

Towards Effective Management of Community Land Disputes in Kenya for Sustainable Development

*By: James Ndungu Njuguna**

Abstract

Article 61 (2) of the Constitution of Kenya, 2010 classifies land as public, community and private. This is a huge departure from the previous constitution order where community land was not specifically recognised. Classification of community land presents huge potential for communities in Kenya to pursue a common agenda in relation to the land in line with traditional African values of inclusivity, harmony and togetherness. However, the likelihood of disputes arising in respect of community land is also high due to the large number of individuals claiming a stake in such land.

The paper thus seeks to critically analyse the current legal framework for management of community land disputes under the Community Land Act. It will examine the viability of each of the mechanisms stipulated under the Act in management of community land disputes and point out their strengths, weaknesses and opportunities. Finally, the paper will propose recommendations aimed at facilitating effective management of community land disputes in Kenya in order to foster sustainable development

1. Introduction

Land has always held a central position among African communities. It was the basis upon which the struggle for independence was waged in most countries. ¹ In Kenya, land has traditionally dictated the pulse of the

* LLB (Hons), LLM (UON), PG Dip. (KSL), Dip. Management (KIM), Dip. Law (CILEX), ACI Arb.

¹ Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land., available at http://kenyalaw.org/kl/fileadmin/CommissionReports/A_Report_of_the_Land_Com

nationhood and continues to occupy a central position in the country's economic, social, political and legal relations.² Natural resources including land play an important cultural role for many local communities and may even be a point of pride for the nation as a whole serving historical and cultural significance.³ The importance of land means that land and land based resources must be managed, utilized and exploited in a sustainable, efficient, productive and equitable manner.⁴

The Community Land Act⁵ was enacted to give effect to article 63 (5) of the Constitution in respect to community land. It inter alia provides for the recognition, protection, management, registration and administration of community land.⁶ One of the salient features of the Act is the stipulation of a set of mechanisms to govern management of disputes relating to community land.⁷ The classification of community land is important since it will encourage land management by communities.⁸

However, despite its recent recognition, the concept of community land is not novel in Kenya. Before colonialism, the land system tenure in Kenya comprised of communities who held land in common and used it either for

mission_of_Inquiry_into_the_Illegal_or_Irregular_Allocation_of_Land_2004.pdf
(accessed on 23/02/2021)

² *Ibid*

³ Muigua. K., Conflict Management Mechanisms for Effective Environmental Governance in Kenya, available at <http://kmco.co.ke/wp-content/uploads/2018/09/Conflict-Management-Mechanisms-for-Environmental-Governance-Kariuki-Muigua-September-2018.pdf> (accessed on 04/03/2021)

⁴ Muigua.K., Wamukoya.D & Kariuki.F.;, *Natural Resources and Environmental Justice in Kenya* Glenwood Publishers Limited, 2015

⁵ Community Land Act, No. 27 of 2016, Government Printer Nairobi

⁶ *Ibid*, Preamble

⁷ *Ibid*, Part VIII

⁸ Muigua. K., Integrated Natural Resources and Environmental Management for Sustainable Development in Kenya, available at <http://kmco.co.ke/wp-content/uploads/2019/01/Integrated-Natural-Resources-and-Environmental-Management-for-Sustainable-Development-in-Kenya-Kariuki-Muigua-January-2019.pdf> (accessed on 04/03/2021)

agrarian activities or pastoralism.⁹ Under this system that was prevalent in other African communities, individuals obtained land rights by virtue of residence in a particular community.¹⁰ Individuals did not own such land but could cultivate and use it for other purposes. When not in use, the land reverted back to the community.¹¹ Consequently, Land ownership and use was also governed by the respective customary laws of the various ethnic communities.¹² Disputes involving land were managed through existing traditional justice systems which played a major role in managing conflicts and maintaining social order among the communities.¹³ These communities had rules to ensure that individuals lived in harmony with one another and that justice was done when conflict broke out.¹⁴ This was administered by institutions such as the council of elders. Traditional conflict resolution mechanisms were geared towards fostering peaceful co-existence in the community.¹⁵

Colonialism impacted the social, economic, cultural and political life of indigenous African communities in a radical manner. The land tenure system was massively impacted due to the implementation of laws and policies that

⁹ Wamicha W N and Mwanje J I, 'Environmental management in Kenya; Have the national Conservation Plans Worked?' Organization for Social Science Research in Eastern and Southern Africa, (2000) Addis Ababa, Ethiopia.

¹⁰ Kajoba. G., 'Land Use and Land Tenure in Africa: Towards an Evolutionary Conceptual Framework', available at <https://www.codesria.org/IMG/pdf/Kajoba.pdf> (accessed on 23/02/2021)

¹¹ *Ibid*

¹² HWO Okoth Ogendo, 'The Tragic African Commons: A Century of Expropriation, Suppression and Subversion' Amplifying Local Voices: Striving for Environmental Justice, Centre for International Environmental Law, et. al.". In: Cent. Afri. J. Pharm.Sci. 5(3): 60-66. Cent. Afri. J. Pharm.Sci. 5(3): 60-66; 2002.

¹³ Kariuki. F., 'Conflict Resolution by Elders in Africa; Successes, Challenges and Opportunities', available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3646985 (accessed on 23/02/2021)

¹⁴ Muigua.K., Nurturing Our Environment for Sustainable Development, Glenwood Publishers Limited, 2016

¹⁵ Muigua. K., Traditional Dispute Resolution Mechanisms under Article 159 of the Constitution of Kenya, 2010, available at <http://kmco.co.ke/wp-content/uploads/2018/08/Paper-on-Article-159-Traditional-Dispute-Resolution-Mechanisms-FINAL.pdf> (accessed on 04/03/2021)

resulted in mass disinheritance of African communities.¹⁶ Land was thus held by colonial officials in trust for the crown through laws and policies such as the 1901 East African Lands Order in Council, Crown Land Ordinance of 1915, the Trust Land Act and the Swynnerton Plan.¹⁷

The dawn of independence was met with optimism that the transfer of power to indigenous communities would dramatically change the policies that were in place, especially with regards to land; this however was not the case.¹⁸ The ensuing period witnessed a general re-entrenchment and continuity of oppressive land policies, laws and administrative structures that resulted in massive land injustices.¹⁹ The power of the President to allocate and alienate land was misused through a culture of selective land allocation by the political elite to gain political support and mileage. These problems were well addressed by the 1999 Njonjo Report and the 2002 Ndung'u Report that advocated for radical land reforms that would recognize and address historical land injustices, customary land rights and conflict resolution.²⁰

Promulgation of the Constitution of Kenya, 2010 thus ushered in an era of hope in relation to the proverbial land issue in Kenya. The Constitution

¹⁶ Republic of Kenya, *National Land Policy*, 2009, Government Printer, Nairobi

¹⁷ See generally Ojienda T., 'Principles of Conveyancing in Kenya: A Practical Approach' May 2008; see also S. Wanjala, 'Land Ownership and Use in Kenya; Past, Present and Future' in Wanjala S (ed), *Essays on Land Law: The Reform Debate in Kenya*, University of Nairobi, Nairobi, 2000

¹⁸ Njuguna. J., 'Arbitration as a Tool for Management of Community Land Conflicts in Kenya,' (2019), *Journalofcmsd Volume 3 (1)*.

¹⁹ Muigua.K., Wamukoya.D & Kariuki.F.; '*Natural Resources and Environmental Justice in Kenya*' Glenwood Publishers Limited, 2015; See also Kameri-Mbote P, 'The Land Question in Kenya: Legal and Ethical Dimensions' International Environmental Law Research Centre (2009) Strathmore University and Law Africa.

²⁰ Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land., available at http://kenyalaw.org/kl/fileadmin/CommissionReports/A_Report_of_the_Land_Commission_of_Inquiry_into_the_Illegal_or_Irregular_Allocation_of_Land_2004.pdf; See also Report of the Commission of Inquiry into the Land System of Kenya of Kenya on Principles of a National Land Policy Framework; Constitution Position of Land and New Institutional Framework for Land Administration., available at <http://www.archives.go.ke/wp-content/uploads/2016/10/List-of-Commission-Reports.pdf> (accessed on 25/02/2021)

dedicates an entire chapter on land and environment and further sets out certain principles to guide land policy in Kenya key among them equitable access to land; security of land rights and encouragement of communities to settle land disputes through recognized local community initiatives consistent with the Constitution.²¹

The paper seeks to critically analyze the dispute management mechanisms set out under the Community Land Act. It argues that disputes relating to community land are sui generis in nature and their management requires a well customized approach. The paper will give an overview of these disputes and how they pose a threat to the sustainable development agenda in Kenya. It will then propose reforms aimed at effective management of these disputes in order to promote sustainable development in Kenya.

2. Nature of Community Land Disputes

Sustainable development has been defined as development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs.²² It has become one of the central pillars of the development agenda across the globe and has been enshrined as a principle of governance under the Constitution.²³ Further, it is also one of the principles governing land policy in Kenya.²⁴ To this extent, the Community Land Act requires every person dealing with community land to be guided by certain principles including sustainable development.²⁵ It is a key pillar in the management of natural resources that is inextricably linked to people's livelihoods thus requisite in moving towards environmental justice.²⁶ Use and management of community land can aid the attainment of sustainable

²¹ Constitution of Kenya, 2010, Chapter Five, Article 60 (1)

²² World Commission on Environment and Development, *Our common future*. Oxford, (Oxford University Press, 1987).

²³ Constitution of Kenya, 2010, Article 10 (2) (d)

²⁴ *Ibid*, Article 60 (1) (c)

²⁵ Community Land Act, Op Cit, S 3 (b)

²⁶ Muigua.K., Wamukoya.D & Kariuki.F., *Natural Resources and Environmental Justice in Kenya* Glenwood Publishers Limited, 2015

development due to indigenous knowledge and skills on how to grow food, varieties of crops to plant and how to control diseases in plants and livestock.²⁷ Community land as a natural resource is a possible breeding ground for conflicts due to the multiple interests at stake. This could take the form of conflict between communities over community land interests; Conflict between an individual community member and the community; conflict between the community and county or national government over community land interests; and conflicts between county governments for community land that crisscross the county boundary.²⁸ Effective management of such disputes is integral in achieving sustainable development by enhancing social cohesion, peace and harmony. When such disputes spiral out of control, it threatens the core fabric that has sustained indigenous communities since time immemorial and affects the development agenda of a particular community in relation to community land.

3. Current Legal Framework on Management of Community Land Disputes in Kenya

The Community Land Act stipulates a set of mechanisms to be applied in management of disputes relating to community land. Under the Act, a registered community may use alternative dispute resolution mechanisms for purposes of settling disputes and conflicts involving community land.²⁹ This is in line with the vision of the Constitution of Kenya which advocates for the promotion of alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms in the exercise of judicial authority by courts and tribunals.³⁰

²⁷ Muigua. K., Integrating Community Practices and Cultural Voices into the Sustainable Development Discourse, available at <http://kmco.co.ke/wp-content/uploads/2021/01/Integrating-Community-Practices-and-Cultural-Issues-into-the-Sustainable-Development-Debates-8th-January-2021-Kariuki-Muigua-PhD.pdf> (accessed on 04/03/2021)

²⁸ Njuguna. J., 'Arbitration as a Tool for Management of Community Land Conflicts in Kenya, Op Cit

²⁹ Community Land Act, No. 27 of 2016, S 39 (1), Government Printer, Nairobi

³⁰ Constitution of Kenya, 2010, Article 159 (2) (c), Government Printer, Nairobi

Where, a dispute relating to community land arises, such dispute shall in the first instance be resolved using any of the internal dispute resolution mechanisms set out in the respective community by-laws.³¹ This provision envisages formulation of internal rules by respective communities for management of disputes concerning community land. However, where such rules do not exist, the Act encourages a registered community to give priority to alternative methods of dispute resolution.³²

Among the ADR mechanisms recognised under the Act is mediation. Mediation is a voluntary, informal, consensual, strictly confidential and non-binding dispute resolution process in which a neutral third party helps the parties to reach a negotiated solution.³³ It is a continuation of the negotiation process and arises where parties to a conflict have attempted negotiations but have reached a deadlock.³⁴ Parties thus agree to involve a third party to assist them continue with the negotiations and ultimately break the deadlock.³⁵ The Act provides that parties to a dispute relating to community land may agree to refer the dispute to mediation.³⁶ Such mediation shall take place in private or informal setting where the parties participate in the negotiation and design the format of the settlement agreement.³⁷ This is in line with attributes of mediation which include party autonomy, privacy, confidentiality and informality. Under the Act, the mediator's role is limited to helping parties to resolve their dispute.³⁸

Another form of ADR recognised under the Community Land Act is arbitration. The Act provides that where a dispute relating to community land arises, the parties to the dispute may agree to refer it to arbitration.³⁹ Arbitration is a mechanism for settlement of disputes which usually takes

³¹ Community Land Act, Op Cit, S 39 (2)

³² *Ibid*, S 39 (3)

³³ Fenn.P., 'Introduction to Civil and Commercial Mediation', Chartered Institute of Arbitrators, *Workbook on Mediation*, (CI Arb, London, 2002)

³⁴ Muigua.K., 'Resolving Conflicts Through Mediation in Kenya', Glenwood Publishers Limited, 2nd Edition, 2017

³⁵ *Ibid*

³⁶ Community Land Act, Op Cit, S 40 (1)

³⁷ *Ibid*, S 40 (2)

³⁸ *Ibid*, S 40 (3) (c)

³⁹ *Ibid*, S 41 (1)

place in private pursuant to an agreement between two or more parties under which they agree to be bound by the decision of a neutral third party (arbitrator).⁴⁰ It has a number of attributes including privacy, confidentiality, flexibility and party autonomy.⁴¹ However, the process is adversarial in nature and resembles litigation in certain aspects thus raising concerns over its viability in the management of community land disputes.⁴²

The Act further envisages the use of traditional dispute resolution mechanisms in management of community land disputes. It provides that court or any other dispute resolution body shall apply the customary law prevailing in the area of jurisdiction of the parties to a dispute or binding on the parties to a dispute in settlement of community land disputes so far as it is not repugnant to justice and morality and inconsistent with the Constitution.⁴³ This provision mirrors that of the Constitution which provides that traditional dispute resolution mechanisms shall not be used in a way that contravenes the bill of rights; is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or is inconsistent with the constitution or any written law.⁴⁴ Finally, the Act also provides for recourse to judicial proceedings in management of community land disputes as a measure of last resort. It states that where all efforts of resolving a dispute under the Act fail, a party to the dispute may refer the matter to court which may confirm, set aside, amend or review the decision which is the subject of the appeal or make any order as it may deem fit.⁴⁵

⁴⁰ Barnstein.R., *The Handbook of Arbitration Practice: General Principles* (Part 2) (Sweet & Maxwell, London, 1998), p.313.

⁴¹ Muigua.K., 'Settling Disputes Through Arbitration in Kenya', Glenwood Publishers Limited, 3rd Edition, 2017

⁴² Njuguna. J., 'Arbitration as a Tool for Management of Community Land Conflicts in Kenya, Op Cit

⁴³ Community Land Act, Op Cit, S 39 (4).

⁴⁴ Constitution of Kenya, 2010, Op Cit, Article 159 (3)

⁴⁵ Community Land Act, Op Cit, S 42

4. Efficacy of The Current Legal Framework on Management of Community Land Disputes in Kenya

The current legal framework on management of community land disputes in Kenya as set out under the Community Land Act comprises of a set of mechanisms including traditional dispute resolution mechanisms, mediation, arbitration and judicial proceedings.

Traditional dispute resolution mechanisms can play an important role in management of community land disputes and enhancing the sustainable development agenda in Kenya. It has been asserted that culture is an essential aspect of sustainable development since it represents identity, creativity and innovation of a community and is an important factor in building social inclusion.⁴⁶ Indigenous knowledge, cultures and traditional practices contribute to sustainable and equitable development and proper management of the environment.⁴⁷ Thus, effective application of traditional dispute resolution mechanisms can facilitate proper management of community land disputes and promote sustainable development. These mechanisms emphasize harmony/togetherness over individual interests.⁴⁸ However, these mechanisms suffer from a number of drawbacks such as the potential disregard for basic human rights; application of abstract rules and procedure; absence of a legal framework; lack of consistency in decisions made and mixing up of different cultures thus eroding traditions.⁴⁹

Mediation is also a viable mechanism for management of community land disputes since it addresses the root causes of conflicts. In the context of community land, this is important in maintaining relationships and promoting social cohesion in the community. However, it requires the goodwill of the parties and is non-binding in nature which affects enforceability of decisions.

⁴⁶ United Nations Development Group, *Delivering the Post-2015 Development Agenda: Opportunities At the National and Local Levels*, 2014, p 28.

⁴⁷ United Nations Declaration on the Rights of Indigenous Peoples, Preamble, available at https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf (accessed on 25/02/2021)

⁴⁸ Muigua.K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Glenwood Publishers Limited, 2015

⁴⁹ *Ibid*

⁵⁰ Further, it has been asserted that it creates no precedents and it is not suitable when one party needs urgent protection like an injunction.

Despite being an ADR mechanism with advantages such as flexibility, expediency and cost-effective dispute resolution, the efficacy of arbitration as a mechanism for management of community land disputes has been subject of ongoing debate. It has been argued that although arbitration is not as formal as adjudication, it does follow the same general style as a courtroom proceeding. The process resembles a courtroom because "the arbitrator accepts evidence, listens to witnesses called by the parties, and hears the arguments of the parties."⁵¹ This may not be the ideal setting for disputes or conflicts with need for or close relationship since it can feel adversarial.⁵² Further, it has been argued that arbitration may not address the psychological issues that arise in community land disputes which could potentially result in the dispute reemerging in future.⁵³

Litigation as a mechanism for management of community land disputes has been criticised for being slow which could result in prolonging of such disputes when there is need for expeditious dispute resolution to maintain harmony within the community.⁵⁴ The process is also expensive, riddled with technicalities and does not address the root causes of conflicts.⁵⁵ These factors make litigation an ineffective mechanism in the management of community land disputes.

5. Way Forward: Towards Effective Management of Community Land Disputes in Kenya

⁵⁰ Muriithi, T. & Ives, P.M, Under the Acacia: Mediation and the Dilemma of Inclusion, (Centre for Humanitarian Dialogue, April 2007),

⁵¹ Vorys, Y., "The best of both worlds: the use of med-arb for resolving will disputes," p. 884.

⁵² *Ibid*

⁵³ Njuguna, J., 'Arbitration as a Tool for Management of Community Land Conflicts in Kenya, Op Cit

⁵⁴ *Ibid*

⁵⁵ *Ibid*

5.1 Effective Utilisation of TDRMs in the Management of Community Land Disputes

Tradition Dispute Resolution Mechanisms represent the most viable mechanism of managing community land disputes. They reflect principles of reconciliation based on long-standing relationships and values.⁵⁶ They tend to be effective in addressing intra-community and even inter-community conflict, where relationships and shared values are part of the reconciliation process.⁵⁷ However, these mechanisms suffer from a number of challenges including informality and lack of consistency in decision making. Further, due to the patriarchal nature of most African communities, there may be bias against women while applying traditional dispute resolution mechanisms in the management of community land disputes.

There is need to integrate traditional dispute resolution mechanisms in conflict management in a way that ensures that the informality of these mechanisms is not lost.⁵⁸ This would ensure consistency in decision making and protection of human rights whilst promoting the principles of reconciliation that is embedded in these mechanisms.

1.1.1 5.2 Strengthening the Legal Framework on ADR in Kenya

Both the Constitution of Kenya and the Community Land Act capture the spirit of Alternative Dispute Resolution.⁵⁹ However, the uptake of ADR in Kenya has been curtailed by among other factors, the lack of a harmonised legal framework. The Alternative Dispute Resolution Policy (Zero Draft)⁶⁰

⁵⁶ Myers, L.J. & Shinn, D.H., 'Appreciating Traditional Forms of Healing Conflict in Africa and the World,' *Black Diaspora Review*, Vol.2(1)

⁵⁷ *Ibid*

⁵⁸ Muigua. K., 'Effective Application of Traditional Dispute Resolution Mechanisms in the Management of Land Conflicts in Kenya: Challenges and Prospect' available at <http://kmco.co.ke/wp-content/uploads/2019/10/Effective-Application-of-Traditional-Dispute-Resolution-Mechanisms-in-Management-of-Land-Conflicts-in-Kenya-Challenges-and-Prospects-October-2019-5.pdf> (accessed on 25/02/2021)

⁵⁹ Constitution of Kenya, 2010, Article 159 (2) (c), Government Printer, Nairobi; Community Land Act, No. 27 of 2016, S 39 (1), Government Printer, Nairobi

⁶⁰ Alternative Dispute Resolution Policy (Zero Draft), 2019, available at <https://www.ncia.or.ke/wp-content/uploads/2019/10/DRAFT-NATIONAL-ADR-POLICY.pdf>

represents a good starting point in enhancing the legal framework on ADR in Kenya. The purpose of the policy is to strengthen, guide and support the growth of Alternative Dispute Resolution (ADR) in the Country in order to achieve optimal delivery of access to justice for all Kenyans.⁶¹ It is intended to create a well-coordinated, well capacitated and cohesive ADR system that is strategically linked to the formal system, while at the same time maintaining its autonomy as an informal system and providing quality justice services to Kenyans across the country.⁶² The policy recognises the applicability of ADR in different sectors including land disputes.⁶³ Adoption of the policy will therefore strengthen the legal framework on ADR in Kenya and enhance its effectiveness towards management of community land disputes in Kenya.

5.3 Use of Hybrid ADR Mechanisms in the Management of Community Land Disputes

The foregoing discussion has demonstrated that despite their inherent advantages, ADR mechanisms suffer from a number of challenges and would ideally not be suitable on their own in management of community land disputes. One possible remedy is the utilisation of hybrid ADR mechanisms such as med-arb. This ensures that parties are able to benefit from the advantages of each of these mechanisms and mitigate their shortcomings.

Med-arb is a combination of mediation and arbitration where the parties agree to mediate but if the mediation process fails to achieve a settlement, then the dispute is referred to arbitration.⁶⁴ This allows parties to benefit from the advantages of mediation and arbitration in the dispute management process by striking a balance between party autonomy and finality in dispute resolution.⁶⁵ The finality, efficiency and flexibility of Med-Arb makes it a viable mechanism in management of disputes related to community land.

⁶¹ *Ibid*

⁶² *Ibid*

⁶³ *Ibid*

⁶⁴ Muigua.K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Op Cit

⁶⁵ *Ibid*

6. Conclusion

Effective dispute management is a key pillar of sustainable development by creating a conducive environment that fosters the development agenda. The Community Land Act sets out a number of mechanisms to be utilised in the management of disputes relating to community land including traditional dispute resolution mechanisms, mediation, arbitration and litigation. However, despite the advantages of each of these mechanisms, there are inherent shortcomings that curtail effective management of disputes relating to community land. To cure these challenges, there is need for streamlining of traditional dispute resolution mechanisms, strengthening of the legal framework on ADR in Kenya and use of hybrid ADR mechanisms in the management of community land disputes. This would facilitate effective management of community land disputes and promote sustainable development in Kenya.

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