



Hakijamii

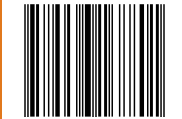
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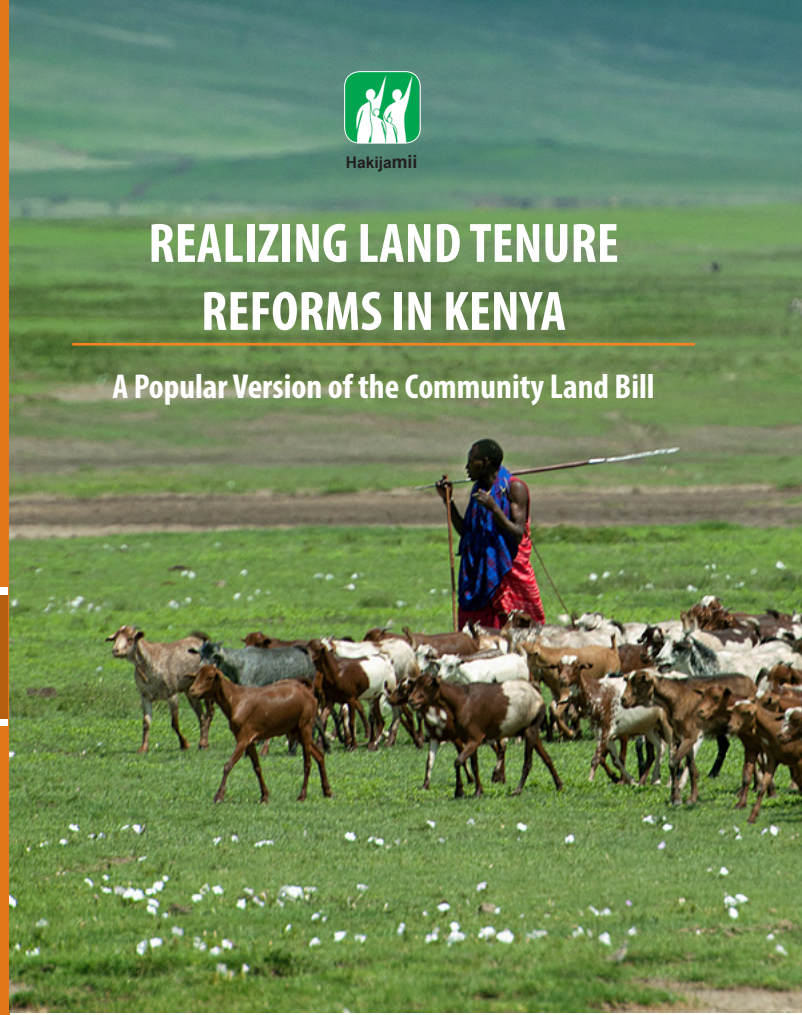
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REALIZING LAND TENURE REFORMS IN KENYA

A Popular Version of the Community Land Bill



April 2014

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List of Abbreviations

ADR	Alternative Dispute Resolution
ESRC	Economic and Social Rights Centre
NLC	National Land Commission
NRM	Natural Resource Management

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1.0 INTRODUCTION

On the 21st of December 2012 the then Minister of Lands, Hon. James Orenge gazetted the appointment of a Task Force on the Formulation of the Community Land Bill and the Eviction and Resettlement Bill¹. After several consultations and research the Task Force completed its work in February 2014 and the draft is only awaiting submission to the Minister of Lands, Housing and Urban Development before being presented to Parliament for discussion and enactment. This popular version is based on the final draft developed by the Task Force and which has been published for public circulation. The Bill has far-reaching implications for protecting community land rights and defining the extent of third party rights, including companies interested in exploiting resources on community land. The next step is for Parliament to enact the law and ensure enforcement.

Despite the prevalence of customary law, land and resource rights of most communities lack security of tenure. Recognizing community land as a constitutional category is one of the major pillars of the land reform agenda in Kenya. Encouragingly, some African countries like Liberia, Namibia and Cameroon have taken decisive steps towards recognizing community land and resource rights.

1 Hakijamii was privileged to be a member of the Task Force.

However, in many other countries, the reality is that most communities remain vulnerable to eviction or having their land and resources taken away from them, with little or no say or compensation.

The aim of this booklet is to:

- Create an understanding of key aspects of the Community Land Bill
- Engage community members and the public in general to critically debate the Bill and make recommendations on how to improve it.

1.1 Why the Community Land Bill

The debate around an appropriate tenure system for protecting community land rights is as old as colonialism. It was hoped that on attainment of political independence, the historical land injustices visited on Africans would be addressed, but this was not to be. It was not until almost 40 years later that the first real step was taken to comprehensively address the anomaly. This was achieved during the discussion and eventual adoption of the National Land Policy in 2009. The fact that the category of land that falls under community land supports the livelihoods of the majority of Kenyans and constitutes about 67% of the

entire stock of land in Kenya is perhaps reason enough to demonstrate that it is no longer possible to ignore it.

Sadly, for too long the law treated community land as a poor cousin to registered individual land. The Community Land Bill is therefore a bold and radical attempt to reverse and change this historical anomaly and injustice that rendered millions of individuals and groups vulnerable to marginalization, forced evictions and poverty. Under colonialism and the first post-colonial Constitution, community land was characterized as Native Reserve or Trust Land and community members had no say on how it was disposed or used and yet they were the true owners.

This is what the National Land Policy 2009 and the Constitution 2010 set out to correct. The Community Land Bill 2013 is the legal instrument meant to provide the basis for the recognition and protection of community land and the establishment of appropriate community governance institutions. It also provides for the management of natural resources, investments on community land and the settlement of disputes. Historically, the perception has been that community land is owned by nobody, even in areas where cultural norms favor community ownership of land, for instance in pastoralist and nomadic communities. Previously, community land was owned by the state and communities were disinherited by the state with little

or no compensation to show for it. The trend informed the demand for legislation to document norms, land use practices and instances of sustainable management of land by communities.

Realizing community rights in practice remains a daunting task. Notwithstanding, the existence of a Community Land Bill, it is imperative to note that implementing the Bill and changing the society's contempt towards customary land ownership remains a hurdle. Apart from Kenya, contempt for customary land tenure has been evident in legal texts in other African countries like South Africa, Uganda and Tanzania. The most extreme case was in Uganda where as late as 1975, customary land users were regarded in law as "tenants at will" at risk of eviction by the government or of those individuals holding leasehold title from the state. Even though the 1998 Uganda Land Act sought to correct that problem, it was not entirely resolved since the Act was still biased towards freehold tenure as compared to customary tenure. In Kenya, contempt for customary land tenure has been widely documented. Even before the 1954 Swynnerton Plan laid down procedures for the conversion of customary tenure into individual freeholds, official policy always contemplated the ultimate disappearance of that system. However, the Constitution 2010 overturned the contempt of customary land ownership by providing for legislation on community land.

2.0 CONSTITUTIONAL, STATUTORY AND POLICY BACKGROUND TO THE PROPOSED COMMUNITY LAND BILL

The National Land Policy 2009 was the first definitive and official step to categorically and formally propose the introduction of the community land tenure. This was reaffirmed by the Constitution of Kenya 2010 that now gave legitimacy to “community land” as a separate and constitutional tenure category. Article 63 of the constitution provides that community land shall be held by communities identified on the basis of ethnicity, culture or similar community of interests. Community land consists of—

- a) Land lawfully registered in the name of group representatives under the provisions of any law;
- b) Land lawfully transferred to a specific community by any process of law;
- c) Any other land declared to be community land by an Act of Parliament; and
- d) Land that is—
 - i) Lawfully held, managed or used by specific communities as community forests, grazing areas or shrines;

- ii) Ancestral lands and lands traditionally occupied by hunter-gatherer communities; or
- iii) Lawfully held as trust land by the county governments, but not including any public land held in trust by the county government under Article 62 (2).

Any unregistered community land will be held in trust by county governments on behalf of the communities. Community land shall not be disposed of or otherwise used except in line with legislation specifying the nature and extent of the rights of members of each community, individually and collectively.

Apart from the Constitution, there are various land legislations related to community land. The Land Act 2012 covers a myriad of issues. It mostly defers disposition of community land to future legislation. It guarantees the protection of community land as one of the three categories of land. It declares that the Land Act is applicable to all land declared as community land. It also defines the term “customary land rights” and recognizes it as a form of tenure. The Land Registration Act 2012 establishes a Community Lands Register to be kept in each Land Registration Unit. However, no registration of community land transactions can take place before the enactment of the new Act.

The Act also identifies the specific items that must be included in the Community Land Register. It requires the Registrar to issue certificates of title or lease for registered community land. It also prohibits the Registrar from registering any instrument that disposes of community land, except in accordance with the Community Land Law.

3.0 OVERALL PURPOSE OF THE LEGISLATION

The main purpose of the Community Land Bill is to provide legal security of tenure by transferring communal land to communities. Specifically the Bill is aimed at making provisions for the recognition, protection and registration of community land rights; management and administration of community land; to establish and define the powers of community land boards and management committees, to provide for the role of county governments in relation to unregistered community land and other related matters.

It also aims to vest community land in the communities identified on the basis of ethnicity, culture or similar community of interests; convert community land to other categories of land; resolve the problem of illegally acquired community land and community land disputes; set apart community land for public purposes; and provide conditions for holding of unregistered community land in trust by county governments.

It is guided by a number of key principles that include vesting community land in the communities; affording equal status and recognition of title to community land with any other title; empowering members of the community to determine the management and administration of their land;

affording equal rights to all members of the community; and elimination of all forms of discrimination.

Some of these objectives and principles were incorporated in the 2010 land mark decision by The African Commission on Human and People's Rights in the case of the Endorois people in which the Commission stated that denying community land tenure security not only violates human and indigenous people's rights, but also runs counter to their economic development goal. Under international law, customary ownership of community lands and resources must be recognized, respected and protected by states. International law is therefore a key tool in seeking secure community rights. Essentially, the primary purpose of the Community Land Bill will be how to secure the land rights of marginalized groups who may include minorities, pastoralists and women.

4.0 DEFINITION OF “COMMUNITY”

A community is defined as a consciously distinct group of users of community land who share common ancestry, culture or unique mode of livelihood, ethnic language, geographical or ecological space. A similar definition is given in the Land Registration Act. The Bill expands the definition of community beyond ethnicity. This is important as it recognizes the dynamic nature of community formations in the evolving context of urbanization and settlement patterns

4.1 What is the definition of community land?

Community land is defined as:

- All land used as community settlement area, farming area, grazing area, rangelands, fish landing sites, common resource area including watering points, salt licks, wildlife habitats, wildlife corridors, livestock passage routes and cattle dips;
- All land traditionally or historically used for communal purposes including sacred or religious sites, and kaya forests;

- Land converted into community land under any law.

Further, all public land in the coastal region under the Bill has been converted to community land.

5.0 REGISTRATION PROCESS OF COMMUNITY LAND

Community land shall be registered through the following process: The National Land Commission, shall by a notice in the gazette, appoint an Adjudication Officer in respect of every community registration unit who shall be responsible for adjudication of the land, including recording the community land claims.

Upon adjudication, the title relating to community land shall be issued by the Registrar in the prescribed form. Community land may be registered in the name of—

- A community
- A clan or family in accordance with the customary practices applicable
- A community association in accordance with the document constituting the association.

5.1 What are the steps that should be followed in the registration process?

Essentially the National Land Commission is the body mandated with ensuring that the process of documenting

and developing the registry of community land is transparent and participatory. The process shall comprise the following steps—

- a) A public notice shall be broadcasted in a radio station thirty (30) days before the land is registered as community land. Further, the notice shall be posted in a conspicuous place on the land which is to be adjudicated
- b) Actual involvement and engagement of the community by creating awareness on the community land rights
- c) Drafting and validation of a constitution that will govern community land and natural resources
- d) Formation of the relevant community institutions
- e) Conferment of certificate of title to the community

5.2 What is the effect of registration of community land?

Once a community is registered as the absolute proprietor of land, that land shall absolutely belong to the community with all rights and privileges. The certificate of title issued by the Registrar upon registration shall be taken by all courts as primary evidence that the person named as proprietor of the land is the absolute and indefeasible owner, except on grounds of fraud.

5.3 Community institutions

Community as a corporate body

Every community is required under the Bill, for purposes of being registered as owners of community land, to be registered as a legal corporate entity with a common seal and legal powers to sue and be sued, to enter into contracts, to acquire, purchase, hold, charge and dispose of property, and power to borrow money.

Community Assembly

Community Assemblies consist of all members of the community. The Assembly shall have a chairperson and a secretary appointed by the members of the Assembly. The Community Assembly has the powers to appoint through an electoral process supervised by the National Land Commission, members of the Community Land Management Committees as well as constitute any other offices necessary for the effective and efficient management of community land as determined by the community. The functions of the Assembly include among others, to advise and ratify the decisions of the Community Land Management Committees or other organs of the community charged with the responsibility of management or administration of the community land and to draft community constitutions and basic rules acceptable by the communities.

Community Land Management Committees

The Community Land Management Committee shall consist of not fewer than seven (7) and not more than eleven (11) members, and the membership shall take into consideration gender balance, and persons with disabilities. The members are elected by community members through the Community Assembly for a renewable term of three (3) years. Further, the committee members must meet the requirements of Chapter Six of the Constitution and shall not act contrary to the provisions of the community's constitution, rules or by-laws.

The functions of the Community Land Management Committees include that of managing and administering registered community land, coordinating development of community land use plans in liaison with relevant institutions, promoting the principles of co-operation and participation among community members in dealing with matters related to community land, and liaising with adjudication personnel and the NLC in documenting rights and the interest of communities in relation to community land for purposes of facilitating issuance of community titles by the Registrar.

Community Land Management Boards

Community Land Management Boards are boards established in respect to every sub-county where there is community land. The functions of the board are basically to act as a watchdog of the Community Land Management Committee in that they have power to:

- Recommend to the Community Assembly to review or suspend a decision of a committee if the committee acted in bad faith;
- Recommend to the Community Assembly the removal from office of any member of the committee;
- Make rules of conduct and procedure for the committees.

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The members of the Community Land Management Boards also include experts in various legal fields such as law, survey and others seconded to the boards by the NLC to help the board discharge its functions effectively and efficiently.

6.0 FREQUENTLY ASKED QUESTIONS

6.1 Can community land be converted to public land?

Yes. Community land can be converted to public land by compulsory acquisition, transfer or surrender. Before conversion of community land into any other category of land, the community land management committee shall seek and obtain approval from the Community Assembly.

Where community land is compulsorily acquired in accordance with the Land Act and other relevant law, it shall only be in the interest of defence, public safety, public order, public morality, public health or land use planning and **subject to** prompt payment in full of just compensation to the community

6.2 Can community land be converted to private land?

Yes, registered community land can be converted on approval by the Community Assembly in a meeting convened for that purpose. It can be converted to private land through transfer; which shall be done subject to the approval of the members of the community in a Community Assembly, in accordance with the Land Act and any other applicable law.

6.3 Can private land be converted to community land?

Yes, private land can be converted to community land by transfer, surrender or operation of the law in relation to illegally acquired community land.

6.4 Can public land be converted to community land?

Yes, public land may be converted to community land by allocation of the National Land Commission in accordance with the Land Act. Further, public land in Mombasa, Kwale, Kilifi, Tana River, Lamu and Taita Taveta counties shall be converted to community land, save for the exceptions under the Fifth Schedule.

6.5 Can an individual community member obtain exclusive rights on community land?

Yes and No. A member or a group of members of the community can apply for exclusive use and occupation of community land, but no separate title shall be issued for such parcels. The member(s) shall apply to the committee with approval from the Community Assembly. These individual entitlements shall not be superior to community title in any way.

6.6 Are customs and practices related to land use by pastoral communities (grazing rights) be recognized by the Bill?

Yes. Customs and practices related to land used by pastoral communities shall be taken into consideration. Community land in a pastoral community shall be available for use by members of the community for the grazing of their livestock, subject to conditions set out by the committee. These include the kind and number of livestock that may be grazed; the section or sections of the land where livestock may be grazed, grazing in rotation on different sections and a grazing plan.

6.7 Can grazing rights of a community member be withdrawn and in what instance?

Grazing rights granted to any individual may be cancelled due to drought or any other reasonable cause, and such cancellation must be in the interest of the residents of the community concerned.

6.8 Can a non-member of the community be granted grazing rights?

The committee may, upon application by any person who

is not a member of the community, grant grazing rights to such persons as long as they comply with the provisions of this Act or other applicable law.

6.9 Do all community members share equal rights in benefits from the community land?

Yes. Every member of the community has the right to equally benefit from community land. Equality includes full and equal enjoyment of rights of use and access. Women, men, minority groups, persons with disabilities and marginalized groups have the right to equal treatment in all dealings in community land. A committee shall not directly or indirectly discriminate against any member of the community on any ground including race, gender, marital status, ethnic or social origin, colour, age, disability, religion or culture.

6.10 What are some of the legal transactions that can be done in community land?

Legal transactions can be conducted on community land and they may include:

- Contracts over land, transfers and charges over community land shall be carried out in the same

manner as transactions over private land as provided for in the Land Act and procedures as provided for in the Land Registration Act.

- A lease over community land shall be on the basis of an agreement between the community and the lessee.
- No part of community land may be transferred to a non-citizen.

6.11 How will communities benefit from exploitation of natural resources on community land?

Natural resources found in community land shall be used and managed sustainably for the benefit of the whole community, with transparency and accountability and on the basis of equitable sharing of accruing benefits. Every community shall, in consultation with the relevant State agencies assess and document natural resources within the land and prepare a Natural Resource Management Plan (NRM).

Any investment related to exploitation of natural resources in community land shall be on the basis of an agreement between the investor and the community. An agreement relating to investment in community land shall be made

after a free, open consultative process and shall contain mandatory provisions on the following aspects—

- a) Requirement for an environmental, social, cultural and economic impact assessment;
- b) Requirement to consult and involve the community;
- c) Continuous monitoring and evaluation of the impact of the investment to the community;
- d) Payment of compensation and royalties to the community based on the income generated from the investment;
- e) Requirement to rehabilitate the land upon completion or abandonment of the project;
- f) Requirement to put in place measures to mitigate any negative effects of the investment;
- g) Requirement for the investor to build capacity and transfer technology to the community.

An agreement made between the community and an investor is null and void unless it is ratified by a two-thirds majority of members in a community assembly.

7.0 DISPUTE RESOLUTION

The Community Management Board shall set up dispute resolution mechanisms in accordance with a community's constitution for resolving disputes. In resolving disputes related to community land, priority shall be given to alternative dispute resolution (ADR) mechanisms which include dispute resolution processes and mechanisms that fall outside the court processes and traditional dispute resolution mechanisms. A person can go to court only if aggrieved by a decision of the Board and may first appeal to the Community Assembly prior to moving to the court.

8.0 MATTERS THAT MUST BE PROVIDED FOR IN THE CONSTITUTION OF EVERY COMMUNITY

1. The name of the community and a description of the area, being the land which the community owns.
2. The persons who are the original members of the community and the persons to whom membership is open.
3. The personal particulars of the members of the committee, term of office, the method and frequency of their election appointment, suspension and dismissal.
4. The authority for and the method of filling vacancies occurring amongst the officers of the committee.
5. Payment of allowances to committee members and other officers of the team, and frequency of calling dates of the annual general meeting.
6. The custody and investment of the funds and property of the community, and the designation of the persons responsible and the purposes for which the funds and property of the committee may be used.
7. The maintenance and inspection of books of accounts and the periodic audit of accounts.

8. The manner of making and amending the name, constitution or rules of the community.
9. The manner of dissolution of the community and the disposal of its property on dissolution.
10. The mechanisms for dispute resolution.

9.0 CONCLUSION

So far legislation on land reforms has come a long way in addressing the issues affecting the rights of communities. The Community Land Bill or legal system of ownership has been a long time coming and adopting the same in our legislation system is vital for pushing forward the land reform agenda. The slow implementation of the Bill by the government is alarming. The Bill will address the issue of security of tenure in community land that accounts for over 60% of land in Kenya. Further, several extraction industries have expressed interest in excavating natural resources found in community land, and the Bill enshrines the procedures to be used by investors before exploiting community land. In that regard more lobbying should be done by the communities and civil society to influence the government to pass this crucial Bill. It is unfortunate that the incessant and unnecessary in-fighting between the Ministry of Lands, Housing and Urban Development and the National Land Commission is denying Kenyans the hard fought benefits of land reforms. It is time the two institutions stop the infantile chest thumping and began doing the work for which they are paid.