

Kenya's Land Reform Agenda: Pastoralism within the Current Land Debate

Kenya's Community Land Bill could herald a new and improved approach to securing the rights of pastoralists to land, grazing and water. Devolving the governance of these resources to the local level could provide pastoralists with greater influence over decisions affecting their livelihoods.

Introduction

In 2010 Kenya enacted a new Constitution that led to a policy shift in the administration of land in the country. Chapter Five of the Constitution on Land and Environment lays down the different categories of land existing in the country, identified as state, private and community lands. To operationalise and strengthen this constitutional framework on land the National Constitution Implementation Commission (NCIC) in consultation with the Ministry of Lands began a process of drafting legislations to be enacted by Parliament to guide the implementation and management of each of the proposed categories of land. Seven bills were proposed for enactment, namely: the Land Bill, the Land Registration Bill, the Environment and Land Court Bill, the Kenya National Land Commission Bill, the Matrimonial Property Bill, the Private Land Bill and the Community Land

Bill. Four of these bills have since been debated and legislated as Acts of Parliament² while the others are in the process of being enacted through a process of stakeholder consultation.

This policy brief explores and argues for the enactment of a people-driven Community Land Act. The objective is to provide key observations and arguments that can help guide the process that will recognise and respect efficient management, control and use of community land. The process is informed by past practices and experiences whereby pastoralists in Kenya accessed land and natural resources through customary systems and institutions that operated largely outside the statutory legal framework of land administration. Although there were clear provisions in the Constitution and the Trust Land Act on management of trust land there appeared to be an unwritten policy on the part of government that sees community land as land that is not owned but rather is available for County Councils and other government departments to appropriate through the setting apart procedure.³ There has been no cohesive policy, legal or institutional framework supportive of the customary land tenure through which most pastoralists attain access to land and key resources. Instead,

the statutory framework for managing and administering land has been driven largely by a modernisation ethic seeking to privatise and individualise land tenure. In pastoral areas and other areas where the trust land regime applies, the form that land rights take is generally subservient or 'held in trust'. Lands held in trust are broadly regarded as being the property of Local Government Authorities. Inhabitants of these areas often find that they do not realise their legal rights to the land in question as a result of unilateral action on the part of County Councils, often in total disregard of provisions of the Constitution and the Trust Land Act.⁴

The policy brief thus points out the urgent need to shift from past practices of administration of pastoralists' lands and focus on a people-driven process that ensures adequate protection of their land through ongoing land reform processes for sustainable use, control and management now and in the future.

The history of pastoral land tenure in Kenya – an overview

The process of pastoral land tenure can be traced to the colonial government imposition of the Land Title Ordinance which provided for the crown to lay rightful claim over pastoral land. Promulgated on 13 December 1899 under Britain's Foreign Jurisdiction Act of 1890, the Ordinance gave imperial powers for disposal of 'waste' and unoccupied land in protectorates where there was no settled form of government and where land was appropriated to the local sovereign or to individuals. Subsequent legislation saw more expropriation of pastoral land for use by the imperial colonial powers. In 1901 the East Africa Order in Council Ordinance was enacted that gave powers to the Commissioner of the Protectorate to dispose of public lands. The ordinance declared all 'waste and unoccupied land' in the protectorate as

'crown land'. An amendment to the Crown Lands Ordinance of 1915 introduced the 999-year lease and redefined crown lands to include land that is occupied by native Kenyans. In 1920 the declaration of a colony over Kenya led to the appointment of a Land Tenure Commission to look into the freehold issue and particularly pastoral land that had been appropriated by the colonial government. The Native Trust Lands Ordinance of 1938 excised native lands from crown land and vested these lands in a Native Lands Trust Board. This initiated the expropriation through law of pastoral lands, even though in practice most pastoral lands continued to be utilised for customary livestock-keeping systems and were administered under customary institutions.

At independence, these native lands became trust lands, and were vested in County Councils to hold them in trust for the benefit of all persons residing thereon. Further, crown land became government land, and was vested in the President, whom the Constitution empowered to make grants or dispositions of any estates, interests or rights in or over unalienated government land.

While in theory the Trust Land Act was meant to protect pastoral interests, in practice it failed to provide adequate protection of grazing lands and access to key resources used by pastoralists. According to the post-independence Constitution,

All trust land shall vest in the county council within whose area of jurisdiction it is situated.⁵

Each county council shall hold the Trust land vested in it for the benefit of the persons ordinarily resident on that land and shall give effect to such rights, interests or other benefits in respect

of the land as may, under the African customary law for the time being in force and applicable thereto, be vested in any tribe, group, family or individual.⁶

This constitutional clause provided a legal basis for the central and local governments to appropriate land and high-value key resources in rangelands, which have been allocated to a variety of external actors, though often supported by local elite interests, for wildlife and forest conservation, private ranching, plantation farming, military training and other uses. The Trust Land Act was particularly ineffective in protecting the rights and interests of pastoralists, in spite of the fact that it was the only legal concept of tenure that was entrenched in independent Kenya's Constitution.

The post-independence Constitution further conferred far-reaching powers to Parliament and the President to alienate trust lands, thereby extinguishing rights provided under customary law. The setting aside of powers vested in the County Councils and the President have been used to expropriate high value pockets of land within trust lands and allocate these to private individuals and other groups. Though access or user rights existed on paper in the Constitution and legislations, some argue that their lack of registration or formalisation has made it easier for the government to ignore them. Security will only be achieved if these rights are given greater formal protection by establishing effective governance systems that are willing and capable of defending pastoral rights to land and key resources.

Another legislation that relates to customary land tenure is the Land (Group Representatives) Act (Cap 287) enacted in 1968. The Act advocated for security of tenure as a key instrument in promoting the development of the pastoral rangelands. It was believed that

security of tenure would reduce the pastoralists' tendency to overstock the ranges, increase their incentives to invest in range improvement and act as collateral for loans to invest in these improvements (Republic of Kenya 1974). It states that 'each member shall be deemed to share in the ownership of the group ranch in undivided shares'. It called for major changes in pastoral social and political organisation and livestock management strategies.

Underlying the law was a new approach to pastoral development. Planners and policymakers assumed that pastoralism was inherently destructive to the environment, and that this diminished the productivity of pastoral herds. The argument ran that a ranching system in which group members had rights in particular land holdings, and hence a greater interest in improved land management, would help to increase herd productivity. The Land (Group Representatives) Act under which the group ranches were created provided an element of confusion and uncertainty with regard to how land classified as group ranches can be disposed of. According to the Act, members of Group Ranch committees were to hold and manage the land and other resources on behalf of the entire group for their collective benefit. However, in reality individual members disposed of their lands without approval of the group representatives themselves (Doyo 2003). Many poorer herders were pushed to sell their plots to speculators and wealthier members of group ranches. Although the Act was touted as a mechanism for entrenching customary land rights, most group ranches were sub-divided into individual holdings within two decades, thereby undermining the intent of the Act to provide secure tenure while improving the productivity of pastoral herds.

Administration of pastoral lands was further complicated by the existence of numerous

Group Ranch Development Plan

- Adjudication of trust land into 'ranches' with freehold title deed held by groups.
- Registration of permanent members of each ranch; these members were thus to be excluded from other ranches.
- Allocation of grazing quotas to members to limit animal numbers to carrying capacity of the ranches.
- Development of shared ranch infrastructure such as water points, dips, stock handling facilities and firebreaks. Using loans members would pay user fees and be collectively responsible for loan payment.
- Members would manage their own livestock and would be able to obtain loans for purchasing breeding stock and cattle for fattening.
- A group ranch committee would be elected to manage all group ranch affairs including
 - overseeing infrastructural development and loan repayment;
 - enforcing grazing quotas and grazing management; and
 - maintaining the integrity of the group ranch boundary.
- The group ranch committee would be assisted by a hired ranch manager and the extension services.

statutes such as: Land Control Act Cap 302, Land Consolidation Act Cap 283, Land Adjudication Act (Cap 284), Land (Group Representative) Act (Cap 287), Land Dispute Tribunal Act (1990), Land Planning Act (Cap 303) and Title Act (Cap 282). Inaccurate and insufficient land records have further compounded problems of inefficiency and corruption (Republic of Kenya 2003).

Unfortunately, the opportunity provided by the Constitution and the Trust Land Act at independence for recognising and giving effect to pastoral customary land rights has been squandered by the tendency to manage trust land with little or no regard for the trust obligations envisaged in the law. Uncertainty engendered by multiple laws concerning land has made it difficult for people to protect their land. Between the Commissioner of Lands and the County Councils, trust lands have been turned into quasi-private estates of local government (KLA and RECONCILE 2004), with a complete lack of accountability for officials who misappropriate land and very little transparency

concerning the transfer of trust lands to other (private) uses. The outcome has been intensified fragmentation of pastoral lands, with many of the most valuable key resource pockets being expropriated for other land uses. This has undermined the wider functionality of pastoralist production, which depends on mobility between key resource reserves and seasonal grazing lands to support mixed-species herds, with damaging consequences for the livelihoods of a majority of pastoralists.

Pastoralism within current policy and legislative reform processes

Since 1999 there has been a paradigm shift in the policymaking and legislative processes with regard to pastoralism. Kenya has begun to recognise pastoralism and community rights over land and resources existing therein. Increasingly, national laws have included legislation that allows both collective and individual rights to land. These laws further define processes that govern the management and use of these lands

for the benefit of all individuals or communities who claim ownership and access to these lands. Both the new Constitution and the National Land Policy lay down a clear foundation and concrete guidelines for securing community land.

(i) The new Constitution

Article 63(1) in the new Constitution provides for community land which shall vest in and be held by communities identified on the basis of ethnicity, culture or similar communities of interest. This community land shall consist of land lawfully held in the name of group representatives; land transferred to specific communities under any law; land declared to be community land under an Act of Parliament; and community forests, grazing areas, ancestral lands and trust lands held by counties. Article 63(4) states: 'Community land shall not be disposed of or otherwise used except in terms of legislation specifying the nature and extent of the rights of members of each community individually and collectively.' To give effect to this Article the Constitution further instructs Parliament in Article 63(5) to enact legislation that will operationalise its implementation.

(ii) The National Land Policy

In 2009 the Government of Kenya adopted a new Land Policy, which changed the category of 'trust land' to 'community land'. This provided the demarcation of community land and the allocation of its title to a particular community group. This policy seeks to recognise the rights of communities to access resources upon which they depend. Community land boards elected by communities themselves shall be established to manage access to land. In a nod to the interests of women – whose land and resource rights were widely ignored under earlier Trust Law provisions – the policy also provides for access by secondary users such as access to water points, grazing reserves or mineral licks.

The Land Commission, according to the policy, will investigate injustices (Republic of Kenya 2010; Makau 2010; Wachira 2009) related to land appropriation and acquisitions and determine them within the framework of existing laws and legislations. The mechanisms for implementing this policy are still being put in place, so it remains to be seen how effective it will be in managing common property resources.

Chapter 3 (3.3.1) of the National Land Policy defines the different categories of land. Paragraph 63 recognises community land as land lawfully held, managed and used by a specific community as shall be defined in the Land Act. It equally provides for communities allocated land to own it in perpetuity. Paragraph 64 defines the 'wrongs' that an Act governing community land is to rectify, while paragraph 65 points out the widespread abuse of trust in the context of both the Trust Land Act (Cap 288) and the Land (Group Representatives) Act (Cap 287). Paragraph 66(d)(i) directs the Act to lay out 'a clear framework and procedures for, the recognition, protection and registration of community rights to land and land-based resources taking into account multiple interests of all land users, including women.'

Draft land legislation and pastoral land rights

Despite this recognition there remains an array of anomalies and inconsistencies in some provisions of the current proposed land bills that form the framework for implementing the constitutional provisions related to community land.

(iii) The draft Land Act 2012

The Land Act of 2012 is defined as an Act of Parliament to give effect to Article 68 of the Constitution. The Act proposes to provide for a comprehensive, harmonised, efficient and

effective legal framework for the administration and management of land to achieve efficient utilisation of land resources; equitable land delivery; promotion of sustainable forest, wildlife and mineral resource management and utilisation; and promotion of orderly and planned development of land resource and allocation of public land based on economic efficiency, equity, social justice and ecological sustainability. It also provides for equitable distribution of and access to land by all citizens and regulation of the operation of a market in land so as to ensure that rural and urban smallholders and pastoralists are not disadvantaged.

According to the National Land Policy, which actually informed the provisions in Chapter 5 of the Constitution, the Land Act is expected to provide a framework for identifying, verifying and recording genuine landless people; acquiring land for establishment of settlement schemes; planning, surveying and demarcating land in settlement schemes; and equitably and accountably allocating settlement scheme land (para. 152[b]). It should also harmonise existing modes of statutory tenure (para. 68[a]) and provide for pastoralism as a way of securing pastoralists' livelihoods and tenure to land (para. 183[b]). These requirements are not, however, addressed in the Land Act.

Review of the Land Act

The Land Act is mainly concerned with lands that are designated as public or private; it has very little to say about 'community' lands (USAID 2012: 8). The Act does not address community lands in any systematic way nor does it give reference to the Community Lands Act. The only significant reference to community lands is in Section 3(c), stating that 'this Act shall apply to ... such parts of community land as the Cabinet Secretary shall specify.' The Act does not give further detail about what this means, dropping

mention of community land almost completely from this point.

A critical analysis of this Act brings into focus observations that need to be expounded further to avoid future loopholes that might be used to expropriate land in opposition to the interests of pastoralists.

- Its provisions are vague and at times ambiguous.
- The institutional structures the Act establishes are not as clear as the CLRR model proposals. It is not clear why the Cabinet Secretary and the National Land Commission (NLC) are ascribed disparate roles. It is unclear why some powers are to be exercised by the NLC and others by the Cabinet Secretary. There is need for a sharper delineation of roles with regard to community land to avoid overlaps.
- The Land Act has implications for community land but does not elaborate how community land will be handled. For instance, there are no provisions elaborated on conversion of land from private or public to community and vice versa. This leaves community land open to alienation unless safeguards are put in place to protect it from wanton conversion to public or private land. This could mean that land on which communities have viable claims could be alienated prior to those claims being recognised.
- Section 16 of the Act also gives the NLC powers to determine rules and regulations for the sustainable conservation of land-based natural resources. These resources include those in community land (Section 16[2]). However there is no definition of customary rights in the Act, and though the Community Land Bill defines these, there is no cross-reference.

(iv) The Community Land Bill 2011

The Community Land Bill is defined as an Act of Parliament to give effect to Article 63 of the Constitution. The bill provides for the allocation, management and administration of community land and establishment of Community Land Boards; it defines the functions and powers of the Community Land Boards; and it outlines the powers of County governments in relation to unregistered community land.

The bill states that community land refers to land lawfully held, managed and used by a given community as shall be defined in the Land Act. It outlines that in order to secure community land, the government shall document and map existing forms of communal tenure, whether customary or contemporary, rural or urban, in consultation with the affected groups, and incorporate them into broad principles that will facilitate the orderly evolution of community land law.

Review of Community Land Bill

The bill has a number of key provisions that require recasting to align it with the Constitution and the National Land Policy in order to give communities full autonomy over community land and to provide for the management and ownership of this land.

- The bill is not properly focused on the recognition of customary land rights. It does not allow for the discovery of existing customary land institutions and the property rights they supply as a condition necessary for formal legal recognition. Instead it stipulates what customary rights consist of and their duration as well as prescribing what these institutions ought to be. This approach is inconsistent with accepted best practices for recognising customary land rights where community participation is required to identify and

document communities' customary institutions and rules for land holdings.

- The Bill deviates substantially from the requirements and intent of the Constitution and the National Land Policy in critical areas. These include inadequate attention to community land institutions, the Land Administration Committee, establishment of Community Land Boards and provisions for withdrawing community land.
- The creation of a Land Administration Committee attempts to supplant customary land institutions. There is lack of recognition of existing land administration bodies in communities. Recognition of these existing structures would give meaning to the principle of devolution and respect communities' right to determine their own form of governance.
- Instead of providing legal status to customary land rights as practiced in communities (the National Land Policy requirement), the bill attempts to introduce its own brand of customary rights.
- With respect to recognition and protection of community lands that are currently held as 'Trust Lands' the community land bill does not identify a legal process for resolving and establishing community ownership of these trust lands. In absence of a clear process, it is highly likely that individual private claims to these trust lands will prevail and these lands which have been used by communities for generations will be lost to private ownership.

Conclusion

The process of enacting the Community Land Act should be guided by the principle

of empowering communities to be able to make informed decisions in the ownership, management, access and use of their land. The history of appropriation of community land and related legislations – the Trust Land Act and Land (Group Representative) Act – should guide the enactment of the Community Land Act to avoid past mistakes that saw pastoralists lose land as a result of flawed legislation. Recognition of pastoral land as land that is managed under the customary system with communal user rights will help ensure fairness and involvement of pastoralists in using these lands now and for future generations.

The Community Land Bill deviates substantially from the requirements and intent of the Constitution and the National Land Policy in several ways, as outlined above. Other land legislation – the Land Act 2012 and the Land Registration Act 2012 – do not address community land rights or issues in more than a nominal way. Although the Land Act has significant implications for community land, it does not elaborate provisions for conversion of land from private or public to community, and vice versa, nor does it provide a framework for recognition, protection and management of community lands.

The challenge now is for pastoralists and their policymakers to engage in the land legislative processes to ensure that the interest of pastoralist communities are represented and articulated. Although the Constitution stipulates community rights over land and resources, in most cases such rights are not full ownership rights and may only consist of possession or user rights. The law must therefore provide for secure access for particular groups that use these lands and ensure that they are not expropriated for other uses by government or private actors without consultation and consent from the affected community.

The Constitution and the National Land Policy provide clear frameworks for securing pastoral/community land rights, access, use and ownership. It is therefore imperative that Parliamentary Acts (the Land Act, Land Registration Act and Community Land Bill) that give effects to provisions of the Constitution ensure compliance with the letter and spirit of the two foundation documents.

Recommendations for the way forward

This brief recommends that the government, and in particular the Ministry of Lands that is charged with the responsibility of drafting and presenting to Parliament for enactment legislations to operationalise provisions of the Constitution on Land, should work to align the different land bill and Acts with the Constitution and the National Land Policy. Critically, the proposed laws (Land Act, Land Registration Act and Community Land Bill) must respect and recognise existing community institutions and authorities to govern customary lands. The traditional land management and governance structures should be given due consideration within the provisions of the Acts as proposed in the Constitution and the National Land Policy. The recognition and protection of community land rights should be incorporated into the Land Act.

To secure the rights of pastoralist communities, the Government of Kenya should draw on lessons from the past and elsewhere. Specifically, this policy brief recommends that:

- The Community Land Bill and other land laws should establish mechanisms that recognise, protect and register customary land rights in a manner that treats community land rights as equal to other forms of tenure.

- Different types of community land such as Trust Lands and Group Ranches should be identified and registered.
- The process of establishing Community Land Administration Committees and Community Land Boards should give due authority to communities to elect/appoint members to these committees rather than delegating the same functions and responsibilities to the Cabinet Secretary for Lands or any other person.

⁵Constitution of Kenya, Section 115(1)

⁶Constitution of Kenya, Section 115(2)

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End notes

¹ John Letai works with Pastoralists Policy Research, Advocacy and Resource Tenure (PAPPART) and is doing research on land in Kenya in partnership with the Institute for Poverty, Land and Agrarian Studies (PLAAS) at the University of the Western Cape, South Africa under the Future Agricultures Consortium (FAC), Institute for Development Studies, University of Sussex, UK.

² The Environment and Land Bill, The Land Bill, The National Land Commission Bill and The Land Registration Bill were enacted into Acts of Parliament in 2012.

³The system whereby the government plans and allocates land for different uses, including setting up urban centres, institutions, grazing land and game reserves.

⁴KLA and RECONCILE: Policy Brief on community land tenure and the management of community land in Kenya

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