Brief §3

Community Property in Kenya

Liz Alden Wily[1]

June 2018

Main messages

1. **Kenya's new land laws are among the most supportive of community property on the continent. Nevertheless, implementation hovers on a precipice.** Political will to enable and ensure uptake is weak.

2. **While primarily progressive and empowering, the law is also constraining.** The potential for wrongful but legal dispossession continues to exist.

3. **Kenya is one of few African states to provide for redress for historical land injustices, including through restitution**. This is in addition to acknowledging presently possessed community lands as lawfully held property. In practice, no community has seen restitution or other redress and the legal window is closing.

4. **Land rights are a chronically contentious and periodically violent issue in Kenya**. This is likely to remain the case until a significant area of community lands are formally identified and registered, a sufficient number of viable restitution claims to demonstrate good faith, changes made to compulsory acquisition for infrastructure, mining, conservation, etc. to make it fairer to communities losing woodlands, rangelands and waters, and allocations in settlement schemes fairer in terms of ensuring maximum inclusion of beneficiaries customarily owning scheme lands. There is also increasing frustration that court rulings affecting their land rights are not being implemented.

5. **Governance provisions in the law do not ensure inclusive decision-making.** Multiple negatives lessons on this from group ranches on this have not been learned.

6. **Collective entitlement is a more modern, useful, and applicable form of property in Kenya than is yet grasped.** Its present main focus is on pastoral arid and semi-land lands, and where collective property is also ideal for securing fragile dry resources. It is also useful for regularizing slum occupancy, where plots are too tiny and rights too multiple over shared areas to make individual titling practical. By 2050, 50 million Kenyans will be either slum dwellers or rural community landholders, even more urgently seeking secure tenure than presently. As in many other African countries, collective tenure is likely to be the dominant tenure construct in Kenya by century-end.

[1] Tenure & Natural Resources Governance Specialist:lizaldenwily@gmail.com

1 A background on community property in Kenya

1. Customary norms underwrite community-based land tenure and management today.

Kenya's law does not define community lands a solely on the basis of tradition. Nevertheless most rural communities govern their lands on the basis of custom, appropriately amending norms and practices as need requires. In the rural sphere, it is appropriate to use the terms customary and community lands interchangeably.

2. Community lands in Kenya have a similar history of legal treatment as imposed in other Anglophone colonies.

Customary rights to land in Kenya were not abolished during the colonial and post-colonial eras, but denied recognition as property.[1] They were legally acknowledged as merely occupation and use rights, and existing at the will of the State. This ownership was further undermined until Independence by declaration of Kenya as Crown Land from which allocations were derivative, not absolute, in the form of English freehold, leasehold and native rights. While freehold has taken on effect as absolute interests, majority customary rights were not significantly liberated until 2010.

The framework for native occupancy was Native Reserves (later Trust Lands), 24 of which were placed under the trust of appointed boards by 1930. By 1938 the colonial Governor was required to consult with these bodies prior to issuing leases from these lands to non-natives. The framework for freehold tenure was Government Land, declared to cover all land outside the Native Reserves. Communities whose ancestral lands were located within Government Land were by 1940 even less protected than Trust Land occupants and easily evicted.

Settlement schemes around and after Independence helped some Kenyans regain lands, but in areas often traditionally owned by other communities before them, and who were not equitable beneficiaries. In addition, well-off Kenyans benefitted from special schemes and opportunities for further land accumulation, consolidating bitter and ethically slanted inequities.

3. Contested land rights have been a source of civil conflict for decades.

Compulsory individualization of fertile lands from 1959 into the 1990s systematically abolished family tenure along with community-based norms and jurisdiction – at least in law, conflicted customary and statutory inheritance norms quickly clogging up the courts.[2] Individualized titling also enabled Government to co-opt the shared off-farm lands of communities, adding another source of resentment.[3] Centralized decision-making over Trust Lands from the 1960s, including wilful reallocations to non-state interests, often contrary to requirement to act in the interest of customary occupants, produced more losses and grievance.[4] Settlement schemes continued to take both presumed unowned public land and Trust Lands.[5] Displaced groups in the Rift Valley Province were politically assisted to retake lands during elections in the 1990s, with resulting violence.[6] Ignored grievances with a more complicated history grew along the Kenyan coast.[7] As wildlife and forest reserves within Government Lands expanded, including into Trust Lands, justified as essential for conservation, occupation and use by forest and pastoral communities was more forcefully curtailed.[8] All the above continue as issues into the present.

Independence in 1963 did not liberate customary property from its subordination. It has taken until the 2010 Constitution to do so – in law. Community land is now a formal class of landholding in Kenya. A Community Land Act, 2016 guides communities on how to secure and manage their properties.

4. Kenya made an effort in the 1960s to provide for collective tenure, from which (some) lessons have been learned.

The Land (Group Representatives) Act, 1968, provided opportunities for pastoralist to secure lands under the collective ownership of a limited group of representatives to hold the land in trust for members. In its report for 2013, the new National Land Commission reported that 549 group ranches were registered over 4.33 million ha in 16 counties.[9] It is unclear how many had by then extinguished group title. Already by the 1970s, ranch formation was politically encouraged as a stepping-stone to subdivision and private land accumulation by elites; beneficiaries regularly included influential non-members. Thousands of poorer members

were left landless. Some group members encouraged subdivision simply as a defence against sales made by their representative trustees for private profit, and whom they found it difficult to remove from office. This remains problematic.[10]

Comparable governance lessons as quickly emerged from trial establishment of a Community Land Trust model in an urban slum in Voi in the 1990s. No replication has been attempted.[11] Ensuring appropriate governance for community lands has become a priority with the new Community Land Act.

5. Legal support took several decades to come about.

How to provide legally for naturally collective resources such as rangelands and the regimes of community-based regulation that have customarily evolved around these, has clearly been on the agenda for many decades. Expectation that collective tenure would disappear within individualization failed to occur. On the contrary, as communities faced yet more challenge every decade to their rights to critical shared resources, community solidarity grew. Recognizing this as a current and future reality took time. It is 19 years since the *Njonjo Land Commission* heard submissions that individualized titling was inappropriate and unfair to citizens living in more than half the country (1999). It is 16 years since the *Constitutional Review Commission* debated community land as an essential and distinct property class (2002). It is 9 years since this became formal policy (2009) and 8 years since this was embedded in the Constitution (2010). It is also 8 years since the Constitution directed Parliament to accordingly enact a community land law, in the event achieved in only 2016.

6. The Community Land Act is not yet applied.

As of June 2018, although drafted, regulations to apply the Community Land Act, 2016 remain unapproved. The Community Land Registrar has not been appointed. No community property has been registered. Neither national nor county governments have budgeted sufficiently to assist communities formalize ownership of their lands. Encroachments, takings for new protected areas to be owned by the State, and infrastructural and commercial developments continue to be planned without community participation.[12] The National Land Commission has received over 100 submissions for redress of historical land injustices. The timeline for submission and redress is disputed.[13] Despite decentralization to numerous locations, the new Land and Environment Court system (2011) has a massive backlog of petitions to consider.[14] Communities are among petitioners. Failing to secure rulings or implementation of important rulings, some have turned to regional courts.[15]

There is less concern with the content of the law at this point than with the failure to enable its uptake

7. Community property is the largest class of property by area.

It is known that customary lands shrank steadily over the 20th century and into the present. It is not known by how much. Published information often still relies on data compiled in 1995.[16] AT that time, Trust Lands officially still covered 80% of the country. However, government admitted that state agencies or private title holders occupied 20% of this area, making 37 million ha or 64% of the total country area, the more accurate figure. Government has failed to produce new figures for Trust Land in the last decade. Community lands may not cover much more than half of Kenya's total area today.

8. Additional community lands are claimed but not acknowledged by Government.

There are additional lands outside trust and group ranch lands claimed as community land but also claimed by the State as public assets. Most concern lands gazetted as forest and wildlife reserves. Forest dweller communities have been particular active since the 1990s in claiming ancestral forestlands which they continue to occupy, and for which they now enjoy constitutional support, but no delivery. Affected forests cover more than half a million hectares.[17] Nor are abandoned private lands yet being returned to community tenure, despite their historical possession and long-sustained claims.[18]

9. Most community lands are pastoral lands.

Trust lands and group ranches are mainly located in arid and semi-arid Kenya, in the north and east of the country. Pastoral tenure is complex; all land is communal. Each clan has primary rights over certain lands, shares other areas with other clans, and customarily exercises transit, grazing and watering rights in yet other areas. Emergency pasture access during

droughts is an additional feature of pastoral tenure. While historically treated as 'wastelands' of little consequence to other than pastoralists, the commercial value of these lands has soared in recent decades as mega-networks are developed in arid zones, wind, oil, hydrocarbon, mineral, water and other assets surveyed and exploited, herd sizes dramatically increased as elites invest remotely in tax-free livestock, pressures from Ethiopia and Somalia rise with drought and expansions, and as extraordinarily well-funded internationally-backed wildlife conservation efforts stumble in community relations, including pursuing armed policing strategies alleged to seriously divide communities.[19] Unpacking the nuances of pastoral tenure and securing their lands has become an urgent concern for affected communities.

10. Up to 8 million Kenyans presently hold land under community tenure.

It is not known how many Kenyans hold land under community/customary tenure is unknown. No county government has yet presented although it is required to do so by the Community Land Act, 2016. The main category of community lands is trust land and these are mostly found in 21 of 47 counties. Possibly 8 million Kenyans are community landholders, up to 5 million of who are pastoralists. This figure is conservative. Unknown numbers of family members working in towns also have interests in community lands. Moreover, figures will rise. The present rural population of Kenya is 37.4 million people (2018), anticipated to reach 53 million people in 2050. Community landholders could easily number 11 million people in 2050.

11. Tenure security through collective entitlement is relevant in city slums.

Slum dwellers possess tiny parcels not easily regularized and protected by individual entitlement. Community-based norms regularly operate in slum neighbourhoods, as ration mechanism for local order in occupancy and often structured upon norms brought from rural home areas.[20] Community title holds high potential for regularization of long-term occupancy and governance of occupation and use, and plans to test this exist. If taken up, this will help entrench recognition of community-based tenure and governance as appropriate to the 21st century. Rural community land security should benefit from reduced pressure to subdivide communal assets. The potential reach of collective tenure in the urban sector alone could be substantial; slum dwellers already number 7 million in Kenya and are anticipated to number 20 million in Kenya by 2050.[21]

12. Internal pressures on community land rights cannot be discounted as an impediment to majority community land security.

Not all stresses and limitations upon community land security derive from State or external actors. Unlike customary communities in a number of other African countries, Kenyan communities do not noticeably suffer from 'chiefly land capture'; this is a syndrome seen in a number of other countries where laws have so significantly protected the prerogative of traditional authorities, now appointed or otherwise, and enabling them over time to reframe their roles as less trustees of their communities' lands than owners, including rights to freely allocate unfarmed land with minimum consultation and maximum personal profit.[22] Yet some Kenyan customary communities visibly do suffer from elite capture and experience difficulty regulating actions of leaders, appointed or elected, as touched upon in regard to group ranches.

13. While community lands in Kenya are now endowed with legal recognition as properties, they remain vulnerable to involuntary losses.

Other sources of vulnerability need note. One is the absence of demarcation of each community's land on the ground, enabling competing State-community claims to abound. There is insufficient popular recognition that community lands already constitute a lawful and major landholding class, leaving unregistered properties more vulnerable that the law intends. The law itself has contradictions needing resolve, as outlined in Section 4.

3 Positive legal support for community property

1. *Community property enjoys direct constitutional support.*

Only a dozen or so African Constitutions directly support community property (Brief §2). Constitutional support is important, as these supreme laws are less easy to amend than

subject laws. Citizens in the 21st century generally participate in making Constitutions. They are more aware of their contents. Article 61 of Kenya's Constitution (2010) declares that -

> *(1) All land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals*
> *(2) Land in Kenya in classified as public, community or private.*

Implications of the above, and their elaboration in other laws follows, with most reference to the Land Act, 2012 and the Community Land Act, 2016.[23]

2. Community land are recognized as existing, especially those that are customary, given explicit statement of the equal protection of customary, private and public rights.

This needs stating in light of the long history of subordination of customary property. The Constitution uses the term 'belongs to'. Community lands have the protection granted to private and public property. Section 5 in the Land Act is precise, focusing on customary tenure. It states that customary rights have the same legal force and effect as freehold and leasehold rights. The Constitution (Article 2) establishes customary law as lawful, provided its rules are not consistent with the Constitution. Customary law prominently includes customary land rules and practices.

In practice, community lands defined by new groups including in towns will need formalization in order to be equitably protected.

3. Government ownership has technically disappeared.

Government Land has been replaced by national property belonging to all citizens in common (public land), or by the population of a county in common in some cases. The make-up of public land is listed in Article 62 of the Constitution. The legal demise of Government as a major landowner rightly does not remove does popular presumption that nothing but the name has changed; this is because public land is to be formally vested in the national or county governments in trust for the national or county community. The government is de facto owner. Nevertheless, the altered status does raise opportunities for communities to challenge overreach of landlordism.

4. The law recognizes that community lands are only exceptionally registered.

Group ranches are the only sub-sector of the community land class that are registered, although indirectly, in the name of representatives only. County governments are retained as trustees of former trust lands on behalf of community owners, with new limitations. Their role lasts only until a community has secured registration of its property. In the interim, the county is constitutionally forbidden to dispose of community properties it holds in trust. This ends (at least on paper) the long history of disposal of community lands at will.

Trust Land no longer exists. The Trust Land Act has been repealed. Former trust lands are now community lands, owned by communities.

5. Titling of each community's land is voluntary. This reinforces the fact that community property already exists, and that registration is confirmation – that is, registration does not create *the property, it registers its existence*.

Formalization is nevertheless strongly encouraged. Part of the Community Land Act is devoted to the procedure, elaborated in (draft) Regulations. This emphasis on formalization acknowledges that properties are more secure these days if they are physically identified, surveyed and registered. Communities also need this process to remove overlaps, unpack complicated arrangements in a manner that can be agreed, and to protect their lands from casual assumption by government actors that certain areas are public property because of their use or land type.

6. The law does not prescribe the number of members or area of a community's land.

In theory, a county population could secure the county land as a single community property. There is also nothing to stop a community property crossing administrative boundaries, important for pastoral clans who complain that administrative boundaries are inconsistent with traditional territories. As observed earlier, an urban community may secure community title. The common element of all community lands is simply that defined land area is owned in common by a defined group of citizens.

7. Title over a community property is vested in the community in common.

The community need not create a legal entity to hold title on its behalf or rely on a trustee. Draft regulations under the Community Land Act suggest the community will first register itself through a simple procedure including naming its members, upon which it becomes a juristic person. It may then apply for collective title. This provision is firmly in line with both avoiding trustee situations, demonstrably easily abused by government and group ranch representatives, and ensuring constitutional provision that land is directly vested in the community in common is executed.

8. International law and ratified treaties and conventions are also part of Kenyan law.

This is established by the Constitution (Article 2). Expanding interpretations on property articles in the Universal Declaration of Human Rights (1948) and the African Charter on Human and Peoples Rights (1986) enable customary properties to be better included. Courts in Kenya are not hesitating to refer to international law in supportive rulings.

9. The Community Land Act nests private interests in community land well.

A century of legal preference that property exists only if owned individually or corporately means this is still the default in dominant political and economic positions in Kenya. It will take time for growth strategies based on collective ownership of shared resources such as forests and rangelands to evolve. It will also take time for widening global reality that collective property is not practically or fairly the sole prerogative of governments to be absorbed.

It is helpful to acceptance of collective property among citizens that the Community Land Act establish that a community may distinguish between parts collectively owned lands and privately possessed areas within the community property. The law provides for the latter to be allocated by communities and registered should families so wish, under inheritable rights of occupancy. Depending upon the rules that a community makes, these rights may be disposable by sale, although ownership of the land itself remains with the community. This is in line with dominant customary practices. An individual farmer and house owner is thus both a co-owner of the land with other community members and has exclusive rights to occupy and use a particular part of that land. This arrangement should lessen pressure to extinguish communal ownership as the only means until recently to secure private rights.

10. Formal subdivision of titled community land is provided for.

Despite the above (or aided by the above) removal of family lands from the community property may be anticipated in the medium to longer term, especially in farming communities where essentially shared off-farm resources are scarce. The Community Land Act allows such partition. This can provide win-win balance for private and collective interests; communities have a clear opportunity to retain traditionally communal lands under collective ownership and jurisdiction. Among pastoral and hunter-gatherer communities these assets are the most important. Forest, rangeland and seasonal wetlands are generally not considered productively subdivided. This is not necessarily the case for permanent village homes and farms within the community domain.

11. Inclusive community governance of community lands is stipulated.

The adult members of the community are the ultimate land authority through decisions they make in an annual Community Assembly. The assembly elects a Community Land Management Committee to execute management on their behalf. Drawbacks in the prescribed governance of community lands are listed in Section 4.

12. Community property lawfully may include valuable natural resource areas.

This is implied in instruction to communities by the Community Land Act to conserve natural resources for the benefit of the whole community including future generations. Legal contraindications are listed later.

13. Community landowners may enter into agreements with investors for the use or development of part or all of their lands.

They may reject offers and set conditions, including issuing leases as owners. This should reduce the knee-jerk reaction of governments to acquire community lands for onward profitable sale or least to investors.

14. The law supports community land security through other means.

Communities enjoy the same rights to freedom of information, fair administrative action, and other rights enjoyed by individuals. Devolution to county governments brings community voices and representation closer to decision-makers. Laws on infrastructural development, and resource exploitation are also looking more to popular consultation with communities in planning. Benefit sharing is obligatory. Communities are as eligible as individuals for equitable compensation where they occupy land in good faith without title, although a major limitation discussed later applies. Such general provisions, and there are many more, will help communities overcome contradictory or too narrow interpretations of the law's intentions.

15. Supportive non-legal conditions also exist.

These will come into play as Kenyan communities break new ground in asserting their legal rights to their lands. *Inter alia*, they include:

- Global recognition that community property interests exist and are viable (Brief § 1)
- Comparable surge in awareness and recognition in Africa (Brief § 2);
- Established legal support for community property in immediately neighbouring countries, most notably in Tanzania;
- Strengthening separation from the executive and judiciary, and
  - among communities themselves, awareness that –

a. More than their lands are at stake, that the loss of these spells loss of identity, norms, social support and organizational frameworks;
b. Values and therefore competition for unfarmed lands are rising sharply, and tenure strategies that include these are essential;
c. They no longer have the luxury to revile registration and no longer the need; with collective entitlement fully provided for, they can root possession in ways which officials and outsiders are more easily bound to accept;
d. Solidarity among communities to ensure application of fair property law will be needed; and that -
e. Communities already hold a key to secure tenure in their existence and a basis for future workability: 'community' does not need to be recreated or engineered. A ready-made set of connections, shared interest, and social security can be built upon.

4 Legal provisions undermining community land security

As shown above, Kenya ranks highly in legal provision for community property. Still, no law is perfect. Main limitations are listed below.

1. Overlap among public and community land is insufficiently avoided in the law.

This poses the greatest threat to community land security. It stems from –

a. the absence of physical demarcation between public and community lands, enabling overlapping government and community claims to flourish over decades; and

b. inadequate legal protection of community interests in the adjudication of their properties at registration, too open-ended classification of public lands, and national policy (e.g. *Vision 2030*) which prioritises privatised land investment for commercial development, already interfering with customary/community properties in some parts of the country.

Legal sources of the above derive from –

a. Open-ended possibility in the Constitution and the Land Act that new categories of public land may be declared, indicated in the latter as likely to include lands needed for investment, and virtually any land with an environmental function or value, even where this is essential to community livelihood;[24]

b. Provision by the Community Land Act for either a local or national government to determine that any community land under public use, or of unspecified potential public use. Be excluded from lands that may be titled formally to the community;[25]

c. Absence of provision in the law for public lands to be vested not only in agencies of state but in communities where these fall within their properties and may easily be made subject of conservation or other use orders; and

d. Contradictions in the legal status of protected areas in the Constitution, and which has already been adopted into the Forest Conservation and Management Act, depriving communities of rightful possession of forest lands held ancestrally and presently by forest communities (see section 5).

2. The law is not clear enough that community property already exists although unregistered.

For lawyers, the law is clear that community lands are property.[26] For officialdom and lay readers clearly should have been made more explicit. This is because, administrative interpretation continues to assume that property does not and cannot exist until the parcel is formally identified, surveyed and registered. This leaves communities in a vulnerable position, particularly as government's commitment to facilitate rapid formalization is not yet tangible.

3. Devolution of land administration is too limited to serve citizen and community interests.

Too much depends on the political will of the Cabinet Secretary for mobilizing, funding and staffing formal identification and registration of community properties. Unlike the health and agriculture sectors, land policy and administration are not devolved to county governments, and despite their trustee status over community lands.

4. Legal stipulation for trustee administration of unregistered community properties is opaque.

The Constitution forbids counties to dispose or otherwise use community lands under their trust – until legislation specifies the nature and extent of the rights of members of each community individually and collectively (Article 63 (4)). The Community Land Act is that law but fails to be precise on the scope or limits of county rights, especially in reference to lands it believes should be classified as public lands. County land use planning and zoning including for investment zones could further de-secure community property rights.

5. Good governance is undermined by weak requirements.

This is most apparent in quorum provisions, for otherwise positive establishment of adult members constituting an ultimate decision-making body as a Community Assembly. By virtue of section 36 (3) in the Community Land Act, the approval of only 40% of members is needed, for example, to issue a lease over the land to an investor. The balance of authority between the elected Community Land Management Committee and the Assembly is also skewed in draft regulations, such as by the Assembly only required to meet once every 15 months, but as of June 2018, the Regulations have not been approved.

6. The timeframe for hearing submissions for redress of historical injustices is unjust.

The procedure for hearing historical injustices is laid out in Amendment to the National Land Commission Act, 2012 in 2016. This specified that the provision would stand repealed *within* ten years (2022), impliedly including determination and application of remedies. In addition, the five-year period within which the National Land Commission must review all grants or dispositions of public land to establish their propriety or legality, ended in May 2018. Many historical land injustices endured by communities concern re-designation of their land as public property.

7. Communities may not receive compensation for their lands at compulsory acquisition.

Payment of compensation when government proposes to buy community lands for public purposes is firmly based on the market value and improvements to the land. Many community lands are purposely not developed in order to retain their natural values: forests, woodlands, rangelands, marshlands, riverine areas, etc. The Land (Assessment of Just Compensation)

Rules of 2017 fails to account for this. The Land Value Index Laws (Amendment) Bill, 2018, proposes to reinforce this. The Bill defines its priority as to '... ease acquisition to land to successfully implement pubic infrastructure projects and to signal Kenya's quality in ease of doing business' (Memorandum of Objects).

8. There are no penalties for failure of state actors to apply the Community Land Act.

The Community Land Act, 2016 helpfully requires the Cabinet Secretary to develop and conclude adjudication within three years of the enactment of this Act (section 46 (6)); i.e. by September 2019. Having not even begun, this is not going to occur. A legal extension of years is inevitable, and is likely to be re-extended at will. This increases vulnerability in the interim, such as through already active declaration of new national forest reserves from their lands, and with little choice other than to challenge delays in the courts, a lengthy and costly process.

5 The law and forest communities

Pastoralist and forest communities are in the frontline in demanding secure community-based tenure. This section focuses on the law as it directly impacts the former. Section 6 does similarly in respect of pastoral communities.

5.1 Positive Legal Support

There is much in Kenya's law encouraging forest dweller communities to assume their ancestral lands are now acknowledged as their property. While few in number (c. 150,000 people) their lands are large (c. 500 million ha). These are extremely valuable, especially as many are montane watersheds providing water to millions of Kenyans. [27]

The most important legal support of forest community rights is constitutional statement at Article 63 (2) (d) (ii) that "the ancestral lands and lands traditionally occupied by hunter-gatherer communities" are a category of community land. These communities are structured until the present as hunter-gatherer societies with entrenched socio-cultural and economic identity with forest environments. Special attention is also guaranteed for marginalised groups, into which category these communities fall. Provision for redress of historical land injustices is also of immediate relevance to these groups, among the first to submit claims.

All forest dweller lands were claimed by the colonial state as Government Land, partly for onward allocation to settlers, and partly, for commercial timber harvesting, later adjusted for protection of by then scarce natural forests. This history has been forcefully sustained since Independence and is contentious. This is due to the sustained loss of forest community rights, and, of more popular concern to Kenyans, the alarming degradation and loss of these same forest areas under State tenure and management, and from which the traditional owners are regularly evicted.

5.2 Constraining Law

There are also legal means through which the community property rights of Kenya's forest communities are jeopardised. These include –

1. Sustained nationalization of natural forests limits both community rights and conservation of threatened resources.

This underwrites other limitations listed below. Article 69 of the Constitution establishes environmental protection as the duty of the State and its agencies. Citizens are to assist the State, to "participate in the management, protection and conservation of the environment". They have a "duty to cooperate" with State organs. Their reward is some use of their ancestral forests, and a share in benefits gleaned by the State.

Sustained nationalization of forest tenure and governance is contrary to modern forest conservation practice around the world; these demonstrate that Governments are by no means the only, or necessarily correct agent to own and conserve fragile forests and watersheds. On the contrary, scientific studies have shown for some time that Government co-

option of valuable ecosystems is a main trigger to alarming levels of degradation (Brief § 4). Government investigations in Kenya confirm this.[28]

2. No provision is made for lands of public interest to be owned by citizens or communities in particular.

Consequent upon the above, Kenya's law adopts a narrow approach to public property in respect of natural resources. As recorded earlier, the Constitution vests all lands of ecological importance including those gazetted as forest and wildlife reserves as public property, and in turn vests these in national government (Article 62). A more modern approach is to classify publicly important lands as variously owned and ownable by government, communities and individuals, using Protection Orders for this purpose.

3. *Legal contradictions maintain a route for legal denial of forest community property rights.*

The above result in legal contradiction. While the Constitution stipulates the lands of ancestral forest communities as community land, these same lands are declared to be public property (respectively Article 62 (1) (9) and 63 (2) (d) (ii)). This has enabled the new Forest Conservation and Management Act, 2016 to retain forest dweller lands as public property, vested in the Kenya Forest Service.

4. The Cabinet Secretary is given a free hand in gazetting new public forests and without explicit requirement for public consultation.

Public consultation requirements are indicated in the Forest Conservation and Management Act, 2016 but need not be exercised in this event, according to section 31 (2)). Numerous new public forests were gazette in especially 2017, often without affected communities being aware of this.

5. Waters, and water-bearing lands are nationalized and directly controlled by national state authorities.

The Water Act, 2016 nationalized water, and creates a national agency to manage and allocate rights to water. This exacerbates insecurity of community land tenure as many of their lands encompass waters and water-bearing lands. The Environmental Management and Coordination Act as revised in 2016 is more flexible. It provides for any water-related area to be gazetted as a protected zone, without declaring this public property (section 42). Section 43 also requires that the traditional communities interests within or around a lake basin, wetland, coastal area or river basis or forest be protected interests.

6. Commercial exploitation of forested water towers is legally permitted.

Although intuitively contrary to conservation commitments, by raising opportunities for rent seeking and risks of unsustainable use, commercial exploitation by state agencies is provided for in the Wildlife Conservation and Management (Joint Management of Protected Water Towers) Regulations 2017. This contributes further to the removal of water towers from community tenure and protection.

7. Truncated devolution in forest law constrains county support for the rights of their communities.

Following from Constitution division of powers among the national and county government (Fourth Schedule), the Forest Conservation and Management Act fails endow counties with policy powers in this sector. Counties are only to implement national soil, water, and forest policies.

8. Community Forests may only be established on community lands.

A positive development in new forest law is provision for community owned and managed forests. This opportunity is denied forest communities, potentially the most active forest protectors, for as long as their ancestral lands are denied recognition as community land. Communities whose lands are acknowledged as lawfully theirs also confront contradictory provisions in above-mentioned provisions, including the right of the Cabinet Secretary to declare new public forests and the right of adjudicators to exclude existing or potential valuable lands from registration as community property in the first instance.

5.3 Summary

Overall, the state-centric approach to forest tenure and conservation is already impeding inclusive and cost-effective protection. All ancestral community forests are listed as protected public properties and community rights to reside within, use, rehabilitate and protect those properties denied. The courts have also chosen compensation over restitution as remedy for property rights where they acknowledge these exist. Communities living outside these areas, such as in former trust lands, also face the possibility of losing intact or potential forestlands to the State. They may prove reluctant to set aside areas for rehabilitation and re-afforestation, fearing this will result in legally -supporting takings of these lands. Modern, citizen-based forest rehabilitation and protection is being suppressed.

Remedy is possible through securing judicial reinterpretation of contradictory provisions, and on a case-by-case basis through petitions for alternative of boundaries of Public Forests, transfer of forests from public to community ownership, subject to protection orders, and through claims for redress of historical land injustices. Claims for fair administration where consultation has been lacking or poor, and abuse of constitutional protection of property and other rights, are also possible. While all the above is being pursued by several affected communities, costs are prohibitive and early hearings remote.

6 The law and pastoral communities

1. Pastoralist communities face all constraints already listed to delivery on their property rights.

For example, vast areas of pastoral lands have been declared national parks and reserves and where pastoral access and use is increasingly limited. A number of communities have protested, including prior to new laws. A well-known case concerns the Enderois, who eventually sought the help of the African Commission for Human and Peoples' Rights in 2003 to retrieve their land taken to create the Lake Bogoria Game Reserve. This body advised the Government of Kenya in 2010 that while designation of the area as protected could be sustained, ownership and access to the Reserve should be awarded to the Enderois. This advisory has not been implemented. This illustrates a problem afflicting many cases where the State is the respondent, application of rulings is notoriously slow to non-existent, even when these are legally binding. Other constraints more specific to pastoralists include the following.

2. Extraction and compulsory acquisition laws are inattentive to the community land rights.

Communities in the northern half of Kenya are vulnerable to extractive exploitation of their lands, resources and environments for mineral, gas, oil, water extraction along with solar and wind power developments, supporting infrastructural developments (highways, railways, ports, pipelines, international airports, dams, etc.) and creation of service centres and 'resort cities'. The LAPSSET Transport Corridor is the first of such programmes to be implemented. This is bringing pastoral and coastal communities face-to-face with legal limitations for extractive investment, investor rights, contested distinctions between public and community lands, and limited provision for compensation to be paid for rangelands where the land is acknowledged as community property. The Mining Act, 2016 has taken the lead in providing for (some) benefit sharing in new Regulations Mining (Community Development Agreement) Regulations, 2017. This does not extend to availing shares in developments to communities.

3. Restitution for pastoral lands allocated for private ranching is unlikely.

Millions of hectares of pastoral rangelands were allocated to settler ranchers and has been expanded since. Alternative redress will not relieve pastoralists of their pressing needs for pasture, already a major source of violent conflict in several counties.

4. As frontier lands with rising employment and speculative opportunities, pastoral lands are vulnerable to demands that freedom of citizens to settle anywhere in the country be applied.

This routine constitutional principle requires more regulatory nuance, to enable the equally important right of traditional landowners to determine conditions, and to protect key lands from unmanaged encroachment and claims, within reasonable bounds.

5. Law defining communities as discrete parcels does not work well for pastoral tenure.

Pastoral communities are at risk of losing rights to seasonal areas and water resources they own jointly with other communities. The complexities of pastoral tenure are not adequately attended to in the Community Land Act. A clan/ community typically owns rights to use lands that it may not own, in accordance with customary arrangements or emergency conditions (drought). Core home areas may today be defined as its property, but equal attention is required to secure access, transit, pasturing, and watering rights in other areas. While the Community Land Act provides for a registered community to grant grazing rights to non-members, it is otherwise deficient in offering pastoralists workable ways forward to unpack and secure complex arrangements. In due course, a community pastoral land law will be required.

7. Conclusion

Kenya has taken enormous strides towards majority rural land security, but delivery hovers on a precipice. The law is both empowering and constraining. The potential for continued wrongful but legal dispossession is tangible, especially by the hand of the State, and the commitment of which is proving uncertain in respect of majority land rights. Communities will need to act themselves to limit damage to their rights. They have broad support for these through a strong bill of rights including protection of property, and in circumstances where the law recognizes their tenure in these terms.

However, due to the complexities of the law, this requires working with the courts. Judicial interpretations, amendments, and community claims on grounds of unfair administrative action, abuse of protection of property, may all be duly applied as remedies. This approach is highly cost and time-consuming, sometimes taking years, and generally beyond the means of communities.

A complementary, and cheaper approach to legal and political limitations is also needed. This could focus on widening awareness of what the law says, and its implications, to embrace most if not all community landowners, each of which is affected to one degree or another by shortfalls in the law. At this point solidarity, and large-scale petitioning to policy-makers, parliamentarians and the courts, is becoming urgent.

Endnotes

[1] Prominent original analyses of colonial tenure upon which many writers have since relied upon, include: Y. Ghai & J.P. McAuslan, 1970. Public Law and Political Change in Kenya. Oxford University Press, Oxford, UK; H.W.O. Okoth-Ogendo, 1991, Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya, ACTS Press, Nairobi; C. Leo, 1984. Land and Class in Kenya. University of Toronto Press, Toronto, Canada. A. Njonjo, 1981. *The Kenyan Peasantry: A Re-Assessment*. Review of African Political Economy, No. 20, Jan-Apr1981: 27-40.

[2] Regularly reported on in annual administration of justice reports, leading eventually to establishment of a dedicate land court system by constitutional directive (2010). Also routinely reported on by the press; e.g. "How courts have handled past property disputes", Standard, 23 October 2008, available at: https://www.standardmedia.co.ke/article/1144017194/land-family-disputes-complicated-by-laws; "Land family disputes complicated by laws", Standard, 18 June 2009, available at: https://www.standardmedia.co.ke/article/1144017194/land-family-disputes-complicated-by-laws; "Dealing with property disputes", Standard, 10 June 2010, available at: https://www.standardmedia.co.ke/business/article/2000011245/dealing-with-property-disputes.

[3] On **individualized farm titling**: S.E. Migot-Adholla, F. Place, and W. Oluoch-Kosura, *Security of Tenure and Land Productivity in Kenya*, and M. Carter, K. Wiebe, and B. Blarel, *Tenure Security for Whom? Differential Effects of Land Policy in Kenya* - respectively Chapters 6 & 7 in J. W. Bruce and S. E. Migot-Adholla, 1994, Searching for Land Tenure Security in Africa (eds.), Kendall/Hunt Publishing Company, Iowa, USA; D. Hunt, 2005. *Some Outstanding Issues in the debate on External Promotion of Land Privatization*, Development Policy Review 2005, 23(2): 199-231). Coldham, S. 1978. The effect of registration of title upon customary land rights in Kenya, J. African Law, 22(2): 91 - 111.

[4] On **Progressive Takings of Community Lands**: C. Juma and J.B. Ojwang, 1996, In Land We Trust, Environment, Private Property and Constitutional Change, Initiatives Publishers, Nairobi and Zed Book London; P. D. Ndungu & 10 Others, 2004. Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land. Government of Kenya, Government Printer, Nairobi. P. Syagga, 2006, *Land Ownership and Use in Kenya: Policy Prescriptions from an Inequality Perspectives*, Chapter 8 in Readings on Inequality in Kenya: Sectoral Dynamics and Perspectives, pp. 289-344. Society for International Development, East Africa, Nairobi; P. Syagga, 2010. *Public land, historical land injustices, and the new Constitution*, Society for International Development (SID), Stockholm

[5] **On settlement schemes**: C. Leo, *Land and Class in Kenya*, University of Toronto Press, Toronto, Canada. F. Lukalo & S. Odari, 2016. *Exploring the Status of Settlement Schemes in Kenya*, Working Paper Series No. 3, National Land Commission, Nairobi. J Kamau, 2009. "How colonial land deals of the early 1960s came to haunt Kenya during the 2007 poll chaos". Afro Articles, December 30, 2009.

[6] **On inter-ethnic land conflict:** J. Wakhungu, E. Nyukuri, C. Huggins, 2008. *Land Tenure and Violent Conflict in Kenya.* ACTS, Nairobi. N. Maina, 2011, Colonial Legacy and Land Conflict in Kenya: A Case Study of the Rift Valley Province, MA Thesis, Institute of Diplomacy and International Studies, University of Nairobi, Kenya. I. Mwathane, 2010. The Contribution of Land to the Recent Violence in Kenya. Land Development and Governance Institute, Nairobi.

[7] **On coastal tenure issues**: K. Kanyinga, 1998. *Struggles of Access to land. The 'Squatter Question' in Costal Kenya*. Danish Institute for International Studies, Working Paper 98.7. Copenhagen. G. Wayumba, 2015. *A Review of Special Land Tenure Issues in Kenya*, 2005. In P. van der Molen and C. Lemmen (eds.) Secure Land Tenure: 'New Legal Frameworks and Tools', International Federation of Surveyors, Denmark, pp. 261-268.

[8] **On dispossession of forest dweller communities**: R. Blackburn, 1982. *In the land of milk and honey*. In E. B. Leacock and R. B. Lee (eds.), Politics and history in band societies, pp. 283-305. Cambridge: Cambridge University Press. J. Kamau, John, 2000. "The Ogiek: The Ongoing Destruction of a Minority Tribe in Kenya". www.ogiek.org. J. Klopp and J. Sang, 2011. *Maps, Power, and the Destruction of the Mau Forest in Kenya*. Science and Technology, Winter/Spring 2011: 125ff. EU. 2017. 'EU suspends its support for water towers project in view of reports of human rights abuses. Press Release, Brussels, 17 January 2018. Accessed at:https://www.forestpeoples.org/sites/default/files/documents/EU%20suspends%20its%20support%20for%20Water%20Towers.pdf Amnesty International, 2018. F*amilies Torn Apart Forced Eviction of Indigenous People in Embobut Forest*, *Kenya*. Amnesty International, London.

[9] National Land Commission, 2014. *Progress Report,* Nairobi, Kenya.

[10] **On group ranches**: J. Galaty, 1980. The Maasai group ranch: politics and development in an African pastoral society. American Ethnologist 9(1): 1-20. M. Rutten, 1995. *The Tragedy of Individualizing the Commons The Outcome of Subdividing the Maasai Pastoralist Group Ranches in Kajiado District, Kenya*. African Studies Centre, Leiden University. P. Ntiati, 2002. Group ranches subdivision study in Loitokitok Division of Kajiado District, Kenya. LUCID Working Paper No. 7, International Livestock Research Institute, Nairobi, Kenya. E. Mwangi, 2007. The Puzzle of Group Ranch Subdivision in Kenya's Maasailand. Development and Change 38(5): 889-910. J. Muchangi, 4 March 2016, "Maasai group ranches unease over land bill". The Star, Kenya. Accessed at: www.the-star-co.ke/news/2016/03/04/maasai-group-ranches-unease-over-land-bill_c1305652.

[11] **On urban Community Land Trusts**: E. Bassett and H. Jacobs, 1997. *Community-based tenure reform in urban Africa: the community land trust experiment in Voi, Kenya*. Land Use Policy 14 (3): 217-229, 1997; E. Bassett, 2005. *Tinkering with tenure: the community land trust experiment in Voi, Kenya.* Habitat International 29(3), 2005: 375-398.

[12] DANWATCH, 2016, A People in the Way of Progress, Copenhagen. R. Kibugi, I. Mwathane & M. Makathimo, 2016. Large Scale Land Acquisitions for Investment in Kenya, Land Development and Governance Institute, Nairobi, Kenya. L. Alden Wily, 2018. *Risks to the sanctity of community lands in Kenya. A critical assessment of new legislation with reference to forestlands*, Land Use Policy 75(2018): 661-672. Republic of Kenya in the High Court of Kenya at Nairobi Petition No. 22 of 2012 re consultation and participation of communities affected by construction of Lamu Port, Judgment May 2018 as Delivered.

[13] J. Otieno, 2017, "NLC received 111 claims of historical land injustices from 2016 – Swazuri", The Star, Kenya, 4 November 2017, available at: http://www.the-star.co.ke/news/2017/11/04/nlc-received-111-claims-of-historical-injustices-from-2016_c1664033. B. Wasuna, 2018, "Historical land disputes with NLC in limbo", The Star, Kenya, 30 May 2018, available at: Available at: https://www.the-star.co.ke/news/2018/05/30/historical-land-disoutes-with-nlc-in-limbo_c1765469. The Standard, 2018. "Opinion: National Land Commission should get its act together", 2 May 2018. Available at: https://www.standardmedia.co.ke/article/2001275286/opinion-national-land-commission-should-get-its-act-together

[14] Refer monthly listings of the Land and Environment Court at: http://kenyalaw.org/kl/index.php?id=8150

[15] For example, the positive ruling in 2014 on a case originally lodged in 1997, ordering the Government of Kenya to cancel titles to plots allocated to other than the intended Eastern Mau Ogiek, is yet to be implemented (Joseph Letuya and 21 others v Attorney General & 5 others [2014], Environment and Land Court at Nairobi, ELC Civil Suit No. 821 of 2012]. The decision of the African Commission of Human Peoples Rights in 2010 on essential restitution of lands to the Enderois pastoralists is also still to be implemented by the Government of Kenya (Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Republic of Kenya, available at: http://www.achpr.org/files/sessions/46th/comunications/276.03/achpr46_276_03_eng.pdf.

[16] Central Bureau of Statistics, 2004. Statistical Abstract. Republic of Kenya, Government Printer, 2004.

[17] L. Alden Wily, 2017. *Communities and forests in Kenya: Where are new laws taking them?* Briefing Note, June 2017, FERN. Available at: http://fern.org/Kenyabriefing

[18] For example, for one county alone, refer J. Letai, 2011. *Land Deals in Kenya: The Genesis of Land Deals in Kenya and its Implications on Pastoral Livelihoods – A Case Study of Laikipia District, 2011*. Oxfam, Nairobi. Laikipia Unity and Land Initiative, 2013. *The Abandoned Lands of Laikipia. Land Use Options Study*, Laikipia County Council, Rumuruti, Kenya. *Anonymous, 2017. Cattle* Barons, Political Violence, Land Invasions and Forced Displacement in Kenya's Laikipia County. Available at: http://theconservationimperative.com/wp-content/uploads/2017/06/CattleBarons-May2017.pdf

[19] See endnote 12 above.

[20] J. Weru, W. Wanyoike & A. di Giovanni, 2010. Confronting Complexity. Using Action-Research to Build Voice, Accountability, and Justice in Nairobi's Mukuru Informal Settlements. In The World Bank Legal Review Volume 6 Improving Delivery in Development: The Role of Voice, Social Contract, and Accountability, March 2015: 233-255. Available at: https://doi.org/10.1596/978-1-4648-0378-9_ch10.

[21] UN Habitat, 2017. *Slum Almanac. Tracking Improvements in the Lives of Slum Dwellers in Africa*, UN Habitat, Nairobi.

[22] This has been reported in Namibia, Zambia, Sierra Leone, Swaziland, Ghana and South Africa; e.g. refer: Ministry of Lands and Resettlement, 2013. *Rapid Survey of Farms in Kavango*, Government of Namibia, Windhoek. A. Hughes, A. Knox & K. Jones-Kelsey, 2011, *Customary Leaders and Conflicts of Interest over Land in Ghana,* Focus on Land in Africa, Brief. G. Mkondzoni, 2015*, 'I am a paramount chief, this land belongs to my ancestors': the reconfiguration of rural authority after Zimbabwe's land reforms,* Review of African Political Economy, 43 (2016) Issue Sup 1: Special Issue: Land, liberation and democracy: A tribute to Lionel Cliffe.

[23] Legal analysis including citation of articles and clauses is provided in L. Alden Wily, 2018, *The Community Land Act in Kenya Opportunities and Challenges for Communities*, Land 2018, 7, 12: doi.10.3390/land7010012, and L. Alden Wily, 2018. *Risks to the sanctity of community lands in Kenya. A critical assessment of new legislation with reference to forestlands*, Land Use Policy 75 (2018): 661-672.

[24] Refer Article 62 (n) of the Constitution and section 12 of the Land Act, which although referencing assets within lands already presumed to be public, references future 'investment zones', lands 'adjacent to protected areas', land with water catchment functions, natural, cultural and historical lands of value, that are, on the ground and in practice, integral to community properties, and indispensable to customary social life and economic livelihood.

[25] Section 13, 26, and 29 of the Community Land Act, 2016.

[26] As per Articles 61 and 63 of the Constitution and the Land Act, section 5, in reference to status of customary land rights.

[27] For active reporting on contemporary status of forestland rights, refer Forest Peoples Programme at: https://www.forestpeoples.org/en/resources?Publications%5B0%5D=region%3A23&Publications%5B1%5D=language%3Aen&search_api_fulltext=kenya&sort_by=search_api_relevance

[28] *Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land.* Government of Kenya, Government Printer, Nairobi. Prime Minister's Office, 2009, Report on the Mau Task Force in 2008, Government Printer, Nairobi. Government of Kenya, 2018, *First Report of the Kenya's Task Force Inquiring into Forest Resource Management and Logging*, Ministry of Environment, Nairobi.