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Fostering Efficient Management of Community Land Conflicts in Kenya for Sustainable Development

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Abstract

Land is an important natural resource and one of the primary factors of production. Land holds a paramount position in the Kenyan society and was the basis upon which the quest for independence was wedged. However, land has also been one of the most conflict prone areas in Kenya due to concerns such as historical land injustices and discrimination in the allocation, management and use of land. The Constitution of Kenya, 2010 was enacted with this in mind with among other aims being to address the land concerns in Kenya.

The Constitution classifies land to include public land, private land and community land. This paper critically discusses the concept of community land in Kenya. It defines community land. The paper further analyses the nature and causes of community land conflicts in Kenya and approaches towards management of such conflicts. The paper then proposes measures towards efficient management of community land conflicts in Kenya for Sustainable Development.

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1.0 Introduction

Land is considered to be an important component of development¹. It is one of the primary factors of production². It is one of the single-most important natural resource that human beings rely on for survival and the basis upon which agriculture takes place³.

It has been rightly pointed out that land retains a focal point in Kenya's history⁴. It was the basis upon which the struggle for independence was waged. It has traditionally shaped the country's destiny and continues to command a pivotal position in the country's social, economic, political and legal relations⁵. Land is a vital factor of production in Kenya since agriculture and tourism which are the main foreign exchange earners rely on land⁶. The importance of land means that it needs to be managed, utilized and exploited in a sustainable, efficient, productive and equitable manner for the benefit of the present and future generations⁷.

¹ Wickeri, E. & Kalhan, A., 'Land Rights Issues in International Human Rights Law,' (Institute for Human Rights and Business), p.5. Available at http://www.ihrb.org/pdf/Land_Rights_Issues_in_International_HRL.pdf (accessed on 25/05/2023)

² Ibid

³ Muigua. K., Wamukoya. D & Kariuki. F., 'Natural Resources and Environmental Justice in Kenya.' Glenwood Publishers Limited, 2015

⁴ Ndungu Commission Report: 'Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land in Kenya.' Available at <https://www.scribd.com/document/386251805/The-Ndungu-Report-Annexe-Volume-1#> (accessed on 25/05/2023)

⁵ Ibid

⁶ Muigua. K., Wamukoya. D & Kariuki. F., 'Natural Resources and Environmental Justice in Kenya.' Op Cit

⁷ Ibid

The Constitution of Kenya recognizes the importance of land as a natural resource and mandates the use and management of land in an equitable, efficient, productive and sustainable manner⁸. The Constitution enshrines various principles towards this end which include *equitable access to land; sustainable and productive management of land resources; elimination of gender discrimination in law, customs and practices related to land and property in land and encouragement of communities to settle land disputes through recognised local community initiatives consistent with the Constitution*⁹.

In order to promote the equitable, efficient, productive and sustainable use and management of land in Kenya, the Constitution classifies land into various categories. These are public, community and private land¹⁰. In respect of community land, the Constitution provides that such land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest¹¹. The Constitution thus envisages identification of community land in Kenya based on factors such as ethnicity, culture or shared community interests. However, this approach has been criticized since it limits the definition of the term 'community' to ethnic origins¹². It has been argued that there is need for a wider definition of community beyond the narrow sense of community being equivalent to an ethnic tribe to embrace the possibility of a

⁸ Constitution of Kenya, 2010 ., Article 60 (1)

⁹ Ibid,

¹⁰ Ibid, article 61

¹¹ Ibid, article 63 (1)

¹² Njuguna. J. N, '*Arbitration as a Tool for Management of Community Land Conflicts in Kenya.*' University of Nairobi, 2018 ., available at https://scholar.google.com/scholar?hl=en&as_sdt=0%2C5&q=arbitration+as+a+tool+for+management+of+community+land+disputes+in+Kenya&btnG= (Accessed on 25/05/2023)

cosmopolitan nature of a community for purposes of a better definition of community land in Kenya¹³.

The *Community Land Act, 2016*¹⁴ was enacted to provide a framework for the recognition, protection and registration of community land rights, management and administration of community land and to provide for the role of county governments in relation to unregistered community land.¹⁵ The Act defines "community" to mean citizens of Kenya who belong to an organized group of users of community land and share any of the following attributes- common ancestry; similar culture; socio-economic or other common interest; geographical space; or ecological space¹⁶. This definition is broader and integrative and attempts to overcome the perception of a community being synonymous with tribe or ethnicity, as it has been the case in Kenya. This paper critically discusses management of community land conflicts in Kenya. It analyses the current approach towards management of community land conflicts in Kenya. The paper then proposes approaches towards effective management of community land disputes in Kenya for Sustainable Development.

2.0 Nature of Community Land Conflicts in Kenya

It has been asserted that conflicts over natural resources such as land vary across different communities and their manifestation may differ¹⁷. Such causes can range from control over vital natural resources to contestations over certain aspects such as use and ownership of natural resources at the individual, community or

¹³ Ibid

¹⁴Community Land Act, No. 27 of 2016, Laws of Kenya

¹⁵Ibid, Preamble.

¹⁶ Ibid, S 2

¹⁷ Muigua. K., *'Nurturing Our Environment for Sustainable Development.'* Glenwood Publishers Limited, 2016

national level¹⁸. Land conflicts are prevalent especially in Sub Saharan Africa due to the history of land inequalities and a skewed distribution of land resources¹⁹. In Kenya, land conflicts have been triggered by factors such as the contentious history of land laws, the emotive nature of the land question as well as the real or perceived land injustices in the country since the pre-colonial era²⁰.

Indigenous African communities espoused customary land tenure systems which were the earliest manifestation of the concept of community ownership of land. However, these systems were dismantled in Kenya during the colonial era since the colonial government considered them to be inconsistent with development and modernization²¹. All land was declared as crown land and alienated from customary systems without compensation²². Most communities were displaced from their land due to this approach and resettled in native reserves a situation that was not addressed after independence contributing to some of the current land conflicts in Kenya²³.

Community land conflicts in Kenya occur in various forms. These include Conflict between households, neighborhoods and neighboring 'communities' over land rights and boundaries; Conflict

¹⁸ Ibid

¹⁹ Urmilla.B "Land-related conflicts in sub-Saharan Africa," *African Journal on Conflict Resolution* 10, No. 2 (2010):

²⁰ Adam. L, 'Land reform and Socio-Economic Change in Kenya' in Wanjala C. Smokin, *Essays on Land Law; The Reform Debate in Kenya* (Faculty of Law University of Nairobi 2000)

²¹ Veit. P., 'History of Land Conflicts in Kenya.' Available at <https://gatesopenresearch.org/documents/3-982> (accessed on 25/05/2023)

²² Ibid

²³ Ibid

between traditional and 'non-traditional' local organisations in land management and conflict resolution; Inheritance-related conflict among family members; Conflict between 'newcomer' households and long standing residents; Conflict arising from household mobility; Generational conflict over land use and appropriation of benefits; Conflict between interest groups over appropriate land purposes; Distribution of benefits from land development projects; Escalating levels of crime and violence undermining both land rights and land management practices; and gender conflict over land access, land use and appropriation of benefits²⁴.

Management of community land conflicts is key in promoting Sustainable Development and fostering peace and security in Kenya and Africa at large. Due to the many shared and vested interest in community land, conflicts can trigger concerns such as depletion of natural resources, wars, insecurity and gender based violence²⁵. Thus, there is need for efficient management of community land conflicts in Kenya for Sustainable Development.

3.0 Current Approaches towards Management of Community Land Conflicts in Kenya

One of the salient principles undergirding land policy in Kenya is the encouragement of communities to settle land disputes through recognized local community initiatives consistent with the Constitution²⁶. Consequently, the Community Land Act encourages registered communities to use Alternative Dispute Resolution (ADR) mechanisms including traditional dispute and conflict resolution

²⁴ Urmilla.B "Land-related conflicts in sub-Saharan Africa," Op Cit

²⁵ Muigua. K., 'Nurturing Our Environment for Sustainable Development' Op Cit

²⁶ Constitution of Kenya, 2010., Article 60 (1) (g)

mechanisms for purposes of managing disputes and conflicts involving community land²⁷. The Act further requires registered communities to give priority to ADR mechanisms for purposes of managing conflicts and disputes involving community land²⁸.

ADR mechanisms offer a viable option for managing conflicts and disputes involving community land. These mechanisms have been practiced by indigenous communities since time immemorial and were premised on institutions such as the council of elders²⁹. It has rightly been pointed out that 'Kenyan communities and Africa in general have always used informal negotiation and mediation in the management of conflicts'³⁰. Such mechanisms are thus able to guarantee effective and efficient management of conflicts and disputes involving community land in Kenya.

ADR mechanisms include negotiation, conciliation, mediation, arbitration, adjudication, expert determination among others³¹. These mechanisms have been hailed for their attributes which include voluntariness, party autonomy, privacy and confidentiality and the ability to foster expeditious and cost effective management of disputes³². In relation to conflicts and disputes involving community land, ADR mechanisms are able to guarantee justice due to emphasis on the root causes of the conflict and other underlying issues such as

²⁷ Community Land Act, No. 27 of 2016, S 39 (1)

²⁸ Ibid, S 39 (3)

²⁹ Muigua.K., 'Alternative Dispute Resolution and Access to Justice in Kenya.' Glenwood Publishers Limited, 2015

³⁰ Ibid

³¹ Ibid

³² Muigua. K & Kariuki.F., 'ADR, Access to Justice and Development in Kenya.' Available at <http://kmco.co.ke/wp-content/uploads/2018/08/ADR-access-to-justice-and-development-in-Kenya.pdf> (Accessed on 26/05/2023)

the history of the land³³. This approach ensures that there is finality to the conflict and the likelihood of the dispute arising again is eliminated³⁴. Parties thereto can thus continue to co-exist and live harmoniously in the community.

Due to the advantages of ADR mechanisms, the Community Land Act advocates for the promotion of these mechanisms especially mediation and arbitration for purposes of managing conflicts and disputes involving community land³⁵. However, mediation and arbitration as ADR processes suffer from certain drawbacks that may potentially limit their effectiveness in managing conflicts and disputes involving community land. Mediation is notably not binding and parties have sometimes used it to delay the negotiation process or to obtain more information about the other party's case³⁶. The non-binding nature of mediation is a limitation since parties often have to resort to other binding mechanisms to resolve their conflict³⁷.

Arbitration may also not be a viable tool of managing community land conflicts in Kenya due to several drawbacks. The possibility of court interference in the arbitration proceedings may deny parties the advantages associated with other ADR mechanisms and further result in delay in managing the conflict³⁸. Further, resort to court brings in issues of delays, costs, procedural technicalities and

³³ Njuguna. J. N, '*Arbitration as a Tool for Management of Community Land Conflicts in Kenya*, Op Cit

³⁴ Ibid

³⁵ Community Land Act., No. 27 of 2016, S 40 & 41.

³⁶ Njuguna. J. N, '*Arbitration as a Tool for Management of Community Land Conflicts in Kenya*, Op Cit

³⁷ Ibid

³⁸ Ibid

publicity that parties may have been intending to avoid all along when they resorted to arbitration³⁹. Arbitration is a means of dispute settlement based on rights and may not appreciate the interests and needs of individual parties or in the case of community land disputes, it may not appreciate the cultural influences of the problem at hand⁴⁰. Arbitration may therefore not resolve the underlying issues in conflicts and disputes involving community land resulting in the possibility of such disputes reoccurring in the future.

The Community Land Act also allows conflicts and disputes involving community land to be managed through litigation where all other efforts of managing such conflicts and disputes have failed⁴¹. However, litigation may not a viable option in managing community land conflicts since it is a right based system whereas most traditional communities emphasize on harmony and togetherness over individual interests ⁴². Litigation may therefore not settle the underlying issues in a dispute but rather results in a determination based on the facts and evidence presented before the court⁴³. This may eventually affect the relationship of the parties in the system of community land where there is common ownership of land. Further, concerns such as delays, costs and procedural technicalities inherent

³⁹ Gakeri J. K., 'Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR,' *International Journal of Humanities and Social Science*, Vol. 1 No. 6; June 2011.

⁴⁰ Ibid

⁴¹ Community Land Act., No. 27 of 2016, S 42

⁴² Mkangi K., 'Indigenous Social Mechanism of Conflict Resolution in Kenya: A Contextualized Paradigm for Examining Conflict in Africa,' (Nairobi, University of Nairobi, 1997).

⁴³ Muigua. K & Kariuki.F., 'ADR, Access to Justice and Development in Kenya.' Op Cit

in litigation may hinder efficient management of conflicts and disputes involving community land⁴⁴.

From the foregoing discussion, it is evident that the Community Land Act envisages management of community land conflicts and disputes through mechanisms such as Traditional Dispute Resolution Mechanisms (TDRMs), arbitration, mediation and litigation. However, these mechanisms suffer from several drawbacks that may hinder efficient management of conflicts and disputes involving community land. There is therefore need for reforms in order to ensure efficient management of community land conflicts in Kenya in order to promote Sustainable Development.

4.0 Way Forward

Land holds an important position among indigenous Kenyan communities and is much more than just physical soil⁴⁵. Conflicts and disputes involving community land may threaten peace, harmony and co-existence among members of the community affecting the fabric of the community⁴⁶. Such conflicts may result in instances such as wars, internal strife and domestic and gender based violence within the community affecting the attainment of Sustainable Development⁴⁷. Efficient management of community land conflicts is thus an essential component of the Sustainable Development agenda. There is need to promote the vision of the Constitution by encouraging communities to manage land conflicts and disputes

⁴⁴ Njuguna. J. N, '*Arbitration as a Tool for Management of Community Land Conflicts in Kenya*, Op Cit

⁴⁵ Ojienda T, *Principles of Conveyancing in Kenya: A Practical Approach*, May 2007.

⁴⁶ Njuguna. J. N, '*Arbitration as a Tool for Management of Community Land Conflicts in Kenya*, Op Cit

⁴⁷ Urmilla.B "Land-related conflicts in sub-Saharan Africa," Op Cit

through local community initiatives consistent with the Constitution⁴⁸. This is also espoused in the Community Land Act that also envisions management of conflicts and disputes between members of a registered community and those between two or more registered communities through internal dispute resolution mechanisms set out in the respective community by-laws⁴⁹. Traditional Dispute Resolution Mechanisms (TDRMs) thus offer a viable option of managing conflicts and disputes involving community land. However, there is need to address procedural and appropriateness concerns of these mechanisms through measures such coordination and harmonization with formal justice systems in a way that ensures that the informality of these mechanisms is not lost⁵⁰. There is also need to include communities and the affected parties in appointment of traditional dispute resolvers to help lend credence to the process and repositioning the traditional authority especially as far as resolution of land conflicts within communities, as contemplated under Article 60(1) (g) of the Constitution, is concerned⁵¹.

There is also need to promote public awareness among communities about the viability of managing community land conflicts through ADR processes including traditional dispute resolution mechanisms. Communities should be encouraged to pursue these mechanisms at

⁴⁸ Constitution of Kenya, 2010, S 60 (1) (g)

⁴⁹ Community Land Act, No. 27 of 2016, S 39 (2)

⁵⁰ Muigua.K., 'Effective Application of Traditional Dispute Resolution Mechanisms in the Management of Land Conflicts in Kenya: Challenges and Prospects.' 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 26/05/2023)

⁵¹ Ibid

the expense of litigation in order to benefit from the advantages inherent in most of these systems such as flexibility, expediency, low costs and settling the root cause of a problem⁵². This will help to preserve social order and ensure that members can continue to co-exist in the community.

Another way of fostering efficient management of community land disputes in Kenya is by streamlining the conflict management mechanisms under the Community Land Act. There is need to cure some of the challenges that are bedeviling ADR mechanisms including delays, costs and court interference especially in arbitration⁵³. Where this occurs, then the whole purpose of Alternative Dispute Resolution is defeated⁵⁴. These shortcomings can be cured by streamlining alternative dispute resolution in line with the Constitutional provisions⁵⁵. While pursuing arbitration, parties should be discouraged from making numerous and unnecessary applications to court as this results in inordinate delays⁵⁶. Further, there is need to institutionalize traditional dispute resolution mechanisms in line with the Constitution to ensure their efficacy in settling community land conflicts⁵⁷.

⁵² Njuguna. J. N, '*Arbitration as a Tool for Management of Community Land Conflicts in Kenya*, Op Cit

⁵³ Muigua. K & Kariuki.F., '*ADR, Access to Justice and Development in Kenya*.' Op Cit

⁵⁴ Ibid

⁵⁵ Njuguna. J. N, '*Arbitration as a Tool for Management of Community Land Conflicts in Kenya*, Op Cit

⁵⁶ Ibid

⁵⁷ Muigua.K., '*Effective Application of Traditional Dispute Resolution Mechanisms in the Management of Land Conflicts in Kenya: Challenges and Prospects*.' Op Cit

Parties should also be encouraged to use hybrid ADR mechanisms such as Med-Arb in managing conflicts and disputes involving community land. Med-Arb entails subjecting a conflict to mediation then resorting to arbitration if the mediation fails⁵⁸. The system allows parties to benefit from the advantages of mediation and arbitration in the dispute resolution process⁵⁹. Further, the system guarantees finality, efficiency and flexibility which are key features of both arbitration and mediation⁶⁰. Through such hybrid systems, it is possible to achieve efficient management of community land conflicts in Kenya.

5.0 Conclusion

Land occupies an integral place among Kenyan communities and continues to shape the country's social, economic, political and legal future.⁶¹ Consequently, land has been one of the major areas of conflicts in Kenya due to the country's past historical land injustices and bad policies in the management, allocation and use of land⁶². Conflicts and disputes involving community land may threaten the attainment of Sustainable Development by affecting the social order of the community by triggering concerns such as depletion of natural resources, wars, insecurity and gender based violence⁶³. However, the mechanisms set out under the Community Land Act for

⁵⁸ Muigua. K., "Heralding a New Dawn: Achieving Justice Through Effective Application of Alternative Dispute Resolution Mechanisms (ADR) in Kenya", Chartered Institute of Arbitrators (Kenya), *Alternative Dispute Resolution*, Vol. 1, No 1, (2013), pp. 43-78

⁵⁹ Ibid

⁶⁰ Ibid

⁶¹ Ndungu Commission Report: 'Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land in Kenya.' Op Cit

⁶² Ibid

⁶³ Muigua. K., 'Nurturing Our Environment for Sustainable Development' Op Cit

management of such conflicts and disputes suffer from several drawbacks that hinder their effectiveness towards this end. Thus, there is need for reforms through measures such as encouraging communities to manage conflicts through local community initiatives consistent with the Constitution, promoting public awareness, streamlining the conflict management mechanisms under the Community Land Act and promoting the use of hybrid ADR mechanisms such as Med-Arb. Through this, it will be possible to foster efficient management of community land conflicts in Kenya for Sustainable Development.

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