



# Risks to the sanctity of community lands in Kenya. A critical assessment of new legislation with reference to forestlands



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## ABSTRACT

Important new legislation protects community lands in Kenya. Delivery is principally dependent upon each community securing formal collective entitlement to its land. Many factors may impede this. While some are experienced in all titling programmes, others are specific to Kenya, exacerbated by low confidence in the readiness of the state to embrace new approaches to property after a century of subordination of traditional land rights. Forestlands, customarily shared by members of a community, are a likely early casualty, needlessly retained by the State. This paper focuses upon loopholes in new laws that could exclude forested lands from collective entitlement, impairing constitutional advances in the process. Ambiguity within the Constitution itself plays a role. Therefore, while lesser impediments to land justice may be remedied through clarifying regulations and parliamentary removal of offending clauses, judicial interpretation of constitutional intentions is required. This is better sought sooner than later to limit wrongful land takings and evictions of vulnerable forest communities, active until the present.

## 1. Introduction

The egregious legal condition of Africa as a vast unowned wasteland is slowly but surely ending (Alden Wily, 2017a). The principal remedy is legal acknowledgement that customary land rights are property interests, deserving the same protection granted to non-customary entitlements. Should they wish, rural communities may continue to own all or some of their lands in common, in registrable ways, and without losing community-based or customary incidents in the process. This includes community-based jurisdiction, logically applying to community-owned properties. Where such reforms are being enacted around the world, these put an end to a century or more of legal denial that indigenous tenure regimes ('customary tenure') produce less than property. Such enactments are slowly releasing millions of hectares from wrongful status as ownerless and vacant lands. This is important in Africa, where customary lands were (with one notable exception, Ghana) designated through most of the 20th century as public or state property, controlled and disposable by the State. As McAuslan writes, laws were more or less everywhere predatory, creating a regime of land law 'which effectively marginalized the indigenous inhabitants and made it virtually impossible for them to hold on to their land with a secure tenure' (McAuslan, 2013; p.12).

Some progressive jurisdictions in the current era of land reform, such as Tanzania, Burkina Faso, South Africa, Mozambique, Uganda, and now Kenya, are additionally explicit that liberation of customarily

held lands is not limited to homesteads but includes rangelands, waterlands and forested lands, which communities still customarily hold in common. Despite expanding population and (more slowly) expanding areas of permanent cultivation (Jayne et al., 2016), such off-farm communal properties generally comprise the larger proportion of customary estates, and a surprising three-quarters of the present-day customary domain in Africa as a whole (Alden Wily, 2017b).

The term customary tenure can be confusing in the 21st century, still implying to many an archaic regime that should be done away with in favour of European forms of individualised ownership received into national laws through colonialism. However, the customary regimes of the present are arguably more in tune with democratically devolved governance than imported property forms typically allow. This is because they vest decision-making and regulation in the community, not in remote offices of State. This allows for ready adaption of rules and norms as consensually evolved or formally agreed, enhancing the relevance and vibrancy of 'customary' tenure (Cotula, 2007). Thus, community land rules today may, or may not, have the same content as those of 50 or 100 years past. They are hybrids of old and new norms. The latter include adaptations driven by constitutional bills of rights which alter gender and other relations internal to the modern community. 'Community based tenure' and 'community lands' are increasingly preferred terms (Oxfam International, 2016).

Contrary to expectations, community-based jurisdiction regularly consolidates in modern times, in face of land shortages, or threatened or

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real involuntary land losses, such as occurring in the present surge of economic transformation, and within which large-scale land acquisitions of especially untitled lands are a feature (Nolte et al., 2016). Losses may be aided and abetted by competing class interests including within communities (Patnaik and Moyo, 2011). Communities, or at least poorer majorities within communities, in many African states now consciously seek means of formally titling their lands; this is often frustrated by the type of limitations which new Kenyan law seeks to remove by providing for collective entitlement. The recent establishment of a dedicated international facility to promote community land security illustrates the trend (RRI, 2017a).

On their part, a growing number of African administrations see property reforms that enable rural communities to secure collective ownership as combining the need to redress historical land injustices, while expanding formal entitlement in national territories. A typical sub-text is assumption that collective entitlement is but a step towards subdivision and individual entitlement (Alden Wily, 2017b).

In theory, geographical definition of customary or community lands should aid liberating procedures, such as exist in especially Anglophone Africa, given the British colonial habit of reserving specific territories for native occupation. These exist today, for example, as the former homelands of South Africa, the tribal lands of Botswana, the communal lands of Namibia and Zimbabwe, the customary lands of The Gambia and Malawi, and the trust lands of Kenya. Post-colonial policies failed to redefine these territories as owned by their inhabitants until changes began to be made from the 1990s.

In practice, transferring ownership from government to communities is more complex and time-consuming than administrations envisage, leaving thousands of communities in uncertain conditions. Improved techniques of survey and registration are commented upon elsewhere, including the recent success of Rwanda, and the exceptional conditions which drove this, but where, it may also be noted, collective tenure was given no place, with consequent loss of community rights to valley swamplands, a source of tension today (Alden Wily, 2018a). There are other drivers to delays, such as overlapping claims resulting from the State's relocation of populations to untitled but not necessarily unowned lands, the case in parts of Kenya (Cliffe, 2001).

The sophisticated nature of community-based tenure can also be a complicating factor in formalization, especially in respect of pastoral and agro-pastoral tenure regimes. These comprise nuanced layers of rights to the same lands along with in-built flexibility to cope with drought or water emergencies. The norms take time to unpack and entrench in fair ways (Reda, 2014; Basupi et al., 2017). Opaque, onerous, and expensive procedures to adjudicate and formalize collective rights also take their toll, most famously the case in Ivory Coast, where not a single community succeeded in registering its collective property between 1998 and 2013 (Teysier, 2014). Or, registration may take time due to flawed consultative procedures, arguably the case in Mozambique (Aquino and Fonseca, 2017), or in Uganda, where registries for communal land associations was still undeveloped 18 years after passage of the new land law in 1998 (Adoko and Neate, 2017). Other impediments include the opacity of boundaries descendant from native reserves, and comparable but differently termed zones in Francophone states and the falsity that customary rights were ever confined to those designated areas.

However, socio-political drivers almost certainly have more impact than any of the above on how quickly, cheaply, and fairly community lands are identified and registered, or comparable legal frameworks constructed delivering the same effect. Reluctance of state actors to surrender lands over which they have enjoyed a century or more of prerogative and dispensation is the most common cause. As McAuslan concluded in 2013, weak political will to apply legally described new property regimes was still producing conflicting traditional and transformational approaches.

### 1.1. Contested public/community lands in the protected areas sector

A main element of the above to emerge in this paper is the handling of community lands historically classified as protected areas. This paper asks: is it essential that protected areas belong to the state? This question matters to thousands of communities around the world who have endured takings of their most precious natural resource lands for proclaimed conservation (or sustainable exploitation purposes within this context), a trend now termed 'green grabbing' (Fairhead et al., 2012). This longstanding issue has raised its sore head in Kenya, as new classifications of land ownership necessitates new approaches to protected area tenure, a change which state conservation sectors are unwilling to embrace. The premise here is that the legal reforms present the perfect opportunity (and legal pressure) for traditionally held lands classified as government protected areas to be formally acknowledged as community properties, subject to conservation orders; that is, to be reconstructed as community owned protected areas under State oversight.

While subjective in part, this premise is also ontological to the extent that there is growing evidence that, with the right incentives, devolution of authority over protected areas to rural communities with vested interests in sustaining those resources are a viable path to conservation. Relevant literature is cited later. In brief, to venture into this transformation is hardly radical, given widespread practice of community-based conservation, especially well developed in the forest sector. To underpin this with transfer or recognition of community ownership of the forestland is more challenging for governments. Some countries do pursue this, recognizing that forests historically co-opted as state property are more rightfully the property of such communities, and accede to this in recognition that secure localized tenure is the single most important incentive to citizen-based conservation. While this is mainly found in the Americas and Oceania (and with several important cases in Europe, such as Portugal and Romania), new forest laws in Tanzania and South Africa are among those that have taken this step in Africa (RRI, 2015).

## 2. Contribution to the literature

There are several bodies of literature to which this paper is relevant, and aims to contribute to in a modest way, by providing a window onto a contemporary example of how socio-political tensions play out in matters of land and resource rights. Primary literature concerns the handling of customary tenure over the last century in Africa. I have recently addressed resulting transformations in notions of property elsewhere (Alden Wily, 2017a). The improving status of customary tenure is briefly touched upon below, and in more detail in a sister paper on Kenyan land law (Alden Wily, 2018a). An analysis of the status of customary tenure in 54 National Constitutions adds to analysis of the present legal situation in Africa (Alden Wily, 2018b). This paper contributes insight from one country as to persisting reconstruction of indigenous tenure in both opportunistic and revisionist ways; a theme especially addressed in the 1980s (e.g. Colson, 1971; and more generally by Hobsbawm and Ranger (1983). As this paper will show, contested interpretations of custom and consequent rights remain alive in battles between communities and the State over forestlands.

Another relevant theme in the literature examines legal pluralism as affecting property interests, such as addressed early last century by Cornelis van Vollenhoven in Indonesia (von Benda Beckmann and von Benda-Beckmann, 2008), Bentsi-Enchill (1969) and more recently by Ubink and Amanor (2008) in Ghana, Bayeh in Ethiopia (2015), and Mushingwe and Mulenga in Zambia (2016), among others. An argument of this paper is that the changes described in Kenyan law represent both a profound equalization of statutory and customary tenure, and as profound adoption of founding elements of customary land law into statute, around collective tenure and governance. That is, although difficult to deliver in practice, Kenya's legislation lays a resilient

foundation for not only equitable pluralism of tenure regimes, but integration of key principles and constructs. In theory, this should minimize the contradictory elements that have kept the two property systems apart over the last century.

The above leads naturally to an immense literature on the commons, among which the work of Bromley (2008, 1992), Ostrom (1990), and Agrawal (2001) are well known, but not unique illustrations of long and expanding study of the commons in relation to natural resources. This includes more recent emergence of ‘commoning’ as a rational governance approach for the 21st century to all forms of shared assets (Bollier and Helfrich, 2015).

### 3. Approach

The objective of this paper is to examine how far Kenya’s new legal environmental allows for forest tenure transformations as above. It focuses upon conflicting perspectives as to community forestland rights. In a worst-case scenario, these could put paid to the liberation of customary tenure signalled by Kenya’s new Constitution in 2010. In a best-case scenario, constitutional directives will prove an effective trigger to significant advancement in citizen rights to own and govern natural resources.

The paper identifies where laws protect local forestland rights, and where limitations could be used to disadvantage customary owners. Shortfalls will most strongly materialize at the point of state-led identification of community lands for registration. For Kenya’s new legal landscape adheres to a pragmatic trend on the continent, that whilst in principle declamation of customary rights as lawful property, titled or not, is a fundamental legal requirement, this is insufficient in today’s commoditised world to secure unregistered assets. Survey and registration of customary lands and their owners (titling) is needed to double-lock vulnerable untitled possession. It is predictably at the point of adjudication that overlapping claims make themselves most felt. Kenyan policy makers and legislators appear to assume that contestation will be restricted to inter-community relations, providing well in new laws for traditional dispute resolution to have legal force. However, this paper suggests that much more serious contestation will be between government and communities as to which lands may be titled in the first instance.

Three Kenyan laws are particularly referred to: the Constitution, 2010, the Forest Conservation and Management Act, 2016, and the Community Land Act, 2016. The Land Act, 2012 as amended in 2016 is also mentioned.

The Constitution heralded a new era in land relations in doing away with government land and admitting community land, by area if not population, as the major tenure category. The Constitution declared “All land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individual. Land is classified as public, community or private” (Article 61). That is, public land belongs to the people, even though its management may be vested in the national or local governments as trustees. This is reinforced by provision that public lands include any land not classified as private or community land (Art. 62(1) (m)). Although doubtless not intended, this makes public land, in effect, a subsidiary category to private and community lands. The scope of each class is specified. The scheme clearly implies that no overlaps should occur.

The new forest act is mainly innovative upon its predecessor Forests Act, 2005, in reconstructing forest tenure in accordance with the above constitutional classifications as either public, private or community forests. Usefully, it provides for the first time for communities to own and register forests on their lands. However, as discussed below, it does so with a strong bias to the status quo as to how far forested lands are recognized as community lands, to an extent that is questionably constitutional.

In contrast, the Community Land Act, 2016, enacted around the same time, meets obligation to give effect to constitution instructions

on this tenure class. Its focus is on procedures through which a community may secure collective title, satisfactorily order individual, family and group rights under that common title as registrable rights of occupancy, and for the owner, the community, to govern the overall community land estate in an inclusive manner.

Definition of each community’s land depends upon adjudication, survey, demarcation, and registration by the Ministry of Lands, and first, upon registration of communities themselves. Ministerial capacity could fall well short of needs. At the time of writing, no financial or manpower provision has been made to deliver a programme that should cover at least half of Kenya’s territory and embrace the customary land rights of 10–18 million Kenyans, with an unworkable deadline of 2019, according to draft Regulations under the Community Land Act. A critique of this law in all its parts is provided elsewhere (Alden Wily, 2018a). Here, the focus is upon constraints confronting communities as to which forestlands the new laws allow them to bring under community title. Main issues are discussed below.

### 4. Who owns ancestral forestlands?

This is a contested question, reaching both domestic and regional courts, and inducing violent evictions and violent protests against state positions in most affected forests since the 1990s.

In this, the Constitution is not blameless, despite efforts to clarify distinctions between public and community lands. An early contradiction to surface concerns the status of community lands occupied by hunter-gatherer communities but whose ancestral lands have been gazetted as protected areas, now known as public forests. To be precise, one constitutional provision declares all “government forests, game reserves, water catchment areas, national parks, government animal sanctuaries and specially protected areas” to be public land (Art. 62 (1) (g)). The Constitution vests these in the national government in trust for the people of Kenya (Art. 62 (3)). This is contradicted by the following article listing sub-types of community lands, including “the ancestral lands and lands traditionally occupied by hunter-gatherer communities” (Art. 63 (2) (d) (ii)). The question facing administrators and the courts is how far this is as contradictory as appears, discussed under section 4.3. First, some background is provided.

#### 4.1. Forest communities

Many rural communities in Kenya have woodland or other forest types within their family or residual shared lands where these still exist, and should in theory be able to secure these under individual or collective entitlement. The above constraints most affect traditional forest dwellers, who refer to themselves as indigenous forest peoples.

Although a tiny minority of citizens, these 130,000 community members have insistently remained within three large highland forest zones and in several smaller lowland and coastal forests, from all of which they are regularly evicted, but as regularly return. They do so, less from a lack of places to resettle, sometimes provided by government schemes, but because they have deep attachments to their ancestral homelands, and see retention of these historic lands as indispensable to their socio-culture and livelihoods. Forest dweller communities have been pressing government for some time to recognize their traditional ownership. Government resists because of the protected area status of affected forests and the important role of the three largest contested forest complexes (Mau, Elgon, Cherangany) as proclaimed water towers, despite the acutely degraded state of the first complex, under state tenure (Kamau, 2000).

For traditional forest inhabitants, these rich water collecting forests are all that are left to them of larger territories, much of which were co-opted for white settler farming and commercial logging, and to expand the native reserves of other neighbouring tribes into which these small tribes of forest hunter-gatherer communities were expected to assimilate; this was laid down in the early 1930s by the Carter Land

Commission. Cavanagh (2017) provides an excellent analysis of thinking affecting these forests in that era.

Degradation of montane forests began in the early 20th century with the earmarking of these areas for commercial logging and replanting with fast growing exotic species (Kariuki, 2013). As degradation mounted, these forests were brought under water catchment protection as Central Forests then Government Forest Reserves in the 1940s. Government-led logging was not banned until the late 1980s. These protected forests continued to suffer losses in area and quality. This included clearing and creation of profitable state-run tea zones from the 1980s, expanded since, some tea reaching several kilometres into highland forests. Allocation of natural forest for private tea farming to influential officials and politicians also occurred in respect of the Mau Forest Complex. During the late 1990s to early 2000s, excisions for settlement schemes for displaced persons and interested farmers with means to pay for parcels deprived a large number of Mau Ogiek forest dwellers of their naturally forested lands (Office of the Prime Minister, 2009). Ironically, these schemes had their origin in a political commitment in the early 1990s to permit each Mau Ogiek clan to legally reside in the unforested moorlands in the upper reaches of their respective territories, in return for forest protection services (KIFCON, 1992). In delivery, only one small Ogiek clan was ever beneficiary of the parcelling out of these lands, and which continued to expand deeply into natural forest zones (Office of the Prime Minister, 2009). Unlawful logging has also continued, as filmed by the Mau Ogiek and presented to the African Court of Human and Peoples Rights in late 2014 (see below). Collusion with forest authorities is difficult to deny, as physically shown to a court judge in 2017 in the case of Mount Elgon Forest, during proceeding in a relevant case brought by the Elgon Ogiek forest people (see below).

#### 4.2. Seeking remedy from the state

State policy on forest communities since colonial times has oscillated between making use of forest dweller occupancy including requiring they reside near Forest Stations to provide plantation labour, and their eviction (Kariuki, 2013). Evictions have multiplied (SESCUP, 2016; FPP, 2017). The most recent eviction of Sengwer is continuing at time of writing, resulting in the death of one Sengwer, wounding of others, and burning of huts found in glades (FPP, 2018). The European Union has suspended funding of the Kenya Forest Service (KFS) until it arrives at a plan for conservation that does not abuse the ancestral land rights of communities (EU, 2018a). Sengwer had several years earlier brought The World Bank to book for similarly funding a forest conservation programme that involved unlawfully conducted evictions; an inquiry within the Bank followed, with acknowledgement that while its funds had not directly sponsored the evictions, the project had failed to fulfil the Bank's own human safeguards (Ahmed, 2014; Vidal, 2014).

As expected in a rapidly transforming and politicised world, affected communities have become more organised and focused upon their primary grievance, failure to acknowledge their ownership of ancestral forestlands. This has included presentation of their case to the Paris Climate Change Conference in 2015 (Kiptum, 2015) and to Members of Parliament in the European Union (EU, 2018b). Support from international agencies has been forthcoming, including from UN Special Rapporteurs on Human Rights (UNHR, 2016, 2018). Since 2013, affected communities have repeatedly appealed to local politicians and government agencies, and most particularly to the National Land Commission. This is a constitutionally mandated body, directed, inter alia, to initiate investigations into present and historical land injustices (Art. 67). In response to an open letter from Kenyan land and human rights advocacy organizations in February 2014 (The Star, 2014), the Commission acknowledged that it was aware “that some of the best conserved forests around the world are those now owned and managed by local communities” (The Daily Nation, 2014). It has since reneged on this position, ordering forest peoples to give up the forests “to make

way for conservation” (FPP, 2017). Nor has amendment to forest policy or law been tabled. On the contrary, the new forest act of 2016 persists in designating the concerned ancestral community lands as public lands, each affected forest to be formally vested in the Kenya Forest Service (s. 77a & Third Schedule).

#### 4.3. A legal balance in favour of citizen rights

The opportunity to interpret those articles as contradictory diminishes when read with other constitutional provisions on social justice, the rights of marginalized communities, protection against arbitrary deprivation of property, and direction that historical land injustices must be redressed (as per the 2010 Constitution at articles 10–11, 19–21, 25, 27, 49, 56, 60, 67 & 68). Neither can the broader paradigm shift in the Constitution in how land rights are perceived and protected be ignored, including amendments governing the conduct of evictions. These are reinforced by constitutionally entrenched governance changes committing to devolved and popularly inclusive decision-making, accountability of state actors, and fair administrative action, elaborated in instrumental acts. Together these should, in theory, amplify the relocation of the national and local governments as more regulators of community property than landlords.

A constitutional court could not fail to observe the long history of deprivation of property rights of this minority forest dweller sector, nor the concern of policy makers and constitutional drafters to redress this particular injustice (Republic of Kenya, 2009: Part 3.6). It would be expected to take note of the final report of the Constitution of Kenya Review Commission on matters of land and the environment, and to reflect upon the original text as drafted by the Commission describing community land as including –

“all land held, managed or used by specific communities as community forests, water sources, grazing areas or shrines and identified by them as such whether or not such land is, but for this provision, classified as public land” (CKRC, 2005).

Or less awkwardly, in the text of the relevant article in the so-called Bomas Draft (CKRC, 2004), which described public forests thus –

“Government forests *other than forests to which Article 80(2)(e) applies*, game reserves and water catchment areas, national parks, animal sanctuaries, specially protected areas” (Article 79 (1) (g)) (author's italics).

Article 80(2)(e) listed “ancestral lands traditionally occupied by hunter-gatherer communities” as a category of community lands; this was carried forward into the finally enacted Constitution, 2010.

### 5. Can forest communities protect valuable forests?

Clearly what the law says is not determining state action on forest dweller land rights. How far a community may successfully own a resource area of national importance is also a matter of conservation strategy. In brief, problematic forest tenure made its global appearance in The Earth Summit in Rio in 1992, by which time failures of state custodianship to limit tropical deforestation were known and alarming (FAO, 2002). Climate change concerns have since heightened interest in forest ownership models and pursuit of citizen-centred strategies, with growing success (FAO, 2010; RRI, 2012). Community based forest protection had become a ‘best practice’ in the sector by 2000. By then it was evidentially most transformational where communities were recognized as owners of the forested land, not only managers or co-managers of the forest with state authorities (FAO, 2003). While Latin American states learned early on the power of combining community empowerment with tenure security to better secure millions of hectares of natural forest, by the 1990s Tanzania and The Gambia were applying this approach (Bluffstone and Robinson, 2015).

Thus, whereas FAO's Forestry Division focused upon livelihood

development as community forestry until 2000, its review of progress in 62 countries in 2016 concluded that secure tenure is a critical condition for successful conservation (Gilmour, 2016; Bray, 2013). Monitoring forest change under different tenure regimes is now quite common, along with environmental impact assessments and cost-benefit analyses of different regimes (Nepstad and Schwartzman, 2006; Porter-Bolland et al., 2011; Seymour et al., 2014; Hagen, 2014; Robinson et al., 2014; Langton et al., 2014; Gray et al., 2015). While frustrations and failures occur, few global forest agencies or scientists question that, for example, securely banking carbon in forests requires a much bigger push towards community owner-conservator approaches (Ding et al., 2016; RRI, 2017b; Cronkleton et al., 2017; Stevens et al., 2014).

### 5.1. Resistance to change

Nevertheless, it remains a fact that a good number of administrations resist adaptive tenure-governance stratagems to save forests (and wetlands and rangelands), maintaining communities as helpers in government initiatives. While a great deal in Kenya's new Constitution is to be admired, including its breakthrough recognition of customary tenure and community lands as registrable, this supreme law fails to make the same advances in matters of conservation. The sub-chapter on the Environment declaims that it shall “encourage public *participation* in the management, protection and conservation of the environment” (Article 69 (1) (d), author's italics). “Every person has a duty to cooperate with State organs ...” (Article 69 (2)). But nowhere in this chapter on environment is there the progressive subsidiarity in forest tenure which Kenyans should expect from a Constitution that is generally determined to advance devolutionary democracy. Only lands *lawfully* held, managed or used by specific communities as community forests, and lands ancestrally occupied by hunter gatherer communities are protected as community property (as per Article 63 (2) (d)) – the latter with problematic overlaps as shown above, the former with questions as to the meaning of ‘lawful’. While the Constitution does not prevent citizen-led and community property-based forest conservation and management, lack of explicit support for this in context of environmental protection add grist to conservatism on the part of forest administration.

Reasons are not difficult to detect, and are not unique to Kenya. These include the traditional reluctance of Governments to ‘let go to move forward’, especially where lucrative commercial harvesting opportunities for government and aligned private sector interests prevail (Hance, 2016, 2017). Or, unfamiliar with advances in forest governance, forest agencies and politicians may genuinely believe hardening State ownership and armed policing against forest-local populations is the best way forward, an approach now derogatorily referred to by many in the sector as ‘fortress conservation’ and considered unworkable. Or, like Kenya's new *Forest Conservation and Management Act, 2016*, these jurisdictions believe it is sufficient to permit community owned and managed forests to evolve on less critical lands (“little forests for little people”, an expression coined by an FAO forest expert in 2002), thus excluding the forests in most need of new approaches – degraded state run reserves. Insistence by the Kenya Forest Service that it is practising community forestry ring hollow in this regard, as its paradigm for Community Forest Associations first embedded in the forest law of 2005, does no more than enable interest groups in the vicinity of the forest to access the forest for agreed uses, to secure jobs planting exotic trees, and to contribute to the Service's management regime, such as reporting illegal users. Moreover, such Associations are known to sometimes comprise retired forest guards and individuals who dubiously claim to be from the forest adjacent area (Wamae, 2013; Mutune et al., 2015) Nor need Associations include all members of the forest adjacent community or share access rights accordingly, but exist as self-selecting interest groups; this user group approach has been found to be problematic in other African states (Hagen, 2014; Merlet and Fraticello, 2016).

A newer defence by the Kenyan State against forest community land claims is assertion that other, less forest dependent tribal groups in the vicinity, have equal rights to those lands. This is incorrect; as research in and around Mau Forest Complex showed in the early 1990s, forest adjacent dwellers, while indeed using the forest in certain ways, made no claim to own the forests: “the forests are Ogiek land” they insisted in 1991, “but they let us use collect firewood and find polewood when we need it for houses. They do not let us make charcoal or place beehives there” (KIFCON, 1991). This echoed research findings in the 1970s in which Blackburn documented the tendency of hunter-gatherer societies in Kenya to engage with stronger neighbouring tribes for trading purposes and in the process becoming clients of a sort to dominant tribes, but at no time voluntarily surrendering possession of their territories (Blackburn, 1982). Blackburn has also recently reproduced maps from his research in the 1970s, showing the location of forest dwellers in Kenya (Blackburn, 2017). His historical work and maps are now helping forest dwellers counter yet more recent claims by some state actors that forest dwellers are not even Kenyan, but have moved recently into Kenya in search of land.

### 5.2. Traditional forest dwellers as forest conservators

Forest communities do not number the majority of owner-conservator communities in East Africa today; at least 1300 distinct communities in Tanzania lawfully own and manage over a million hectares of once-degraded natural forests prior to their tenure be secured (Government of Tanzania, 2012). The implication is that *all* rural communities have the capacity to rehabilitate and conserve forests when rooted on secure tenure, and this is accepted widely in the forest sector. Nevertheless, it is also a fact that globally, forest peoples have played an even more forceful role in saving natural forests. The Schedules Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 in India, and the Indigenous Peoples' Rights Act, 1997 in the Philippines are popular examples of where this has reinforced acknowledgement of their ownership of important natural forests. Well-known large-scale successes include protection by the Kayapo forest people in Brazil of the two million hectare Xingu Park, around which fires and clearing by settler farmers rage (Schwartzman and Zimmerman, 2005). Scientific studies confirm that indigenous peoples have a special interest in sustaining their environments intact, including forests (e.g. BenYishay et al., 2016).

Kenya's forest communities echo claims made by forest communities elsewhere that, with secure tenure, they too can ensure forest recovery and survival, and for the long term. They point to the massive deforestation occurring under Government's watch even since the 1990s as reiterated in the government's own reports. They explain their forest dependence as less a matter of livelihood in the longer term than socio-cultural survival. “Our society will die without intact forests”. We alone, they say, have the incentive to ensure natural forests survive “for time immemorial” (Forest Dwellers, 2014). While this is mocked by officials and politicians, these communities have backed this up with public pledges that, if assured recognition as owners of these forests, they will retain protected forests on strict conservation conditions, work with state agencies to execute rehabilitation, and will limit their habitation to naturally unforested glades. They also pledge to forgo the right to alienate their community lands once titled (ibid). Most forest dweller communities in Kenya have developed by-laws regulating above matters, despite being declared illegal occupants until the present (e.g. IAPAD, 2013).

In sum, Kenya's forest communities willingly accept and urge the sustained protected status of their ancestral domains, but not claims of state ownership.

### 5.3. Resorting to the courts

Some of these communities have taken denial of their ownership to

court since 2000.<sup>1</sup> Most cases have been triggered by violent evictions, protesting these as violating human and land rights. The most recent application to the court was in January 2018, protesting the latest violent eviction of the Sengwer, to which an injunction against further eviction was ordered, the hearing set for February 2018. The affected Sengwer community has continued to be evicted, their houses burnt and livestock killed, inducing contempt proceedings being submitted to the court at the time of writing.

Only two cases concerning wrongful eviction have been decided upon since 2000. The first, brought by Letuya and 21 other Eastern Mau Ogiek sought, *inter alia*, to have their repeated eviction ruled unlawful, and lands that were allocated to some hundreds of outsiders in recent years, ruled null and void. The court decided in 2014 that evictions “unfairly prevented Ogiek from living in accordance with their culture as farmers, hunters and gatherers in the forest” (Republic of Kenya, 2014). The judge directed the National Land Commission to implement the recommendations of the Mau Task Force Report of 2009, which had indeed shown with considerable detail that virtually all allocations to outsiders had been unlawful or irregular, and to be revoked (Office of the Prime Minister, 2009). The judge’s ruling was appealed, still undecided after three years.

The second case refers to that taken by the African Commission on Human and Peoples’ Rights (ACHPR) to the African Court in 2012, also on behalf of forest dwellers from the Mau Forest Complex, but with acknowledged implications for all forest communities. The Court issued its ruling in May 2017 (African Court, 2017). It found that the Kenya Government had violated the rights of the Ogiek under various Articles of the African Charter, that Mau Ogiek had occupied the land since time immemorial, and were entitled to occupy and use their lands. While the Court acknowledged that this possession might be restricted for a public purpose, it found no evidence that Ogiek presence was the main cause of severe environmental degradation and encroachment. Instead, it concluded that this was mainly the result of Government policies, including issue of land parcels to outsiders and logging concessions.

The African Court provided for separate reparations hearings to proceed after the parties have made their submissions, a process that will now not occur until 2018. ACHPR filed its submission in October 2017 on behalf of the Mau Ogiek; this makes restitution the cornerstone of their claim, including plans showing how they will retain existing forests and repair degraded forests through establishment of Community Forests in each clan’s territory, and for each of which community title deeds will be sought. ACHPR has also presented the Ogiek pledges to limit habitation to unforested moorlands within each clan’s land. The Government of Kenya is yet to make formal submission to the court, and appears to be delaying the hearing. Meanwhile it has publicly implied that it will not accept restitution, but may award compensation for damage to houses, and will relocate the claimant forest dwellers (The Star, 2017). This is precisely what the Mau communities have formally resisted since the 1990s.

## 6. Must protected areas be owned by the State?

Visibly at issue lie the matters discussed above as to whether the State is the only pair of hands in which protected areas may be safely vested, and how far forest peoples can perform as forest owner-conservators in the national interest.

<sup>1</sup> Notably including: *Letuya and 21 Others v Attorney General and 5 Others*, in the Environment and Land Court at Nairobi ELC Civil Suit No. 821 of 2012 (OS) and to an original petition lodged in the court in 1997 (No. 635); *David Kiptum Yator, Luka Kiraton, and Joseph Cheptorus v Attorney General and 4 Others*, Petition No. 15 of 2013 formerly ELD HCPT No. 6 of 2013 in the Environment and Land Court of Kenya at Eldoret; *Peter Kitelo Chongeywo and 10 Others v Attorney General and 3 Others*, Petition November 2016 in the High Court of Kenya at Kitale; *Peter Kitelo & Others v. Attorney General*, High Court Civil Suit No 109 of 2008 at Kitale; and *The African Commission on Human and Peoples’ Rights v Republic of Kenya*, Application No. 006/2012 in the African Court on Human and Peoples’ Rights of the African Union.

In addition, these raise questions as to how lands subject to conservation protection have become *de facto* government property, and it seems, could remain *de facto* government property in the future. The fact that governments (national or local) hold public lands strictly in trust for either the county or national population depending upon the category of public land, is not reassuring, given the salutary history of trusteeship in Kenya wherein trust lands have been demonstrably lost to communities (Republic of Kenya, 2004; KNCHR and KLA, 2006). Fears might have been assuaged through vesting all public lands in a genuinely autonomous National Land Commission, accountable to the populace, such as was intended by the National Land Policy, 2009 (para.3.3.1.1). The continuing poor ranking of the Kenyan State in matters of corruption and impunity, especially among the Police and within land sector, does little to raise confidence (The World Bank, 2016).

Concerns rise further where forests have arrived in government hands through unjust historical procedures as illustrated earlier, but where movement towards redress through restitution remains trenchantly resisted and unfulfilled despite constitutional pledge to see these resolved. Forest communities made applications for redress in 2013 and again in 2014. Fears of further forest loss are raised for communities who face the prospect of key forests and wildlife-rich areas that have so far escaped designation as reserves, being lost to them through dispossessory provisions of the new Community Land Act. The status of local as compared to central/national reserves existing upon former trust lands, now community lands, is additionally problematic. These issues are addressed below.

### 6.1. The uncertain boundaries of the lands of people and the State

Today’s problems around forest tenure derive in part from the complicated history of land classification prior to the present Constitution, a history repeated throughout much of Africa during the 20th century (Alden Wily, 2011). Much rests upon the distinction in colonial Kenya between native/trust land and Crown/Government Land, and evolving interpretation of the latter as, in effect, the private property of Government. As the powers of the Colonial Governor, and then the President after Independence, rose, this was true in all but name, although less steadily rooted in law. Under the first *Crown Lands Ordinance, 1902*, Crown Land excluded areas occupied, used and governed by communities on the basis of indigenous norms (customary law), that is, most of the country. This went hand in hand with a Land Acquisition Act adopted from India in 1894, permitting protectorate authorities to compulsorily purchase such lands for public purposes, confirming the Crown was not the owner, but a buyer (Ghai and McAuslan, 1970).

This changed in 1915, when a new Land Ordinance expanded Crown Land to embrace all native lands, a change reinforced by Orders in Council in 1921. This enabled the Chief Justice in the colony to confirm in 1923 that natives were mere tenants at the will of the Crown, of the land actually occupied, which he acknowledged “would presumably include land on which huts were built with their appurtenances and land cultivated by the occupier, such lands including the fallow”, as cited by Kariuki (2013 p. 53). This dispossessed Africans in law. The more pernicious aspect in practice was confirmation in the above that shared uncultivated lands (forests, rangelands, etc.) were not included as occupied or used.

In addition, the Governor could take any land for settler farming, and could limit the boundaries of native reserves, which duly created overcrowding and resource pressure. Agitation grew, raising three commissions of inquiry between 1920 and 1934. The *Native Lands Trust Ordinance, 1938* was the result. This marked a new era, and which would last until 2016, the law being adopted as the *Trust Land Act* after Independence (Cap 288). From its enforcement in 1939, native and Government lands became formally distinct; the former were vested in boards and then local councils on behalf of customary owners.

Areas within the native reserves were identified where rural elites could obtain leasehold tenure. Elsewhere, customary law was to apply to occupancy and use. Customary law, as affecting the interests of “every native tribe, group, family and individual” was to be respected (Section 68). The boards, then councils, could earmark local lands for public purposes, conditional upon consultation with those affected, and payment of compensation. This was in context of obligation of the trustees “to give effect to the rights, interests and benefits of those citizens on whose behalf they held the lands in trust” (as became Article 115 (2) Constitution of Kenya 1969).

However, no compensation was payable for lands *held in common with other residents* – such as for rangelands, wetlands and forests (section 8(1) Cap 288). Technically, this was because the land remained the property of the community, as setting aside of native/trust lands for wildlife or forest exploitation or conservation purposes did not extinguish its status as lawfully possessed customary lands. Section 10 of the Native Lands Trust Ordinance, 1938 stipulated that such lands remained part of native lands. The Ordinance also allowed that while administered and controlled by government “All net profits accruing to the Conservator of Forests from the working of forest areas in the native lands shall be paid annually to the Local Native Council concerned” (s. 52 (3)). In short, native forest reserves could be created but did not become Government or public land. Their main intention was to curtail local use of these areas.

It is also of note that over the nine or more amendments made to the native/trust land law since 1938, two strong trends have been (i) the mounting list of purposes for which a council may set apart community lands for other purposes, and, (ii) an even stronger trend centralizing authority over trust lands, culminating in the designation of the Commissioner of Lands in central government to administer the Trust land as the agent of each council, along with an expanding list of matters upon which the Minister in charge of lands may regulate occupation of trust lands (sections 53 & 65, Cap. 288, Revised Edition 2012 [2010]).

### 6.2. Difficulty departing from dispossessory norms

The situation was slightly different for gazetted forest areas which fell outside the native reserves. Regulations affecting individual forests were issued from 1891 and once his post was created in 1902, the powers of the Chief Conservator expanded (Wass (ed.) 1995). According to the East Africa Forestry Regulations of 1902, the Conservator could earmark forests for logging, for railway sleepers, and for export, and to allocate licences to settlers to replant denuded areas with faster growing exotics. These areas became the basis for Central Forests, as defined in the first Forest Ordinance in 1942. By then, no compensation was payable to Kenyans as such areas were automatically excluded from Native Reserves. This did not mean these or other Government Lands were unoccupied; as shown above, virtually all forest dweller communities and quite a few other communities, such as around Mount Kenya, the Aberdares and Kakamega Forest, found themselves living on Government Land.

Returning to the present, intention to title what were first named Central Forests, then National Forests, and now public forests to the Kenya Forest Service, is being actively pursued. The *Land Act, 2012* allows the National Land Commission to “vest the care, control and management of any reserved land with a statutory body, public corporation or a public agency” (section 16(1)(a)). This provision has its own history. Under the term of President Moi (1979–2002) excisions from gazetted forests for thinly veiled private purposes grew exponentially (Wass, 1995). The advocated solution from the 1990s was to vest ownership of gazetted forests in a semi-autonomous agency to limit such losses. The main purpose of the new Forest Act in 2005 was to create such an agency, the Kenya Forest Service. As recounted earlier, the Constitution opened up the opportunity for the agency to secure gazetted forests as their *de facto* property, albeit held in trust for

the people of Kenya (Articles 62(1)(g) and 62(3)). The Land Act delivers the instrument as above.

The new *Forest Conservation and Management Act, 2016*, simply states: “All public forests in Kenya are vested in the Service...” (section 31(1)). Survey of these areas is well advanced. Entitlements will not be fully alienable to private ownership, given strictures laid down by the *Land Act, 2012*, although lease of these forests to private forest development entities in the form of concessions is provided for (sections 43–44). Complainant communities understandably consider the privatization of forest reserves as removing their forested community lands yet further from their grasp. Formal titling of public assets in state agencies also raises query as to how far this meets the new constitutional principle that public lands belong to the national community, especially as these agencies may lease if not sell these lands to relevant interests.

It may also be observed that the sister *Wildlife Conservation and Management Act, 2013*, makes no provision for titling of National Parks and Game Reserves to the Kenya Wildlife Service. Indeed, it declares its first principle as: “Wildlife conservation and management shall be devolved wherever possible and appropriate to those owners and managers of land where wildlife occurs” (section 4 (a)). The new forest law features no such subsidiarity.

### 6.3. The contested status of local authority reserves

Above discussion is pertinent to the disappearance of Local Authority Forest Reserves, as they were known until the new forest law in 2016. The Forest Act, 2005 (section 2) had defined Local Authority Forests as forested areas set aside for protection or use on trust land under the former Trust Land Act, and belonging therefore to the community.

These reserves have disappeared – in law. The new forest act does not provide for local authority forest reserves. Local authorities have themselves disappeared with introduction by the Constitution of autonomous county parliaments (‘assemblies’) each with executive governments. By sleight of hand, the new forest law assumes the Local Authority Forests are public forests now to be vested in the Kenya Forest Service (sections 30–31), although it also expects county governments to manage these on its behalf (section 21 (1) (b)). This may not be intolerable to county authorities, which expect business as usual. It is intolerable to communities who expect the return of these areas to the custodianship of the relevant affected community, to be confirmed by their inclusion under the appropriate community land title.

There is a good chance that this will not occur. NGOs report that some affected communities have been informed by county and national officials that they will not be permitted to include any forest under community land title (pers. comm., Ogiek Peoples Development Programme, Forest Peoples Programme). Threats are real enough for one affected community to have revitalised their demand that a petition they submitted to the court in 2008 protesting the reclassification of their trust land as a Local Authority Reserve (see High Court Civil Suit No. 109 at footnote 1). While the county government has indicated that it is amenable to restitution of the reserve to the community, provided the wildlife and forest protection activities already being executed by the community are sustained, the Attorney General advised the county in 2017 that this should not be implemented on grounds that all reserved lands are defined as public property under the Constitution. In the meantime, this author has noted a flurry of legal notices, such as in especially July 2017, declaring a host of new Public Forests, including forests which communities may reasonably be expected to assume will be acknowledged as within the lands they apply to have titled to them. Technically, the Cabinet Secretary may lawfully declare new public forests, on the recommendation of the Board and after consultation with the National Land Commission (*Forest Conservation and Management Act, 2016*, s. 31(2)). This provision is not made specifically subject to public consultation, and the Cabinet Secretary appears

to be taking advantage of this shortfall. Few Kenyan read Legal Notices and affected communities may be unaware that forests in their domains, as small as 2.4 ha to several thousand hectares are now being titled to the Service. It is further surprising that the law requires no consultation with the local county government. Broader constitutional requirements for fair administrative action may be needed to halt this trend.

### 7. How far will the community land act secure community forestland rights?

The answer to this is mixed. One part of the new community land law does provide for communities to manage natural resources on community lands, and, if they wish, to enter in agreements with investors for the use or management of these lands (sections 35–36). Another part of the law protects rights held common, which logically relate to off-farm resources such as over forests and woodlands (section 5 (3)). This exists in long-awaited provision in the Community Land Act for lands held in common to be registrable right (section 5(3)). The Act also allows a registered community to reserve a portion of its land for communal purposes including for community conservation (section 13(1)). These provisions are in line with those of the new forest law, which do indeed provide for community forests as existing on community lands (section 30 (3)). Such forests are to be vested in the community (section 32 (1)). The Kenya Forest Service will register these community forests, and notify the relevant county government, to whom the community may turn for technical advice and secure loans to develop the forest (section 32 (3) (4)) – a curious inversion in roles in light of the overriding commitment of the Constitution to devolution.

Several means have been noted above through which the [Forest Conservation and Management Act, 2016](#) makes it difficult for communities to retain traditional forests as their land, within areas they will apply to be subject to community land titles. These include lack of legal direction that the former Local Authority Forest Reserves on trust lands will revert to community tenure, and absent requirement that declaration of new Public Forests requires a procedure of public consultation. The Community Land Act is also unhelpful. It states –

“Any land which has been used communally, for public purpose, before the commencement of this Act shall ... be deemed to be public land vested in the national or county government, according to the use it was put for” (section 13(2)).

This article conflates local communal property with lands used by the wider public in general. Communities can be forced to surrender these lands, especially as present draft Regulations under the Community Land Act have made no attempt to remedy this confusion. This will be in addition to lands which communities may be forced to give to local governments or national agencies to use for other purposes; in three different sections of the law, the Community Land Act empowers a county government or the national government to determine which areas of a community’s land are to be set aside “for the promotion or upgrading of public interest” (sections 13(3), 26(1), 29(g)). All these lands are to be excluded from community entitlement (section 26 (2)). It is regrettable that neither Kenya’s Constitution nor the Land Act saw fit to vest public lands in communities as and when appropriate, such as is provided for in Mozambique, where its Constitution stipulates that: “The law shall ... distinguish between the public domain of the state, the public domain of local authorities, and the public domain of communities, with due respect for the principles of imprescriptibility and immunity from seizure” (2004, Article 98 (3)).

### 8. What other risks threaten community forestland security?

The door to further losses of community estates could be opened wider through constitutional provision for legislators to create new categories of public land (Article 62(1)(n)(ii)). The most obvious source

of new national property will be community land, and particularly unregistered community land.

The Land Act points to types of lands which this may include through indicating which types of public land may not be alienated in addition to reserves lands; these include public lands subject to erosion, floods, earth slips or water logging, buffer zones around reserves or environmentally sensitive areas, land along watersheds, rivers and stream catchments, fish landing areas, natural cultural and historical features of exceptional national value, and “any other land categorised by the Commission, by an order published in the Gazette” (section 12(2)(g)). The Land Act also directs the Commission to set aside land for investment purposes (section 12 (3)).

While the above refer to lands already considered within public lands, when read with above-mentioned but unspecified claims that the State may lay to community lands, the above may be used as a guide. Yet all the above listed land types are of importance to communities and integral to their understanding of customary lands. For example, local waterlogged lands play a critical role in seasonal rice production. Dry season grazing and buffer zones around gazetted forests and wildlife reserves are actively claimed and used by local communities, and which have already lost valuable lands by the creation of those reserves.

Contestation is made even more inevitable when it is recognized that the boundaries between public and community land are not already well known as mutually discrete areas by state authorities or even demarcated on the ground. At adjudication of community lands for titling, state-appointed adjudicators may assert that quite substantial areas which communities believe to be their own are public land by virtue of their nature. That is, a reverse logic may occur; that, any lands which are along stream catchments, floodable lands, watershed areas, and areas surrounding gazetted reserves, are to be treated as public land. This may also enable government to co-opt community land without having to compulsorily acquire these resources from communities in return for compensation.

Communities may lose lands through other legal means. Physical planning, water, livestock, agriculture, and investment laws, are, expectedly, among those that will be applied to community lands. County government are also authorized by the Community Land Act to make regulations on such matters. However, as local consultation is not visibly required in some of these laws, they could prove to be Trojan horses for technically lawful but wrongly dissipation of community lands and interference in the sanctity of customary land rights.

The potential for losses does not cease once community lands are registered. As is already the case for private owners, registered community landowners, may face notification that their lands are needed for public purposes. While expected, this deserves note on several counts. First, conservation is indisputably a cause the Kenyan State could deploy as grounds for retaining or re-acquiring forestlands of communities, especially given somewhat archaic attitudes to citizen-based conservation recounted earlier. Second, Kenya is in the throes of a massive infrastructural, water, mineral and energy development expansion, including in the dry northern half of the country where major community lands are located. Amendment to the Land Value Index Law has been tabled since 2016. In line with the Constitution, this bill provides for compensation to be paid to occupants in good faith, including for land traditionally occupied by individuals, families or entities pending adjudication. However, the bill is also explicit that compensation to these occupants in good faith will be based upon factors that exclude the value of *unimproved* lands, and “shall not in any case exceed the value of the structures and improvements on the land” (section 107A (10)). This suggests that communities will not receive compensation for their valuable pastoral and forest resources.

Third, the Community Land Act establishes that until community land is registered, county governments will receive compensation for compulsory acquisitions on their behalf, and will transfer these sums along with interest that has accrued, to community owners once they



are registered owners (section 6). Draft regulations under the Act fail to specify the responsibility of counties to investigate exactly which communities are affected by a development and to insist upon compensation through procedures involving those communities from the outset. The need to modernize compulsory acquisition procedures is generally urgent. The new [Land Act, 2012](#) and its amending act of 2016 are out-dated on procedure prior to decision to acquire the land, such as failing to require exploration of alternatives to compulsory acquisition, such as by leasing the needed land from communities. Contestation with the State and with investors is inevitable. This is already apparent in different parts of the country, such as in relation to intended coal fire power stations, taking of local swamplands for commercial enterprises, and land losses to communities being caused by wind farms, new dams, roads and ports and creation of new urban centres ([Kibugi et al., 2016](#)). Court cases are mounting, such as in northern Kenya where communities lodged proceedings on grounds of not being consulted ([Danwatch, 2016](#)). While the [Fair Administration Action Act, 2015](#), constitutional protection of property, and other legal provisions can be brought into play, actions will be long and expensive, and significant numbers of land rights are likely to be jeopardised.

### 9. Can the trustees be trusted?

Another question arises as to how far county governments, as trustees over unregistered community lands, will act in the interest of communities. As noted above, their powers over customary/trust lands were largely co-opted by the national government. With the new Constitution and Community Land Act, national government's role has now disappeared, although it clearly continues to exert significant powers including regulatory authority over community lands. Helpfully, both the Constitution at Article 63 (4) and the Community Land Act at section 6 prescribe that a county government shall not sell, dispose, transfer, or convert for private purposes, any land it is holding in trust. However, there are administrative and representational functions of county governments for which no procedural guidance is given. The Community Land Act merely prescribes that "Any transaction in relation to unregistered community land within the county shall be in accordance with the provisions of this Act and any other applicable law" (section 6 (6)). Some of these laws lack requirement to consult with community members in an inclusive manner.

In addition, it is unclear to which transactions that article refer, when supposedly no such transactions should occur. Ominously, this may refer to the Act's allowance for national and county governments to vaguely set aside community lands "for upgrading of public interest" (section 13 (3) (f)) as cited earlier. While this will be less easily applied once community lands are registered, no community's land is yet registered, and this will remain the case for some years, leaving county governments as operational trustees. Unfortunately, there is plenty of evidence to suggest that county assemblies and their executive governments are not immune to the corruption and malfeasance for which administration of the land sector as a whole is famed ([The Standard, 2016](#)). Post-election (2017) contempt of court injunctions, affecting press freedom, and a number of other areas of governance, including at least one case directly concerning Sengwer forest dwellers as recorded earlier, do not inspire confidence.

### 10. Conclusion

To recap observations made early in this paper, Kenya's new land framework assures millions of landholders that their community-generated rights are secure, with forceful encouragement to apply to have these identified on the ground and registered. Equitable legal pluralism and a remarkable degree of integration in property principles have been achieved. Landed commons, as historically and presently belonging to communities, are not excluded and community based land jurisdiction is established as lawful, empowered, and modernized in legal

requirements for inclusive decision-making by all community members. These amount to a tipping point, after a century of subordination, if not full suppression, of indigenous tenure and denial that the lands of this part of Africa were owned in a manner acceptable to colonial and then modern state-making. In effect, what has now been given legal force is acknowledgement that collective tenure and community-based land administration constitute a viable basis for accumulation and growth for a significant portion of the population. Few commentators can dispute that progress has been made.

#### 10.1. The law is not enough on its own

Nevertheless, there are flaws, including in legal paradigms. A major strength of the new property regime in Kenya is its constitutional foundations, useful in a somewhat troubled and fast transitioning economy not known for strong day-to-day rule of law or fair administrative action. For millions of Kenyans, the Constitution is a last refuge to which they may appeal. Yet, as this paper has shown, there are problems in these founding directives, either leaving too much to interpretation or simply failing, as in the case of instructions around environmental conservation, to bring Kenya firmly into the modern age of citizen-based environmental protection, regulated, technically assisted, and monitored, by a national apparatus which should be, but is not, released from competing interests of landlordism.

It has also been shown that uncertainties and contradictions in the new and more detailed land and forest laws open up opportunities through which majority community land interests may be frustrated, and curtailed in arguably lawful but unjust ways. These opportunities may not always be exploited. Much depends upon political will to uphold citizens' land rights, but which certainly cannot be taken for granted.

An overriding uncertainty at this point is how well customary/community based rights and associated lands will be protected ahead of formalization. As show in this paper, these rights and therefore consequent community properties are legally established as *already* existing, due the same protection as property as the law provides for private registered properties, and now for 'public properties', as are being quite hurriedly identified and vested in state agencies, including surveying of existing and new public forests. However, for as long as the boundaries of community lands are not formally adjudicated and agreed, and surveyed, communities are right to feel their rights and lands are insecure. While draft Regulations under the Act, plan to impose short timeframes for carrying out an inventory of community lands in each county, and launching adjudication, survey and titling, achieving this depends entirely upon state will. Eighteen months after enactment of the Community Land Act, no Community Land Registrar has been appointed, an essential first step. Regulations under the [Community Land Act, 2016](#), formally announced as being available in December 2017, are still not in place.

Many takings, claimed as outside community properties or unsuited to inclusion, may in the meantime continue to be lost to communities, suggested as already underway in gazettelement of numerous new Public Forests on former trust lands/community lands. Even once formalization is launched, this paper has shown how communities may be denied inclusion of all their prime forest, water and pastoral assets. Contestation itself is likely delay a great deal of cases. Still, Kenyans are increasingly vigilant as to their rights. There are steps that communities could immediately begin to take to strengthen interpretation of the law as honouring inclusion of traditionally communal resources as rightfully part of their lands.

#### 10.2. Community empowerment and action to engage

In summary, these include empowering themselves with the knowledge and organization to be clear as to their respective land and resource areas, and the procedures for formalization which need to be

followed, from which they may more easily lobby county governments and central actors to more speedily inventory and adjudicate these lands. In organizational terms, it would be unwise for communities to await the calling of meetings by the Community Land Registrar before identifying themselves, and through this the limits of the community's domain in relation to neighbouring communities or private owners. Clarification of members of each community allows each to form the essential Community Assembly, and which is to perform as the ultimate land decision-maker. Although the law implies that the Land Management Committee it should appoint is not lawful without the presence of the Community Land Registrar, there is no reason why communities cannot appoint interim Committees to facilitate provisional boundary agreements with neighbours, internal zoning of their respective community land areas, and rules to be applied.

In this, the definition of communal forest, swampy and rangeland areas which a community wishes to retain as their shared collective property under community regulation, will be critical, an important bastion against anticipated claims that these should be surrendered to local and national governments as public property. There is no reason why a community could not declare Community Forests along with Community Forest Rules to strengthen their claim, and to defend these assets against encroachments or takings by government or other actors. It is true that the Government refuse to register these declared Community Forests but the action of declaring these and establishing rules will greatly aid community awareness of their rights and deepen their determination to uphold their constitutionally protected land rights. Some forest communities have already undertaken these steps.

Communities will also wisely promptly scrutinize Regulations under the Community Land Act when released and/or demand their release for open public consultation. Consultation has been held on drafts, but only by a handful of NGOs (LSNSA, 2017). Meetings which involve community representations from relevant counties are essential prior to promulgation of these Regulations, or now, it seems more likely, to challenge gazetted Regulations which they had no direct part in formulating or approving. These representatives will ideally demand specification of county government powers as trustees over their lands ahead of formalization, with stipulation that no transaction or any other decision or action affecting the status quo of landholding is taken without the informed consent of those they are supposedly trustees for.

They should also demand new sections in the draft Regulations to lay out precisely the right of communities to declare protected community forests with their domains. Yet more essential is definition of what constitutes communal land and claimed or potential national or county public land in the community land sector. Tendencies in the draft Regulations to over-empower the Land Committee and under-empower the Community Assembly as decision-maker also require community review (Alden Wily, 2018a).

### 10.3. Civil society support

These are all matters wherein NGO and INGO facilitation and support will be helpful and in some parts of the country, essential. This ranges from information dissemination and discussion to alert community members as directly as possible of what the law does and does not provide to support land and natural resource security, to practical actions they can take on all aspects of land identification and inclusive regulation. Useful guidelines built upon practical experiences exist in Tanzania, Uganda, Mozambique, Sudan, Ghana, Liberia, Namibia and other states, that can aid construction of practical guidance. Thus far, the Ministry's proposed guidelines to be attached to Regulations are too general or circumscribed by subject to be of much use to community members. At least at this point, the draft Regulations welcomed the inputs of civil society actors to help deliver tenure security in the community land sector. Overall, an early period of actively supported community empowerment is needed.

### 10.4. Addressing the judiciary

However, such work with communities may not deliver the kind of procedural or legal changes needed to genuinely support community land security at scale, as inputted into subsidiary regulations or otherwise. Should such requests at public consultation as illustrated above fail to be delivered without reasonable grounds, individually or collectively, communities will have no option other than to petition the courts with their asks, including amendments they expect to see to the law itself, resulting in amendments. Realistically, this too requires civil society support.

There is also tremendous scope for progressive county parliaments (assemblies) to develop county land and forest laws for implementation within their jurisdictions. These cannot prescribe in ways contrary to the main national acts (or the Constitution) but may use the better spirit of both to direct socially just and practical actions. There are also limitations on subjects upon which counties may legislate. On land matters, counties may only regulate on land identification and boundary and survey matters, a sufficiently important field at this time to cover a host of essential questions. Counties have been given a slighter mandate in the forest sector but as the de facto managers of public forests, scope exists. Several counties have already drafted County Forest Bills. Counties also benefit significantly from overriding constitutional stipulations for devolutionary governance, under which aegis progressive policy and legal development should in theory begin to more actively appear. Still, despite their trustee and local government responsibilities, there can be no guarantee that county government visions accord with those of communities, and community level action with their elected and administrative representatives will be required.

### 10.5. Tackling the bitter issue of ancestral forestland ownership

A main topic in this paper has been around contradictory interpretations as to the status of forests that are at one and the same time publicly protected areas and the ancestral and lands of living forest societies. To recap, as the law presently stands, these remain public properties to be vested in a state agency, each affected forest listed as a public forest in the Third Schedule of the Forest Conservation and Management Act. Challengeable grounds have been identified, including the constitutionality of the relevant provision and Schedule, backed up by contrary policy statement on this matter, a national land policy that parliament itself approved; commitment to redress historical land injustices; affirmative action to redress disadvantages suffered by minorities and marginalized groups; rights to practice distinctive ways of life, fair administrative action, and protection of property in a new legal environment in which customary tenure has force and effect as lawful property. There is also the fact that public land is constitutionally described as unable to embrace either private or community land.

In such conditions, the wilful inclusion of ancestral forestlands as public forests may be argued as unsound. At best, their inclusion may be understood as a temporary measure while forest communities document the boundaries of their respective ancestral lands, and lay out the by-laws through which, as intended titled community landowners, they propose to ensure all forests within their registered lands will be protected in the public interest. The engine for this could be petitioning the National Assembly; the new forest law permits any person "to petition the National Assembly or the Senate for the variation of boundaries of a public forest or the revocation of the registration of a public forest or a portion of public forest" (section 34). Such petitions are to be subject to an independent Environmental Impact Assessment and public consultation. While this is preferable to going to court, refusal of state authorities to see its citizens as worthy protectors of nationally important forests suggests that court action, will be necessary, later, if not sooner. Such refusal has been amply demonstrated in the state's refusal

to apply positive rulings and to continue violently evicting traditional forest dweller communities even after court injunctions against this have been issued, such as for the Sengwer in 2013 and 2018. The prompting of a constitutional court ruling on the interpretation of the relevant articles is now necessary. Amendments of offending clauses in laws could be sought through this means.

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