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Over promising while under-delivering: Implementation of Kenya's Community Land Act

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ABSTRACT

Context and background

Kenya's constitution of 2010 provides for recognition, protection, and registration of community land. This is of significant importance because it recognizes customary tenure after decades of historical bias towards private property, and brings to the fore the uniqueness of the African commons. We revisit the debate on managing communal land by reviewing the process of implementation of the Community Land Act, 2016. We argue that while the law promises greater protection for commons, implementation challenges continue to hinder realization of the promised rights and benefits. Procedural uncertainty in the implementation process, tension in the formalization of customary tenure, and institutional overlaps are identified as key bottlenecks in the process. The paper argues that laws should be aligned to community systems and practices to achieve best results.

Goal and objectives

This paper aims at revisiting the question of managing African commons and highlights the significance of community-owned processes and customs in the process of implementing land law reforms. This paper is useful not only in the debate about African commons but also for programmes intended to facilitate communities to secure their rights.

Methodology

The paper is based on a document analysis of the Community Land Act, the broader legal framework in Kenya, and discussions with representatives of local communities engaged in the process of seeking to use the Community Land Act to govern their land, which took place at a conference in Nairobi in February 2020. Other discussions and observations have been undertaken by the authors across the country in areas where there is community land, including Baringo, Isiolo, Laikipa, Marsabit, Turkana, Kajiado, Samburu, Tana River and West Pokot. It also relies on a review of workshop reports from civil society organizations working on the implementation of community land rights and a review of academic writing on the African commons.

Results

This paper highlights the fact that the progress of implementing the Community Land Act is taking longer than anticipated. Key bottlenecks identified include questions around security of tenure for all groups, including special categories like women, overlaps in key institutions mandated to facilitate the implementation process, and uncertainty in the procedures required to fully implement the community land law. We find tensions between the formal and informal processes, specifically with the threatened relevance of customary tenure. It is important that these bottlenecks are addressed so that the intention of the Community Land Act is realised in the country.

Keywords

Kenya, Community land, African commons, Constitution, Customary tenure

1. Introduction

On September 21, 2016, Kenya's legal environment for regulating property rights underwent a fundamental change. The date marked the coming into force of the Community Land Act, a legislation passed by the country's two-chamber parliament and assented to by the President in accordance with the Constitution adopted in 2010. The Constitution promised to usher in a new dawn in the ;land management process (Odote, 2013:88). The enactment of the community land legislation was to be a fulfillment of that promise as it sought to provide for 'recognition, protection and registration of community land' (Republic of Kenya, 2016) and for its management and administration.

The importance of Kenya's legislative enactment draws from a historical bias towards private property regimes and disregard for communal tenures, which were viewed as open access (Hardin, 1968; Peters, 2020; Migai-Aketch, 2001). This position affected all customary arrangements for land holdings across the continent following the imposition of European laws. In Kenya, the laws governing land were amended over time to vest all land in the Crown and to relegate Africans and their rules for ownership and management to the periphery (Okoth-Ogendo, 1991; Mweseli, 2000). At one time in 1923, the colonial court in the Kenyan case of *Isaka Wainaina v Murito,*[1] argued that Africans were incapable of holding land and could only be 'tenants at the will of the crown' on land that they occupied.

Independence was premised on the rationale of correcting the errors of the colonial period. Contrary to the hope that this would result in a reversal of the disregard for communal tenure, the post-colonial Government in Kenya adopted the same policy, with the consequence that modernization of tenure to private land holdings continued (Ogolla and Mugabe, 1996). Despite this approach, though, communities continued to use their rules to govern land with the consequence that law and practice were at odds. Okoth-Ogendo (2002) described the situation as a tragedy but pointed out that this tragedy occurred because of expropriation and exploitation of commons, denial of their juridical content, and systematic subversion.

In 2009, Kenya followed the trend that had started in several parts of the African continent, signaled by the African Union Land Policy framework which recommended that as part of land reforms, there was need for policies that recognized and supported indigenous tenure arrangements and created linkages with state and modern systems. (AUC-ECA-AfDB,2009). The country, therefore, adopted the first ever National Land Policy, which recognized community land tenure as a legitimate land category, setting the stage for plurality of tenure -- a clear departure from the policy of conversion to private tenure that had obtained until then (Republic of Kenya, 2009).

In 2010, the country adopted a new constitution, not only giving anchorage to the National Land Policy but also reinforcing the importance of land reforms. The Constitution further provides that land belongs to communities based on their different identities and joint interests (Republic of Kenya, 2010). While constitutional recognition was momentous and marked the dawn of an era (Odote, 2013), the enactment of the Community Land Act[2] was to ensure that the era was actually

[1] 2 KLR 102

[2] Act No. 27 of 2016

operationalized. Translating the constitutional provisions has had to overcome several challenges, including technical issues around clarifying the definition of communities, balancing collective and individual rights, registration procedures, protecting rights of vulnerable members of the community, (Odote and Kameri-Mbote, 2016:3-4) and political intrigues.

With the constitutional provisions on community land clearly spelt out, the enactment of the Community Land Act[3] should have seen communities registered to hold their land and enjoy secure tenure as envisioned in and guaranteed by the Constitution. The paper seeks to assess the progress made in achieving the implementation of the community land law. It identifies the obstacles that have prevented full realization of security of tenure and improvement of livelihoods for Kenyan communities, especially in rural and marginal areas where most of the communal lands are found. The main argument of the paper is that the slow pace of implementation is not accidental but a demonstration of the continuation of a privatization philosophy despite the recognition of communitarianism in the country's property rights regime. The paper opines that addressing this challenge requires a move beyond legislating to a philosophical shift to recognize the place of communities in the governance of society. This will be augmented by a bottom-up approach to implementation of the law, an honest adherence to the requirements of public participation, deepening of land reforms, and a true fidelity to the Constitution through promotion of a culture of constitutionalism.

2. The role of law in managing African commons

Research on common property and debates on the land question in Africa have been surrounded by Hardin's controversial 'tragedy of the commons' (Hardin, 1968). This has been adopted to understand the difficult nature of managing commons and the expected degradation of the environment or even over the use of resources (Ostrom, 1990). In this article, we reignite the discussion by focusing on the African commons as propagated by Okoth-Ogendo to underpin our understanding of the conceptual issues facing community land in general, as well as practical challenges brought about by the laws governing the African commons.

Commons refer to resources that are owned collectively. It also refers to natural resources accessed by communities (Clarke, 2009). Debates on commons originally confused this to mean that such resources were not owned by anyone, thus *res nullius* as opposed to the correct depiction of such resources as being collectively owned, thus *res communes* (Wily, 2017). This is the departure point for African commons, which are seen as being secure just like private property since they are owned and controlled by a distinct group of people (Okoth-Ogendo, 2002). African commons have been defined as entailing common property and are linked to resources available to people based on their family affiliation or clan identity (Okoth-Ogendo, 2002). African commons, rights to them and their management, are linked to the culture and practices of the African society, hence the need to understand commons alongside customary law. The link between African commons and customary law is such that when African customary law became subjugated, commons suffered a similar fate. Instead, Common Law became the more preferred to supplement statute law (Okoth-Ogendo, 2000). The discussions were mainly on property rights with focus on the Western conceptions of property. However, recent developments have led to the recognition that both African commons and African customary law are critical and interlinked. Consequently, there has

[3] Act No. 27 of 2016

been evidence of the need to reconsider the African commons in the ongoing land reforms in sub-Saharan Africa.

The World Bank Policy Review Report on land policy (2003) states that: 'customary systems of land tenure have evolved over long periods of time in response to location-specific conditions. In many cases, they constitute a way of managing land relations that is more flexible and more adapted to location specific conditions than would be possible under a more centralized [regime]'. At the centre of these reforms has been the critical involvement of governments in ensuring sustainable land use. This is happening as the issues of community control and resource use are being debated.

In making a case for African commons, there is need for laws to acknowledge customs and customary laws, and to mainstream them into national legal frameworks and in governance of community land. The previous approach of seeing customary land rights as inferior and only applicable in limited instances when they are not repugnant to justice limits the protection of commons.

The need to raise the status of customary law has been suggested in managing African commons and to avoid merely being 'guided' by customary norms and rules (Bruce, 1993). Even in cases where the existence of customary laws has been recognized, it has not been appreciated and thus continues to affect how African commons are managed. In arguing for Common Law as the common law of African jurisdiction, we join this debate to assert that there is a need to rationalize the domain of customary land laws to govern community land in Kenya and to recognise African resources held communally. The challenges faced in the attempts by the state to include customary law in the laws governing communal lands, for instance, are pegged on the lack of a structured way to incorporate local people's lived experiences in managing and using the land. Even where the state is using public law and other legislative processes to regulate communal land use, numerous problems have been found to emerge.

The laws set to manage communal land, for instance, have been found not to reflect the lived experiences of the communities and in some cases are unsuited for the ecosystem as has been argued to be the case for pastoralists (Kameri-Mbote et al, 2013). The problems have been exacerbated by weak land governance structures in areas where state authority is still weak. Even when those in power have used their authority, there has been little or no change in the management of the African commons. The policies on land aiming to improve land governance should prioritize tenure reform by recognizing and mainstreaming communal/ indigenous/ customary rights (Odote, 2021).

However, the processes of lawmaking have continued to disregard the African commons by failing to critically examine ways to incorporate customary laws, which are the very foundation of African commons. However, this is changing with the recent clamour for recognition of the customary laws with its norms and values for managing African commons by many African countries. For instance, in South Africa, there has been ongoing recognition of communal ownership and group rights incorporation (Fitzpatrick, 2005), while Botswana has adopted systems to manage communal land (Quan, 2000:200). Similar approaches are found in Lesotho, where non-urban land is administered at communal level (Adams et al, 2000) while Tanzania's communal land has village level councils, which include community management (Alden Wily, 2003)

Whereas countries in sub-Saharan Africa have embraced the need to recognize indigenous values and use customary institutions in managing African commons, the process has been complicated by the establishment of multiple structures which then negate the very idea of customary systems. Other

attempts to recognize the customary systems have also been procedural rather than a systematic effort to incorporate customary laws in ensuring better management of African commons.

By providing for customary processes without a clear legal framework, these societies have generated tensions on the legitimacy of customary institutions. People, therefore, continue to struggle for resources without a clear framework, in some cases, leading to conflicts. The adoption of the African Framework on Land Governance in 2009 underscored the importance of putting African commons at the forefront of land reforms. This explains why Kenya, in both its Land Policy and constitutional reforms, recognized communal tenure rights and the need for their protection and strengthening. This is the background against which the Community Land Act (CLA) came into force in 2016.

3. Progress in the implementation of the Community Land Act

The enactment of the Community Land Act in September 2016 provided the required legal framework for the recognition and registration of communal land tenure in Kenya. Since then, numerous actors have continued to engage communities to prepare them for the ultimate registration of their lands. The key institutions involved in this process include the Ministry of Lands and Physical Planning, several civil society organizations, and technical organizations such as the Food and Agriculture Organization of the United Nations (FAO).

The implementation of the Community Land Act has, however, faced delays resulting in complaints from several quarters (FAO, 2019). The Constitution required parliament to enact legislation on community land within five years though delays were experienced until August 27, 2016. Drafting the regulations followed a year later, with their gazettement coming in 2017. The Cabinet Secretary established a working group in 2019, more than a year after the finalization of the regulations, and which developed a roadmap detailing the steps for the rollout of the law, including civic education, gazettement of community land registrars, establishment of land registration units, amendments, adjudication and demarcation as well as resource mobilization. The process was, however, beset with budgetary constraints and thus implementing the roadmap was staggered, thus limiting the activities.

As part of the activities for implementing the roadmap, a massive civic education campaign on the Community Land Act was undertaken from 2019 running into early 2020. The focus was on 24 out of the 47 counties in the country, which were identified as having large proportions of community land. This culminated in the first ever registration of community land under the Community Land Act, 2016, by the Ilngwesi and Mosul communities; and subsequently the Sereolipi community in Samburu County. These communities transitioned their land from previous group ranch status to community land. In addition, advocacy to fastrack implementation continued. However, the fact that only two communities have been registered, five years after operationalization of the law demonstrates the slow process of implementation, raising concern whether there is political will to translate the promise of the legal provisions and the 2010 Constitution into tangible benefits for the numerous communities that rely on commons and want them given legal recognition and protection.

4. Challenges in the implementation process

4.1 Institutional pluralism

The Community Land Act establishes various structures to manage community land. Each of the established structures is further allocated specific roles. The institutions involved in the process include the Ministry of Land and Physical Planning, the National Land Commission and the county governments. The law further provides for communities to manage their land directly. Community institutions established for this purpose include the Community Assembly, and the Community Land Management Committee whose members are elected to manage the administration process. (Republic of Kenya, 2016).

In addition to these structures, there are institutions with responsibility for operationalizing and implementing the Community Land Act. The various structures set up and multiple institutions involved in the process have necessitated the need to understand the relationships between national, county and local level processes. The main concern has been that community structures and customary institutions have not been fully included, and in some cases the duplication of roles has slowed the process of formalizing community land. This is despite the African commons being governed by customary structures and rules. The conflict between these customary rules and institutions, on the one hand, and formal institutions under the CLA, on the other, brings up implementation conflicts.

Further, the different roles of institutions involved are not explicit. This has meant that communities' access to services needed to convert their land to community land has been hampered. On the one hand, counties, which are expected to play a central role in the rollout of the Community Land Act, have not been sufficiently prepared for this role. In addition, their relationship with the national government over land management generally has been contentious, with each claiming to have more powers over land management than the other. This conflictual relationship is evident in the manner in which the rollout of the registration process has been undertaken, with the Ministry of Lands being at the centre and sometimes ignoring county governments, yet the latter are nearer the citizens, holding unregistered land in trust, and are required to facilitate the registration of community land.

While the law requires that Community Land Registrars carry out registration, community members have faced challenges in registration since it is not clear to which office they should present their documents. In discussions with communities, some have indicated that there is confusion created by multiple offices dealing with community land registration processes. This has led to conflicts, lack of responses and confusion among community members. The excerpt from a FAO report below explains this challenge. The report points out that communities

> … highlighted their experiences in dealing with the registrars complaining of registrars rejecting application documents presented for registration by communities. They suggested that their roles and mandate in dealing with community land registration needs to be clearly defined. (FAO, 2019)

Multiple actors involved have also raised the issue of accountability, with arguments about lack of guarantees that the established institutions will benefit everyone equally. The unfair exclusion of people who do not belong to the dominant groups in the community have also been cited. Thus,

domination by a few elites can occur and benefit some groups more than others. The effects of exclusion have also been found to be worse for women and minorities. This is the case in instances where land is unevenly shared, with no avenues for redistribution. The challenges of improving land governance in Kenya are also a point of concern (Bassett, 2017). These overlaps in roles and actors involved in managing community land are a concern, which yields further delays and conflicts.

4.2 Procedural uncertainty

The process of implementing the Community Land Act takes shape through the establishment of land committees as required by the law. This presents a procedure through which a community may secure its lands. Ideally, the process should start with the community identifying itself as an entity for purposes of registration (Republic of Kenya, 2016). At the same time, consensus building is required to ensure members in the community agree to elect the land committee as well as develop consensus on their land boundary, which also entails its occupants.

Despite the key steps being captured in the law, there is lack of unanimity on the sequence to be followed in actualizing the envisaged steps. The lack of clarity in the sequence of the steps is leading to both confusion and frustration by communities. There are many questions that require responses, which communities are already asking. The communities' inability to understand the legal language and provisions has been found to create barriers in the process of enhancing awareness on the rights of communities (Moyo, 2017).

The definition of community property by the community itself is critical for securing community land. The process should not be left to the state and land officers as local communities must ensure the definition is exhaustive depending on existing land uses. The challenge could be exacerbated by the exclusion of private and public land from the registration of community land (Republic of Kenya, 2016).

Whereas the need to exclude registered private land is appropriate, circumstances under which the land was acquired can be contested. This is especially the case for community land that has been allocated to government or forest reserves. Communities who are nomadic are also likely to contest the ownership of land that has previously been taken away from them before the law on community land was introduced. In some cases, government offices have failed to address cases of illegal land acquisition and irregularities in land allocation. In other instances, community land has been converted to settlement schemes, with few members benefiting.

Despite the stated bottlenecks, formal title remains the preferred option for communities to safeguard their land. The process of acquiring a title deed, however, may take long because of the uncertainty on the categorization of the lands in the country. One of the critical questions is whether the process will be fair and guarantee the rights of communities.

The establishment of a formalization procedure is seen as important in ensuring communities comply and thus have their land registered as required. The performance of government at the national and county level has huge impacts on translating the formalization promise to reality. Early evidence, however, demonstrates more frustrations than facilitation on the part of counties as regards the role of government in delivering on the procedural requirements for formalization.

The length of time taken to start off the implementation of the Community Land Act suggests the lack of will to facilitate rural communities in securing titles to their land. The future of the process is uncertain.

4.3 Dangers of formalizing informality

Communal property rights have traditionally been based on unwritten rules and cultural practices of traditional communities. Consequently, the process of developing the Community Land Act had to grapple with the debate on whether formalization had implications for governance and security of communal property rights. The contestation revolved around whether the process of giving meaning to the constitutional provisions on community land (Kameri-Mbote et al, 2013) would be complete or distracted by titling, the path to formalization most debated and recognized both in the country and literature.

The debate about formalization of customary or communal tenure arrangements is captured in an article by Prof Okoth-Ogendo titled, 'Formalising "Informal" Property Systems' (Okoth-Ogendo, 2008), which critiqued the Work of the Commission on the Legal Empowerment of the Poor, which sought to address the endemic poverty in society by moving the poor to the formal sector in several areas including property rights. The argument drew parallels from the writings of de Soto (2000), who also pointed out that the non-existence of a formal property system made having a modern market economy inconceivable. In de Soto's view, property was useful largely as an economic good. Customary property arrangements evidenced by lack of titling failed the formality test, could not be traded, and was consequently dead capital (Gilbert, 2002). On the other hand, and against de Soto's thesis, were arguments that titling was not a mark of formalization and, in any case, customary or communal land tenure was not informal or insecure as argued by private property proponents. (Cousins, 1987; Musembi, 2007).

These conflicting positions influenced the debate around the Community Land Act. While African scholars have argued against copying the private property model of the West, complete with registration (Odote, 2013:99), the history of Kenya's property regime glorified titling (Odote, 2013). Citizens became accustomed to seeking titles as evidence of ownership, a mark of property protection, and a status symbol. Any legislative enactment that departed from this reality would be seen as not responding to the past mistreatment of customary land rights but instead seeking to provide avenues for their continued disregard hence justify the previous obtaining philosophy of conversion to private 'modern' tenure (Ogola & Mugabe, 1996).

In the end, the Community Land Act leaned towards an element of formalization. First, communities were to be registered to be entitled to ownership of land. While the definition under the law was wide and inclusive, being seen as a 'consciously distinct and organized group of users and sharing the characteristics of either common ancestry; similar culture or unique mode of livelihood; socio-economic or other similar common interest; geographical space; ecological space; or ethnicity' (Republic of Kenya, 2016), such community must first be registered.

The registration process has two fundamental flaws. First, it does not fundamentally change the possibility of elite capture that was evident in the previous group ranches through having some

group representatives (Odote, 2013; Kibugi, 2009; and Lenaola, 1996) only changing their names to community land committees. Secondly, the requirement for registration, a task to be performed by a Community Land Registrar appointed by the national government makes community recognition subject to the whims of employees of the national government. This perpetuates the notion that community arrangements and institutional frameworks are informal and require formalization. The experience from implementation is such that this process has had its flaws, including Community Land Registrars who are accused of not being sensitive to the community dynamics, or communities whose efforts to lay claim to their land and thus get recognition fail on the basis that such process is not self-driven but coordinated by county governments. Some of the county governments have claimed that counties should be registered as a unit, e.g., Turkana County, and in Marsabit the leadership has claimed that Laisamis sub-county be registered as a unit, while not recognizing other land uses in a different category such as being a conservation reserve.

The question of titling was resolved more neatly by the Community Land Act through the requirement that community land will not just be registered but a title deed issued for it (Republic of Kenya, 2016). Unlike the obtaining situation before the adoption of the 2010 Constitution and the Community Land Act, such title will not be in the names of representatives but of the community itself. This is to avoid fraud where trustees previously dealt with communal land as their absolute property. However, the process of registration has been slow, with only two titles having been issued to communities under the law, four years since the Community Land Act was enacted. In addition, the provision in the law that such land can be sold to and registered in the name of individuals still leaves room for mischief.

The early evidence points to challenges around the registration requirements for communities and delays in issuance of title deeds for community land. Consequently, the adopted philosophy of formalization through registration and titling does not seem to be delivering the anticipated dividends.

4.4 Security of rights

Security of land rights is the legal protection of rights of individuals or groups of people, including local communities and indigenous peoples, over land. These rights include access, withdrawal, management, exclusion and alienation -- also referred to as bundles of rights -- and include all aspects of resource use and management (Ribot and Peluso, 2003). The source of these rights can be statutory law or customary law. For many years, land rights have been under statutory law, common law and customary traditions (Molen, 2000). The rights held under statutory and common law are defined in land legislations. This further brings about differences between the formal and customary rights because by their very nature, formal rights are safeguarded by legal instruments, holders of such rights can assume that their rights to land are protected and secured and, in some instances, can be contested in a court. Customary rights, on the other hand, have suffered this deficit. Customary land rights are secured in customary law, which is a body of unwritten rules that find their legitimacy in tradition, which may have been applied since time immemorial (Lotula and Chavenue, 2007).

The argument on the nature of the African commons and the inadequate consideration of customary rules in the laws that secure land rights can be said to account for the challenges faced by communities who own land communally. Kenya's Community Land Act lays a foundation for

community land security as the law provides for a basis for which they hold, use and transact lands under their own, usually customary norms (Wily, 2017). This is seen as a different policy direction in Kenya since previously, the only means through which property was legally acknowledged was if it had freehold or leasehold entitlements issued. Communal tenure is now provided for and customary land practices legally supported.

Despite these legal provisions, concerns have been raised on security of community land rights in the implementation of the Community Land Act. These concerns range from ambiguity on tenure security for communities, the question of land grabbing, including illegal acquisition of communal lands, to the inclusion of communities in decision-making. These concerns, in our view, undermine the law and the major gains that would have safeguarded community rights.

The definition of 'community' has been identified as an avenue that brings ambiguity in the implementation of the Community Land Act. Whereas community has been defined in the law on the basis of its key elements, which include ethnicity, culture and similar interest, the definition has been found limiting. The key challenge in conceptualizing 'community' for purposes of community land tenure has to do with figuring out how to promote and secure community land rights without accentuating ethnic differences and promoting ethnic polarization.

The land question in sub–Saharan Africa remains a controversial and politically charged issue. This has been attributed to colonial legacy and mass expropriation of land (Kanyinga, 2009). This has also meant marginalization of indigenous tenure systems, which have continued to affect the management of communal land (Okoth-Ogendo, 2002). Whereas the law has provisions that protect community land from acquisition by national and county governments, there have been concerns over the processes of compulsory acquisition, including the protection of unregistered land (Wily, 2017). The following excerpt from a report explains this situation:

> Communities in Isiolo, for instance, have pointed out how some community land is grabbed by the government and the elite within the community; communities live in fear as they are not certain what portion of their land will eventually be registered as community land. In addition, they also expressed concerns over land that is considered public land despite communities having settled on such land. There has been pressure to subdivide and privatize some community land even though the law prohibits [doing so] if it had not been declared an adjudication section by September 2019 (FAO,2019).

The upshot of the foregoing is that insecurity of tenure for communities continues to be a key challenge despite the promise of the Community Land Act.

4.5 Women's rights

Article 27 of the Kenyan Constitution calls for equality between men and women in decision-making, access and participation (Republic of Kenya, 2010). However, customary law and communal practices have been traditionally patrilineal, making women customary rights to land unguaranteed (Mwangi, 2009). This has remained a challenge even with the provisions in the Community Land Act, which recognize women's rights and require the participation of women in decision-making. Women have limited participation in decision-making processes because customary practices often obstruct

their participation (Kameri-Mbote, 2006). Women have, therefore, been found to suffer exclusion and, in some instances, they are not recognized.

The rights of women in the Community Land Act are straightforward: They should participate in decision-making processes on the community land. This aspiration is facing challenges as reflected in the case of the two registered communities. Whereas the women are currently included in the process of registration as officials, their participation in decision making is yet to be established. There is fear that the inclusion of women could be part of a formality to meet the requirements for registration only.

It has also been observed that part of the slow implementation of the Community Land Act lies in the lack of willingness for communities to comply with the provisions of the law. Part of these provisions require women to participate in decision-making. Ensuring the protection of women's rights requires addressing the entrenched patrilineal nature of Kenyan communities, and as evidenced by the raging debate on the difficulty in implementing the constitutional provisions on that decree that not more than two-thirds one gender constitute elective and appointive positions in the country, it is a goal that is far from being actualized.

This conflict between customary practices that exclude women and the provisions of the law that recognize their rights and role present a challenge on how customary rights can be applied in land management without importing elements that are unconstitutional. The laws on property in African countries restrict women's access to resources and limit their rights to family resources. (World Bank, 2016). Furthermore, customary land tenure systems have been found to discriminate women from ownership or control of land or restrict their right to inherit land, making divorced and widowed women particularly vulnerable to dispossession even in situations where the formal laws provide for gender equality (SID, 2004).

Courts have had to come in to enforce constitutional equality provisions with respect to land in succession matters where customary law is raised as a barrier to women's rights. The Kenyan case of *Joshua Kiprono Cheruiyot v Rachel Cherotich Korir*[4] is an example of customary practice being found to contravene the constitutional provisions of equality. In this instance, the court thwarted an attempt by two brothers to exclude their sisters from inheriting a share of their father's property on the basis that under Kipsigis customary rules allowed women to only inherit property from the families of their husbands, if and when they were married. The court held that this argument was discriminatory and contrary to the provisions of Article 27 of the Constitution, which provides for equality. The upshot is that despite the provisions of the Community Land Act, protection of women's rights under community land continues to suffer from retrogressive cultural practices.

4.6 Cost of implementation

The promise in the Community Land Act created great expectations among communities. The process of implementing the law was, however, hampered by lack of initiative in planning and budgeting for it. Government priorities have set aside the actualization of the Community Land Act, 2016, in helping communities to recognize, protect and register their community lands. At the national and county government level, the process of implementing the law has not been sufficiently supported with

[4] *Joshua Kiprono Cheruiyot v Rachel Cherotich Korir [2017] eKLR*

budgetary allocation as evidenced by the provision of funds for it at both levels. The recent processes of digitizing land registries have also focused on private land cases.

The communities are required to lodge a claim on the land by initiating and supporting all the processes, including financing the advertisement in a local daily newspaper on their intent, and call for the election of the Community Land Management Committee by the Community Assembly. The question that has not been resolved is how county and national governments can collaborate with local communities to register communities and thereafter community land in a cost effective, participatory, and timely manner. Failure to financially provide for and support communities to operationalize the law places a huge and unrealistic burden on indigent communities, thus resulting in their being unable to activate the required procedural steps to ensure that their land rights are recognized and protected in law.

5. Options for more effective implementation

The passing of the Community Land Act was a landmark development in Kenya after several false starts and a long delay. The hope that it would translate to improved recognition and protection of community land in the country has been hampered by slow and half-hearted implementation of the law.

While it is easy to explain these delays as the product of bureaucracy, resource shortages and other administrative challenges, they point to a more deep-seated and fundamental problem. The philosophy underlying the law is one that is removed from community systems and practices, and more in tune with private property, state-controlled property rights recognition, and enjoyment.

The overbearing nature of the state in land relations is one that the country sought to depart from when it adopted the 2010 Constitution. Unfortunately, it is the philosophy that permeates the letter and spirit of the Community Land Act and its implementation to date. It is necessary for a radical shift in viewing community relations and governance arrangements so as to bridge the divide by debunking the myth that the traditional is ineffective (Odote, 2017) or informal (Okoth-Ogendo, 2008). Self-governance must be promoted through recognizing that community rules and processes are self-contained processes. The constitutional architecture recognizes them as the 'common law' for Kenya. Those charged with overseeing implementation must seek to understand and support these rules and not seek to supplant them with their own version of rules and approaches. To do so will not only lead to resentment but also ineffectiveness.

6. Acknowledgement

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9. Key terms and definitions

African commons: Land in Africa owned collectively and used according to customary rules and transferred from one generation to the next.

Community:A distinct group of users of land identified on the basis of ethnicity, culture and community of interests and governed by a set of unwritten norms and rules.

Community land:Land held and used by a distinct community of users identified on the basis of ethnicity, culture or similar community of interest.

County:A sub-national territorial unit in Kenya consisting of a defined population and having its own local government and assemblies. Refers to one of the 47 entities into which Kenya is divided.

Customary tenure:A set of rules and norms that govern community allocation, use, access, and transfer of land and other natural resources.

Freehold: This is the right to land for an indefinite period of time and is only subject to the overriding interests of the state.

Formalization:The process of securing rights to property through a formal legal process that includes registration and titling of rights to land.

Tenure:The rules governing the manner in which land is held, used and managed. It deals with identification of who has the rights to land, the period under which they hold the land, and the conditions under which they hold and use the said land.

Land rights – The legal entitlement to land, its access, use, control and transfer. Under traditional systems, this is linked to society and livelihoods,

Land registration – The process by which the rights of land are recorded in a formal process, usually a register, so as to enable the public to know and thus respect the rights that entities have over a defined piece of land.

Land Use:Different purposes to which land can be put to.

Leasehold:This refers to an interest in land that is held for a specified duration of time and that expires at the end of that period.