

REMARKS ON BEHALF OF

PS - STATE DEPARTMENT FOR LANDS AND PHYSICAL PLANNING –

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CUSTOMARY TENURE RIGHTS IN EASTERN AFRICA

CONFERENCE THEME: MAKING LAND POLICY REFORMS WORK FOR COMMUNAL LAND RIGHTS IN EASTERN AFRICA

THEMATIC DISCUSSIONS: Status of regional instruments for promotion of communal land rights – Frameworks and Guidelines on Land Policy in Africa, AU Policy Framework on Pastoralism, and IGAD Transhumance Protocol and advocacy strategies for mainstreaming them into national policies

Topic for discussion: **Progress made with regional policies and guidelines at national level**

1. The Framework and Guidelines on Land Policy in Africa – This is a Framework to Strengthen Land Rights, Enhance Productivity and Secure Livelihoods.
    a. The Land question in Africa has its origins in geo-political economic and demographic factors.

b. The Kenyan land registration regimes began in 1884 – 1885 at the Berlin conference where there was a discussion to amicably divide resources among western countries. The 1889 Foreign Jurisdiction Act declared land in the protectorate in Kenya as waste land – unoccupied with no settlement. All land was therefore appropriated by the crown and whatever rights indigenous people had to the land was extinguished – leaving them mere tenants at the mercy of the crown.

Since independence, Kenya has had two land tenure systems, namely customary tenure and statutory land tenure systems operated under the following statutes: -

i. The Government Land Act Cap 280 - 1902, 1915 and 1920
ii. The Land Titles Act, Cap 282 - 1920 (Coastal strip belonging to the sultanate of Zanzibar)
iii. The Registration of Titles Act, Cap 281 of 1919 for the White Highlands
iv. Registered Land Act, Cap 300
v. The Land (Group Representatives) Act (Cap 287)
vi. The Trust Land Act, Cap 288 (Commencement 1st March, 1939) and the Sectional Properties Act of 1987

The net effect of these tenure systems on land administration was to perpetuate a dual system of economic relationships consisting of an export enclave controlled by a small number of European settlers and subsistence periphery operated by a large number of African peasantries. The duality was manifest in

a) Systems of land tenure based on principles of English property law on the one hand and a largely neglected regime of customary property on the other hand
b) A structure of land distribution characterized by large holdings of high potential land on the one hand, and a highly degraded and fragmented small holdings on the other;
c) An autonomous and producer controlled legal and administrative structure for the management of the European sector, as opposed to a coercive and government-controlled structure for the African areas; and a policy environment designed to facilitate the development of the European sector by under-developing the African counterpart.

Article 60 - Chapter 5 borrowed from the Land Policy 2009

(1) Land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and

sustainable and in accordance to the following principles; -

a. Equitable access
b. Security of rights
c. Sustainable and productive management of land resource
d. Transparent and cost-effective administration of land
e. Sound conservation and protection of ecologically sensitive areas
f. Elimination of gender discrimination in law customs and practices related to land and property in land
g. Encouragement of communities to settle disputes through recognized local community initiatives consistent with the constitution.

The National Land Policy highlighted the fact that the process of individualization of tenure, that is land adjudication and/or consolidation and the eventual registration under the Registered Land Act, Cap 300 and declaration of whole districts as Government Land has affected customary tenure in two material aspects: -

i. Undermining traditional resource management institutions and
ii. Ignoring customary land rights not deemed to amount to ownership, such as family interests in land, the rights of strangers (*Jodak* among the Luo and *Ahoi* among the Kikuyu) and communal rights to clan land (such as the *Inkutot* land among the Maasai and the rights to Kaya forests by the Miji-Kenda)

c. The Framework on guidelines on land policy in Africa sought to provide a framework that acknowledges the legitimacy of indigenous land rights systems.

The Community Land Act, 2016 acknowledges or provides that: -

i. Customary land interests are real property rights, with equal legal force and effect as provided to non-customary rights (e.g., leasehold and freehold entitlements);
ii. Customary lands, whether held by individuals, families, groups, or the community as a whole, are protected property, irrespective of whether or not these lands have been formally identified, mapped and registered; this must be taken into account at compulsory acquisition of their lands for a public purpose, and in any national land administration processes affecting their lands;

iii. Communities are legally enabled to acquire formal collective titles over all or part of their lands without this formalization extinguishing customary incidents of the land or community jurisdiction over it;

iv. Communities are legal persons for the purposes of land ownership; that is, they are not required to register companies, cooperatives, or other legal entities to own land on their behalf;

v. Customary/community lands lawfully include traditionally owned and shared off-farm forests, grazing, swampy lands, and collective title may encompass these properties

d. Developing effective land administration systems – digitization and digitalization of records. Densification of Geodetic controls to ensure accurate land parcel boundaries – to avoid boundary disputes and conflicts.

2. IGAD Transhumance Protocol and advocacy strategies for mainstreaming them into national policies. The purpose of this policy is to exploit the full social and economic potential of pastoral system by:

a. Allowing free, safe and orderly cross-border mobility of transhumance livestock and herders in search of pasture and water as an adaptation mechanism to climate change and weather variability within the IGAD region

b. Committing member states to invest adequate resources to pastoral regions and competent institutions managing transhumance;
c. Harmonization of national laws, and policies related to livestock and pastoral development, land use and governance, disease control and cross border measures

3. AU Policy Framework on Pastoralism

The 2 objectives of the Policy framework for Pastoralism in Africa are to: -

1. Secure and protect the lives, livelihoods and rights of pastoral peoples and ensure continent-wide commitment to political, social and economic development of pastoral communities and pastoral areas
2. The Framework principles are: -
    a. Recognize the rights of pastoralists, and the need to provide security, services, infrastructure and economic opportunities in pastoral areas which are comparable to non-pastoral areas
    b. The political and policy process – the framework highlights the processes required to ensure improvements in the political, social and economic

capital of pastoralists. This covers issues of representation and voice, and processes of improving dialogue and understanding between pastoralists and policy makers

c. Pastoralism as a way of life and a production system – The framework supports multi-sectoral coordinated approaches which combine to protect and develop human, financial, natural and physical capital. Implicit in this principle is the concept of supporting livestock-based development while simultaneously improving basic services and relevant infrastructure.

Summary

The Community Land Act, 2016 addressed cross-cutting issues in the 3 regional policies and guidelines in matters of inclusivity, gender mainstreaming and respect for cultural beliefs and practices. Infrastructural projects in the ASAL areas opens up the areas for economic growth and development.