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# The Community Land Act in Kenya Opportunities and Challenges for Communities

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**Abstract:** Kenya is the most recent African state to acknowledge customary tenure as producing lawful property rights, not merely rights of occupation and use on government or public lands. This paper researches this new legal environment. This promises land security for 6 to 10 million Kenyans, most of who are members of pastoral or other poorer rural communities. Analysis is prefaced with substantial background on legal trends continentally, but the focus is on Kenya's Community Land Act, 2016, as the framework through which customary holdings are to be identified and registered. A main conclusion is that while Kenya's law is positive and even cutting-edge in respects, legal loopholes place communities at risk of their lands not being as secure as promised ahead of formalization, and at risk of losing some of their most valuable lands during the formalization process. This is mainly due to overlapping claims by the national and local government authorities. Political will to apply the law is also weak. The truism that the law is never enough on its own to secure social change is illustrated. With or without legal protection, the assistance of non-state actors will be needed to help communities secure their lands under formal collective entitlements. The need for judicial interpretation of disputed legal provisions may also be required to ensure new constitutional principles are delivered.

**Keywords:** Kenya; Community Land Act; customary tenure; community lands; collective land titles; devolved land governance

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## 1. Introduction

### 1.1. Objective

The aim of this paper is to examine how well Kenya's new Community Land Act, 2016 lays a foundation for majority rural land security, as affecting communities which hold, use and transact lands under their own, usually customary norms, and whose lands remain un-surveyed and untitled.

This is in the context of a new national policy and supreme law (the Constitution) which signals a dramatic new policy direction; abandonment of the strategy pursued since the 1950s that security of rural tenure lies in extinction of customary rights and their replacement with freehold or leasehold entitlements issued to individuals or corporate entities; this was the only means through which property was legally acknowledged. Registrable family and communal tenure were not provided for. Nor, while tolerated, was community-based jurisdiction as practiced over customary lands legally supported.

All of this is now provided for in Kenyan law, to be reinforced through application of the Community Land Act. Through this, each community may, if it wishes, secure a single collective title over all or part of its lands, and lawfully govern this property. This includes regulating traditionally 'private' possession of plots within the community domain, as allocated to individual families for settlement or farming purposes. Customary practices may be applied within constitutional parameters of human and social rights. The law is new, and while already in force, will not be fully applied until

Regulations under the law are formally promulgated, anticipated in early 2018. The focus of this first study is therefore on what the law says, its strengths and weaknesses, and pitfalls that require address. Reviews of progress will come later.

### *1.2. Contribution to the Literature*

The nature, and legal and administrative treatment of indigenous or customary tenure has been a major subject in the historiography of social transformation in Africa over a full century, only illustrative examples of which need be given [1–4]. Anthropological studies have been complemented by official analyses, as colonial administrators laid down paths for indigenous tenure to be replaced with the property norms of Europe, adopting these into the national laws of the colony or protectorate ('statutory tenure') [5]. Only exceptionally were these terms abandoned by early post-Independence administrations. Presently, a main track in land and property change in Africa is focused upon improving the legal status of customary land interests.

Therefore, the more pertinent literature is from the 1990s as challenge to conventional paradigms mounted, including whether indigenous tenure systems really do constrain agricultural development [6], how far sustained failure to deliver secure indigenous land rights was limiting investment in Sub Saharan Africa [7], what manner of land reform was needed [8], and whether the World Bank should be changing its influential policies on handling of unregistered rights [9]. Inquiries continue into the present as tenure reforms do (or do not) get underway. The focus is wide-ranging, such as linking customary land insecurity to state order and social conflict [10], migration [11], environmental sustainability [12] food security [13], good governance [14], the land rights of rural women in transforming society [15], and to investigations into how far privatization in communal settings creates or destroys wealth [16].

The intended contribution of this paper is more modest. First, the subject is on that part of present-day land reform advancing paradigms for the recognition of community-based rights, and, given the African context, customary rights in particular. Second, the paper focuses not on the application of new paradigms, but upon the laws establishing these. Third, the focus is on one state. cursory comparison is made with laws in other jurisdictions, but Africa-wide comparison is not the objective, pursued elsewhere [17,18]. Nevertheless, this paper intends to sufficiently explore the legal paradigms presented by one country's new community land law to add to accumulating country analysis of their terms and likely effects (e.g.,) [19–23].

### *1.3. Assumptions*

These need to be made explicit. The utility of enabling a community-based landholding regime to flourish is taken as given, as is the necessity for this to be underwritten by formal law. Reasons include the role this plays in social justice and peace in modern agrarian societies, establishment of an inclusive foundation for land-based economic growth by providing a more equitable playing field for rural ownership, installing a stronger bulwark against involuntary dispossession, landlessness and migration in an era of rapid transformation, and a presumption that it is the duty of the modern agrarian state to empower citizens on property matters to the same degree historically availed officialdom and elites, such as a founding implication of now regularly enacted freedom of information acts e.g., [24]. The last is contemporarily relevant as African economies embrace devolutionary democratization as elemental to their transformation [25–27].

While the above are not explored here, contributing elements are unpacked for easier recognition of these assumptions. This is in the form of indicators, which this author considers essential to enable majority land security, and against which the attributes of Kenya's new paradigms are assessed. While these indicators too are axiologically subjective, it is observed that they are quite widely used by others, including assessment tools for local tenure security [28,29].

#### 1.4. A Focus on the Law

The legal focus stems from the reality that the legal treatment of property rights is the ultimate determinant of tenure security. This is irrespective of the fact that many communities succeed to retain their lands as their property without legal support, and also to regulate that landholding with relatively little interference. However, as literature of the present surge in 'land grabbing' demonstrates, this security can be easily brought to a rude halt where demand for their lands expands [30].

Related, for new land policies to be effective, legal entrenchment is advisable. Thus, law reform has been an integral part of land reform over the last century, such as embedding the redistributive 'land to the tiller' policies that dominated feudal tenure reform in Asia and Latin America between 1917 and 1975, embedding coerced land collectivization in communist states, and entrenching land administration and individualized farm titling as quite widely adopted in Africa from the 1950s [31] (Chapter 1). It is also evident that court rulings have at times been the main force for land policy change. An example is court rulings in 1993 and 1994 in Tanzania [32], triggering presidential review for new land law.

#### 1.5. Hierarchy and Timeline of Laws

For readers unfamiliar with the English common law regime adopted in Kenya (and other Anglophone African states), a note of the structure of the law may be useful. Three levels of national law are cited in this paper; supreme law (Constitution); subject specific laws (or acts) that must be in accordance with supreme law, and Regulations developed by the appropriate Government ministry to elaborate procedures to apply the law. The Constitution and acts are made by parliament, which may also cancel (repeal) or alter (amend) laws. The Community Land Act and Land Act are most referred to national laws, respectively summarized as CLA and LA. Regulations also have legal force.

The 47 local governments in Kenya (elected county councils, each with an executive arm) may also enact laws applicable to their counties, providing these are in accordance with national law on the subject. Kenya's Constitution specifies land survey and mapping, and boundaries and fencing, as the only two land issues which counties may regulate. While limited, these are directly pertinent to the actions of defining and registering community lands within each county. County governments also have trustee functions over community lands for as long as they are not registered, raising queries addressed later.

National and county laws are termed statutes or statutory law. The term 'received law' is also used to describe laws of European origin adopted into local national law, as described earlier. Customary law comprises the rules and regulations that a community historically or presently uses to guide its decision-making, and is accurately increasingly referred to as community law. Kenya's Constitution accept customary laws as having legal force, provided these are not inconsistent the Constitution or statutes.

A timeline of the key national legislation may also be helpful. Kenya secured independence from Britain in 1963. A first Constitution was enacted (1963). This was replaced in 1969, in turn replaced by the Constitution in 2010. This constitution widely departs from the two earlier constitutions, including on land and property.

The main pre-Independence law referred to is the Native Lands Trust Ordinance of 1938, especially as the post-Independence Trust Land Act of 1968 was modeled on this colonial enactment. While amendments were made since, the Trust Land Act was only repealed in 2016, replaced by the Community Land Act (CLA). Another early law after Independence referred to is the Land (Group Representatives) Act, 1968, also repealed by the CLA in 2016.

Following the directives of the Constitution (CON) in 2010, Parliament has enacted four main land laws: the Land Act, 2012 (LA), the Land Registration Act, 2012, the National Land Commission Act, 2012, and the Community Land Act, 2016. (CLA). Some provisions in the first three laws have already been altered by the Land Laws (Amendment) Act, 2016. This included moving supervising authority over community lands from the semi-autonomous National Land Commission to the Government

Ministry in charge of lands. Draft Regulations under the CLA are referred to as relevant. While clauses in the Constitution are referred to as Articles (Art.) in this paper, those in ordinary laws are referred to as sections (s.). The National Land Policy, 2009 is summarized as NLP.

## 2. Background

### 2.1. Customary Tenure in Africa

Most of Africa is unregistered community land [33]. Community land means lands acquired, possessed, and transferred under community-based regimes. In Africa this mainly means customary tenure. Founding norms derive from longstanding practices by a village, clan or tribal community. The system survives into the 21st century, because it has not been forcibly extinguished by superimposed property systems, and because its community-based character allows ready adaption of norms as each generation finds necessary. This keeps it vibrant and relevant, including to changing land uses and social relations within the community [34]. Therefore, the rules by which customary tenure operates are a hybrid of traditional and contemporary practices. As community members are also citizens of modern states, they regularly use constitutional bills of rights to reshape less satisfactory elements of custom, such as relating to women's rights, or to increase the permanency of rights over stable homesteads within the locality. Many rural communities also now govern land relations through bodies they elect or appoint, in which traditional authorities play no or a declining part (e.g., Tanzania, Angola, Liberia).

Community-based tenure regimes may also be state creations. China is a dominant example, where 1 million collectives lawfully own and control defined rural domains [35]. Land cooperatives, and local governments are also often landowners on behalf of community members (e.g., Armenia, Tunisia and Egypt). In this paper, the terms customary and community lands are used interchangeably. Some new land laws including Kenya's refer to customary or communal lands as community land. Many global initiatives do similarly [36].

### 2.2. Evolving Global Support for Securer Community Lands

FAO's guidelines on the subject illustrate global attention on the status of community-based land rights in developing countries [37]. Reasons for this attention may be briefly listed as follows: first, community land tenure remains a major landholding system today, alongside statutory and Islamic property systems. At least 2.5 billion people hold community lands, over 6+ billion hectares, more than half the global land area [38]. Second, the nature of community tenure is also proving more relevant in most of the 130 or so economies which The World Bank identifies as agrarian in the 21st century [39], as a useful framework for devolving authority and decision-making to the grassroots [40]. Third, the community land sector is predominantly made up of resources that have been seriously neglected in property relations—forests, rangelands and swamplands. In fact, three-quarters of the 2 billion hectares estimated as customary/community lands in Africa are neither farms nor house plots, but comprise such shared natural resource lands [41]. This derives from the surprising fact that only 12 percent of Africa's lands are permanently cultivated [42], and despite absorbing most population, the density of habitation in towns means they cover little area, less than 2 percent of total land in Africa [43].

The ownership of off-farm communal resources is proving more and more contested as their values are exploited, resulting in rising degradation, or the transformation of use for mainly state or private commercial purposes [44]. With exceptions, governments have historically defined off-farm lands as un-owned or government property, a condition tantamount to open access in the eyes of land seekers. For increasingly aware and articulate communities worldwide, claim of their lands as un-owned or government property constitutes wrongful dispossession of often their most valuable assets, and a route to degradation of their lands, which they cannot control, for lack of formal recognition that they are the owners [45]. It is not surprising that the conservation sector is itself increasingly mindful of the

role which recognition of community land ownership plays in saving and sustaining important forest, wetland and pastoral land resources [46].

Pragmatism also comes into play in making legal means available through which communities may be recognized as collective landowners. Despite more than half a century of intended conversion of family and communal lands into non-customary individual properties, only 10 per cent of Africa's lands are under private entitlement in 2017 [47]. One reason is cost, complicated and remote procedures. Another is political will. As Rwanda has recently shown, with a sharp eye for simplest, cheapest and fastest procedures, an entire country can be brought under registered individual or government entitlement in five years [48]. Admittedly, the very small size of Rwanda, the historical setting leading the post-genocide government to declare a virtual tabula rasa on ownership of contested lands, and perhaps most of all, dictatorial facets of present-day governance in Rwanda, have helped drive this success [49]. It should also be noted that around 15 percent of Rwanda's land, comprising mainly swampy areas lying between hills, and which communities used for seasonal cultivation and grazing, were firmly co-opted by the State in the process, some of which have been reallocated to commercial sugar enterprises, to the chagrin of local communities [50]. Still, there is much in Rwanda's approach that could be useful for Kenya's application of community land titling. Other reasons for limitations to individualized rural titling are that its relevance reaches a natural limit as it confronts resistance by communities, as they see family rights and shared community lands lost, or as it confronts land areas where most of the lands are not farms but shared forests and rangelands, not productively subdivided. This is certainly the case in Kenya, where the greater proportion of lands for which private title is sought, has been registered.

Another incentive to attend to community land tenure is political. This is best summed up in 21st century admission that sustained legal denial that Africans have always owned their lands is repugnant to natural justice, and a trigger to conflict. This exists against a backdrop of what Professor Okoth-Ogendo described as "*a century of expropriation, suppression and subversion*" of such lands [51] (p. 1), and "*the last colonial question*" to be addressed [52] (p. 1). Other legal experts have recorded paradigm shifts, such as Lindsay for FAO [53] and McAuslan [54].

### 2.3. Reforming the Law

As recently as 15 to 20 years ago, the relations of customary lands with statutorily titled lands focused upon such questions as: how can customary lands be a basis for property if they are not saleable? Is not customary land tenure inferior to statutory tenure? In 2006, McAuslan firmly reminded readers that: "*Customary tenure is—and always has been—one of the foundational elements of the land laws of all states in Africa. It is not an add-on to received law: indeed, received or imposed law is the add-on. Received law thus needs to be adapted and adjusted to indigenous law, not vice versa, and proponents of received law should be advancing the case for legal pluralism*" [55] (p. 9).

By 2017 such matters had ceased to be contentious in a number of African states. A total of 32 new national lands laws had been enacted since 1990; that is, by nearly 60 per cent of Africa's 54 states [56]. Most upgraded the status of customary lands, if to varying degrees. Around 20 of the new laws significantly improved protection of customary/community lands, some more than others. Such assessments may be made against selected legal indicators. These were referred to in the Introduction, as axiologically subjective. However, they are also ontologically relevant in that a number of countries have made the overall objective of these indicators—equitable legal status for customary land interests with statutory interests—one of their policy objectives. Any number of indicators of achievement in laws may be used, but the most instrumental used in this study are as follows: that the law acknowledges or provides that

1. Customary land interests are real property rights, with equal legal force and effect as provided to non-customary rights (e.g., leasehold and freehold entitlements);
2. Customary lands, whether held by individuals, families, groups, or the community as a whole, are protected property, irrespective of whether or not these lands have been formally identified,

- mapped and registered; this must be taken into account at compulsory acquisition of their lands for a public purpose, and in any national land administration processes affecting their lands;
3. Communities are legally enabled to acquire formal collective titles over all or part of their lands without this formalization extinguishing customary incidents of the land or community jurisdiction over it;
  4. Communities are legal persons for the purposes of land ownership; that is, they are not required to register companies, cooperatives, or other legal entities to own land on their behalf;
  5. Customary/community lands lawfully include traditionally owned and shared off-farm forests, grazing, swampy lands, and collective title may encompass these properties;
  6. The community may define membership for purposes of landholding itself, within limitations imposed by bills of rights;
  7. Communities may govern the distribution of rights of occupancy and use to lands within the property in accordance with their own rules including traditional norms, so long as all community land rules comply with requirements of inclusion, transparency and accountability, and other constitutionally established requirements.

The laws of Uganda, Mozambique, Tanzania, South Sudan and Burkina Faso may be singled out as most comprehensively transformational against above measures, as overviewed by the author in 2017 at reference 16 above, and as documented by LandMark, which provides a download of data for 120 countries including many in Africa [57].

Common shortfalls in other new national land laws are that: (i) above provisions are limited to visibly occupied lands (farms, houses) thereby excluding forests and rangelands; (ii) the law fails to complement improved recognition of customary lands with recognition of community-based governance; or (iii) while recognizing customary/community lands as existing, national laws stipulate that their formalization continues to depend upon their reclassification as freehold parcels, and in ways which diminish existing attributes of held lands and limit community jurisdiction, a crucial foundation of community-based tenure.

Newest land laws impacting on community lands are those of Benin, Malawi, Kenya, and Mali. Ghana, Liberia, South Africa, Zambia and Namibia have draft new laws in hand. At least 10 other countries are working towards this objective, including Sierra Leone, Senegal, Morocco and the Democratic Republic of Congo.

Nevertheless, it is a mistake to conclude that most African community lands are securely tenured today. Most are not. This is because many other states have not made this an objective, or because changes made are limited in ways exemplified above, or because key requirements according to the particular law, are yet to be met, so the law does not get beyond being a piece of paper. There are also cases where customary tenure has been formally abolished (e.g., Mauritania, Senegal, Eritrea), although replaced to an extent with arrangements that allow communities to regulate the use of local resources.

#### 2.4. Registering Community Property

Different legal routes for the recognition of customary/community property appear in these laws. Declaration that these have equal legal force and effect with statutorily secured rights is a critical step. For remote communities who do not face incursions or claims to their lands, such declamation is sufficient in the short to medium term. This is not the case for thousands of others, who confront local and international land rushes as integral to surges in growth, as explored by Patnaik and Moyo [58] and Byamugisha for The World Bank [59]. Therefore, it is rare for new laws to recognize untitled lands as owned without also providing titling mechanisms to better identify, survey and register these properties.

However, the path to formalization is always more difficult than anticipated. Procedure may be too weak or costly for communities to adopt, or roadblocks may linger in the law. Drawing fair

legal distinction between the rightful property of the State and communities is frequently problematic. Administrations that have been used over a century or more to assuming customarily held land is un-owned and disposable at will by the State, find surrender of this paradigm difficult. Devolving official control over untitled lands to citizens also meets resistance. Even where reformed, laws may leave loopholes, limiting progress. This paper examines Kenya's new Community Land Act with these concerns in mind.

### 3. The Kenyan Case

#### 3.1. Background to the Community Land Act

In most respects, the status of customary land rights in Kenya prior to the CLA was little different from that in other African countries through the 20th century. As became the norm in British colonies, reserves were demarcated in the 1920s, wherein natives could live and farm. By 1930, security in the 24 reserves in Kenya was improved by vesting these lands in appointed boards of trustees, not in the colonial government [60]. The Native Lands Trust Ordinance, 1938 also required that the Local Native Council was to be consulted before the Governor issued leases from these reserves to non-natives. Land decisions were to be to the benefit of residents in the reserves, although what constituted a benefit was not defined. Native councils in the 1950s, and then locally elected county councils after Independence in 1963 continued to be the trustees of native lands. They held powers to 'set aside' parts of these Trust Lands (as they were by then known), a process which extinguished tribal, group, family or individual customary rights. The Trust Land Act of 1968 also recentralized control, making the Commissioner of Lands in Nairobi the official administrator, counties acting at ministerial request. By then takings included regular allocations to non-members of communities, and forcible relocation of whole clans to meet the demands of expanding elites and influential tribes, often in the form of settlement schemes [61].

Losses were compounded by compulsory individualization, titling and registration programmes operating since Independence. This vested homesteads in (usually male) household heads, and cases of wrongful inheritance multiplied [62]. Community rangelands, forests and wetlands were reallocated to local farmers with means to clear these, or co-opted by government for disposal to private interests, or turned into local authority wildlife and forest reserves, controlled by the new county councils. Many were in turn depleted and/or sold off, on the instruction of, or with the endorsement of, the Land Commissioner [63]. Excisions of intact national forest reserves mounted through the 1980s and early 1990s, for mainly private purposes [64]. This, along with other illegal or irregular takings from public land became such a concern that a Presidential Commission was established to document the level of wrongdoing in the land sector (the 'Ndungu Report') [65]. This was preceded by a review of all land matters [66]. By then it was also known that many individual title deeds had never been collected, and transfers by inheritance or sale had largely remained unregistered [67].

In the interim, an effort launched in 1969 to enable pastoralists to share demarcated 'ranches' as registered groups quickly became little more than a stepping stone to land capture by elites, through politically encouraged subdivision of these lands [68].

In light of the above, it was not surprising that by the time the content of a new land policy and constitution began to be discussed in 1999, arguments included that the ownership and administration of customary lands should be vested directly in the community in common, including requirements for majority decision-making [69]. Assessment of the CLA below uses these as bottom-line measures.

#### 3.2. Making New Policy and Law

The progenitors of the CLA were the Parliamentary-approved National Land Policy, 2009 (NLP) followed by the new National Constitution in 2010. These were developed in concert over eight years. As supreme law, the sturdier origins of the CLA lie in the Constitution. This declared that all land in Kenya belongs to either the people collectively (public land), to individuals (private land) or to

communities (community land) (CON Article 61). To limit overlaps, the composition of each class was listed. A discernible goal was to end the century-long legal status of community lands as un-owned and unregistrable, and of lesser status than public or private property. The Constitution directed the State to enact a law giving effect to its provisions on community land. The Community Land Act, 2016 (CLA) is that law. Much of the Act focuses upon how community lands may be brought under formal Community Title, and governed by communities. Provision of collective title is the cornerstone of the law.

### 3.3. *The Community Land Estate in Kenya*

Official figures for community land area in Kenya do not exist. This is because the boundaries of individual community lands have never been demarcated. Only the area of group ranches is known, listed by the National Land Commission in 2014 as covering 4.3 million hectares [70]. Additionally, the scope of community land is contested in relation to public land, as later discussed. Nevertheless, a guestimate of community land area may be arrived at, by subtracting private and public lands the total land area of Kenya. These too can only be guestimates as chaotic recordkeeping in Government means that private lands may be between 16 and 29 per cent of the country area, and public lands between 24 and 30 percent of country area. The result is that community lands may encompass up to 60 percent of Kenya, largely within 21 of the 47 counties.

It is more certain that most community lands are located in the dry northern half Kenya, predominantly occupied by pastoralists, and where the largest areas of former trust lands are located. No distinction is made by the Kenya Bureau of Statistics between persons living on private, community or public lands, and only the roughest estimate of the number of people on community lands can be given; somewhere between 6 and 10 million people, or up to 20 percent of the estimated total population of Kenya in 2017 [71].

The Constitution at Article 63 defines community lands as including those:

1. Registered in the name of group representatives (i.e., group ranches);
2. Lawfully transferred to a specific community or declared to be community land by an Act of Parliament;
3. Lawfully held, managed or used by specific communities as community forests, grazing areas or shrines;
4. Ancestral lands and lands traditionally occupied by hunter-gatherer communities; and
5. Lawfully held as trust land by the county governments (trust lands).

While this seems clear enough, the last two sub-categories are the subject of contestation between communities and State authorities, the latter claiming that most lands under the 4th and some lands under the 5th are public property, a main topic discussed below.

## 4. Discussion

### 4.1. *Strengths of the Law*

These include attributes fostering legal acknowledgement that communities are already property owners and foster inclusive decision-making within communities. Some listed below also have elements of disadvantage for communities.

#### 4.1.1. Constitutional Norms Lay the Foundations

The CLA would probably not have seen the light of day without constitutional obligation to enact such a law within five years (August 2015). In the event, constitutional amendment was required to allow another year for drafting. According to the Constitution, failure to enact the CLA by 27 August 2016 could have led to the dissolution of Parliament. The law was enacted earlier that month and assented to by the President within a month.



Substantively, the CLA is profoundly shaped by the liberation and sanctity of community lands established by the Constitution. This includes a strong bill of rights, the right of citizens to seek redress for administrative malfeasance, protection of the rights of marginalized communities, and most directly, protection of property in a new context within which community lands are accorded status as property. As no longer tenants of State but owners, necessarily allows them to govern their own lands. In addition, as above, community lands were defined in such a way that off-farm communal lands were not prevented from being defined as community land.

These constitutional provisions set the agenda for the CLA, and from which it could not derogate. Constitutional backing is also important for challenges against wrongful interpretation or application of the law, such as during adjudication and demarcation of their respective properties. Generally, modern constitutions are also the laws most known and read by citizens, having been widely consulted in their formulation, and in the case of Kenya, subject to their views by national referendum. It is fair to say, that for many Kenyans, the Constitution provides a haven of rights protection to be turned to when threatened, including in respect of actions by Government.

#### 4.1.2. 'Community' is Defined in a Forward-Looking Manner

A useful aspect of new law is that 'community' is liberally defined. This has origins in the National Land Policy, which directed Government to: *"Document and map existing forms of communal tenure, whether customary or contemporary, rural or urban, in consultation with the affected groups, and incorporate them into broad principles that will facilitate the orderly evolution of community land law"* (NLP Para. 66a). The Constitution in turn identifies communities for the purpose of landholding as those *"identified on the basis of ethnicity, culture or similar community of interest"* (CON Art. 63 (1)). The CLA defines community as meaning *"a consciously distinct or organized group of users who share any of the following attributes: common ancestry, similar culture or unique mode of livelihood, socio-economic or other similar common interest, geographical space, ecological space or ethnicity"* (CLA s. 2). Community of interest is defined as *"the possession or enjoyment of common rights, privileges or interests in land, living in the same geographical area or having such apparent association"* (CLA s. 2).

The implication for non-traditional communities is important. There are, for example, city slum neighbourhoods where parcels are so tiny, sometimes only a few square metres, in which a collective approach to registration would be advantageous for regularizing insecure mass occupancy. In addition, the broad definition locates Kenya's new law as forward-looking, by presenting collective tenure as a modern form of ownership appropriate for a rapidly changing 21st century.

#### 4.1.3. Community Lands Become Lawfully Owned Property

Community lands are regulated by communities, using their own rules, defined as customary or community law. The Constitution acknowledges customary laws, only requiring these to be consistent with the Constitution, as must statutory and religious law (CON Art. 2). The Land Act, 2012 (LA) is more specific. Along with freehold, leasehold, and legally established partial interests in land, customary land tenure is recognized as a lawful and equitable means of owning land and secondary rights to such owned lands (such as rights of occupancy and use). *"There shall be equal recognition and enforcement of land rights arising under all tenure systems and non-discrimination in ownership of, and access to land under all tenure systems"* (LA s. 5 (2)).

The CLA furthers this by protecting customary rights held immediately prior to the commencement of the law (CLA s. 5). It empowers communities to make rules for regulating the management and administration of their land, including on the basis of custom (CLA s. 2, 37). Issue of individual customary rights of occupancy to community members will be *"governed by customary law"* (CLA s. 14). The *"customs and practices of pastoral communities"* are specifically to be taken into account (CLA s. 28). Recognition of unregistered customary land rights as real property is also provided in requirement that county governments will hold unregistered holdings in trust for their owners only

until these lands are formally identified and registered (CLA s. 6). The overall effect of the above is that customary/community property is recognized as existing, whether registered or not.

#### 4.1.4. Formalization of Property Parcels Is Strongly Promoted to Double-Lock Security

Some other relatively new African land laws have made registration of community/customary lands compulsory, and set time limits for titles to be acquired (e.g., Cote d'Ivoire, Angola and Namibia). All failed to achieve this within the time frames they initially set, forced to extend the deadlines, sometimes two or three times. This has been critical in Cote d'Ivoire where its land law of 1998 states that customary rights will cease to exist after the deadline. In practice, not a single rural title has yet been issued in Cote d'Ivoire almost 20 years later, although many have been issued in urban areas [72]. Other governments, knowing the difficulties of applying mass rural titling where tenure is contextually community-based, have avoided setting time limits (e.g., Tanzania, Uganda, South Africa, Mozambique). Nevertheless, formalization as a means of double-locking rights is everywhere strongly encouraged. Kenya's CLA takes this position.

Government is required to develop a special adjudication programme for community lands and to ensure that this will be concluded by 2019 (CLA s. 46). Should this not be achieved, the Cabinet Secretary may gazette new completion dates. One year has already passed with no community titles applied for or issued. Draft regulations under the CLA (June 2017) aim to hasten the process by making a deadline for the required inventory of unregistered community land to start the process. Still, there can be no expectation that the three-year deadline will be met. However, neither are there legal grounds, for community lands to cease to exist as lawfully owned without registration.

#### 4.1.5. Security of Derivative Rights Is Well Provided for

The vesting of title in the community does not prevent derivative rights being issued for discrete plots within the property. On the contrary, the CLA makes provision for individuals, families, and other customary groups or new groups formed by community members, such as a cooperative or association, to be acknowledged as the owners *of rights to* particular parts of the community's domain (CLA s. 14). That is, community members together jointly own the land, but individual members, families and groups may register (lesser) title to specific areas, most usually for house and farm plots (CLA s. 27). The derivative nature of these rights is clear. Such entitlements "*shall not be superior to community title in any way*" (s. 27 (3)).

These derivative rights are termed Customary Rights of Occupancy. Their formalization is possible through issue of Certificates using a scheduled Form, but this is not compulsory. Draft Regulations intend that their identification and recordation be undertaken as part of the process of identifying and titling the community's land as a whole. This will multiply the time it will take to finalize adjudication of a community's land. It may be that officialdom is keen to see family parcels formally identified and titled from the outset, as a means of encouraging the eventual disbandment of collective ownership of part or all of the community land through its alienation to members on this basis, a form of tenure with which officials historically feel more familiar.

Or it may be that the drafting Task Force for the Regulations assumes that certificating of their family lands is what all that rural Kenyans really want. They may be wrong; the Mexican Government famously found it puzzling that so few communities took up opportunities to subdivide their root collective ownership granted as legally offered in 1992, and that such privatizations are still a small minority 25 years later [73]. The forested nature of many Mexican community lands is one cause. In Kenya, most pastoralists are likely to find it unproductive and confrontational to subdivide their own main asset, grazing lands.

Applications for new rights to occupy or use a community's land may be made in the future. The issuing authority of all derivative rights is the Community Land Management Committee, subject to approval by the community (CLA Regulations, s. 17). The Committee will also forward a copy

of each Certificate to the Registrar for noting in the file pertaining to that community's land (CLA Regulations, s. 17).

Appropriately, the law enables derivative rights to be governed by customary law, meaning rules that the community as a whole prescribes. If so agreed, individual and family rights may be held for an indefinite duration (CLA s. 14). A premium or fee for securing these plots only applies when Certificates for these plots are issued (CLA s. 27). Otherwise, the statement in Regulations that *"every member shall be entitled to reside free of charge on the community land together with his family and dependents"* (CLA Regulations Second Schedule Part B: 7.3) would be contradictory. Nonetheless, a two-tier set of rights could eventuate; wealthier community members securing registered Certificates of Occupancy to their homesteads, while majority poorer members are unable to do so. This could prove divisive.

#### 4.1.6. Communal Lands Are Directly Provided for

The CLA provides well for communal (or collective) property. This operates at two levels; the ownership of all the community land in common, as described above and to be held under a formal collective title deed, and collective ownership of derivative rights to specified parts of the property, that do not constitute absolute ownership but access and use by all community members or an agreed sub-set of members. Communal use of land is defined by the Act as *"holding or using land in undivided shares by a community"* (CLA s. 2). Arrangements will vary. At one extreme, a community may assign its entire property to individuals and families under customary rights of occupancy, certificated or not, in which event the community land will be a composite of 'private' parcels, governed by community rules. Or the opposite may be decided—that the property shall be entirely owned, occupied and used in common by all members with no exclusive occupancy and use rights allocated to individuals, families or groups. Other communities may adopt a middle way: defining existing houses and farms as under customary family occupation and use, and the remaining areas of the community as communal areas. The law encourages the latter in requirement that natural resources be used and managed *"sustainably and productively, for the benefit of the whole community including future generations, with transparency and accountability and on the basis of equitably sharing or accruing benefits"* (CLA s. 35).

#### 4.1.7. Women Have Backing for Equal Treatment as Landowners and Right Holders

Kenya's Constitution establishes gender equity as a right. These include directives that gender discrimination in law, and customs and practices related to land and property in land must be eliminated (CON Art. 60). Enactment of law to protect matrimonial property and the interests of spouses in occupation of land at the decease of the other spouses/s is also obligatory (CON Art. 68). Legislation is required to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender, still not enacted (CON Art. 27 (8)). The Land Act provides that compensation when community land or private land is compulsorily acquired is payable to the spouse/s of affected persons as well as to *"any person actually occupying the land and the spouse or spouses of such person"* (LA s. 107). The CLA stipulates that there must be *"equal treatment of applications for women and men"* (CLA, s. 14 (4) (c) (i)). Nor may women marrying into the community be excluded as members, and their rights to land remain unless they divorce and remarry elsewhere (CLA s. 30 (5)).

The above suggest there is sufficient for a woman to appeal against injustices in land dealings by a community land committee. Nevertheless, it is noticeable that no provisions are made for a minimum number of women to be members of that committee, or that women must constitute no less than one third of community members to achieve a quorum at assemblies of members. While the law does not prevent women being allocated lands independently from men, it would also have been helpful for this to be inscribed.

#### 4.1.8. Institutions for Community Land Governance Are Largely Sound

The CLA establishes two institutions through which a community will manage its land. The first is the Community Assembly. This comprises a meeting of adult members. This body elects the Community Land Management Committee of 7 to 15 persons to conduct day-to-day administration (CLA s. 7 & 15). The Community Assembly is legally obliged to meet only once a year, and otherwise may hold Special General Meetings, on the demand of not less than one third of its members (CLA Regulations, First Schedule). The quorum is two-thirds of all adult members (CLA s. 15 (2)). As a simple majority is sufficient to pass or reject a proposed action or decision, as few as 34 per cent of adults could make binding decisions (CLA s. 15 (5)). This rises to a minimum of 44 percent of all members in matters of disposal or alienation of community land, including when an agreement between an investor and the community is being considered (CLA s. 36). The dubious prospect of less than half of adult members making key decisions has been raised by civil society [74]. Therefore, it is positive that the drafted Regulations under the Act somewhat liberally interpret the CLA as that 66 percent of adult members (not 66 percent of those attending a meeting) must consent to any disposition of community land, or use of the community property as security for a loan for its development (CLA Regulations, Model Rules, 7.9). Nevertheless, contradictory provisions in the CLA need amendment.

#### 4.1.9. Access to Community Lands by Investors is Reasonably Addressed

Untitled customary/community land in Africa is a known target for local and international large-scale commercial investment [75]. The African Union has been concerned enough to issue (non-binding) guidelines as they affect communities [76]. Kenya is in the midst of a surge in economic transformation, with oil, water, coal, port and infrastructural developments flourishing alongside private sector developments. Despite protection of their lands in law, appropriation of community lands for these purposes is common [77]. It is therefore positive that the CLA is specific as to the requirements of investors, including that each request is subject to consultation and agreement with the community, and with payment of compensation and royalties, should an agreement be reached (CLA s. 36). A community may also determine terms of any leases, and establish requirements for the investor to conserve and rehabilitate lands (CLA s. 37). Clearly, the Act presumes that communities will not absolutely alienate their land to investors but lease land to them. The draft Regulations go further, requiring notice of all consultation meetings to be placed in two national newspapers and one local newspaper, and posted in all local government offices as well as in affected communities, and to allow 30 days for written submissions to be made.

#### 4.1.10. Community Lands Provide an Ideal Framework for Restitution of Lost Communal Lands

Many rural communities in Kenya have long resented involuntary land losses, which the NLP in 2009 showed was as much by the hand of post-Independence administrations as by the colonial government. Specifically, the NLP committed the Government to “*resolving the problem of illegally acquired trust land*” and “*reversion of former Government land along the Coastal region to community land after planning and alienation of land for public usage*” (NLP Para. 66 (d) (ii) & (iv)). This led to constitutional provisions establishing a National Land Commission to manage public lands, and to investigate and plan the redress of historical land injustices. Article 67 directed the Commission “*to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress*”. It took the Commission until 2014 to establish a Task Force to draft law governing this, eventually achieved in 2016, by amending the National Land Commission Act under the Land Laws (Amendment) Act.

To date, 111 submissions have been registered, with a call in November 2017 for final submissions, and on which the Commission is required to act upon within three years [78]. Claims may be based on injustices occurring between 15 June 1895 (the date Kenya became a protectorate) and 27 August 2010, the date on which the new Constitution was promulgated. Eleven remedies may be considered, of

which restitution is one. Experiences thus far suggest the even where restitution of land to community ownership is viable, the Kenyan State prefers to evict complainants and pay compensation in lieu, a strategy often fiercely protested by those affected [79]. While the CLA as compared to the National Land Commission Act, does not mention historical land injustices, the collective title it provides for is a useful construct through which to transfer land to community ownership, especially where the claimed lands are presently defined as unallocated or unoccupied public land. In short, there is no excuse for not restoring property to communities for lack of a suitable mechanism to do so, where this is viable. Political resistance to restitution is a more likely impediment.

#### 4.2. Troubling Attributes of the Law

Strengths in the CLA have been described above, including weaknesses still to be addressed. Less positive attributes have been alluded to. Some are procedural and could be remedied through Regulations. For example, present draft Regulations require advertisement of notice of meetings of the Community Assembly be given in at least one national newspaper and radio station. Auditors must be appointed to approve a community's accounts. While desirable, both are expensive for communities, and failure to achieve registration a questionable basis on which to declare a Community Assembly meeting invalid. Although Regulations attempt to overcome contradictions on the proportion of members needed to vote on rules, actions or decisions, these have been unable to affect contradictory stipulation in the main law that less than half of all members need consent in many matters, as discussed earlier. Regulations also still have scope before their final promulgation to require conversion of group ranches to be proceeded by external reassessment of membership to remedy cases where women, families without livestock, or other members of the pastoral community were unfairly excluded at registration of the ranch, due in part to weak vigilance on this in the law. Remedy could similarly occur through introducing a regulation that specifically addresses the tenure needs of urban slum communities. Without this, years could pass before such a community is alerted to the relevance of the law to their situation and begins to use it. More serious shortcomings in the law are identified below.

##### 4.2.1. The Purpose of Providing a Choice of Freehold or Customary Title Is Unclear

Community lands are by definition lands possessed by communities. Principal title is therefore to be vested in communities at registration (CON Art. 63 (1), CLA, s. 4). Title may be held as a customary, freehold, leasehold or other legal entitlement. Certificate of Title issued by the Registrar will serve as prima facie evidence of the community as the absolute and indefeasible owner, except where the title has been obtained fraudulently (CLA s. 18). The procedures for securing freehold, customary or leasehold title are the same; first, registration of the applicant community, and then application by it for formal survey and adjudication of its land, the results to be registered as a collective title in a Community Land Register set up for this purpose in each county.

It is hard to say how far the right to choose the type of title will be helpful to communities, or how real the choice is. While choice is in principle positive, neither the CLA nor draft Regulations under the CLA explicates the implications. A case may be made that choice undermines the realization of customary title as equal to freehold title. This argument has been made in Uganda, but in circumstances where the Certificate of Customary Ownership and a Freehold Title in Uganda are unequal to the extent that only the latter requires formal survey; this suggests to citizens that it is therefore more easily defended, and this could indeed be the case where the exact location of a boundary is at stake. Nevertheless, many Kenyan communities may also choose to hold their community title in freehold, rather than the equally absolute ownership availed by a customary community land title by the Land Act and the CLA; this might simply be because of the long history in which only freehold tenure has been regarded as fully secure. Fears that a collective title in freehold will undermine community jurisdiction are not in fact the case, where the law is clear that the owner is the administrator, whether an individual, company or a community. Nonetheless, the Land Registration Act, 2012, does list attributes of freehold title, and state-led administration of freehold lands, that could in practice interfere with

community jurisdiction. Many communities may deservedly at this early stage, feel more comfortable with issue of a collective title held under customary law.

The conditions where leasehold title will be the only form of community title available are clearer. A community is unlikely to be able to obtain more than leasehold tenure on public land, especially should it fail to convince the State that the land should be fully transferred to it. Certain categories of public land are already stipulated as not alienable, in ways that will frustrate communities (see later).

More positively, should other forms of tenure be admitted into law, as is provided in the Land Act, a community could use this to advantage. An example could be admittance of *metruka* and *musha*, collective forms of tenure under Sharia law, which some Islamic coastal communities may prefer as governable by Sharia so long as the norms pursued do not contradict the Constitution. The Land Registration Act, 2012, already makes *Wakf* (properties set aside for Islamic religious use) registrable on these terms.

#### 4.2.2. State Powers Over Community Lands Are Too Open-Ended

The arrangement for trustee ownership of community lands raises questions. On one point, the law is firm; the Constitution directs that “*unregistered community land shall be held in trust by county governments on behalf of the communities for which it is held*” (CON Art. 63 (3)). This trustee role ceases immediately a community’s land is registered (CLA s. 6 (7)). The problem lies in interim arrangements. The Constitution directs that community land “*shall not be disposed or otherwise used until legislation specifies the nature and rights of members of each community individually and collectively*” (CON Art. 63 (4)). That legislation is the CLA. It confirms constitutional limitation on the disposal of community lands until registration CLA (s. 6, 47). At the same time, it contrarily provides that “*any transaction in relation to unregistered community land within the county shall be in accordance with the provisions of this Act and other applicable law*” (CLA s. 6 (6)). To which transactions does this refer? This is not clear. Nor do the draft Regulations provide enlightenment. Nowhere are the powers of county governments as trustees specified.

This is ominous in light of the fact that neither does the CLA require a county government to secure the majority agreement of community members or to lay out the procedure for make decisions as a trustee. Although routinely flouted, the obligation to consult with communities was explicit in the former Trust Land Act and the Land (Group Representatives) Act. The long history of malfeasance, misuse and wrongful disposal of trust lands as listed in the ‘Ndungu Report’ cited earlier, add cause for concern. Although undocumented, a number of communities and NGOs assert that it is ‘business as usual’ in the county land sector, and that deals are being made to reassign some community land areas as disposable public land. Land offices are more publicly still singled out as among the most corrupt in Kenya [80]. It is conceivable that cases of new transactions, such as the purchase of community land by a private party, or its designation as public land, are being backdated to appear to have begun before enactment of the CLA, as this law permits already initiated processes to continue (CLA s. 42).

These would be less pressing concerns should registration of community lands rapidly proceed. This is unlikely. Community land titling, affecting half the country area, will take years or even several decades. The way in which trustees work with communities prior to formalized documentation of their rights is therefore inadequately addressed. It is true that the CLA removes the Commissioner of Lands as the administrator and thus controller of their lands. However, as shown above, neither does the law formally restore these powers to communities—until registration. Together with powers of county governments to determine which lands are to be reserved “*for the promotion or upgrading of public interest*” as described below, county interference in unregistered community lands could be substantial—and lawful.

It would also be a mistake for communities to assume that registration will free them from interference from central government decisions. Despite devolutionary governance being a core theme of the Constitution, no major land functions or powers are devolved to county governments, other than boundary and survey as mentioned earlier. The CLA merely requires the Ministry of Lands to

inform and consult with county governments (CLA s.7, 8, 11). The draft Regulations more realistically acknowledge that dependence upon county officials will be high, from carrying out the inventory of community lands in their respective counties, to being delegated responsibilities for adjudication and titling. All these and other tasks will be undertaken at the behest of the Cabinet Secretary for Lands.

Cabinet authority can be further powerfully exerted through regulations over which communities have no control. While all land owners are subject to national law, the CLA reminds communities at many turns that they are subject to national and county government policies, laws and regulations, and most directly so in all matters relating to land use, fishing, hunting and gathering, protection of animals and wildlife, water use, forestry, environment, energy and exploitation of minerals and natural resources (e.g., CLA s. 4, 38). Such reminders far outnumber cautions for private owners in the Land Act.

#### 4.2.3. Political Will for Securing Community Lands Is Ambivalent

Kenya has half a century's experience of land titling programmes, yet has achieved 25–30 per cent coverage. A good deal of this shortfall is because such a high proportion of the country is unsuited to the individualization process pursued in those programmes. The CLA remedies the legal absence of collective titling.

Advancing this in practice depends upon steps listed in the law, which in turn depend upon political will, and upon institutional and financial commitments, not yet visibly made. Five NGOs found political will absent in an assessment they carried out in August 2017 [81]. They observed that none of the manifestos of political parties in the 2017 election took up the cause of community land insecurity and the conflicts these engender, despite the continuing abundance of such conflicts. They also noted that risks of untitled lands being treated by Government as un-owned public lands for easier onward allocation to new settlers or to investors, are rising in concert with large-scale developments, promoted in Kenya's Vision 2030 [82].

Nevertheless, the fact that civil society land actors are vigilant on these matters, and that the law is clear as to the sanctity of community-based land rights, should aid address of weak political and administrative will. NGO and iNGOs such as the Land Development and Governance Institute and Namati, have, for example, already held meetings with some community leaders to raise their awareness on potential pitfalls in expanding large-scale investments, and the Indigenous Forest Peoples Network plans to do similarly with forest and pastoral communities in early 2018.

#### 4.2.4. Community Titles as Only a Stepping Stone to Subdivision Is Evident in Official Thinking

One driver to weak political will is doubt that collective titles can provide a basis for rural development and growth. This is not surprising; Kenyans have seen a full half-century of donor and government conviction that this, along with concentration of land ownership in the hands of the able few, is the path to wealth creation. As recorded earlier, even legal provision for group-held ranches in 1968, was delivered as only a stepping-stone to subdivision, undertaken by the first tranche of group ranches created, with both dramatic wealth creation for elites and landlessness and poverty for many others (see Leeson and Harris at reference 16). While the above-mentioned civil society report praised Kenya for its visionary Constitution and for enacting the CLA, it concluded that: "*... there is no evidence that politicians or leading civil servants have grasped the viability of collective tenure as an appropriate basis for economic growth where communities own resources in common and wish to sustain and develop these lands and resources in common*" (p. 1).

Preventing formalization turning into a trigger for subdivision is an expressed concern of some communities. Traditional forest communities have publicly announced they will not allow community lands to be alienated through subdivisions among members or sales to outsiders [83]. They define their community lands as ancestral property belonging not only to themselves and generations past, but also to future generations. Modern Kenyans are generally sufficiently aware of trends of concentration and landlessness that can result from titling, for some to also prefer their collective properties not be saleable

for other reasons. They fear that those who most depend upon commonage, the poor, will suffer disproportionately, or that opening the door to sales will leave no land for future generations. These concerns are not unreasonable. Kenya is among states with soaring levels of accumulation of lands in the hands of the few, including urban elites buying up rural lands for speculative purposes [84].

#### 4.2.5. The Identity of Communities as Natural Persons Is in Danger of Being Undermined

How title is vested in communities is an important indicator in legal treatment of community lands. The ideal is where communities need not take the trouble or expense to form legal entities such as associations, cooperatives, or companies. This can also reflect growing appreciation that customarily, communities are the landowners of local domains in common, and that it is law that needs to adjust to this, not communities to continue to needlessly maintain their status as tenants of the State. Yet, it is apparent in the last three decades of reformism that one of the more difficult shifts for even lawyers to make is to conceive of community ownership being possible without requiring the community to form a legal entity. Ivory Coast's land law of 1998 founders on this point; the law acknowledges communities may be owners but requires them to establish corporate entities in which to vest their lands. This is also the case for communities in Botswana and Namibia; in theory, they may formally secure traditional grazing lands only through formation of companies, cooperatives or syndicates, and for more commercial use than they intend or can pay for. The creation and registration of group ranches in Kenya was along similar lines. Variations of this theme still characterize laws in The Gambia, Tunisia and Algeria among many others.

In contrast, laws of Mozambique, Tanzania, Uganda and Burkina Faso lead the way among a handful of others in treating the community for landholding purposes as a natural person. Kenya has taken this route. The Constitution declares that community land shall vest in and be held by communities (Article 63). The CLA reiterated this (CLA s. 4 & 16). The law provides for the community to be registered on the basis of a list of names of community members, along with rules and regulations on landholding that the Land Committee has proposed and the Community Assembly agreed to. This is confirmed in draft Regulations. Most important, it is elaborated that upon registration of the community (not its land), the community named shall become a body corporate. Registration also confers on the community power to sue and be sued in its name, and to acquire, hold, charge and dispose of property of any kind and to borrow money with or without giving security (CLA Regulations, s. 7 (8)). Through this the community acquires status as a legal person.

Nevertheless, the notion of the Committee rather than the Community being the owner keeps creeping in, at two points in the same regulations declaring community land will be held by the Committee on behalf of the community (CLA s. 7 (13) & CLA Model Rules and Regulations, s. 14a). While much more negative than the present situation in which a remote actor, the county government, serves as trustee until the land is registered, vigilance is needed to ensure the Regulations do not come into force with these tendencies intact.

#### 4.2.6. The Powers of Community Members and the Elected Committee Are Imbalanced

Linked to the above is tendency to over-empower the elected Committee at the expense of powers of the Community Assembly, the body comprising all adult members of the community. This body is, or should be, the ultimate land authority, and to which the Committee reports. This relationship is poorly developed in the law. It is further entrenched in draft Regulations. These enable the Community Assembly to not even meet more than once every 15 months. In contrast, the powers of the Committee are fleshed out to the maximum. Delegation of powers to an operational land administration committee is logical. However, maximum popular inclusion is as crucial to raised awareness and majority ownership of decisions, and to minimize the scope for dispute and fury at too autonomous decision-making by an over-empowered committee. Much of the text in the draft Regulations relating to management powers appears to derive from outdated Regulations (1969, 1970)



under the Land (Group Representatives) Act, which could explain these weaknesses, and which again need remedy before Regulations are publicly promulgated.

#### 4.2.7. Practical Guideline for Communities Is Still Limited

The CLA presents an awkward procedure through which a community may secure its lands. This begins with the creation of the Community Land Management Committee and yet, logically, a community must identify itself to establish the constituency from which a committee may be fairly elected. This in turn needs the community to arrive at consensus as to the scope of its community land area; spatial limits will determine which occupants will be included in the land of one community or the land of its neighbours. At least provisional consultation by the community with neighbours is needed, before a community elects its Land Committee.

These early fundamentals appear nowhere in the law, or in the draft Regulations. Nor do Guidelines for Communities so far produced by civil society do more than list legal steps [85]. Popular guidelines are needed. These should take advantage of the substantial experience of preparation for community land titling elsewhere on the continent [86], along with providing responses to multiple questions, which communities are already asking. As Moyo illustrates from Tanzania, failure to sufficiently raise awareness of legal terms remains an impediment to land rights delivery in rural areas, despite the passage of highly supportive land law 18 years past, the Village Land Act, 1999 [87].

#### 4.2.8. Risk of Key Community Lands Being Excluded at Registration Is High

None of the above present as many threats to community land rights as does the risk of community property not being defined by communities themselves, on the basis of existing occupation and use, but by a potentially capricious State, choosing which lands communities may retain as their property. This lies most immediately in direction that two categories of lands must be excluded from survey and registration as community land: lands titled as private properties and lands in use for public purposes (CLA s. 8 (6)).

#### Wrongfully Acquired Freeholds with Community Lands Could Is Difficult to Reclaim

Exclusion of registered private parcels falling within a community's land is appropriate. Nevertheless, some circumstances will be contested. This is where such alienation has been against majority will and/or achieved irregularly. Mau Ogiek, for example, will be directly affected where parcels meant for themselves in lands excised from Forest Reserves were instead reallocated to non-Ogiek [88]. Pastoralists may also challenge land taken involuntarily taken from them by local governments in their capacity as trustees, and which have remained beyond their reach, due to the sanctity of even wrongfully registered private parcels under the Registered Land Act, repealed only in 2012. Failure of the National Land Commission to make progress in resolving historical injustices will be heightened as a concern at the point of adjudication and titling of their lands. This may not be a small matter. In coastal areas alone, numerous communities have seen substantial traditional lands reallocated for settlement schemes, in which they have been only token beneficiaries [89].

#### Governments May too Easily Withhold Communal Lands

The greater concern for many communities will be new losses arising in the adjudication process through which they discover the State lays claims to some of their communal areas.

The CLA is unhelpful in this regard. While allowing a community "to reserve a portion of land for communal purposes", it adds that "Any land which has been used communally, for public purpose, before the commencement of this Act shall . . . be deemed to be public land vested in the national or county government" (CLA s. 13 (1) & (2)). Associated risks derive from empowering county governments and the national government to set aside parts of the community's lands for "the promotion or upgrading of public interest" (s. 13 & 29). All these areas will be gazetted as public lands (CLA s. 26 (2)).

What is public purpose and what is public interest? Public interest is nowhere defined in Kenyan law. The Land Act 2012 does define public purpose. This is mainly for physical infrastructure, roads, dams, national sports facilities, etc. However, the law then opens the door by adding “*and for any other analogous public purpose*” (LA s. 2). Who shall define these?

Communities have indeed made some of their shared lands available for their village playgrounds, football pitches, local market places, social meeting areas, schools and similar purposes, but without expectation that they would lose ownership of the land on which these facilities sit. Many have constructed these facilities through self-help. Until recently, it was not government policy to title schools or other facilities to county governments or the national government, but this is now an officially pursued programme [90].

The above illustrates overlaps between public and community lands. Constitutional intention that this should not occur was remarked upon earlier. In practice overlaps abound. One cause is that boundaries between public and community lands largely exist only in legal description, not demarcated on the ground. This is a lesser problem in especially Southern Africa where survey and demarcation is advanced, including both public and private lands. However, the law is also partly to blame. A main example is where the Constitution defines government forests and game reserves as public lands to be vested in the national government, but which are regularly the same lands as those ancestrally occupied until the present by hunter-gatherers; a category firmly defined as community land (CON Arts 61 & 63). This overlap is being challenged by traditional forest dwellers in several different court cases [91,92]. In May 2017, the African Court of Human and Peoples’ Rights ruled in favour of ancestral community land ownership in respect of another traditional forest dweller community, but for which restitution is yet to be agreed upon as the remedy [93]. A comparable decision of the African Commission a decade past has not yet seen compliance by the Kenyan Government [94].

Further losses to community lands are feared through the constitutional right of the State to define new categories of public lands (CON Art. 62 (n)). A hint of what these may be is obtained by noting which parts of existing public lands may not be transferred to communities. These land types are listed in section 12 of the Land Act. They include, inter alia, ‘lands prone to waterlogging’ and ‘buffer zones around reserves and parks’ and ‘cultural sites of importance.’ None are demarcated. All are presently actively part of community lands; the first observed earlier as crucial for wet season cultivation, the second, also critical to communities who have already endured dispossession of forest and wildlife areas for the creation of nationally owned reserves and parks. Cultural sites usually have as much local as national significance, and often more.

The National Land Commission may also identify public lands to be made available to investors (LA s. 12 (3)). The CLA itself allows the National Land Commission to add to the list of local land types that may not be transferred to communities (CLA s. 24 (3)). All the above spell danger for communities, and who assume that all their present community land areas will be included under community titles.

Instead, some and perhaps many communities will experience land losses. Where physical eviction is a result, they are to be given three months’ notice. Lawful owners have only seven days from the date of eviction to clear their belongings after which these will be disposed of by public auction (Land Laws (Amendment) Act, No. 28 of 2016, s. 152C–152H). In practice, most affected areas other than for lands on which local public infrastructure is built, will be unoccupied but traditionally owned and used forests, swampy areas, and rangeland resources. As examined below, even token compensation for such lands is unlikely.

#### 4.2.9. Compensation for Compulsorily Acquired Lands Will Be Token

Communities will have little chance of securing compensation for losses, where their lands are treated as public property, and removed on this basis from lands available for titling. Conditions exist in which Government is energetically expanding the identification and titling of public lands [71]. The Constitution permits this (CON Art. 62). This arose to protect public lands from a long history of

wrongful allocations of public land to officials, politicians and others, which began to be listed by the 'Ndungu Report' in 2004, referred to earlier. Community lands will be the casualties in this effort to secure public lands through titling to state agencies.

It is not far-fetched to suspect State actors might aim to remove as much land as possible from potential community entitlement, if only to avoid paying compensation in future once those lands are registered as community property and more difficult to take. Delays in formalizing community boundaries could occur in counties where large-scale investments are proposed.

This is not to say that communities are not eligible for compensation prior to their lands being titled. The major change in the Constitution on matters of compulsory acquisition was to enter a new clause stipulating that occupants of land in good faith as well as registered owners are to be paid compensation at takings for public purposes (CON Art. 40). The Land Act reiterates this pledge, as does the CLA at Section 6. In these cases, compensation will be held by the county government, released to the community, as soon as it is a registered owner (CLA, s. 6).

However, the value of compensation could be insignificant to non-existent. The Land Value Index Laws (Amendment) Bill, 2016 proposes to limit compensation to the value of structures and improvement to the land. In addition to most rural housing being of low value, nothing is said on lands such as grazing and forested lands that are purposely not occupied or developed by community owners. In most cases in the northern half of Kenya, such lands comprise most and even virtually all their community lands.

## 5. Conclusions

Many positive attributes of the CLA have been identified. To recap, the law benefits enormously from its origins in the Constitution, and without which it may not have come into being. Community-based land rights are not being extinguished but formally brought into the mainstream, as registrable property, and with as much protection as accorded private lands. Provision for and registration of community title is presented as a means of clarifying community property and which exists as property through the status granted customary tenure, even prior to registration; communities already lawfully own their properties.

Individual, family and sub-group customary rights are appropriately nested under the aegis of ultimate title held by the community in common. Choices to privatize all or some of community lands are availed. The institutional set-up for community lands is basically sound, if with flaws that can (and should) be remedied. Community title is directly vested in communities once they register their existence, without need for them to create corporate entities. Once draft Regulations correct the impression that the committee, not the community, is the owner, this Constitutional directive will be met. Communities may make land rules themselves with binding legal force. Communities may define their membership themselves. Off-farm lands and communal land use areas are provided for, although with more impediments than any other aspect of the law as recapped below.

In all these ways, the CLA scores highly against the seven indicators listed earlier. In some ways, the CLA ranks more highly than comparable new laws addressing this subject, such as grasping the nettle that collective title need not be confined to rural or customary landholding, and developing this species of tenure more clearly than others have achieved. Nor in issuing community title, need customary tenure be extinguished, ending the century-long political ambition to do so, according this status as a modern viable property regime. Both legal pluralism and integration are attained.

### *The Work to Secure Community Property Has Just Begun*

The immensity of Kenya's achievement should not be taken for granted, however long overdue. An excellent basis for securing majority rural land interests has been laid. However, seeing this through in the form of a community land entitlements, is yet to get underway. Doubts have been raised that achieving this will not be easy or swift, and that contradictions or shortfalls in the law still have plenty of opportunity to evolve into serious impediments to promised security. Risks loom.

The most serious stems from evident reluctance on the part of government to surrender lands to communities it would prefer to keep itself, by defining these as public, not community property. This is even where such lands are long claimed, occupied and used by communities, or where the reasons for Government's preference questionably meet public interest. Forests on community lands promise to be first in the firing line, given the well-known reluctance of forest authorities to use its constitutional right to transfer lands from public to private and community categories of ownership, and despite a global conservation environment in which community owner-conservator norms are recognized as a viable, cheap and sustainable route to forest rehabilitation and conservation for the long term. Forest tenure in Kenya is further explored elsewhere [95].

A broader list of land types belonging to communities that may be affected is not as precise in the law as fair for citizens, and even expandable. Once adjudication is launched, communities could be bullied into surrendering lands intensely valuable to them on the word of government adjudicators, claiming this is the law, law which communities are not fully familiar with. Or communities may be held over a barrel and told they cannot get any land registered without surrendering such areas. Negotiations could be long and heated. This is where civil society attention and action will be helpful. Kenya already boasts a Land Sector Non-State Actors Working Group on Community Law, most members of which already engage with communities on land matters.

The reality is that many constraints to realizing community land security will not forcefully materialize until communities launch the process of defining and registering themselves, and then their land areas. Guidelines on practical matters and problem solving are needed, improved over time as experiences accumulate. These should go beyond providing guidance on how to make by-laws, into more thorny matters such as fairly deciding community membership at the outset, deciding whether community members resident in towns for most of the year should have the same voting rights as resident members, devising workable land sharing agreements across boundaries in especially pastoral communities, handling contradictory tenure aspirations within communities, overcoming customary norms limiting the rights of women and other presently land-disadvantaged groups, operating the Community Assembly as genuinely the ultimate decision-maker, raising quorum requirements as necessary, including achieving a reasonable gender balance.

Adjudication procedures also need concretizing in ways specifically relevant to working with large numbers of people, not an individual owner. Inputs from communities are required, along with modifications as experience provides lessons. Steps to ensure state claims to presumed public lands within community lands are required so as not to undermine constitutional acknowledgement that community lands are a major class of land ownership, due protection. Effective procedures are also needed to ensure that restitution is not dismissed out of hand for the sake of convenience as a viable strategy of redress for longstanding land grievances, especially where the concerned lands are presently designated as public property. Work will also be required to ensure local and national government actors and political cadres are informed and encouraged to get to grips with the implications of the new property paradigm relating to untitled customary/community lands now legally established, which they themselves helped engender—on paper. Old truisms that the law is never enough, that law can be interpreted in many ways, should not be allowed to work against the weaker party, communities. To do so would throw into jeopardy the founding equity that the Constitution gives to communities as landowners. Instead of resolving longstanding land injustices, a new layer of land injustice could be laid.

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