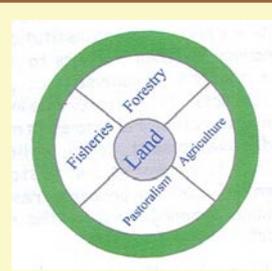


Kenya Land Alliance

# POLICY BRIEF

## COMMUNITY LAND TENURE AND THE MANAGEMENT OF COMMUNITY LAND IN KENYA



RECONCILE

### Introduction

A majority of the Kenyan population live in rural areas accessing land and natural resources through customary systems and institutions that operate largely outside the mainstream legal framework of land administration. Although there are clear provisions in the Constitution and the Trust Land Act on management of trust land there appears to be an unwritten policy on the part of government that sees community land as land that is not owned but rather is available for County Councils and government to appropriate through the setting apart procedure. There has been no cohesive policy, legal and institutional framework supportive of customary land tenure. Instead, the formal framework for the management and administration of land has been driven largely by a modernization ethic that sought to privatize and individualize land tenure. In pastoral areas and other areas where trust land regime applies the form that land rights take is generally subservient or 'held in trust'. The land in trust land areas is broadly regarded as the property of Local Government Authorities. People who have lived on trust land for generations often find that they do not realize their legal rights to the land in question as a result of unilateral action on the part of County Councils often in total disregard of provisions of the Constitution and the Trust Land Act.

Despite community historical rights to trust lands and other communal lands, the general problems which are caused by lack of legally enforceable rights to trust land include the following:

- Vulnerability to interference or setting apart of customary rights by the government
- Difficulty in securing credit and other development finances using land as collateral
- Lack of administrative support for the customary system of land rights, making the position of the occupants of the vulnerable
- Unscrupulous County Council officials and individuals taking advantage of the lack of enforceable customary land rights to grant community land in exchange for money or to bolster their personal power

This legal insecurity that makes it difficult for people to protect their land, whether from setting apart, or any other form of compulsory acquisition is what has resulted into the demand for a regime of community land tenure. Tragically, the opportunity provided by the Constitution and the Trust Land Act at independence for recognizing and giving effect to African customary land rights has been squandered by the tendency to manage trust land with little or no regard for the trust obligations envisaged in the law (see Box 1). Between the Commissioner of Lands and the County Councils, the trust lands have virtually been turned into the private estate of the local government.

#### **Box 1: Trust Land in the Constitution**

**All trust land shall vest in the county council within whose area of jurisdiction it is situated. (Constitution of Kenya, Section 115(1))**

**Each county council shall hold the Trust land vested in it for the benefit of the persons ordinarily resident on that land and shall give effect to such rights, interests or other benefits in respect of the land as may, under the African customary law for the time being in force and applicable thereto, be vested in any tribe, group, family or individual (Constitution of Kenya, Section 115(2))**

The setting aside powers vested in the County Councils and the President have been used to privatize large portions of trust lands to individuals and other groups, resulting in increased insecurity of tenure for rural land users. Even the Land (Group Representative) Act Cap 287 under which the group ranches are created which were touted as a mechanism for statutory entrenchment of customary land use collapsed within two decades with most of the group ranches being subdivided into individual portions of land.

## **In Search of Harmony between Customary and Statutory Land Law**

The variance between law and practice regarding access to land by rural land users has adversely affected land use in rural Kenya, engendering tenure insecurity and conflicts. The Government of Kenya has long appreciated the need to harmonize customary land practices and the statutory framework for land administration. When the Presidential Commission of Inquiry into the Land Law System of Kenya was appointed in November 1999, part of its brief was to "take into account all customary laws relating to land and so far as is practicable, to incorporate such of those laws, with such modifications if any, as may be considered to be desirable for the purposes of making them consonant with present- day condition" (GoK, 2002).

The Commission recommended the classification of land in Kenya as public, commons or private. The commons category would incorporate land presently administered under the Trust Land Act, as well as all land "held and managed as community forests, water sources, grazing areas, and shrines identified as such by specific communities".

The Draft Constitution of Kenya went further in this regard and proposed "community land" as a separate tenure category to 'vest in and be held by communities identified on the basis of ethnicity, culture or community of interest". It specified that community land shall include (CKRC, 2004: Article 80 (2)):

- (a) all lands lawfully held as trust land by devolved governments;
- (b) land lawfully registered in the name of group representatives under the provisions of any law for the time being in force;
- (c) land lawfully held, managed or used by specific communities as community forests, grazing areas or shrines;
- (d) land lawfully transferred to any community by any process of law;
- (e) ancestral lands traditionally occupied by hunter-gatherer communities; and
- (f) any other land declared to be community land by an Act of Parliament

### **Why Community Land Management**

Community land is simply land lawfully held, managed and used by a specific community. The underlying premise for community land tenure is that communal land-holding systems exist in over sixty-five percent of the country. Providing for them in policy and law will ward off the colonial characterization of communal land systems as backward and ease pressures for its privatization and conversion into individual ownership. The reality is that customary owners of community land are known. What is lacking is an institutional framework for managing and administering land in such a way as to secure its benefits for the communities. Such an institutional framework is critical given the breakdown of traditional institutions and systems in many communities.

The community land tenure needs legal and administrative support system to enable it function effectively. The new system shall be devised and sustained at the community level and in a context defined by a new constitutional dispensation of devolved and democratic land governance.

What is required in community land management is to ensure that the majority rural poor are not deprived of the benefits of their rightful heritage in land which constitutes for them a critical capital base and stepping stone out of poverty. For this to happen it is necessary to secure community tenure by defining clearly the tracts of land that belongs to different communities and establishing a functioning institutional framework through which the communities will regulate access to land and distribute its benefits.

## **KEY POLICY CONCERNS AND RECOMMENDATIONS**

### **1. Community Land Tenure Institutionalization**

The Draft National Land Policy, DNLP defines community land as "land lawfully held, managed and used by a specific community" and asserts that this tenure regime "creates a powerful system of land allocation regimes (sic) and a tenure system designed to preserve the asset base for current and future generations" (DNLP). It stipulates that in order to secure community tenure to land the government shall document and map existing customary land tenure systems to derive broad policy principles that will facilitate the

orderly evolution of customary law; establish a clear legislative framework and procedures for recognition, protection and registration of customary rights to land and land-based resources, including the rights of women; review all previous acquisition of community land to facilitate restitution for affected communities; develop procedures to govern transactions in community land; incorporate customary mechanisms for land management and dispute resolution into the national framework for land administration; build the capacity of traditional land governance institutions; and vest the right of reversion of community land in the community where the owner dies without any heirs.

The draft policy constitutes a serious effort to address the problem of securing customary land rights by providing a legal basis for their enjoyment. The policy stipulations about community land respond to the concerns that have been articulated above and they take into account the recommendations generated through consultations with a wide spectrum of stakeholders, including community groups and individuals. The real challenge however lies in translating the policy stipulations into legally enforceable rights and duties. It is in this connection that a number of issues and challenges arise that will require attention before the benefits of these positive policy stipulations may be realized by communities. Some of these issues and challenges are listed in Box 2.

**Box 2: Key challenges regarding community land**

- What constitutes “a community” for purposes of “community land”?
- What are the rights of members under community land tenure?
- What is the difference between “community land tenure” and “pastoral land tenure”?
- How shall customary land law be ascertained?
- What about the Judicature Act and place of customary law in the hierarchy of norms?
- How does the promotion of land markets on community land secure land rights?
- How will community land management and administration sit with the existing national governance framework?

**What constitutes “community” for purposes of “community land”?**

The DNLP define “community”, as group of users of land, which may, but need not be, a clan or ethnic community. These groups of users hold a set of clearly defined rights and obligations over land and land-based resources. In any case, those who advocated for community land rights before the Commissions and within the National Land Policy Formulation Process, NLPFP approached the issue from the ethnic dimension. Moreover, the agitation for recognition and protection of community land rights is closely linked to grievances arising from historical injustices suffered by specific communities whose land was wrongly alienated during the colonial and post-colonial periods. It is these communities that are demanding restitution for past alienation and secure protection of what they still have.

The definition of “community” constitutes a major challenge for the national land policy, not least because of the strong tribal sensitivities that characterize the land question in Kenya. In some areas communal land grievances pit specific tribes against one another as was evident during the past so-called politically instigated ethnic clashes. Whether and to what extent the Government will be ready, willing and able to manage the ethnic dimension of community land claims will determine in large measure how community land rights are translated into law and action. In this connection, it is instructive that Government has been unable to act on the recommendations of the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission which identified land alienation and injustices related to land as some of the major factors justifying the appointment of such a Commission. While there are rural areas in which communities are still homogeneous in terms of tribal composition, this is not true across the country. As a result of previous governance and land administration practices both in the colonial and post-colonial era, there are rural parts of the country where people of diverse ethnic, religious and cultural backgrounds now live side by side, even though specific ethnic groups have historical claims to these areas. It is important that the definition of communities for purposes of community land rights is such as to accommodate these realities.

**2. Rights of Members under Community Land Tenure**

Beyond repeal of trust land provisions in the current Constitution and the Trust Land Act - Cap 288 of Laws of Kenya, legalizing of the community land tenure system will entail the transfer of the main portion of

what is referred to as trust land controlled and managed by County Councils to the Community members or groups. Accordingly, the ownership of community land will vest not in the Community Land Boards but in the members of the community group as co-owners of the community land. It needs to be set out in law from the outset that the members of the land owning group will have power to choose the representatives of the structure which represents them in decisions pertaining to the day to day management of the community land and all issues relating to members' access to community land as their asset. It ought to be stipulated clearly that a majority of members of the community land would also be able to set aside unpopular decisions made by the Community Land Boards. The law establishing community land management structures need to provide for protection pertaining to equality and rights of women. Any decisions that discriminate against women would be invalid. In order for rights and protection enshrined in the envisaged community land law to be effective, no transfer of designated community land will happen until there has been a process of information sharing, discussion and consensus with members of the land holding.

The essence of community land tenure is to provide recognition and protection for group land rights and vest the ultimate ownership and control over community land with members of the community both men and women. These measures are necessary to ensure that community land tenure conforms with the new constitutional dispensation and thereby provides redress to members of community whose human rights have been abrogated. Indeed much of the land which will be transferred to community land regime is currently held in trust by County Councils and Group Ranches. Thus, the government is under duty to ensure that the form of transfer of ownership accommodates and protects the rights of all beneficiaries of the trust lands and group ranches which will be wound up at the point of transfer to community land management system. The bottom line of community land tenure is to protect and uphold the human rights of all especially in the process of inclusive decision-making in all matters pertaining to the management of the jointly held land asset.

Community land tenure is recognition of historical land rights but not an opportunity for consolidation of personal power or bolstering small grouping of people power over community. Hence a monitoring and evaluation system need to be mainstreamed in community land tenure regime to ensure in practice balance of protecting group-based historical land rights and protecting the human rights of members of community land-based system. The test will be whether the members of the community are able to make and challenge decisions in relation to their shared land asset in ways which reflect the views of majority of members.

### **3. What is the difference between "community land tenure" and "pastoral land tenure"?**

Pastoralists were by far the most vocal single group in the policy formulation process in the push for the recognition of customary land holding systems within the National Land Policy, in order to secure their land rights and land use practices. It would appear that this is the reason why the DNLP defines "pastoral land tenure" as a separate category of tenure and commits the government to five sets of actions to secure pastoral land rights, including "instituting alternative methods of registration of land for pastoral communities".

However, apart from the obvious political mileage gained in appearing to be giving special attention to the strong pastoralists lobby in the National Land Policy Formulation Process, NLPFP, it is not clear what value-added is gained by separating pastoral land tenure from community land tenure. The needs of pastoralists are adequately addressed within community land tenure, which provides for recognition, protection and registration of customary land and resource rights, and this separation only adds confusion to the new land tenure categorization established by the DNLP. Similar confusion arises from discussions about resource tenure and environmental resource tenure. True, tenure reform is a complex process, which involves interests in land and the form that these interests should take. But having settled for three tenure regimes all tenure reforms must address difficult problems within that. Otherwise introducing further land holding, land rights and forms of ownership would have far-reaching implications. It is imperative that the DNLP clarifies the land tenure systems for the country to address the confusion identified to accrue from the fragmented, complex and pluralistic system that currently prevails. To do that, it is necessary to review section 3.3 on land tenure issues of the DNLP and rationalize the policy recommendations regarding different tenure systems.

#### 4. Ascertainment of customary land law

The DNLP proposes the definition of broad principles that will facilitate the orderly evolution of customary law. A major challenge in this regard relates to the ascertainment of customary land law. While there are clearly customary norms and traditions that communities still use to structure their land relations, whether these constitute customary law capable of ascertainment and enforcement within the existing framework of law in Kenya is arguable.

Customary law is unwritten and is transmitted orally from one generation to the next. As a result of the influences of urbanization and modernization, this method of transmission has been largely corrupted. Moreover, the influence of colonialism on perceptions of law and justice have been so profound that there are those who argue that customary law as such no longer exists. Instead, what exists is an amalgam that has incorporated values from different customs both local and foreign. A significant amount of work will have to be done to clarify and create consensus about what constitutes the relevant customary law for specific communities.

Furthermore, the national policy and legal framework has to be transformed in a significant way if customary law generally and customary land law in particular is to have a chance for orderly evolution. The current legal framework puts customary law in a subordinate position in the hierarchy of norms. The Judicature Act, which among other things stipulates the sources of the law of Kenya, clearly puts customary law at the bottom of the normative framework (see Box 3)

##### **Box 3: Judicature Act**

**(2) The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay - (Judicature Act, Cap 8)**

This provision has combined with socio-cultural changes taking place in traditional society, the general policy preference for modernization in all aspects of life, and inadequate interest in customary law within legal scholarship to undermine the development of a jurisprudence of customary law. This and other relevant provisions of law will have to be amended to give effect to the new orientation of supporting the orderly evolution of customary land law. In addition, deliberate efforts for capacity building will be required to develop interest among judges, magistrates and advocates in customary law.

One of the core arguments against customary law has to do with its perceived discrimination against specific categories of land users demonstrated by its treatment of women and children in land ownership and inheritance. While there are those who argue that customary law did in fact protect all members of the community and that the variant of customary law that has marginalized women, children and immigrants is the 'invented' customary law that came out of the colonial manipulation of traditional institutions and systems, it will clearly be necessary to reconcile such aspects of customary land law with imperatives of the constitution and other human rights conventions to which Kenya is party.

#### 5. Community land markets

A major concern of the DNLP which underpins the whole National Land Policy Formulation Process, NLPFP, is to establish a framework for "the efficient, effective and economical operation of the land market". In this connection, the draft commits the Government to "enact legislation to promote the land market operations in land held by communities". It is not clear from the draft policy how the legislation will go about promoting land operations within community land, and how this will reconcile with customary land use practices and fit with customary institutions. Traditionally, sale and purchase of land do not constitute the reality of land relations in communities, even though there are mechanisms for intra-community exchange of land and land produce. Communities do not traditionally view land as a commodity that can be exchanged in the market place and transferred to non-members of a specific community for good.

The policy is also strong on registration as a means of securing community land rights. Again, this will have to be considered further and reconciled with the commitment to promote the operations and evolution of

customary land rights. The experience of the group ranches in which the registration of land engendered new forms of conflict, leading eventually to demands for individualization should be taken into account in considering the implications of registration for customary land rights.

## 6. Community land tenure and the existing governance framework

Community land tenure is in effect a mechanism for decentralization of land administration to the level of the community. This assumes a governance framework that is supportive of decentralization, and this reality defined a major constraint for the proposals of the DNLP regarding the management of community land. These proposals are in effect not operable within the existing political governance framework, characterized by a centralized, top-down authority and decision-making paradigm.

It is clear that the proposals about community land tenure have been adapted largely from the Draft Constitution, but the difference is that the Draft Constitution made the proposals regarding community land tenure as part of a package of governance reform that included devolution. Indeed the Draft Constitution defines community land by reference to devolved governments.

The proposals of the DNLP with reference to community land tenure are clearly based on the assumption that a new constitutional dispensation supportive of devolution will emerge in due course and that the land policy will take effect within that supportive constitutional order. Only then can the benefits of community land tenure be truly realized and enjoyed by Kenyans.

## Conclusion

The proposal in the DNLP to recognize community land tenure and to provide a framework for the management and administration of community land on the basis of customary land law, norms and values is among the most important innovations of the draft policy, and has significant implications for security of tenure for the majority of Kenyans who derive livelihoods from community held land and land-based natural resources.

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