

**COMMUNITY LAND BILL, 2015 AND WILDLIFE CONSERVATION ON COMMUNITY  
LAND IN KENYA  
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**1. Introduction**

In Kenya, property rights, especially community land rights, are important for sustainable investment in natural resources. In a country where 66% of the land mass falls under the constitutional classification of community land<sup>1</sup> it is inevitable that most of the natural resources are found in land under this category. These natural resources are largely composed of minerals and wildlife resources.

In Kenya, it is estimated that wildlife resources account for 70% of gross tourism earnings, 25% of the Gross Domestic Product (GDP) and more than 10% of the total formal employment sector.<sup>2</sup>

While most wildlife resources fall within protected areas and are therefore managed by the Kenya Wildlife Service,<sup>3</sup> much of it also occurs outside protected areas: in the dispersal areas on community land.<sup>4</sup>

Many communities have lived with wildlife resources without formal laws and policies, and have ensured wildlife conservation through cultural and social bonds, and traditional practices.<sup>5</sup> Unfortunately, the communities derive little or no benefit from wildlife tourism. In fact, in ordinary times, wildlife is tolerated, fenced off or killed in these areas. This is because it is considered a threat to life, property and costly to accommodate, especially by those communities living adjacent to protected areas.<sup>6</sup> Rather than being viewed as an investment opportunity, wildlife which exists on community land has historically been considered a burden.<sup>7</sup>

One of the biggest factors contributing to this has been the lack of a clear management framework for community land to address the subject of wildlife conservation on community land. Such a framework has now been introduced in the recent Community Land Bill, 2015. This chapter discusses the impact of the Bill on wildlife conservation.

**2. Community Land Bill, 2015**

Under the Constitution of Kenya, 2010, community land is vested in communities identified on the basis of ethnicity, culture or similar interest.<sup>8</sup> Any unregistered community land is to be held by the county government on behalf of the community.<sup>9</sup> Article 63 (5) of the Constitution then mandates parliament to enact legislation to further provide for the management of community land.

The Community Land Bill of 2015 which is currently under consideration provides for the substantive and procedural rights in land, and creates an institutional framework for management of community land.<sup>10</sup> It is hoped that by identification and protection of community land rights, community land shall henceforth benefit the communities undertaking wildlife conservation as a form of land use.

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<sup>1</sup> Kameri Mbote P 'Land tenure, land use and sustainability in Kenya: Towards innovative use of property rights in wildlife management' IELRC WORKING PAPER 2005 – 4.

<sup>2</sup> Ministry of Forestry and Wildlife 'The National Wildlife Conservation and Management Policy, 2012'

<sup>3</sup> Kenya Wildlife Service Website 'About Us'. Accessed at <http://www.kws.go.ke/about-us/about-us>

<sup>4</sup> Supra note 'Wildlife Policy'

<sup>5</sup> Ibid

<sup>6</sup> KWCA 'About KWCA: Our People'. Accessed at <http://kwcakenya.com/page/about>

<sup>7</sup> Supra note 2 'Wildlife Policy'.

<sup>8</sup> Article 63(1) of the Constitution of 2010

<sup>9</sup> Ibid

<sup>10</sup> The Community Land Bill, Bill No. 45 of 2015

### **3. Impact on Wildlife Conservation**

The National Wildlife Policy<sup>11</sup> recognized the challenges and impediments facing the wildlife sector. These include: the loss of biological diversity; poor land use planning; destruction of wildlife habitats; insecurity; insecure tenure to land and illegal allocation; inadequate incentives; lack of partnerships; lack of management and development plans; human wildlife conflict; poor conservation of shared wildlife resources; and lack of governance structure.<sup>12</sup>

The enactment of the Wildlife Conservation and Management Act of 2013 made the first major steps towards addressing these challenges. However the full implementation of this Act has not been achieved because the Regulations under it have not yet been promulgated. The Wildlife Act deals with the wildlife resources inside protected areas and to a minimal extent, the wildlife which subsists outside the protected areas.

It is however recognized that there is a large segment of wildlife resources that occurs outside protected areas, often in community land, co-existing and conflicting with community members. For such wildlife to be properly managed, the laws, policies and institution have to be aligned to promote conservation.

The enactment of a Community Land Act would be a step forward in improving the management and administration of community land for better wildlife conservation. The following part highlights some of the challenges of wildlife conservation on community land and the manner in which the pending Bill could deal with them.

#### **3.1. Governance and wildlife conservation**

Lack of proper governance structures is one of the major factors that paves way for mismanagement of community land, and the resources therein. This inexorably impacts on wildlife conservation as there is no proper system of direction, information dissemination, and accountability.

Clause 15 of the Community Land Bill creates an institutional and regulatory structure for the management, registration and devolved governance of community land. The community assembly established under this clause, is the decision making body of the community, and is composed of all the community members. The Bill also establishes a community land management committee to oversee the day to day running of the community and to:

- i. Manage and administer community land on behalf of the respective community;
- ii. Coordinate the development of community land use plans in collaboration with the relevant authorities;
- iii. Promote the cooperation and participation among community members in dealing with matters pertaining to the respective registered community land; and
- iv. Prescribe rules and regulations, to be ratified by the community assembly, to govern the operations of the community.

These two institutions will have the authority, in consultation with the community, to formulate a strategy of administration, management, conservation and sustainable utilization of wildlife resources where these exist on community land.

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<sup>11</sup>Supra note 2 'Wildlife Policy'

<sup>12</sup>Ibid

### 3.2. Land use plans and conservation

Land is important as the base upon which activities such as agriculture and wildlife conservation are undertaken. A modern approach to land use demands a carefully thought out and succinct management plan. Yet community land today seems to have been left behind in *ad hoc* administration, which makes it a target for unplanned or under-planned development. Where management plans exist, they are formulated in a non-participatory manner by a select group of people who have minimal ties or accountability to the community. Further, there are no sufficient resources for the implementation of the plans and the necessary monitoring of the execution.

In some areas where wildlife exists lack of proper laws and planning has led to significant changes in land use in favour of agriculture which may have faster and more tangible benefits. In other areas, the animals have also been pushed to the periphery to accommodate rural settlements. This systematic encroachment on wildlife habitat has led to fragmentation and disruption of wildlife movements, migration and conservation.<sup>13</sup>

It is observed that increased pressure for subdivision of land into individual holdings in areas that serve as wildlife dispersal and migration areas run counter to wildlife management. Failure to provide for multiple land uses and lack of proper management of wildlife-based tourism also hampers wildlife management.<sup>14</sup>

Under clause 19, the Bill requires the registered community to develop and submit to the county government a plan for the development, management and use of community land. This plan must consider the 'conservation, environmental and heritage issues that are relevant to the management and use of the land' and incorporate them in the plan. Such considerations would naturally include the presence of wildlife on the land. Where the plan is yet to be developed, the county government must have in place a plan that the community should follow in this regard.

Clause 29 of the Bill provides that the community may reserve a special purpose area for conservation while clause 35 requires that where any natural resources are found on community land, they should be managed sustainably and productively.

Land use plans and zoning not only allows for an integrated form of land use, but also reduces likely incidences of human-wildlife conflict. Regular compilation of baseline information on incidences of damage, loss of life and property, caused by wildlife,<sup>15</sup> by the authorities will also aid in information gathering, monitoring and planning.

Such land use plans and zoning are important as they proffer direction on how areas holding wildlife should be sustainably utilized to produce optimal gain. In general, a proper utilisation of management plans should positively impact of wildlife conservation.

### 3.3. Decision making

It is often the case that decisions on community land management are taken by persons who have little or no ties with the community. These include decisions on wildlife conservation where these exist on community land.

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<sup>13</sup>Ibid p.5

<sup>14</sup>Kameri Mbote P 'Land tenure, land use and sustainability in Kenya: Towards innovative use of property rights in wildlife management' IELRC WORKING PAPER 2005 – 12.

<sup>15</sup>Supra note 2 'Wildlife Policy' p.11

The community assembly created under clause 15 of the Bill is mandated to take decisions on every matter affecting community land. Clause 15(4) requires decisions on sale or alienation of community land to be taken by a two thirds majority and other minor decisions to be taken by a simple majority of the members present in a meeting. This means that decision making on wildlife is now an internal process and will be taken by the people who are impacted by the wildlife for their own benefit.

### **3.4. Insecurity of tenure**

Land tenure practices and illegal land allocation even in areas that are inhabited by wildlife have resulted in apathy by community members towards wildlife. Further, insecurity of tenure to community land is an additional challenge that increases acrimony between wildlife agencies and communities due to the overt conflict of interest.

In some areas, local authorities are entrusted with parcels of land on behalf of the community. This system however, without proper oversight, has lent itself to abuse of the trusteeship through illegal allocation and change of user. This has negatively affected wildlife conservation and management in such areas.<sup>16</sup>

Without a system that protects security of tenure, communities and other investors remain hesitant to invest in conservation as a form of land use. This is partly because it is a form that requires longer term investment as compared to agriculture and other forms.

Land owners and communities need to have control and responsibility over wildlife resources if they are to meaningfully participate in its management.<sup>17</sup> Security of tenure in community land is essential in enabling the communities to collectively make management decisions. This wildlife-land ownership is necessary for countering the current apathy towards wildlife.<sup>18</sup>

In line with article 63 (1) of the Constitution, the Community Land Bill in clause 4 vests community land in the community. Clause 5 further recognises, protects and provides for the registration of community land rights. This put community land rights at par with individual rights to private land, which has historically been the focus of legislation in Kenya.

Such clarity on security of tenure now allows registered communities to choose and commit to wildlife conservation as a form of land use that is capable of providing a significant return.

### **3.5. Lack of incentives for investment in conservation**

Closely related to the issue of lack of tenure has been the lack of incentives to invest in wildlife conservation. While wildlife resources in protected areas are managed through an established structure which often produces tangible benefits, there is no corresponding system of incentives to motivate communities to adopt conservation as a form of land use commensurate to the task of sustaining wildlife.<sup>19</sup>

Lack of incentive in turn discourages local and international investors from investing in wildlife conservation. Most investors consider certainty of the legal environment to be one of the key factors of an investor friendly environment. Where the land tenure system does not allow the investor time to

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<sup>16</sup>Op cit 2 'Wildlife Policy' p.8

<sup>17</sup>See 'Introduction' in *Voices from Africa-Local Perspectives on Conservation 4* (World Wildlife Fund, Dale Lewis & Nick Carter, eds., 1993)

<sup>18</sup>Owen J. Lynch & Janis B. Alcorn, 'Tenurial rights and Community-Based Conservation' in *Natural Connections: Perspectives in Community-Based Conservation* 373 (David Western et al. eds 1994)

<sup>19</sup>Op cit 2 'Wildlife Policy' p.8

get sufficient return, and also to benefit the community, then investors may be reluctant to invest in wildlife conservation.

The Bill provides a framework of benefit sharing with the community. Clause 36 requires that any agreement relating to investment in community land be made after an open consultative process taking into account payment of compensation and royalties to the community.

From the communities' point of view, this gives them the benefit of the legal recognition of the need for adequate compensation from investments, while the investors get the benefit of certainty of the legal framework of investing in wildlife conservation at the community level. This should also help alleviate the acrimonious relationship between communities and wildlife.

### **3.6. Lack of partnerships**

Lack of a proper system of leadership and management of community land also renders any form of partnership between the community and wildlife management authorities impossible. Yet, as mentioned earlier, in many instances, wildlife in protected areas seasonally disperses to surrounding community land. Lack of this partnership leads to conflict as opposed to a harmonised approach to conservation and benefit sharing.

Under the Bill, communities can now, through the community land management committee in clause 15 (3) coordinate with the relevant authorities in development of land use plans. The committee also has the role of promoting co-operation and participation among community members in matters pertaining to land.

Having proper institutions in place will enable communities to be able to form the required partnerships for wildlife conservation.

### **3.7. Conservation of shared wildlife resources**

Wildlife resources, as with most natural resources straddle the boundaries of two or more communities. The nature of wildlife resources is that no single property rights holder can own the entire range within which they are found. Communities are therefore likely to hold the same wildlife populations at the same or different times.<sup>20</sup> Without a proper understanding of this cycle, and a harmonized approach to wildlife conservation and management, disputes, or mismanagement of wildlife is very likely to arise.

Due to this, the desire to secure separate land rights must therefore be subordinated to the need for sustainable wildlife management through cooperation.<sup>21</sup>

One of the proposed additions to clause 36 on benefit sharing is that where resources, such as wildlife resources straddle the boundaries of different communities, the leadership must come up with a way of collaborating in conservation of the resources and sharing of benefits. One of the ways of operationalising this is through formation of a joint wildlife management committee consisting of the different stakeholders and different groups of land owners. Such collaboration will increase efficiency and reduce incidences of conflicts over natural resources.

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<sup>20</sup>D.H.M. Cumming 'Conservation Issues and Problems in Africa', in *Voices from Africa- Local Perspectives on Conservation* 23 (World Wildlife Fund, Dale Lewis & Nick Carter, eds, 1993)

<sup>21</sup>Ibid

### **3.8. Dispute resolution**

Lack of recognized avenues of dispute resolution either within the community and between communities further disrupts wildlife conservation efforts.

Part VIII of the Bill attempts a solution to this challenge by introducing detailed provisions on various options of dispute resolution mechanisms. These include traditional dispute resolution mechanisms, mediation, arbitration, and finally court adjudication.

Where disputes arise over wildlife resources, communities now have various avenues of solving their disputes.

### **4. Conclusion**

Wildlife conservation is one of the many forms of land use that can be undertaken on community land. However, property rights in community land in Kenya have historically discouraged conservation even though much of the wildlife resources in Kenya are found in dispersal areas on community land. Lack of proper management structures and tangible benefits from wildlife has led to an acrimonious relationship between human and wildlife, where animals are seen only as destructive and a burden to accommodate on community land.

The growth of conservation as a form of land use on community land, and the enjoyment of benefits from this therefore hinges on a good legal framework that establishes the substantive rights in community land, elaborate procedures to be followed and the right management structures.

The Community Land Bill of 2015, through the various elements it proposes, holds the promise of promoting sustainable wildlife conservation on community land if properly implemented.