods and live in dignity.
5. Protect against human rights violations by private actors, including by adopting effective measures to ensure compliance with the United Nations Guiding Principles on Business and Human Rights. This includes regularizing corporate activity via domestic legislation that can ensure corporate accountability, and supporting multilateral processes, such as the UN Intergovernmental Working Group process in Geneva to develop a legally binding instrument to regulate corporate activity internationally.

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<sup>7</sup> Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox (2013) A/HRC/25/53

Finally, please inform us of any steps taken to address this situation.

Cordially,

Chris Grove,  
Executive Director