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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 adaptions 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 (Teyssier, 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 tthe 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 Mushinge 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