COMPLICATIONS IN LAND ALLOCATIONS: APPRAISAL OF THE COMMUNITY LAND ACT, 2016, KENYA

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Abstract

The Constitution vests community land and its ownership in communities identified on the basis of ethnicity and culture or similar community of interest. In view of this, community land ownership in Kenya, if unregistered would be held by county Governments on behalf of the communities. However, these is set to change once the communities secure collective titles. The efforts to have titles issued to community owned land, begun a decade ago during the Njonjo Land Commission of 1999. With the promulgation of the Kenya’s new Constitution of 2010, the turning point for community land ownership was clearly marked. The Constitution of Kenya 2010, declared that, ‘All land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals’. Further it classified land into three classes mainly; public land, community land and private land (Article 61). With all these achievements, there underlies major challenges involving land allocations, particularly the Constitutional ambiguities. To this end, this paper sought to address the Constitutional ambiguities/gaps in Community Land Act, 2016. First, this paper presents an overview of parts and sections as provided for in the legislation. Part one focuses on the preliminaries; Part two focuses on the recognition, protection and registration of community land rights; Part three focuses on administration and management of community land; Part four talks about the nature of community land titling; Part five talks about conversion of land; Part six talks about special rights and entitlement in the community land; Part seven talks about environment and natural resources management; Part eight talks about settlement relating to dispute relating to community land; and lastly, Part nine focuses on general provisions of this Act. These parts and their sections are highlighted and discussed in details below.

Keywords: Community Land Bill, National Land Commission, Community Land Rights, Constitution of Kenya, 2010, Community Land Act

1. Introduction

Land use, management and ownership in Kenya has over the years been an emotive issue. The National Land Policy Sessional paper No. 3 of 2009, to matters land served as a guide towards
management of land in Kenya prior to the promulgation of the Constitution of Kenya, 2010. Some of the guiding principles in the Constitution include;

- Equitable access to land
- Security of land rights
- Sustainable and productive management of land resources
- Transparent and cost effective administration of land
- Sound conservation and protection of ecologically sensitive areas.
- Elimination of gender discrimination in law, customs, and practices related to land and property in land,
- Encouragement of communities to settle land disputes through recognized local community initiatives consistent with the Constitution

On 21st September, 2016, the Community Land Act, 2016 was enforced. Some of the aims surrounding the enactment of this Act were to:-

- Ensure that legislative authorities enact legislation to give effect to the Article 63(5) of the Constitution of Kenya, 2010;
- Ensure and provide for the recognition, protection and registration of community land rights as stipulated in the Constitution of Kenya, 2010;
- Provide for effective management and administration of community land in Kenya.

And importantly to provide for the role of county governments in relation to unregistered community land and for connected purposes.

2. Problem Statement

Land use, management and ownership in Kenya has over the years been an emotive issue. Being the most valuable resource, it was a key driver for the new Constitution. The manner in which this resource is allocated, accessed, and managed is central to the country’s efforts to promote
socio-economic development by alleviating poverty and creating wealth. However, this has not been the case since independence with increased land historical injustices.

Figure 1: A Section of Kisii, Kenya’s Landscape

Njonjo and Ndungu Commissions were formed to bring land reforms. The land reforms failed to confront the materials consequences of unequal access. New laws either were not redistributive or transformative save for the new Constitution of Kenya (2010). Longstanding grievances and injustices on land culminated into the establishment of the National Land Commission, mandated to address them.

The much anticipated Community Land Bill finally came into law in August 2016, after parliament enacted within its timelines, this crucial Community Land Act. This law has taken a long time coming and has brought the urgency of relieving millions of Kenyans from being state tenants.
The purpose of the Act was to provide for the recognition, protection, and registration of community land rights, management and administration of community land and the role of County Governments in relation to unregistered community land. However, its enactment into law presents major challenges to communities.

It is believed that this Act would not bring any meaningful change in the land sector until all the regulations under the Act are issued. If unresolved, the danger would have a far reaching impact on land reforms in community land because already there exists a number of uncertainties in the law. Again with the new concept of community title ownership, such regulations remains very crucial for the country.

3. Objectives of this Paper

This paper seeks to address and discuss divergences in the Community Land Bill, 2016 and its impact on public land, Community land and Private land in the country. Specifically, the paper seeks to address the Constitutional ambiguities and its effect in regards to communities’ land rights.

4. The History of Community land in Kenya

Prior to the coming of foreign rulers to Kenya, all land belonged to communities, who were free to use it, distribute it, protect it and alienate it according to cultures and traditions of particular communities.

The history of community land in Kenya dates back to pre-colonial period. Many valuable resources such as oil, wildlife, water catchment areas among others are in land – which were held by communities. Since 1939 when the Trust Land Act came into force, communities owned land indirectly through their respective native councils. During this period, ownership of land was given to native authorities as trustees. When Kenya gained its independence under the independence Constitution, this trust was handed over to the old county councils. Even at that stage, communities were not recognized as true land owners.
Luckily, the progressive land laws have tried to address this issue. The problem has been that councils were never bound to communities’ consent. Subsequently, this mandate was left to local authorities themselves and then passed on to the Commissioner of Lands who could easily dispose of community land.

![Image of Ogiek people by a tree Stump in Mau forest](Image adopted and modified from the Guardian). The forest has been considered a water catchment area.

With the promulgation of the new Constitution, 2010, trust land was held by the County governments until new laws was passed in 2016. For the first time since independence, communities will be issued with title deeds to secure and preserve their land. However, with the new community Land Act, it is feared that there will be more challenges to land, particularly community land than meets the eye. This is because community land encompasses 67% of the country’s land mass. Most of such land is in arid and semi-arid areas where the main economic activity is pastoralism.
5. Arrangement of Sections in the Community land Act 2016

Part one: Preliminaries

This section provides for the short title as to which citations will be attributed to as well as interpretations. The Act also provides the guiding principles set out in Article 60 and Article 10 of the Constitution of Kenya, 2010.

Part II: The recognition, protection and registration of community land rights,

This part contains 11 sections (4-14). Under these sections, the Act provides for the ownership and tenure system – where land will be held, protection of community land rights, roles of county governments, application for registration, procedures to be followed for recognition and adjudication of community land. Further, the Act under this sections, gives a provision for community land registrar to facilitate the registration of community land as well as put in place a community land register. The Act also provides for classes of holding community land, communal and reserve of land. The section concludes with a provision of confirmation of validity of existing customary rights of occupancy.

Part III: Administration and management of Community Land

This part deals majorly with the functions and powers of the community land management committee for purposes of administration and management of community land.

Part IV: Nature of Community Land Title

The sections under this part (16-20) outlines provisions for interests conferred by registration to the communities whose land is under registration, rights of a community as proprietors of community land. The Act emphasizes the provision of certificate of title to be evidence of proprietorship, provisions on land use and development planning of community land undertakings as well as the conservation and management of resources in the community land.
Part V: Conversion of Land

Sections (21-26) of this Act provides general provisions on conversion of community land. The Act also provides provisions on conversion of community land to public land, to private land and as well as from public and private lands to community land.

Part VI: Special Rights and Entitlements in the Community Land

Section (27-34) of the Community Act recognizes individual rights on community land as well as grazing rights and prohibits discrimination of any kind in community land. The Act under this part further outlines provisions relating to transactions in the community land, leases over community land, cancellation of rights of leasehold. Importantly, the section seeks to ensure that the existing rights to use and occupy community land are adhered to.

Part VII: Environment and Natural Resources Management

Section (35-38) of part VII encompasses provisions relating to Natural Resources management in community land, benefits sharing, rules and by-laws, as well as regulations of community land use planning.

Part VIII: Settlement of Disputes Relating to Community Land

This is a very important feature within the community land. Section (39-42) of the community Act comprises provisions for disputes resolutions mechanisms. This shall involve the application of ADR and or TDR mechanisms as well as mediation and arbitration in efforts to resolve community land disputes.

Part IX: General provisions

This is the last part of the community land Act. The sections (43-48) under this part encompasses general provisions involving unlawful occupation of community land, general penalties, repeals, saving and transitional provisions and related regulations. This part also presents Group
representatives as per Cap 287 of the Constitution of Kenya, 2010 in relation to land held under the land (Group Representatives) Act.


Community

By definition, the term “community” within the context of Community Land Act 2016 has been defined as a consciously distinct and organized group of users of community land who are citizens of Kenya sharing attributes such as ancestry, similar culture or unique mode of livelihood, socio-economic or other similar common interest, geographical space, ecological space and ethnicity.

Figure 3: Members of the Siria Maasai community listen to land-related discussion (Image adopted and modified from the Star).
The definition given in this Act did not take into consideration the community organizational structure, rules, beliefs and values of the community. This is because the Kenyan set up diverse and therefore with varied cultural backgrounds. All these are different and may not be the same as the Act put it.

**Customary Landowners and Land ownership**

To start with, there is a danger in the Act whereby there is not yet liberation for customary Landowners. This means that most communities in Kenya under the Constitution of Kenya (2010), their property (land) is still held by the National and particularly the County Governments. The reason behind this is unsecure collective titles by communities.

Then the question begged to be answered can the community trust the trustees and who is doing the checks and balances? Entitlement to right to land is determine by registration. Therefore this becomes another obstacle. This is so because ownership is squarely dependent on registration. As such the Act did not take into account that the process of registration can be long and bureaucratic.

**Unregistered and Registrable Community Lands**

There is unregistered community land in Kenya. Article 6(7) of the Act states that upon registration of any unregistered community land in accordance with this Act, the respective registered community shall, assume the management and administrative functions provided in this Act and the trustee role of the respective county government in relation to the land shall cease. To this end, the Community Land Act reiterates the prohibition against disposal of unregistered community land. However, the ambiguity in this clause presents that landholders/owners will still be vulnerable to compulsory acquisition of land for public purposes. “This will not limit compulsory acquisition for public purposes —to which all landholders are vulnerable. In that event, the Community Land Act instructs counties to hold compensation for the affected community until it secures formal title” (Wily, 2016).

Also, the Act fails to clarify what constitutes registrable community land in Kenya. Instead, the Act just mentions the registration processes. Largely, community lands in Kenya are termed as
public land and as such it’s not clear when these public lands will revert back to community land under the new Act. A case in point is that of the Endorois contesting their ancestral lands better known to them as community lands against claims by the government that the forested land is public land. It’s claimed that being the Lands being National forests is therefore by that virtue a public land. Endorois culture, religion, and traditional way of life are intimately intertwined with their ancestral lands – Lake Bogoria and the surrounding area.

Under Section 13(3) (f) of the Act, any purposes as may be determined by the community, respective county government or national government for the promotion or upgrading of public interest. With regards to this sections, it is unclear how much choice the community has about this. Nor is it clear whether this reserved land then becomes public lands in compliance with the Act (section 26(1 & 2)) which states as follows:

26(1) A community may set aside part of the registered community land for public purposes.

26(2) Where land is set aside for public purposes under the subsection (1), the commission shall gazette such parcel of land as public land.

On the basis of this, again, it’s not very clear whether this was just a mistake in the legislation of this Act or an ill-motive to lure and tempt communities to set aside as much land as they could for public purposes. By doing so, the communities will soon lose rights through gazette notices as public property.

Community land rights and community land management

All the community land in Kenya under the Constitution of Kenya, 2010 and the Community Land Act, 2016, belongs to communities. In view of this, the Act took into consideration three land tenure and classes (Customary, free and lease) and this means therefore that community land may be held under the customary, freehold, leasehold and or any other such tenure system recognizable by this Act. On one hand the ownership to any of the community land is within the
community or group membership, as well as the county governments who would be the trustees of community land and community land management committee acting on behalf of a community or group. Access to such land outside these grouping dully registered is illegal. Some of these provisions in the Act, presents Constitution al ambiguities such as for instance the community land management committee composition. It is important to note that the Act only give a provision detailing the minimum and maximum number of membership to the committee.

In relation to the community land rights, the Act provides for the functions and responsibilities of the members of the committee. However, the Act fails to provide for the composition, their term as well as the removal processes should such be deemed necessary. All these divergences have not been taken into account in the community land Act, 2016. This failure is presents a grave scenario in a manner that would violate the community rights. Membership for the committee will be subject to abuses and vulnerable groups such as women and the youths in the community will never be considered for the committee membership. Failure to address the term limits in the community representation will also spell lawlessness in the community.

The Act provides that in the process of administration and management of community land and carrying out the functions of the community land management committee, the Act requires at least two thirds of the registered community members for binding decisions involving disposal and or alienation of community land. In this section, there is a gap presented in relations to simple majority decisions. This implies that some key decisions made will only require a simple majority of the members present. What happens to detested decisions of the committee? It’s believed that community decisions involving community land must be liked by all, and as such the Act does not provide for the reversal of the already made decisions which are not liked.

**Functions and powers of Community Land Committee**

Section 15(4) of the Act provides an elaborate responsibilities of the Committee. Sadly, yet again, the Act fails to present mechanisms for oversight on the functions and powers of the community land management committee. This alarming!
The Act did not take into account for the provisions of an oversight body. However, in the Community Land bill draft, there was such a provision. It’s noted in draft that, there was an established community land board in respect of every sub county where there is community land. The main goal of the board was to play an oversight role on the community land management committee.

According to the draft bill, the board was mandated to;

(a) oversee, supervise and regulate the committees in their management and administrative functions over community land;
(b) continuously monitor and evaluate compliance by the committees with the provisions of this Act and any other law;
(c) facilitate the committees in the discharge of their functions; and
(d) promote the participation of community members in the decision making of the committees;
(e) facilitate dispute resolution including the employment of alternative and traditional mechanisms for dispute resolutions consistent with this Act and the Constitution;
(f) liaise with County Land Management Boards in the promotion of effective and efficient administration and management of community land; and
(g) Perform such other functions as are assigned by this Act.

To this end, the Community Land Act, 2016, was enacted by parliament after scrapping off the oversight role of the Community Land Boards. This means that there is no board or agency in place to intervene and overrule wrong decisions of the Community Land Committees. Lack of oversight presents great challenges for the administrative of justice on matters related to community land in Kenya.

**Decentralized Functions; Effective Services Delivery**

In Kenya, devolved governance brought about by the Constitution of Kenya, 2010, has been given the highest priorities. Most functions and powers have been devolved/ transferred as functions
of the county governments. Among these is the management of community lands. This means that most of the local authorities’ functions have been vested in the county governments, following their abolishment with the promulgation of the Constitution of Kenya, 2010. Therefore on one hand, the county government plays a key role in the administration and management of community land vested upon them as trust land and any unregistered community land. It’s the duty of the county governments to hold on trust such lands on behalf of communities for which such land is held.

On another hand, the Constitution of Kenya, 2010 established the formation of the National Land Commission besides other mandates and function to also manage the community land held on behalf of the county governments. A major gap in this Act regarding decentralization of functions and roles of county governments in the management of community land is the failure to make available adequate provisions for the decentralization of the management of community lands. For instance, the Act ought to have included provisions on decentralization units such as the village units – as provided for in the county government Act for purposes of decentralized functions and effective and efficient services delivery.

**Community lands versus Public lands and their limitations**

One of the major ambiguities in the Constitution is the lack of clarity over what community and public land is. The Act fails to bring clarity on the existing laws over what land is community and what land is public. This causes quite a lot of overlaps in the two classes of land.

While the Constitution was clear on the limits of public land, the Land Act (s. 12), implies that not only government forests and wildlife reserves are public land, as the Constitution provides, but also buffer zones around them. Not only all waters, but also lands along rivers and streams, and lands which may be subject to erosion or floods. These, and natural, cultural and historical features in public land are not to be allocated to anyone (in other words must remain public land) (Wily, 2016).
Conflicts among Communities

On one hand the Act aggravates community disputes instead of rather building unity among communities. It’s noted in the Act (section 13(2) that any land which has been used communally, for public purpose, before the commencement of the new Act shall upon commencement of this Act be deemed to be public land vested in the national or county government, according to the use it was put for. Based on this provision alone, there is a danger of major conflicts in the communities. On another hand, with this Act in place, disputes may arise between communities and the government bodies concerning land and natural resources to be included as part of community land or resources.

However, the Constitution of Kenya, 2010 and the National Land policy both recognized the importance of settling land disputes through recognized community initiatives such as the application of ADR and or TDR as alternative mechanisms to resolving land disputes. The Act was dependent upon to spell out such mechanisms for resolving land disputes. This Act was not successful in clearly spelling out such mechanisms.

Compulsory Acquisition of land for Investments

With a focus on transition being given priority in Kenya, the development priorities in the Land sector is now focusing on large scale investments and utilization of unutilized natural resources. In Kenya, past regimes have in the past found it easier to put community lands in public use for government projects. This is because there were no structured communal ownership as well as control tenure systems. In efforts to bring land reforms, recognition of community lands under the new Act is a major achievement towards addressing historical injustice in the land sector. As noted elsewhere in this document, some of the injustices caused rendered the communities vulnerable to marginalization and exploitation.

The Community Act 2016, gives land rights to communities but yet again limits the protection of those rights through the compulsory acquisition of land for investments. This means that the acquired land can revert from being community land to public land. This clearly, poses significant
Complications in Land allocations

risks to the affected communities. These communities still rely on subsistence agriculture and or pastoralism for basic needs. We take note therefore that, because of high rates of poverty in most communities, the Act doesn’t protect them and instead makes them vulnerable to manipulation during land acquisitions and involuntary displacements. The Act doesn’t promote community benefit and accountability in large scale, land acquisition in Kenya. As such there is a lack of mechanisms in place with the enactment of the Community Act 2016 to enable the implementation of social, economic and environmental safeguards for communities during land acquisitions for investment purposes.

Pastoral Communities Customs and practices

The Act states that customs and practices related to land use by pastoral communities such as for instance grazing rights shall be taken into account by the registered community. It’s noted that this shall only take place provided that the registered communities are in line with the Community Land Act. Further to that, it’s noted that the grazing rights are restrictive in the sense that these rights are subjected to the number of livestock the community has, the sections for grazing among other grazing rights. This is considered a great economic impediment since most of the community land in Kenya is in the arid and semi-arid areas and pastoral culture does not put a limit to the number of livestock.

Conclusion and Way Forward

The Constitution of Kenya, 2010 and the National Land policy, 2009, have both reported milestones towards closing the gaps on the management of community lands in Kenya. However, from the aforementioned gaps and Constitutional ambiguities in the Community Act, 2016, the Act falls short of addressing key pertinent issues that would make the Act relied upon to safeguard and protect the community land rights. The steps that have been made, that have ensured huge gains on community land rights could wither with the implementation of this Act as it is without amendments. By the end of February 2017, another of affected communities and individuals had petitioned courts of law against operation and implementation of the said Community Land Act. Specifically, a case filled by Kelly Malenya vs the Attorney General, the
lands Cabinet Secretary and the Council of Governors succeeded in suspending the operation of 6 sections of the Community Land Act, namely sections 8, 9, 15, 21, 38 and 48 until full determination of the petition.

In light of the foregoing discussions in this paper, the following is recommended:

1) Secure community land rights must be equal in weight and statute
2) Clear definition of who or what “community” will be fundamental to a sound law.
3) There is need for clear community land demarcations to protect community land from invasions/encroachment.
4) Land use planning in community lands particularly in areas/around urban centres.
5) The involvement of NLC and County governments must be enshrined in this Act
Reference

The Constitution of Kenya, 2010


