



SYNOPSIS OF THE 8TH OCTOBER, 2014 COMMUNITY LAND BILL

Respect and recognition of human rights play an important role in the general development of any given country. Protection of these rights often facilitates the realization of full potential of individuals as well as association of individuals. The Bill of Rights appreciates this fact that all rights and

Article 63 of the Constitution of Kenya

Community land consists of— (a) land lawfully registered in the name of group representatives under the provisions of any law; (b) land lawfully transferred to a specific community by any process of law; (c) any other land declared to be community land by an Act of Parliament; and (d) land that is— (i) lawfully held, managed or used by specific communities as community forests, grazing areas or shrines; (ii) ancestral lands and lands traditionally occupied by hunter-gatherer communities; or (iii) lawfully held as trust land by the county governments, but not including any public land held in trust by the county government under Article 62 (2).

fundamental freedoms belong to every person and are not granted by the State. It also provides that the Bill of Rights applies to all law and binds all persons

and all State organs both at the County and National level.

Relevant to this paper, Article 40 of the Constitution recognizes the right to property. Of much importance is the fact that the right to own property may be enjoyed individually or communally. This forms the basis of recognition of Community land rights. The right to property is protected by the State and it is not to be deprived of any person except upon satisfaction of the Constitutional limitation safeguards. The basis for the argument is that rights and fundamental freedoms in the Bill of Rights belong to each individual and are not granted by the State, they are to be enjoyed by every person to the greatest extent and to the extent consistent with its nature.

The extent of enjoyment is regulated by the limitation mechanism under article 24 and 66 of the Constitution. Article 66 provides for regulation of land either by the State and or legislation enacted by Parliament. The result is to ensure investments and developments of the natural resources (read land) benefit all persons including the local communities and economies. Article 24 on the other hand ensures that before the right to property is limited, it ought to be a reasonable and justifiable way, in an open and democratic society based on human dignity, equality and freedom taking into account relevant factors.

This paper is a general commentary on the Community Land bill. It considers the Constitutional basis of the bill, the relationship between the bill and other legislations dealing with Land and finally a critical appraisal of the bill with a view of recommending the necessary amendments. The Constitution has classified land in several classes one of them being community land under article 63. Community land is to be held by communities identified by ethnicity, culture and similar interests. Article 11 provides for recognition of culture as the foundation of the nation and that the State ought to promote any form of national and cultural expression through culture heritage.

Article 6 divides the Kenyan territory of into counties. The importance of devolution is to ensure transparency and transfer of power from the National government to the County government that is closer the people thus resulting to the enhancement of public participation. Devolution in relation to community land is felt by the county governments holding unregistered community land

in trust on behalf of a given community. The only mode of disposition of community land is through legislation that has specified the nature and extent of their rights (the community specified).

Article 68 of the Constitution of Kenya

Parliament shall-(a) revise, consolidate and rationalize existing land laws;(b) revise sectorial land use laws in accordance with the principles set out in Article 60 (1); and (enact legislation-(i)to prescribe minimum and maximum land holding acreages in respect of private land;(ii)to regulate the manner in which any land may be converted from one category to another;(iii) to regulate the recognition and protection of matrimonial property and in particular the matrimonial home during and on the termination of marriage;(iv)to protect, conserve and provide access to all public land;(v)to enable the review of all grants or dispositions of public land to establish their propriety or legality;(vi) to protect the dependants of deceased persons holding interest in any land, including the interests of spouses in actual occupation of land; and (vii) to provide for any other matter necessary to give effect to the provisions of this Chapter.

SECURING THE RIGHTS AND OWNERSHIP OF COMMUNITY LAND TENURE SYSTEM

The Community Bill has been drafted to give effect to Article 63 (5) of the Constitution. **Section 2** of the bill provides for the definition of the different terms used in the Bill for ease of public interpretation. The Bill's **preamble** is;

- To provide for the recognition, protection, management and administration of community land;
- To establish and define the functions and powers of Community Land Boards and management committees;

- To provide for the powers of county governments in relation to unregistered community land; and
- For connected purposes.

The Bill's **objective** is as follows;

- Recognition, protection and registration of community land rights;
- Vesting in and holding of community land by communities identified on the basis of ethnicity, culture or similar community of interests;
- Management, utilization and administration of community land; and
- Holding of unregistered community land in trust by county governments.

The Bill has been classified in several parts for ease in implementation. In addition to the classification, the Bill has also set up principles that shall help guide its implementation. Section 3 has provided the principles by first appreciating those set by **article 60** of the Constitution of Kenya. Other **principles** guiding in the implementation include;

- The national values and principles of governance set out under article 10 of the Constitution;
- vest community land to the Communities;
- afford equal status and recognition of title;
- empower members of the community to help in administration and management of the land; and
- Afford equal rights to all.

LEGAL FRAMEWORK

a) Recognition, Protection and Registration of community land rights

Sections 4 and 7 appreciate the need to regulate land laws to enable better development and distribution of natural resources. The right of a community to own Community land is not absolute.

It is subjected to the Constitutional anticipated limitations. Article 24, 40 and 66 of the Constitution are instructive on this subject. Section 5 of the bill recognizes the principle of eminent domain where the state may compulsorily acquire community land by paying regard to Article 40 as to compensation.

Section 6 provides for recruitment of officers by the Public Service Commission who are to discharge functions in the Act. Unfortunately, the bill is silent as to the designation and roles of these officers. The Act under **Section 8** provides for identification of community land that should be done within two years from date of commencement. Every community ought to establish a committee to facilitate registration and management of the community land. The committee is to provisionally set boundaries of the land they claim to belong to their community. After setting boundaries and no conflicts arise, then, the Registrar will issue a certificate of title before adjudication process. Effectively, it means that whenever there is a conflict, adjudication is inevitable. (See Section 11)

Section 9 provides for categories of community land. They include communal, reserve land and others parcels approved by the committee. **Section 12** provides for the adjudication process. The Commission is to issue a public notice for 30 days before classifying any land as community land. Thereafter undertake actual demarcation, facilitate establishment of land management committees and lastly ensure a title is issued to the community. **Section 13** provides modes of registering community land. The land may be registered in the community's name, **INDIVIDUAL**, clan or family, community association in accordance with the

document constituting the association and a traditional leader to hold the land in trust. This section is okay except from what if the traditional leader dies? There is no transition process. Two, how can an individual's land be classified as community land? The section ought to be clear as to whether the individual owns the land under some customary land right. **Section 14** provides for a community land's register thus confirming the importance of section 8 of the Land Registration Act that establishes the Community land registries that are to be set up in each registration unit.

b) Nature of community land's title

Section 33 of the Act provides that once a community is registered as a proprietor, it has absolute ownership of the land. The Committee in consultation with the members will determine joint tenants and tenants in common. Upon registration, **section 34** provides that the registered community will have absolute ownership except when there are overriding interests under **section 36** and other interest that the land will carry. They include; encumbrances, conditions and restrictions. **Section 35** of the Act appreciates the fact that certificate of title is conclusive evidence on ownership of community land and customary rights. **Section 37** provides for establishment of a development plan on the community land by the Committee. The plan is to be presented before the Commission for approval and it has to incorporate socio-economic aspects, environment impact and the values and principles of the Constitution. The Commission in considering the plan should ensure compliance with the law relating to development planning. Additionally, **section 38** provides that the

Commission is to make rules and regulations for sustainable conservation of land based on natural resources on community land.

c) Conversion of land

Section 39 provides for conversion of community land to either public or private. It appreciates the provision of section 8 of the LRA that the conversion is to be registered. Conversion entails the need to have approval from the community. The Act under **section 40** provides that community land be converted to public land by compulsory acquisition, transfer, or surrender. Transfer of community land is subjected to approval by members of the community in a general meeting. Compulsory acquisition is only allowed for public purposes and public interests. **Section 41** provides for modes of conversion of community land to private land. They include transfer and allocation. This is subject to approval of County Assembly in case of County Government holding it in trust and by the members of a community in a general meeting in case of land managed and administered by a Committee. **Section 42** provides for conversion of public land to community land. This is done by allocation by the Commission in accordance to the Land Act and by legislation of the national government. The legislation will be subjected to land contained in the Third Schedule and the Commission may gazette others. Private land may be converted to community land by transfer, surrender or operation of law under **section 43**. The Act provides under section 44 that community land may be set aside for public purposes. This is through consultation of the community with the Commission and gazette is done. If the same is done by the County, then

adequate compensation is to be made to the affected community.

d) Special rights and entitlements in the community land

The Act under **section 45** provides that a committee may allocate part of the community land to an individual for exclusive use and occupation but the individual entitlement is not superior to community title. Such an individual is subjected to several requirements one of them being that the person is not to transfer or lease the land to a third party, the land will revert to the community if at all it is not used properly and last but not least, after death and the owner does not have an heir the land reverts back to the community. **Section 46** provides for customs and practices to be taken into consideration by the Committee so long as it is not inconsistent to the Constitution, this Act or any written law. This section specifically allows allocation for grazing rights subject to provisions provided by this section. **Section 47** also recognizes and appreciates community land set aside for farming, settlement, access and rights of way and or any other purposes. **Section 48** appreciates article 27 of the Constitution which provides for equality and freedom from discrimination. This is to be exercised by the Committee or County Government. The Act also provides for transaction in community land under **section 49**. Transactions are carried out by written consent of the Committee, ratification by members and any other written law. No part of community land may be transferred to a non-citizen. The act under **section 50** provides for leases transactions in community land shall be transacted as per the Land Act provisions section 55 (1). Further **section 51**

provides for cancellation of a deed of leasehold due to failure to comply with the requirements or adhere to the restrictions imposed by law. **Section 52** provides for existing rights of a person who acquired rights without customary rights. **Section 53** allows the community to cause a survey for a community land and a plan prepared in respect of the surveyed area.

e) Environment and natural resources management

Section 54 appreciates the regulation clause under article 66 of the Constitution to help in development of investments. The investment agreement is provided in **section 55**. They include but are not limited to requirement of environmental, social, cultural and economic impact, monitoring and evaluation, payments and capacity building and transfer technology to the community. **Section 56** provides for benefit sharing by investors on community land and **section 57** provides for the community to adopt by-laws for regulating the management and administration of their land.

f) Settlement of disputes relating to community land

Section 58 provides for a dispute resolution mechanisms set by the Committee between members. The mechanism will either adopt the ADR process or the traditional method of settling disputes that is recognized by article 60 of the Constitution. This is in line with article 159 of the Constitution which promotes the ADR process to settle disputes other than court process.

Section 59 provides for Mediation, **section 60** provides for Arbitration while **section 61** provides for Appeals. The initial Appeal provided for under section 61 will be before the Sub-County Board then

may be raised later before the County Appeals Board.

g) Miscellaneous

i) General

Section 62 provides that occupation of community land for any purpose other than as per the provisions provided in the Bill is an offence. The Bill further appreciates the provisions set by the Constitution article 67(2) (e) for investigation of historical injustices. This will safeguard the interests of customary land rights (see **section 63**). **Section 64** further stipulates the general penalty for offences committed in relation to this Act where penalty has not been provided for.

Section 65 has provided for Acts that will be repealed after the enactment of this Bill. **Section 66** and **67** provides for transitional process. The Bill bestows powers to the Commission and Cabinet Secretary to make regulations for the efficiency in implementation of the Act (**sec 68**). The Bill further provides that the Land Act and Land Registration Act will prevail in case of conflict of law (**sec 69**).

ii) Schedules

1st Schedule- Provides for matters that the constitution ought to address In relation to section 16. They include; name of the Community, description of the areas, original members of the community, open membership, particulars of members of the Committee, method of filling vacancies, payment of allowances, frequency, custody and investment of the funds, periodic audit of accounts, process of amending name and manner of dissolution of the Committee and its property.

2nd Schedule- Provides for conduct of business and affairs of the committees in relation to section 25. Meetings are to be held not less than 4 times in every financial year. Chairperson chairs the meeting. Special meetings are held only after written request by at least 5 members. $\frac{3}{4}$ of total members ought to agree for a meeting to be held otherwise there ought to be at least 14 day written notice given to all members by chief executive officer. Quorum for conducting business is $\frac{2}{3}$ of the total members. In case the Chairperson is not present then the members will elect one to preside over the meeting. Decisions will be reached at by majority votes otherwise the person presiding over the meetings will have a casting vote. Vacancy will not invalidate proceedings of the Committee. This part also provides for disclosure of interest.

3rd Schedule- provides for parcels of land converted from public to community land as to be addressed under section 42(2). All public land in Mombasa, Kwale, Kilifi, Tana River, Lamu and Taita Taveta counties except— (a) public land lawfully held, used or occupied by any State organ; (b) all minerals and mineral oils as defined by law; (c) government forests, government game reserves, water catchment areas, national parks, government animal sanctuaries, and specially protected areas; (d) all roads and thoroughfares mentioned by an Act of Parliament; (e) all rivers, lakes and other water bodies as defined by an Act of Parliament; (f) the territorial sea, the exclusive economic zone and the sea bed; (g) the continental shelf; (h) all land between the high and low water marks; (i) public lands subject to erosion, floods, earth slips or water logging; (j) public lands that fall within mangroves,

and wetlands or fall within the buffer zones of such reserves or within environmentally sensitive areas; (k) public lands along watersheds, river and stream catchments, public water reservoirs, lakes, beaches except fish landing areas; (l) public land reserved for security, education, research and other strategic public uses as may be prescribed; and (m) natural features of exceptional value falling within public lands; (n) reserved land; (o) any other land categorized, by the Commission, under an order published in the gazette.

4th Schedule- Provides for the transitional process of obligations, contracts, staff, assets and liabilities e.t.c from former institution to the current one. The meaning of the former institution meaning an institution by whatever name called registered under any law for purpose of managing or administering community land. This is in relation to section 67(6).

STRUCTURAL FRAMEWORK

a) Administration and Management of Community Land

Section 15 and **16** establishes the formation of the Community Land Management Committee. The Commission shall facilitate the formation and it is to be formed before registration of the community land. The requirements are established under **section 16** and that the Committee is not to act contrary to the community's constitution. **Section 17** provides for composition of the Committee and it has captured and incorporated the principle of non-discrimination in article 27 of the Constitution. **Section 18** appreciates incorporation of a Committee, the Committee becoming a body corporate with perpetual succession and a common seal. It is capable of being sued and be sued,

entering into a contract and last but not least, borrowing and lending money.

Section 19 recognizes election of members of the Committee. It provides that there shall be a notice of the election both in the newspapers and a conspicuous place in the registration unit 30 days before the election date. The regulation of the elections will be by the Commission and equality and freedom from discrimination article 27 will be exercised. The act under **section 20** has provided for the functions of the committee which include the management and administration of community land on behalf of the community. In management and administration, the committee may dispose of the community land but only after ratification of such a resolution by members of the Committee.

Section 21 grants the committee power to; control and regulate community land usage, determine membership acquisition criteria, allocate land and establish and maintain records of any transaction. It has also safeguarded the community's interest by ensuring that members of the Committee are of good conduct and work efficiently by providing a removal clause under **section 22**, of a member who acts in violation of the constitution. In addition to this section, **section 23** further provides that a member of the committee may tender a resignation letter to the commission or may be removed if he is convicted of a criminal offence and sentenced to term of imprisonment not less than six months, bankruptcy, death and mental or physical infirmity.

The Committee under **section 25** is to conduct its business, affairs and annual general meeting in accordance with the Second Schedule. The

Committee has been bestowed with power to regulate its procedure and committee members may also invite any person to attend the meetings but the person is not allowed to vote in any decision by the Committee. **Section 27** provides for the establishment of the Community Land Board at the sub-county level. It consists of 7 persons nominated by the Community Land Management Committees within the Sub-county and appointed by Commission. The Board is to elect a Chairperson from among them during their first meeting.

The Act has also provided for the functions of the Board under **section 28** one of them being to oversee the management and administrative functions over community land by the committees. The Board under **section 29** is bestowed with powers to overrule a decision of a committee if the Board is satisfied that the committee acted in bad faith, recommend to the Commission the removal from office of any member of the committee and make rules of conduct and procedure for the committees. The County

government is to hold unregistered community land in trust and once the registration has been done, then the committee registered is to take charge in management and administration (See section 31). Lastly, on the institutional framework, the bill establishes a Community Land Appeals Board under **section 32**. The appeals board is to be established in every county. The Community Lands Appeals Board will consist of five members appointed by the Commission

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