

# **Analysis and Proposals to Strengthen Draft Community Land Regulations, 2017**



**Land Sector Non State Actors (LSNSA)  
Working Group on Community Land Law**

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## Introduction

Land Sector Non State Actors (LSNSA) have been engaged in the process of developing and now implementing community land law. Since the enactment of the law on the 30th of August 2016 and its commencement on the 16th of September 2016, LSNSA members have been involved in the review and simplification of the contents of the for awareness creation, round table and workshop dialogues and discussion to promote the understanding of the law and the analysis of the draft rules and regulation to critique and generate proposals on how to strengthen community land rights in the country while making the community land law implementable.

The LSNSA have held several meetings to deliberate on the nature and the content of rules and regulations that will meet the expectation of the community law, and communities so that the gains made in the law are safeguarded and even expanded. In this regard, a working group was put together to work on the regulation. The members of the working group were: RECONCILE, Action Aid, HakiJamii, Kituo Cha Sheria, Pamoja Trust, Kenya Land Alliance, Kenya Wildlife Conservation Association, Kenya Human Rights Commission, KHRC, Indigenous Movement for Peace Advancement and Conflict Transformation, and ASAL Stakeholders Forum. The LSNSA Working Group on Rules and Regulations benefitted greatly from the insights and proposals from Liz Aldely, an independent consultant.

Having looked at the Community Land Act 2016 and analysed the draft rules and regulations put together by the Task Force on Land Laws Rules and Regulations, we find the following issues worth noting as we make proposals on how to improve different sections of the rules and regulations.

### 1. Section 3 Claim of an Interest in Land

The Regulations begin with 15+ persons applying to the Community Land Registrar for registration and use of Forms is excellent.

However, several problems exists in this. First, there is a strong assumption that families are applying for adjudication of family parcels, whereas in most cases, the majority of the community land is rangeland or woodlands, traditionally and presently owned collectively.

Second the present application form asks for the name and location of the community, and for an indication of the parcels of land (sic, plural) for which adjudication is sought.

Further, more preparation needs to be undertaken by the community prior to applying for adjudication of the community land. Failure to ensure necessary pre-registration planning has been undertaken risks dispute and conflict in the neighbourhood. It will also be pointless for the registrar to invite members to a meeting if they have not already reached provisional agreement as to (i) Who constitutes the community that will be applying for title; and (ii) Provisional agreement on the area that that community will apply to be issued title over. Further the regulations need to be explicit on the roles of the Community Land Registrar in the process.

Most community land is in the northern half of the country and most communities applying for community title will be pastoralists or agro-pastoralists. These communities will need to enter into negotiations with each other to define which areas will best fall under which community, and what terms of seasonal or other access will be afforded to each other, on the basis of custom or as new agreements. Additionally, some pastoral areas are so large, that owning communities may decide it is wisest to subdivide these among sub-groups of the clan/tribe in order to ensure that (a) they are easily able to monitor occupation and use of those areas; (b) manage them well; and (c) all members are able to reach Community Assembly meetings. Such considerations should be discussed and decisions made about this prior to formal application for adjudication.

Therefore it is recommended that the Regulations require certain tasks more so on identification to have been undertaken prior to formal application on the appropriate Form. These should be listed in both the text of the Regulations and in the Form.

Prior to formal application for adjudication and titling of community land, the community should be beneficiary of the following –

1. *Facilitated awareness-raising* by the county and/or by assisting NGOs on the purposes, implications and different options for a community to apply for community land title and to have its claim adjudicated accordingly. The awareness programme should capture registration process, how communities are to be registered and register their lands, negotiations within communities, the governance structures, conflict resolution processes, guidelines on the creation of the by-laws, resolution of historical injustices on community land.

**Form:** should include requirement for the dates, locations, facilitators, and attendance at such meeting/s.

2. Receipt and discussion by members of *written Guidelines/elements and FAQ* on community land entitlement, as may have been variously prepared by either the county government, the ministry of lands, and/or by assisting NGO agencies.

**Form:** should request specification of such Guidelines and the date/s of their presentation and discussion in the community.

3. *A record of a meeting or meetings* along with dates, location and numbers of adults from the community in attendance, that have been held, at which the application for registration of title was discussed, and general agreement reached as to –

- a. the composition of the community that is applying and the basis upon which it is applying, along with an indication of the likely number of adult members, their primary residence, and their land uses;
- b. the proposed general area of the parcel for which the community seeks community land entitlement, as should be described in an attached document and as sketched by the community, or in any other map, digital map, or other visual form (this is already required in the Application Form as attached to the Regulations).

**Form:** Minutes, with dates, location and participants of these meetings, or a statement reporting on those meetings as signed by a minimum of ten members.

4. *A record of preliminary meeting held with neighbours* to the proposed land to indicate how far the proposed perimeter boundary of the community land parcel has been provisionally agreed/ discussed with such neighbours, any reservations/contestations pending formal adjudication.

**Form:** minutes of when those meetings were held with neighbours, who attended, and signed by both parties.

5. *The names of any members of the community* which have been designated as the Provisional Community Land Committee, with the *Provisional Chair* and who may be contacted for making arrangements for meetings of the community with the Registrar to formally elect a Committee.

Form: names list, addresses, IDs.

6. Evidence that the community membership has reached general *provisional agreement to register their land as community land and other pre-existing tenure rights claims on the land*.

**Form:** this is critical, as the lands of most community lands are grazing or other communal grazing land.

## **2. Freehold, Customary or Leasehold Title**

The Community Land Act, 2016 makes application for freehold or customary title optional but neither that law nor the regulations indicate the circumstances in which either will apply. It is critical for a community to have guidance on this, especially if the state intends to deny a community entitlement in freehold for any reason.

It will be helpful for the Regulations to specify any conditions in which a customary community may not apply for a community land entitlement in freehold. Obviously no condition can lawfully exist in which a community is deprived of the right to a freehold entitlement where individual citizens are not so deprived.

The conditions in which only a leasehold title will be available to a community also need to be laid out; perhaps this is the case where land is public land (although this too may be alienated to a community), or where the land is within a municipality. Uncertainty surrounds leaseholds and their terms and their inferiority to freeholds or customary entitlements in relation to land rent and such matters, so the Regulations are the right place for the norms to be clearly laid out as may affect community land entitlements.

In addition, the Regulations need to be clear that whether community title is registered or not in freehold, customary or leasehold, the same management requirements apply; that is the community land is governed by the Community Assembly, which elects a Committee to conduct day to day business on its behalf, and in accordance with directives issued to it by the Community Assembly, and in accordance with rules and regulations which are unlawful unless they have been ratified by the Community Assembly.

## **3. Section 11: Exclusion of public purpose plots from registration as community property**

There are problems in the Community Land Act, 2016, in the sense of undue risk of finding at adjudication that many of their communally owned and used lands, are designated as public property and are excluded from entitlement to them. This occurs in opaque provisions around public purposes at –

Section 8(6) (a) which refers to ‘all parcels already in use for public purposes’ to be excluded from community entitlement read with -

Section 13(2) ‘Any land which has been used communal, for public purpose’ – to be excluded and vested in the national or county government.

Section 13 (3) (f) seeming to empower a county or national government to set aside land for public purposes, and which according to –

Section 26 (1) which empowers a community to set aside part of the registered community land for public purpose and which shall also be gazetted as public land (section 26 (2)).

The Regulations need to be clear as to what public purposes are included in reference to community lands; there is a danger that communally used land for community purposes will be wrongfully declared to be public land, simply because it is communally used for a purpose such as local communal forest, wildlife, rangeland or other conservation – which also happens to be in the national interest can be easily aligned to county and national government public interests. This is made more likely by the open-ended description of public purposes and interests in the Land Act, 2012 at section 2 as including ‘any other analogous purpose’. There is also an assumption that even where a community has built its own school on its own land, that this is now taken from it and vested in the national government or the county government.

The Regulations would helpfully lay down the procedure through which a community may assert its right to set aside lands for communal purposes including for market places, gathering places, and even schools it has built, but which do not necessarily mean that the land must be owned by the county or national government.

#### **4. Powers of county governments**

The Community Land Act, 2016 makes reference to “any transaction in relation to unregistered community land within the county shall be accordance with the provisions of this Act and any other applicable laws” (section 6(6)).

To which transactions does the law refer? Supposedly, the county government may make no transactions in community land. If there hidden powers of the county government as administrator of its trustee ownership role until the land is registered, the regulations need to spell this out – along with requirement that no transaction is effected without the consent of the community that is customarily and presently the owner, although unregistered, and which community will in due course seek formal entitlement testifying to that fact.

#### **5. Quorums: First Schedule, Sections 2(5) and 2(7)**

The regulations should address the inconsistency in Section 36 (3).

- a. Section 15(2) which requires a quorum for decision-making ‘of not less than two thirds of the community assembly’; (This does not stipulate the majority by which a decision is passed or rejected);
- b. Section 15 (5) which requires that ‘any decision to dispose of or otherwise alienate community land shall be binding if it is supported by at least two thirds of the registered adult community’ (that is 100% agreement of a community assembly meeting at which only two thirds of members are present); and
- c. Section 36(3) which requires that ‘no agreement between an investor and the community shall be valid unless it is approved by two thirds of adult members at a community assembly meeting called to consider the offer and at which a quorum of two thirds of the adults members of that community is represented’.

It is useful for the Regulations to clarify that agreement between community and investor falls within the scope of “decision to dispose of or otherwise alienate community land”. It must be supported by 2/3 of the members of the community assembly. This should be provided for in the community constitution and by-laws.

Sections 2(5) and 2(7) of the First Schedule of the Regulations must be read in line with the thresh holds provided for in the Act itself.

For clarity and avoidance of doubts, communities should provide in their constitutions and by-laws the decisions they consider as major (in addition to the ones already in the law) and the minor ones that can be passed through simple majority. It is proper for the

Regulations to provide for Community Assembly to make decision on other decisions that may require a majority vote through their by-laws, consisted with COK and other laws

#### **6. Undue costs: advertisements in newspapers First Schedule**

The Community Land Act, 2016 section 7(2) requires notice in at least one newspaper of nationwide circulation and a radio station of nationwide coverage only for the first meeting called by the Community Land Registrar. Presumably government will cover this cost.

However, Section 3(3) requires every community in the country to advertise the date and place of its Annual General Meeting of the Community Assembly not less than 21 days before the date of the meeting. Section 3(6) requires that all Special General Meetings also be advertised in a national newspaper not less than seven days in advance. This is in the first schedule.

This seems unduly expensive for a community, and if it fails to advertise thus, cannot hold a legal meeting.

It is preferable for the Regulations to require that –

The Community Assembly is bound to establish in by-laws the means through which all adult members will be reliably informed of the date and place of its Annual General Meeting at least 21 days in advance of the Community Assembly and the means through which the Community Land Management Committee will inform all members including those absent from the area of the date and place of Special General Meetings seven days in advance.<sup>1</sup>

## 7. Approval of community by-laws as the law in force for relevant matters.

The Community Land Act, appropriately provides for formal rules and regulations for community lands to be developed, both for regulating the Committee (section 7(6)) and for other matters -

- a. The Committee is obliged to ‘prescribe rules and regulations to be ratified by the community assembly, to govern the operations of the community’ (section 15 (4) (e)).
- b. A community ‘may make rules or by-laws for regulating the management and administration of their land and such rules or by-laws may provide for –
  - (i) The regulations or investments on the land
  - (ii) The determination of terms of any leases granted for purposes of investment
  - (iii) The conservation and rehabilitation of the land;
  - (iv) Land use and physical planning; and
  - (v) Any other relevant matter (section 37).

Further it will be helpful if the Regulations make it clear that these rules and by-laws have legal force and effect as the principal regulation in respect of the community’s property (provided these are not contradictory to the constitution or other law). It is critical that a community can bring a person to court for breaking the law, including an outsider, and to have the judge apply it’s by-laws.

## 8. Group Representatives: Section 24

Many group ranches have been formed without full inclusion of all community members; persons with no livestock, women, and disabled persons have allegedly not always been included on membership lists.

It will be helpful if Section 24 (3) of the Regulations establishes that the Registrar, in calling a meeting of meeting of group representatives and members shall ensure that all legitimate adult members of the community are listed prior to registration of the group land as community land.

## 9. Consideration for inclusions:

It is important to ensure the protection of women, persons with disabilities, and other special interest and marginalized groups to ensure their representation and participation on land issues at the community level. In order to achieve this it is important to pre-determine the nature of the CLMC to comprise of the following members:-i. community elders; ii. the youth; iii. special interests iv. Women v. persons with disabilities; and vi. different ethnic, cultural or other community of interest within the community.

Also on inclusion is under section 30 (4) and (5) of the Act which as at now insinuates that once the man remarries, he will still maintain membership of the woman’s community land rights even after divorce or upon death yet that is not the same sentiments on the woman. There is need for the Regulations to capture the sentiments of equality in all ends.

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<sup>1</sup>A practical way of doing this is for the Community Assembly to fix the date and place of its Annual General Meeting as the same date and place every year, so there is no excuse for members not to be aware of this important date. This does not apply to Special General Meetings, and for which the Community Land Management Committee must ensure that all members are informed; a logical and cheap way is to require every family to notify absent community members of the date by phone and for each member of the Committee to be responsible for ensuring that it has checked up on this for a shared number of families.

## 10. Accountability of CLMC to membership of Community Land

It is useful to provide an overarching frame for conduct of business of the community to guide the operations of CLMC. Generally and as a guiding role, the regulations should provide for the Community Assembly to provide in the community constitution the guidelines for the CLMC operations. The CLMC will be bound and guided in its work over the year by the resolutions/ decisions of the Community Assembly and will be expected to report back on the progress made in implementing the key decisions of the Community Assembly.

It is important for the regulations to emphasise that CLMC shall not act contrary to the provisions of the community's constitution, rules or bye-laws made in accordance with this Act.

The regulations need to point out strictly that a decision by a Committee which has an effect of disposing of an interest in community land to any person, including to a community member, shall not have force and effect unless it ratified by a resolution of the assembly supported by at least two thirds of the members.

The regulations further provide for a framework for removing a member of the CLMC or the entire committee as follows: i. violation of the constitution or rules of the community; ii. Gross misconduct in performance of the member's functions; iii. Physical or mental incapacity to perform the functions of office; iv. Incompetence or neglect of duty.

## 11. Guidelines

Guidelines should be advisory not obligatory (if obligatory, they should be directly entered into the Regulations). Where guidelines are provided for under the Regulations it will be helpful if instruction reads 'The content of rules and regulations shall be taken into account guidelines provided in - Schedule'.

Many guidelines will in due course need to be prepared for

- (a) Different types of communities such as pastoralists, settled farming communities, urban communities, communities existing on settlement schemes who wish to hold certain lands in common, and communities in fully titled highland areas who wish to reclaim natural forest areas or other shared lands as the property of the community by application for transfer of public to community land;
- (b) Specific issues that arise.

Guidelines will also alter as experience in titling and managing community lands accrues.

Additionally, the national and county governments will benefit greatly from the involvement of civil society organizations in implementing the Community Land Act. Many will wish to produce guidance for those communities they work with.

The Regulations will ideally encourage production of guidelines for communities, including their translation into Kiswahili or local languages as appropriate, but may wish to draw a distinction between Official and Unofficial Guidelines. The Regulations would usefully make provision for Guidelines to become Official Guidelines on approval by the Community Land Registrar in consultation with County Governments.



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Donyo Sabuk Avenue,  
Off Peponi Road, Westlands, Nairobi, Kenya.  
P.O. BOX 66300 - 00800, Nairobi  
TEL: +254 20 418759 / 418284753 / 4180523  
Cell: 0722 220 086 / 0733 838 744