

**THE LEGAL AND POLICY FRAMEWORK REGULATING COMMUNITY LAND IN KENYA**

**AN APPRAISAL**

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## 1. INTRODUCTION

Land is man's most valuable resource, supporting basic and critical needs of food, shelter and business. This is particularly true for Africa where economies heavily rely on agriculture, livestock production, tourism and the exploitation of natural resources.<sup>1</sup> In Kenya, dependence on land is evident in the high percentage of persons who rely on agriculture and pastoralism, and in the fact that the country's top foreign exchange earners are agriculture (including horticulture) and tourism, both based on land. Indeed, Vision 2030, Kenya's overall development blueprint, places a high premium on agriculture and wildlife-based tourism.<sup>2</sup> The manner in which land is allocated, accessed and managed is therefore central to Kenya's aspirations to alleviate poverty and create wealth.

Prior to the colonial rule, communities in Kenya had their own leadership structures that administered land rights among their members for purposes of activities such as construction of shelter, farming, grazing, hunting and gathering. Communities lived in harmony and occasional fights over territorial claims were resolved by panels of elders.<sup>3</sup> The colonial government not only imposed alien land tenure relations, but also introduced conceptual, legal and sociological confusion in traditional tenure systems. This led to far reaching disruption of African customary land tenure system and laws.<sup>4</sup> Customary law and its attendant rights were treated as inferior to the private formal property rights based on English law, newly introduced as the tenure for white settlers. The wisdom of this was that private tenure was the most suitable tenure regime to ensure agricultural productivity.<sup>5</sup> This necessitated a dual system of land law with English law applying to areas occupied by white settlers, and customary law applying to the areas occupied by the natives, the "native reserves"<sup>6</sup>.

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<sup>1</sup>Ibrahim Mwathane, 2012. *Land policies in East Africa: Is there way and goodwill for Implementation?* A paper presented to the International Conference on Land policies in East Africa held in Kampala, Uganda on 4-5 October 2012. Land Development and Governance Institute (LDGI), Nairobi, Kenya

<sup>2</sup> Government of Kenya, Kenya Vision 2030. Nairobi

<sup>3</sup> Mwathane, 2012. See *supra* note 1

<sup>4</sup> Kameri-Mbote, P., Odote, C., Musembi, C. and Kamande, W., 2013. *Ours by Right: Law, Politics and Realities of Community Property in Kenya*. Strathmore University Press, Nairobi.

<sup>5</sup> *Ibid*

<sup>6</sup> The native reserves were majorly areas that were not immediately required for European settlement.

The areas occupied by the settlers were more expansive, arable and habitable than the native reserves. This created social and economic problems with poverty, disease, famine and ethnic tensions characterizing the native reserves.<sup>7</sup> Late in its tenure, the colonial government initiated a policy of converting customary land tenure to individual private ownership. The Registered land Act<sup>8</sup> was enacted purposely to remove claims to land based on African customary land law. Both the Trust Land Act<sup>9</sup> and the land (Group representatives) Act<sup>10</sup> were meant to transition customary to individual tenure in areas where immediate individualization of land could not be undertaken.<sup>11</sup>

The land law in Kenya has thus focused on individualization of land rights at the expense of customary/community rights to land. This has undermined indigenous culture and conservation systems, and destroyed traditional resource management institutions. Despite this however, many local communities in Kenya continue to manage land. This is attributable to the resilience of customary tenure, which has withstood sustained subjugation, suppression and denial of juridical content in official parlance.<sup>12</sup> Kameri-Mbote *et al.* (2013)<sup>13</sup> notes this as proof that assumptions regarding modernization or extinction of customary rights to land through formal law were not based on sound scientific theories.

Kenya's first ever National Land Policy (NLP) and the Constitution of Kenya, 2010 recognizes the lack adequate legal attention and treatment for community land in Kenya. In response, the two have made provisions for community land, and present an opportunity to craft new land laws for its management and protection. The NLP notes that individualization of tenure has undermined traditional resource management institutions; ignored customary land rights; and

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<sup>7</sup> Kameri-Mbote *et al.*, 2013. Supra note 4

<sup>8</sup> Chapter 300 of the Laws of Kenya (Repealed by the Land registration Act of 2012)

<sup>9</sup> Chapter 288 of the Laws of Kenya

<sup>10</sup> Chapter 287 of the Laws of Kenya

<sup>11</sup> Kameri-Mbote *et al.*, 2013. Supra note 4

<sup>12</sup> Okoth-Ogendo, H. W. O., 2000. *The tragic African commons: A century of expropriation, suppression and subversion*. Keynote address delivered at a workshop on Public Interest Law and Community-Based Property Rights organized by the Lawyers Environmental Action Team, Tanzania and the Centre for Environmental Law, USA, in collaboration with the World Resources Institute, and the International Association for the Study of Common Property, Arusha, Tanzania, 14 August 2000

<sup>13</sup> <sup>13</sup> Kameri-Mbote *et al.*, 2013. Supra note 4

led to widespread abuse of trust in the context of both the Trust Land Act<sup>14</sup> and the Land (Group Representatives) Act<sup>15</sup>.

The constitution vests community land in communities identified on the basis of ethnicity, culture or similar community of interest.<sup>16</sup>It provides that any unregistered community land be held in trust by county governments on behalf of the communities for which it is held. It defines community land to include: land held by groups under the Land (Group Representatives) Act; land lawfully transferred to a specific community by any process of law; land that is lawfully held, managed or used by specific communities as community forests, grazing areas or shrines; ancestral lands and lands traditionally occupied by hunter-gatherer communities; and land that is lawfully held as trust land by the county governments.<sup>17</sup> The Constitution requires parliament to enact legislation on land within eighteen months from August 2010 when the constitution was promulgated, and on community land within five years.

Pursuant to the Constitutional requirement, parliament has enacted the National Land Commission Act, 2012; the Land Registration Act, 2012; and the Land Act, 2012. The community land bill is still in draft form and has not been tabled in parliament. The new laws have repealed some of the older statutes relating to land and require the ones that have not been repealed, to be applied with the necessary alterations and adaptations to give effect to the new laws. This paper examines the legal and policy instruments regulating community land in Kenya with a view to identifying the key issues for a community land bill and making recommendations for their inclusion in the bill. Following this introduction, the rest of the paper is arranged as follows. Section II retraces the historical antecedents and contextualizes community land in Kenya. This is followed by a review of the constitutional imperatives of community land rights in Section III, and the policy foundations of community land in Section IV. Section V distills the laws relevant to community land followed by a comparative analysis of selected countries in Section VI. In Section VII, the key issues for a community land bill are identified. Section IX concludes the paper and suggests recommendations.

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<sup>14</sup> Chapter 288 of the laws of Kenya

<sup>15</sup>Chapter 287 of the Laws of Kenya

<sup>16</sup> Article 63 (1)

<sup>17</sup> Article 63 (2)

## 2. HISTORICAL ANTECEDENTS AND PLACE OF COMMUNITY LAND IN KENYA

The concept of community land was well established in Kenya and other African countries prior to the colonial era. Communities had their traditional methods of marking out their territory and respected the rights of neighbouring communities. They had their own leadership structures that administered land rights among their members for purposes of activities such as construction of shelter, farming, grazing, hunting and gathering. Where disputes arose, these were resolved by panels of elders.<sup>18</sup> Following the signing of the Treaty of Berlin<sup>19</sup>, Kenya was allocated to Great Britain. With that, Great Britain declared Kenya as part of the British Empire, and therefore part of the King's territories, and the Crown or King could deal with the land in the territory in such manner as he or she pleased.<sup>20</sup> Great Britain's legal interpretation of the treaty assumed that there were no indigenous peoples in the territory, and if there were people, their rights were totally irrelevant to Great Britain's plans of expanding its empire.

The British created a legal and policy edifice that perpetuated a system focused on allocation, exploitation, appropriation and expropriation of land and natural resources in the new territory. The government enacted the East African (Lands) Orders in Council of 1895, 1897 and 1901, which were later re-enacted in the form of the Crown Lands Ordinances of 1902 and 1915. The Ordinances dealt with, and governed the allocation of land for agricultural, residential, commercial and other purposes. The statutes defined crown land as: all public land within the East African Protectorate which for the time being is subject to the control of His Majesty. Thus the entire territory known as Kenya was declared to be Crown Land. This set the stage for massive expropriation of lands, belonging to the indigenous peoples, to white settlers. Local communities who may have previously occupied such lands were forcibly moved to what became known as the "native reserves"<sup>21</sup>, to make room for white settlers. Hopes of the

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<sup>18</sup> Mwathane, 2012. *Supra* note 1

<sup>19</sup> In 1885, several European imperial powers met in Berlin, Germany, to discuss the partition of the African Continent amongst them. The meeting led to the signing of the Treaty of Berlin, under which arbitrary boundary lines were drawn on a map of Africa and territories thereby created allocated to the participating European powers.

<sup>20</sup> Paul N. Ndungu. *Tackling land related corruption in Kenya*.

[http://siteresources.worldbank.org/RPDLPROGRAM/Resources/459596-1161903702549/S2\\_Ndungu.pdf](http://siteresources.worldbank.org/RPDLPROGRAM/Resources/459596-1161903702549/S2_Ndungu.pdf).

Internet accessed June 8, 2013

<sup>21</sup> See *supra* note 6

indigenous people of land ownership were extinguished by a landmark case that declared them “mere tenants of the crown of the land they occupy”.

The colonial government thus introduced the private formal property rights as the tenure for the white settlers. As mentioned, this necessitated a dual system of land law with English law applying to areas occupied by white settlers, and customary law applying to the native reserves. Customary law and its attendant rights were treated as inferior to the newly introduced private formal property rights based on English law. This was based on the belief that private tenure was the most suitable tenure regime to ensure agricultural productivity. The colonial government thus not only imposed alien land tenure relations, but also introduced conceptual, legal and sociological confusion in traditional tenure systems. This led to far reaching disruption of African customary land tenure system and laws.

Towards the end of the colonial period, the government initiated a policy of converting customary land tenure to individual private ownership either as individual property or as group property (in the form of group ranches). This was to both increase security of land tenure and to allow the development of a large, impersonal market in land, which it was hoped would be characterized by distributive efficiency, and to provide landowners with the opportunity to raise capital for investment by mortgaging their land.<sup>22</sup> The Registered land Act<sup>23</sup> (now repealed) was thus enacted to remove claims to land based on African customary land law. Both the Trust Land Act<sup>24</sup> and the land (Group representatives) Act<sup>25</sup> were meant to transition customary to individual tenure in areas where immediate individualization of land could not be undertaken.<sup>26</sup>

The practice of undermining customary land rights went on until the resistance movement cropped. In response to the violent uprising by the local people, the British Government

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<sup>22</sup> John Bruce, 2008. *Kenya Land Policy: Analysis and Recommendations*. A paper prepared for the United States Agency for International Development, Property Rights and Resource Governance Program under the Prosperity, livelihoods and Critical Ecosystems (PLACE) Indefinite Quantity Contract (IQC) Contract No. EPP-I-00-06-00008-00, Task Order 002.

<sup>23</sup> Chapter 300 of the Laws of Kenya (Repealed by the Land registration Act of 2012)

<sup>24</sup> Chapter 288 of the Laws of Kenya

<sup>25</sup> Chapter 287 of the Laws of Kenya

<sup>26</sup> Kameri-Mbote *et al.*, 2013. *Supra* note 4

declared a state of emergency in 1952 which lasted for close to 10 years. In 1961/62, constitutional talks took place in London, which led to internal self government in June 1963 and full independence in December of that year.

Despite expectation that the transfer of power from colonial authorities to indigenous elites would lead to fundamental restructuring of the legacy on land, this did not materialize.<sup>27</sup> The independent Kenya inherited and adopted the entire set of colonial land laws that had been enacted to address the interests of the white settlers. The principal of these laws were the Crown Lands Ordinances of 1902 and 1915, under which the British Monarch was empowered to allocate land to whoever the Monarch wished and on such terms and conditions as the Monarch pleased. As a result, depending on who the allottee was, land would be granted on freehold tenure, or leasehold term for periods ranging from 99 to 999 years. The independent Government only made superficial amendments to the colonial laws, such that Ordinances were simply renamed “Acts”, Crown was substituted with “President”, Crown Land was renamed “Government Land”, and where Crown referred to the British Monarch as an institution, it was substituted with “Government”.

In effect, the powers of alienating and allocating land in Kenya, previously vested in the British Monarch, were transferred to the President of independent Kenya. The substantive law applicable remained English common law. Land remained either in the hands of the former colonial masters or merely changed hands to the new ruling African elites. Many indigenous people earlier dispossessed of their land therefore remained landless even after independence. To obtain land, they had to go through the state. This bred a culture of selective land allocation for political support by those in power. Regrettably that remained the position until only recently.

### **3. CONSTITUTIONAL IMPERATIVES FOR COMMUNITY LAND RIGHTS IN KENYA**

Ownership, use and management of land is a highly emotive issue in Kenya and was one of the key drivers of the push for a new constitution. Following lengthy deliberations and a

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<sup>27</sup> Sessional Paper No. 3 of 2009 on the National Land Policy



comprehensive public participation process, the Constitution of Kenya, 2010 was promulgated on 27 August 2010. Chapter five of the Constitution is dedicated to land and the environment. The Constitution requires land in Kenya to be held, used and managed in a manner that is equitable, efficient, productive and sustainable. It also spells out the principles governing land, which are very important for securing community land rights. They include: equitable access to land; security of land rights; sustainable and productive management of land resources; transparent and cost effective administration of land; elimination of gender discrimination in law, customs and practices; and encouragement of communities to settle land disputes through recognized local community initiatives consistent with the Constitution. The Constitution also requires all laws relating to land to be revised, consolidated and rationalized within certain timelines.

The Constitution specifically provides for the recognition of community rights to land by designates three tenure regimes: Public, Community and Private. Community land is vested in communities identified on the basis of ethnicity, culture or similar community of interest.<sup>28</sup> Any unregistered community land is to be held in trust by county governments on behalf of the communities for which it is held. The Constitution defines community land to comprise: land lawfully registered in the name of group representatives under the provisions of any law; land lawfully transferred to a specific community by any process of law; any other land declared to be community land by an Act of Parliament; land that is lawfully held, managed or used by specific communities as community forests, grazing areas or shrines; ancestral lands and lands traditionally occupied by hunter-gatherer communities; and land that is lawfully held as trust land by the county governments.<sup>29</sup> The constitution also predicates any disposition or use of community land on legislation specifying the nature and extent of the rights of members of each community individually and collectively.<sup>30</sup>

Apart from revising existing land laws, the Constitution presents an opportunity to craft new land laws for the protection of all the three tenure regimes. Legislation on Community land is to be enacted within five years of the date of promulgation of the Constitution while legislation

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<sup>28</sup> Article 63 (1)

<sup>29</sup> Article 63 (2)

<sup>30</sup> Article 63 (4)

on other land categories are to be enacted within eighteen months of the Constitution's promulgation. Whether these timelines are by design or by default, one wonders whether they reflect the prioritization of the three land tenure regimes by the drafters of the Constitution. Never the less, parliament enacted within the specified timelines, the Land Act and the Registration of land Act to govern all private and public land. The Community Land Bill is still in draft form and is yet to be tabled in parliament for debate.

#### **4. THE POLICY FOUNDATIONS OF COMMUNITY LAND RIGHTS IN KENYA**

##### **4.1 The National Land Policy**

The National Land Policy of 2009 is Kenya's first ever single and clearly defined land policy since independence. Before that the land policy in Kenya, while not articulated in a comprehensive national document, had been driven by a conviction that economic growth requires the transformation of customary land tenure to private ownership. This policy was pursued with remarkable consistency by successive governments over the years, and the extent of implementation has been impressive. As such, the vast majority of commercial, residential, and arable land in Kenya (and much arid land as well) was brought under private individual ownership by a process of systematic first registration. This led to many indigenous people earlier dispossessed of their land remaining landless even after independence. To obtain land, they had to go through the state. This bred a culture of selective land allocation for political support by those in power, inefficiency and corruption.

This led to a clamour for land reforms and specifically the demand for a National Land Policy by a broad-based coalition of nongovernmental organizations (NGOs), CSOs, and donors. The Kenya National Land Policy (NLP) adopted in 2009 followed a well structured process of wide consultation and public participation. The NLP has a vision to "guide the country towards efficient, sustainable and equitable use of land for prosperity and posterity". It addresses the critical issues of land administration, access to land, land use planning, restitution of historical injustices, environmental degradation, conflicts, unplanned proliferation of informal urban settlements, outdated legal framework, institutional framework and information management. It also addresses constitutional issues, such as compulsory acquisition and development control as well as tenure. It recognizes the need for security of tenure for all Kenyans (all socio-

economic groups, women, pastoral communities, informal settlement residents and other marginalized groups).

The NLP is very important for community land rights in Kenya as it repudiates the long-standing priority of land administration in Kenya, the conversion of customary land tenure into individual ownership. The NLP designates all land in Kenya as Public Land, Community Land and Private Land.<sup>31</sup> The policy defines community land as “land lawfully held, managed and used by a specific community as shall be defined in the Land Act”.<sup>32</sup> Community is defined as a clearly defined 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.<sup>33</sup> The NLP particularly identifies subsistence farmers, pastoralists, hunters and gatherers as vulnerable groups who require facilitation in securing access to land and land based resources; participation in decision making over land and land based resources; and protection of their land rights from unjust and illegal expropriation.<sup>34</sup>

To secure community land, communities are encouraged to settle land disputes through recognized local community initiatives consistent with the Constitution<sup>35</sup> which adhere to the constitutional imperatives of non-discrimination, participation, equity and fairness. The NLP also details the land policy principles most of which are relevant for securing community land rights. They include: equitable access to land; secure land rights; access to land information; transparent and good democratic governance of land.

## **4.2 The Agricultural Sector Development Strategy**

The Agricultural Sector Development Strategy (ASDS)<sup>36</sup> is the overall national policy document for the sector’s ministries and all stakeholders in Kenya. The document outlines the characteristics, challenges, opportunities, vision, mission, strategic thrusts and the various interventions that the ministries will undertake to propel the agricultural sector to the future.

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<sup>31</sup>The National Land Policy *supra* note 19 p57

<sup>32</sup>The national land Policy *supra* note 19 p63

<sup>33</sup>See the Glossary of terms section of the National Land Policy *supra* note 19

<sup>34</sup>The National land Policy, *supra* note 19, p195-198

<sup>35</sup>The Constitution of Kenya 2010, Article 60 (1)

<sup>36</sup> Government of Kenya, 2010. Agricultural Sector development Strategy 2010-2020.

The strategy reiterates the importance of the agricultural sector, being the backbone of Kenya's economy and the means of livelihood for most of the rural population. The vision of the ASDS is to make Kenya a food-secure and prosperous nation. According to the strategy, the overall goal of the agricultural sector is to achieve an average growth rate of 7 per cent per year. As the most important resource for agricultural production, the utilization and management of land is critical for the success of the ASDS. This is evident in the inclusion of development and management of key factors of production (including land) as one of the strategy's two strategic thrusts.<sup>37</sup>

The strategy addresses the issue of land use and identifies a number of challenges that have hindered effective administration and management of land. These include fragmentation of land, breakdown in land administration, disparities in land ownership, squatting, landlessness, under-utilization and abandonment of agricultural land, tenure insecurity and conflict. To address these challenges, it proposes policy, legal and institutional reforms in the land sector. Already, the National Land Policy (discussed above) has been approved to address land administration and management problems. There is also considerable progress in enacting legislation on land including the National Land Commission Act; the Land Registration Act; and the Land Act enacted by parliament in 2012. The Community land Act which will govern the utilization and management of all community land in Kenya is currently in draft stage. The strategy also calls for transformation of land use through: creating a consolidated geographic information system (GIS)-based land registry; developing and implementing a land-use master plan; investing in institutions and infrastructure; and settling the landless poor.

These interventions although referring generally to land are very relevant for securing community land rights. For instance, creating a consolidated GIS-based Land Registry will speed up land adjudication and registration including community land; enhance good land governance and improved security of tenure in all three land regimes. An agricultural land-use master plan will facilitate a more efficient use of all forms of land including community land. In proposing investing in institutions and infrastructure, the strategy recognizes the weakness of

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<sup>37</sup> The other strategic thrust is increasing productivity, commercialization and competitiveness of agricultural commodities and enterprises.

the legislative framework for handling land-related cases, and the multitude and incoherence of land laws. These issues have *inter alia*, contributed to a backlog of disputes in courts; complexities in land administration and management; and prevention of people from asserting their rights over land. This intervention is therefore critical as it will enable communities to assert their rights over community land. Settling the landless poor also has implications for community land as this group of people are the vast majority of the potential beneficiaries of clearly spelt out and secure community land rights.

The strategy rightly gives special attention to Northern Kenya and Other Arid Lands. While ASALs constitute over 80 per cent of Kenya's land mass, their enormous potential remains largely untapped, and the region has districts with the highest incidence of poverty in the country. Community land rights are particularly very important in these areas because due to a number of reasons. These include insecurity and long-standing inter-communal tensions; and competition over resources. To realize the full potential of ASALs, the strategy proposes a number of interventions. These are: formulating and implementing appropriate policy and legal framework; investing in targeted ASAL development programmes; increasing area under cultivation; diversifying income sources for pastoral communities; and implementing the Vision 2030 ASAL development flagship projects. For most of the ASAL communities, these interventions involve diversifying into non-traditional land use practices such as agriculture. The security of land tenure including community land is therefore very important in realizing the growth and development of the ASAL lands.

The strategy also addresses the management of the environment and natural resources including river basins and large Water body resources, forestry and wildlife resources. It is important to note that much of these resources fall on community land. Clear and secure community land rights are therefore essential for their efficient management and utilization.

#### **4.3 The National Policy for the Sustainable Development of Northern Kenya and other Arid Lands (ASALs Policy)**

Northern Kenya and other Arid Lands in this policy refers to an area that is commonly called the ASALs (arid and semi-arid lands), and that covers nearly 90% of the country. The goal of

the ASALs Policy<sup>38</sup> is to facilitate and fast-track sustainable development in the ASALs by increasing investment in the region and by ensuring that the use of those resources is fully reconciled with the realities of people's lives. The objectives of the ASALs policy are *inter alia*, to: strengthen the integration of ASALs with the rest of the country; improve the enabling environment for development in ASALs by establishing the necessary foundations for development; develop alternative approaches to governance which accommodate the specific realities of the region; and strengthen the climate resilience of communities in the ASALs and ensure sustainable livelihoods.

The ASALs policy uses three distinct but related terms: the ASALs, pastoralism, and Northern Kenya. The arid counties are geographically synonymous with the concept of 'Northern Kenya', which refers to the area once known as the Northern Frontier District (NFD). Pastoralism is the dominant production system in the ASALs. It is important to note however that not everyone in the north is a pastoralist nor are the inequalities between the north and the rest of Kenya primarily a consequence of its ecology, hence the use of the terms "northern Kenya" as well as ASALs.

Community land rights are important for this policy for a number of reasons. First, as stated in the policy, the ASALs are prone to drought, insecure land tenure, and unpredictability in the face of climate change threats. Secondly, the economy of the ASALs is dominated by pastoralism, fishing, hunting and gathering. The ASALs are also home to more than 90% of the wild game that supports the tourist industry, and contain most of the protected areas such as game reserves and national parks. One of the defining features of these economic and social activities is the communal management of land and other natural resources. In deed the policy identifies the main policy challenge as protecting and promoting these customary practices in a society which is otherwise sedentary and tending towards more individualized modes of organization and production.

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<sup>38</sup> Sessional Paper No. 8 of 2012 on National Policy for the Sustainable Development of Northern Kenya and other Arid Lands

Thirdly, pastoralists are among the most marginalized groups hence meaningful development will depend on the extent to which attention is given to the distinct challenges facing pastoral communities. Furthermore, pastoralism has for a long time been less valued than other forms of land use and less well-supported. The government of Kenya now recognizes the strengths of pastoralism and has set to enhance its contribution to food security, environmental stewardship, and economic growth. This can only be achieved through clear and secure land tenure. Fourthly, the ASALs have enormous endowment of natural wealth which include vast potential for renewable energy, from both solar and wind; sand and gravel for construction; minerals including soda ash gums, resins, gemstones; medicinal plants; the recently discovered oil and gas deposits; and significant amounts of seasonal water run-off; and dry land soils and vegetation which store substantial amounts of carbon. These resources require equitable and effective management mechanisms which can only be achieved by securing land rights including community land rights.

The policy proposes a number of interventions to ensure sound land and natural resource management in the ASALs. Among these are provisions that are very relevant for community land rights. Although it does not specifically mention community land, the policy requires the government to: reinforce the authority of traditional natural resource management systems; protect and promote indigenous knowledge and practice; and ensure that the interests of pastoralists, particularly pastoralist women, are adequately and appropriately addressed in new land legislation and institutions, in line with the National Land Policy.

#### **4.4 Vision 2030**

Kenya Vision 2030<sup>39</sup> is the long-term development blueprint for the country. The Vision aims at transforming Kenya into “a newly industrializing, middle income country providing a high quality of life to all its citizens in a clean and secure environment”. It is anchored on three key pillars: Economic; Social; and Political Governance. The economic pillar aims to achieve an economic growth rate of 10 per cent per annum and sustaining the same till 2030. In order to facilitate the desired growth, the vision has identified a number of flagship projects in every sector, and flagged off specific projects in key sectors such as agriculture, education, health, water and environment. The social pillar seeks to create just, cohesive and equitable social

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<sup>39</sup> Government of Kenya, 2007. Kenya Vision 2030

development in a clean and secure environment. The political pillar aims to realize an issue-based, people-centred, result-oriented and accountable democratic system.

The Vision is anchored on the following foundations: macroeconomic stability; continuity in governance reforms; enhanced equity and wealth creation opportunities for the poor; infrastructure; energy; science, technology and innovation (STI); land reform; human resources development; security; and public sector reforms. Most of these foundations have either direct or indirect implications for community land rights. For instance the Vision recognizes that land is a critical resource for the socio-economic and political developments and reiterates the importance of respecting property rights to land, “whether owned by communities, individuals or companies”. It states that the transformation expected under the Vision is dependent on a national land use policy, which it calls for its urgent establishment. The policy, it is hoped will facilitate the process of land administration, the computerization of land registries, the establishment of a National Spatial Data Infrastructure in order to track land use patterns, and the introduction of an enhanced legal framework for faster resolution of land disputes.

The Vision is also anchored on equity and it gives special attention to investment in *inter alia*, the arid and semi-arid districts and communities with high incidence of poverty. Clear and secure rights over community land are critical to achieving such equity. Energy is another key foundation on which the vision is anchored. Among other things, the vision requires development of new sources of energy through exploitation of geothermal power, coal and renewable energy sources. Much of the potential sites for these projects will fall on community land hence the need for security of tenure over community land. In addition, the Vision’s specific strategies in key sectors have implications for community land. For instance, under the economic pillar, the Vision identifies six key sectors identified to deliver the 10 per cent economic growth rate per annum. Most of the specific strategies in these sectors are land-based which means they have implications for community land. The sectors are: tourism, agriculture, manufacturing and trade.

The social pillar also has community land-related target sectors and strategies. For example, securing a clean, secure and sustainable environment by 2030 as required under the pillar requires protecting community land rights to enhance their management. Furthermore the



pillar's calls for gender equity in power and resource distribution, improved livelihoods for all vulnerable groups, and responsible, globally competitive and prosperous youth. This requires not only recognition of community land rights but also its re-examination in order to remove the bias against women and youth in land access and management which has been the case traditionally. A number of strategies under the political pillar are relevant for community land. These include observing the rule of law including aligning the national policy and legal framework with the needs of a market-based economy, as well as national human rights, and gender equity commitments; democracy; and transparency and accountability.

## **5. THE LAWS RELEVANT TO COMMUNITY LAND**

### **5.1 Trust Lands Act**

The trust Act<sup>40</sup> provides for the management of trust land. Trust land consist of areas that were occupied by the natives during the colonial period and which have not been consolidated, adjudicated or registered in individual or group names, and native land that has not been taken over by the government. The Act vests all trust lands on local authorities or county councils which have since been abolished after 2013 General Election. In respect of the occupation, use, control, inheritance, succession and disposal of any Trust land, the Act grants every tribe, group, family and individual all the rights which they enjoy or may enjoy by virtue of existing African customary law or any subsequent modifications thereof.<sup>41</sup>

The Act details an elaborate procedure to be followed in case the government or the county council wants to set apart any part of Trust land for public purposes. The procedure *inter alia*, protects the rights of residents from expropriation of Trust land without compensation. However, as pointed out in Kameri-Mbote *et al.* (2013)<sup>42</sup> the record shows that this procedure

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<sup>40</sup> Chapter 288 of the Laws of Kenya

<sup>41</sup> Section 69, Chapter 288 of the Laws of Kenya

<sup>42</sup>Kameri-Mbote *et al.*, 2013. Supra note 4

has routinely been disregarded. County councils in many cases disposed of trust land irregularly and illegally.<sup>43</sup>

## **5.2 Land (Group Representatives) Act**

The Land (Group Representatives) Act<sup>44</sup> is one of the exceptional statutes that recognized group tenure over land prior to the current land governance arrangements.<sup>45</sup> The Act provides for the incorporation of representatives of groups who have been recorded as owners of land under the Land Adjudication Act<sup>46</sup>, and for purposes connected therewith and purposes incidental thereto. The Act, for its purposes defines a group as a “tribe, clan, family or other group of persons, whose land under recognized customary law belongs communally to the persons who are for the time being the members of the group, together with any person of whose land the group is determined to be the owner”.

The Act establishes the position of a Registrar of Group Representatives whose roles are to supervise the administration of the groups, and ensure proper records of the groups are kept. The registrar presides over election of group representatives, who upon incorporation have powers to sue and be sued in their corporate name, and to acquire, hold, charge and dispose of group property. The group representatives have a duty to hold any property which they hold as such, and to exercise their powers as such, on behalf and for the collective benefit of all the members of the group, and fully and effectively to consult the other members of the group on such exercise.<sup>47</sup> The registrar ensures resolution of disputes either through internal mechanisms or through the District Magistrate’s Courts.<sup>48</sup>

This Act provides a very important basis for recognizing and protecting community land rights, and was the basis of registration of group ranches in many pastoral communities. A group ranch refers to a demarcated area of rangeland, to which a group of pastoralists who

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<sup>43</sup>Sessional Paper No. 3 of 2009 on the National Land Policy, at para 65

<sup>44</sup> Chapter 287 of the Laws of Kenya

<sup>45</sup> The current land governance arrangements here refer to the Constitution of Kenya, 2010’s provisions on land; the new legislations on land including the Land Act, Land Registration Act and the National Land Commission Act; the National Land Policy; and the continuing legal reforms in the land sector.

<sup>46</sup> Chapter 284 of the Laws of Kenya

<sup>47</sup> Section 3- 8, Land (Group Representatives) Act. Chapter 284 of the laws of Kenya

<sup>48</sup> Section 10, Land (Group Representatives) Act. Chapter 284 of the laws of Kenya

graze their individually owned herds on it, have official land rights. However, group ranches set up under the Act suffered a number of setbacks as pointed out in Kamei-Mbote *et al.* (2013)<sup>49</sup>. First, in many cases, the group representatives entrusted with the management of such group land disposed of group land without consulting the other members of their groups.<sup>50</sup> Secondly, the group representatives lacked the authority of traditional leaders leading to questions over their legitimacy. Thirdly, government policy has tended to emphasize individual land rights over group ownership. These factors have led to defensive subdivision and individual titling of land within group ranches to avoid encroachment by government or other entities.

### 5.3 Land Registration Act

The Land Registration Act<sup>51</sup> gives provisions for revision, consolidation and rationalization of the registration of titles to land, in order to give effect to the principles and objects of devolved government in land registration, and for connected purposes. The Act applies to registration of interests in land under all the three land tenure regimes established by the constitution. The Act empowers the National Land Commission, in consultation with national and county governments, to constitute land registration units at county level and at such other levels to ensure reasonable access to land administration and registration services. It details the procedure for division and systematic numbering of parcels of land in each registration unit.<sup>52</sup> The Act requires a land registry to be maintained in each registration unit. The land registry shall contain all the land records which include: a land register; the cadastral map; parcel files; any plans which shall, after a date appointed by the Commission, be geo-referenced; the presentation book, in which shall be kept a record of all applications; an index of the names of the proprietors; and a register and a file of powers of attorney.<sup>53</sup>

The Land registration act makes specific provisions for community land, subject to the legislation on community land to be made pursuant to Article 63 of the Constitution.<sup>54</sup> It

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<sup>49</sup> See *supra* note 4

<sup>50</sup> Para 19, Sessional Paper No. 3 of 2009 on the National Land Policy

<sup>51</sup> Land registration Act ( Number 3 of 2012)

<sup>52</sup> Section 6, Land Registration Act (Number 3 of 2012)

<sup>53</sup> Section 7(1), Land Registration Act (Number 3 of 2012)

<sup>54</sup> Article 63 (5) requires Parliament to enact legislation to give effect to the constitutional provisions for management and utilization of community land.

defines a community as: a clearly defined group of users of land identified on the basis of ethnicity, culture or similar community of interest as provided under Article 63(1) of the Constitution, which holds a set of clearly defined rights and obligations over land and land-based resources. It requires a community land register to be maintained in each land registration unit. The community land register is to contain: a cadastral map showing the extent of the community land and identified areas of common interest; the name of the community; a register of members of the community; the user of the land; the identity of those members registered as group representatives; the names and identity of the members of the group; and any other requirement as shall be required under the law relating to community land. The Registrar is to issue a certificate of title or certificate of lease, but is prohibited from registering any instrument purporting to dispose of rights or interest in community land unless it is in accordance with the law relating to community land.

The Act, at section 10 grants the public access to information in the register either by electronic means or any other means.

#### **5.4 County Governments Act**

The County Governments Act<sup>55</sup> is an act of parliament to give effect to chapter eleven of the Constitution. It provides for county governments' powers, functions and responsibilities to deliver services and for connected purposes. It came into operation upon the final announcement of the results of the first elections under the Constitution. The County governments, established under Article 176 of the Constitution consist of a county executive and a county assembly. The executive authority of the county is vested in, and exercised by the county executive committee which consists of the county governor and the deputy county governor; and members appointed by the county governor, with the approval of the assembly, from among persons who are not members of the assembly.

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<sup>55</sup> County Government Act (Number 17 of 2012)

The County Governments Act lists functions of county executive committees which include implementing county legislation as well as relevant national legislation; managing and coordinating the functions of the county administration; preparing proposed legislation; and providing the county assembly with full and regular reports on matters relating to the county. The County governments through the executive committees thus have a very important role in implementing laws related to community land. The county Governments Act, read together with Article 186 and Fourth Schedule of the Constitution, also assigns the county executive committees a number of roles that relate directly or indirectly to community land. For instance, one of the key functions assigned to county governments is agriculture which has very direct implications for community land. County planning and development is another county government function which directly affect community land. Under this role the county governments are to perform *inter alia*, land survey and mapping; boundaries and fencing; and housing.

Another role of the county governments listed in the Fourth Schedule is the implementation of specific national government policies on natural resources and environmental conservation, including soil and water conservation; and forestry. A lot of such natural resources do occur on community land. The fourth schedule also mandates the county governments to ensure, coordinate, and assist communities in developing administrative capacity for participation in governance at the local level. This role can be relied upon to ensure that communities effectively participate in management of community land. Other county government roles with implications on community land are trade, transport and cultural services such as libraries, museums, sports, county parks, beaches and recreation facilities. In addition to the roles listed in the Fourth Schedule, the Act empowers the county governments to acquire, purchase or lease any land which may include community land<sup>56</sup>, and to implement integrated development planning within the counties<sup>57</sup>, as well as within the cities and municipalities therein.<sup>58</sup>

The roles assigned to the county assemblies by the County Government Act (read together with Article 185 of the Constitution) also make them important players in the management of

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<sup>56</sup> Section 6(2)(b), County Government Act (Number 17 of 2012)

<sup>57</sup> Section 102-115, County Government Act (Number 17 of 2012)

<sup>58</sup> Section 37, County Government Act (Number 17 of 2012)

county affairs including community land whenever it is involved. The assemblies are mandated to *inter alia*, make laws necessary for the functioning of the county governments; exercise oversight over the county executive committee and any other county executive organs; and approve plans and policies for the management and exploitation of the county's resources, infrastructure and institutions. Other roles of the county assembly, which may also impact community land are approving the budget and expenditure of the county government; and approving county development planning.

The County Governments Act makes provisions for decentralization of the functions and provision of services of county governments to the village unit among other lower units.<sup>59</sup> The village units, to be headed by the village council are to be established on account of *inter alia*, community of interest, historical, economic and cultural ties; and means of communication. It is important to note that these same criteria are used to define “community” in the National land Policy and in the Land Registration Act, for the sake of managing community land. The village units are therefore very important with respect to community land rights. The act also provides for the inclusion and integration of minorities and marginalized groups<sup>60</sup>, and for citizen participation in counties. These are very key ingredients for effective access and management of community land. The principles of citizen participation include reasonable access to the process of formulating and implementing policies, laws, and regulations; protection and promotion of the interest and rights of minorities, marginalized groups and communities.<sup>61</sup>

### **5.5 Urban Areas and Cities Act**

The Urban Areas and Cities Act<sup>62</sup> provides for the: classification, governance and management of urban areas and cities; and the criteria of establishing urban areas, to provide for the principle of governance and participation of residents and for connected purposes. The Act came into operation in April 2013 after the first elections held under the Constitution, except

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<sup>59</sup> Section 48, County Government Act (Number 17 of 2012). See also the Section, for the other proposed units for decentralization: urban areas and cities within the county; the sub-counties equivalent to the constituencies within the county; wards within the county; and such other or further units as a county government may determine.

<sup>60</sup> Section 97, County Government Act (Number 17 of 2012)

<sup>61</sup>Section 87, County Government Act (Number 17 of 2012)

<sup>62</sup> Urban Areas and Cities Act (Number 13 of 2011)

part VIII of the Act which came into operation upon the repeal of the Local Government Act.<sup>63</sup> The stated objects and purposes of the Act are to establish a legislative framework for the classification, governance, and residents' participation in governance, of urban areas and cities.<sup>64</sup> The Act vests the management of cities and municipalities in the county governments. It provides for the establishment of boards of cities or of municipalities whichever the case may be, as well as managers and other staff to manage the cities or municipalities on behalf of county governments.<sup>65</sup> Of relevance to community land is that the boards so established are empowered to *inter alia*, take, purchase or otherwise acquire, hold, charge or dispose of movable and immovable property which may include community land.<sup>66</sup>

The Act gives the city/municipality boards a raft of functions which may directly or indirectly impact on community land. Of biggest significance to community land is the role of controlling land use, land sub-division, land development and land zoning by public and private sectors for any purpose. The boards also develop and adopt policies, plans, strategies and programmes for their respective cities or municipalities, as well as formulate and implement integrated development plans. The other functions of the boards include overseeing the affairs of the city or municipality; implementing applicable national and county legislation; and collecting rates, taxes levies, duties, fees and surcharges on fees.

The Urban areas and Cities Act empowers the Cabinet Secretary for the time being responsible for cities and urban areas, to make regulations for the better carrying out of the provisions of the Act, or for prescribing anything which is required to be prescribed under the Act. Such regulations are subject to approval by the Senate, and shall only take effect after such approval. The cabinet secretary can thus employ such regulations to enhance the recognition and better utilization of community land rights.

The Urban areas and cities Act is very important in the discourse on community land. This is because land in urban areas has widely been overlooked yet urbanization has had far reaching

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<sup>63</sup> Chapter 265 of the Laws of Kenya

<sup>64</sup> Section 3, Urban Areas and Cities Act (Number 13 of 2011)

<sup>65</sup> Section 12(1), Urban Areas and Cities Act (Number 13 of 2011)

<sup>66</sup> Section 12(2)(b), Urban Areas and Cities Act (Number 13 of 2011)

effects on community land. For instance, the Nairobi Metropolitan Development Project<sup>67</sup> failed partly because the planners never paid adequate attention to community land which constitutes bulk of the land in the proposed project area.

## 6. COMPARATIVE ANALYSIS OF COMMUNITY LAND RIGHTS IN SELECTED COUNTRIES

### 6.1 Australia

Indigenous people of Australia comprises all persons identified as being of Aboriginal, Torres Strait Islander, or both Aboriginal and Torres Strait Islander origin. They comprise about 2.5% of the total Australian population. A survey conducted by the Australian Bureau of Statistics (ABS) in 2002 indicates that Australia has 520350 indigenous people comprising 90% aboriginal only, 5% Torres Strait Islander only and 5% both aboriginal Torres Strait Islanders.<sup>68</sup> Tussles over customary land rights in Australia can be traced to 1963 when seven clans of Yolgnu in the Gove Peninsular of the Northern Territory of Australia objected to the mining license the Australian Government granted allowing bauxite to be extracted from their traditional land.<sup>69</sup> They brought a Federal Court case, *Milirrpum & Others v. Nabalco Pty Ltd*<sup>70</sup>, to establish ownership of the land in accordance with traditional Aboriginal law. The Court ruled, in 1971, that their traditional relationship to land could not be recognized under Australian common law. Consequently they did not hold a right to control access and could not prevent or permit mining on their traditional land.

The government of Australia commissioned Justice Woodward to conduct an inquiry into appropriate ways to recognize Aboriginal land rights. In his findings presented in 1974, Woodward found that a land base was essential to enable Aboriginal economic development and proposed procedures for claiming, holding and dealing with traditional Aboriginal land. He

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<sup>67</sup> The project had a vision to turn Nairobi into a world class African metropolis, supportive of the overall national agenda articulated in national development blueprint, Vision 2030.

<sup>68</sup> Australian Bureau of statistics, *National Aboriginal and Torres Strait Islanders Social survey, 2002*. Abs series cat no. 4714.0.

<sup>69</sup> Dodson, M., Allen, D. and Goodwin, T., 2008. *The role of the Central Land Council in Aboriginal Land dealings*. In: Reconciling customary ownership and development. Making land work, Volume Two case studies. [http://www.ausaid.gov.au/Publications/Documents/MLW\\_VolumeTwo\\_CaseStudy\\_6.pdf](http://www.ausaid.gov.au/Publications/Documents/MLW_VolumeTwo_CaseStudy_6.pdf). Accessed June 6, 2013.

<sup>70</sup> *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141. <http://www.scribd.com/doc/136206534/Gove-Land-Rights-Milirrpum-v-Nabalco-Pty-Ltd-1971-17-FLR-141>. Internet accessed June 14, 2013



held that mining and other development on Aboriginal land should proceed only with the consent of the Aboriginal landowners. He argued that “...to deny Aborigines the right to prevent mining on their own land is to deny the reality of their land rights”, and that the right to withhold consent should be over-ridden only if the Australian Government determined that the national interest required it.<sup>71</sup> The concept of aboriginal title was adopted by Brennan J. of the High Court of Australia in *Mabo v. Queensland*<sup>72</sup> where he said that native title included the recognition of rights and interests unknown to common law: rights not necessarily analogous to common law rights “are assumed to be fully respected”.

Following Woodward’s recommendations, the first land rights legislation in Australia, the Aboriginal Land Rights (Northern Territory) Act 1976, was passed by the Australian Government. The legislation provides structures and procedures for Aboriginal people to claim, hold and manage their traditional lands. It established a procedure that returned about 40% of the northern territory to aboriginal ownership. The Anangu Pitjantjatjara Yankunytjatjara Land Rights Act of 1981 had a similar effect in Southern Australia. In response to the *Mabo* decision, the Australian parliament passed the Native title Act 1993. The Act codified the doctrine and established the National native title Tribunal. In 1996, following a concern about pastoral leases, the High Court in *Wik Peoples v Queensland*<sup>73</sup>, held that pastoral leases do not extinguish native title, and that exclusive procession was given to the lease holder. In 1996, two years after the *Wik* decision, parliament passed the Native Title Amendment Act 1998 which extinguished a variety of aboriginal rights over land, and provided security of tenure to non-indigenous holders of pastoral leases and other land title and gave state governments the ability to follow suit.<sup>74</sup>

## 6.2 South Africa

South Africa is one of the African countries that obtained their independence from the colonial rule most recently i.e. in 1994. Before its independence, the British colonial government ruled the country through the apartheid policy, an official policy of racial segregation involving

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<sup>71</sup> Dodson *et al.* (2008), see *supra* note 69

<sup>72</sup> *Mabo v. Queensland* No. 2 1992 (Cth). <http://foundingdocs.gov.au/item-did-33.html>. Internet Accessed June 14, 2013

<sup>73</sup> *The Wik Peoples v Queensland* (1996) 141 ALR 129

<sup>74</sup> See also Kameri-Mbote *et al.* (2013) for a comparative perspective of community land rights in Australia and other regional and international selected countries.

political, legal, and economic discrimination against nonwhites. The policy led to a history of conquest and disposition, forced removals, and a racially skewed distribution of land resources. It is in this context that the South African constitution promulgated in 1996 provides for land tenure security among all South Africans, regardless of their social or economic status.<sup>75</sup> Like in Kenya, the South African land tenure regime has for a long time been characterized by a dual tenure system with customary tenure derived from African customary law on the one hand and individual tenure based on the English law on the other.<sup>76</sup>

The South African constitution has an elaborate bill of rights which while guaranteeing existing property rights, simultaneously requires the state to take reasonable steps to enable citizens to gain equitable access to land, promote tenure security and provide redress to those who were disposed of property as a result of past discriminatory laws and practices.<sup>77</sup> The South African government recently enacted two national laws that have major impact on people living in communal areas, while some provinces are attempting to develop more appropriate strategies for managing land use.<sup>78</sup> The laws, the Communal Land Rights Act (CLARA) and the Traditional Leaders Governance Framework Act (TLGFA), will potentially impact on how the rural poor in South Africa hold land rights and how those rights are administered. The province of KwaZulu-Natal is also developing Land Use Management.<sup>79</sup>

The Community Land Rights Act<sup>80</sup> (CLARA) was enacted to give recognition and protection of communal land rights. The objects of the Act are to transfer communal land rights to traditional communities, registration of individual land rights within communally owned areas, and use of traditional council or modified tribal authority structures to administer the land and represent the 'community' as owner. The Act employs three broad strategies to achieve its objects<sup>81</sup>. The first is corporatization of land administration where communal land is transferred to and registered in the name of the resident community who must govern and

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<sup>75</sup> Leap, 2005. *Perspectives on Land Tenure Security in Rural and Urban South Africa: An analysis of the tenure context and problem statement for Leap*

<sup>76</sup> See Kameri-Mbote *et al.* (2013), *supra* note 4

<sup>77</sup> Constitution of the Republic of South Africa (No. 108 of 1996), at Article 25 (5)-(8)

<sup>78</sup> See Leap (2005), *supra* note 75

<sup>79</sup> *Ibid*

<sup>80</sup> Republic of South Africa, 2004. Communal Land Rights Act, 2004 (Number 11 of 2004)

<sup>81</sup> Kameri-Mbote *et al.* (2013), *supra* note 4

administer tenure relations according to community rules. The second is individualization of communal rights in which certain old order rights are defined and registered as new order rights in the names of individuals and communities in the new order office. The third strategy is decentralization of public administration. Here, traditional councils, or elected land administration committee where traditional councils don't exist, administer community land rights.

Critics have however claimed that CLARA does not address some or any of the fundamental problems relating to tenure in South Africa. They argue that the Act provides for a process in which “old order” or de facto rights can be identified and, confirmed, converted or transferred into “new order” rights capable of registration. What it does not provide for is either the criteria for determining what evidence counts in identifying an old order right or what processes should be followed for adjudicating multiple old order rights all competing for recognition as a new order right.<sup>82</sup> Indeed, CLARA has been the subject of a number of court cases questioning its validity and constitutionality.

In October 2008, the North Gauteng High Court declared fifteen key provisions of CLARA invalid and unconstitutional, including those provisions for transfer and registration of communal land, determination of rights by the minister and establishment and composition of land administration committees.<sup>83</sup> The judgment did not find the parliamentary process to have been procedurally flawed, and did not struck down CLARA as a whole. The High Court, as it was required to do, referred the order of invalidity of CLARA to the Constitutional Court for confirmation. In May 2010, the Constitutional Court struck out CLARA in its entirety<sup>84</sup>, having accepted the applicants' arguments about procedural issues, and therefore did not consider the applicants' substantive arguments or those contained in the findings of the High Court.<sup>85</sup> The minister responsible for lands, having decided not to contest the judgment, chose

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<sup>82</sup> See Leap (2005), *supra* note 75

<sup>83</sup> *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* (11678/2006) [2009] ZAGPPHC 127; 2010 (8) BCLR 838 (GNP) (30 October 2009) <http://www.saflii.org/za/cases/ZAGPPHC/2009/127.pdf> Internet accessed June 15, 2013

<sup>84</sup> *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* (CCT100/09) [2010] ZACC 10; 2010 (6) SA 214 (CC); 2010 (8) BCLR 741 (CC) (11 May 2010). <http://www.saflii.org/za/cases/ZACC/2010/10.pdf>. Internet accessed June 15, 2013

<sup>85</sup> See also *Richtersveld Community v Alexcor*, 2001 (3) SA 1293 (LCC).

to formulate a new legislation to govern community land. It will be interesting to see how the new law addresses the fundamental issues raised in the court cases.<sup>86</sup>

### 6.3 Tanzania

Like in Kenya, customary land rights and practices were, in one way or another, redefined and increasingly overridden and extinguished by the colonial and post-independence governments in Tanzania. During the 1970s up to five million people were forcibly resettled into collective villages. While its theoretical benefits in terms of improved primary health, education service provision, and better communications have been slow to materialize, the “villagization” era severely disrupted customary land tenure and land management practices.<sup>87</sup> By the end of villagization in the late 1970s the few rights left in the security of customary rights derived from the country’s original land legislation (the colonial Land Ordinance of 1923) had been destroyed.<sup>88</sup> Under the Constitution of Tanzania, all land is vested in the president and land rights are therefore not rights of private ownership but of occupancy.

The prospects for customary and communal land rights took a turn for the better in the late 1990s as Tanzania reformed its land laws. Two new land laws were passed: the Land Act of 1999 and the Village Land Act (VLA) of 1999. These were followed by the Courts (Land Disputes Settlements) Act of 2002. The Village Land Act re-established a system of village based land tenure by recognizing customary rights and creating the means to formalize them through issuing certificates of customary occupancy. The VLA is the main legislation on community land. In its definition of what exactly constitutes “customarily law”, it allows for each community to freely determine their rules and practices, provided that such don’t contradict Tanzania’s other laws or contravene the rights of others.<sup>89</sup> While its primary focus is

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<sup>86</sup> See also Kameri-Mbote *et al.* (2013) for analysis of community land rights in South Africa. *Supra* note 4

<sup>87</sup> Villagization was itself preceded by evictions of communities from their lands – for example, the Maasai were forced to leave the Serengeti to create the national park in the early 1950s, and the Barabaig forced from the Basotu plains for wheat farming in the early 1970s. These evictions have continued sporadically to the present day; for example, with the eviction of the Parakuyo Maasai from Mkomazi to create a game reserve in 1988, and up to 70,000 Sukuma and other agro-pastoralists from the Ihefu Swamps in 2006 ostensibly to protect a nationally strategic watershed. See Maliasili Initiatives, 2012. *Securing Community Land Rights: Local experiences and insights from working to secure hunter-gatherer and pastoralist land rights in Northern Tanzania*. Pastoral Women’s Council (PWC) and Ujamaa Community Resource Team (UCRT) with Maliasili Initiatives. Tanzania: Arusha.

<sup>88</sup> Maliasili Initiatives (2012), *Ibid*

<sup>89</sup> Village Land Act, Article 20

not customary land ownership, the Land Act recognizes and legalizes customarily law as it applies to the assignment, transfer and definition of property rights.<sup>90</sup>

Despite the new seemingly progressive legal tenets, it has been argued in some quarters that the new land laws did not forestall many of the challenges that local communities have since encountered.<sup>91</sup> These include the continued appropriation of their land by the state and commercial private sector, without proper safeguards and in ways that socio-economically disempowered them.

#### **6.4 Uganda**

Britain's land tenure policy in Uganda was not any different from those in her other Eastern Africa colonies where recognition of customary land rights was the exception rather than the rule. Customary land tenure was recognized but with certain conditions. Under the Crown Lands Ordinance 1903, indigenous Ugandans had a right to occupy any land (outside the Buganda kingdom and urban areas) not granted in freehold or leasehold without prior license or consent in accordance with their customary law. However, the Governor had the power to sell or lease such land to any other person without reference to the customary occupants of the land. Compensation was payable to the displaced occupants at the discretion of the Governor. The only right the customary occupants had was to remain in occupation of the land until arrangements, approved in writing by the Governor, were made to re-locate them to other land.<sup>92</sup>

Like in Britain's other East African territories, the publication of the East African Royal Commission (EARC) Report in 1955 acted as the catalyst for the reform of customary land

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<sup>90</sup> The Land Act, at the Preamble and Section 4(3)

<sup>91</sup> The new land acts were ostensibly the culmination of a long consultative process, substantively framed by a presidential commission of inquiry into land matters that had been reported in 1992. Originally, the commission proposed a series of radical changes that would have led to the legal inalienability of land from communities, gave land constitutional treatment, redeveloped local land tenure and management institutions based on customary land laws and practices, and divested radical title from the President to national institutions held accountable by Parliament. However, these recommendations were considered radical by the Tanzanian state and were largely rejected, not least because they took control away from the executive, and were perceived as being counter to a development agenda centred on promoting foreign direct investment. See Maliasili, 2012. *Supra* note 87

<sup>92</sup> Mugambwa, J., 2007. *A comparative analysis of land tenure law reform in Uganda and Papua New Guinea*. Journal of South Pacific Law 11(1)

tenure in Uganda. The EARC report recommended individualization of land ownership arguing that customary land tenure was less suitable for agricultural activity. The EARC report caused a political uproar in Uganda, with most districts overwhelmingly rejecting its recommendations. As stated in Mugambwa (2007)<sup>93</sup>, the timing of the report was unfortunate as it coincided with the land rights uprising in Kenya. The people suspected that its purpose was a pretext by the colonial administration to appropriate their land and give it to foreigner investors as had happened in neighbouring Kenya. In spite of the protests, the Ugandan administration embraced the EARC's recommendations and eventually convinced three districts (Kigezi, Ankole and Bugisu) to convert their land from customary land law to statutory and common law.<sup>94</sup>

Although post-independence Uganda completed the pilot scheme of individualization of land in the three districts, it was not extended to other districts.<sup>95</sup> Several reasons were given for this.<sup>96</sup> African intellectuals and politicians dismissed the EARC report, as based on a misconception of customary land tenure. They argued that although African customary land tenure was communal, it recognized individual land rights over the land they occupied, and that such rights were inheritable and, in some cases, alienable to other group members. Others praised the customary land tenure as the very foundation of African culture, and warned that changing it to individual freehold would destroy the very fibres that held the society together.

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<sup>93</sup> *Ibid*

<sup>94</sup> The three were the most highly populated districts in the country and they happened to have the most land disputes. The government convinced them that demarcation and registration of individual titles would give customary landowners secure titles and would eliminate disputes over ownership and land boundaries. Pilot schemes were set up in the three districts to adjudicate individual ownership of parcels of land in accordance with customary law. Once the land was surveyed and the boundaries appropriately marked, the adjudicated owner could then apply to the Director of Lands and Survey to be registered as proprietor of an estate in freehold in respect of the land, and would be entitled to be issued a certificate of title under the Registration of Titles Act. Legally, customary land law ceased to apply to the land, instead statutory and common law applied just like any other freehold land. (Mugambwa, 2007), *ibid*.

<sup>95</sup> Even in the three districts, the feedback was not very encouraging as there was no evidence of significant increased agricultural production or investment. Moreover, most landowners who had had their land surveyed and demarcated did not bother to complete the process by registering their title under the Registration of titles act. Their only concern it seems, was to have their boundaries marked in order to ward off encroachment by neighbours, and not insecurity of tenure. Even registered titles soon ceased to reflect the actual state of affairs, especially because of subsequent unregistered transfers due to subdivision of the land amongst the proprietor's relatives under customary succession law. The process of keeping a register seemed to be a waste of funds.

<sup>96</sup> *Ibid*

Despite rejecting the recommendations of the EARC, the post-colonial government did not formulate any formal alternative policy to promote customary land tenure. What was formally Crown land after independence was renamed public land. The status of customary land tenure essentially remained the same. The legal status of customary land ownership received a boost following the enactment of the Public Land Act (Cap 21). This Act prohibited the government from granting in freehold or leasehold any public land that was lawfully occupied under customary tenure without the consent of the customary occupants.

Ironically, the same Act gave customary occupants of land a right to apply for a lease over the land they occupied. It has been suggested that the object of the provision was to facilitate “progressive farmers” who wished to use their land more productively or use it as security for a loan, to convert their customary title to leasehold. The reason for this is that they could not do so under customary tenure. If this be the case, it can be said that the independent government, like its colonial predecessor, felt that economic development was not achievable under customary land tenure. The only difference between the two governments was that the independent government did not take any active steps to promote the conversion of customary tenure to leaseholds. Instead, it was left to individual landowners to decide whether or not to convert their titles.

Things took a different turn in Uganda in early 1970 when Dictator Idi Amin overthrew the elected government and imposed his own regime. In 1975, Amin, out of the blue enacted the Land Reform Decree 1975, which essentially sought to overhaul the country’s land tenure system. Under the Decree all land in Uganda was declared to be public land. With respect to customary land tenure, the Decree removed the protection customary landowners had previously enjoyed under the Public Lands Act 1969. The Decree caused panic throughout the country, with landowners fearing losing their land to the rich and well connected people. Meanwhile, the Decree remained largely unimplemented partly because it was politically unpalatable, even for dictator Amin’s regime, and partly because the country remained in political turmoil, with government activities being almost at a standstill until the mid-1980s. Effectively, customary land tenure was left to develop on its own.

Upon return of political stability, land tenure reforms became a priority area for the Uganda government. With assistance from the World Bank and other donor countries, the government embarked on formulating the most appropriate land tenure policy. Consultations and debates lasted over ten years, resulting in an agreement to change the system of land holding in Uganda. Key land reform provisions were embedded in Uganda's new 1995 constitution. Uganda's parliament also enacted the Land Act 1998 and later in 2001, Uganda embarked on a more comprehensive land policy formulation process. The Uganda National Land Policy formulation process is currently in its last stages.

The new Uganda Constitution vests land in Uganda in the citizens of Uganda owned in freehold, mailo (quasi-freehold), leasehold and customary tenure. With the exception of Buganda (central region) and urban areas, most land in Uganda is held under customary tenure. The Constitution empowers all Ugandan citizens owning land under customary tenure to acquire certificates of customary ownership in respect of their land in a manner prescribed by legislation.<sup>97</sup> The Land Act 1998 grants perpetual ownership to customary tenure, just like freehold tenure. It also reiterates the constitutional right of individuals, families or communities owning land under customary tenure to apply for a certificate of customary ownership in respect of their land. The certificate of customary ownership is deemed by the Act to be conclusive evidence of the customary rights and interests endorsed thereon.

Although the new laws go a long way in recognizing community land rights, they do not carry with them a pro-customary land tenure policy.<sup>98</sup> The constitution gives customary landowners a right to convert their title to freehold in accordance with any law enacted by Parliament. The Land Act makes provisions for converting customary tenure to freehold by following the prescribed procedure. The normal practice is for customary owners to apply for a certificate of customary ownership and later, if they wish, apply to the relevant authority to convert their customary title to freehold. However, it would seem from the Act that possession of a customary certificate of ownership is not a prerequisite for conversion to freehold. As such, applicants may directly apply to the authority to convert their customary tenure to freehold. In addition, the Land Act does not give the relevant authority discretion to decide whether or not

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<sup>97</sup> Article 237(4)

<sup>98</sup> Mutambwa (2007)



to allow an applicant to convert their title to freehold. It seems that permission to change should be granted as long as the customary law of the community concerned recognizes or provides for individual ownership.<sup>99</sup>

## **7. KEY ISSUES FOR A COMMUNITY LAND BILL**

### **7.1 Defining the “community”**

Based on the existing statutes, three criteria are used to identify a “community” for the purpose of ownership of community land: ethnicity, culture and community of interest. Despite its limitations, ethnicity or culture is the most prevalent definition of community in Kenya. This definition however has serious limitations. It neglects the dynamism of community and negates communities that are considered not to have enough in common to sustainably manage the land and the resources in it. This includes for instance, communities with different ethnic or cultural heritage but which have been using land and/or other land-based resources side by side. The narrative of community has been used to include or exclude different groups competing for scarce resources.

Community of interest is the criterion used to identify communities brought together by land and land-based resources such as water, forests and wetlands. This criterion is very critical for creation of cohesive communities in Kenya in the light of ethicized socio-politics following the tragic 2007-2008 post election violence. The Waki report following investigations into the post-election violence noted that the constitutional liberty to occupy land anywhere in Kenya does not happen in practice. Instead, Kenyans are continuously pursuing ethnic homogeneity in land allocation and acquisition. In light of this, any attempt to identify communities on the basis of ethnicity could ignite inter-ethnic tensions that could lead to conflict and violence. Therefore, in drafting the Community Land Bill, it is important to carefully consider the dynamics of determining the basis of entitlement to community resources, and the management of competing bases for entitlement. This will not only enhance ethnic inclusivity but also assist in creating cohesive communities for the purpose of sustainably managing and utilizing community land.

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<sup>99</sup> *Ibid*

## 7.2 The nature of community land and the quantum of rights

Due to the complexity and diversity of community tenure arrangements, it is not easy to define community land. However, as pointed out in Kameri-Mbote *et al.* (2013), certain characteristics are discernible. Community land rights derive from indigenous property law based on customary rules and practices. As such, it is as much a juridical content as it is an integrated social system. The central basis of community land is anchored on two foundations. First, access to land is an incident of membership in a specific community or social group. The quantum and nature of access will in turn reflect specific resource use rights recognized by that group. Second, control and management of land resources is vested in the governance organ of the community or group. Therefore, community rights to land must take into account the social and political context of implementation.

In trying to understand the nature of property rights, the double issues of power and control are discernible.<sup>100</sup> In Africa, access to power (the right) and control are distinct and are governed by diverse social and cultural rules. Such power is not vested in one person and is determined by membership in a particular society. Based on this, the following are the key defining features of African land that would equate to community land tenure (Kameri-Mbote *et al.* (2013). First, land rights are embedded in a range of social relationships and units, including households, kinship networks and various levels of “community”, with often multiple, overlapping and therefore layered relevant social identities. For instance, individual rights may exist within households, household rights within kinships networks and kinship rights within local communities.

Secondly, land rights are inclusive rather than exclusive in character. They include both strong individual and family rights to residential and arable land and access to common property resources such as pasture, forests and water. Third, rights are derived from accepted membership of a social unit and can be acquired through birth, affiliation or allegiance to a group and its political authority, or transaction of various kinds. Fourth access to land (through

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<sup>100</sup> Okoth-Ogendo, H. W. O., 1989. *Some issues of theory in the study of tenure relations in African agriculture*. African Journal of the International African Institute, 59, 1 (1989), pp6-17

defined rights) is distinct from control of land (through systems of authority and administration). Fifth, control is concerned with guaranteeing access and enforcing rights, regulating the use of common property resources, overseeing mechanisms for redistributing access and resolving disputes over claims to land. Last, social, political and resource boundaries while each is relatively stable, are also flexible and negotiable, given the layered character of social identities, rights and authority structures.

There has been a raging debate on whether community (or customary) rights to land should be formalized and codified and those holding such rights be issued with title deeds. Proponents of this debate argued that formal codification of property rights is the only way to guarantee security without distinguishing between individual and collective rights.<sup>101</sup> However, this view is countered correctly and strongly by African property scholars who demonstrate that formal codification without a contextual understanding of the multiple interests in and meanings of land can actually generate insecurity instead.

As pointed out in Kameri-Mbote *et al.* (2013), two fallacies have accompanied indigenous tenure in Africa. First, there is the notion that the formal process of documentation will strengthen indigenous tenure system through removal of its diffuse nature and help clarify its extent, nature and juridical content. The second fallacy regards the notion that only private tenure provides adequate tenure security essential for economic development. The Constitution of Kenya, 2010, in recognizing community land rights and putting them at par with the other tenure regimes, seeks to depart from these fallacies. The Constitution focuses on the transformation and democratization of the basis of tenurial arrangements, and not conversion of customary land holdings. This resonates closely with the modern thinking and writing on tenure reforms in Africa, which argue that the focus should be on how to recognize and secure land rights that are clearly distinct from private property and are “communal” in character, but cannot be accurately described as “traditional” given the profound impacts of rapid socio-economic and political changes since the colonial era. This thinking should be clearly captured in the Community land Bill.

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<sup>101</sup> See for example, De Soto, H., 2000. *The Mystery of Capital: Why Capitalism triumphs in the West and fails everywhere else*. Basic Books, New York

### 7.3 Rights of marginalized groups

Typically marginalized groups include poor and landless individuals and households; women and children; and indigenous peoples and ethnic minorities. These groups may be less likely to have clear and secure rights over land because they lack assets, have fewer rights or are less able to influence how the rights are distributed. The largely unresolved land question in Kenya can be attributed in part to the settling of indigenous communities on unproductive land to give way for the white settlers during the colonial period. The post-independence government did not help matters as politically influenced land allocation became common practice, and urbanization and the introduction of a cash economy gave rise to competitive land markets. Indeed, past policies and laws on land have protected private land rights, especially under the Registered Land Act, at the expense of indigenous or communal land rights.<sup>102</sup> These developments further marginalized the mostly poor indigenous people. Both the Constitution of Kenya, 2010 and the national land policy recognize the role of indigenous and poor people, and provides for their participation in natural resources management. With regard to community land, the Community land Bill should clearly spell their role and entitlement to land, as well as protect such entitlement.

Gender discrimination in access to land resources, particularly in rural Africa, is a serious problem. Traditional Customary practices in Kenya and many other African countries ignored the right of women and youth in the management of land. Effectively, women and youth could only access land through their husbands (in the case of married women) or their fathers (in the case of children). Ironically, agricultural production and preservation of land resources is primarily the responsibility of women and children.

The current land governance arrangements<sup>103</sup> in Kenya have introduced a shift from most of the cultural practices of the past, including gender-based discrimination in the access to land and during inheritance. The constitution of Kenya 2010 includes “elimination of gender discrimination in law, customs and practices related to land and property in land” as one of the principles of land policy.<sup>104</sup> The National land Policy also proposes a raft of measures that the

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<sup>102</sup> Sessional Paper No. 3 of 2009 on the National Land Policy, at para 53

<sup>103</sup> See *supra* note 46

<sup>104</sup> Article 60(1)(f)

government will take to protect the rights of women. These include repealing existing laws and outlawing regulations, customs and practices that discriminate against women in relation to land.<sup>105</sup> Effective implementation of this commitment will greatly boost land productivity given that women account for the higher percentage of Kenya's agricultural production. To achieve this commitment with respect to community land, clear mechanisms for its achievement should be included as part of the Community Land Bill.

#### **7.4 Governance of community lands**

As stated earlier, community (or customary) rights to land were not given adequate legal attention prior to the National Land Policy and the Constitution of Kenya 2010. There were no clearly defined structures for their management. Group/community ownership was dealt with under trust land group ranches. Trust lands were governed through the Trust Act which vested all trust lands on local authorities or county councils (these have since been abolished after 2013 General Election). The Act granted communities rights occupation, use, control, inheritance, succession and disposal of trust lands. The Act predicates setting apart any part of Trust land for public purposes by the councils, on protection of the rights of residents from expropriation of trust land without compensation. This procedure has however routinely been disregarded as the councils in many cases disposed of trust land irregularly and illegally.

Group tenure over land was recognized only in exceptional cases such as the registration of group ranches in pastoral communities. Group ranches were governed by the Land (Group Representatives) Act. Management of group land under this Act had its shortcomings. For instance, the group representatives often disposed of group land without consulting the other members of their groups. There were also questions of legitimacy of the group representatives since they lacked the authority of traditional leaders. In addition, the government policy that favoured individual land rights over group ownership led to defensive subdivision and individual titling of land within group ranches to avoid encroachment by government or other entities. The concern of such group members it seems was to ward off encroachment, and not insecurity of tenure.

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<sup>105</sup> Sessional Paper No. 3 of 2009 on the National Land Policy, at para 225

The Constitution of Kenya 2010 and the advent of devolved system of government envisage a new framework for the management of community land. The Constitution requires parliament to enact legislation on land within eighteen months from August 2010 when the constitution was promulgated, and on community land within five years. Already parliament has enacted the land Act, The land registration Act and the National Land Commission Act. The process of drafting the Community land Bill to manage Community land is ongoing.

### **7.5 Linkages to devolved structures**

The devolved government structure brought about by the 2010 constitution vested most functions of the local authorities on the county governments. It is important to note that much of the community lands were vested in the local authorities prior to their abolishment after the 2013 general election. The devolved governments thus have very important roles to play in the management of community lands.

The Constitution lists land lawfully held as trust land by the county governments as constituting community land. It also vests any unregistered community land in the County governments, to be held in trust on behalf of the communities for which it is held. The national Land Commission is mandated to manage the community land held as such on behalf of the County governments. Apart from the role given directly to the county governments over community land, the County Government Act makes provisions for decentralization of the functions and provision of services of county governments. One of the decentralization units is the village units. The village units, to be headed by the village council are to be established on account of *inter alia*, community of interest, historical, economic and cultural ties; and means of communication. The village units are very important with respect to community land rights. The Community land Bill should therefore capture and make adequate provisions for decentralization of the management of community lands.

Under the Urban Areas and Cities Act, cities and municipalities are managed by county governments and administered on their behalf by city or municipality boards. The Act assigns the city and municipality boards a number of functions including oversight of the affairs of the

city or municipality. Many of these functions impact on community land whenever it falls under any city or municipality.

## **7.6 The Place of the National Land Commission**

The National land Commission was established pursuant to Article 67(2) of the Constitution of Kenya, 2010. Although the Act deals mostly with public and private land<sup>106</sup>, its functions also affect community land in a number of ways. The functions are *inter alia* to: manage public land on behalf of the national and county governments; recommend a national land policy to the national government; advise the national government on a comprehensive programme for the registration of title in land throughout Kenya; initiate investigations into present or historical land injustices, and recommend appropriate redress; and encourage the application of traditional dispute resolution mechanisms in land conflicts. It is interesting to see whether the Community Land Bill would create a standalone institution for community land or expand the mandate of the National land Commission to manage community land. Whichever the case, the institution for managing community land should have adequate mandate and sufficient resources for effective implementation of its mandate.

## **7.7 Dispute resolution**

Mechanisms for dispute resolution have existed among the communities in Kenya long before the advent of the courts of law.<sup>107</sup> Early in history, communities in Kenya solved disputes over through panels of elders. However, disputes over land were only occasional since land was deemed to be abundant. The colonial land policy led to land dispossession, inequality in land ownership and use, resentment by Africans, landlessness, squatting, land degradation and resultant poverty. This led to more disputes and contestations over land that has persisted to this day. In addition, the formal land ownership and administration regime introduced by the British colonial government and followed for the most part by post-independence governments undermined the customary structures. Subsequently, land disputes were determined through new state prescribed institutions and procedures.

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<sup>106</sup> The Commission's limited roles in community land include managing community lands held in trust for communities by the county governments.

<sup>107</sup> Even after the advent of legal system in Kenya many disputes among families and friends are sorted outside the courts through submission to respected family members or friends. Such resolutions are socially binding.

The National Land Policy envisages scenarios which will require different ways of resolving them rather than courts of law. These include issues of historical injustices arising out of colonial land policies and practices, as well as those necessitated by poor practices of post-independence governments which have occasioned mass disinheritance of various Kenyan communities of their land. These will include issues such in the Coast, the minority groups, the internally displaced ethnic clash victims. There are also the cases of boundary disputes between individuals, families or clans as to the correct boundaries of their claims. These will occur in areas where land has been registered and in those where land is not registered. There will then be those who are being frauded of their rights to land through culture and inheritance practices.

The National Land Policy therefore recognises the need to ensure access to timely, efficient and affordable dispute resolution mechanisms, in order to facilitate efficient land markets, tenure security and investment stability in the land sector. In order to ensure this, the policy proposes a number of steps to be taken by the government. First, the government should establish an independent, accountable and democratic system backed by law to adjudicate land disputes at all levels. Second, and of particular relevance to community land, the government should establish appropriate institutions for dispute resolution and access to justice within communities. These should have clear operational procedures, mechanisms for inclusion of community members in decision-making and clear record keeping to ensure transparency and the development of guiding rules for making decisions on specific matters. The policy also urges government to encourage and facilitate the use of Alternative Disputes Resolution (ADR) mechanisms such as negotiation, mediation and arbitration to reduce the number of cases that end up in the court system and delayed justice. There will therefore be need for creating channels for negotiation at community level using known practices within various communities, before matters are forwarded to Land Dispute Tribunals, and only thereafter could disputes be referred to the newly created Land and Environment Court.

The Constitution of Kenya, 2010 also encourages communities to settle land disputes through recognized local community initiatives consistent with the Constitution.<sup>108</sup> Pursuant to this, the

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<sup>108</sup> This is one of the principles of land policy. See Article 60 (1)(g) of The Constitution of Kenya, 2010



National land Commission is required to encourage the application of traditional dispute resolution mechanisms in land conflicts, as one of its constitutional roles.<sup>109</sup> In addition, and especially for land disputes that cannot be solved at the community level, the Land and Environment Court has jurisdiction over such cases. The court's jurisdiction includes cases relating to compulsory acquisition of land; land administration and management; public, private and community land; any other dispute relating to environment and land. From the discussion, it is clear that the constitution, the national land Policy and the new land laws recognize community mechanisms for solving land disputes. What remains is for these mechanisms to be clearly spelt out in the Community Land Bill.

## 8. CONCLUSION AND RECOMMENDATIONS

This paper has analyzed the legal and policy status of community land in Kenya. There is a general lack of clarity on the status of community land in the absence of community land law. In some cases, communities have embarked on sub-division of land to protect it from the government and other operatives who have traditionally abused the trust bestowed on them. With regard to trust lands, much of them have changed status either to individual ownership under the Registered land Act<sup>110</sup>, or to public land based on the powers of the county councils under the Local Governments Act.<sup>111</sup> This means that customary tenure and collective rights ceases to apply in those areas.<sup>112</sup> From the discussion, it is clear that the current legal regime cannot be relied on to safeguard the gains on community land rights, and to advance the status of community land. The constitution of Kenya 2010 and the National Land Policy have made considerable progress in filling this gap. However the delay in putting in place the requisite legislation to govern community land essentially leaves community land under the old and inadequate framework.

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<sup>109</sup> Section 5(1)(f), The National Land Commission Act (Number 5 of 2012)

<sup>110</sup> Now repealed and replaced by the Land registration Act.

<sup>111</sup> Although the Local Government Act has been repealed and replaced with the Urban Areas and Cities Act, the new Act did not remove the by-laws made and the licenses or permits issued by the local authorities established, under the Local Government Act, and subsisting or valid immediately before the commencement of the new Act. Such by-laws licenses and permits are deemed to have been given, issued or made by the boards established pursuant to the new Act until their expiry, amendment or repeal.

<sup>112</sup> Kameri-Mbote *et al.* (2013). *Supra* note 4

The paper has drawn from experiences from Australia, South Africa, Tanzania and Uganda. Experiences from these countries provide useful pointers on the way to go with the community land rights law. The South African case is particularly very instructive. Critics claim that although the country's land laws recognize community land rights, they do not carry with them a pro-customary tenure policy. For example they seem to encourage conversion from customary to private tenure by making the process of doing so very easy. The Tanzanian experience is a pointer that a community land law without proper safeguards may not forestall many of the challenges relating to community land tenure.

In order to secure community land rights, first and foremost, there is need to make community land rights equal in weight and stature to the other two forma tenure regimes. The drafters of Community Land Law should also take into account the following elements.<sup>113</sup> The law should clearly define "community". This should include how the community is organized; the rules that hold the community together; and who holds the rights within that community. It is important that the definition adopted for 'community' is very flexibly so as to be non-exclusionary and to allow for evolution, flexibility and adaptability over time. Definition based on culture or ethnicity alone should be avoided as it can ignite inter-ethnic tensions, conflict or violence. It is also important that membership to a community be based on use of land and not on family lineage or transfer of title. In this regard, legal proof of claims on community land should be aligned by formalizing landscape-based evidence.

Secondly, the law should clearly provide for demarcation of the community land (and its resources) including maps and boundaries, in order to protect community land from encroachment. Special attention should be paid to community land in or around urban areas in order to ensure that they are properly vested and used. Within the community lands, communal areas, customary rights of way and shared land use and access rights should be legally protected. Third, the principles of protection should be clearly spelt out. These should detail for instance, how the community rights are recognized and protected; registration of rights to land and land resources; multiple land users including women and children; land use planning and sustainability imperatives; processes of compulsory acquisition of community

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<sup>113</sup> See also Kameri-Mbote *et al.* (2013), *supra* note 4

land; rights of way and grazing rights; and conversion of community land to other uses. Of particular interest is the need to explicitly establish and protect women's and children's right to hold or own land as this has traditionally been undermined in many customary practices.

Fourth, the laws should clearly state who can transact the community land on behalf of the community and the nature of permissible transactions. On this regard, it is important that the ultimate land rights to community land be vested in communities and not under the name of any individual member(s) of the community. This would avoid cases of misappropriation of community land by group representatives as was the case in the past. The laws should also provide for and encourage the creation of community bylaws and land and natural resource management plans as is already happening in some natural resource sectors. Once community land is properly vested, transactions on such land should be made legal and enforceable or voidable under contract law.

Fifth, the laws should provide on how rights are to be enforced including rights and entitlements of individual members within communities. Sixth, the laws should state clearly how the community land rights are to be delivered i.e. registration of titles. Lastly, the laws should redefine the state and/or public by taking into account the devolved system of government, and by clearly providing for the relationships between the County governments and the National Government through the National Land Commission (NLC) in relation to management of community land. In addition, an enforceable fiduciary duty between the responsible institutions and community members should be created. The rights of communities vis-à-vis the state or external agents should be explicit and clear enough so as not to leave room for interpretations that can weaken these rights. For instance mechanisms for royalties and benefit sharing between the National government, County Government and local communities should be agreed upon and clearly spelt out.