Implementation of Responsible Land Governance: Informing the development of policy through a participatory land delimitation experience in Tana River County, Kenya

FRANCISCO CARRANZA
Land & Natural Resources Unit team leader, FAO Representation Office, Kenya
francisco.carranza@fao.org

Paper prepared for presentation at the
“2017 WORLD BANK CONFERENCE ON LAND AND POVERTY”

Copyright 2017 by author. All rights reserved. Readers may make verbatim copies of this document for non-commercial purposes by any means, provided that this copyright notice appears on all such copies.
Abstract
Policy developed through a top-down approaches has always faced challenges in its implementation, resulting in poor ownership from the local governments and other stakeholders. The two-pronged approached in the experience of Tana River County in Kenya, during the implementation of an FAO pilot project on land governance demonstrates the pertinence and effectiveness of using active participation and consultation of communities (bottom-up) as well as the use of international tools such as the Voluntary Guidelines for the Responsible Governance of the tenure of Land, Forest and Fisheries (top-down) to formulate policy that directly affects people’s livelihoods and well-being.

FAO’s Participatory Land Delimitation (PLD) methodology for securing community land tenure was tested in the pastoralist context. Although the legal framework to formalize ancestral community land rights was incomplete at the time, this was precisely the impetus for developing policy that could fill the gap and address tenure security through land management (grazing management) of the primary livelihood in the county, whose lack of governance was progressively creating more conflicts with other livelihoods (e.g. farming), as well as with other transhumance groups looking for pastures in the County.

Key Words:
Bottom-up approach, policy implementation, community land rights, responsible governance.
INTRODUCTION

One of the greatest challenges in land policy implementation is due to the sole use of a top down approach in its formulation phase. In Kenya, just like other sub-Saharan countries in Africa, the development of policy around natural resources occurs at national level for further domestication at decentralized levels which does not necessarily take into consideration the idiosyncrasies of the different areas it is intended for. Even when policy domestication does take place, actual consultation and public participation is seldom systematic or thorough enough for the uptake of the new policy. Often, it is this failure in policy implementation which leads to the further marginalization of underrepresented groups and exacerbation of conflict over land.

Over five years have passed since the new Kenya Constitution (2010) was published and seven years since the gazettement of the National Land Policy, and yet a very limited application of the legal package that protects and guarantees the rights to land of communities has been put into practice in Kenya. Increasing impacts from climate change, land tenure conflicts from foreign investment and food insecurity are all challenges faced by Kenyans in counties considered arid and semi arid lands (ASAL). This is all exacerbated by an incomplete implementation of legal frameworks related to land and natural resources.

It was in this backdrop that FAO, with funding from the European Union, initiated a pilot project entitled *Support for Responsible Governance of Land in Communal Lands of Kenya*, and was implemented in Tana River and Turkana counties from 2014 to 2016. For ensured sustainability of the project results, close partnership was established with the Ministry of Lands, the National Land Commission (NLC), the County Governments and the communities from the project sites.

Amongst the outputs in the project was a focus on implementing the national land policy and formulating the necessary legislation to ensure an improved governance of community land. To achieve this, the project mainstreamed the Voluntary Guidelines on the Responsible Governance of Tenure (VGGT) of Land, Fisheries and Forests in the context of National Food Security. The Voluntary Guidelines were contextualized into a policy bill to fit the Tana River County scenario yet fusing it with traditional land management systems of communities in the County. The bill was elaborated based on the ten principles recommended by the Voluntary Guidelines on how to approach responsible governance of tenure. These principles are: human dignity, non-discrimination, equity and justice, gender equality, holistic and
sustainable approach, consultation and participation, rule of law, transparency, accountability and continuous improvement.

Hence, this paper describes the development of The Tana River Animal Control and Grazing Bill, 2016, that was informed through the results of the participatory land delimitation process while collecting data for the formal registration of an identified community. Meanwhile, the County Assembly, made up of individuals from the different Wards of the County and in charge of providing legislation, had been overwhelmed by the amount of requests to solve the land conflicts between pastoralists and farmers as well as from other pastoralist groups coming from neighboring counties. The Members of the County Assembly (MCAs) then began a proposal for a County Bill that could address these conflicts around tenure by establishing the criteria to identify and locally manage the pastoralist grazing areas in the county. The MCA’s requested FAO for technical support in developing the Bill. The combination of the FAO field work for land delimitation and the MCAs proposition is what gave way for a robust and comprehensive policy (bill) on land tenure and management.

Achieving food security for all is at the heart of the Food & Agriculture Organization of the United Nations (FAO), meaning that people have regular access to enough high-quality food to lead active, healthy lives. Amongst FAO’s main goals is the sustainable management and utilization of natural resources, including land, water, air, climate and genetic resources for the benefit of present and future generations. FAO is mandated to find solutions to land tenure issues and is committed to assist governments, land officers and rural communities to improve tenure security at scale.

The Participatory Land Delimitation (PLD) methodology that FAO used had already been tested in countries such as Mozambique and Angola with much success for the past 15 years. For the case of Kenya however, there was an additional challenge to consider: these were not sedentary farmers whose land have a fixed set of recognizable boundaries in terms of land use; these were pastoralist and mobile communities who use and perceive land differently.

LAND USE AND AVAILABILITY IN TANA RIVER COUNTY

It is estimated that only 10% of the 2.5 billion rural and indigenous people who depend on collectively managed lands and natural resources have formally recognized rights to their lands (IFAD, 2013). According to the Kenya Census of 2009, Kenya occupies an area of 582,646 Km² of land which is categorized as public, private and community land. Public land comprises 77,792 Km² (13%); Private
land 107,953 Km² (19%) and the rest is considered unregistered community land: 396,315 Km² (68%). As pressure on land and natural resources increase, land governance mechanisms (whether formal or customary) are no longer an option but a necessary means to deal with the uncontrolled use of the already degraded common lands. Despite the national legal frameworks which determine how land is accessed, secured and used (even for mobile-dependent communities of pastoralists), significant gaps remain between the intent of these laws and policies and their effective implementation.

Tana River County is one of the six counties that make up the coast region and is sparsely populated, with an estimated population of 240,075 people, including the Pokomo farmers who are Bantus and the Orma and Wardei pastoralists who are Cushitic, (Kenya Population and Housing Census 2009). The County’s name is derived from the Tana river, the longest river in Kenya that runs along the entire eastern boundary of the county and is the major source of water for human and livestock consumption, and for wildlife and agricultural use. Towards its mouth, between Mnazini and Kipini at the Indian Ocean, the river creates an extensive triangular landmass characterized by wetlands, which constitutes the Tana delta, and this is the richest pasture in the whole region. The delta forms a natural habitat for an enormously diverse flora and fauna, providing a fall-back grazing pasture for livestock during the dry season (by the pastoralists), while its waters are used for agriculture (by the Pokomo farmers and agro-pastoral Orma) and to a limited extent, fishing (by both the farmers and the pastoralists).

The Tana delta also provides critical pastures for hundreds of thousands of heads of cattle for the Orma pastoralists, and to a lesser extent, the Wardei. During the dry season, the Orma and many other pastoralists from neighbouring districts rely entirely on the delta for pastures for their cattle, sometimes reaching a peak of over 3 million heads (as was the case during the 2009 drought), some of which often remain within the delta throughout the year. The delta also supports small-scale crop cultivation by Pokomo farmers and some Orma agro-pastoralists. In addition to the farmers and the pastoralists, the delta also supports minorities of hunter-gatherer communities, collectively known as the Wasanya (sometimes referred to as the Watta). The County has witnessed prolonged and chronic land conflicts over the years that have led to loss of lives and property. The main land problems include competition of scarce resources, territorial boundary disputes between different communities and large scale land acquisition by multi-nationals for agricultural development around Tana delta.

Land availability can be a relative concept. Countries like Kenya have large areas that are apparently unoccupied or underused, and often the greater concern for those unfamiliar with pastoral systems is that this land is not being properly used. Governments concerned about national development might then want
to give these ‘empty’ areas to those who are seen as having more ‘capacity’ (money and know-how) than local farmers (Tanner, 2009). A common argument in the land reform debate is that private investment in depressed rural areas will bring jobs and new opportunities for all.

Most people, despite their status, will prefer to have access to good soils, natural resources, and access to water. Local people have known for generations where these areas are, which is why populations are often concentrated instead of spread across ‘empty’ landscapes. These areas are naturally also the ones that investors want, and competition – and conflict – then involves relatively small areas, not the vast areas of more marginal, unused land (Tanner 2009).

What is hardly contested in Tana River and elsewhere, is that tenure security for local people and the potential investors (whose capital and know-how are on high demand) are essential and is at the heart of local development. Most of the communities in Tana River County -whether pastoralists or farmers- have long standing historical rights that have been undermined by public irrigation projects that have provided very little positive impacts in the livelihoods of the people that live in and around those projects. Evidence from the field confirms a legacy of exclusion and highly discretionary decision-making by local governments and elites who hand over land to external users for (seemingly) public interests with little or no local agreement. Even if the investor has good tenure security according to national laws, if his or her occupation is regarded as illegitimate by local people, it cannot be considered secure (Tanner 2002). Local people, investors, and the government must include legitimate tenure security in its land management to guarantee good development strategies.

PARTICIPATORY LAND DELIMITATION

The Participatory Land Delimitation (PLD) as used and promoted by FAO, is an approach that puts as much emphasis on the process as it does on the end result, which is a critical factor because as communities engage in the process, there is an awareness that comes with it that can bring an abstract concept, such as ‘land rights’, into a more tangible and achievable objective for them. The principal use of land delimitation is to identify and record customarily acquired rights on official records. These are rights that have existed for long periods of time before formal land administration systems were established (either by colonial governments or by modernizing elites in evolving agrarian economies). They usually extend across large areas or territories, and are managed according to local customs and using local institutions (Tanner 2009).
As will be described later on, the dynamic context in the ASALs of Kenya demanded a much higher level of engagement not just with the community in question but with the other neighboring and moving pastoralists whose land use was also determined by the rain and consistent water access points, available pastures and livestock markets. Some of the aspects of the community that PLD mainly considers and assists in documenting are:

- Land use patterns and production systems
- Land management systems
- Historical occupation
- Social organization
- Common use of cultural sites
- Relationships with neighbors and confirmation of shared resources

The PLD process produces georeferenced maps for the visual representation of the community’s perception of their land and forms the basis for initiating community land registration processes. FAO implemented this participatory approach for the purpose of land registration that involved consensus meetings and the development of sketch maps of the perception of the communal territory by selected community representatives composed of different ages and gender. Beyond land registration, the maps were also regarded by the MCA’s as vital in strengthening of land management to improve land productivity and to reduce vulnerability in an area that already faces challenges with the increased change in climatic conditions, which compromises their food security.

This application of participatory mapping approaches in Tana River County increased general understanding and enabled documentation of the existing communal land tenure rights, location of various resources (water points, grazing areas), settlement types and arrangements, seasonal resource use patterns and recommendations developed for land use planning. The data and the maps developed contributed towards registration and securing of community lands as per the evolving community land bill\(^1\) in the country.

A key element in the PLD process is the emphasis on good governance, where local participation and the democratization of land management procedures were increasingly recognized as key aspects of an

\(^1\) The Community Land Bill was passed into an Act of Parliament in August 2016.
enabling environment that can attract investment and guarantee equitable returns for local people as well. Communities can then play an active role in decisions that affect their lives and also make the County Government more accountable. The PLD thus becomes a multifaceted tool to implement the Voluntary Guidelines for the Responsible Governance of Tenure of Land, Forests and Fisheries.

Land delimitation under PLD depends upon the active participation of as many members of the local community as possible. It is essentially a process of community ‘self-identification’, in both spatial and socio-economic terms. People who live in a particular village or group of villages show a supporting field Technical Team\(^2\) where their borders with neighboring communities are located. This can be a tremendously empowering process in which local people learn about their rights and what they can do with them. Local management structures are also reinforced and, where appropriate, modified or added to (for example by the legal obligation to include women and minority groups amongst elected community members who represent the community in land law matters).

As was the case for Wayu community of Tana River in the FAO project, the process can also serve as the basis for a decentralized and stakeholder-based land use planning process that can inform the development of policy and promote economic activities that identify opportunities for community integrated natural resource management.

Summarizing, the steps of this methodology are the following:

i. Assuming a community claim on land has been placed or a demand to formalize the community tenure has been requested, a **Technical Team is composed at the County Government**. This team is aware and knowledgeable of the community land law in place and the procedures to implement it. The team is usually made up of different institutions and people of diverse technical backgrounds such as a surveyor, an extension worker, a lands officer, a planner, or individuals working through an NGO.

ii. Once a community has been approached and sensitized on the existing legal framework that protects them, a **Participatory Rural Appraisal (PRA) is put into practice**. PRA is a highly involving method to arrive to a common understanding of the reality that shapes the community members’ daily lives. In the particular case of delimitation, the reality in question is how they manage and use land and other natural resources, and how they organize themselves both socially

\(^2\) Often composed of technical officers from the County Government and members of civil society.
and politically to occupy and exert rights over specific areas of land (FAO, 2008). PRA is meant to go beyond the conventional approach where researchers simply extract information about the local situation. The target group – in this case a village or group of villages are assumed to form a local community – that works closely and interactively with the Technical Team to collect and analyze information about their livelihoods, social organization, land use, and relationships with other communities (transhumant communities or not). This is achieved by using a few of the PRA exercises such as a Venn diagram, developing a matrix on the use of the natural resources, a historical account of the community, land valuation, drawn sketch maps by the men and women (separately then discussed in plenary), etc.

iii. The Technical Team then **formulates a report** that is also shared with the community. The report should contain all the information for administrative requirements\(^3\) of the entire process to move toward the collective certification of a **community land title deed**.

It is important to emphasize that the role of the Technical Team is mainly to **facilitate** this process. Team members work with the community to help them produce the data required in order to identify boundaries, land use and comply with the requirements of the law. The Technical Team also plays a crucial role in the validation of the information with neighboring communities. This is a mandatory part of the delimitation process, and the active participation of these other communities is thus also essential.

**A LOCAL POLICY FOR LAND MANAGEMENT**

Decentralization of government and the devolution of responsibilities and powers to subnational levels ensures that local governments have the necessary autonomy and flexibility to turn popular participation at the local level into something meaningful. When governance and administration are closer to beneficiaries, social pressure may enhance transparent, fair and accountable decision-making. Reality however, is not as straight forward, and although a country like Kenya may have plenty of national laws and policies to cover the different sectors of society, knowledge of these policies or their adequacy at the local level thrusts the local government to define new policy that is fit for purpose.

Though rural communities and their leaders have always played an important role in land and resource management, central governments have continued to promote top-down approaches to policy formulation

\(^3\) These include public notice announcements, emoluments that may be paid, confirming borders in the existing cadaster, etc.
and often do not treat local people as legitimate stakeholders with rights over the resources they are even policing on behalf of other interests.

As the PLD process in Wayu community went ahead and neighboring communities were also being involved, the empowerment of those community groups was enhanced through their participation in local decisions in a way that in fact makes their management of resources more effective, both from the local point of view, and from the point of view of a County concerned about unsustainable practices that only foster more conflicts between the different livelihoods (e.g. fencing, hindrances to water access, etc.).

All the meanwhile, the County Assembly, through their members (MCAs) as the county policy makers, were being afflicted by a rise in land conflicts manifesting in different parts of the County. The MCAs requested FAO assistance on drafting a county policy that will address these issues in order to prevent more conflicts. FAO supported the County Assembly’s Committee on Land, Agriculture and Livestock by building capacity on the existing legal instruments (national level policy) and the technical (management and land use) and environmental aspects to consider in the content of the Bill. Three trainings with the MCA’s i.e. 16 members (6 Female and 10 men) took place in the first half of 2016, which included trial runs to explain the Bill in the public participation phase (as required by law before any law is passed).

HIGHLIGHTS OF THE POLICY BILL

It was of outmost importance to properly align the County Policy to the Constitution principles, the ASAL policy, the Community Land Act, and the National Land Policy. The point was not to create more policy to implement policy, but to provide an ad hoc policy for the county that captures national guiding policy and legislation.

The Tana River Animal Control and Grazing Bill of 2016, has as its main policy objectives:

- address threats in grazing areas accruing from widespread migration of livestock of the County;
- address and influx of migratory grazing, its exacerbation of resource-based conflicts and the spread of diseases;

---

4 Wayu covers an area of over 5000 square kilometers and over 36,000 inhabitants comprising all of the 7 villages that make up Wayu community. In terms of surface coverage in relation to the size of the county, that is approximately the surface area of 9% of Tana River County under temporary secure tenure.
c) tackle frequent and severe droughts coupled with overstocking and degradation of the environment;
d) deal with issues of tenure security in grazing areas;
e) identify grazing areas and designate this areas for planned sustainable use;
f) promote the role of pastoral communities in the sustainable management of use of the grazing resources;
g) guarantee equal access to grazing resources to all members of the communities residing in the county including women and people with special needs;
h) establish process for the resolution of disputes internally, as well as cross-boundary disputes; and
i) ameliorate opportunities to use and access improved technologies in the enhancement of the grazing resource use.

Structure of the Bill:

Part I - Preliminary
Part II- Recognition, Protection and registration of grazing rights
Part III - Administration and management of grazing areas
Part IV - Grazing rights and entitlements
Part V – Nature of Grazing area
Part VI – Environment and natural resources management
Part VII- Settlement of Disputes
Part VIII – General Provisions

Also in line with the Community Land Act (and the PLD process), the bill requires that communities identify the extent of the land and democratically elect a grazing management committee\(^5\) for purposes of having the land designated as a grazing area and managed in accordance with this Act. Furthermore, where the residents at the wards claiming or occupying land it shall identify the extent and the boundaries of its land and no dispute is raised over such boundaries by any person whose land borders or is contiguous to the land so identified, the Registrar may issue a certificate of title to the community before adjudication.

---

\(^5\) The Community Land Act requires that if communities want to secure their land, they must democratically elect a Community Land Management Committee, composed of 9 to 15 people that includes minority groups and one third women representation. Subsequently the Committee remains as the land management and decision body for the life of the community.
The grazing management committees established at the Ward\(^6\) level has as its functions:

a) Establish and delineate grazing areas, identify their boundaries and cause there demarcation;

b) Prepare a comprehensive record of this demarcated grazing area;

c) Identify the seasons of use and the approximate carrying capacity of the grazing area;

d) Maintain an up to date database or inventory of all its activities;

e) Carry on research on matters relating to management of grazing areas generally;

f) Receive and process application for grazing permit and/or licenses;

g) Deposit all fees received from this process to the accounts as directed in the Fifth Schedule;

h) Updating all records showing monetary accruals;

i) Manage income accruing to the community for community good, purpose and/or interest.

j) Receive complaints within the grazing areas and cause the same to be recorded;

k) Attempt to resolve the dispute amicably within the framework contained in the Schedule;

l) Prepare a schedule of all complaint and their status to be presented quarterly to the Board;

m) Prepare and submit an annual report to the Grazing Management Board for transmission to the County Assembly on the status of grazing areas bi-annually;

n) Establish structures for community participation;

o) Ensure that community participation activities are inclusive of the Board spectrum of the community and not limited to the traditional sector stakeholders;

p) Establish clear and reasonable timelines are established for community input and comment and that these timelines are communicated to the participants;

---

\(^6\) A County is composed of sub counties and each Subcounty is in turn composed by Wards, which are the constituency level administrative boundaries and jurisdiction.
q) Establish a feedback process to the community including opportunities for the community to forward additional comments or input to the decision taken;

r) Develop an evaluation framework to the community participation plan;

s) Ensure that the public, affected groups, and stakeholders are informed of the results of the community participation process and how their input was used in the decision taken;

t) Ensure that community participation processes adhere to the relevant legislation, regulations, policies or guidelines affecting the rights and responsibilities of the public, officers and the different participants involved.

At the Subcounty level, a Grazing Management Board is to be established comprising of not fewer than three and not more than five members appointed by the County Public Service Board and approved by the County Assembly. The Board is to be registered (in accordance with the Bill), and be representative of all levels of the community so far as it is appropriate to do so having regard to the geographical and ethnic distribution of the members of the Sub-County.

The functions of the Board are:

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 any other law;

c) Facilitate the committees in the discharge of their functions;

d) Promote the participation of community members in the decision making of the committees;

e) Doing or performing all other acts necessary for the proper, performance of its functions under this Act, which may lawfully be done.

The Board may, after consultation with the Committee in whose functional area a grazing area is situated, consent to the granting of a grazing permit by the Committee in respect of any areas, grant to a person a permit to operate the areas as a grazing area for such period as may be specified in the permit and the Board may attach to such permit such conditions as it deems necessary. The committee shall establish and maintain a register of grazing area permit of every permit granted.
Finally, the Bill enshrines all elements of due diligence for public participation and necessary time to mobilize communities or other stakeholders that may be involved:

No grazing areas shall be established without the involvement and approval of the community in a well-attended qualitative public consultation forum.

The notice shall be made in the vernacular radio station by the committee as well as two daily newspapers with wide circulation at the County. The Notice shall also be posted in the local administration offices for publicity and shall be in a simple, clear and in a language understood by the residents of the County. No such grazing area shall be established until the expiration of ninety days after such notice has been given, nor until twenty days after such hearing held, provided however, that the publication of such notice shall have the effect of withdrawing all lands within the exterior boundary of such proposed grazing areas from all forms of entry or settlement.

The Bill also includes provisions on the environment and conservation of rangelands: the grazing plan shall consider any conservation, environmental or heritage sites that should be protected and whose access is limited for purposes of sustainable management of the County ecosystems.

As far as securing community land tenure is concerned, the Bill mirrors the provisions stipulated in the Community Land Act, and, some of the procedural gaps that the PLD process fills:

The programme [...] shall provide for measures to document existing forms of communal tenure and map the boundaries of such lands, whether customary or contemporary, rural or urban and shall develop an inventory of all grazing areas in the County.

The Board shall ensure that the process of documenting, mapping and developing an inventory of grazing areas shall be transparent, equitable, cost effective and participatory and shall involve the following steps–

a) a public notice of not less than ninety days, declaring an area or areas of land to be a grazing area, shall be posted in a public place, stating which land has been designated as grazing areas and requesting all persons with an interest and/or claim in the land attend a specified meeting;
b) actual involvement and engagement of the community by creating awareness of the process and taking an inventory of all their land and resources rights;

c) recording of all community land claims including the designated grazing areas;

d) actual involvement of the residents in the demarcation of the grazing area, delineation and harmonization of boundaries with neighboring communities;

 e) validation and adoption of rules and regulations for the proper governance of grazing areas and natural resources.

The documentation and mapping process contemplated in this section shall be—

a) undertaken through the registration units constituted under the Land Registration Act;

and

b) concluded within such time as the Board may determine.

CONCLUSION

Whilst community land tenure security awaits the development of regulations for the Community Land Act to issue a certificate or title, the Tana River Animal Control and Grazing Bill is elaborated in such a way as to address tenure in the absence of those regulations. The Bill is currently undergoing public awareness and participation/consultation before it moves toward the second reading and it is passed at the County Assembly.

The information that emerged from the PLD experience of engaging with the community was woven into the draft concept of Policy started by the MCAs. Hence, the final Policy Bill had a bottom-up approach which consisted on the consultation processes and data gathered during the land delimitation, as well as a top-down approach launched by the County Assembly of Tana River that also received expert inputs and benchmarked on the Voluntary Guidelines for the Responsible Governance of the Tenure of Land, Forests and Fisheries for its development. So far, this has been an archetypical example of policy development that used an integrated approach to make policy pertinent and effective.

Proactive community-based action to leverage and demand legal protection is critical. This approach to policy development or reform put into evidence the need to engage local stakeholders (as actual users of the land) in a central role in the policy development process. More participatory land delimitations will
take place in different areas of Tana River as well as in other counties in order to inform the regulations for the Community Land Act.

REFERENCES


