



## Communities & forests in Kenya

### Where are new laws taking them?

Liz Alden Wily<sup>1</sup>



*The embrace of devolutionary forest tenure and governance as a logical and urgently needed path to recover Kenya's dwindling forest resources is weak*

**This Brief provides a snapshot of new laws in Kenya that fall short in enabling communities to secure traditional forests under formal collective ownership. The *Community Land Act, 2016* gives effect to constitutional recognition that community lands exist as a lawful class of property. The *Forest Conservation and Management Act, 2016* reconstructs forest tenure in line with this, providing for Community Forests for the first time.**

Yet both laws leave loopholes through which a long history of state co-option of customary forestlands risks being sustained. Insufficient constitutional distinction between public and community land is superficially to partly to blame, although a careful reading of multiple articles in conjunction with each other provides a clear steer on interpretation. Nevertheless, a seeming contradiction described later has allowed the forest law to avoid reclassifying certain national forest reserves as more correctly community properties, subject to sustained protected area status.

Limitations in both the Community Land Act and Forest Act may also frustrate opportunities for communities to retain their most important forests and woodlands as community property. Weak or contradictory provisions open the way for conflict between the state and communities as to who owns ancestral forestlands, lost opportunities to halt forest degradation through empowerment of communities as owner-conservators, and competition between communities and interest groups as to forest access and use.

Overall, the embrace of devolutionary forest tenure and governance as a logical and urgently needed path to recover Kenya's dwindling forest resources is weak. Clarifying regulations under both acts offer good opportunities to lessen constraints. Should this not occur, affected communities will have little option but to seek changes in the laws through court applications, including as necessary, interpretation of the constitution in respect of their rights.

**Part I** overviews the Community Land Act in the context of forests.

**Part II** focuses on the Forest Conservation and Management Act in the context of community rights.

**Part III** draws conclusions. All sections refer to the new national Constitution of 2010. The Land Act, 2012 is also mentioned.

<sup>1</sup> Independent land tenure specialist, research fellow at Van Vollenhoven Institute, Leiden School of Law, Netherlands, [lizaldenwily@gmail.com](mailto:lizaldenwily@gmail.com). FERN will post urls for the research papers upon which this Brief is based and where documentation of legal provisions is provided.



Fred Kibelio speaking at NLC meeting with Community at Chepkitale, November 2015

Photo: Forest Peoples Programme

## I The Community Land Act, 2016

Although Regulations are not yet issued, the Community Land Act has been in force since September 2016. Broadly, the new law gives effect to constitutional recognition in 2010 that rural communities own half or more of the national area of Kenya under customary tenure. The act lays out procedures through which communities may secure formal entitlement to these lands under collective title.

### From trust land to community property

Most community property has been designated as trust lands since the 1930s, ownership vested in local government bodies on behalf of communities, and administered by the national government. Although 30 years out of date, the following figure illustrates a continuing fact: that most trust lands (now 'community lands') are located in the drier northern half of the country. These areas contain woodlands and thickets covered by the definition of forests. These resources are important for local livelihood.

The tenure status of forests in less arid zones is more problematic. The most valuable montane forests, along with millions of hectares of other customarily shared lands, have been steadily lost to communities through administrative actions. These have ranged from definition of native territories as essentially leftover lands once the logging and other needs of the colonial administration including for white settlement were met, takings to meet the demands of stronger tribes for more land, exclusion of communal lands at compulsory titling of homesteads from the 1960s, land grabs

by influential individuals in collusion with the state, and with more promise, forest reservation to protect critical water catchments.

### Weak embrace of devolutionary resource tenure for national benefit

Yet one of the key resource tragedies of modern Kenya remains a governance tragedy in weak to no recognition that transfer of community assets to the state has not only failed to limit deforestation and degradation in government properties, but worse, may have abetted this, and with continuing incident. The logical conclusion that the nation needs to look to more accountable and citizen-based approaches for forest conservation has only weakly been absorbed into legal and policy paradigms. This is the case from the new Constitution onwards. Its significant advances in other respects aside, this supreme law fails to explicitly direct devolutionary natural resource tenure to save the environment. Instead, it offers tired paradigms from the early 1990s that citizens should participate, to help the authorities, and upping benefit-sharing with them, presumably to buy support for what has meantime also become an increasingly gun-toting forestry service.

This contrasts starkly with more modern approaches designed to save and restore forests, mangroves, non-flowing waters, and other natural resources through vesting these assets directly in citizens and especially in groups of citizens with longstanding rights to these areas, and therefore the incentive to sustain forests intact. Such subsidiarity also frees up the state to serve more efficiently and transparently as the

oversight authority, regulator, technical adviser, and monitor of progress, holding individual and community owners strictly to account for conservation obligations.

## **Ending a century of subordination of community-based African tenure**

The absence of this reform is also curiously dissonant with the advanced tenure reforms made by the Constitution. This powerful document finally liberated customary property from being treated as if unowned or necessarily controlled by the state on behalf of communities. It establishes 'community lands' as a lawful and equitable category of landholding, alongside public and private property. It directed that formalization of community ownership be through vesting title directly in communities. It instructed that a law be enacted to facilitate and regulate this. This is the purpose of the Community Land Act.

Government lands meanwhile became public lands owned by the nation or county populations as appropriate, although vested in the national or county governments as trustees. Yet, the composition of Government, now 'public land' barely changed. Of most relevance here, all existing protected areas remained national property. The consequences of this are discussed in the next section.

In the interim the Land Act, 2012 protects customary land rights and declares there shall be no discrimination against these; they shall be of equal legal force and effect with rights held under non-customary statutory tenure. When its land area is finally registered, a community may choose to hold title under freehold, leasehold or customary tenure. Although the last implies a stronger basis for a community to regulate its holding in accordance with customary norms, this is not necessarily the case, as the Community Land Act requires all community lands to be governed by community members through inclusive and transparent norms, rules to be approved by a majority of members.

Circumstances may arise in which the only option available to a community is to lease land from a private owner or from government. This may be the case for urban communities; for one of the features of Constitution and Community Land Act is that while community lands are primarily geared to rural customary owners, non-customary communities, such as living in the same geographical area or having shared land-based interests, may also apply for collective title. While the Land Act promises allocation of public lands to disadvantaged groups such as would include city slum communities, is it more likely that such lands would be leased to such a group rather than titled absolutely to them.

Once registered, local and national powers over community land cease, to the same extent as applies to private owners. All properties are subject to national laws. However, these may make special stipulations in respect of community owners. The new forest act is such a law.

## **Formalization of community property is urgent**

While the Community Land Act does not make registration of community lands compulsory, there is much to encourage communities to ensure this comes about. First, while the laws forbid county governments as trustees to dispose or transfer community lands that remain under their care until title is issued, there are loopholes through which a community could lose land in this interim period. For example, where transactions disposing community lands have begun, the law says these may be continued. County governments also retain administrative powers until registration, with surprisingly absent stipulation that communities consent to their actions, and despite constitutional obligation for 'fair administrative action'. Counties may also issue by-laws that have the effect of limiting how a community defines, uses or allocates its lands.

More ominously, the act permits a county government or national government to identify and set aside special purpose areas within a community's area 'for the promotion or upgrading of public interest'. Whilst well intentioned, this places such areas at risk of being excluded at final registration, on grounds that they constitute public land by virtue of their public use. Already the Community Land Act stipulates that any community land used communally, for public purpose, will be vested in the national or county government, not in the community.

## **Imbalance in the pursuit of titling public lands & community lands**

This relates to a larger concern, that as neither community nor most public lands are demarcated on the ground, there is a risk of some untitled customary lands being assumed to be public property, and/or allocated to private parties. Both absent demarcation of public property and a history of wilful disposal of such lands to private interests have policy concerns since 1999; this led to present-day political intention to identify and title every parcel of public land; these will be allocated through auction to the highest bidder or otherwise, or if a public asset not to be disposed of, vested in state agencies. Community lands are already caught up in determination to secure public lands to agencies of state, including in respect of forests. Although unable to sell such lands, the law permits state agencies may lease these out. This includes the Kenya Forest Service in respect of forest

reserves. Where a community's forest has been wrongly designated as public property, this removes the chance to recoup its forest one step further.

In comparison, while the Cabinet Secretary is directed by the Community Land Act to advance a programme of community land titling as soon as possible, the securing of community lands has been ambivalently pursued over six years since the Constitution. Delivery of collective entitlement to communities will take several decades. Even communities which have pursued requisite steps towards formalization, may have to wait until systematic adjudication and survey reaches their area. Meanwhile, large-scale agricultural land investments are on the rise, along with oil, gas, mining, and wind and solar power developments, and dramatic expansion of supporting infrastructure and new investment zones. This raises the incentive for government to presume lands as already public property unless proven otherwise.

Moreover, the Constitution permits new categories of public lands to be declared. The Land Act enables the National Land Commission, in charge of public lands, to set aside land for investment purposes. The Community Land Act provides for communities to reach agreements between investors to use their lands. In the event of the land being shown to be community land, the county government is to hold due compensation on behalf of the community, handing this over only at the time of formal entitlement. With government accountability in Kenya still ranking so low on virtually every transparency and governance index, even this positive provision may be found wanting. There is some irony in the fact that just as Kenya's parliament finally acknowledges community lands are real property, the threat of insecurity rises. The need for communities to purposively define their domains becomes more urgent every year.

Another constraint to community land security derives from local circumstances. The enactment of the Community Land Act has reputedly accelerated land grabs within many communities, such as by wealthier members who wish to expand their farm holdings for real or speculative purposes, prior to community procedures whereby the majority may limit such encroachments into valuable shared lands including woodlands and pastures. A weakness in the Community Land Act is that communities are not bound to immediately undertake simply zoning and rulemaking or to agree the limits of overall community land areas with neighbours, well ahead of formal adjudication and survey, which could be a decade or more hence. A structural shortfall of the law is that it makes the Community Land Registrar (yet to be appointed) responsible for calling meetings of communities to guide them towards identifying and

registering themselves and electing a land committee. Accordingly, no community has yet been registered. Nevertheless, there is nothing to stop a community informally defining itself and its lands well ahead of official approval. Some communities are doing so with the assistance of NGOs.

## **Formalization of community properties is a straightforward process**

Ultimately, legislators agreed to make issue of title to communities as easy as possible. Communities do not need to form legal entities in which to vest title on their behalf, but are held to be a legal person for this purpose; they may register the community by and under a name they choose, so long as community membership is defined (and presumably in a list of adult members to be regularly updated).

Despite legal inconsistencies as to the quorum for decision-making, adult community members together constitute the ultimate land authority, via meetings defined as a community assembly. Although unstated, the land committee is logically accountable to this body.

Usefully, the law is explicit that any decision to dispose of or otherwise alienate (sell) community land must have the support of two-thirds of registered adult members of the community. While this refers to situations where the community land is already registered, communities will wisely immediately adopt this as a rule.

## **Customary rights nested under collective ownership**

The Community Land Act is also clear that existing customary occupation and use rights such as held by individuals and families over homesteads and farms are protected, and to be documented and registered as 'customary rights of occupancy'. These rights are subordinate to the collective title to the land that will be formally vested in the community as a whole at registration. Experience elsewhere, including in neighbouring Uganda and Tanzania, suggest neither county nor community land registries providing for such customary registration will quickly eventuate. Helpfully, the Land Act does not require registration of such rights to assure these are legally protected.

## **Communal assets within community lands may not be as secure as communities assume**

The right for communities to hold some or all of their lands in common is explicit in the law. Such communal rights and thus the lands they refer to are equally protected with individual and family rights. The community may reserve

'special purpose areas', including for conservation, cultural site protection, farming, settlement, urban development, or 'any other purpose'.

Forestland is explicitly mentioned only in context of community obligation to abide by national and county government laws and policies. They are instructed to use and manage natural resources 'sustainably and productively'. This is immediately followed by clauses enabling communities to transfer rights to investors for the use and occupation of their lands. This is subject to community assembly agreement, almost certainly mistakenly drafted to imply that only 44 per cent of adult community members need agree to this.

Communal rights are potentially undermined by especially one provision, which appears to conflate communal use and public use and in a manner that when read with other clauses, could result in exclusion of some common properties from entitlement. This includes above-mentioned provisions that the national and county government may earmark community lands 'to upgrade public interest'. Such opacities could in practice deprive communities of lands they have voluntarily made available for schools and clinics, including those they have built themselves, and other lands they have retained as purposely unoccupied for holding livestock or other markets, and other community functions. Even traditionally-owned and used waterlands, so important for dry season cropping and grazing, will fall to the state in light of the expansive way in which water is earmarked as a public asset. There is also likelihood that not only reserved lands, already declared to be public property, but also buffer zones around these may be claimed by the state, which, in reading terms of the Land Act, 2012, could already be earmarked as lands which are declared to be national property ('public lands') vested in state agencies.

For most communities, contention will not fully surface until the point of formal adjudication and survey. Regulations under the law are needed to iron out its inconsistencies, to flesh out and order procedure to meet constitutional requirements for fair administrative action as constitutionally required to maximize the points at which community consent is required. Nevertheless, 'lawful' losses to the community land sector must be anticipated. These will derive less from the Community Land Act itself than from dictates of planning, investment, agriculture, livestock, natural resource and many other laws. In this Brief, only one source of potential conflicts is examined, that pertaining to provisions in the new forest law.

## II The Forest Conservation and Management Act, 2016

This new forest law is mainly innovative upon its predecessor Forests Act, 2005 in reconstructing forest tenure in line with constitutional classification of all land as belonging to the people of Kenya collectively as a nation, as communities and as individuals and accordingly formalizing classes of public, community and private land. To limit overlaps, the Constitution specified the content of each class. Despite this effort, overlaps do occur, including in respect of forests.

### **A conflicted presumption that national-important forests can only be owned by the State**

The most obvious overlap occurs in constitutional provision that government forests, game reserves and national parks are public lands, to be vested in the national government, while community lands are also listed in the Constitution as including the ancestral lands and lands traditionally occupied by hunter-gatherer communities. While some hunter-gatherers historically occupy rangelands there are also around 140,000 forest hunter-gatherers whose ancestral lands coincide with mainly high altitude national forest reserves. These are remnant areas of their much larger forested territories, depleted through state allocations to private farmers over many decades, or taken for other purposes. Although unlawful to do so, forest communities have continued to reside within the forest reserves, enduring periodic evictions since the 1930s, increasing in frequency and force in recent decades.

A fundamental misunderstanding blights this situation; the state assumes their return after each eviction, no matter how violent, is because they have nowhere else to go. Resettlement opportunities and compensation are increasingly offered. Affected communities find difficulty persuading government and politicians that their socio-cultural survival depends upon retaining an intact forest environment of which they are traditionally part, and that altering livelihood sources, such as uptake of some cultivation and grazing in naturally unforested moorland glades, or incomes earned by younger educated generations in towns, are irrelevant to their determination that their home territories remain their ancestral lands. Their pleas that they are better able to protect and restore degraded created on their lands also falls on deaf ears. Nevertheless, through a range of articles the Constitution now supports their land and other human rights, especially by their undisputed classification as marginalized communities.

Since the mid 1990s forest dwellers have increasingly protested the designation of their lands as Government

Forests, including through the courts. Cases remain unheard or, in one instance, directed the Government of Kenya in 2014 to return at least lands it had excised from two Forests for allocating to forest people, which it had, in practice, allocated to outsiders, including politicians and officials. The ruling has not been implemented. The African Commission on Human and Peoples' Rights petitioned the African Court on behalf of these communities in 2012, the Court's ruling anticipated before mid-2017. The Government of Kenya is obliged to implement whatever this ruling determines.

Despite longstanding as a publicly contested issue, the new forest law fails to unpack the overlap inadvertently implied by the Constitution, as constitutionalists expects laws to do. Instead it ignored the matter, or arguably, made its decision by sustaining designation of the affected forests as public property, scheduled, according to the forest act, to be vested in the Kenya Forest Service. This will almost certainly be challenged by forest communities, possibly in a joint application to the court by all forest dweller communities. This domestic action is likely to be pursued irrespective of the ruling by the African Court.

### **Sidestepping the issue by sustaining an interest group approach**

In the above circumstances the new forest law makes a meaningless concession in that, as has been the case since the 2005 Forests Act, any group of individuals, including from traditional forest dwellers may gain access and use rights through forming a Community Forest Association under the Societies Act. The Association may then apply to the Forest Service to use the forest in specified ways, on conditions the Chief Conservator will specify. Despite the terminology, Associations are self-selected interest groups rather than inclusive of all members of communities directly adjacent to Protected Areas.

A number of Associations of such persons have already obtained significant rights to many of the affected ancestral forests. Forest dweller communities blame these groups along with the Forest Service for the destruction being wrecked upon their 'their' forests through expanding grazing, felling, clearing, cultivation and other wood collection activities permitted these Associations. Instead of modifying the manner in which Associations are formed or how they obtain rights, the Forest Conservation and Management Act provides that no new applications can be made where there is an existing prior agreement or licence in relation to that forest. The general absence of new thinking in the law as to how community participation in forest conservation is obtained could also limit uptake by a much wider range of communities, such as in rangeland areas where sparse

woodlands and thickets are threatened, and/or where group ranches have been created. Thoughtful regulations under the new Act could provide some remedy, especially on matters of rights-based inclusion instead of formation around harvesting or other interests.

### **Meeting community forest rights beyond Reserves**

An important component of community lands as listed by the Constitution is lands that are 'lawfully held, managed or used by specific communities as community forests, grazing areas or shrines'. While some cases of such lawful holding are clear-cut, most are not. Communities in several counties report that they are being told by officials that, for example, any lands described in the repealed 2005 law as Local Authority Forest Reserves are deemed to be public property, not community property. This is despite the fact that at no point were these forests formally transferred from Trust to Government land, nor compensation to affected communities paid as was legally required. One plaint on this is already before the courts. Allegedly the local county government is caught between the instructions of its constituency residents and the national government.

### **Incomplete devolution of forest governance as well as tenure**

The above raises another limitation in the new forest law, in its failure to devolve more than day-to-day management of public forests to the 47 counties, despite the strong orientation of the Constitution as a whole towards devolutionary governance. Foresters remain attached to the centralized Kenya Forest Service, local conservation zones and committees to be created according to the forest act, do not necessarily follow county boundaries, and need include only one county official. The law grants no specific role for county governments to decide terms or receive a share of benefits available through managing public forests, including through their lease to investors by the Service, for commercial timber, bamboo, tourism or other purposes.

However, the law does direct counties to advise communities and individuals on forest management and counties may enter into joint management agreements with them. As shown earlier, they also have substantial and undefined rights to regulate how community lands are used, including determining that a certain area, such as a woodland, should be set aside 'to upgrade public interest', and which as a result could end up being transferred to the Kenya Forest Service. Communities may also wisely be wary of the right the law gives the Cabinet Secretary in charge of forests to declare any national, county, community or private forest to be a nature reserve, for which compensation to the owner will be



Ogiek hut and children at Chepkitale

Photo: Forest Peoples Programme

payable, seemingly only for deprivation of access and use. Overall, there seems ample opportunity for communities to be squeezed on both sides by local and national institutions on matters of unfarmed lands within community lands.

### **Community Forests potentially to the rescue**

A contrary force in the forest law opens the way for communities to secure at least some forests as their property and under their direct control.

In light of the new constitutional classification of landholding, the Forest Conservation and Management Act was forced to provide for community forests, having rejected this construct for its Forests Act, 2005. In doing so, the law reiterates the types of community lands where community forests may be declared as first laid out in the Constitution. This includes forests on the 'ancestral lands and lands traditionally occupied by hunter-gatherer communities'. Momentarily, this gave hope to forest dweller communities that Government had decided to recognize that relevant forest reserves were their ancestral community lands. Classification of these forests as Public Forests in a Schedule to the Act put paid to

that hope. Clearly, drafters - and parliamentarians, assuming they read the law they enacted - concluded that gazetted forests were no longer ancestral lands, traditionally occupied, or in other ways persuasively community property.

The case is more straightforward for un-gazetted forests on community lands. The forest act provides that all community forests shall be vested in the community, registered by the Service, and the county notified accordingly. The community may then appeal to the county for technical advice and to the Forest Conservation and Management Trust Fund to help support best practices. There is no sign that this Fund will be devolved to or administered by county governments. Again, a great deal rests upon how regulations under the Forest Conservation and Management Act handle the creation of Community Forests.

### III Conclusion

Rural communities in Kenya have long faced subordination of their customary rights to traditional forestlands. The concern today is that still not enough has been done to legally protect or restore those rights. This is despite, and in part, because of, new constitutional arrangements for land tenure. On the positive side, the 2010 Constitution provides directly for community lands as an existing class of landholding due the same protection given to public and private land rights. On this basis, for the first time, Kenyan communities may seek formal adjudication and survey of their lands under collective titles. The Community Land Act, enacted six years after the Constitution, finally provides directions on this.

On the other hand, the Constitution fails to distinguish between public and community lands to an extent that will ensure that no community will be lawfully deprived of its property without due cause, thereby undermining one of its other constitutional principles. This Brief has identified several routes through which such deprivation could occur, and be lawfully justified, at a pinch or otherwise. Popular resistance already exists in a number of quarters. While legal ambiguities and policy resistance to innovative paths to saving and restoring forests remain, an aggravated tug of war between the state and its citizens over rights to forestlands could ensue, and which has already from time to time become violent. The involvement of the courts seems inevitable. Rulings will tell much about the routes which devolutionary Kenya, is or is not, in practice embarked upon.

One minority community in Kenyan society has been noted as in the front-line of this broader conflict in the forest sector. This issue mirrors broader difficulties faced by transitional economies to transform their governance and strategic approaches in equal measure to transformation of their economies, and the property systems as needed to inclusively and justly underwrite safe social change. In plain language, it illustrates the time-old difficulty Governments tend to have with 'letting go to move forward'. On its part, and despite the openings provided by the Constitution and the Community Land Act, the Forest Conservation and Management Act opted for the status quo; it stops short of the recalibration needed to place some of the country's most

important forests and which also serve as functional water towers, on a safer footing than has been achievable over the last half century under traditional government tenure and management. The unhappy fate of the Mau Forest Complex is especially illustrative.

For several decades now but most tangibly with the new Constitution, the legal opportunity to dramatically advance conservation was before the forest sector's eyes: to pledge to vest these afflicted forests, on a case by case basis, in their long claimant communities, with conditions and caveats attached, which sustain the protected status of these forests under community ownership. This takes advantage of the particularly determined interest of traditional forest dwelling communities to repair and sustain forests intact, and moreover, for 'time immemorial'.

While this is an opportunity a rising number of states have felt obliged to take up, for the sake of conservation if not for human and land rights, the Kenyan state demurred. Accordingly, the forest sector is left with an increasingly agitated standoff between government and these marginalized citizens, and one that may only be resolvable by the courts. Tensions could expand exponentially as other communities around the country outside the Protected Areas sector find their constitutional and land law right to hold forests as their collective property, are frustrated. This could prove to be needless bravado on the part of the Administration; it could well find that the legal balance of rights has shifted since 2010 towards citizens, with concomitant requirement that the State serve less as landlord than as regulator of lands and resources, held as far as reasonably possible by citizens, as individuals or as groups. Constitution pledges to see historical land injustices addressed are but one additional route through which customary forest tenure security will be pursued.

In the interim, a glimmer of hope presents itself in the form of regulations that are yet to be drafted under both the Community Land Act and the Forest Conservation and Management Act. With careful crafting these could open more tangible opportunities for modern, devolved forest tenure and governance, so uncertainly delivered thus far in especially the new forest law.