



Hakijamii

(Economic and Social Rights Centre)

Golf Course Commercial Centre
Kenyatta Market, Nairobi
P O Box 11356, 00100 Nairobi
Tel: +254 (0) 20 2731667
Fax: +254 (0) 20 2726023
Email: esrc@hakijamii.com
Website: www.hakijamii.org

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TOWARDS A COMPREHENSIVE **COMMUNITY LAND BILL**



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The Director
Economic and Social Rights Centre (Hakijamii)
Golf course Commercial Centre
Kenyatta Market, Nairobi
P O Box 11356, 00100 Nairobi

Edited by Betty Rabar
Layout & design by Peter Wambu

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INTRODUCTION

The introduction of Community Land as a constitutional category is perhaps one of the most profound changes under the new dispensation. It aims to not only democratize the administration and management of land, but will also potentially lead to enhanced security of tenure and access to land-based resources for the marginalized communities. Granted, although many countries including South Africa and Mozambique have come up with various versions of Community Land legislation with mixed fortunes, Kenya has a unique opportunity to learn from these experiences and develop an innovative Community Land legislation that will address the complex issues presented by the increased capital pressure on land in Africa and the growing demand of local people for equitable access and control of their natural resources.

The aim of this booklet is to—

- (a) Outline the fundamental issues that have to be addressed in developing the forms of Community Land Bill; and
- (b) Help community members to engage in the debate on the Community Land Bill with a view to influencing the content of the Bill.

Below is a brief review of the respective provisions of the Constitution, various legislative provisions in the existing Acts of Parliament and the Sessional Paper on National Land Policy that have a bearing on the issue of Community Land. The review aims to identify the framework and the scope that is already set for the Community Land Bill in the Constitution and the Sessional Paper on Land Policy.

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

Article 60 of the Constitution outlines key land administration and management principles. These are:

- Equitable access
- Security of land rights
- Sustainable and productive management
- Transparent and cost effective administration systems
- Elimination of gender discrimination
- Encouragement of communities to settle land disputes through recognized community initiatives.

The above principles are applicable to all categories of land including Community Land. These principles should be read together with other provisions of the Constitution, especially Article 10, which outlines the values and principles of governance and Chapter Four on the Bill of Rights.

Article 63 of the Constitution provides that Community Land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest. The definition will obviously generate a lot of interest especially with regard to what “community of interest” means. There will also be need to ensure that reference to ethnicity and culture does not offend the fundamental constitutional values and principles, especially those that touch on non-discrimination, equality and protection of the marginalized. This will be particularly so in those cases where people from various ethnic groups may be occupying one area.

- The Article provides illustrations of Community Land which comprise—
- (a) Land lawfully registered in the name of group representatives under the provision 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
 - (d) Land that is—
 - (i) Lawfully held, managed or used by specific communities as community forests, grazing areas or shrines;
 - (ii) Ancestral land and land 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).

It is clear that the Constitution envisages other categories of land coming under the domain of Community Land, especially through the powers of conversion vested on the National Land Commission.

The Constitution further provides in Clause (3) that *“Any unregistered Community Land shall be held in trust by County Governments on behalf of the communities for which it is held”*.

The Constitution further provides that Community Land shall not be disposed of or otherwise used except in terms of legislation specifying the nature and extent of the rights of the members of each community individually and collectively. The provision is the basis for the proposed Community Land Bill.

Trust Lands in the former Constitution

The former Constitution provided that *“all Trust Land shall vest in the County Council within whose area of jurisdiction it is situated”* (Constitution of Kenya, Section 115(1)).

Each County Council was to 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 (Constitution of Kenya, Section 115(2)).

Most Trust Lands are still considered “traditional” land with land use practices based on customary law. The authority of customary law and the viability of customary tenure have, however, been undermined through political patronage, corruption and the English/ Common Law on land ownership.

The Trust Land Act (Cap 288)

It is assumed that former Trust Land under the Trust Land Act and the former Constitution would automatically fall under the category of Community Land. As such they form the bulk of Community Land that is envisaged under the Constitution.

The Trust Land Act (Cap 288) is intended to reserve State Land for community use. County Councils are vested with the authority to hold and manage Trust Land on behalf of the people. In practice, County Council land administration has rarely benefited local communities. Councils lack management capacity on one hand; but on the other, they have lost the trust of local constituencies due to irregular and illegal land transactions.

Community Land under National Land Policy (Sessional Paper No. 3 of 2009)

The National Land Policy also sets out a number of guiding principles. These include equitable access to land, gender equity, security of land tenure and efficient and democratic land administration and management.

Under the Policy, Community Land refers to land lawfully held, managed and used by a given community as defined in the “Land Act”. The Policy therefore expects that the term “community” would be defined by legislation.

The Policy, in justifying why it became necessary to introduce this new category of land, argued that the process of individualization of tenure, that is, land adjudication, registration and titling under the (now repealed) Registered Land Act and declaration of whole districts in the pre-independence period as Government Land has adversely affected customary tenure in two material respects, namely—

- (a) Undermining traditional resource management institutions; and
- (b) Ignoring customary land rights not deemed to amount to ownership, such as family interests in land.

According to Policy there were widespread cases of abuse of trust in the context of both the Trust Land Act (Cap 288) and the Land (Group Representatives) Act (Cap 287). The County Councils, which are the trustees of Trust Land, in many cases disposed of the land irregularly and illegally. Further, in the case of pastoral communities, the group representatives entrusted with the management of that land disposed of such land without consulting the other members of their groups.

To address the problem and provide a sustainable solution, the Policy proposed that Community Land be introduced. To secure such land, it

directed that the Government shall—

- (a) 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;
- (b) Repeal the Trust Land Act (Cap 288);
- (c) Define, the term “community” in the Act, and vest ownership of Community Land in the community;
- (d) Lay out a clear framework and procedure in the Act for—
 - (i) 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;
 - (ii) Resolving the problem of illegally acquired Trust Land;
 - (iii) Governing the grant to, and regulation of, rights of use to members;
 - (iv) Reversion of former Government Land along the Coastal region to Community Land after planning and alienation of land for public usage;
 - (v) Governing Community Land transactions using participatory processes;
 - (vi) Accountability of groups, individuals and bodies entrusted with the management of Community Land, and community participation in the allocation, development and disposal of Community Land;
 - (vii) Incorporating mechanisms for Community Land management and dispute resolution;
 - (viii) Members opting out of the communal arrangements and buying out of non-members;
 - (ix) Reviewing and harmonizing the Land (Group Representatives) Act (Cap 287) with the proposed “Land Act”;
 - (x) Setting apart Community Land for public use; and
 - (xi) Vesting fish landing sites to appropriate local institutions.

- (e) Invest in capacity building for communal land governance institutions and facilitate their operations; and
- (f) Facilitate flexible and negotiated cross-boundary access among communities.

It is obvious that the Policy recognized that Community Land exists or can exist in different contexts, namely customary or contemporary, and rural or urban. It is these different contexts that the new legislation must address and ensure that appropriate provisions are made.

The Land Act, 2012

The new legislation on land has not specifically addressed the issues of Community Land. Among these is the Land Act whose main purpose is to revise, consolidate and rationalize land laws and provide for the sustainable administration and management of land and land-based resources.

Section 37 of the Act lacks details on the management of Community Land. Section 3 makes the Act applicable to Community Land and all other categories of land, but it appears that the only provisions that may be relevant to the community are the sections outlining the guiding values and principles of land management and administration: Section 5 on the forms of land tenure, Section 6 on land management and administration institutions and Section 7 on the methods of acquiring title to land.

It is therefore not clear if the Land Act will play any significant role in the administration and management of Community Land. Indeed it is not even clear why Community Land was covered in Section 3. Perhaps with time the true meaning of the provision will emerge and become clearer through practice and judicial interpretation.

The Land Registration Act 2012

The purpose of the Act is to revise, consolidate and rationalize the registration of titles to land and to give effect to the principles and objects of devolved government in land registration. Under the Act, the term “community” is described as a clearly defined group of users of land identified on the basis of ethnicity, culture or similar community of interest and which holds a set of clearly defined rights and obligations over land and land-based resources. The definition is substantially derived from the one contained in the Constitution.

- (a) Regarding registration, the Act provides for the establishment of a Community Land register in each Registration Unit. The register shall have a cadastral map showing the extent of the Community Land and identified areas of common interest;
- (b) The name of the community as identified under the provisions of the Constitution and any other law relating to Community Land;
- (c) A register of members of the community;
- (d) The identity of those members registered as group representatives;
- (e) The names and identity of members of the group; and
- (f) Any other requirements as shall be required under the law relating to Community Land.

It further provides for the issuing of a certificate of title or lease in the prescribed form. The Act prohibits the Registrar from registering any instrument purporting to dispose of rights or interest in Community Land except in accordance with the law relating to Community Land.

From the above, it is evident that a form of title over community is envisaged to be issued to the legal entity and further that the issuing of such title to such a legal entity will not by itself allow the entity to deal with the land unless specifically authorized by the law on Community Land. It is thus very clear that any law on Community Land must have

very detailed provisions specifying the nature and extent of restrictions imposed on disposition of Community Land and how such disposition should, if appropriate, be done. The assumption is that the intention is to ensure that adequate measures are put in place to avoid the kind of abuse that characterized the powers given to County Councils and group representatives under the previous system.

As the country prepares to develop a comprehensive legislation on Community Land it is important that a number of issues be addressed. In the following section we shall outline some of those issues and make some suggestions on how they should be dealt with.

1. OVERALL PURPOSE OF THE LEGISLATION

On the surface, this does not appear to be an issue at all since all the law will be doing will be to provide for the administration and management of Community Land in accordance with Article 63 of the Constitution. But the issue is more profound than that because a casual reading of the issues leading to the introduction of this category of land appears to suggest that the main aim was to protect customary land rights. While the protection of customary land rights is important, it is vital that we go further than this.

Indeed, in view of the rapid changes occurring in the land sector especially in Africa, particularly in the face of the sustained onslaught by the big capital, it may well be that the fundamental object of this legislation should shift to seeking to ensure security of land tenure for the marginalized and vulnerable groups who are going to be the most affected victims of this development. Marginalization has no ethnic boundaries and is not only confined to rural areas. With the rate of urbanization it may well be that those who will be exposed to this danger of lack of security of tenure are going to be the army of the semi-employed or poor inhabitants of the informal settlements in major

urban areas. The proposed legislation must therefore be alive to these new realities and adequately address the same.

This was the approach taken by the South African Communal Land Rights Act 2004 which, even though was declared unconstitutional on other grounds, was however very clear from the beginning that the main purpose was to provide legal security of tenure by transferring communal land to communities. It would be appear that in contemporary times the major issue to be addressed is that of security of tenure of the marginalized and vulnerable, and not necessarily preservation of customary land rights. Consequently the matter to be addressed by the new Community Land legislation should be how to secure the land rights of the marginalized who may include minorities, pastoralists and other groups, particularly those in urban areas.

2. DEFINITION OF “COMMUNITY”

Both the Constitution and the Land Registration Act define “community” on the basis of ethnicity, culture or similar community of interest. It is not clear whether this is adequate or whether there is need to elaborate on this without necessarily going against the spirit of the Constitution.

It is proposed that the Community Land legislation expound on this definition. Under the Land Law 1997 of Mozambique, the term “community” is defined as “a grouping of families and individuals living in a territorial area that is at the level of a locality or smaller which seeks to safeguard their common interests through the protection of areas for habitation or agriculture”. The South African Communal Land Rights of 2004 defined it as “a group of persons whose rights to land are derived from shared rules determining access to land held in common by such a group”. These definitions appear broad enough to include different categories of people and it may be useful to see if there is something that can be borrowed from them.

3. APPROPRIATE LEGAL ENTITY

Once Community Land has been determined and the relevant members identified, it is envisaged that a legal entity would have to be registered that will hold the title. This is an extremely important element in securing community and individual rights. This entity must be designed in such a way that it guarantees effective participation of all the community members. It must also be fully accountable and transparent. Community members must make the ultimate decision on how such land can be accessed, used and administered. Technical support can be provided by the county or national government. This is the hallmark of democratization of land and land-based resources. Indeed, this was one of the key issues at the centre of the South African Constitutional Case of Stephen Segopotso Tongoane & others Vs Minister of Agriculture & others (CCT100/09) where the law had allowed traditional leaders to be the decision makers on community land matters. The said law (Communal Land Rights Act) was eventually declared unconstitutional on this ground. This is the danger of equating community law with traditional tenure, some of which are clearly inconsistent with the fundamental values and principles of equality, non-discrimination, public participation and protection of the marginalized.

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The law should make clear provisions that will assist in addressing issues of membership. Clear criteria and definition of those entitled to be members and conditions under which subsequent members are admitted should be provided. Rights and obligations of each member must guarantee the protection of the interests of the most marginalized and vulnerable.

The voting rights of the members and the members' power vis-a-vis the Board of Trustees must be outlined to ensure that the Board does not exercise excessive power while at the same time giving them adequate opportunity to provide efficient management.

The law should state the qualifications and responsibilities of the Trustees. Clear vetting procedures should be established. It must address whether all the Trustees must be residents of the area in question or whether there may be a mix of representation from other institutions.

Disputes are inevitable among the membership. Therefore, the law should provide a credible, efficient, accessible, timely and affordable dispute resolution system.

Disposition of individual rights should be adequately addressed. Procedures and circumstances under which such disposal would be allowed to take place must be clearly outlined. This is to guarantee that the land remains more or less permanently for the benefit of the community.

4. RESOURCE MANAGEMENT

A lot of activities e.g. mining, oil exploration, and large-scale farming are taking place in what is essentially Community Land. Most, if not all these activities are being done without any reference to the constitutional provisions on Community Land and resource management. This is likely to result in serious conflicts in future. The Community Land law provides the best opportunity to clearly and unequivocally address the provisions of Article 66 of the Constitution that requires Parliament to enact legislation that investment in land benefit local communities.

Finally the proposed Bill should—

- (a) Identify Community Land and outline the legal mechanisms to protect such land;
- (b) Outline the procedures of disposing of Community Land in accordance with the Constitution;

- (c) Provide for the vesting of unregistered Community Land to the County Governments to hold in trust for the people in the county;
- (d) Provide for the establishment of democratically and accountable community land institutions to administer Community Land under the supervision of the National Land Commission;
- (e) Repeal the Land (Group Representatives) Act and Trust Land Act;
- (f) Provide for identification of Community Land and outline the legal mechanisms to protect the land;
- (g) Provide comprehensive provisions for the effective protection and participation of women, the youth and other vulnerable groups in the administration and management of Community Land;
- (h) Provide for mechanisms for restitution of illegally acquired parts of Trust Land to the affected communities;
- (i) Provide for mechanisms for the recognition, registration and dealings in Community Land; and
- (j) Provide further provisions on how to address disputes using cost-effective and community-based dispute resolution systems.

In conclusion it should be emphasized that the proposed land reforms mark a fundamental departure from the past when neither the Constitution nor land was considered as of central importance by the state. It also departs from the common trend where the debate on the Constitution and democracy has always tended to concentrate on the elitist and bureaucratic concerns about reorganizing political power, while excluding the major concerns of the large majority of people relating to the use and control of resources. The challenge is for citizens to ensure that land reforms remain on course and are not derailed by the short term political interests of the ruling elite.