Enhancing Community Voice in Land Management

COMMUNITY LAND ACT 2016
Introduction

In giving ourselves to the new constitution in 2010, Kenyans had hoped to turn a new leaf by departing from a contested, conflicted and often violence laden past - with respect to ownership, access to, and use of land - to a new dawn characterized by clear institutional mandates and responsibilities, robust participatory decision making and accountability frameworks, and clear and prompt modalities for conflict and grievance resolution. To a large extent, this promise of a new dawn, appears to be an illusion and mirage as yet, for most poor-rural Kenyan communities who primarily depend on land for their basic survival.

The goals of the land sector targeted reforms were to promote constitutionalism, institutionalism and rule of law in the sector, enhance citizen agency in land matters, address historical land related injustices, neutralize the very high premium placed on individual and private ownership of land (often at the expense of communal tenure), and address the over-bearing power of the executive arm of government in the allocation of land rights. These factors are at the core of the often cut-throat competition over access to and ownership of land observed in the land sector and partly attributed to the post-election violence of 2007.

The land question(s) was therefore to be addressed through new policies and legislations meant to provide clarity on institutional and administrative arrangements across all levels - community, sub-county, county and national. To begin with, the Constitution of Kenya 2010 provides clear broad categorization of land ownership arrangements under - public, private and communal – and the overarching principles to guide citizens and public officials in dealing with such lands.

Subsequently, following the adoption of the new constitution, new enabling legislation were to be put in place to give meaning and effect to the principles and provision of the constitution and address prevailing policy gaps in existing legislations. Virtually all pre-existing land related legislations prior to adoption of the new constitution in 2010 were repealed and/or redrafted to ensure conformity to the constitutional provisions.

The focus and concern of this pamphlet, is the question of community land and the emerging legislations for its management and administration. It is one thing having good policies and laws in-place, but is yet another ensuring their effective application, especially through citizen driven demands for timely and effective application arising out of their awareness.
The question of Community Land with respect to security of tenure, fairness and equity in distribution/allocation of land rights including dispute resolution, was at the heart of the political campaigns of the first general elections under the new constitution in 2013. Both sides of the political divide had their own proposed solutions – with one camp proposing to privatize all communally held land, as in their perspective; collective ownership was/is the major problem bedeviling the land sector.

Under the previous legislative order, community land was either managed as Trustlands under the Trust land Act cap 288, held in trust by the defunct County Councils or as group ranches, under the Group land representative Act cap 287.

Security of land tenure under communal and or trustee ownerships has been a rather problematic one. Concerns have ranged from abuse of Trust by both the Trustee and group ranch officials, to a rendering of local land owners voiceless/ agency-less in the management of the land and associated natural resources.

In Narok County for example, community land under Trusteeship of the former County Council and now Narok County government has been grabbed left-right and center. The unresolved cases of Kamorora ranch (26,993.0 Ha) annexed out of the larger sections of community land; Olkiombo land (4,000 acres) annexed out of the larger Maasai Mara Game Reserve, a Trustland and the Maasai Mau Forest section land area of at least 104,000 ha has been grabbed from the community to mention but a few Trustland related cases.

Community land under the Group ranches arrangement has not been spared the land-grab craze either. The close to a total of sixty group ranches in Narok County, majority of which have since been subdivided, privatized, fenced with subsequent land sales, has witnessed untold experiences of land dispossessions, conflict and a litany of legal suits that remains unresolved to-date. The on-going land rights struggle in Majimoto group ranch in which at least 2000 acres of community land, including hospital, schools, church, and public waterpoints grounds have been grabbed by ranch officials, is a classical case to watch.

While the group ranch communal land ownership arrangement was one of the most participatory decision making arrangement on paper, in practice the opposite was the norm. Ranch officials often capitalized on the high level of illiteracy and low level of awareness on the provisions of the law amongst ranch members to stifle their voice and interests in decision making, ultimately resulting in untold violations of members’ land rights. This must not be allowed to happen under the new dispensation. The current group ranches will now be managed under the new community land Act 2016.
The New Era

The Community Land Act 2016

The community Land Act 2016 provides for the recognition, protection and registration of community land rights; including its management and administration and guidance on the role of county governments in unregistered community land.

The act defines community as a consciously distinct and organized group of users of community land who are citizens of Kenya and share common ancestry, similar culture or unique mode of livelihood; ethnicity and geographical space.

Key stages of Registering the Community, and its Land

i. Registration of Communities

- Members elect a Community Land Management Committee in the presence of a Community land registrar and county representative.
- The committee comes up with a name, register of members, rules and regulations including minutes and forward to the registrar.
- A comprehensive register of communal interest holders is prepared by the committee.

ii. Registration of Community land

- Registration of Community land is initiated by the Cabinet Secretary lands in consultation with county government and community members.
- A 60 days public notice of intention to survey, demarcate and register community land is issued by CS detailing community of interest, area of land inviting all interested persons
- The resulting cadastral map indicating public utility parcels is submitted to the Registrar.
- The register of community includes Name of registered community, cadastral map, Register of members and use of the land.

Key Principles Recognized under Community Land

i. Customary ownership of land under Customary law is recognized

Under the new law, customary ownership of land is recognized and given the same force and effect in law as leasehold and private/freehold land tenure systems. And, as such cannot be compulsorily acquired without negotiated, prompt and just compensation.
Community tenure systems and customary land rights are defined, right of occupancy and use is recognized and provisions made for its registration and respect. The customs and practices of pastoral communities relating to land shall also be taken into consideration by a registered community, including livestock mobility in times of drought. Provision is made for registration of members of a community as family, clan association, and or cooperative society. Community members can apply to the registered community for customary right of occupancy, in which case a certificate of customary right of use and occupancy can be issued.

ii. The role of County Governments

County governments retain the role of trustees for unregistered community land, such as the Maasai Mau and Enoosupikia forests, and Maasai Mara amongst others in the case of Narok County. Important to note, is requirement that, the county government not to deal nor transact on community lands under its trusteeship and the requirement to transfer it in its entirety to the registered community at the earliest opportunity upon registration.

In addition, where for whatever reason, land is taken away from communities through negotiated arrangements, the County governments are required by law to hold such monies for compensation.

iii. Community Participation

- The processes of defining community of interests and associated land rights is designed to be participatory and community-owned and driven, with access to records guaranteed at all stages.
- Community retain the right to set aside land for special purposes e.g. cultural and heritage sites and community conservation
- Community land rights are strongly safeguarded as only, 2/3 of all registered members can dispose/alienate land.
- A registered community title grants that community absolute title of that land
- The registered community has right to put in place land use plans in consultation with county government taking into consideration conservation, environmental, heritage concerns endorsed by 2/3 of registered members. This includes the right to set aside special purposes areas such as access and rights of way, cultural and religious sites.
- Leases on community land will be between the community and lessee and cancelled only by the community.
iv. Inclusivity and Equity

- The principles of equality and non-discrimination are guaranteed in the community land law. Every member of the community has the right to equal benefit from community land - Women, men, youth, minority, persons with disabilities and marginalized groups. Every man or woman married to a member of the community shall gain automatic membership of the community; until divorce and remarry.

v. Nature of Community Land Title and conversions

- A registered community title grants that community absolute title of that land as proprietor and the title shall be held on behalf of the community and will remain free from all other interests and claims whatsoever. Only questioned if acquired through fraud or misrepresentation, illegally, un-procedurally or through a corrupt scheme.

- Community land is convertible to other land use categories so long as it’s approved by 2/3 of the registered members.

- Community resources to be managed in a sustainable, transparent and accountable manner.

vi. Benefit Sharing arrangements

- Benefit sharing arrangements are to be enabled through free, open consultative processes, incorporating social & environmental safeguards and capacity building of community members.

vii. Dispute Resolution and Grievance Redress

- Alternative dispute resolution approaches are emphasized & prioritized.

- Internal dispute resolution mechanism is the first option/step.

- The courts are encouraged to respect resolutions made under customary law, so long as they are not repugnant to justice and morality and inconsistent with the constitution.

- Informal mediation with design for how a settlement agreement will be reached, with a mutually agreed mediator with responsibility to convene, guide/facilitate and document the outcome are encouraged.

- Dispute may be referred to Arbitration as per law.

- Judicial proceedings are presented as options of the last resort.
Limitations

• National governments shall have power to regulate the use of any land, right over land as per art. 66 of the constitution: Also subject to national and county government laws and policies related to land and natural resources;

• The culture of each community shall be recognized in accordance with Article 11(1) of the Constitution in the exercise of community land rights. How does this provision be applied in the context of cultural practices discriminating against women?

Looking ahead...

• Deliberate efforts to create awareness and build capacity of communities presently under group ranches and unregistered or trust community land is critical to ensure effective and full participation to safeguard land rights

• County governments need to familiarize themselves with the new legislation, their powers and that of communities

• Community members still holding their land communally need to be on the lookout for the notices from the Cabinet secretary Lands for registration, in order be better prepared to establish strong Community land management committee

• Efforts must be made by community land owners, national and county governments to avoid the bad experiences of group ranches and trustlands in which land owners had their voice extinguished