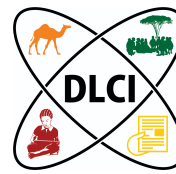




Pastoralist Parliamentary Group-PPG
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Drylands Learning and
Capacity Building Initiative
for Improved Policy and
Practice in the Horn of Africa

POLICY BRIEF: CRITICAL ISSUES ON COMMUNITY LAND LEGISLATION IN KENYA

Jarso Mokku and Liz Alden Wily¹, June 2019

Critical issues

Pastoralists already own their collective lands: what they lack is registered community land titles to legally confirm this ownership.

Registration is a priority for the pastoralists: pastoralist lands are slipping out of community hands. This is mainly due to national and county governments administering community lands as if they are public lands. This can only stop when the pastoralists double-lock their lands under community land titles.

Community land title should not be confused with individualization. Community title registers the community as the owner. As the owner, it makes its own rules about use and access to its property by its members, and by outsiders. **Community land title is superior to group ranch title** as group ranches are registered as owned by representatives. Also, not all families were included as members. Abuses followed. This is why group ranches need to re-register as community land.

Land laws in Kenya are improved but still have flaws. **Amendments are needed to protect pastoralist rights.** The main problems include:

- a. **The Community Land Act, 2016 enables government to exclude unspecified parts of those properties as public lands,** to be vested in the county or national government or its agencies (e.g. KFS, KWS, Ministry of Agriculture). There is grave danger that communities will lose prime areas of their traditional lands. **Adjudication must be fully inclusive and transparent to ensure that needless losses at the whim of adjudicators does not occur.**
- b. **The Community Land Act, 2016 permits counties to retain trusteeship until community lands are registered. Although this is reasonable, in practice it is allowing counties to reallocate some community lands for private and State purposes, without the owners' consent. Sometimes lands are claimed to be public land, without adjudication with communities.** If land is important enough to take from communities, then it is critical to identify the community owners, help them secure formal title to their land, and *then* assist them to receive compensation directly. They must also be given the right to negotiate other reparations for their losses (e.g. assisted resettlement if needed).
- c. **The Land Act, 2012 defines 'public purposes' too broadly, including for private commercial uses, so the risks of losing lands are high for communities. The open-endedness of 'public purpose' needs to be reined in, and procedures for consultation greatly improved.**
- d. **The Land Act, and Community Land Act fail to provide for public land at the community level.** This risks services within community lands being taken as public land, such as a traditional livestock market place, borehole, and school, even when these are developed by the community itself. The law

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needs to be amended to ensure that communities do not lose such lands where they serve only that community.

e. The Community Land Regulations, 2018 require communities to notify the public of their intent to apply for a community land title in a national newspaper and radio station. This is too expensive for communities. In any event, such announcements will not be accessible to communities themselves. The Regulation needs amending to enable communities to use practical methods to inform members of meetings, and make mandatory that local languages are used.

f. Other laws can interfere with pastoralist land and resource rights (laws for water, forest, wildlife, mining, gas and oil, investment zones, foreign investors, etc.). Vigilance is needed to prevent laws interfering unfairly with community land rights being enacted. One example is given below.

6. The Land Value Index (Amendment) Bill, 2018 that was passed by the Senate in February 2019 requires urgent reversal. The Amendment devalues ‘undeveloped lands’ (i.e. lands which have not been cleared, turned into farms, and lands without structures cannot be compensated). It does not direct that these communal lands be properly paid for if the State wants to take these. Failing to do this is an old colonial approach to African native land acquisition. **Every hectare of pastoralists land must be paid for when taken by the State. These lands must be valued for their contribution to the pastoralists’ livelihoods, if the market value of the land does not cover this. Laws must also provide compensation to the community in cash or kind for loss of the socio-cultural role of lands in keeping pastoral communities intact over time. This especially matters if the community is forcibly dispersed because of land takings by the State.**

Pastoralist leaders need to review the status of implementation of the Community Land Act in their Counties. When necessary, they need to challenge governments on the following immediate concerns:

a. The County Government is required to submit inventory of unregistered community lands in their counties by 29th February 2020². Counties need guidance to do this comprehensively (not exclude communities, even if they presently occupy protected areas, or private lands, etc.). But where are the guidelines from the Ministry? And will this be subject to community consultation to ensure they are fair, and the inventory conducted with communities? The process must be participatory, but counties have not yet contacted all communities to arrange for this.

b. Group ranches should be required to call meetings to ensure that all members of the community are recorded prior to being registered as community lands. Many women and persons with little livestock were not recorded as members. In some cases, an elite family is a member of two or more group ranches. The procedure needs rethinking for group ranch conversion into community lands to be fully transparent and fair.

d. Government ministries or counties should not define boundaries or allocate new titles for public land until they do an inventory of community lands. A state land grab can easily ensue, against the interest of citizens.

e. It is unlawful for county governments to dispose of any community land until owners have been identified. Failure to follow this needs action.

Communities are concerned that community titles will deprive other customary users of their longstanding access rights. Guidelines must assist each pastoralist community to:

² This deadline is based on the fact that CS lands has declared that the amendment of the Community Land Regulations as the date that the Regulations become effective, although this has yet to be gazetted or officially communicated to the Counties.



- a. Identify the ***community which is the primary owner of the land and which will apply for title, and with which decision other communities agree;***
- b. Ensure that ***long established customary rights of seasonal access and use of that land are specified and the persons or clans who enjoy these are identified;***
- c. Establish ***the conditions*** for above access and use;
- d. Establish that ***traditional arrangements for special use of shared water sources, or other special resources, are agreed with all parties.***

Communities should avoid retaining Counties as trustees as a way of solving overlapping rights among clans or tribes. Rights within community lands can be layered. Or, if several clans or tribes agree they wish to hold a certain area jointly, they can easily register this joint ownership under a Community Land Title.

Community land security means ensuring that losses of common lands by the pastoralists are minimised. This includes helping communities to know about their rights under the Community Land Act. This includes developing mechanisms for communities **to themselves lease lands to investors or to national and local governments**, rather than seeing these lands taken from them by the governments, and then leased to investors. Conditions and benefits can be agreed. *Temporary allocation* of small parcels for county or national facilities can also be considered. These steps will dramatically cut losses and bureaucracy and costs for all involved. **Surrendering title should be the last resource.**

The procedure for securing pastoralist lands is straightforward, but it requires time, genuine engagement of all community members, and practical guidance and support. Awareness creation of the community-based governance of shared property is a fundamental aspect of securing and protecting the community lands. Communities must elect appropriate members in order to protect the interests of the whole communities and future generations. They need support to register the community, and to apply for adjudication and registration of the community lands. **Pastoralists in remote areas, women and marginalised and minority groups need to be included and participate in all the steps of registering the communities and their land.**

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