

# AN ANALYSIS OF INTERNATIONAL LAW, NATIONAL LEGISLATION, JUDGEMENTS, AND INSTITUTIONS AS THEY INTERRELATE WITH TERRITORIES AND AREAS CONSERVED BY INDIGENOUS PEOPLES AND LOCAL COMMUNITIES

REPORT No. 3

KENYA



Stockholm Resilience Centre  
Research for Governance of Social-Ecological Systems



Stockholm  
University

KALPAVRIKSH



कल्पवृक्ष

Environmental  
Action Group

The ICCA  
Consortium

**NATURAL JUSTICE**

**MALIASILI INITIATIVES**  
INVESTING IN PEOPLE FOR NATURE

“Land is the foundation of the lives and cultures of Indigenous peoples all over the world... Without access to and respect for their rights over their lands, territories and natural resources, the survival of Indigenous peoples’ particular distinct cultures is threatened.”

*Permanent Forum on Indigenous Issues  
Report on the Sixth Session  
25 May 2007*

**Authored by:** Fred Nelson

**Published by:** Natural Justice in Bangalore and Kalpavriksh in Pune and Delhi

**Date:** September 2012

**Cover Photo:** Artisanal fishing, Shimoni. © Richard Lamprey/Fauna & Flora International

## CONTENTS

<b>1</b>	<b>BACKGROUND: COMMUNITIES &amp; ICCAS</b>	<b>7</b>
1.1	Country	7
1.2	Communities & Environmental Change	8
1.3	Indigenous Peoples' and Local Communities' Conserved Territories and Areas (ICCAs.)	10
<b>2</b>	<b>LAND, NATURAL RESOURCES AND MARINE/FRESHWATER LAWS &amp; POLICIES</b>	<b>18</b>
2.1	Policy and legislation	18
2.2	Tenure and recognition issues	23
<b>3</b>	<b>PROTECTED AREAS, ICCAS AND SACRED NATURAL SITES</b>	<b>24</b>
3.1	Protected Areas	24
3.2	ICCAs Within Protected Areas Systems	26
3.3	Sacred Natural Sites as a Specific Type of ICCA	27
3.4	Other Protected Area-related Designations	27
3.5	Trends and Recommendations	28
<b>4</b>	<b>HUMAN RIGHTS</b>	<b>28</b>
<b>5</b>	<b>JUDGMENTS</b>	<b>30</b>
<b>6</b>	<b>IMPLEMENTATION</b>	<b>31</b>
<b>7</b>	<b>RESISTANCE AND ENGAGEMENT</b>	<b>32</b>
<b>8</b>	<b>LEGAL AND POLICY REFORM</b>	<b>34</b>
8.1	Land	34
8.2	Wildlife	34
8.3	Forests	34
8.4	Coastal Marine & Fisheries	35
<b>9</b>	<b>CASE STUDIES</b>	<b>35</b>
9.1	Namunyak Wildlife Conservancy Trust, Samburu District	35
9.2	Loita Forest, Narok District	36
9.3	Kuruwitu	37
	<b>REFERENCES</b>	<b>39</b>

## ACRONYMS

ACHPR	African Commission on Human and Peoples' Rights
BMU	Beach Management Unit
CAMPFIRE	Communal Areas Programme for Indigenous Resources
CBD	Convention on Biological Diversity
CFA	Community Forest Association
EAWLS	East African Wildlife Society
EIA	Environmental Impact Assessment
GDP	Gross Domestic Product
ICCA	Indigenous People's and Local Community Conserved Territories and Areas
ILRI	International Livestock Research Institute
KCWA	Kuruwitu Conservation and Welfare Association
KFS	Kenya Forest Service
KWS	Kenya Wildlife Service
LMMA	Locally Managed Marine Area
LNECT	Loita Naimina Enkiyo Conservation Trust
NCC	Narok County Council
NEMA	National Environment Management Authority
NGO	Non-government organization
NRT	Northern Rangelands Trust
PoWPA	Programme of Work on Protected Areas
UNDP-GEF	United Nations Development Programme-Global Environment Facility
USAID	United States Agency for International Development

## **ACKNOWLEDGEMENTS**

Nancy Chege, Jan de Leeuw, Matt Brown, Carla Clarke, Fiona Flintan, Richard Lamprey and Michael Gachanja helpfully provided information, including published and unpublished materials and images, which assisted in the preparation of this report. Ken Coe generously provided photographic images from Kenya used to illustrate this report. Harry Jonas provided valuable guidance and oversight throughout this legal review process. Any errors of fact or interpretation are the author's alone.

## INTRODUCTION

Across the world, areas with high or important biodiversity are often located within Indigenous peoples' and local communities' conserved territories and areas (ICCAs). Traditional and contemporary systems of stewardship embedded within cultural practices enable the conservation, restoration and connectivity of ecosystems, habitats, and specific species in accordance with indigenous and local worldviews. In spite of the benefits ICCAs have for maintaining the integrity of ecosystems, cultures and human wellbeing, they are under increasing threat. These threats are compounded because very few states adequately and appropriately value, support or recognize ICCAs and the crucial contribution of Indigenous peoples and local communities to their stewardship, governance and maintenance.

In this context, the ICCA Consortium conducted two studies from 2011-2012. The first (the *Legal Review*) analyses the interaction between ICCAs and international and national laws, judgements, and institutional frameworks. The second (the *Recognition Study*) considers various legal, administrative, social, and other ways of recognizing and supporting ICCAs. Both also explored the ways in which Indigenous peoples and local communities are working within international and national legal frameworks to secure their rights and maintain the resilience of their ICCAs. The box below sets out the full body of work.

### 1. Legal Review

- An analysis of international law and jurisprudence relevant to ICCAs
- Regional overviews and 15 country level reports:
  - *Africa*: Kenya, Namibia and Senegal
  - *Americas*: Bolivia, Canada, Chile, Panama, and Suriname
  - *Asia*: India, Iran, Malaysia, the Philippines, and Taiwan
  - *Pacific*: Australia and Fiji

### 2. Recognition Study

- An analysis of the legal and non-legal forms of recognizing and supporting ICCAs
- 19 country level reports:
  - *Africa*: Kenya, Namibia and Senegal
  - *Americas*: Bolivia, Canada, Chile, Costa Rica, Panama, and Suriname
  - *Asia*: India, Iran, the Philippines, and Russia
  - *Europe*: Croatia, Italy, Spain, and United Kingdom (England)
  - *Pacific*: Australia and Fiji

The *Legal Review* and *Recognition Study*, including research methodology, international analysis, and regional and country reports, are available at: [www.iccaconsortium.org](http://www.iccaconsortium.org).

This report is part of the legal review and provides a case study of Kenya. It is authored by Fred Nelson.<sup>1</sup>

---

<sup>1</sup> Fred Nelson is Executive Director of Maliasili Initiatives, a US-based non-profit organization that supports natural resource conservation, sustainable development and social justice in Africa by

## **1 BACKGROUND: COMMUNITIES & ICCAS**

### **1.1 Country**

Kenya is the second-largest country in the East African Community, with a total size of 580,367 km<sup>2</sup> of land and water (the latter comprising mainly its portions of Lake Victoria and Lake Turkana). Approximately 80% of the country's land area is semi-arid or arid. True desert covers the northern part of the country around Lake Turkana and along parts of the Somalia and Ethiopian borders, transitioning into semi-arid brushland and dry savannah moving south. Rainfall is higher along the coast, in the southwest near Lake Victoria, and in the highlands in the south-central part of the country, centred on Mount Kenya, sub-Saharan Africa's second-highest peak, and the Aberdares range. These montane areas serve as 'rain towers' for the arid lowlands and contain the bulk of Kenya's remaining evergreen forest. As a result of its generally arid and semi-arid climate, only about 8% of Kenya's land is arable and the predominant land use in arid and semi-arid areas is transhumant pastoralism.

Kenya's human population has grown rapidly during the past 30 years, now totaling over 41 million with a growth rate of 2.46 and fertility rate of 4.19 children/woman (CIA 2011). The population is concentrated in the southern and western portion of the country and along the coastline, particularly around Lake Victoria and in the southern and central highlands and other montane areas with relatively high rainfall and soil fertility.

Kenya ranks 143<sup>rd</sup> out of 187 countries on the UNDP Human Development Index, with a score of 0.509 which is above the regional average for sub-Saharan Africa of 0.463 (UNDP 2011). Kenya, particularly the capital Nairobi, is the commercial and business hub of eastern Africa, with a strong international business community and growing middle class. The economy has generally experienced high growth rates for the past decade, although growth and investment cratered in 2008 as a result of the global recession as well as the post-election violence that engulfed Kenya in the first quarter of that year. GDP growth in 2010 was over 5% (CIA 2011). Key sectors in the economy include agriculture- including a horticulture and floriculture industry that has grown to become one of the country's leading exports- as well as tourism and a range of technology and services industries that serve much of sub-Saharan Africa. Nevertheless, poverty in both rural and urban areas is pervasive, particularly in light of population growth and concomitant rural-to-urban migration. The demands of the growing population, coupled with a growing middle class and rising standards of living and demands for resource consumption, are frequently pointed to as leading drivers of environmental degradation in Kenya.

Governance is a major social concern and challenge in Kenya; the country ranked 154<sup>th</sup> out of 183 countries in Transparency International's 2011 Corruption Perceptions Index (Transparency International 2012). Governance patterns since independence have been heavily based on ethnic and regional political alliances and patronage (Wrong 2009). There are strong interconnections between the exercise of public functions and involvement in

---

working with leading local organizations to build their capacity and foster wider collaborative initiatives. He has lived and worked in Tanzania for a total of 11 years and is now based in Vermont, USA.

private enterprise, with a major function of public office being to service private accumulative or patronage interests. Natural resources such as land, forests, and wildlife, as resources partially or entirely under governmental authority, have featured prominently in this political economy (Kabiri 2010).

In the face of these pervasive social and political concerns, Kenyan society also features some of Africa's most sophisticated civic discourse, with a vibrant civil society challenging the political elite on nearly all important decisions, particularly since the political arena opened up during the 1990s. Kenyan civil society organizations, including those related to the environment, conservation, land rights and pastoralist development, are among Africa's most skilful, as is the national media and academic community. Emblematic of the strength and influence of Kenyan civil society, as well as the profound connections felt in the country in terms of the interlinkages between human rights and natural resources, was the life of Wangari Maathai, the late 2004 Nobel Peace Prize laureate whose career was defined by her resistance to government destruction of forests and working for greater accountability in land and natural resource governance.

## **1.2 Communities & Environmental Change**

### **(i) Indigenous people and local communities**

Kenya's population is ethnically diverse and reflects the diversity of its physical geography and climatic zones. The arid and semi-arid savannahs that make up most of the country's land area are occupied primarily by Nilotic-speaking pastoralist groups, including the Turkana, Kalenjin, Maasai and Samburu, as well as the Cushitic-speaking Somalis who predominate in the eastern parts of Kenya. Most pastoralist groups, in particular, are heavily dependent on natural resources such as water, grasslands, and forests, and have numerous customary resource governance institutions designed to conserve critical resources. The area around Lake Victoria, centered on Kisumu, is home to the Luo and Luhya, while the Kikuyu, Kenya's most populous ethnic group (about 22% of the total population) predominate in the central highlands.

One notable group of indigenous people are the forest-dependent Ogiek hunter-gatherers, who live in remnant communities in various forests in the western part of the country such as the Mau Forest. On the coast, the Mijikenda people have a strong connection to patches of coastal forest preserved as sacred groves and known as *Kayas*.

### **(ii) Biodiversity**

Kenya's coast contains patches of coastal forest which are a part of the East African Coastal Forest biodiversity hotspot, which runs along Africa's Indian Ocean coastline from Somalia to Mozambique and is characterized by high levels of species endemism, particularly among birds, reptiles, plants, and invertebrates. The Arabuko-Sokoke forest, a National Park and Forest Reserve managed by the Kenya Wildlife Service, is one of the most important patches (420 km<sup>2</sup>) of forest in all of sub-Saharan Africa for avian conservation, and for conservation of the East African coastal forest biome in general.

Another of Kenya's outstanding biological features is the Maasai Mara National Reserve, which lies adjacent to Tanzania's Serengeti National Park along the Kenya-Tanzania border.

The Maasai Mara, perhaps the most famous and visited wildlife reserve in Africa, hosts the Serengeti ecosystem wildlife migration, totaling around 2-3 million wildebeest, zebra, and other ungulates during the dry season and thus is an integral component of this migratory system. The Maasai Mara is also, as a result of its wildlife populations, which comprise about 25% of all the wildlife founds in Kenya (Western et al. 2009), the key attraction in a tourism industry that generates over \$1 billion in annual receipts and is a leading source of foreign exchange, employment, and investment (Honey 2008).

### (iii) Drivers of biodiversity loss

Kenya's environment, biodiversity, and natural resources face high levels of pressure from human population growth, rising consumption, and a range of policy failures and governance shortfalls. Forest cover stands at less than 2% of the country's total land area, and highland forests have been heavily degraded and destroyed over the past several decades. The sources of forest loss range from local demand for timber and other products, to large scale clearing due to government actions, taken either formally or informally. Public forest reserves were often used for patronage purposes, with the government allocating public land to individuals; in the most notorious and controversial case, the regime of Daniel arap Moi proposed in the late 1990s to degazette about 10% of the country's remaining highland forest reserves (KFWG 2006).

Kenya's wildlife populations, centered around famous areas such as the Maasai Mara and Amboseli ecosystem, have declined considerably since the 1970s, perhaps by as much as 50-60% (Norton-Griffiths 2008). The proximate causes of wildlife decline are illegal hunting for bushmeat, skins and other products such as ivory; and habitat loss driven by conversion of savannahs and other natural vegetation to agriculture and human settlements. Competition over water and forage also plays a role in wildlife declines in some arid and semi-arid areas. Underlying these processes, however, are a range of policy failures and governance factors. Commercial poaching of ivory and rhino horn, which spiralled out of control in the 1970s and 1980s, often involved state officials or even wildlife parks staff at this time. More broadly, Kenya has pursued heavily centralized wildlife management policies, including banning all commercial and subsistence hunting in 1977, a ban which remains in place. Local communities may benefit from wildlife through non-consumptive tourism, but there is no tourist hunting and no legal local utilization of wildlife; such proscriptions on wildlife use serves to reduce wildlife's economic value and makes it difficult for wildlife to generate income for local communities that might offset the costs imposed by large mammals in rural areas (Norton-Griffiths, 2008). This economic dimension of wildlife use and land use is a central issue in wildlife declines in Kenya.

Somewhat similarly, coastal and marine resource management is also impeded by issues of government capacity and policy failure. Coastal communities are heavily dependent on marine resources as a source of food and income, but at least until recently fisheries were either entirely open access, and thus subject to the pressures of increasing consumptive demand, or loosely controlled through various centralized licensing and monitoring provisions which in practice had little impact. Local fishery users have historically not had clear rights to collectively govern their marine resources, an issue central not only to coastal ICCAs but to the sustainability of Kenya's coastal marine resources more generally.

### **1.3 Indigenous Peoples' and Local Communities' Conserved Territories and Areas (ICCAs)**

#### **(i) Range, diversity and extent of ICCAs in Kenya**

With its culturally and biologically diverse geography, and relatively limited extent of state protected areas, Kenya has a range of documented ICCAs covering both marine and terrestrial environments and a wide range of ecosystems. The country has a diversity of cultures, many of whom, such as pastoralists, have strong connections to their lands and natural resources and a range of traditional conservation institutions, many of which remain undocumented. Several of these may have constituted, or may still constitute, ICCAs.

#### ***Pastoralist Landscapes***

Kenya's different pastoralist communities have long-standing and diverse traditions of actively managing their environment in ways that conserve the forage and water resources that their livelihoods depend upon. For example, Bassi (2006) describes the indigenous conservation practices of Borana pastoralist communities in northern Kenya along the Ethiopian border. The Borana, like other pastoralist communities in East Africa, traditionally protect springs and highland forests as critical resources for their livestock, with the forests providing refuge and forage during times of drought as well as protecting water catchments. Other pastoralist groups such as the Maasai, Samburu, and Turkana also traditionally protect dry season grazing refuges and forests through traditional mechanisms and belief systems. For example, the Loita Forest in Narok District is one of Kenya's more significant remaining patches of highland forest, in a country that has experienced heavy levels of deforestation (see Section 9.2).

ICCAs traditionally conserved by pastoralists are examples of strongly coupled and interrelated ecosystem services, biodiversity, and human economies. Pastoralist land use practices such as the use of fire as a range management tool, and grazing by livestock, have shaped East Africa's savannahs and grasslands for millennia (Collet 1987). These management interventions have aimed, primarily, to improve the quality of forage through active management (fire, rotational grazing) of pasture for livestock as the basis to local livelihoods and economies. Ecosystem services such as water catchment by highland forests provide for these livelihoods in their entirety and thus traditional production systems evolved in ways that foster their conservation.

#### ***Forests***

Among the most well-known and extensively documented traditional ICCAs in Kenya are the sacred groves of the Mijikenda people of the coastal zone. These groves, known as *Kayas*, range in size from about 30 to 300 ha and are found along much of the Kenyan coast in Kilifi, Kwale, Malindi and Mombasa Districts. About 70 *Kayas* have been identified, and these areas now often serve as relict refugia for a range of species in the high biodiversity East African coastal forest biome, which has otherwise been highly degraded by clearing, settlement, and urbanization. The *Kayas* are estimated to cover in total about 6,000 ha, or about 10% of the total remaining coastal forest in Kenya (Githitho n.d.).

Kenya also has promoted participatory forest management through the 2005 Forests Act, which provides for the establishment of Community Forestry Associations by communities

adjacent to Forest Reserves. These associations then enter into co-management agreements for the management of Forest Reserves with the Forestry Department; this arrangement however is effectively co-management of state-owned protected areas and the communities are thus in a delegated yet secondary position of authority with regards to the forests they are involved with managing.

### ***Community Conservancies***

The most widespread form of community-based conservation practiced in Kenya during the past twenty years has been the establishment of locally-protected areas, often termed community conservancies or sanctuaries. These areas are set aside explicitly for wildlife, often on the basis of tourism investments made by outside companies that enter into contractual agreements with the local community. Conservancies generally include a small core area where no livestock grazing is allowed, and multiple use integrated livestock and wildlife across a larger land area.

However, in Kenya the term ‘conservancy’ bears no official meaning circumscribed within wildlife or protected area policy or law; it is rather an informal term to denote the local designation of conserved areas within established Group Ranches or trust land. This terminology is also used partly to market these areas by the tourism companies, and to emphasize the local conservation measures that are being instituted.

Data collected by the International Livestock Research Institute (ILRI) provides documentation, compiled from different sources, of 41 conservancies established in eight districts around the country, covering a total 1.58 million hectares, including 402,141 hectares within ‘conservation zones’ that are specifically set aside for wildlife, tourism and seasonal livestock grazing.<sup>2</sup> (ILRI unpublished data).

The majority of conservancies (24 out of 41) in the ILRI database are located in the Group Ranches surrounding the Maasai Mara National Reserve in Narok District, and those surrounding Amboseli National Park in Kajiado District. In both these areas, conservancies have been formed through joint venture and concessionary agreements between local landholders and tourism companies, which provides for the communities to set aside areas for tourism and wildlife in exchange for certain fees and other benefits. Importantly, some conservancies grant exclusive use of the area to only one tourism company or lodge; the demand for creating conservancies emanates from this desire for more private, exclusive ‘wilderness’ experiences on the part of high-end tourism clients. This led to the establishment of the first conservancies during the 1990s (Honey 2008). The creation of these areas is thus largely driven by the tourism market, and the reality that as much of Kenya’s wildlife is found on the community lands outside these state protected areas as within them (Western et al. 2009).

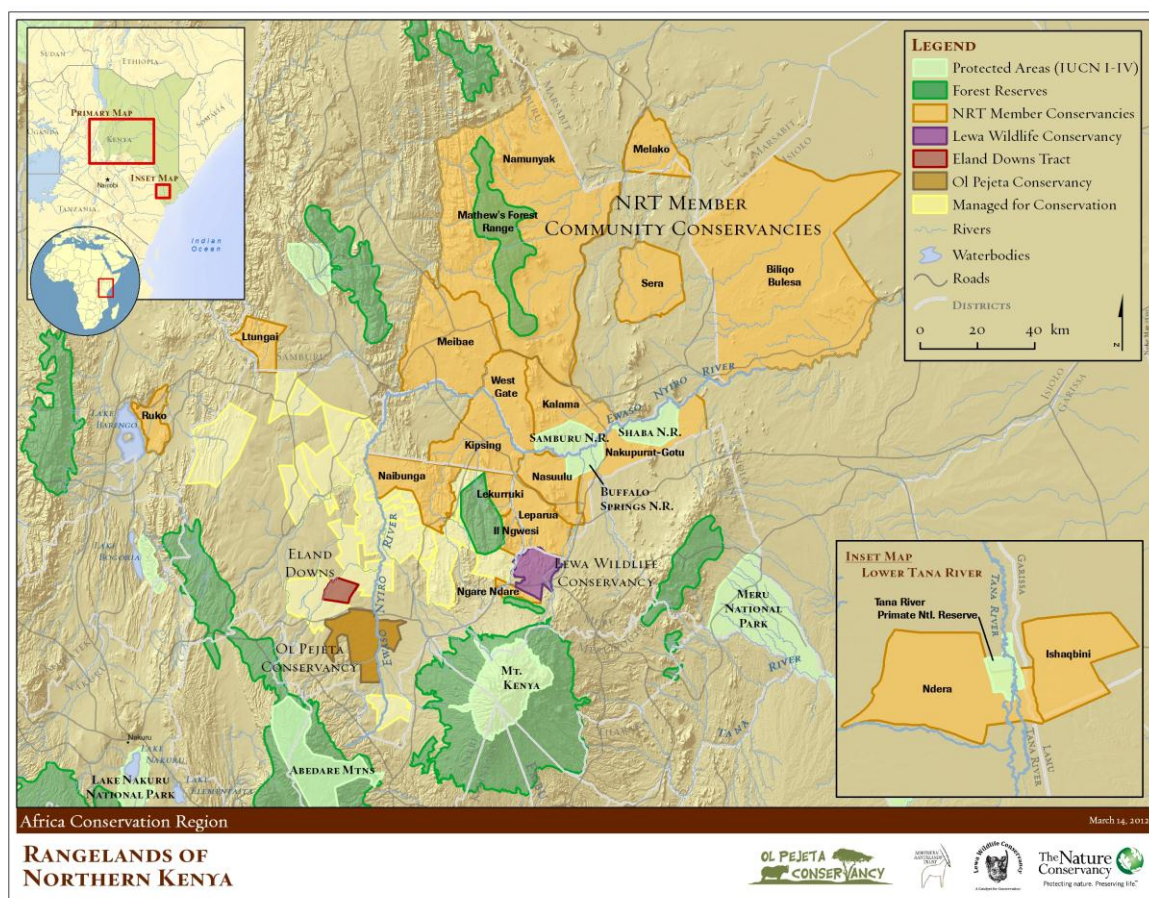
The Northern Rangelands Trust (NRT) records a slightly larger total area than that contained in the ILRI database, about 1.6 million ha, as being contained within the 19 conservancies operating under its umbrella (NRT 2012) (see Figure 1). All of these conservancies are

---

<sup>2</sup> The boundaries of the conservancies as a whole includes areas where people reside and areas or zones where conservation is not the primary form of land use.

located within central and northern Kenya, where the number of conservancies has increased rapidly over the past decade. Given the partial overlap between the NRT figures and the ILRI database, it is reasonable to estimate at least a total of 2 million ha nationwide as being contained within conservancies. All of this land lies within pastoralist rangelands in the south-central or north-central (or in a few cases eastern) part of the country.

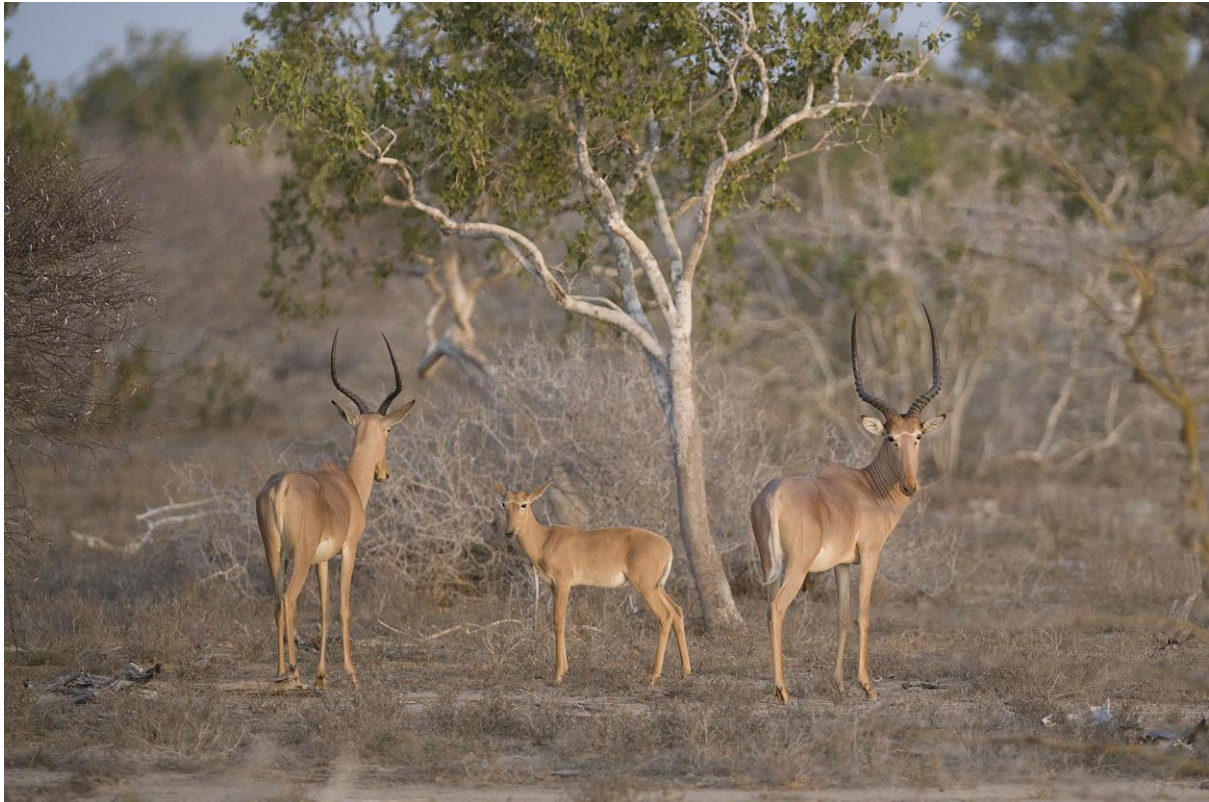
Conservancies are critical for wildlife in a country where an estimated 65% of all wildlife are found outside state protected areas (Western et al. 2009). In addition, number of conservancies protect significant populations of highly endangered species. In Laikipia and Samburu Districts, conservancies provide critical habitat for Grevy's zebra, which is endemic to northern Kenya and southern Ethiopia and of which only a few thousand remain in the wild. Other endangered species found in this network of community conservancies include wild dog, cheetah, and elephant.



**Figure 1:** Conservancies in northern-central Kenya supported by the Northern Rangelands Trust. Source: The Nature Conservancy/NRT.

A very notable new and emerging conservancy is Ishaqbini, located in Garissa District in eastern Kenya (Walker 2012). This conservancy has been established explicitly for the protection of a key area of habitat used by the hirola, an antelope endemic to eastern Kenya and Somalia, which now numbers only 200-300 in total, most of these found in a few locales in far eastern Kenya (King 2011). The Ishaqbini conservancy contains a significant

proportion of remaining hirola and is one of the most important conservation initiatives in this critically endangered species' limited range.



**Figure 2:** Hirola on Ishaqbini Conservancy, Garissa District, eastern Kenya. Photo Credit: Kenneth Coe.

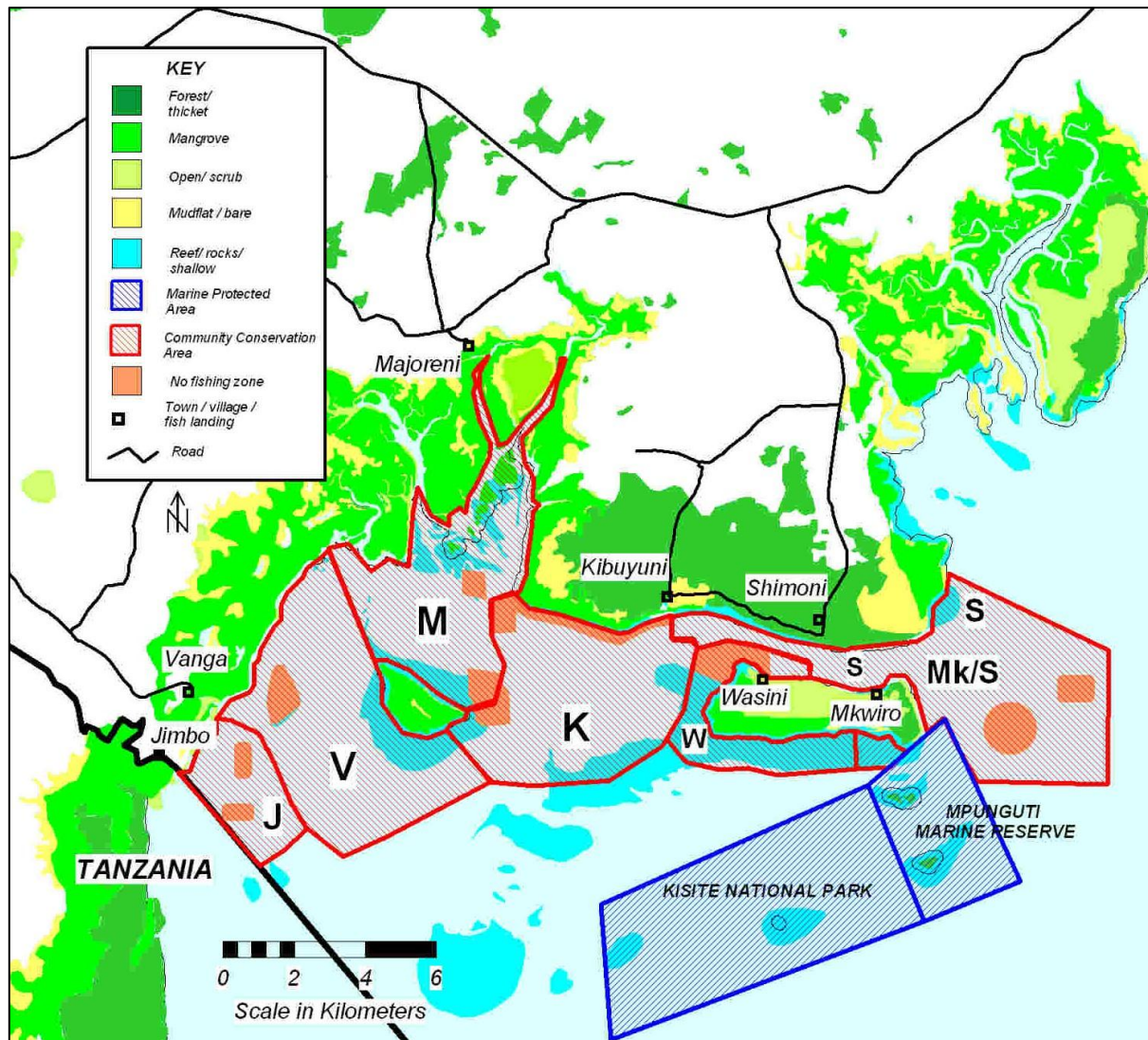
### ***Locally Managed Marine Areas***

Kenya's coastal communities rely heavily on inshore reef fisheries and marine resources for their livelihoods- for food, trade, and other products. Kenya's coastline is also a key area for marine biodiversity, with extensive coral reef all along the coastline, as well as beaches used for nesting sea turtles. Traditionally fisheries have been open access, with traditional fishing technologies limiting catches and avoiding high levels of by-catch or unselective harvest. With technological changes, such as the introduction of purse seine and monofilament netting, fishing practices have become less selective and more impactful on local fish populations (Samoilys et al. 2011). This endangers both marine biodiversity as well as human livelihoods along the coast.

Both the concept and the terminology of ICCAs is emerging as a central strategy to improve local management of in-shore fisheries and coral reef systems in coastal Kenya. The basic concept is to enable communities to establish 'Locally Managed Marine Areas' (LMMAs) which grant a defined group of fishery users- including fishermen and other marine product harvesters as well as boat operators, processors etc.- the rights to govern a defined area of water and reef. The first significant pilot LMMA was established starting in 2003 by the community of Kuruwitu on the central Kenyan coast (Section 9.3). Lessons from Kuruwitu and other freshwater and marine areas contributed to designing co-managed LMMAs under the Fisheries Act, through Beach Management Unit (BMU) regulations which were released

in 2007. Since then a number of BMUs have been established along the coast although most of these are not yet operational (Lamprey and Murage 2011).

The most functional emerging stretch of LMMAs established as BMUs is along the southern Kenya coast adjoining the Tanzanian border. This area, known as Shimoni-Vanga, includes seven communities, all made up of artisanal fishermen and traders. Their territorial waters as established under local by-laws passed pursuant to the BMU Regulations covers a total of 12,400 ha (Lamprey and Murage 2011; Brett 2011), and adjoins to the Kisiti National Park and Mpunguti Marine Reserves (see Figure 3).



**Figure 3:** Map of individual territorial waters comprising Shimoni-Vanga LMMAs along Kenya's southern coast. Source: Richard Lamprey/Fauna & Flora International.

These LMMAs include a range of management categories, including no-take zones and regulated use zones, and are established explicitly to regulate local reef fisheries in the interests of local livelihoods dependent on sustainably managed fisheries and marine resources. In Kuruwitu, which was established about seven years ago, there is evidence of fish and coral recoveries in the no-take zone (Lee 2011).

## (ii) Governance and management of ICCAs

Governance and management of ICCAs in Kenya today continues to be based on a merging of traditional and customary beliefs and practices with new formal governance institutions. The Loita Forest, where traditional governance institutions have been adapted to modern conditions and complemented by new legal advocacy and organizational bodies, is emblematic of that dynamic (see Section 9.2).

The traditional preservation of the sacred *Kayas* forests was underpinned by Mijikenda spiritual beliefs and ritual traditions, and enforcement of traditional rules has been primarily through adherence to taboos and social sanction. Many *Kayas* have been degraded through clearing, encroachment, and, closer to the coast, resort developments. *Kayas* are mostly legally government lands and thus local communities have no formal jurisdiction over them. Since the early 1990s, in order to protect the cultural and biological values the remaining *Kayas* contain, a strategy has been employed of gazettement *Kayas* as National Monuments under the Antiquities and Monuments Act. This provides the *Kayas* with a form of statutory protection from encroachment and development, and appears not to significantly constrain local access since traditional uses of these forests are non-extractive. 11 representative *Kayas* spread along the coast were officially inscribed in 2008 as one of Kenya's six World Heritage Sites (UNESCO 2011).

The governance framework for LMMAs along the Kenyan coast is provided by the Fisheries Act and its subsidiary regulations providing for the creation of Beach Management Units (BMUs), which were released in 2007. BMUs comprise an association, generally of several hundred registered members, made up of fishermen, boat owners, fish traders, and other users of the fishery such as tourism operators or fish processors (Lamprey and Murage 2011). The physical basis for the BMU is the traditional fish landing site of each community, which is where most regulation is focused. Registered members of the BMU form the BMU Assembly, who elect the BMU Executive Committee every four years. The Committee comprises 9-15 people, of whom 30% are boat owners, 30% are boat crew members, and 30% are other stakeholders, with at least 10% being fish traders and at least three members being women (Lamprey and Murage 2011).

The BMUs are able to devise and enforce their own by-laws and, in concert with officials from the Ministry of Fisheries Development, may create their own management plans to govern their territorial waters and its fishery. Examples of regulations developed under this framework includes the designation of certain areas as no-take zones or otherwise regulated for particular uses, levying fees or taxes on fish landings or other activities such as tourism, regulation of the types of fishing gear that may be used, and restriction of use of the fishery to registered fishermen and boats (Lamprey and Murage 2011).

Community conservancies have been created since the mid-1990s in a fairly adaptive manner, with no single governance or institutional framework to guide them. Conservancies are for the most part established on land held collectively as registered Group Ranches (see Section 2.1(i) for details on the Group Ranch framework), whereby governance structures comprise an elected Group Ranch committee and a General Assembly comprising all the residents of the area. In order to strengthen management of the conservancy and address some of the problems with transparency and accountability that have typified the Group

Ranches, additional collective representative bodies have been formed in many conservancies, particularly those in the north working with NRT. These bodies vary and include (Aggarwal and Thouless 2009):

- Self-help groups registered with the Ministry of Culture and Social Services;
- Societies formed under the Societies Act (Cap 108)
- Trusts formed under the Trustee (Perpetual Succession) Act (Cap 14)
- Cooperative Societies formed under the Cooperative Societies Act (Cap 490)

Since there is no government-mandated structure of conservancies, and indeed no legal meaning to the term ‘conservancy’ in Kenya to date, communities and NGO facilitators have experimented with a range of structures and legal identities.

(iii) Main threats to communities’ governance of territories, areas and natural resources

Threats to ICCAs in Kenya take a range of forms, including direct drivers of ecosystem degradation or land loss on the ground, and underlying policy or institutional challenges. At the landscape scale, many areas face increasing pressures from a combination of human population growth, economic expansion, new or growing commercial interests, and the effects of drought and climate change. All of this occurs in a governance context characterized by enduring weaknesses in the ability of local groups to secure rights over communal lands and resources, which community conservation practitioners continue to search for creative ways to overcome.

As throughout sub-Saharan Africa, a combination of high poverty, growing human populations and in particular large numbers of young people, most of whom are unemployed or underemployed, as well as increasing growth and investment in some areas, are putting pressure on natural resources and ecosystem services. The charcoal trade, for example, is the major source of household energy throughout East Africa, and is based almost entirely on forests and woodlands, with most harvesting carried out with little regulation or controls. Growing energy needs increase pressure on woody biomass. A number of new or growing industries such as horticulture and biofuels are placing increasing pressure on land and water resources in Kenya. Allocation of large areas of land by the government for biofuels and commercial agriculture lies at the heart of conflict over natural resource use in the Tana Delta, a vitally important area for agro-pastoralist communities and biodiversity and ecosystem services in coastal Kenya. (McVeigh 2011).

Institutional and governance issues underlie processes of environmental degradation and the loss of land to external interests in Kenya. Weaknesses in the status of most community lands as ‘trust lands’ managed by district-level governments has led to widespread encroachment and alienation of such areas. Even in Group Ranches, which are privately vested in registered communities, problems with elected leaders’ accountability and transparency in decision-making around land allocation has contributed to the dissolution through individual property adjudication of many Group Ranches holding important ICCAs (Mwangi 2007).

Kenyan conservation and community rights organizations have been innovative in working to develop effective legal and administrative measures to overcome the limitations of

Kenyan land and natural resource laws and policies to date. The development of community conservancies and Beach Management Units are among the most notable recent attempts to develop new institutional and governance frameworks for communities to collectively manage lands and resources.

(iv) Key initiatives to support and address the threats to ICCAs

A wide range of Kenyan organizations, government agencies and donors are supporting the further development, expansion, and strengthening of ICCAs in Kenya. Key initiatives include the following:

- The Northern Rangelands Trust (NRT) has emerged as the leading organization supporting a growing network of community conservancies in northern Kenya, covering a total of about 16,000 km<sup>2</sup>. NRT works closely with County Councils and KWS as well as key supporting partner organizations such as The Nature Conservancy, Tusk Trust and Fauna & Flora International. USAID has also been an important financial supporter.
- On the coast, the initial development of the ICCAs at Shimoni-Vanga, building on the experience of Kiruwitu further north, provides a potentially critical pilot initiative that may be scaled up to a wider coverage along coastal marine ecosystems. This will likely be a priority for government, donors, and various NGOs in coming years. East African Wildlife Society, Fauna & Flora International and the World Wide Fund for Nature (WWF) are all active along the coast working on LMMAs.
- Support to ICCAs in Kenya is a priority theme for the UNDP-GEF Small Grants Programme country office, which is poised to play an increasingly influential role supporting individual ICCAs in the country, as conservancies and coastal ICCAs all look to scale up and expand.
- As discussed in this report, the Endorois case based around Lake Bogoria National Reserve is a landmark in African jurisprudence in relation to communities' ancestral land rights and indigenous peoples' rights. Follow up action by the Kenyan government, as well as various advocacy groups supporting the local community, will be critical in shaping the ultimate impact of this ruling by the African Commission on Human and Peoples' Rights (ACHPR). Other marginalized resource-dependent communities who have suffered historic or contemporary loss of lands, such as the forest-dependent Ogiek, and others may be able to use the precedent of this case to effectively argue for their land rights in the spate of new land-grabbing threats.
- As discussed throughout this report, perhaps the most important ongoing development with regards to ICCAs in Kenya, and specifically the ability of local communities to secure collective rights over their customary lands and resources, is the wide suite of reform measures that are being put in place in order to implement the new 2010 constitution. The constitution provides key provisions for securing communities' land rights, as well as generally strengthening government accountability and providing safeguards to communities in public decision-making processes, but many critical aspects of the constitution will only take shape through legislation drafted to give meaning to its general clauses. As this process plays out over the next several years, communities may obtain critical new opportunities to secure formal rights over their lands and resources, and to protect their customary

practices, or they may continue to face many of the challenges that have plagued natural resource governance, and governance in general, in Kenya in the past.

## **2 LAND, NATURAL RESOURCES AND MARINE/FRESHWATER LAWS & POLICIES**

### **2.1 Policy and legislation**

#### **(i) Land**

Kenya presently has a number of statutes governing land tenure and ownership, including the Government Land Act (Cap280), the Land Adjudication Act (Cap 284), the Agriculture Act (Cap 318) and various others. Under Kenya's post-colonial land tenure framework, there have been three land tenure categories: freehold land, government land, and trust land. The 2010 constitution changes these categories to: public land, private land, and community land. For ICCAs, the most significant land reform in the constitution is the transformation of trust land to 'community land', although this change is yet to be legislated on.

The majority of land in Kenya is trust land, which has been under the authority of County Councils (district-level elected government bodies) and administered by the Commissioner of Lands. Trust land is governed according to the Trust Land Act (Cap 288). While legally trust land governance requires land to be managed on a trusteeship basis by the County Councils, and has specific requirements in terms of consultation with regard to any land allocations, Aggarwal and Thouless (2009), among others, note that "in practice, Trust Lands have been routinely alienated without consulting or notifying resident communities." Communities living in trust lands, which includes nearly all pastoralists in the northern and eastern arid and semi-arid zones of Kenya, have no rights to exclude outside users, to make and enforce land governance or allocation decisions, or to enter into third-party agreements pertaining to land use. There is thus no basis for common property land and natural resources governance in much of Kenya; this is one of the most important legal and institutional features of ICCA governance in Kenya, and highlights why the constitutional changes to the status of trust lands in Kenya are potentially so important.

Kenya does however have one established and important legal mechanism enabling communities to secure collective common property rights over land, and that is the institution of the Group Ranch provided for in pastoralist rangelands under the Land (Group Representatives) Act (Cap 287) passed in 1968. Until new legislation is passed to implement the constitutional provisions for the registration of community land, the Group Ranch remains the only way of formally exercising collective rights over land.

Group Ranches are vested in trustees ('group representatives') on behalf of the Group Ranch membership- its residents- and managed by an elected Group Ranch committee which is elected annually at the General Assembly meeting. Land is held in undivided shares amongst the entire Group Ranch membership, as a form of collective freehold tenure. The idea underlying the Group Ranches was to adapt freehold property rights to collective land management contexts in pastoralist areas in order to promote tenure security and ultimately investment in modern, commercial ranching practices in traditionally pastoralist areas. Group Ranches were established mainly in the more productive rangelands in southern Kenya, predominantly in Maasai areas in districts such as Kajiado and Narok,

although they have more recently also become widespread in Laikipia and Samburu Districts as their tenure advantages in comparison to trust land become more apparent (Aggarwal and Thouless 2009).

Despite this, the Group Ranches have had a mixed record as land holding and collective natural resource governance bodies. Aggarwal and Thouless (2009) summarize some of the governance shortcomings of group ranches as follows:

*...existing group ranches continue to face numerous challenges. Most group ranches are unable to hold annual general meetings as prescribed in the Group Ranch Act. This may be because their leadership does not want to be held accountable by the members, or because the membership is too dispersed to allow a quorum, or the membership is too large to be able to operate as a single unit. Some groups do not maintain basic records as required by the Act, for example, the register of members.*

Partly as a result of these internal governance problems, Maasai communities in southern Kenya, where land values are highest, have increasingly decided to subdivide Group Ranches into individual holdings, despite the reality that livestock production is not viable on most properties in these semi-arid regions at the scale of smaller individual properties. The problem that has motivated this shift is the local, internal governance of the Group Ranches, and particularly the problem of elites in the Group Ranch committees allocating lands and key resources to themselves or other applicants, without sufficient recourse or accountability to the Group Ranch membership (Mwangi, 2007). Due to various factors related to informal governance dynamics and formal institutional design, the operation of the Group Ranches has been such that the membership frequently has not been able to enforce accountability in land management on the part of the leadership.

In central and northern Kenya, where many new community conservancies are now emerging, these formal ICCAs are situated on both Group Ranches and trust lands. On trust lands, however, the communities do not have any real *de jure* authority over land management and administration.

Land policy and law is presently in a state of considerable overhaul in Kenya. A new National Land Policy was developed in 2007, and passed by Parliament in 2009 (Sessional Paper No. 3 on the National Land Policy). The National Land Policy calls for the conversion of trust lands to community lands, which will be vested in communities holding customary rights over those areas, and provides for the creation of Community Resource Boards as key land governance bodies. Kenya's new constitution has enshrined this reform and planned conversion of trust lands to community lands (see Section 4). If effectively implemented, this has the potential to greatly strengthen the tenorial basis of ICCAs across Kenya, including both formally constituted areas such as conservancies as well as traditionally protected areas such as pastoralist communities' customary grazing reserves, which have become seriously eroded over the years due in part to the open access nature of trust lands administration and governance. The constitution requires legislation to provide for the establishment of community lands to be passed by 2015, and a Community Land Bill is presently being developed by the Ministry of Lands, which has also already developed a proposed Community Land Rights Recognition model detailing how the conversion of trust

lands (or government lands in the coastal regions) to community lands could be affected (Ministry of Lands 2011).

## (ii) Inland Fisheries, Water & Marine

The governance of aquatic territories in Kenya is fragmented across a wide range of statutes, many of which are relatively outdated. For instance, wildlife legislation provides for the establishment of marine parks and reserves, which are managed by the Kenya Wildlife Service (KWS). The Environmental Management and Coordination Act (1999) contains provisions for coastal zone protection and regulations, but it is not clear if these provisions are being enforced or playing a significant role in coastal management. Fisheries utilization, meanwhile, is governed by the Fisheries Act (Cap 378) and the Ministry of Fisheries Development. Fisheries management and governance generally follows a conventional command and control regulatory regime based around licensing and sustainable yields. Historically, coastal marine fisheries, in Kenya as elsewhere in East Africa, have been effectively open access, with no meaningful controls on utilization exercised by either local communities (who have not had the authority to impose such controls) or government authorities (who have not had the capacity or perhaps inclination to do so).

The Water Act (2002), which is implemented by the Ministry of Water and Irrigation, provides a generally centralized licensing and regulatory framework for utilization of water, without providing expressly for customary rights of use (Aggarwal and Thouless 2009). The jurisdiction of the Water Act extends to lakes, swamps and other freshwater bodies and wetlands; meanwhile the administrative authority in Kenya for the Ramsar Convention on Wetlands is the KWS.

Within this generally fragmented and centralized regulatory and governance framework, there are some emerging opportunities for local communities to establish some degree of territorial jurisdiction over marine and inland fisheries resources and habitats. The key statute for doing so is the Fisheries (Beach Management Units) Regulations (2007), which were issued by the Ministry of Fisheries Development as subsidiary legislation under the Fisheries Act. The BMU Regulations effectively provide for:

- a) fishery landing sites to establish their own local governing body (the BMU) comprised of all stakeholders in the fishery, including boat owners and operators, crew members, and other processors and input supplies;
- b) for this governing BMU to democratically establish rules and regulations to govern the fishery resource;
- c) for the BMU, in concert with Department of Fisheries officers, to establish a 'co-management' area demarcating the BMU's territorial waters, and managed through an approved management plan.

This framework for 'Locally Managed Marine Areas' on the Kenyan coast does not give local communities full legal authority over a defined coastal and marine territory, as is perhaps the case in more fully autonomous ICCAs in regions such as the western Pacific Ocean, but it provides the basis for co-managed governance of coastal marine resources, in a context that has up until recently been effectively uniform open access (Cinner et al. 2009). As such,

Kenya's BMU regulations represent an important opportunity for establishing local marine and fisheries governance regimes in coastal East Africa.

### (iii) Wildlife

Kenya produced its first comprehensive wildlife management policy in 1975 (Sessional Paper No. 5 of 1975) which was in turn given legal form through the Wildlife (Conservation and Management) Act (Cap 376) of 1976. While this policy and legislative framework included broad calls for local community and landholder participation in wildlife management, including through devolution of user rights, subsequently all hunting and utilization of wildlife was banned by Presidential decree in 1977, a ban which remains in place to this day.

In the 1970s and 1980s illegal commercial poaching of wildlife, particularly for elephant ivory and rhino horn, assumed epidemic proportions in Kenya and the populations of those species plummeted, endangering a tourism industry which had become one of Kenya's most significant sources of foreign exchange and employment. As a result, the government amended the Wildlife Act in 1989, abolishing the Wildlife Conservation and Management Department and establishing the Kenya Wildlife Service (KWS) as a semi-autonomous parastatal body.

Under the legislative framework established in the 1970s and 1980s, KWS is responsible for wildlife throughout the country. As all hunting remains banned by Presidential decree, and wildlife utilization is a highly polarized and contentious issue in Kenya, more so than in any other country in sub-Saharan Africa (Norton-Griffiths 2008), local communities have few opportunities to participate meaningfully in wildlife use and management. At a management level, KWS and other government policy making bodies recognize this poses an extreme challenge for wildlife conservation in Kenya, as somewhere in the range of 60-70% of all of the country's large mammals reside on or seasonally utilize community or private lands (i.e. freehold lands or trust lands) (Western et al. 2009). Wildlife has declined precipitously in Kenya since the 1970s, due in significant part to the centralized wildlife management policies in the country that foreclose landholders' options for generating revenue and capturing benefits from wildlife (Norton-Griffiths 2008). As a result, KWS has at times sought to support local initiatives to establish community conservancies and tourism joint ventures as a way of creating local incentives for conservation in lands adjacent to state protected areas; yet KWS has not had and has not developed, any legislative mechanisms to formally grant local communities greater rights over wildlife. These institutional constraints result in the rather perverse situation where community conservancies, which are established in large degree to enable communities to generate economic benefits from wildlife and tourism, and to better manage land and natural resources in an integrated fashion towards those ends, have no basis whatsoever in the country's wildlife law.

Since the 1990s, recognizing many of these entrenched policy challenges, Kenya's wildlife sector has been characterized by a seemingly constant cycle of policy and legislative reform efforts, none of which has been able to bring about the overarching changes needed (e.g. see Kabiri 2010). The latest of these efforts is a draft Wildlife Bill (2011) which has been subjected to various rounds of public debate and revision.

Notably, the Wildlife Bill contains provisions for the registration of 'Community Wildlife Associations' established for purposes of cooperative wildlife management, and prescribes certain requirements in this application including a draft plan detailing various management, monitoring, and enforcement activities the Association plans to carry out. The Bill further details the functions of these Associations, which include supporting KWS in law enforcement and problem animal control. However, the Bill does not provide any incentives or tangible benefits for the registration of Community Wildlife Associations. It would appear that this registration simply adds a new layer of procedural bureaucracy and does not provide any concrete measures for communities to benefit from their status as registered Community Wildlife Associations. As such, it is not clear how the Bill's proposals represent an improvement on the *status quo* as it pertains to community conservancies.

#### (iv) Forests

Kenya's forest sector has undergone a relatively recent overarching reform through adoption of the Forests Act (2005). The Act provides for establishment of a Kenya Forest Service (KFS), a parastatal corporate body analogous to KWS which will replace the Forest Department. The Act establishes three categories of forests, namely state, local authority and private forests. Local authority forests comprise forests on trust land which the County Council has established as such.

The Act states that all forests other than private and local authority forests are under the jurisdiction of the state, but also provides a general exemption to local communities to continue subsistence-based (non-commercial) customary uses, subject to provisions which may be prescribed, from any forest throughout the country. The Act provides for joint management of any type of forest with a group or individual.

A chapter of the Forests Act (Chapter 4) is devoted to community participation in forest management. The main mechanism for community participation is registration of a Community Forest Association (CFA) under the Societies Act (the same framework provided by the draft Wildlife Bill for establishment of Community Wildlife Associations). The KFS may then enter into a management agreement with that CFA, conferring up on the latter user rights to the forest including collection of non-timber forest products, harvesting timber, grazing livestock, carrying out tourism activities, and the development of community wood products industries.

As is clear from this brief summary, the Forests Act essentially limits the role of communities in forest governance to one of co-management or joint forest management. There are no provisions for communities to establish community-owned forests as would fall within the definition of ICCAs. However, this is largely because the Forests Act followed the existing framework for land tenure in Kenya, with forest categories (state, local authority, and private) effectively corresponding to land tenure categories (government, trust land, and freehold).

#### (v) Environment

Environmental regulation in Kenya is governed by the Environmental Management and Coordination Act (1999). The Act creates a broad legal and institutional framework for

environmental protection and regulation in Kenya, including establishment of the National Environment Council and the National Environment Management Authority (NEMA). The Act provides for a wide range of environmental planning and protection requirements, ranging from protection of wetlands, rivers, coastal areas, and other sensitive areas, to regulation of genetic resources.

The most important provisions of the Environmental Management and Coordination Act are its broad provisions for Environmental Impact Assessment (EIA) to be carried out for any major development projects. The EIA requirements have given NEMA an important role, as is the case for environmental regulatory agencies in many other countries, as the administrator of safeguards in relation to the environmental and social impact of infrastructure developments as well as land-based investments in industries such as tourism and agriculture. The process of developing and approving EIAs remains uneven and often subject to weak analysis of impacts, but nevertheless the process has become a valuable tool for environmental and community welfare groups to challenge external development interventions as well as land allocations. This has been used, for example, to file legal challenges to the allocation of lands for biofuel and agricultural projects in the coastal zone, notably the Tana Delta and the Dakatcha woodlands. These provisions are useful for local communities, particularly those living on trust lands or government lands and thus facing insecure land tenure, to defend their territories from external modification or acquisition, although the environmental legislation does not pertain to land or natural resource rights *per se*.

#### (vi) Traditional Knowledge & Genetic Resources

The Environmental Management and Coordination Act contains provision for the regulation of genetic resources, including access and benefit sharing, although its provisions are highly generic and simply serve to create the basis for regulating these activities. In 2006, such regulations were propagated in the form of the Environmental Management and Coordination (Conservation of Biological Diversity and Resources, Access and Benefit Sharing) Regulations. These regulations provide specific requirements for regulating access to genetic resources in Kenya, although they do not explicitly provide any protections to local communities' traditional or cultural knowledge. The only requirement of the regulations is that applicants wishing to access genetic resources must include evidence of "Prior Informed consent from interested parties", although the regulations do not define who constitute 'interested parties'. In general the regulations are geared towards the protection of biodiversity and genetic resources as a national Kenyan resource, rather than protecting the rights of local communities and their own indigenous knowledge.

## **2.2 Tenure and recognition issues**

Local efforts to secure clear tenure and recognition of ICCAs in Kenya face numerous challenges. The land tenure framework in place prior to the reforms passed by the 2010 constitution has been a major constraint, with most communities, particularly pastoralists in arid and semi-arid areas, living on trust lands where land is under the authority of the County Councils and administered by the Commissioner of Lands. Communities in such areas lack the authority for developing and enforcing formal rules governing common property resources such as rangelands and forests. As a result much land use in these areas

has been open access and local regimes have been difficult to enforce. Coastal marine environments also have historically been open access with no legal basis for local control over territorial marine waters.

The reforms to Kenya's land tenure framework described by the National Land Policy and enshrined in the 2010 constitution, which will involve the conversion of trust land to community land, is a major positive development for the formal establishment of ICCAs and recognition of communities' existing customary territorial rights. However, it may be several years until the specifics of this transition are spelled out in a new Community Land Bill or other legislation, and it will take many years to demarcate and register community lands all around the country.

While ultimately the country's land tenure framework is the most critical underlying issue for governance and recognition of ICCAs, Kenya's natural resource sectors are all also in various states of reform and evolution. For the most part, recent reforms provide greater opportunities for community participation in natural resource management, although they tend to promote co-management rather than the territorial and governance autonomy that characterizes ICCAs, yet this is an evolving and somewhat uncertain distinction.

Somewhat ironically, the strongest framework for formally constituted and recognized ICCAs has been established in Kenyan rangelands, where the focus of local management involves integrating land, livestock, tourism and wildlife, but the wildlife sector itself provides no legislative framework to support these areas. Rather, community conservancies established throughout various rangelands, and currently expanding rapidly, create their own community-based organizations (societies or trusts in most cases) and utilize either the group ranch or the trust lands tenure framework. Land tenure in conservancies is more secure in areas such as Kajiado, Narok, Laikipia and Samburu Districts where most pastoralist territories are contained within adjudicated group ranches.

While these conservancies make a major contribution to wildlife conservation objectives in Kenya (see Western et al. 2009), there is no supporting legislative framework in place within the wildlife sector itself. The 2011 draft Wildlife Bill contains provisions for registering conservancies, but it is not clear what if any benefits conservancies receive as a result of fulfilling the requirements of such registration, or what incentives there are to register. As such, this legislation seems unlikely to add any value to the existing framework for community conservancies. As with community land rights more broadly, the conservancies will also be strengthened by the transformation of trust lands to registered community lands.

### **3 PROTECTED AREAS, ICCAS AND SACRED NATURAL SITES**

#### **3.1 Protected Areas**

##### **(i) Institutional framework and dynamics**

Kenya's protected area network covers about 8% of the country's land area and consists of National Parks, National Reserves, National Sanctuaries, National Monuments, Marine National Parks and Marine National Reserves, and Forest Reserves. The parastatal Kenya

Wildlife Service (KWS) manages National Parks, several National Sanctuaries, and Marine National Parks and Marine National Reserves, and is also responsible for all wildlife outside protected areas. National Reserves are under the jurisdiction of local government- the County Councils- which manage them directly or in concert with KWS. One unique feature of Kenya is consequently that some of its leading wildlife protected areas- including the Maasai Mara and Samburu National Reserves- are managed by local government authorities, which also retain the bulk of revenues generated by tourism therein. As a result, local governments play a particularly important role in managing the national conservation estate.

Forest Reserves fall under the Kenya Forest Service (KFS). Unlike other protected areas under KWS, Forest Reserves may, according to the Forests Act (2005), be managed jointly with local communities, through their Community Forest Associations, or other entities that KFS enters into a joint management agreement with.

Nearly all of Kenya's protected areas, with the exception of Tsavo East National Park, form portions of much larger ecosystems where wildlife migrates seasonally across a mosaic of state and private or trust land. This is the case for example in Amboseli National Park, the Maasai Mara National Reserve, and Samburu and Buffalo Springs National Reserves. As a result, when KWS was established in 1989, it placed a strong emphasis on community benefit-sharing. Richard Leakey, the first director of KWS, promised to share 25% of all gate receipts from national parks with surrounding communities, although this level of benefit sharing subsequently proved impossible to sustain. The next director of KWS, David Western, was an even more committed proponent of community-based conservation, and in the mid-1990s worked to support the development of landholder forums that could cooperate with KWS and promote community-based tourism and the development of the initial conservancies in areas such as Laikipia (Honey 2008). Since the end of the 1990s, though, the relationship between KWS and surrounding communities has become somewhat more fraught, with KWS losing some of its independence and institutional strength of its early years, and recurrent policy debates over wildlife governance and legislation generally pitting KWS against local communities and private landholders (e.g. Kabiri 2010). Some legislative efforts, such as a 2007 draft Wildlife Bill, sought to heavily centralized power in the hands of KWS and would give the agency draconian powers to regulate wildlife and tourism on private lands and in conservancies (Aggarwal and Thouless 2009).

## (ii) Implementation of PoWPA Element 2

This section provides a brief review of Kenya's performance in relation to the CBD Programme of Work on Protected Areas (PoWPA) Element 2 which pertains to equity, benefit sharing, and participation of local communities (see Box 1 for full text). In general, Kenya has made important advances in recent years in promoting co-management arrangements for Forest Reserves through the Forests Act passed in 2005, and with the advent of the BMU regulations enabling co-management of coastal and inland waters. As stated throughout this report, the new constitution has the potential to greatly enhance the security of local communities' territorial and resource rights, as well as improving wider access to justice and public accountability in the management of state protected areas and other natural resources.

While forestry and fisheries sectors still face significant shortfalls- notably, in the forestry sector major questions about the equitable distribution of costs and benefits between KFS and local communities remain under extant co-management initiatives- the wildlife sector and KWS are the most conservative in their approach and have done little over the past decade to encourage greater community participation and access to benefits. The positive expansion of community conservancies, while benefiting from cooperation with KWS on law enforcement and wildlife trade issues, has not benefitted from government policy or legal reforms but has almost entirely been driven by local communities, innovative NGOs, international donors, and private tourism companies.

#### **Box 1: The CBD PoWPA Element 2**

Goal 2.1: To promote equity and benefit-sharing

Target: Establish by 2008 mechanisms for the equitable sharing of both costs and benefits arising from the establishment and management of protected areas.

Goal 2.2: To enhance and secure involvement of indigenous and local communities and relevant stakeholders

Target: Full and effective participation by 2008, of indigenous and local communities, in full respect of their rights and recognition of their responsibilities, consistent with national law and applicable international obligations, and the participation of relevant stakeholders, in the management of existing, and the establishment and management of new, protected areas.

Indeed, in relation to other countries in the region, Kenya remains unique within eastern and southern Africa in not allowing consumptive utilization, either commercial or subsistence, and providing some framework for devolving user rights to local communities as a way to generate local benefits and incentives to support conservation. Most other countries with significant wildlife populations outside protected areas have developed some formal mechanism for granting local communities user rights to wildlife (e.g. Tanzania: Wildlife Management Areas; Namibia: Communal Conservancies; Zimbabwe: CAMPFIRE; Botswana: Community-based trusts in Wildlife Management Areas). Kenya's wildlife sector is thus behind regional best practice, even while its rather ad hoc network of community conservancies, as it has been constituted adaptively and pragmatically by non-state actors, emerges as one of the stronger cases of community-based conservation in the region.

### **3.2 ICCAs Within Protected Areas Systems**

No clear-cut ICCAs fall within Kenya's protected area system or are reported as such, with the exception of the *Kayas* gazetted as National Monuments, although in this case this status does not formally provide for communities to exercise active management over the *Kayas*, which may make the ICCA status questionable. In general the protected area categories have the following relationship with local communities:

- (i) National Parks and National Marine Reserves under KWS; These areas do not allow for co-management or devolved management to local communities and do not have scope to be managed as ICCAs.

- (ii) National Reserves; These areas are under County Councils but this district-level government is far removed from the scale of individual communities. Some National Reserves, notably the portion of the Maasai Mara National Reserve in Transmara District, have been delegated to private entities to operate, but there is no known case of delegation to a community to manage.
- (iii) Forest Reserves; As noted, KFS may enter into joint management agreements with local communities, constituted through Community Forest Associations, and this form of co-management is fairly widespread now in Kenya's forest sector.
- (iv) National Monuments; These areas are under the authority of National Museums of Kenya (NMK). This designation has been used for a number of *Kaya* sacred forests along the Kenyan coast; while protecting these forests, it does not actually provide communities with legal authority over them.

### **3.3 *Sacred Natural Sites as a Specific Type of ICCA***

The Forests Act protects sacred groves that exist in any category of forest (state, local authority, private), but does not provide any provisions for communities themselves to secure and exercise rights over such areas.

As mentioned, the *Kayas* are Kenya's most famous sacred forests, but they exist on government land along the coastal belt and many of the most significant ones have been placed under the authority of the National Museums of Kenya. Although these sacred forests are Kenya's most famous traditionally protected forests, they are in fact not under the jurisdiction of local communities in any formal sense. The vulnerability of the *Kayas* to uncontrolled encroachment from land development for urban expansion, tourism development and other activities has been the main rationale for their gazettelement as National Monuments.

Other sacred sites linked to ICCAs in Kenya include numerous forests protected by pastoralists and other communities for their spiritual and other values. These areas do not receive any particular or additional protections under the law.

### **3.4 *Other Protected Area-related Designations***

11 *Kaya* forests have been established as a World Heritage Site, as representative forests for the wider network of *Kaya* groves along the coast of Kenya. It is not clear what provisions of Free, Prior and Informed Consent were made for this designation, and as noted the protection of the *Kayas* under the Antiquities and Monuments Act places authority for the *Kayas* with the National Museums of Kenya. However, it should be noted that the local use of these sacred groves is entirely for spiritual and cultural values, i.e. locals' interest in protecting the *Kayas* from encroachment and development from expanding coastal populations and enterprises, is compatible with protection of the *Kayas* by the government. Protecting the *Kayas* through National Monument designation thus appears to be compatible with this formal government protected status. Whether *Kayas* managed as National Monuments should be considered ICCAs, now that local communities are not formally responsible for managing these areas, is another matter that needs closer analysis.

### **3.5 Trends and Recommendations**

In Kenya's forest sector, and in the management of fisheries and coastal marine resources, the trend over the past decade has gradually been towards greater co-management between government authorities and local communities. These areas do not necessarily qualify as ICCAs, although in the case of coastal LMMAs communities generally have greater authority in practice to develop their own rules and governance systems than in forest co-management.

Kenya's protected area system and related sectoral legislation does not provide for communities to establish their own protected areas. The Forests Act does not describe or recognize 'community forests', although this term is included in the 2010 constitution's definition of the new tenure category of community land (see Section 4). It is therefore likely that the forests legislation will be revised and amended to take account of forests on community land, as trust land is converted to community land and tenure over forests consequently shifts from County Councils to communities themselves.

More research is needed on governance arrangements for *Kayas*, in terms of how National Monument designation affects traditional communities' values and forest use practices, and if formal co-management arrangements for *Kayas* have been put in place or are needed. At present there is virtually no literature on the governance of *Kayas* under the National Monument designation, and how said designation has affected these forests' biological and social values.

## **4 HUMAN RIGHTS**

Kenya is presently in a period of considerable policy, legal, and institutional innovation, as well as political uncertainty. The post-election violence of early 2008 which followed the general election in December 2007 ultimately brought to a head a range of long-standing social tensions and grievances. These include conflicts around land rights, use, access, and tenure, including the increasingly inequitable land distribution of the post-colonial era linked to the interests and actions of the political elite. Other prominent concerns have been the centralization of discretionary power in the executive branch; the credibility of public institutions such as the judiciary, police, and electoral oversight bodies; and the generally pervasive and institutionalized nature of corruption throughout public institutions.

All of these issues figured prominently in the constitutional reform process which was established as a condition of the power-sharing arrangement that ended the post-election violence and political stand-off in early 2008. The 2010 constitution was welcomed by Kenyan civil society as a tool of liberation from years of post-independence abuse of state institutions and lack of accountability. The constitution contains a range of important reforms designed to improve public accountability, oversight, and the integrity and performance of public institutions. The constitution contains an entire chapter (Chapter 5) devoted to land and environment. As noted earlier, this includes revising Kenya's land tenure categories to public, private, and community land, with community lands being converted from trust lands or previously demarcated areas such as Group Ranches. The constitution also includes the following important definition of community lands, in Article

63, that community land consists of, among others (see context for this clause in Box 2 below):

*Land that is-*

*(i) lawfully held, manage or used by specific communities as community forests, grazing areas or shrines;*

*(ii) ancestral lands and lands traditionally occupied by hunter-gatherer communities;*

This provision, which will need to be elaborated in new or amended land and forests legislation in order to give it effect, does however provide communities with some potentially important overarching land rights over common property resources, notably forests and grazing areas. The second part of the definition also provides an important recognition of traditional land rights on the part of 'hunter-gatherer communities', although it is not clear where such ancestral land rights apply or how they might be delimited (e.g. presumably protected areas defined as public lands will not be converted into community lands based on this clause, although the wording of the law seems to create such a possibility).

More specific procedures for registration and governance of community land as a tenure category will await new legislation that is currently being developed and which must be passed by Parliament by 2015. Box 2 provides a summary of the key provisions of the constitution on community land rights.

**Box 2: Excerpts from the Constitution of Kenya on Community Land Rights**

*Article 61: Classification of land*

*(1) All land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals.*

*(2) Land in Kenya is classified as public, community or private.*

*Article 63: Community land*

*(1) Community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest.*

*(2) 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 country government under Article 62(2).*

*(3) Any unregistered community land shall be held in trust by county governments on behalf of the communities for which it is held.*

*(4) Community land shall not be disposed of or otherwise used except in terms of legislation specifying the nature and extent of the rights of members of each community individually and collectively.*

*(5) Parliament shall enact legislation to give effect to this Article.*

The constitution's passage requires a virtual overhaul of Kenyan public institutions and founding legislation, resulting in a wide range of ongoing reforms. New land legislation is being developed to implement the constitution's provisions, as well as providing for the similar reforms called for in the National Land Policy. A new Wildlife Bill is also under development, and reforms are ongoing in numerous other sectors. Various civil society and community groups have already begun using the constitution's guarantees with regards to public decision making and environmental protections to challenge government decisions, for example relating to allocations of land to commercial investments.

## **5 JUDGMENTS**

Kenya is the site of one of the most significant developments in African treatment of community land and resource rights, which is the landmark 'Endorois case'<sup>3</sup> ruling issued by the African Commission on Human and Peoples' Rights (ACHPR) in February 2010. In this case, the Endorois community, a sub-group within the Kalenjin ethnic group of Kenya's Rift Valley region, were evicted by the Kenyan government in the 1970s to make way for Lake Bogoria Game Reserve's establishment. Following many years of domestic legal action to challenge their eviction and reclaim their land, the ACHPR heard the case and found in favor of the community, declaring their expulsion illegal. The ACHPR issued a broad ruling which recognized the community's collective rights to their ancestral land and ordered a full remedy to be provided by the Kenyan government. Minority Rights Group International, which assisted the community in the long pursuit of justice, notes that:

*...the ruling represents the first time that an African indigenous people's rights over traditionally owned land have been legally recognized...the Commission's decision has not only awarded a full remedy to the Endorois community but has also significantly contributed to a better understanding and greater acceptance of indigenous rights in Africa. (Claridge 2011).*

Morel (2010) also notes that the case is a landmark not only in terms of communities' ancestral land rights, but in the recognition of an African form of indigenous identity comparable to that which has emerged in other regions such as Latin America.

One group that may benefit from the Endorois ruling is Kenya's Ogiek community. The Ogiek, who number an estimated 20,000 in total, are the largest community of hunter-gatherers in the country, living in forests on the Mau escarpment and on Mount Elgon (Ohenjo 2003). Because they live in highland forests which have over the years been gazetted as National Parks or Forest Reserves, the Ogiek have progressively become squatters on government land, with their customary rights unacknowledged and extinguished. They have filed at least six court cases to challenge this and reclaim their land

---

<sup>3</sup> *The Centre for Minority Rights Development and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*

rights, but have faced delays and hostile rulings from the Kenyan judiciary (Kimaiyo 2004). Now however the Endorois case may present an opportunity to challenge these rulings outside of Kenya, and Article 63(d)(ii) of the constitution also seems to support Ogiek interests by including “ancestral lands and lands traditionally occupied by hunter-gatherer communities” within the definition of community lands.

## 6 IMPLEMENTATION

The establishment of ICCAs in Kenya faces a range of challenges in relation to the capacity and political will of government agencies to support ICCAs, as well as the provision of adequate human, financial and technical resources to do so. The development of BMUs in coastal areas, for example, has proceeded slowly since the BMU regulations were issued in 2007, partly due to lack of resources on the part of the Ministry of Fisheries Development (Lamprey and Murage 2011). Only in the last several years, with the injection of new donor support to NGO-designed projects, have fully functional LMMAs been formed constituting multiple villages and demarcating territorial fishing zones in coastal waters.

Forest co-management under the Forests Act has become fairly widespread since the Act was passed in 2005, but the way this co-management has been put into practice may be jeopardizing local communities’ incentives to participate, as one recent review describes:

*Communities have limited property rights but are burdened with the task of monitoring and sanctioning. They have some user rights but limited ability to exclude unauthorised users or regulate the timing of harvesting and the quantity of products harvested. They do not generate revenue from forest products as these rights were vested in the KFS. Due to the limited rights accruing to the communities, most of them appear disillusioned and consequently unwilling to pursue PFM [participatory forest management]. (Mogoi et al. 2012).*

Many of the shortcomings of Kenya’s established land tenure framework, now subject to the new constitutional reforms, arise from the way laws such as the Trust Lands Act have been implemented, rather than the letter of the law per se. Legal obligations regarding consultation and due process in granting individual property rights within trust lands have not been followed. Aggarwal and Thouless (2009) cite the following example from a community conservancy in northern Kenya:

*In one case in Isiolo, the representatives of the Biliqo-Bulesa conservancy noted perhaps the most severe breach of customary rights encountered during the interviews. This involved the central government (via the Ministry of Department of Mines and Geology/Ministry of Energy authorizing exploration of oil on Trust Land adjacent to resident homes. The resident community was not informed of the deal, until one morning when they found large machinery adjacent to their homes. The company continues to be present after five months. County Councils are likely generating revenues from this arrangement.*

Even in Group Ranches, which as a collective form of freehold tenure provide the strongest legal community land rights that have existed in Kenya to date, implementation of legal procedures and processes has played a key role in undermining the tenure security the

Group Ranches were intended to provide. One factor is cost; the process of Group Ranch adjudication is costly and this presents a barrier to rural communities (Aggarwal and Thouless 2009). Other key factors include the ability to follow and enforce accountability in Group Ranch leadership and administration decision-making, which has resulted in the loss of confidence in the Group Ranch as a collective governance institution and the moves towards individual property adjudication in many areas (Mwangi 2007).

Beyond these specific sectoral implementation issues, Kenya also faces wider challenges in terms of the operation of the rule of law, widespread and institutionalized corruption, and asset grabbing by public officials. The new constitution requires major changes to the entire architecture of government of the Kenyan state, but inevitably there will be a wide range of vested interests resisting many of those changes. As land reform is a leading area of change called for by the constitution, as well as the National Land Policy, this is now Kenya's most critical area of reform and will demand decisive action. Nevertheless, these changes will inevitably be resisted; it has been noted that an earlier commission of enquiry into irregular acquisition of land in Kenya, which issued its findings in 2004, met considerable resistance and its findings were never implemented (Aggarwal and Thouless 2009). There will undoubtedly be confrontations between vested interests in current land holding and tenure arrangements within the political and economic elite classes, and wider civil society and local community interests, in the near future as implementation of the constitution becomes more urgent.

Similarly, the issue of implementation will now be critical in determining the ultimate outcomes of the ACHPR ruling on the Endorois case, particularly since the ACHPR ultimately lacks power to enforce its rulings and relies on action by national governments. The ACHPR ruling ordered the government to provide remedy to the community within three months of the ruling, but that period expired without said remedy being provided by the state, prompting Endorois community representatives to urge the government to act on the ACHPR ruling (Njoroge 2010).

## **7 RESISTANCE AND ENGAGEMENT**

Natural resource law and policy in Kenya is shaped by one of Africa's most skilled and influential civil societies, one which includes strong connections between rural communities and national activists. Both national and international organizations support many ICCAs at the local scale, as well as linking communities to various forms of external support. Natural resource governance issues feature prominently in wider public debates around accountability, corruption, and democracy in Kenya.

Conflicts and struggles around land rights have been a prominent feature of historic and contemporary Kenyan policy debates. For example, today major land use and tenure conflicts revolve around landscapes and ecosystems utilized by local communities in areas such as the Tana Delta on Kenya's coast, and the Yala Swamp near Lake Victoria. Other long-term land and resource tenure conflicts affect ICCAs such as the Loita Forest (see Section 9.2). Many community conservancies, particularly those situated on trust lands, face ongoing resource use and tenure conflicts.

The Tana Delta is the site of one of Kenya's most significant land struggles. The conflict pits local communities such as Pokomo and Orma agro-pastoralists against large-scale mechanized agricultural projects for sugarcane, rice, and jatropha being promoted by the government and various private companies (McVeigh 2011). People living in Kenya's coastal strip have unique land tenure challenges because land along the coast is owned by the government, due to the region's unique colonial history. Indigenous communities, such as the Boni living in far eastern Kenya near the Somalia border, as a result have no formal title to their lands and are effectively 'squatters on their own land', as one recent review put it (Aggarwal and Thouless 2009). Similar tenurial challenges face residents of Tana Delta, an area of great importance for local agro-pastoralist communities as well as for migratory birds and other resident wildlife, who are resisting large-scale allocations of land by the government to private investors. Support to the communities in the Tana Delta has been provided by national conservation organizations such as Nature Kenya and the East African Wildlife Society, which have helped local communities file legal challenges against these agricultural land allocations. These efforts have recently been boosted by the guarantees in the new constitution for citizens to be consulted in decisions that affect their livelihoods and which are spelled out in the constitution's Bill of Rights.

Local communities in Yala Swamp, one of the most significant remaining papyrus swamps remaining around the Kenyan portion of Lake Victoria, face similar challenges due to conflicts between local resource uses and conservation practices, and large-scale agricultural development. The swamp is the site of a large-scale farming project known as Dominion Farms, which comprises around 7,000 ha of the swamp and has resulted in a range of access and ownership conflicts with local communities who depend on the area for food, water, and other materials (Pearce 2012).

As in the Tana Delta, where legal challenges to certain land allocations are ongoing, communities in Kenya generally have better access to judicial institutions, as well as to legal aid, than is typical in many African countries. The long-standing land conflict between the Endorois community as described in Section 5, was eventually ruled in favour of the communities by the African Commission on Human and Peoples' Rights, after Kenyan legal remedies were all exhausted. This process was supported by the Kenyan Centre for Minority Rights development and the global organization, Minority Rights Group International; these and other organizations are also providing support to other communities' land and resource rights, such as the forest-dependent Ogiek community.

Alliances between international conservation and social justice organizations and local or national Kenyan groups also feature prominently in wider policy debates around natural resource governance and management. The East African Wildlife Society (EAWLS), a Kenyan organization, has been particularly central over the past decade to many policy debates because it hosts or has facilitated a number of working groups and forums that coordinate policy advocacy and engagement on different natural resource issues. These include most notably the Kenya Forests Working Group, which has been a very effective body working to promote improved governance of Kenya's forests since it was established in 1996 (KFWG 2006), as well as the Kenya Wetlands Forum. A Kenya Wildlife Working Group facilitated by EAWLS was also an influential policy advocacy coalition, including local representatives from a number of community conservancies, from around 2002-2005, and nearly played a central role in the legal overhaul of the wildlife sector at that time (Kabiri 2010).

In general, Kenya has some of eastern and southern Africa's strongest national organizations facilitating and supporting ICCAs. These include the Northern Rangelands Trust, which is the leading organization facilitating the spread of community conservancies in central, northern and eastern Kenya; the African Conservation Centre which has a long history of working around the Amboseli ecosystem with local communities there; and NGOs such as EAWLS, Nature Kenya, and Forest Action Network.

## **8 LEGAL AND POLICY REFORM**

As a result of the 2010 constitution, the present time is a watershed in legal and institutional reform in Kenya, with numerous reforms being considered and adopted. The reforms to community land tenure provided for in the constitution, in particular, provide a major opportunity to strengthen the basis for ICCAs in Kenya, building on emerging models such as community conservancies. Influencing the implementation of the constitution through the appropriate sectoral policy and legislative reforms thus must stand as the leading priority of supporters of ICCAs and all other forms of community-based natural resource management.

### **8.1 Land**

The priority for land policy and law in Kenya is to build on the National Land Policy and the reforms contained in the 2010 constitution, particularly the establishment and initial definitions of the new tenure category of 'community land'. This will need to be done with new legislation providing for registration of community land. This legislation should derive key lessons from experiences to date with registration and titling of group ranches, for example by ensuring that the process of registering community lands is not excessively costly and bureaucratic, as such barriers would undermine the intent of the constitution. In addition, further legislation will need to clarify and define the rights of hunter-gatherer communities to their ancestral lands, and how those will be registered.

### **8.2 Wildlife**

The priority for the wildlife sector is to incorporate provisions that support existing and expanding community conservancies into new wildlife legislation. Thus far conservancies have developed, making significant contributions to national wildlife conservation and tourism development objectives, but not receiving any devolved rights over wildlife management or benefits from protected area managers, beyond general cooperation on law enforcement, monitoring, and some other joint interests. It will be important that wildlife legislative reforms do not simply create a new set of registration requirements for conservancies, but provide clear benefits and incentives for conservancies to register with KWS. Devolved rights over wildlife in some form or another, particularly to established conservancies that have proven management capacity, should be a part of these reforms.

### **8.3 Forests**

The key priority for the forests sector is to revise sectoral legislation to incorporate the new constitutional provisions for community lands, which includes 'community forests' within the definition of community lands. This dictates that the Forests Act's current classification

of all forests as either state, local authority, or private forests will need to be amended to provide for clear rights for local communities over forests on community lands.

#### **8.4 Coastal Marine & Fisheries**

The 2007 BMU regulations provide a generally sound framework for establishing local collective governance of coastal in-shore fisheries and marine environments, through co-management with the Fisheries Department of BMU territorial waters, and the priority at this stage is to learn from developing BMUs and scale up the coverage of these LMMAs. As the BMU framework is expanded and developed, opportunities for devolving further rights to the local level within this co-management framework can also be explored.

### **9 CASE STUDIES**

#### **9.1 Namunyak Wildlife Conservancy Trust, Samburu District**

Namunyak Wildlife Conservation Trust was established in 1995, making it one of the first conservancies established in northern Kenya. The conservancy covers an area of approximately 400,000 hectares, located along the Matthews Range in Samburu District. The conservancies' members comprise about 8,000 individuals drawn from the two founding Group Ranches, Sarara and Sabache, as the more recent additions of members from Ngilai West and Ngilai Central Group Ranches (Glew et al. 2010). Namunyak has also expanded to include communities lacking formal title to their land, living on trust land, in Ndoinyo Wasin and Ngare Narok. These residents and conservancy members are primarily Samburu pastoralists, with livestock comprising the main source of livelihoods.

The conservancy comprises semi-arid *Acacia-Commiphora* brushland, and the adjoining Forest Reserve in the Matthews Range contains highland evergreen forest. Namunyak is home to a fairly standard assemblage of savannah wildlife, including elephant, giraffe, buffalo, eland, lion and wild dog. The conservancy has a core conservation zone of about 2000 ha, and has also established formal grazing zones and a management system; Glew et al. (2010) report on increases in green vegetation in the conservancy from 2000 to 2007 as an indication of these management practices' positive impact on habitat conditions.

Since Namunyak's initial establishment, a core objective has been to enable the community to develop wildlife and nature-based tourism as a source of income and the basis for the community to invest in conservation. The conservancy has a small tented tourism camp called Sarara Camp which first was constructed in 1995 and reconstructed following a fire in 1998. According to Aggarwal and Thouless (2009), in 2007 there were 1,200 bed-nights at the camp, generating a total of \$114,000 paid to the conservancy as fees per its contractual agreement with the tourism investor. In addition camp staff wages, beadwork sales, and cultural visits generated approximately \$36,000 in individual income.

As with other conservancies in northern Kenya, an additional benefit from establishing the conservancy has been improved security. Northern Kenya has been characterized for many years by high levels of banditry and cattle theft, with raids within and across different pastoralist ethnic groups. The establishment of security infrastructure- Namunyak employs more than 30 individuals, most of whom are game scouts- and communications networks

with external bodies, as well as local land use regulations and improved governance structures, has helped to reduce insecurity, which has been one of the main benefits to the community (CDC et al. 2009).

Namunyak was initially established with the support of Lewa Wildlife Conservancy, a private wildlife ranch which lies to the south in Laikipia District. Lewa's involvement with Namunyak led to the subsequent establishment, in 2004, of the Northern Rangelands Trust (NRT) as an umbrella organization to support all the emerging conservancies in Laikipia, Samburu, and surrounding districts (Honey 2008). NRT has since grown to a portfolio of about 19 conservancies covering 1.6 million ha in northern and eastern Kenya, many of these catalyzed by the early success of Namunyak.

## **9.2 Loita Forest, Narok District**

The Loita Forest in southern Kenya's Narok South District is "one of the few non-gazetted trust land indigenous forests" remaining in the country (Karanja et al. 2002). The forest, which spans about 33,000 ha lying between the Maasai Mara National Reserve to the west and the Rift Valley escarpment to the east, is surrounded by and traditionally controlled by the Maasai communities of the Loita and Purko sections, who use the forest as a dry season grazing refuge as well as for fuel wood and building materials, water catchment, traditional medicines, and a range of spiritual and cultural purposes and ceremonies (MPIDO 2010). The forest is home to wildlife such as elephant and buffalo, and produces water flows valued at an estimated \$1.3 million annually (Ongugo et al. 2011). The Loita Forest exhibits "little or no degradation" which is "attributed to the value and reverence attached to the forest by the local community" (Karanja et al. 2002). While much of Kenya's broadleaf highland forests has been destroyed during the past fifty years, the Loita Forest represents an outstanding exception to this trend and a demonstration of the potential of local stewardship.

The indigenous Maasai community has protected the forest through a range of customary rules and institutions that govern use of the forest and its resources. Key customary institutions in the Loita Forest include the Loita Maasai spiritual leader (*Laibon*) and the Loita Council of Elders (*ilegwanak*) (Ongugo et al. 2011). The *ilegwanak*, for example, traditionally make collective decisions about use and access of dry season grazing reserved areas, which is one of the main functions that the Loita Forest serves. In more recent times, during the past twenty years, the communities have also developed a number of trusts and local development organizations as formal, legally constituted organs that can help them counter external threats to the forest and local control over it.

Threats to the Loita Forest are both internally and externally rooted. Internally, a range of cultural and livelihood changes threaten the application and enforcement of customary management regimes. These changes include growing human population, increasing interest and tendency towards agricultural cultivation as a livelihood strategy among many Kenyan Maasai, and shifting cultural values and property rights systems.

Despite these internal challenges, the most pronounced threat to continued local control of this ICCA has over the past twenty years come from conflicts between the local community and the local government body with jurisdiction over the area, the Narok County Council

(NCC) (Karanja et al. 2002; MPIDO 2010). The Loita Forest, like much of Kenya's pastoralist landscapes, comprises trust land, and is therefore under the authority of the NCC. In the early 1990s the NCC initiated efforts to declare Loita Forest a nature reserve and develop it for ecotourism, which would have effectively extinguished local community use rights and many of the benefits that the forest provided the traditional owners. Resistance to this move on the part of the local communities launched a long struggle between the community and the NCC, which included litigation being brought by the community, as well as strategies such as protests both within Kenya and internationally through links to the wider indigenous peoples' movement (MPIDO 2010). Karanja et al. (2002) note that this conflict "has pitted a community with demonstrated sound natural resource management skills against a local government authority that has been accused of mismanaging other natural resources within its jurisdiction."

The community established new formal institutions to spearhead local resistance and advocacy, notably the Loita Naimina Enkiyio Conservation Trust (LNECT). A court case filed by LNECT challenging the NCC jurisdictional claim over the forest led to a court injunction against NCC decisions affecting management of the forest, and a subsequent (2002) rescinding of the earlier NCC measures and a pledge to support community-based conservation of the forest (MPIDO 2010).

Loita Forest is thus one of Kenya's most prominent examples of effective indigenous conservation institutions, but also an important case study in local resistance and mobilization in defending indigenous resource claims. The case demonstrates the effective fusion of customary traditional management institutions with more modern, formalized institutions such as LNECT (MPIDO 2010). Other local organizations have also supported community efforts, including the Ilkerin Loita Integral Development Project, the longest-established local NGO in the area and which MPIDO (2010) notes "has played a critical role in external lobbying and advocacy" in the dispute over the forest. External conservation organizations such as IUCN and EAWLS have at various times also provided support to local communities' efforts to secure rights over the forest in their dispute with NCC.

At the centre of the dispute between the communities and NCC, and the long-standing insecurity of the communities' customary claims over the forest, has been the forest's status as trust lands whereby NCC is the official legal authority over the forest, at least can claim such authority. With the adoption of Kenya's land tenure reforms in the new National Land Policy and the 2010 constitution, and the envisioned transformation of trust land to community land, the Maasai communities who have traditionally managed and conserved this important ICCA should be well positioned to formally secure tenure over the forest for the first time.

### **9.3 *Kuruwitu***

The first significant pilot LMMA on the Kenyan coast was established starting in 2003 by fishing communities of Kuruwitu-Vipingo, with the expressed aim "enhancing understanding and capacity support for the protection and promotion of marine ecosystem for environmental, economic, social and cultural benefits of the community and other stakeholders through sustainable practices within the Kuruwitu-Vipingo marine area" (KCWA 2012). These communities reside in Kilifi District on the central Kenyan coast and are

predominantly inhabited by members of the Mijikenda ethnic group. Fishing is the key source of food and livelihoods for the community.

In order to pursue these objectives the community founded the Kuruwitu Conservation and Welfare Association (KCWA), which has expanded to provide support to six BMU landing sites in the area and has played a key role in encouraging the spread of BMUs and LMMAs to other areas along the Kenyan coast. In 2006 KWCA designated a 200 ha no-take zone in their traditional waters around their reef. With the advent of the BMU regulations in 2006, the community was able to formulate their own by-laws to enforce this zonation and related regulations (Yusuf 2011). The protection and enforcement of this no-take zone has been successful in protecting marine resources, resulting in a reported 30% increase in live hard corals and a 200% increase in fish numbers since 2005 (Lee 2011). These improvements in the condition of the reef fishery were critical in encouraging expansion of the Kuruwitu model, such as to the Shimoni-Vanga LMMA to the south (Lamprey and Murage 2011).

Since its formation, the KWCA has also attempted to diversify its marine management and conservation strategies, for example through tourism development (KWCA 2012). Support has been provided by EAWLS and the Wildlife Conservation Society, which supports monitoring and data analysis to underpin local management strategies.

## REFERENCES

- Aggarwal, S. and C. Thouless. 2009. Land Tenure and Property Rights Assessment: The Northern Rangeland and Coastal Conservation Programs of USAID/Kenya. ARD, Inc., Burlington, VT.
- Bassi, M. 2006. Community conserved areas in the Horn of Africa. *Parks*, Vol. 16, No. 1, pp. 28-34.
- Brett, R. 2011. Coast benefit analysis. *Fauna & Flora*, Vol. 14, pp. 22-25.
- CIA. 2011. World Fact Book. <https://www.cia.gov/library/publications/the-world-factbook/geos/ke.html>
- Cinner, J.E., A. Wamukota, H. Randriamahazo and A. Rabearisoa. 2009. Toward institutions for community-based management of inshore marine resources in the Western Indian Ocean. *Marine Policy*, Vol. 33 No. 3, pp. 489-496.
- Claridge, L. 2010. Landmark ruling provides major victory to Kenya's indigenous Endorois. Briefing. Minority Rights Group International, London.
- Collet, D. 1987. Pastoralists and wildlife: image and reality in Kenya Maasailand. In D. Anderson and R. Grove (eds.), *Conservation in Africa: People, Policies, and Practice*. Cambridge University Press, Cambridge, pp. 129-148.
- CDC (Conservation and Development Centre), International Institute for Sustainable Development, and Saferworld. 2009. *Climate Change and Conflict: Lessons from Community Conservancies in Northern Kenya*. CDC/IISD/Saferworld, Nairobi, Winnipeg, and London.
- Githitho, A.N. n.d. The Sacred Mijikenda Kaya Forests of Coastal Kenya and Biodiversity Conservation. Available at: [http://www.sacredland.org/PDFs/Mijikenda\\_Kaya.pdf](http://www.sacredland.org/PDFs/Mijikenda_Kaya.pdf) (Accessed 1 July 2012).
- Glew, L., M.D. Hudson, and P.E. Osborne. 2010. Evaluating the effectiveness of community-based conservation in northern Kenya: A report to The Nature Conservancy. Centre for Environmental Sciences, University of Southampton, Southampton.
- Honey, M. 2008. *Ecotourism and sustainable development: Who owns paradise?* 2<sup>nd</sup> Edition. Island Press, Washington, D.C.
- Kabiri, N. 2010. Historic and contemporary struggles for a local wildlife governance regime in Kenya. In Nelson, F., *Community Rights, Conservation and Contested Land: The Politics of Natural Resource Governance in Africa*, Earthscan, London, pp. 121-144.
- Karanga, F., Tessema, Y. and Barrow, E. 2002. Equity in the Loita/Purko Naimina Enkiyio Forest in Kenya: Securing Maasai Rights to and Responsibilities for the Forest. *Forest and Social Perspectives in Conservation* No. 11. IUCN-EARO, Nairobi, Kenya.

- KCWA (Kuruwitu Conservation and Welfare Association). 2012. Web site. Available at: <http://kuruwitu.org/what-we-do/> (Accessed 31 August 2012).
- KFWG (Kenya Forests Working Group). 2006. Collective action for conservation: The Kenya Forests Working Group story (1995-2005). Kenya Forests Working Group, Nairobi, Kenya.
- Kimaiyo, T. J. 2004. Ogiek Land Cases and Historical Injustices: 1902-2004. Ogiek Welfare Council, Nakuru, Kenya.
- King, J. 2011. They came, they saw, they counted. Swara April-June, pp.
- Lamprey, R. and D.L. Murage. 2011. Saving our seas: Coast communities and Darwin collaborate for a new future. Swara Oct-Dec, pp. 41-48.
- Lee, K. 2011. Kenya: Community-based marine areas hold some important lessons for policy makers. International Institute for Environment and Development. Available at: <http://www.iied.org/blogs/kenya-community-based-marine-area-holds-some-important-lessons-for-policy-makers> (Accessed 18 January 2012).
- McVeigh, T. 2011. Biofuels land grab in Kenya's Tana Delta fuels talk of war. The Guardian. Available at: <http://www.guardian.co.uk/world/2011/jul/02/biofuels-land-grab-kenya-delta> (Accessed 6 June 2012).
- Ministry of Lands. 2011. Community Land Rights Recognition (CLRR) Model. Land Reform Transformation Unit, Ministry of Lands, Nairobi, Kenya.
- Mogoi, J., E. Obonyo, P. Ongugo, V. Oeba and E. Mwangi. 2012. Communities, property rights and decentralization in Kenya: Early lessons from participatory forest management. Conservation & Society, Vol. 10 No. 2, pp. 182-194.
- Morel, C. 2010. Conservation and indigenous peoples' rights: Must one necessarily come at the expense of the other? Policy Matters, Vol. 17, pp. 198-205.
- MPIDO (Mainyoto Pastoralists Integrated Development Organization). 2010. Indigenous peoples and the Naimina Enkiyo forest in southern Kenya: A case study. In Indigenous Peoples, Forests and REDD Plus: Enhancing Forests through Traditional Resource Management, Baguio City, Philippines, Tebtebba Foundation, pp. 1-56.
- Mwangi, Esther. 2007. The puzzle of group ranch subdivision in Kenya's Maasailand. Development and Change, Vol. 38 No. 5, pp. 889-910.
- Njoroge, K. 2010. Endorois tell state to implement ruling. Standard Digital. Available at: <http://www.standardmedia.co.ke/?id=2000016659&cid=159&articleID=2000016659> (Accessed 4 August 2012).
- Northern Rangelands Trust. 2011. Partnerships. Available at: <http://www.nrt-kenya.org/Partnerships.html> (Accessed 17 January 2012).
- Norton-Griffiths, Mike. 2007. How many wildebeest do you need? World Economics, Vol. 8, pp. 41-64.

Ohanjo, N. 2003. Kenya's Castaways: The Ogiek and National Development Processes. London: Minority Rights Group International.

Ongugo, R.A., P.A. Osumba, P.M. Tuzo. 2011. Traditional Forest Use and Institutional Change: Case Study of Loita Community Forest, Narok South District, Kenya. Paper presented to the 13<sup>th</sup> Biennial Conference of International Association for the Study of the Commons, held 10-14 January in Hyderabad, India.

Pearce, F. 2012. The Land Grabbers: The New Fight Over Who Owns the Earth. Beacon Press, Boston, MA.

Samoilys, M., K. Osuka and G.W. Maina. 2011. Artisanal fishing in Kenya: What are the effects? Swara, Vol. 34 No. 33, pp. 18-25.

Transparency International. 2012. 2011 Corruption Perceptions Index. Available at: <http://cpi.transparency.org/cpi2011/results/> Accessed 22 August 2012.

UNESCO. 2011. Sacred Mijikenda Kaya Forests. Available at: <http://whc.unesco.org/en/list/1231>

UNDP. 2011. Kenya: Country Profile. Human Development Indicators. Available at: <http://hdrstats.undp.org/en/countries/profiles/KEN.html> (Accessed 17 January 2012).

Walker, J.F. 2012. In Kenya, hope for an endangered genus. World Policy Blog. Available at: <http://www.worldpolicy.org/blog/2012/06/01/kenya-hope-endangered-genus> (Accessed 28 August 2012).

Western, David, Samantha Russell, and Innes Cuthill. 2009. The status of wildlife in protected areas compared to non-protected areas of Kenya. PLoS ONE, Vol. 4, No. 7: e6140. doi:10.1371/journal.pone.0006140.

Wrong, M. 2009. It's Our Turn to Eat: The Story of a Kenyan Whistleblower. Fourth Estate, London.

Yusuf, H.N. 2011. Religion, Culture and Fisheries Co-management: A Case of Kuruwitu Beach Village in North Coast Kenya. Unpublished MSc Thesis, Institute of Social Studies, The Hague, The Netherlands.