Breaking the Mould: Best Practices for Kenya in Implementing Community Land Rights

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I. Introduction and Context

The recognition by the Constitution that all land belongs to the people of Kenya[1] and that such land can be held by the people as communities[2] has sought to correct a historical fallacy that has existed in Kenya since the start of the colonial period. The Colonial Government, introduced laws and policies whose effect was to disregard communal approaches to land ownership and use and instead prefer private land tenure arrangements.[3] The justification for this approach was both juridical and economic. The Juridical argument held that communities were not legal entities capable of holding property rights in land. From the economic standpoint, when land was vested in communities, so the fallacy went, the land would be mismanaged due to lack of sufficient control, since access in this instance was unregulated and open to everyone. The resultant situation was one of chaos and open access, what a famous scholar, Garett Hardin referred to as the Tragedy of the Commons.[4]

Colonial laws and policies, gave false premium to private property rights to land, focusing all efforts towards individual ownership. This policy was utilized to give Europeans access and control to the most productive land in Kenya and to disinherit Africans from their land.[5] On attainment of independence, the laws and policies on land continued with this

[1] Article 61(1) Constitution of Kenya, 2010.
[2] Article 63(1) Constitution of Kenya, 2010.
[3] See J.M. Migai-Akech, *Rescuing Indigenous Tenure from the Ghetto of Neglect* (ACTS Press Nairobi, 2001) at p1; B.D. Ogolla and J. Mugabe, "Land Tenure Systems and Natural Resource Management" in JB Ojwang and C Juma (Eds.), *In Land We Trust: Environment, Private Property and Constitutional Change*(Initiative Publishers, Nairobi and Zed Books, London)(1996) 85–116 at page 95.
[4] G. Hardin, "The Tragedy of the Commons" [1968] 162(3859) *Science* (New Series) 1243-1248.
[5] For a discussion of the historical land policies and their application in Kenya; see generally, H.W.O. Okoth-Ogendo *Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya*, (Acts Press, Nairobi, 1991).

approach, viewing private property as the most economical mode of holding land.[6] The law gave very little attention to customary land holdings. Despite this, communities continued to own and use land according to their customary rules through communal arrangements.[7] In pastoral areas, especially due to the modes of using land, communal ownership to land remained the preferred method of owning land.[8] In essence the country had a dual tenure arrangement, one recognized and given preference by the law and another existing in spite of the law.

The adoption of the first ever National Land Policy for Kenya in 2009 and the Constitution in 2010 sought to correct this error. The inclusion of communal tenure as a category of land ownership is a simple but profound statement. Henceforth, it gives constitutional recognition to communities and enables them own and use land as communities. This has the potential of marking the dawn of a new era in land ownership in Kenya, what has been titled the dawn of *Uhuru*.[9] However there are several hurdles still to be overcome to make community land rights a reality in Kenya. In the first instance, and partly as a result of modern development, identifying and defining the "community" for purposes of vesting legal ownership is a difficult task. The Constitution states that a Community shall be identified on the basis of ethnicity, culture or similar community of interest. Each of these criteria qualifies a group of people to be identified as a community. The difficulty arises where the three criteria sit side by side and lead to different results in terms of defining the community. The law would have to specify how you reconcile such issues. In doing so it is important that the experience of different communities be taken into account.

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[6] See B.D. Ogolla, and J. Mugabe, *Supra*, note 3.

[7] See generally, H.W.O. Okoth Ogendo, T*he Tragic African Commons: A Century of Expropriation, Suppression and Subversion* (Keynote Address to African Public Interest Law and Community-Based Property Rights Workshop- USA, River-Arusha Tanzania; published in CIEL/LEAT/WRI/IASCP); *Amplifying Local Voices for Environmental Justice: Proceedings of the African Public Interests Law and Community-Based Property Rights* Workshop (USA, CIEL, 2002) pages 17-29.

[8] For a discussion of some experience with land tenure in pastoral areas, See I. Lenaola, "Land Tenure in Pastoral Lands", In J.B. Ojwang and C. Juma., (eds.) *In Land We Trust: Environment, Private Property and Constitutional Development* (Initiative Publishers Nairobi and Zed Books London) (1996) pp 231–257.

[9] Uhuru is the Swahili word for independence. For this depiction see C. Odote, "The Dawn of Uhuru: Implications for Constitutional Recognition of Communal Land Rights in Pastoral Land Rights" [2013] in *Nomadic Peoples' Journal* (Special Issue) pp 87-105.

Secondly, land ownership has been one of the causes of past ethnic conflicts in the country. It is, therefore, imperative that application of the criteria in defining communities does not result to balkanization of the country but instead unity. The criteria should recognize ethnic identity while also promoting national cohesion and the right of every Kenyan to own land in any part of the Republic. This will require innovation.[10]

The other critical point of debate in implementing community land rights is the process of identifying the members of the community and the rights they are entitled to. On identification, debate revolves around membership by birth, marriage, assimilation and a process of either registration or census to determine membership. Others propose to get around this issue by saying that once you determine the unit of the community, then all you have to do is to register the land in the community's name and ensure the land is always available for community use. That way you can avoid the more complicated process of undertaking a census to determine the actual membership of a particular community.

It is important to note that on the issue of rights, the law should be able to balance between communal rights and rights of individuals within the community. This is critical since historically, communal rights included a layer of rights shared amongst various levels within the community, with the political leadership having the rights of control, the clan having some rights, the family having others and the individual another set of rights.[11] A useful law and policy to implement the constitutional provisions on community land rights must protect both the rights of the community and those of individuals within that community.

[10] See Generally, P. Kameri-Mbote *et al, Ours by Right: Laws, Politics and Realities of Community Land Rights in Kenya* (Strathmore University Legal Press Nairobi, 2013).

[11] This is the point Professor Ogendo used to refer to as the inverted pyramid of ownership in customary tenure arrangements. See H.W.O. Okoth-Ogendo, *Supra,* note 7.

In the past, in the process of enjoying community rights to land, women and children often were disadvantaged. Inheritance laws and practices and even rights of access favoured the male and older members of society. This is an aspect that requires to be reformed. The Constitution also encourages the use of traditional dispute resolution mechanisms.[12] In the area of land rights, especially with the adoption of Communal land rights, the role of traditional institutions, like those of the council of elders will be imperative. They will also help to free up the newly established Environment and Land Courts from mundane cases that are better resolved at the community level. But we have to learn from the experience of the Land Dispute Tribunals to avoid their failures. Further, the process of traditional dispute resolution must be made more democratic and inclusive of the women and youth. An honest and deep debate on customary governance institutions with a focus on their reform is necessary to ensure that their patriarchal nature and discriminatory practices are eliminated.

One of the greatest challenges in the management of community land has been procedures for registration and dealings with such land. The modern society is such that without title deeds, one's ownership to land is of limited value. You cannot use such land to access credit and lack of a title deed increases the chances of unscrupulous persons acquiring that land and claiming its ownership. Secondly the amount required as transfer fees is based on the unit of acreage making it overly expensive to register community land due to the huge quantities in question.

There will also be need to clarify the responsibility and procedures for dealing with community land to avoid elite capture as happened in Group Ranches, where those whose names were registered as officials in trust for the rest of the community ended up taking the land as their personal property and dealt with them without recourse to the members

[12] Article 159(2) (c) Constitution of Kenya, 2010.

of the community. Lastly, in the modern era where members of a community move away from their traditional homes, the law will have to reconcile the desires of such individuals to be assigned personal rights that they can trade to others when they move away against the interest of the community to maintain the rights within the community. In essence a balance has to be struck with the desires of free trade in the market, a past critique of customary land rights. That way the issue of whether and in what circumstances individual rights under community land tenure can be traded will have to be answered.

In 2012, the Ministry of Lands appointed a Task Force to develop a draft Community Land law in compliance with the requirement of Article 63(5) of the Constitution. The Constitution required that such a law be in place within a period of five years from the promulgation of the Constitution. As part of the reforms and consolidation of land laws, the country adopted new land legislations in 2012 but the same governed private and public land only. The appointment and work of the Task Force and subsequent efforts have been geared towards ensuring that the country's community lands have a robust and comprehensive legislative framework to govern them. Developing legislation on community land is a complex exercise. It has to address all the issues captured above and much more. The experience of South Africa, whose community land law was declared unconstitutional, demonstrates that addressing these issues is not a straight forward task.

To provide a forum for debating the ideas coming out of the work of the Task Force on Community land and generate options for an effective legislation on Community Land, The Kenya Land Alliance (KLA) in Partnership with both the University of Nairobi and Strathmore University organized an international conference under the theme *Best Practices and Approaches for the Protection of Community Land Rights in Kenya* between 6th and 7th June, 2013 in Nairobi. The conference had four main objectives, being:

(1) To raise awareness and cultivate deeper understanding of the components of community land tenure regime that must be legislated;

(2) To share experiences from other countries on community land rights' regimes.
(3) To take stock of the nature of customary law systems and the broad significance of their accommodation alongside the existing state law system as an equal legal system despite its complexity; and
(4) To Identify and deliberate on the challenges and dilemmas of formulating community land law and offer best practices to overcome them.

Several presentations were made based on experiences from South Africa, Rwanda, Uganda, Tanzania, Brazil, Mozambique and several communities of Kenya. At the end of the conference several lessons were proffered for Kenya and formed the conclusions and recommendations from the conference.

The first key lesson was that while the recognition of communal land as a tenure category within the Constitution is a progressive step in Kenya, it is only a first step. The necessity for an enabling legislation is urgent so as to enable practical implementation and "giving meaning" to communal land rights.[13] Although the Constitution gave a time-frame of five years to enact a community land law, the Conference underscored the importance of ensuring that the legislation was complete within the year 2013. However, this was not to be with the consequent that community land has continued being exposed to irregular dealings due to this delay. Related to this is the jurisprudential debate of the limits of law. Based on this, even a new Community land law will not solve all the problems that have bedeviled community land in Kenya for over a century. Consequently, the Conference called for relook at the provisions of the National Land Policy dealing with community land and their full implementation.

The other key lesson was the need to recognize and take into account the unique nature of community land rights. In the past, efforts aimed at developing legislative

[13] *Supra*, note 10.

frameworks for communal ownership as evidenced in the law on Group Ranches have been prescriptive rather than facilitative. In addition, they had used the template of private property in developing rules and parameters for regulating communal property. Unsurprisingly these efforts have largely been unsuccessful. This is a lesson that the legislative framework to be developed has to be alive to. The new law will be judged on the extent to which it is dynamic and innovative so as to provide space for incorporation of customary experiences and diversities.

Taking into account such lessons the Conference recommended several measures, including having a layered recognition of rights, which unbundles and diffuses land rights between the communal and the individual so that the entire bundle is not vested in one entity. Traditional governance institutions must also be accommodated and their role provided for. In doing so, however, such structures have to be democratized so that their conduct are in accordance with the Constitution and modern democratic tenets. The law on community land should also address the place and relevance of customary law as the substantive law of most communities in regulating their communal lands. Lastly the experience of Brazil demonstrated the need to address both tenure and land use issues in designing community land legislation.

II: Key arguments

This book contains the key articles presented at that conference. The articles have attempted to address themselves to one or more of the four objectives set at the Conference. The Conference benefited from an earlier publication, *Ours by Right: Law, Politics and Realities of Community Property in Kenya*. This earlier publication was developed following the adoption of the Constitution in 2010. It discussed the importance of the provisions on community land rights in the Constitution and traced the historical marginalization that had occurred before this recognition. It argued that "communal land rights are characterized by their diversity and complexity."[14] So as to provide initial knowledge on these diversities the book reviewed international legal

[14] *Ibid.*

frameworks and case law on community land and country experiences from USA, Canada, Australia, South Africa, Botswana, Liberia, Tanzania and Ghana. It also documents experiences of four communities in Kenya. These are Lamu, Yala Swamp, Northern Rangelands Trust, East Mau and Kasighau.

The book concluded that community tenure existed in Kenya even before the enactment of a new Constitution but that the meaning and nature of the term community varied across the country. It also identified several of the issues that required to be addressed in legislating community land rights based on the experience from international law and comparative experiences. While the book detailed the "*what"* in protecting community land rights, the current book addresses the *how*. To set the context and build a bridge with *Ours by Right*, Kevin Doyle traces the history of customary land rights from the colonial period to date. The article concludes by reviewing the Manifesto of the Jubilee coalition and its discussions of Community land, arguing that the prescription to issue individual titles for community tenure "is not a reform of communal tenure but a departure from it." He argues that the question that should concern policy makers is "how to statutorily recognize communal tenure while entrenching customary norms, values and practices and ensuring democratization?" This is the issue that the rest of the papers try to address.

Part Two of the book discusses experiences of three areas in Kenya where communal land rights have been practiced and are potential regions where the Communal land rights law would be relevant once enacted. Two of the case articles discuss communal land in rural areas, while the third paper discusses the urban context for application of community land legislation. The first of the three articles By Mborio Mwachengu Wa Mwachofi and three other co-authors discusses the implications of constitutional recognition of communal land rights for the tenure arrangements in Kasighau, an area where group ranches have been established to provide for ownership and use of land. The authors argue that as long as the majority of the land in Kasighau continues being categorized as public land, the provisions in the Constitution will have no practical benefit for the residents of Kasighau. This raises the point of the need to ensure that

when the community land legislation is enacted there is community land in existence that it will regulate. It also raises the thorny issue of inclusion versus exclusion depending on how the definition of the term community is crafted.

Patrick Ochieng in his paper on *Communal Land Tenure and Property Rights in Tana River County: A Case of Complex Clan Power and Dynamics and Dispossession* argues that communal tenure represents the dominant tenure practice for most communities in Tana River County. His basis for this averment is that "(t)his is not least because it is community-based and thus easily accustomed to the concerns of the communities but because the long standing and glaring issues of ownership, use and management of land in the County have already opened overt fault lines whose resolution requires more than fine words." The fact that most of the land owned communally is unregistered does not make that land subject to dealings by the Government as if it is public land, Ochieng points out.

The last article in Part Two of the book by Patricia Kameri Mbote and Collins Odote discusses the tenure regimes in Mukuru, an informal urban settlement in Nairobi County. The authors demonstrate that while a majority of the land in Mukuru is under private tenure, there are communal arrangements by communities in the slum region. The end result is a disjuncture between legality and legitimacy with each group claiming ownership of the land. The authors argue that previous efforts at addressing the challenges in the informal settlement have ignored the tenure aspects hence their unsustainability. They make a case for adoption of communal tenure arrangements in informal settlements. Based on the Constitution and the experiences in Sectional Properties Act, the authors argue that there is a basis for vesting the land in community on residents of the areas based on a "community of interest." However, such vesting should ensure that the residents have user rights, their rights to sell get regulated while the governance of the land involve County Governments. To give effect to this innovation requires policy and legal innovation which the authors elaborate on in their paper.

Part Three contains comparative articles from South Africa and Brazil. The South African Article by *Willie Comb*, based on a discussion of the Communal Land Rights of South Africa and larger equality debate opines that despite Constitutional recognition, communal land rights in South Africa continue to face challenges as a result of long history of disregard and policy neglect at the expense of private tenure focus. Custmary law also continues to be unequally treated in South African legal jurisprudence. In her view, to ensure meaningful implementation of communal land rights, customary law must be seen as equal to formal written law. The next set of three articles by Carlos Meres, Luis Eden Fachin and Aurelio Vianna Jr discuss the experience of Brazil with community land rights. The discussions revolve around the 1988 Constitution of Brazil, the rights of indigenous communities, especially those referred to as *quilombolas*. The experience of these communities are discussed within the provisions of ILO Convention 169 *on Indigenous and Tribal Peoples*.Aurelio in one of the three Brazil papers points out that despite the importance of the Amazon and the fact that indigenous communities have occupied majority of the land around the Amazon, it is only recently that the Brazil Government has recognized the territorial rights of these groups.

The last part of the book discusses gender within the context of communal land rights. In an article titled *Land has its owners: Gender and Community Rights in East Africa*, Patricia Mbote makes the point that "While land is critical to one's citizenship/belonging to a group, narratives on communities' quest for the recognition and protection of their rights to land and related resources, has tended to overshadow the quest for rights by weaker members of the communities such as the youth and women." A successful community land legislation has to take into account and deliberately address this reality and guarantee their ownership and access within the context of communal rights. Traditional institutions of dispute resolution and governance also have to include women within their structures.

With the recent discovery of extractives in Kenya, the design of an effective community land legislation has taken an additional angle of navigating the arena of benefit sharing and averting the resource curse. While the country will most definitely have community land legislation by the Constitutional deadline of August 2015, the debate about the utility of that legislation, the extent to which it balances and resolves several of the thorny issues in designing legislation on community land will continue to linger. So will the extent to which that law is fully implemented in a manner that ensures that community rights to land are protected and secured in an equitable, effective and sustainable manner. That is a discourse that will continue for several years to come and to which this publication makes a contribution.

III: Implementing the Constitutional Dictates: The Provisions of the Community Land Act

The Constitution recognizes community land and provides broad beacons of what the elements of recognizing that tenure category. Community land is given equal treatment to the other two tenure categories of public and private. Article 63 of the Constitution provides the beacons for Community Land Rights. It states that

"(1) Community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest.

(2) Community land consists of—

(a) land lawfully registered in the name of group representatives under the provisions of any law;

(b) land lawfully transferred to a specific community by any process of law;

(c) any other land declared to be community land by an Act of Parliament; and

(d) land that is—

(i) lawfully held, managed or used by specific communities as community forests, grazing areas or shrines;

(ii) ancestral lands and lands traditionally occupied by hunter-gatherer communities; or

(iii) lawfully held as trust land by the county governments, but not including any public land held in trust by the county government under Article 62 (2)."

This provision though revolutionary in the Kenyan context, left several details unaddressed. The Constitution recognizes this and provided for the enactment of a legislation to provide details on the quantum of community land, the nature of the community and types of interests to which a proprietary land holder would be entitled to. Such process was not expected to be straightforward owing to the complexity of the issues to be addressed. Innovation was, consequently called for.[15]

On 21st September, 2016, The Community Land Act finally became law providing a legal framework for the "provide for the recognition, protection and registration of community land rights; management and administration of community land; to provide for the role of county governments in relation to unregistered community land."[16]

The law clarifies certain issues that are germane to implementing the Constitutional provisions. First it defines who a community is. The Constitution required that such communities be identified either on the basis of ethnicity, culture or similar community of interest. The law details what this really means focusing on the category referring to a distinct and organized users of community land, who are citizens and who share listed attributes, including ancestry, geographical and ecological space, culture, socio-economic interests or ethnicity.

The law also restates the fact that interests in community land are of equal status to that of other categories of land. It addresses the thorny issue of registration, providing a clear

[15] Patricia, K. Mbote, *et al, Ours by Right: Law, Politics and Realities of Community Property Rights in Kenya* (Strathmore University Press, 2013).
[16] Act Number 27 of 2016

procedure for determining the name of a community that wants to own and be registered as owners of community land, the process of identifying the members of such a community, clarifying their rights, adjudication and finally registration. It requires that a Community Land Management Committee be registered from amongst members of the community as the management body for the community. In the past such representative bodies have turned against the community members and dealt with land as if they were the owners. As a consequence, they have breached their trust status. While the law tries to clarify this by explicitly providing for a Community Assembly comprising of all adult members of the community and indicating that it is the supreme body, this is an area of the law that will require greater vigilance in the implementation process.

The law also recognizes the role of county governments over community land but is careful to provide for the transfer of the functions and resources that county governments may hold over community land to the community members as soon as the community land is registered in the name of the communities.

A critical issue in the discourse on community land tenure relates to benefit sharing. Communities rely on land and the resources on those lands for their livelihoods. Part of the concerns around non-recognition of communal land rights was the implications for communities' capabilities to derive benefits arising from the exploitation of their natural resources. The Constitution requires that any investment in land benefit communities around where the land is situated.

In the past, several resource-based conflicts have occurred as a result of non-recognition of rights of communities to their lands and development of clear arrangements for them to benefit from the use of such lands. This explains the importance of benefit sharing discussions and legislative proposals including in the Mining Act, 2016 and the Petroleum Bill of 2016.

The Community Land Act addresses itself to the issue of benefit sharing. First it requires that whenever natural resources exist on community land, then such resources shall be used and managed for the benefit of the entire community and also for future generations. This is in accordance with the principles of intergenerational and intragenerational equity. Further, any benefits that arise from the use of those resources are to be shared equitably. What the Act does to fully address itself to is how to best operationalize the guidance of equity. Other legislation in Kenya has gone the way of signaling percentage share between national government, county governments and local communities.

Debate has raged about the rights of individuals to community land. The law provides that individuals can be allocated a portion of community land for their exclusive use and occupation. However, for this to happen, the community members must consent to such an action. Secondly such allottee cannot get a separate title to the portion of the land that they have been allocated. This is out of the recognition that ownership of community land belongs to the community as a collective entity.

IV: Conclusion

The adoption of the Constitution of Kenya, 2010 ushered in the legal recognition of community land rights in Kenya. Translating these provisions into actual practice is fundamental to the realization of the rights of communities in Kenya. This will catapult communal arrangements for land holding and management from the shadows of the law to the forefront of legal regulation of land rights. This book arises from a Conference on *Best Practices and Approaches for the Protection of Community Land Rights in Kenya* held in 2013.The experiences of countries such as South Africa and Brazil, both shared during that Conference and discussed in this publication, provide pointers to the issues Kenya will have to grapple with in implementing the Constitutional provisions on Community Land Rights. They demonstrate that Constitutional provisions on their own are insufficient to deliver real security of tenure and access to land-based resources to citizens. Such provisions are skeletal and can only be effective if life is breathed into them

through detailed supportive legislative enactments; administrative arrangements and complementary community practice on the ground.

In implementing Community Land Tenure arrangements, Kenya has to bear in mind that while tenure in traditional and communitarian settings differs from modern or western conceptions tenure; both have undergone transformation over the years. Community property systems are extremely dynamic and their years of interaction with western notions have nuanced them somewhat as they have adapted to change. The alignment of these systems to Constitutional norms must therefore take cognizance of the need for adaptation based on the framework of actual or living customary practices. This will enable communities identified on the basis of ethnicity, culture and similar community of interests to identify and hold their land as well as enjoy security over the bundle of rights associated with such land holding. In recognizing community rights, however, the rights of vulnerable groups such as the youth and women must also be secured and not trampled upon under the guise of community practices. These issues are canvassed in this book as a contribution to the Kenya's quest to adopt and implement Community Land legislation in accordance with the requirements of the Constitution of Kenya, 2010.

While the passage of the law was a milestone and marked the beginning of a new era in recognition and implementation of community tenure rights, legal provisions on statute books are not sufficient. What is required is action to implement those provisions. For example, several months since enactment, the law is yet to be fully operationalized, institutions under it still non-existent. Until this happens and communities start feeling the benefits of their resources will one truly turn the corner away from subjugation to real recognition and protection of community land rights in tenure. For now, while the mould may have been broken care has to be had to ensure it does not form again. This a task that require commitment and collaboration of several stakeholders in the country.