

**COMMUNITY LAND BILL:**  
**PROPOSED AMENDMENTS<sup>1</sup>**

**PREPARED BY DR. KEN NYAUNDI**

These proposed amendments are suggested to be considered in the Mediation Committee discussions on the Community Land Bill now before the Senate.

Clause	Provision	Comment
2	Interpretation	<p>The definition of ‘<b>Community</b>’ ought to be more nuanced and expansive to accommodate more categories of groups or persons that qualify as part of the <i>community</i>. There are persons or groups who have lived together in <i>community</i> for decades but do not necessarily share ethnicity. These should be considered as part of one community. The current definition from (a) to (f) does not explicitly cover such groups of persons. The result is that these communities may be driven out of community land by the ethnic groups that are prevalent in these areas. To prevent this, there ought to be introduced an additional category (g) or an amendment of (d) to include a community as a group that shares the following attribute;</p> <p><i>- long term occupation of geographical or physical landscape.</i></p> <p><b>Community member</b>- The definition of a community member should be added so as to determine who has rights to community land. Such as: <i>‘includes all individuals, families and groups that historically live within the defined boundaries of the community land; and persons marrying a member of the community.’</i></p> <p>Full membership in a community must be extended to all persons above the age of 18.</p> <p>The <b>community land management committee</b> established under clause 15 should be expressly defined under clause 2 in the following manner: <b>Committee</b>-means the community land management committee established under section 15.</p>

<sup>1</sup> These proposed amendments are made by the Kenya Wildlife Conservancies Association.



4	Vesting of community land	<p>The provision that community land vests in the state in line with the Constitution should be added.</p> <p>‘Subject to the provisions of this Act, all community land areas vest in the State in trust for the benefit of the traditional communities residing in those areas and for the purpose of promoting the economic and social development of the people of Kenya, in particular the landless and those with insufficient access to land who are not in formal employment or engaged in non-agriculture business activities.’</p> <p>‘No right conferring freehold ownership is capable of being granted or acquired by any person in respect of any portion of community land.’</p>
7	Procedure for registration of communities	<p>Subsection (2) with respect to announcement inviting community members to a public meeting should include an announcement on a vernacular radio stations with local audience.</p> <p>Subsection (2) refers to a <b>community land management committee</b>. This should be defined in the interpretation section as- means committee established under section 15.</p> <p>Subsection (3) refers to section 16. The correct cross reference is section 15, which establishes the community land management committee.</p> <p>Subsection (4) is incomplete as it does not provide for the type of body the community shall be registered as. It should add that the community shall be registered under the Act as a body corporate with perpetual succession.</p>
8	Procedure for recognition and adjudication of	<p>Subsection (1) should provide the timeline within which the Adjudication Programme must be Gazetted.</p>

	community land	<p>The Adjudication Programme should include guidelines on how to ascertain community or individual claims of interest in or right over community land.</p> <p>It should align legal proof of land claims with customary practice by formalizing landscape-based evidence and allowing oral testimony as proof of land rights. (In case of any contestation). It must also include as one of the criteria, whether the group of persons share any of the attributes in the definition of ‘community’ in section 2.</p> <p>This should answer the question of, ‘how will a claim of an interest in or right over community land be ascertained?’</p> <p>Some of the detail could be placed in the regulations to be formulated under section 48 (2) (a).</p>
13	Communal land and reserve land	<p>What constitutes majority members under this section should be specified as in section 21 (1), that is, a 2/3<sup>rd</sup> majority.</p>
15	Functions of a community land management committee	<p>The definition of a <b>Community assembly</b> should be included in the interpretation section as:  ‘means a gathering of members of the community convened pursuant to section 15 (1).’</p> <p>The procedure of constituting the community land management committee should be more elaborate and provide for:</p> <ol style="list-style-type: none"> <li>i. Gender representation</li> <li>ii. Minority representation</li> <li>iii. Procedure of elections</li> <li>iv. Qualifications</li> <li>v. Powers of the committee</li> <li>vi. Term of office</li> <li>vii. Meetings of the committee</li> <li>viii. Financing the committee</li> <li>ix. Remuneration if any</li> </ol>

		These should be in regulations. It is proposed that this be included as an additional area of regulation under section 48 (2).
16	Interest conferred by registration	Since all communities are ‘communities of interest’-due to the homogeneous interest in the land that they have, the legislation should provide for what should be done in the event of the ‘interest’ of the community being extinguished.
19	Land use and development planning of community land	<p>The word ‘may’ as used in the provision implies that it is not mandatory for the community to supply the plan even upon request by the county government. Replace this with the word ‘shall’ to make it mandatory.</p> <p>Insert a clause specifying the timeline within which the plan must be submitted upon request by the county government.</p> <p>Subsection 19 (2) (d) the word ‘and’ at the end should be removed and added to the end of subsection (e).</p> <p>Why was subsection (f) inserted? What mischief is it attempting to cure? This provision reduces communities’ control over their land before they develop their plan. This is because they are to be subject to the counties development plan. The provision should therefore be deleted and replaced with: the county government shall support community land use zoning and development plans.</p>
23	Conversion of community land to private land	Subsection (b) refers to section 22 (2) instead of section 21 (2).
24	Conversion of public land into community	In the provision ...community land by...the word ‘by’ should be replaced with ‘through’ to avoid repetition.

	land	
27		Subsection 5 (c) delete the full stop and add a semicolon
28	Grazing rights	<p>This provision may cause conflict between pastoralists and other competing land uses other than farming that may interfere with grazing.</p> <p>Add the following provision (5) (e) ‘carry out any activity on the land, other than lawful grazing of stock, which may prevent or restrict the residents of the traditional community concerned from a reasonable exercise of their grazing rights.’</p>
29	Designation of other land use rights in community land	<p>Provision (g) ‘any other purpose as may be determined by the...county government or national government...’ leaves a loophole that may be misused by the government. There is need to provide for compensatory measures analogous to those of ‘compulsory acquisition’.</p> <p>Such provisions establish appropriate checks and balances between local leadership and the different levels of government.</p>
34	Existing rights to use and occupy community land	The cross-referenced sections 28 and 29 are not in tandem with the provisions of the sections themselves.
36	Benefit sharing	The quorum and voting majority under this section would entitle a small number of community members to commit the whole community.
39	Dispute resolution mechanism	<p>Subsection 3 and section 40 (1), separate the words land arises. It currently reads a landarises.</p> <p>The dispute resolution system should be tiered. Add a</p>

		<p>provision after subsection (2) stating that in case the internal dispute resolution mechanisms set in the community by-law fail, the parties should resort to the alternative forms of dispute resolution set therein.</p> <p>Further, prior to the communities coming up with their own by-laws, the Act should expressly provide that they will utilize alternative dispute resolution.</p>
47	Group representatives, land-buying companies etc.	<p>There are no provisions on land-buying companies in the provision hence this should be eliminated from the marginal note.</p> <p>Subsection (2) should provide for a transition from the group representative to the community by adding ‘...cease to hold office <i>and the registered community shall elect a new committee</i>’</p>
48	Regulations	<p>The following regulations should be included in subsection (2):</p> <ul style="list-style-type: none"> <li>▪ Setting aside community land for a public purpose</li> <li>▪ Election of a community land management committee</li> </ul>

**Proposed additional clauses**

Clause	Objects and purpose	<p>As a principle of good legislative drafting, every legislation ought to have a clause on objects and purpose. The primary objectives of any comprehensive legislation is to provide for:</p> <ul style="list-style-type: none"> <li>▪ Substantive rights;</li> <li>▪ Procedural rights; and</li> <li>▪ Institutional Structure.</li> </ul> <p>The Bill includes its objects in the short title but not in the body of the legislation. The objects and purpose of the legislation should be reflected (in addition) as a substantive and comprehensive clause in the Bill as:</p> <ol style="list-style-type: none"> <li>i. Recognition, protection and registration of community land rights;</li> <li>ii. Establishment of the institution for the</li> </ol>
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		<p>management and administration of community law;</p> <p>iii. Providing for the procedures for management and administration of community land rights;</p> <p>iv. Providing for the role of county governments in relation to unregistered community land;</p> <p>v. Documentation and mapping of the existing forms of communal land tenure; and</p> <p>vi. Any other connected purpose.</p>
Clause	Involvement of women and minority groups in governance	<p>The Bill needs to be explicit regarding the protection of vulnerable groups and their involvement in governance. It should leave no room for interpretations that can weaken these protections.</p> <p>For instance, women should be involved in decision making and voting at the community assembly. The 2/3<sup>rd</sup> gender rule as encapsulated by the Constitution should be observed in such instances and in the appointment of community land management groups.</p> <p>Minority groups should also be represented in decision making and governance and in investment negotiations.</p>
Multiple registration		There should be procedures for multiple registrations for recognition of communal land rights.
Shared resources		There needs to be added provisions for inter-communal access to shared resources.
Prohibition against fences	Some jurisdictions prohibit fencing of community land into separate paddocks. This should be considered.	<p>Subject to such exemptions as may be prescribed, no fence of any nature -</p> <ul style="list-style-type: none"> <li>▪ shall, after the commencement of this Act, be erected or caused to be erected by any person on any portion of land situated within a community land area; or</li> <li>▪ which, upon the commencement of this Act, exists on any portion of such land, by whomsoever erected, shall after such date as may be notified by the Cabinet Secretary by notice in the Gazette, be retained on such land.</li> </ul>