

MANAGING THE COMMONS: IS THE COMMUNITY LAND ACT A SOLUTION TO RESOURCE MANAGEMENT IN THE ASALS OF KENYA?***Joseph Oluoch Otieno**

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Abstract

Land is critical for the socio-economic development of many developing countries that depend on land and natural resources found on land. The clarity of tenure structures on how individuals own, control and access land define how such land will be used and its' benefits to the citizenry. In Kenya, land has traditionally been adjudicated and registered as private property to individual's with issuance of land titles as legal proof of ownership in most of the agricultural high potential and medium potential areas of the country. However, in areas considered as Arid and Semi-Arid Lands [ASALs], land has been held as communal land under customary laws. Given the multiplicity of claims on these lands and the resultant conflicts, government as part of land sector reforms enacted the community land act in 2016, to recognize and protect the rights of registered communities who were living in these lands. This move has implications on management of resources in these areas that are dominantly under pastoral livelihood system and where mobility and flexibility are central to the sustenance of such livelihood. This paper argues that the enactment of the Act poses many challenges including the role it assigns to county governments and the Land Management Committee of each community who are expected to manage and enter into any partnerships with investors or other stakeholders on behalf of the community. The element of exclusivity that the Act introduces may constrain access to these resources and introduce elements of competition among the community members who may be allocated land over a short period of time and want to maximize their returns within a specific period of time. Individualization and maximization efforts within the specific community land where mobility is restricted may result in the traditional tragedy of the commons scenario. There is need to have mechanisms of ensuring attention is given to equity issues within the communities, including intergenerational equity where long-term agreements with partners involving the community land and its resources as well as empowering and capacity building the LMC's tap into emerging resources such as carbon credits.

Keywords: Community Land Act, Land tenure, ASALS, Pastoralism, Resource Management.

INTRODUCTION

Land is critical to the economic, social and cultural development of any country. It is central to the attainment of economic growth, poverty reduction and gender equity. It is also a social asset, crucial for an individual and community cultural identity, political power and its' access and ownership is valued allowing one to participate in local decisions and overall development process. Land provides a place for settlements, is a basic factor of economic production and is a basis for social, cultural and religious values and practices [1]. As a country, there is need to have policies that tackle land administration and management problems to ensure sustainable economic development. The goal of any land reforms should be to have tenure systems that improve on tenure security that allows sustainable land use and enables landowners to invest in land so as to increase productivity. As noted in an earlier study by Wakhungu [2], the institutions that govern land tenure and the related property rights tends to form the foundations that lead to conflicts in many economies that are natural resource and land based as their basis of economic livelihoods. In Kenya, where agriculture is the mainstay of the economy, land is considered as a key asset in production. Land ownership and access are often equated with wealth and a higher social status among most agricultural and pastoral communities in the country. A person who owns large parcel [s] of land, even in relative terms, often commands respect within the community, a fact that tends to reinforce the concept of titling and individual ownership.

Land ownership and access therefore is not only economically important but has social value that is cherished by many people in Kenya. Tenure systems transcend economic value to include social, environmental, legal and even political spheres and has a country, Kenya has had a number of ethnic based conflicts traced to claims on land [2]. In those areas categorized as high and medium potential for agricultural purposes in Kenya, most of the land has been surveyed, adjudicated and registered in individual persons or cooperate ownership structure and titles or registration certificates have been issued as evidence of legal ownership. However, even in these areas' unclear tenure structures, multiple land control and governance legislations have led to conflicts and land disputes that often take many years to arbitrate and solve and at the end leaving members of a family or community at loggerheads. The situation in regard to land adjudication and registration tends to be different in those parts of the country that are classified as Arid and Semi-Arid Lands [ASALs], where livelihood systems tend to differ and livestock keeping under pastoralism tends to be dominant. In these areas, the land has traditionally been held as communal and often in trust by the local authority for the community. Given the cultural diversity of communities who live within the ASALs, community land ownership under customary laws and rules tends to be complex with multiple interests and claims from different members of the community, a situation that may lead to contestations and conflicts, requiring a clear structure of solving such competing interests. The research is based on the analysis of the Community Land Act of 2016, other legislation on land, the Constitution of Kenya 2010, existing policy and related documents and

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publications by non-state actors in the land sector such as Kenya Land Alliance.

Tenure in Communal Lands

Land under customary tenure has traditionally been held communally. And is often known as trust land and has been managed under the trust land Act of 1965. The Trust Land Act vested absolute rights over land in the group, while individual members of the group enjoyed the right of occupancy, mainly for subsistence purposes. They did not have the right to alienate or transfer the land to non-group members. Community and customary rights have often been undermined the courts on the basis of lacking clarity in terms of property ownership [3]. Communal ownership has often been equated with land mismanagement and the fear that the 'tragedy' of the common's scenario may set in any time in these areas. Where the community land has not been clearly demarcated, it can lead to conflicts between communities who may contest the boundaries, especially for grazing purposes and in dry periods when pasture tends to be limited. The challenge of sustainable management of the 'commons' was captured by Hardin in 1968 [4] when he argued that the commons would suffer a 'tragedy' that results from individual members of the community who try to maximize their gains or returns from a common resource until it is depleted. This tragedy would be exacerbated by increasing population that translates to greater demands on these common resources and individual livestock owners maximizing their herd sizes leading to overgrazing.

In Kenya, this perception of mismanagement of land under community ownership has been quite pronounced among policy makers who try to address resource management in the ASALs. The ASALS constitute approximately 68% of Kenya's land area and a majority of the residents rely on livestock keeping using pastoralism or free grazing systems. The ASALs are characterized by low rainfall, limited vegetation and are generally vulnerable to droughts and other environmental hazards. They account for approximately 36% of Kenya's population, over 60% of the livestock population in the country and are 'traditionally' marginalized with higher incidence of poverty [5]. The demand for land resources in the ASALs has been aggravated by the increase in population arising from natural population growth, immigration of none -pastoral people into these areas and changes in property rights, especially in regard to land ownership. The pressure on community land resources is also contributed by the issue of sedentarization of some pastoral communities, individualization and privatizing community lands by influential members of the community or elites given the perceived benefits of such ownership, the social stratification that exists within the community and a sense of being historically marginalized. In more recent times, the discovery of ground-based resources such as oil in Turkana, cement deposits in West Pokot and other mineral resources have led to further competition for control and access to these lands, The development of large-scale multipurpose infrastructure projects by the government such as Lamu Port and Lamu Southern Sudan- Ethiopia Transport corridor [LAPSSET], the Lake Turkana Wind Power, the setting aside of large tracts of land as conservancies and the emerging demand for conservation measures that can tap into emerging carbon markets have led to further contestations on ownership and appropriate compensation to local communities. The resulting competition amongst the different land users and land uses

tends to not only marginalize traditional pastoral systems and their efficiency but also lead to the creation of 'land shortage' that may result in conflicts amongst the community members and between the different communities who inhabit these areas. It can also lead to conflicts between the community as original owners and claimants to the land and external actors that include the state at the national and county levels, oil prospecting and mining companies and non-governmental organizations that promote conservation agenda.

The Kenya government's traditional policy approach before the adoption of the 2010 Constitution has been that the land and certain resources found in these ASALs or low potential agricultural areas were to be managed as trust land by the local county councils. The ASALs were considered as low potential based on agricultural productivity [crop], at times as vast 'wastelands' whose full potential and utilization would depend partly on transforming pastoralism and promoting other forms of land use including irrigation where possible. To achieve this transformation and avoid the degradation associated with community ownership of land resources in these areas, the government enacted the Trust land act that [repealed by the enactment of the community land Act of 2016] gave a legal framework to the then county council's on managing these lands and attendant resources on behalf of their local communities.

There were also efforts through the enactment of the Land Group Representative Act CAP 287, [commonly called the Group Ranches Act] in 1968 to create a framework where identified and registered members of a group ranch would manage their ranch on sound principles. These efforts to some extent have proved inadequate in meeting the goals of the country's National Land Policy [NLP] that emphasizes equity, productivity and sustainable use of land resources [6] as well as providing a framework for administration and management of land under different tenure categories in the country. The National Land Policy [NLP] has been undergoing areview since 2023 to find ways of aligning it with developments and dynamics of a changing land sector, including sound land management in the ASALs. The 2010 constitution created devolved units [county governments] and a number of independent commissions to help in decentralization of power in the management of the country's resources. Within the land sector, the constitution created the National Land Commission [NLC] under Article 67 of the Constitution [7] whose mandate includes managing public land on behalf of the national government and county government, investigate historical land injustices and making recommendations on how to solve them and encourage the application of traditional dispute resolution mechanisms in regard to land conflicts among other responsibilities. The Commission was operationalized by the enactment of the National Land Commission Act of 2012, The Land Act of 2012 and the Land Registration Act of 2012.

The Community Land Act [2016] and Its Implications on Resource Management in the ASALs

Reforms in the land sector recommended that parliament should enact a Community Land Act to guide the registration and management of community lands in such a way that the community members are not only custodians of these lands but beneficiaries of resources that abode in these lands. This recommendation should be seen to be in tandem with the general view that tenure systems tend to evolve from other

categories towards a formal and in many cases private tenure structure. In the case of community land, this privacy is conferred to the community rather than to an individual and the formalization is meant to unlock the community's potential for socio-economic development. The Community Land Act sought to give registered community members a controlling stake or say on their lands and its' management. The registration formalizes the community's ownership of the land, providing legal security and protection against encroachment or illegal land grabbing by outside entities who may be interested in the land or its resources. The Community Land Act, No. 27 of 2016 was enacted and came into operation in 2016 [8]. Its aim was to provide for the recognition, protection and registration of community land rights, the management and administration of community land. Its' enactment to some extent clarified and strengthened the role of communities in ownership, custody and management of their lands in a way that was not initially captured by previous legislation that tended to emphasize individual land ownership in the country. To operationalize the Act, the Cabinet Secretary in charge of Lands gazzetted the Community Land Regulations in 2017 under Legal Notice 279 of 2017 and they commenced operations in November 2017 [9]. The regulations specified on how the LMC's members are to be elected, their roles and that of the executive committee members, emphasized the protection of community land and gave a timeframe within which county governments were to identify unregistered community lands among other operational issues. We need to interrogate the extent to which the enactment and implementation of this Act will address the competing interest of pastoralism, food production, conservation and general maintenance of the ecosystem.

The Act specifically provides for:

- The recognition, protection and registration of community land rights;
- Management and administration of community land;
- The role of county governments in relation to unregistered community land. [8]

The enactment of the Community Land Act repealed the Land [Group Representatives] Act CAP 287 and the Trust Lands Act CAP 288 of the then laws of Kenya. In the Act, a community is defined as one that, is consciously distinct, organized, are citizens of Kenya and who have some commonality that may include common ancestry, ethnicity, culture, unique livelihood, common interest and reside in a given geographical space or ecological space. This definition, while attempting to be inclusive, can be a source of conflict., for example where commonality is defined in terms of a geographical or ecological area, members of the community may have different and even conflicting livelihoods or cultural orientations and affinity. The act recognizes that community land may be held under different tenure systems that include customary, freehold leasehold or any other tenure system that is recognized by the law [8].In recognizing customary rights which is defined under the Act as rights conferred by or derived from African customary law, customs or practices provided that such rights are not inconsistent with the Constitution or any written law. [10], it gives equal footing in legal terms with leasehold or freehold land that are in many cases more contractual and usually upheld in courts of law.

In order to exercise rights over a given parcel of land, the community that has interest on the land will apply to the

Community Land Registrar, whose mandate includes the registration, and maintenance of the community land register. Registration gives the community absolute ownership with all the rights and privileges that are attendant with such ownership. Upon the completion of the registration process, the community will be issued with a Certificate of Title as evidence that the community named is the legal proprietor of the said land. The community is required to elect at least seven and a maximize of fifteen members to constitute the Community Land Management Committee [LMC] who will manage the registered land on behalf of the community. In constituting this committee, the community is expected to pay attention to gender and other constituencies within the community for measures of inclusivity to be achieved. The 'absoluteness' in ownership in terms of land registered under the community may not differ with those rights conferred to individuals under the Land Act 2012 and may result in conflict between productivity goals of the community and sustainability and conservation goals for the long term. The community needs to have a strong sense and appreciation of conservation and sustainability goals in land management to avoid situations where its' preferred land use system after registration may pose a threat to long term sustainability so as to avoid a situation of traditional 'tragedy of the commons', this time from the community as a unit rather than the individuals within that community. As noted by Mariara [11] in regard to adoption of conservation measures, property rights and land tenure security are important considerations by land users in adopting conservation measures. Given the fragile ecological conditions of the ASALs, they tend to experience land pressure and degradation partly attributed to livestock husbandry systems that emphasize large stocks with adverse effects on the environment. The fact that the Community Land Act limits the possibility of converting community land to private land, unless ratified by the whole community assembly or members is positive as it does restrain the land management committee members from negotiating with third parties for such conversion without involving the whole community. It also tends to limit the 'profiteering' motives that is often associated with privatization of an enterprise.

The Land management committee is expected to manage the community land in an equitable manner and is obligated to ensure that there is equal access to benefits from the community land without discrimination based on gender, minority status, marginalized groups or persons living with disability. Thus, equity to members in terms of access and benefits is a core component of managing community land. It also safeguards the community interest in land by limiting the compulsory acquisition by the State unless it is in accordance with the law, and is for public purposes and expects prompt payment of just compensation in full or in a negotiated settlement. Given the competing interest on community land, especially state sponsored or sanctioned mega projects that require land acquisition and negotiations for compensation, the land management committees must not only be informed but be technically and legally equipped if they have to negotiate for a just and fair compensation on behalf of their communities if their lands have to be acquired for national projects or leased out to other enterprises. The main assumption in regard to the committee is that as local duty bearers, they will be wholly faithful to the community and its' interest and not be swayed by external forces that may have interest in the community land. This assumption assumes a high sense of integrity amongst the management committee members and a sense of

upholding community interest above personal gains or interests, a fact that is not easy to uphold given the past experiences of the group ranches where members often felt shortchanged by their management committees. As argued in the case of Oromia region in Ethiopia, institutional capacity of implementing agencies or organs is critical in achieving the goals of land law reforms, bring desirable changes to the rural communities and for sustainable land productivity [12].

One of the challenges of the Act in terms of managing the community resources is the role it assigns to the county governments. Where a given land has not been registered in the name of a given community, such land will be held in trust by the county Government on behalf of the community, akin to the former Trust Lands that were under the then County Councils. While the county is not allowed to sell, transfer, or dispose unregistered community land or even convert it into private land, the Act is not specific whether the county can enter into lease agreement with third parties or developers who may want to acquire resources from the land within a given time period. The Act requires that any such agreement that allows any form of investment on the land must address the benefits that accrue to the community such arrangements, including just compensation, capacity building and technology transfer and that such agreements will be open, free and consultative involving the community members as key stakeholders. The LMC entering into such partnership is required to not only georeferenced the area of interest and make public consultations with all stake holders but also to clearly define the investors interest and how the community stands to gain from such partnership. This assumes that both the county government and the LMC are informed and appraised in all aspects of the investment and have the general interest and welfare of the community who claim the land above other interest. Given the often mistrust and weak governance structures and poor implementation strategies that characterize state-local community interaction, tend to exist in such agreements, scrupulous county officials may give access to developers, mining companies or even conservancies under lease terms, that while not translating to the community land being privatized, may confer limited benefits to the community. Where the county government may enter it such agreements with a third party, it will inadvertently limit access to the land by the community members for the period of such a lease. There is need for sensitization of the whole community and capacity building of LMC's if they have to engage in negotiating such agreements in ways that will benefit the community and enable the community get fair, prompt and just compensation for any part of their land that may be leased to third parties.

The Act specifies that individual members ora group within the community may be allocated land within the community for a given period to use in their preferred way, for a given period of time and such individuals will not be given titles to the parcels allocated. While these restrictions are good in terms of safeguarding the community land and making individual rights to be subservient to community rights in terms of transfer to any other party, it may pose a challenge to individual members who may want to undertake long term investments on such land or seek financing from institutions for further investment on the land. The individualization of ownership within a community may lead to major challenge in regard to pastoral systems that requires on open access to grazing areas and whose management partly depends on livestock mobility

depending on pasture and water availability. Even where registration has been done in the name of the community, it has the risk of leading to a shrinkage and fragmentation of rangelands or grazing areas as well as blocking migration corridors for wildlife, if the community decides to exercise 'exclusivity' of ownership once they are registered as owners. Individualization should strive to address the often-common exclusion or marginalization of the youth and at times women in accessing and controlling land in many communities. Involving the youth in community activities and agricultural production will be central in increasing productivity and adoption of sustainable management practices as this population cohort is often more informed and open to positive changes than their parents. While registration under the community emphasizes equity in access by all the members of the community, we have to pay attention to women land rights that in many cases are subjugated under customary rules and may lead to their marginalization even if they are formally elected as members of the Land Management Committees [LMC's].The means to uphold these rights may not be clear especially in cases of divorce and the men may claim more or exclusive rights based on customary rules and regulations, a situation that may lead to marginalization or disinheritance. While the Act upholds customary land rights, including those of occupation, it does not address the social stratification that may exist in the community in terms of who has 'more' access rights that may partly be based on lineage, clan leadership or even gender. Many land reform agendas, including titling have tended to ignore the essential need for women to access and control land to enhance their socio-economic contributions in the society [12].Marginalization of women and other vulnerable groups is not anchored in formal laws but arises from customary practices and traditions that are not easy to change and cannot be changed by merely enacting legislation that promotes equality in access and ownership [14].

Resources in the ASALs in many cases require a communal recognition of land rights, where each member of the community can freely contribute to their management and derive equal benefits from the same resources. The Act requires that LMC's 'encourage' the community to observe the principles of environment and natural resources according to the principles of the Act, emphasizing sustainability in the management process. Given the shared nature of these resources, the multiplicity of users and layers of rights over the same resource, conflicts are quite common in the areas under community lands and which traditional are pastoral areas and conflict resolution measures should be an integral part of any framework, whether traditional or legal meant to guide resource management in these areas. The Act encourages the use of Alternative Dispute Resolution [ADR] mechanisms including mediation, arbitration and use of traditional dispute resolution mechanisms anchored in the community's norms and traditions in resolving disputes that may arise over the community land. In the event that ADR fails, the law provides for parties to a dispute to refer the matter to court, a process that in many cases is adversarial and ends up in a winner takes all, creating a sense of enmity amongst the community members and polarization. Resource sharing amongst the pastoral communities often transcends one 'community' as defined in the Act. For many pastoral communities, there is need to ensure access to water and pasture and enable measures to mitigate drought and other hazards, that traditionally has involved mobility of both the herders and livestock. Individualization can translate to formalization of

tenure and may result in 'individual' owners using the formal ownership documents to challenge community interest where it tends to conflict with their own interest, either in the traditional dispute resolution mechanisms or in formal courts that can lead to increased conflicts within the community. Land registered in a given community's name may limit the accessibility or change the nature of such accessibility of these resources to none members who traditionally may have had access and use of these resources and such exclusion may lead to conflicts.

Conclusion

While registration confers and protects community land rights, we should reflect on the social changes taking place in these areas that include changing livelihoods and an increasing population. The growth in the community's population will eventually result in some form of pressure on these resources and the community must develop coping strategies that may include diversification to other activities and limiting their reliance on that land in the traditional sense. We ought to interrogate the extent to which community land registration will be able to cope with these challenges without resulting in the tragedy of the commons given the ecological fragility of land in these areas. There are emerging issues such as climate change and the development of carbon credit markets and how communities and individuals within the community can undertake activities, either as a group or individuals to tap into these markets under the current framework of land registered under the community and develop fair benefit sharing mechanisms for the community members. If the LMC's have to be effective in negotiating these new territories, there will be need for sensitization, capacity building and training of the members and the wider community, especially members of the community assembly, on how the Act operates and how to bargain for a just and fair access to benefits that may arise from utilizing their land resources for activities that are meant to address or mitigate climate change over time.

The other challenge is how to increase productivity in community registered lands, either in terms of crop production and livestock productivity. Individual ownership given to members of the community should create a sense of 'tenure security' that will enable land users the leeway to invest in terms of accessing inputs, enhancing investments on their parcels and adopting livestock management systems that will lead to increased productivity. The fact that these individuals cannot be issued with titles according to the Act, makes the nature of this acquired tenure security unclear in terms of long-term investment on land. The third issue is that tenure structures that only focus on security but ignores the pastoral community's livestock keeping strategy that calls for social and spatial flexibility in accessing and utilizing these resources will not lead to sustainable land use and may result in increased conflicts in these areas. As noted by Robinson et al. [9], in dealing with tenure security in pastoral areas, there is need to incrementally recognize that there are layers of rights that have to be protected even as we focus on the security of tenure for the whole community by dividing the landscape into neat community-controlled land areas. Registration that confers an element of exclusivity in terms of access and utilization of resources in these areas may be counterproductive and be in conflict with pastoral systems that emphasize flexibility and mobility. The pastoral communities often require guaranteed access to grazing lands and water points even if these tends to fall across communities who live

within their defined 'migratory' territory, a fact that is necessary in building resilience of the systems where climatic and ecological factors are variable and often considered as harsh. To meet the needs of the majority of pastoral communities who are found in the ASALs where community land registration is being implemented, land must be defined beyond being a factor of production that can merely be appropriated and allocated but as a space for livelihoods, often conflicting livelihood systems that has survived over time due to customary and collective governance systems [15] The challenge is that legality of ownership as defined by the Act that grants title to a particular community tends to ignore the fact that resources in these areas do not only vary spatially but also temporally, often changing from one year to the other. Access and control of land in this context must not be so restrictive that it affects the sustainable management and utilization of these resources across the communities. The flexibility in access also helps in managing environmental disasters as members of a group under traditional customary system may move to seek help or refuge in other parts of the ASALs that have not been affected. Registration may limit this flexibility and exacerbate the consequences of environmental disasters. While the ASALs may be relatively unproductive in terms of crop agriculture, they normally hold invaluable natural resources whose tapping or exploitation by national and county governments may be premised as being more important that protecting community lands. The Act requires at least an approval of 60% of the community members for the land to be converted to private, however in case of government projects or programmes, these acquisitions may be done under compulsory land acquisition procedures and the local LMC may not have a key saying in such acquisition. It is important to note that exploitation of some of these resources may have an intergenerational timeframe, hence the need to address inter-generational equity within the community even as the LMC's negotiate with partners who may want to exploit or invest on land owned by the community. If the Act has to safeguard the interest of the community and sustainable utilization of resources by different actors in these areas, there is need to empower the LMC's within each community to enable them appreciate sustainability issues, climate change and negotiate from a position of knowledge and understanding of legalities when it comes to acquisition and compensation to be paid out to the community by either the government or other interested parties. Implementation of the Act should also consider those laws that regulate natural resource management in the country as well as benefit sharing arrangements that may be existing between the national government, the county government and the community.

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