



Special newspaper for the conference on **COMMUNITY LAND LAW**

Best practices and approach for the protection of community landrights in Kenya

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Kenya's community land... which way for the country?



By **DUNCAN MBOYAH**

Land in Kenya like in many parts of Africa is a vital source of livelihood for the majority of rural based communities.

Attempts have been made throughout the history of Kenya to undertake land reforms through commissions from as early as 1916 with the aim of recognizing customary rights.

Growing pressure for biofuels, minerals, oil and food for export and local dynamics on customary land have worked against the land rights of the communities.

The stock of customary land is diminishing to statutory and reserved estates and public utilities like schools, playgrounds and churches. And in some cases to land grabbing. Emergence of unplanned settlements in peri-urban leading to uncertain and insecure settlements has been the order of the day in the country.

Inefficient and uncoordinated land market exists and this too threatens the communities' security to land. In many cases, it has led to landlessness and loss of a means of livelihood to local people who stay in rural areas.

"Land is a value, a right and an inspiration that is on the road to substantive equality, emphasising race and gender," Wilmien Wicomb from the South African Legal Resource Centre told a conference on community Land Law in Nairobi.

Wicomb noted that communities are increasingly trying to uncover the hidden boundaries of inequality that is experienced in rural and urban areas

and in customary law rights.

She observed that within the customary context, the inequality within communities highlighted less attention on discrimination against the community as the rights holder.

According to Regina dos Santos, Programmes Officer of Centro Terra Viva in Mozambique, her organization provides paralegals that help create awareness to the public on land matters.

She said that the initiative has helped make the public know their rights and become more vocal in instances of injustice.

Dos Santos revealed how the initiative has included women and vulnerable groups who are trained to train other community members on land rights.

Wakeup call

The views expressed by the South African and Mozambican are a wakeup call to Kenyans to pay more attention to community land rights. But their views beg the question as to whether Kenya's case is set to bear fruit.

However, going by the developments in the land arena, it's clear that in Kenya very few organizations are empowering communities on how to negotiate on these rights.

Community land are land that are held by groups under the Land (Group Representatives) Act; trust land held by County Governments on behalf of communities and other land lawfully transferred to a specific com-



Mui Basin in Kitui County where coal has been discovered. Community land is under threat as the rush to exploit untapped natural resources gains momentum. ABOVE: Delegates follow discussions keenly during the Conference on Community Land Law.

PHOTO: CORRESPONDENT

munity by any process of law.

These lands — community forests, grazing areas and shrines — are lawfully held, managed and used by community.

In definition community land can be defined as

- communal land;
- individual, family or clan land; reserve land; or
- any other category of land approved by the committee.

For instance, communal land shall comprise land occupied and used or available for occupation and use on a community or public basis by all the community and any other persons who are with the agreement of the committee living and working in the community whether those persons are using community land under a derivative right or not and such land shall not be made available for individual occupation or use.

Community Land Law will, there-

fore, be important to help set aside land for grazing as this gives communities powers over ownership and protection of their land.

According to Prof Patricia Kamari-Mbote, The Dean, School of Law, University of Nairobi, although Kenya has a new Constitution, and a whole chapter on land, it has basically ignored community land. Hence the need to have a law that specifically speaks to community land.

The Sessional Paper No3 of 2009 on National Land Policy designates all land in Kenya as public, community and private. Most significantly, it recognises and protects customary rights to land. It also recognises and protects private land rights and provides for

derivative rights from all categories of land rights holding.

"Community land Law is being drafted to address issues of community land," noted Mbote.

The Community Land Law allows pastoralists to exercise joint land use between villages that have common activities and in the end avoid unnecessary tensions that lead to intra clan clashes.

For communities that are beekeepers, hunters and gatherers, or those that have lived and interacted with the forests, the law will help reinforce the management and conservation of the environment.

Since most communities believe in direct ownership of the land, the

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Drafting of Community Land Law bill over



By ODHIAMBO ORLALE

A team tasked with looking at the issue of land reforms in relation to community land is set to make its findings public.

According to Prof Simiyu Wandibba, a member of the task force charged with writing the bill on community land law, the task force has completed most of the work and will soon release a document to that effect.

The task force was formed last September by former Lands and Settlement minister, James Orengo.

According to Wandibba, who represented the chairperson Akinyi Nzioka at the Conference on Community Land Law held in Nairobi, the team travelled across the country's 47 counties and received written and verbal views from members of the public and stakeholders.

The two-day conference was organised by Kenya Land Alliance, University of Nairobi's School of Law and Strathmore University's Law School.

"We went round and held numerous consultative forums with the public and experts on the proposed Community Land Bill and have already come up with a work plan and budget," said Wandibba.

This was in line with provisions of the new Constitution which states that before any law is debated and passed by the Legislature, it must go through community leaders and members of the public.

The task force held talks with minority and marginalised groups in Rift Valley, most of who are pastoralists and or hunter and gatherer like the Ogiek and Endorois among others.

The task force also received written memorandum from various groups and people living in informal settlements in urban centres like Nairobi, Mombasa and Kisumu.

Complaints

"We received complaints from residents of Coast Province who challenged us to tell them how the Government could allow them to be evicted from a disputed parcel of land in the transition between a new Constitution and enactment of the proposed Community Land Law," explained Wandibba.

According to Odenda Lumumba of Kenya Land Alliance, the task force was given limited time to accomplish its task. "This it has done and they now need to deliver to stakeholders."

His sentiments were echoed by Dr Collins Odote who noted that 70 per cent of Kenyan land is community land and that is why it was important to have a taskforce work on the bill.

Currently, there are 27 bills related to land that are being reviewed and harmonized into two bills so that more Kenyans can understand and use them effectively.

Although the Constitution gives the Land Commission authority to hand all land issues in the country, the Land Act has a provision the Ministry of Land will be solving the matters.

According to Mohamed Swazuri, chairman of the National Land Commission, Kenyans have great expectation on his team. He said they will follow the law to the letter and be as innovative as possible.

"It is a fact that community land is under threat now more than ever before because that is where most of the untapped natural resources such as oil in Turkana, coal in Kitui national and game reserves; and solar power in Northern Kenya are," said Swazuri, noting that this is where our biggest challenge will be. The other will be the new Constitution and devolved governments.

The Land Commission is working closely with the 47 governors and senators in addressing the explosive land question. Swazuri said they have records to show that most community land in the country had been grabbed. He noted that they working closely with the au-



"We received complaints from residents of Coast Province who challenged us to tell them how the Government could allow them to be evicted from a disputed parcel of land in the transition between a new Constitution and enactment of the proposed Community Land Law."

Prof Wandibba Simiyu,
member of Community Land Law Taskforce

Laikipia Game Reserve. Most game reserves are under community land and thus the Task Force on Community Land Law will come up with recommendations on how communities can benefit from the resource. | PHOTO: CORRESPONDENT

thorities to ensure that the controversial titles are revoked and the land returned to lawful owners. He cited a case at the Coast where a marine park was threatened.

The task force also received best and worst practices report from other parts of the Africa to help them in writing their report and drafting the Community Land Law as well as Eviction and Resettlement Bill.

According to Gazette Notice No 13557 of September 19, 2012, the Lands Minister appointed the 14-person Task Force to formulate a Community Land Bill as well as an Evictions and Resettlement Bill.

The timeline given for the task was two months with effect from the date of the notice.

Other members of the team are Prof Patricia Kameri-Mbote, Dr Collins Odote, Dr Korir Singoei, Odindo Opiata and Ibrahim Mwachane. Others are Dr Winnie Mwangi, Peter Musyimi, Prof Simiyu Wandiba, Faith Waigwa, Soipan Tuya, Harry Fredrick Mugo, Jane Mumbi Weru, Erastus Lokaale, Amina A. Hashi, Richard L. Lelemusi, Mercy Njamwea, Irene Mutai, Cesare Mbaria and V. K. Liyai.

Reference

Its terms of reference were that it prepares two draft bills: - (a) Community Land Bill; and (b) Evictions and Resettlement Bill.

In discharging its mandate, the task force was to use a consultative process, work closely with the Ministry of Lands and other ministries among stakeholders. It was also to hold consultative meetings to discuss and understand community lands on recognition of rights, administration and management of community land and evictions and resettlement.

The team was also to review and research best practices from within and from other countries that have statutorily recognised community land rights as well as evictions and resettlement to inform development of the bills.

They were also to formulate a draft bill on Evictions and Resettlement based on the provisions of the Constitution, the National Land Policy and recommendations and findings of the consultative process. Hold regional fora with public and stakeholders to discuss draft bills and use feedback from these processes to firm up the draft bills also formed part of their mandate.

The Task Force is expected to develop a detailed work plan indicating milestones and timelines. It will draw funds for its work from the vote of the Ministry of Lands.

Indeed, community land in Kenya is dominant, accounting for over 50 per cent of Kenya's

stock of land, mostly in the expansive Rift Valley Province which stretches from Kenya's border with South Sudan in the North to Tanzania in the South.

It is also home to most of Kenya's pastoralist communities and carries a lot of Kenya's land based natural resources. Financial institutions and investors will need to have clarity on how land rights to such collectively owned land will be transacted or accessed for future investments.

The discovery of deposits of key resources like minerals within many parts of Kenya such as oil in Turkana County and the recent gas findings along the Coast add impetus to the need for Community law.

The process of preparing this law will, therefore, unlock and attract various competing interests locally and externally. This will need careful navigation.

Line Ministries, stakeholders, private sector and communities must follow and participate in this process closely to ensure that the law not only protects the individual and collective land rights of communities but that it is also good enough to facilitate transactions such as:- Registration of land; Conversion from community land to either public or private land; and Transfers of land Leasing for short and long term investments (by local and foreign investors)

On the other hand, the Evictions and Resettlement Bill is expected to define procedures to guide evictions of persons from private, community or public land.

This can be contentious given that throughout Kenya's history, private land owners, local and central governments have easily obtained court orders to evict persons settled on their land.

Measures

They have then proceeded to do so in a brutal and high handed manner, occasioning loss of property and even death at times. Livelihoods are shattered as businesses are destroyed and schooling interrupted.

The anticipated bill wishes to introduce measures to be complied with before any eviction is carried out but this may not be welcome in some quarters and may be viewed to diminish registered land rights. However, the country has to decide whether it is ready to continue with the brutal evictions that has been witnessed in most urban areas and forest settlements.

Therefore, public and stakeholder participation in the formulation of this bill is equally necessary.

Deafening silence on right of women to own land

Africa's agricultural sector largely dependent on a population that does not possess land

By JOYCE CHIMBI

During a recent conference on Community Land Laws held in Kenya that convened participants from around the globe, it emerged that women continue to be side-lined when it comes to land ownership.

The situation is complicated by the fact that women operate in a patriarchal society, where men hold sway. For women, membership to society is not as straight forward as that of men. While women are expected to move from their parents' home to the matrimonial homes, men are looked at differently and accorded many of the rights to ownership of property.

"Men's position in relation to land ownership remains constant compared to that of women and children. An orphaned child or one born out of wedlock is much more vulnerable. The same case applies to the divorced, separated or widowed women," said Judy Adoko, Executive Director, Land and Equity Movement in Uganda (LEMU) during the conference.

Further, a woman with no male child is also discriminated against when it comes to land ownership.

"While the economy of most African countries is dependent on women, they are still deprived the right to own land. They toil all day on land that they have negligible control over, they sustain the breadbasket regions of many countries that are dependent on agriculture but their labour is unacknowledged and they are poorly remunerated," says Mwanahamisi Salimu, who advocates for women's rights to land under OXFAM, Tanzania.

Discrimination

This is in spite of the fact that African countries that are dependent on agriculture rely on the female population to keep the significant agricultural sector afloat.

A sufficient food base is an undisputed prerequisite for development with many African countries perceiving agriculture to be more or less at par with industry and other sectors. Nonetheless despite the massive contribu-

tion that women invest in this sector in terms of labour, they remain marginalized in relation to controlling and profiting from this critical resource.

The situation, therefore, becomes complicated when a married couple separates because in most African countries, the law is silent on how land should be divided upon dissolution of marriage. This silence makes land an exclusive reserve for the man in question.

Rights

Access to land is compromised when the male head of household, who is also the land owner, dies. In most cases, the woman gets disinherited often in a move that is accompanied with violence.

The Community Land Law Conference brought into fore the fact that women still hold a negligible percentage of land title deeds. In Kenya, the host country, only a paltry five per cent of women hold land title deeds.

"In Tanzania the situation is not any different, with only about one per cent of women having title deeds. This means that the rest of the female population which forms the bulk of the labour force in the agricultural sector break their backs but have no say on the proceeds from the farm," Salimu expounds.

She notes that the situation is worse among conservative tribes such as the Chagga where land is exclusively allocated to men and this has had grave cultural implications.

Says Salimu: "The piece of land is also a burial place, if a woman dies unmarried she is buried in the public cemetery which basically means she will be forgotten. It is because of this that most Chagga women will do anything to avoid including getting married for it and withstanding unimaginable levels of abuse from their husbands."

Participants in the land mark conference decried the fact that individual ownership of land and patriarchal norms have progressively compromised women's rights to land tenure.

Challenges regarding the African land rights systems were also discussed



Women invest highly in the agricultural sector in terms of labour but remain marginalised in relation to controlling and profiting from this critical resource. | PHOTO: CORRESPONDENT

and their discriminatory nature towards women.

For instance, it emerged that whereas the national constitutions acknowledge that women have a right to own

land, they are not fully protected when this right is compromised, or in some instances, fully taken away.

As a result, it was agreed that Community Land Law must establish mech-

anisms for ensuring women's rights to not only access land, but to control and even own it.

Kenya's Constitution as well as the National Land Policy provide the much required legal framework to enhance security for women's rights to land.

In the face of the devolved system of governance, it also emerged that effective engagement of women in county and community land governance levels should be encouraged.

While it was important to have the law speak explicitly in regard to women's land rights, there is also need for capacity building to enable women to fully participate in the ongoing land reforms.

This is due to the fact that land rights are not merely about women owning land, it is also about them being able to manage the land they own, effectively and productively.

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Mwanahamisi Salimu Oxfam Tanzania

Kenya's community land — which way for the country?

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law once introduced will help save the water catchment areas that serve the larger population.

Land is critical to the economic, social and cultural development of Kenya, as noted in the National Land Policy 2009. It also states that the Land Act will lay out a clear framework and procedures in Article 66 (d0) (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".

Community Land Law will also guide communities on their rights and privileges when it comes to the use of the land.

Without the law, individuals will easily access and allocate land as they wish in disregard to the community that enjoys the rights to the land in question. The Law will help communities in reminding such individuals of their role in protecting the land from grabbers for the benefit of other

people. Currently in Kenya, a large chunk of community land has been grabbed with people who are rushing to acquire huge chunks of community land before the loopholes in law are sealed.

Failure to have the law in place will mean that very often communities will be fighting amongst themselves. This is what is being witnessed in Tana River County where sedentary agriculturalists keep on clashing with nomadic pastoralists over pasture and water.

The other consequence that will happen if the law is not in place is land grabbers will have a field day in allocating what is owned by communities as was the case with the Mau water catchment. Once such areas are allocated to individuals, the beneficiary communities will start suffering.

Whereas communities have long kept traditions for the protection of their land, such traditions are useless if they have no backing of the law will be watered down and lose meaning in

the society. This is why it is important now that Kenya enacts its Community Land Law.

So far the National Lands Commission has finally been established courtesy of the Constitution of Kenya 2010 and its commissioners have been appointed.

However, following the formation of new and merging of certain ministries, the Commission that was previously housed at Ardhi House, a building that hosts all land titles and documents, is due to relocate to give room to the Ministry of Lands, Urban and Housing. This move has not been welcomed and sends signals that the Commission may not have an opportunity to fulfil its mandate.

"The Commission almost collapsed before it started its work as it lacked funding as well as goodwill to carry out its mandate that is enshrined in Article 249 of the Constitution," said Dr Sam Tororei, a commissioner.

Tororei noted that it was strange to have the Commissioner's offices away

from the building that houses all the titles that they need from time to time for references and confirmations.

These fears were also expressed by the National Coordinator of Kenya Land Alliance (KLA) Lumumba Odenda who questioned why there was lack of implementation strategy and inadequate financial resources as well as an office space to operate from.

What worries land reform stakeholders is that this lack of office allocation for the commissioners and inadequate funding of the body does not augur well.

The Commission requested for an allocation of KSh6 billion but only received KSh241 million, far less than even from last financial year's allocation.

Given that land sector has in the past been riddled with corruption, it is important that the Commission gets adequate funding to enable it manage its affairs professionally without fear or favour.

As is like the case with other

countries, the Government needs to fund some organizations in creating awareness to the public on land matters so that Kenyans can get to know their right to owning and using land irrespective of gender as is indicated in the Constitution. There has been a lot of confusion over community and public land

Land stakeholders must also continue with their campaign and ensure that the Commission is duly taken care of by the Government as stipulated in law for the Land Policy on reforms to take effect.

Communities that are the main losers of corruption deals that have rocked the sector for decades also need to continue reporting questionable deals on land matters to the National Land Commissioner.

Silence by members of the public will only give anti-land reformers opportunity to continue transacting illegal deals on land matters, leaving majority of the communities dispossessed.

Will law provide reprieve to the Mukuru slumlords phenomenon?

By CAROLYNE OYUGI

A leisurely walk through Mukuru kwa Reuben slums at midday is a chance to see the beehive of activities that dominate this informal settlement located towards the south of Nairobi.

A common sight is of children walking home for lunch while others are going back to school. Food vendors have paraded themselves with an assortment of cooked and fresh food along the road. Vehicles and motor bikes are also squeezing along the same narrow road leaving behind a trail of dust.

At some point the motorists drive so carelessly that one cannot help thinking of the nursery school children who know nothing about traffic rules.

"This is how we survive in this slum," explained Evans Jack (Papa Omosh) after reading the fears on my face. "This place is poorly planned because everyone wants to put up a structure wherever there is space and as a result we cannot organise for simple and yet important things like roads or sidewalks."

Papa as he is popularly known around here is 52-year-old village elder. He started living here as a young boy when his father was working for Reuben, a white man only known to the residents by one name. Papa's father worked for Reuben Transport Company, today known as Express Transport.

He has also brought up his family at the same place and this is all he knows as his home. "My children's birth certificates and national Identity Cards indicate that this is their home," he explains.

Papa and his family are just but one of the members of the 3,000 households in Mukuru slum. It is estimated that the slum has a population of 100,000 people who are mostly casual labourers in the surrounding factories.

Unlike other slums in Kenya, Mukuru's case is unique because it sits on private land.

According to Prof Patricia Kameri-Mbote, Dean at the School of Law, University of Nairobi, uncertainty over land ownership in a space viewed as community land has led to poor service delivery.

Develop

"The Government of Kenya gave the land to individuals on leasehold for industrial development. The lease was to take 99 years which has already expired by now."

Mbote notes that some people who were given the land developed it while others did not. Even worse is the fact that someone took a loan from a bank and used his title deed as security and now a piece of the land is owned by the bank.

Registered title deed holders also sell land and evict slum dwellers, something that the slum dwellers have not taken lightly.

They have filed a lawsuit to stop forceful evictions of informal dwellers living in the two industrial zones. The Mukuru settlement community is locked in a legal battle with former President Daniel arap Moi, former Commissioners of Land during Moi's tenure and some politicians.

The slum dwellers are represented in court by a battery of lawyers asso-



ciated with the Katiba Institute. They also have support from Muungano wa Wanavijiji (a consortium of villagers).

They are demanding that the Government should take back the land and do proper planning by constructing better houses for them to rent.

Mary Wangare, a 37 year old woman living with disability, knows better the effects of poor planning. Her house was razed to the ground because there was no road that the fire tanker could use to get to her.

"I watched helplessly as all my



"The Government of Kenya gave the land to individuals on leasehold for industrial development. The lease was to take 99 years which has already expired by now."

Prof Patricia Kameri-Mbote, Dean at the School of Law, University of Nairobi.

River Ngong in Mukuru kwa Reuben overflows with waste water next to people's houses. Land ownership in this slum is a big problem and the residents have gone to court demanding that the government finds a lasting solution. | PHOTO: CORRESPONDENT

worldly possessions were consumed by the fire and the house reduced to ashes as my disabled leg could not allow me to salvage anything," Wangare explains as the painful memories hit her.

Mbote believes that most problems in Mukuru kwa Reuben, just like in the others in Nairobi and other urban centres, can be solved if there is a clear Community Land Rights Law.

Ownership

However, despite this Mbote has reservations and her greatest fears here is the "slumlord" phenomenon. This is a breed of landlords who have informally sub-divided the land, built structures and rented them out to residents.

At times this brings conflict when it comes to rent payment because the tenant feels that he or she should not pay the requested amount because the structure owner does not own the land. The structure owner also feels that he should be paid that and more because he has invested.

Doreen Moseti, a member of Muungano wa Wanavijiji and a resident of Mukuru kwa Reuben attests to this. "I live in a 10 by 10 feet house and pay KSh1,000 per month yet I have no toilet and bathroom," Moseti explains. She adds: "I also have no running water and my electricity is tapped from elsewhere."

At the end of the month, Moseti spends a lot of money buying water and for the other utilities. The so-called slumlords focus on calculating the number of rental rooms they can have in a space without thinking of other important facilities that are needed.

Access to justice and basic services in Mukuru is also fluid and dynamic. People claim that they do not feel the

security by the Kenya Police and so they have formed their own small vigilante groups in specific areas.

Community

Article 63 in the Constitution of Kenya 210 has tried to put the term 'community' into context as defined on the basis of ethnicity, culture or similar community of interest.

However, speaking during the Conference on Community Land Law Rights held in Nairobi Mbote noted that the composition of Mukuru slum and by extension of the urban population is of a heterogeneous nature with regard especially to ethnic groups. She says the only provision of the term community that can fit into this context is through the basis of similar community of interest.

"Their major interest is raising their standards of living by having security of tenure with regard to land. Having security of tenure will substantially shield them from their perennial problems such as threats of eviction or forceful removal from their settlement," explains Mbote.

The National Land Policy section 3.3.1.2 recognizes community land rights and defines it as land lawfully held, managed and used by a given community as shall be defined in the Land Act. It states that to secure community land, the Government shall "document and map existing forms of communal tenure, whether customary or contemporary, rural or urban, in consultation with the affected groups, an incorporate them in broad principles that will facilitate the orderly evolution of community land law".



"This place is poorly planned because everyone wants to put up a structure wherever there is space and as a result we cannot organise for simple and yet important things like roads or sidewalks."

Evans Jack (Papa Omosh)

Investors in Tana River derail community land rights

By FAITH MUIRURI

As focus shifts to recognition and securing of community land rights, residents of Tana River County are upbeat that they will be able to reclaim community land which has been vested in the hands of investors.

The community has been pushed into destitution and squalor as investors occupy huge chunks of land.

Most community land has reverted to private ownership and unless there are deliberate attempts to invoke the law of compulsory acquisition, the county will forever remain chained to the whims of investors.

And as the County government takes shape, it remains to be seen how it will deal with the issue of community land under its jurisdiction.

The Constitution (Article 63(1)) defines community land as land held by communities on the basis of ethnicity, culture or community of interest.

Ownership

Although land in the County is either government land or trust land, Community land rights have been curtailed significantly, especially in instances where the state or individuals have taken over the ownership of the land.

Successive governments and county councils have routinely disregarded set procedures, while leasing out land set aside for public use.

According to Patrick Ochieng of Ujamaa Centre in Mombasa, investors have been given the leeway to acquire huge tracts of community land.

He cites a case in June 2008, where Mumias Sugar Company was granted a license to turn the wetland into plantations for sugar production and "eco-friendly" bio-fuels.

The move elicited protests from the community with the Tana River Delta conservation lobby moving to court to halt the decision. However, in June 2009, Kenya's High Court ruled in favour of the developers on a technicality, with costs. Now the Government has given tenure rights and ownership of 40,000 hectares of Delta land to TARDA (Tana River Development Authority), ostensibly to grow rice and maize as a response to Kenya's recent drought and food shortage. Many local residents have been evicted from their homeland as a result.

Acquisition

Another sugar company, Mat International, has acquired over 30,000 hectares of land in Tana Delta and another 90,000 hectares in adjacent districts. The company has not carried out any environmental and social impact assessment.

Further, Bedford Biofuels Inc, a multinational company based in Canada, has signed a 45-year lease agreement on 65,000 hectares of land in Tana River District to transform into biofuel farms, mainly growing *Jatropha curcas*. The land is currently owned by five local group ranches. All of this land is either in or adjacent to the delta.

A significant percentage of the local community members have rejected this project. In 2011, a dispute erupted about whether or not to allow the project to proceed. A key argument in wanting to stop it is that



jatropha has been shown to fail as an economically viable crop in East Africa. Furthermore that as a biofuel, the aim of which is to reduce carbon emissions, in fact the process of producing it releases more carbon than would be reduced in burning it instead of fossil fuels.

Ochieng at the same time points out that the extraction of Titanium from the sand dunes of the delta by Tiomin Kenya Limited is another project mired in controversy.

Tiomin Kenya Limited was originally incorporated in Canada, but the local subsidiary has been bought by the Chinese who have managed to acquire 20,000 hectares of community land. The Tiomin Company operates in Kwale and Msambweni districts on the south coast of Kenya. The Tana Delta was identified to have huge titanium deposits which could augment Tiomin's Kwale production. The company is in discussion with the local government authorities in Tana Delta.

In addition, former President Mwai Kibaki offered to lease the Gulf-state of Qatar 40,000 hectares of community land to grow fruit and vegetables in return for funding of a new £2.4 billion port in Lamu. About 16,200 hectares of this land lies in the Tana River Delta. The plans to construct the port in Lamu are still on.

Ochieng says that the community in the Tana Delta is hardly consulted in land transactions.

"This has served to fuel conflicts in the County which is purely arid, with only a small portion of about 38,437 square kilometre area being arable," Ochieng explained during the conference convened to discuss approaches for the protection of community land rights.

It is noted that the Bura and Hola irrigation schemes, which were the county's breadbasket in the 1980s and early 1990s have dried up over the years.

Recent efforts to revamp the sector have not borne much fruit. Only the rice-growing Tana Delta Irrigation Project, run by the Tana and Athi Rivers Development Authority (Tarda), has survived the vagaries of nature and politics. However, it was



River Tana which is the largest river in Kenya, traverses the northern and eastern part of Tana River district where investors have capitalised on community land. ABOVE: Orma families in a temporary camp owing to endless clashes in the Tana Delta. | PHOTO: CORRESPONDENT

badly hit when River Tana changed its course in the mid-1990s, and the 1998 El Nino floods almost brought the project to its knees.

With a large population of nomadic pastoralists roaming the county, conflict over the available pastureland has become endemic.

Scarcity

Conflicts in Tana River seem to heighten in the run-up to elections. Statistics show there were clashes in Salama in Garsen in 1996; in Zubaki, Duwayo, Kinakomba and Mnazini in Galole, and Idzowe and Chara in 2001; and this year in Kipini. This is an indication of the jostling for power between the communities in the area.

The pastoralists traverse the length and breadth of the county, from Mbalambala in the north to Kipini in the south, grazing their livestock where there is pasture and staying close to the only reliable water source — River Tana.

Even when they move west of the

river, their large flocks keep drifting back as the wells, water pans and dams in areas such as Boka, Bangale and Chardende dry up.

They keep close to Mbalambala, Madogo, Nanighi, Bura, Milalulu, Zubaki, Wenje, Mnazini and Garsen before they enter the Tana Delta, the final destination.

The Pokomo cultivate along the riverbank, often blocking the pastoralists' access to the river. So the Orma and Wardei drive their animals through the farms, leaving behind a trail of destruction and a seething community of farmers in their wake.

The farmers descend on the offending livestock and slaughter or maim them. The herders, who are armed, usually react with gunfire. This result in tears, blood and death and has been blamed on the vicious cycle of violence and tribal animosity.

Yet it could be easily avoided if the Government implemented the land adjudication and settlement programme that has been on the books for

decades.

The adjudication is meant to allocate farmland to the farmers who already occupy it, and partition the rest of the county's grassland into group ranches to cater for the livestock keepers.

Policy

One of the recommendations is the creation of *malka* or livestock corridors through the farms to the river to avoid destruction of crops.

Some have been created, but the pastoralists don't always use them.

If they were legally created through adjudication, the herders would have to use them. However, some have been blocked by the farmers because they have no legal standing. The councils of elders, Gassa for the Pokomo and Matardeda for the Orma, are supposed to help the government ensure the success of the livestock corridors but this has never happened. Politics always crops up and leaves things as they stand.

A fairly advanced tenure system in Tanzania

By ODHIAMBO ORLALE

Tanzania's land reforms are "relatively progressive" as exemplified by the land tenure system which recognises, guarantees and protects community land rights in its historical development.

That is according to Yefred Myenzi, a land expert, who recalls that prior to the colonial occupation by the Germans, Tanzania, by then called Tanganyika's land tenure was held in perpetuity by tribes and clans with in-built regulatory mechanisms vested on to the elders.

The latter, were responsible for land administration and rights adjudication by settling disputes that emerged between clan members.

Addressing a two-day conference on community land law in Nairobi, Myenzi said no significant changes were made on the land laws after independence in 1961. This meant that land continued to remain public but vested in the President in the place of the Queen and her governors.

With this change, land was later massively alienated from the communities in the name of national interests sometimes at a gun-point for allocation to a parastatal.

Livelihood

Different groups use land to meet diverse motives and ends but the bottom line is 'land is a crucial means of livelihoods for majority small producers especially in the rural areas in Tanzania'.

According to Myenzi, Africa has historically engaged in land reforms that have recognized and retained the customary land tenure system in different forms and governance structures.

Whereas in other countries like Kenya and South Africa, the customary tenure regime was generally squeezed in favour of statutory individualization, Tanzania's land tenure system is and has largely been communal served by customary laws.

The Presidential Commission of Inquiry into Land Matters headed by one of the most prominent professors of law in East Africa, Issa Shivji, produced a report in 1994 detailing how land slipped out of the communities between 1960s to 1990s through nationalization, villagization, decentralization, urbanization and eventually liberalization.

The report sums it up: "To facilitate the nation building project, Tanzania proclaimed the Arusha Declaration in 1967 which was a national blue print aimed at nationalizing all privately owned properties, of which, land was not spared."

Turning to the current state of customary land rights protection, Myenzi notes that there is a remarkable progress in the East African Community laws of the land with regards to recognition, protection and securing of the land rights of the citizens in their constitutions. He cites the case of Kenya where the Constitution that was promulgated in 2010 has a chapter on land and environmental protection issues. This was preceded by the Ugandan Constitution in 1998, which equally guarantees its citizens security over land.

On the contrary, Myenzi notes, the Tanzania Constitution does not provide such a guarantee but gives a general provision on protection of property rights to all citizens.



A section of Tsavo National Park which occupies a large chunk of community land that also flows across the border into Tanzania. RIGHT: Prof Yash Pal Ghai in a conversation with other participants during the Conference on Community Land Law. BELOW: Regina Dos Santos (right), a delegate from Mozambique during the recent land conference in Kenya. | PHOTO: CORRESPONDENT

Tanzania has dual land tenure system. A statutory tenure, also known as Granted Right of Occupancy and Customary Rights of Occupancy, which is also known as deemed right of occupancy.

Land in Tanzania falls under three categories namely village, reserve and general. Ownership of land in the village is either through allocation by the village council or perpetual inheritance from family members. In either case, the owners are granted with same and equal rights over the land owned.

According to Myenzi, the Tanzania land policy and laws recognize and provide for the protection of the rights to land for the vulnerable groups with a specific mention on women and pastoralists.

Despite this seemingly positive gesture in the land law, Myenzi says it is important to underscore that women in Tanzania are yet to take full advantage of what is provided for in the law for three elaborate reasons.

Framework

First, the constitution and land laws still recognise the customary laws, some of which are against the principles of natural and social justice.

On gender, Myenzi says, women in Tanzania, like those in many African countries are treated by their tribesmen inequitably with men and segregated in property ownership including land.

Tanzania has over 120 tribes majority of which practice patrilineal system in which property ownership and disposition follows a male lineage on account that women will be allocated and inherit from their spouses' families.

However, he notes that much as the Tanzania land tenure system is regard-

ed as a relatively progressive case in the region, it may not present the best case for pastoralists' land rights. The Village Land Act recognises allocation of land for pastoralists' activities including grazing during preparation of village land use plans.

However, the second biggest concern is on the conflict of interest between pastoralists and wildlife conservation which is divided into game reserves, national parks, game controlled areas, wildlife corridors and wildlife breeding areas all of which are reserved and governed by the National Wildlife Act of 2009.

On the issue of securing the customary land holding for artisan miners, Myenzi notes that land in Tanzania excludes minerals, oil and gas, and whenever the villager owns a land that is discovered to have minerals, the procedures for mineral exploitation are provided for in the Mining Act 2010 which, among other things; require the prospector to have a prospecting or mining license from the respective authorities in the Ministry of Energy and Minerals.

He says that one of the progressive elements of the land laws and especially the Village Land Act, is the provision for the disputes settlement mechanisms that are participatory and the recognition of the customary procedures in land disputes settlement.

Turning to women's visibility in the new land laws, Myenzi says the



fact that women are not active players in decision making tables is an open secret that also applies to Tanzania.

However, he adds that the Tanzania land tenure system, especially the disputes settlement mechanisms, have an inbuilt progressive element that promotes women's participation without having to consider them through special seats.

Given the fact that village assemblies make final decisions on land in villages, he says, it is obvious that women's voices are not fully recognized for the matters can simply be debated and resolved by men and there

will not be any objection to that no matter the consequences to the women in the village.

"As we continue to reflect on how best to secure the rights to land under the customary regime, we need to take stock of all those strong elements and strongly push for their recognition and protection in the statutory laws beginning with the national constitutions," says Myenzi.

He observes: "The Kenyan constitution has set a good precedence in recognising and protecting customary tenure rights which Tanzanian needs to emulate in the on-going constitutional reform process."

Commission set to protect land

By HENRY OWINO

As Kenya seeks to reform its land laws, Parliament is being urged to enact legislation to make further provision for the operation of Land laws as stipulated in the Constitution of Kenya 2010.

The Constitution, which is the supreme law stipulates that all land belongs to the people of Kenya collectively as a nation, as communities and as individuals. It further classifies land as public, community and private.

Land is of cultural significance to many Kenyans and that is why fundamental issues in the National Land Policy are anchored on the Constitution.

Due to historical injustices, unfair allocations and grabbing of land to an extent that indigenous peoples have been left landless, the country is rewriting legislation on land to ensure that events such as the post-election violence of 2007-2008 do not recur. The violence was blamed on among other things historical injustices in relation to land. The old Kenyan Constitution failed to establish an efficient, accountable and equitable institutional framework for landownership, administration and management.

In Article 65[1], the Constitution provides that a person who is not a citizen of Kenya can only hold land under leasehold tenure within a period that will not exceed 99 years.

According to Dr Mohammed Swazuri, Chairman National Land Commission, all foreigners owning land in Kenya are supposed to present their documents to his offices.

He notes that all non-citizens should immediately furnish the office of the Commission with documents such as lease agreements, letters of allotment and title deeds.

Swazuri was addressing delegates during the Community Land Law conference held in Nairobi. He reiterated that foreigners must regularize their land ownership or use their status to conform to the requirements of the Constitution.

He observed that community land was under threat from urban development. He expressed his concern that most of the country's natural resources were being discovered in areas that land was held as communal band this is why the issue of land being held by non-citizens must be given due attention.

"Property held in trust will be regarded as being held by a citizen only if all the beneficial interest of the trust was held by persons who were citizens," explained Swazuri.

He reiterated that this call is "purely" meant to streamline the land sector to conform to the current Constitution. He noted that no certain community, individuals or ethnic groups are being targeted in the process.



A man grazing cattle in community land in Turkana. A new law is being written to protect communities from unfair land practices. RIGHT: National Coordinator of Kenya Land Alliance (KLA) Lumumba Odenda follows discussions during the Conference on Community Land Law.

PHOTO: CORRESPONDENT

"The Commission is in no way intending to dispose of any non-citizen of their rightful occupation, ownership and use of land in Kenya, and neither should it be seen as scaring away such persons and other potential foreign investors," Swazuri clarified.

He requested that all non-Kenyans present their papers and any other valid documents only to Ardhi House offices in Nairobi and not any other office.

Freeze

"Due to the sensitivity and confidentiality of the exercise, we sincerely insist that documents can only be brought to our headquarters," Swazuri emphasized.

At the same time, the Commission has dispatched letters to land registries, county commissioners, district commissioners, governors and other public agencies warning them against

disposing off public land.

Swazuri noted that it has come to the Commission's attention that some offices and authorities have been disposing off land "without either informing or consulting" his office.

He cautions: "It should be understood that under the Land Act and the Constitution of Kenya 2010, it is only the National Land Commission which is mandated, on behalf of the national or county governments, to allocate public land, and even to sanction conversion of public land to any other category."

He urged all officers to suspend allocation of public land within their custody or areas of jurisdiction until proper guidelines are in place. This move follows consultations with the



relevant stakeholders to ensure that no dispute arises.

Swazuri said the Commission will soon issue guidelines and procedures as dictated by the law and not jurisdiction. He pointed out that land complaints are so many and stem from historical land injustices, land grabbing, boundary disputes, land transactions, land inheritance disputes among others.

To shield the public from exploitation during land transactions, the Commission has published the relevant fee for respective land transactions to avoid cases where unsuspecting members of the public are defrauded. The team is also visiting every county to educate, inform and find out the needs of people.

"We have realized that people are charged exorbitantly because of ignorance. For example, instead of paying KSh500 for a simple service, people are being charged as high as KSh3000. This must stop," Swazuri stated.

He said the Commission will be meeting Governors, Senators and elected Members of Parliament (MPs) to consult further on land issues. However, the Commission has begun with the most affected counties which registered the highest land irregularities. These include Nakuru, Kwale, Kajiado, Meru, Kiambu and Narok.

The remaining 41 counties are also listed in the programme.



"The Commission is in no way intending to dispose of any non-citizen of their rightful occupation, ownership and use of land in Kenya, and neither should it be seen as scaring away such persons and other potential foreign investors."

DR. MUHAMMAD SWAZURI, THE CHAIRMAN OF KENYA LAND COMMISSION

Land use to embrace sustainable approach

By DUNCAN MBOYAH

Policies and laws on water, forests, minerals and wildlife should take community rights into consideration as entitlements not charity from the government.

This should be streamlined by the devolved and local governments by ensuring that the natural resources are integrated into land rights to be able to benefit communities who care for them locally.

"Neglect and abuse of natural resources has led to the individualization of community land as a defense against perceptions that community land is owned by nobody even in areas where the suitable land use and cultural norms favour community ownership of land," Professor Patricia Kameri-Mbote, Dean School of Law at the University of Nairobi told a conference on community land law at a Nairobi hotel.

Kameri-Mbote challenged governments to reverse the trend by documenting land use practices and instances of sustainable management of land by communities while subjecting the scrutiny to ensure that they do not offend constitutional sanctions of non-discrimination, gender equality, stakeholder participation and sustainable development.

The belief that private ownership of land is superior to customary norms of land holding is popular but this is not true.

She observed that investment in policy, institutional and legal frameworks for community land is imperative in Kenya, Tanzania and Uganda.

Constitution

"The constitutional recognition of customary law as law in the three countries has not addressed the historical perception of it as backward and inferior to written law," she said.

Kameri-Mbote noted that laws on community land must avert the



resource curse where abundance of mineral resources could result in the neglect of other economically viable activities such as pastoralism.

Pastoralism has been a neglected land use despite its resilience as viable in many arid and semi-arid areas.

It needs to be recognized not delegitimized as mineral resources and their extraction take centre stage.

In Turkana which has been neglected by successive governments and where oil has been discovered, community land rights and land uses must be considered to avoid multiple exclusions of the people as resources are appropriated through rent-seeking and corrupt deals over the newly found wealth.

In communities where minerals are discovered, there is need to ensure that they benefit from these minerals by sharing with who have lived on these lands over the years by putting transparent and accountability measures to prevent the use of divide and rule tactics within communities.

Kameri-Mbote said that it was unfortunate that legal law that is safeguarding land issues is often neglected by the populations in Africa yet the law protects their interests.

The Programme Coordinator of Centro Terra Vira, a local Non Governmental Organization in Mozambique Ms. Regina Dos Santos said that land is a universal means for the creation of wealth and of social well being.

"The use and enjoyment of land shall be the right of all the people who live in the continent," she said.

She said that local communities in Mozambique participate in land management through natural resource management, resolution of conflicts and also take part in titling of land and identification of boundaries occupied by communities.

Santos revealed that through her



Oil deposits in Turkana County. Policies and laws dictate that all natural resources found on community land belong to the State. INSET: Delegates from Northern Kenya at the conference on community land law. | PHOTO: CORRESPONDENT

organization, communities have become more vocal about injustices within land sector since they have known their rights.

"A good number of people are today looking for ways to develop their delimited land unlike before when people lived with fear of having their land grabbed from them," she added.

Interest

The Chairman of Kenya Land Commission Dr. Muhammad Swazuri observed that African community land was the first victim of the colonial government's interest and to date large tracks of land are still held by the foreigners.

"The community lands are further under siege from urban development, agriculture and mining that often pushes out communities from their natural resource," said Swazuri.

Swazuri revealed that the commission is currently looking into land commissions that were formed as early as 1916 to date, but lacked political will, to help come up with a permanent solution to numerous disputes.

"Complaints ranging from land grabbing, boundary disputes, double and triple allocations continue to be filed by individuals and lawyers in our offices on a daily basis," he said.

According to the chairman of Kenya Land Alliance Mr. Michael Odhiambo many people are keenly following land issues since all view land as part of production that could help improve their lives.

He said that land resolutions can only succeed once the management is bestowed on the people.

"Land policies in countries can only succeed once they are implemented with the interest of the people in mind," he added.

Dr. Collins Odote, Senior Lecturer, University of Nairobi said that colonial laws and policies, gave false premium to private property rights to land, focusing all efforts towards individual ownership.

Odote revealed that this policy was utilized to give Europeans access and control to the most productive land in Kenya and to disinherit Africans from their land.

On attainment of independence, the laws and policies on land, continued with this approach, viewing private property as the most economical mode of holding land.

The law gave very little attention to customary land holdings but communities continued to own and use land according to their customary rules through communal arrangements.

In essence the country had a dual tenure arrangement, one recognized and given preference by the law and another existing in spite of the law.

In Kenya the National Land Policy and the adoption of the Constitution in 2010 have however corrected this error. Communities are now free to own and use land as they wish.

During the conference, participants who were drawn from Brazil, Kenya, Mozambique, South Africa, Tanzania, Uganda and Rwanda noted that the colonial rule was to blame for disposition, accumulation, exploitation and alienation of community land to suit their interests.

They noted that it was unfortunate that the independent governments instead of solving the problem continued the colonial agenda with a number of politicians benefiting in unlawful acquisition of land.



"The community lands are further under siege from urban development, agriculture and mining that often pushes out communities from their natural resource."

DR MUHAMMAD SWAZURI,
CHAIRMAN, KENYA LAND
COMMISSION

How legal options give women a channel to land rights

By HENRY OWINO

Jennifer Kwamboka, a widow went through rough time to fight for her matrimonial property. When her husband died, his brothers decided to disinherit Kwamboka and grabbed the land left behind by her late husband.

Kwamboka's husband, a former employee with Sony Sugar Company died in 2008 after he was shot dead by stray bullet at Awendo market.

Kwamboka says her husband had three acres of sugarcane plantation which she lost to her in-laws simply because she is a woman. Her efforts to have the case resolved through customary law did not yield any fruit despite her having the required documents.

"I decided to leave the matter to God. The farm in question was very critical in terms of generating income for the family and the proceeds would go towards my children's school fees and our up keep since I did not have any other source of income," explains Kwamboka.

The single mother recalls that when campaign to have a new constitution in Kenya began, two main issues came up: Abortion and women's land rights. Kwamboka realized that those opposing the Constitution knew very well it would give women voice and rights.

Constitution

She familiarized herself with the Constitution and more with Chapter five which speaks on land and environment.

"This was because I knew it would help me in getting back my matrimonial land," Kwamboka disclosed.

After the promulgation of Constitution, Kwamboka engaged her brothers and other relatives to push for her rights to reclaim her late husband's land. She stated that the customary law that her brothers-in-law had ignored, became the centre stage of solving the matter before finally moving to courts to authenticate it with current Constitution.

"Today I am a happy woman, who owns a piece of land with valid documents under my name. Had it not been for the current Constitution, I don't know where I would be today. I have partitioned it to grow sugarcane which I sell it to Sony Sugar Company and sweet potatoes for my livelihood. Thanks to the Constitution," she says.

Kwamboka is urging women especially in rural areas who are facing trouble with their land rights and especially ownership, to follow it up with the newly created National Land Commission. She says living in fear of being disinherited or punished will not solve their predicaments but being brave with right documents is the way forward.

For Kwamboka, and many other widows and orphans the new Constitution came as a big reprieve for those who had been disinherited of their matrimonial and family property.

Women now have unprecedented rights and protection to own and in-



Jennifer Kwamboka at her three acre farm which she reclaimed following the promulgation of the Constitution. The Constitution offers a reprieve to women who have been disinherited of their matrimonial and family property. | PHOTO: HENRY OWINO

herit land but also enjoy control over family resources. They not only inherit when their husbands die, but they also get an equal share at the dissolution of marriage.

The Constitution is superior to customary law which had for many years been invoked to discriminate against women. The challenge now remains to realize in practice the land and property rights that are enshrined in the Constitution of Kenya 2010.

Interventions

Several organizations that include the Kenya Land Alliance, the Centre for Land, Economy and Rights of Women, and the Green Belt Movement have helped to educate women on their land rights. Other newer groups such as the Young Women's Advocacy Group popularly known as Waremo ni Yes have also been engaged in sensitization campaigns.

Waremo ni Yes used new technologies such as mobile phones and the internet and more traditional methods such as community fo-

rums to amplify the voices of their constituency. In the process, more innovative female leaders emerged to advance these women's rights. The African Woman and Child Feature Service (AWCF), was not left behind either through publishing educative and informative articles on *The Reject and Kenyan Woman* newspapers.

With time through informative, educative and communication (IEC) materials, and the National Land Commission team going round the counties, women have been able to learn and know more of land law.

According to Prof Patricia Mbote from the School of Law at University of Nairobi, the Constitution recognizes women's rights to land and property.

"This is not unique to Kenya but many sub-Saharan African countries from Angola to Uganda have progressive constitutions that grant women equal rights," observes Mbote. She



notes: "However, traditional practices dominate and traditional rulers are governing, meaning that rural women rarely enjoy those equal rights."

According to Mbote, unless rural residents are educated about land issues in the current Constitution and convinced that it was in their interest, men will still have a bigger say on land and property ownership.

Resistance

Mbote explains how in their attempt to draft the Community Land Law with specific gender details they met a lot of resistance from men.

"Initially, the Maasai and Kalenjin elders in Ol Pusimoru were suspicious, telling us that the new constitution was an 'attempt to undermine their culture' and that 'women would wield the constitution like a sword'. They questioned women's ability to manage land and other family re-

sources and frankly told us that the men of their community would not 'carry babies on their back and cook'," explains Mbote.

She adds: "Despite these misgivings we continued to engage them and during the forums communities began to embrace the need to enforce women's rights, particularly rights to access and manage family resources like land."

In communities such as the Maasai, women felt disenfranchised as men were pushing their families to destitution by selling or leasing family land without their spouses knowledge or consent.

"Women want to gain more control over family land and other resources and many women are eager to familiarize themselves with land law since they need to play a larger role in their home as well as community and advocate for themselves," she observes.

"Today I am a happy woman, who owns a piece of land with valid documents under my name. Had it not been for the current Constitution, I would have lost my piece of land. I have partitioned it to grow sugarcane which I sell it to Sony Sugar Company and sweet potatoes for my livelihood."

JENNIFER KWAMBOKA

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