Exploring the Intricacies of Land Tenure in Pastoral Areas: Issues for Policy and Law Reform

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1. *Introduction*
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1. INTRODUCTION

The report; *"Pastoralism on the Margin"*[3] doubts whether the upsurge of development interest in pastoralism will result in any concentrate deliverables to meet pastoralists' needs, despite the huge sums of money devoted to this end. This is so because the material base of pastoralism in the four countries of Ethiopia, Kenya, Tanzania and Uganda has been thoroughly eroded, the erosion being an act not in isolation but in tandem with climatic change, conflict, disease, drought and famine. *Markakis*, the author of the report analyzes contemporary issues pertinent to pastoralism with varying degree of detail and content. In the first instance, he acknowledges that pastoralism is a culture, way of life and ancient mode of mobile livestock production in the rangelands of Eastern Africa and the Horn. He notes that this culture, form of production and way of life has reached a critical point due to the effects of colonialism and independence struggles, balancing conservation and pastoralism (often pastoralism loses out), politics, conflict, belated recognition, dispossession of land and the promotion of agriculture.

My task in this paper is to review, discuss and point issues relating to land tenure in this report and their relevance to policy and legal reform in Uganda. The fundamental argument on land tenure in this report is that pastoral production is determined by land use patterns which in turn determine whether the herders are mobile or not; elaborated under four major issues:

- Land is a factor that is not controlled by pastoralist; since no system of land tenure recognizes pastoral rights; existing land law does not recognize or understand pastoral tenure.
- Changes that stifle pastoral rights in land originate from the external;
- There is no political will to deal with pastoral land tenure issues, since they are a minority.
- Plans to grant pastoral land rights seem to be in inertia and gender issue ought to be tackled-though we have little understanding of such dynamics in pastoral societies.

In conclusion, I will make arguments for land policy and law reform to address pastoral concerns by stating the major steps, or issues and imperatives that are pertinent to government, private sector and civil society organizations.

2. THE ISSUES

In a study on rangeland tenure and resource management in Uganda[4], it was summarily stated that:

> *"The customary rights and social institutions of pastoralists in their grazing land are generally no longer recognized by law…Given today's hostile rangeland environment, it is increasingly difficult to assume that pastoralism in its traditional form will persist, since pastoralists are easily displaced"*

It is acknowledged through out Eastern Africa that pastoralists occupy and utilize vast areas of land, for this reason, appropriate policy must examine means that empower pastoralists to assert themselves and claim their rights over land effectively.

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[3] *Markakis John, (2004) Pastoralism on the Margin, Minority Rights Group International, UK.*
[4] *W. Kisamba-Mugerwa (1992), Research Paper 1, Makerere Institute of Social Research and Land Tenure Centre*

It is currently accepted that land is a factor over which pastoralists have not control; therefore, efforts should be geared towards changing this trend. No system of land tenure accommodates or recognizes pastoral rights over unimproved or unsettled land and the waters that cross it as a provision for mobile livestock herders. We ought to note that this originates in land tenure laws based on the English property law, which does not recognize the communal system as understood by pastoralists. The entire colonial edifice was built on the supremacist ideology that was out to suppress customary tenure and customary law. Attempts were made throughout the colonial period to suppress the development and adaptation of customary land tenure regimes, through legal and administrative contempt of customary law: the domain, which defines the structural and normative parameters of the Commons. Customary law was expressly subordinated to colonial enactments and received principles of the Common Law of England, the Doctrines of Equity and Statutes of General Application, hence in terms of hierarchy; customary law was essentially residual even in contexts where it would normally apply exclusively.

Secondly, strong were views held by colonial anthropologists and administrators that "native law and custom" was merely a stage in the evolution of African societies. It was expected, therefore, that relations defined by customary law, including common property systems, would wither away as western civilization became progressively dominant in African social relations. In Kenya[5], for example, the processes of conversion of tenure regimes through adjudication, consolidation and registration were extended even to the pastoral and other semi-arid and arid areas where the private property regime was clearly inappropriate. Such was the determination to rid national property systems of common property principles. This has led to auctioning the range to individuals in freedom at a high momentum.

If pastoral land rights are to become a reality, what matters is not the system of land tenure, but the provisions it makes for extensive use of land by pastoralists. A few initiatives such as new legislation have such clauses as issue of certificates of customary ownership to any person, family or communal land under customary tenure. A Communal Land Association may be formed for owning land. In theory, it is possible for pastoralists' households; homesteads and communities to apply for land under communal tenure, but this is yet been tested when implementation of such reforms begins. It will be the litmus; we need to quantify what has been delivered in legislative reforms. No new legislation strictly defines customary tenure, all leave it vague and subject it to interpretation by the judicature that is supposed to construe meanings in law. Pastoralists know from history and experience that neither the law nor the state will interpret such law on their side.

The second issue raised on land tenure in *"Pastoralism on the Margin"* is the influence of external forces of liberalization and free market economy that have led to privatization of land to create an enabling environment for investment. Uganda, Ethiopia and Tanzania have resisted this, but

[5] *H. W. O. Okoth-Ogendo (2000). The Tragic African Commons: a century of expropriation, suppression and subversion. University of Nairobi & Fellow of the Kenya National Academy of Sciences*

incorporate moves in this direction such as transparency, public participation and scrutiny by NGOs. This externalism stresses pastoral resources by not taking into account pastoral realities of ensuring production within a harsh climatic and ecological environment. In some pastoral areas, institutions have been disrupted to an extent that it is impossible to reverse the trend[6]. The theory of property rights (which is the extreme of the tragedy of the commons) is currently advanced by the World Bank whose vocabulary is no longer ownership but land rights (securing of land rights is particular relevance to vulnerable groups e.g. herders); no longer private property but security of landed property (required to motivate people to make improvements on land) not market for land but access to land; is deep rooted in economics, hence assertion that the value of property determines the nature of rights that pertain to it

Such orthodoxy portrays pastoralists as economically irrational and operating within an inherently destructive communal land tenure system. The forgotten assumption in this theory is resilience and persistence of indigenous values and resource management institutions either through transformations or adaptations but retaining the basic set of community values and principles. It therefore avails not only an opportunity but also a challenge for "legal engineering" in Africa in terms of innovation, flexibility and contextualisation by pastoralists themselves. The opportunity now exists for a general rethinking of issues of access, control and management of the primary resource, land, as part of the general process of policy reform now taking place in the region and by NGOs working in this area.

The third major issue raised in *"Pastoralism on the Margin",* is the absence of political will to concentrately explore pastoral tenure issues because pastoralists are minorities whose habitat comes under loosely defined rules of customary tenure. They are easily displaced, which marginalizes them further. The knowledge of how pastoral land tenure and management work and how pastoralist livelihoods strategies are positioned within this tenure have been undermined. Instead, resource degradation is attributed intrinsically to "common property systems," although it actually originates in the dissolution of local-level institutional arrangements whose very purpose was to give rise to resource use patterns that were sustainable. Indigenous communities are crammed into "reserves" or otherwise pushed onto the least productive and most difficult terrain[7].

Common property regimes are declared incapable of providing an efficient framework for the development of land and associated resources. The "tragedy of the commons" has thus translated into legislative policy, which advocates for the conversion of common property regimes into individualized private property. Its basic assumption is and remains that by legislating change in the technical description of title i.e. from common to private property[8], a fundamental revolution in land relations, land use and land management will occur, unfortunately this has harvested other

[6] *W. Kisamba-Mugerwa (1992)*
[7] *W. Kisamba-Mugerwa (1992)*
[8] *Okoth-Ogendo (2000)*

unintended consequences. States are unclear, they are neither unwilling nor making any meaningful intervention, it is a state of inertia. Granting land rights to pastoralists unequivocally and permanently is not planned for in the near future.

The last aspect, raised in *"Pastoralism on the Margin"* is that gender dynamics are not understood in land tenure reform processes in pastoral area. Indeed apart from merely stating several gender sensitive provisions in various land legislation in different countries in Eastern Africa, *Markakis* makes no endeavor to explore what implications this has on gender in pastoral communities. It is my opinion that, this area has to be researched to deliver. The position of women in a pastoral economy faces great change, which must be vigorously investigated and analyzed. Uganda's Land Act (1998)- the act was amended in 2003 to cater for security of occupancy and Tanzania's Act (1999)-access to land by men and women is equal and protects women's rights of property control in marriage but accommodates elements of customary that discriminates against women.

3. EMERGING INTRICACIES: OPTIONS FOR POLICY AND LAW REFORM

From the discussion above, several facts and truths emerge that must be dealt with in policy and legislative reforms. *Markakis* makes two major recommendations in this report that are at the pinnacle of land tenure and pastoralism discussions. The first is that: "all governments should ensure that their recognized system of land tenure include protection of use by pastoralists". Inherent in this, is the need to understand and recognize that:

- Tenure systems for herders should support tried and tested strategies of mobility in order for them to maintain an economically optimal stocking rate.
- Tenure systems evolved by herders should not be destroyed.
- Tenure systems must allow herders to maintain their livelihoods through access to key resources in the ranges
- There is need to rise up to the challenge of providing a framework for the orderly development of customary land law.

Options:

1. *The issue of tenure rights for herders needs a many-stranded and vigorous approach such as that displayed on HIV/AIDS, to allow for promising ideas to be tested on the ground, supported by the wider social and economic networks within pastoral areas and eventually incorporated in national policy.*
2. *The second issue is the development of customary law as the common law of African jurisdictions and the rationalization of the domain of customary land law as the primary regime of land resources held under common ownership. No real attempts have been made in new legislations to create complete land rights systems for the Commons. The mere recognition of customary land tenure per se as the Uganda Land act 1998 now does, will not satisfy this concern. Greater innovation in design of legislation will therefore be crucial if popular demands for the reconstitution of the African Commons are to be met*[9].

[9] *Okoth-Ogendo (2000)*

The second is that: "that all governments set up legal or other systems that can fairly and effectively adjudicate on current and proposed uses of land, unfair seizure of land or prevention of its use. Decision regarding the allocation of such land should be made by independent bodies and not the Executive"

- As a trend, a number of jurisdictions now recognize indigenous values and institutions as providing the only meaningful framework for social and economic livelihoods. As such, attempts have been made to recognize certain aspects of indigenous law as part of the formal legal system. These attempts, however, appear targeted only at procedural rather than substantive issues
- The resilience and persistence of indigenous values and resource management institutions presents an opportunity and a challenge for legal engineering in Africa. Opportunity now exists for a general rethinking of issues of access, control and management of land, as part of the general process of policy reform now taking place in the region

Options:

Whether regarded as "law" or not, indigenous norms and structures, particularly in respect of land relations, continue to operate as sets of social and cultural facts which provide an environment for the operation of state law. As "facts" in the sense, that they are not without important juridical implications, where they are at variance with state law, its implementation will be frustrated.

To the donors, *Markakis* recommends that; "they fully support new and existing mechanisms that can fairly determine pastoralists' rights to use land and compensate them for the past interference with this right"

- The growing knowledge on pastoral land tenure and management systems combined with the new climate of political liberalism, decentralization of power and participatory approaches should be harnessed to pursue systems, which support pastoral tenure rights.
- We need to move away from technical solutions to social and economic issues by building consensus between land resource users and stakeholders in the ranges.
- It is recognized that the privatization model neither provides equity nor efficiency for pastoralist in uncertain environments in terms of livelihoods and sustainable management of resources. Besides pastoralist are unlikely to be able to assert rights to communal land in the face of privatization, unless there is a shift in power relations.

Options:

1. *Donors should push for formal recognition of sustainable pastoral land-use as constituting a development initiative that they ought to promote to enable it be considered at par with cultivation*
2. *Historically, the most glamorous path of access to land has been through state-managed coercive land reform, though this is not a dominant way to access land by current users, however events aside, thus might increasingly become the case for pastoral land rights*

To the rest of us, *Markakis* says, "a regional approach addressing the root causes of conflict involving pastoralists should, in particular address issues of use of land and resources and participation in government".

- Overtime, conflicts over land involving pastoralist have become acute.
- Conflicts emanating from crossing international borders and practices such as cattle rustling create insecurity in pastoral areas.
- Government approach to land use conflicts has been diverse (such as titling and registration schemes, or ranching) and often inappropriate in solving or reversing cases of violence, evictions etc.

Option

Any efficient system of rangeland management must recognize as the basic pastoral values and institutions as part of any development strategy[10], Understanding that the goal of pastoralist is basic survival other than commercial intents is the premise of this strategy.

CONCLUSION:

There is need to address pastoral development policy in a coordinated manner, in national development strategies and programmes.

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