

**COMMUNAL LAND SUPPORT SUB-ACTIVITY**

**Guidelines for Group Land Rights in Communal Areas**

**Proposed official guidance for applicants, allocators and administrators**

**JUNE 2014**

**[FINAL]**

**Commissioned by the Millennium Challenge Account  
Namibia**

**With funding from the Millennium Challenge  
Corporation**



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# **GUIDELINES FOR GROUP LAND RIGHTS IN COMMUNAL AREAS**

**For Applicants, Administrators & Facilitators**

**First Edition  
2014**

## **IMPORTANT NOTE:**

This Manual of Guidelines on Group Land Rights has been prepared by the Community Land Support Sub-Activity (CLS) at the request of MCA-N and the Ministry of Lands and Resettlement. It is proposed that the Manual be reviewed, amended where the Ministry considers necessary and issued as the official guidelines on group rights by the Ministry of Lands and Resettlement.

As application for registrable collective rights ('group land rights') is a new and still-evolving practice in Communal Areas, it is recommended that the guidelines be issued as a First Edition, with intention for revision within three years (Second Edition). This will allow early lessons of application and grant to be absorbed. Depending upon requirements, further Editions could then be periodically issued.

The Manual (or Guidelines) is presented here in incomplete draft. This is because the document cannot be finalised or distributed prior to promulgation of legal changes relating to group rights in Communal Areas.

## **Preface**

### **Letter from the Minister to Residents in Communal Areas**

(to be drafted)

## Introduction

This manual of guidelines is distributed by the Ministry of Lands and Resettlement to guide Communal Area residents and land authorities about group land rights.

This guidance is official. This means that advice should be followed - as relevant to the case in point.

Although formal provision for group land rights is new, the idea of holding rights collectively is well known in Communal Areas. Under customary norms, many residents already hold rights to a particular area not as individuals but as members of families and communities (or 'groups'). The law requires that all existing customary rights to land be registered by February 2016. This includes rights held by individuals, married spouses, families, villages or other groups. After February 2016 (or a later date if extended) customary interests that have not been identified, verified and formalized in entitlements run the risk of being presumed null and void. The lands to which these rights relate could, in theory, be made available for reallocation. Residents therefore have a good reason to clarify and formally apply for recognition of rights they hold as groups.

The routes for such registration are new and still evolving. This is because the national law on communal lands, the Communal Lands Reform Act, 2002, only focused on identification and formalization of individual rights. This was found to discriminate against those who hold rights jointly as spouses, or as families and communities. Changes are therefore being put in place. The objective of this Manual is to guide residents in how to use these new opportunities.

### **Why is provision for group landholding important?**

Sub-dividing land into individual parcels does not always suit the type of land, the type of land use, or the social system. This continues until the present. It is also recognised that collective landholding can be highly useful for modern, shared land use and production purposes.

In the past it was assumed that all rural lands would be sub-divided into private individual parcels. Therefore land laws in many countries provided only for registration of ownership as individuals. Namibia's Communal Land Reform Act, 2002 is a case in point.

This is not the case today. Most countries (including in Europe, North America and Australasia) give citizens tenure choices: to formalize their existing land holding as individuals, as married spouses, as families, or as communities, or other groups.

Most Constitutions (including Namibia's) back this up with stipulation that rights to land may lawfully be held individually or in association with others.

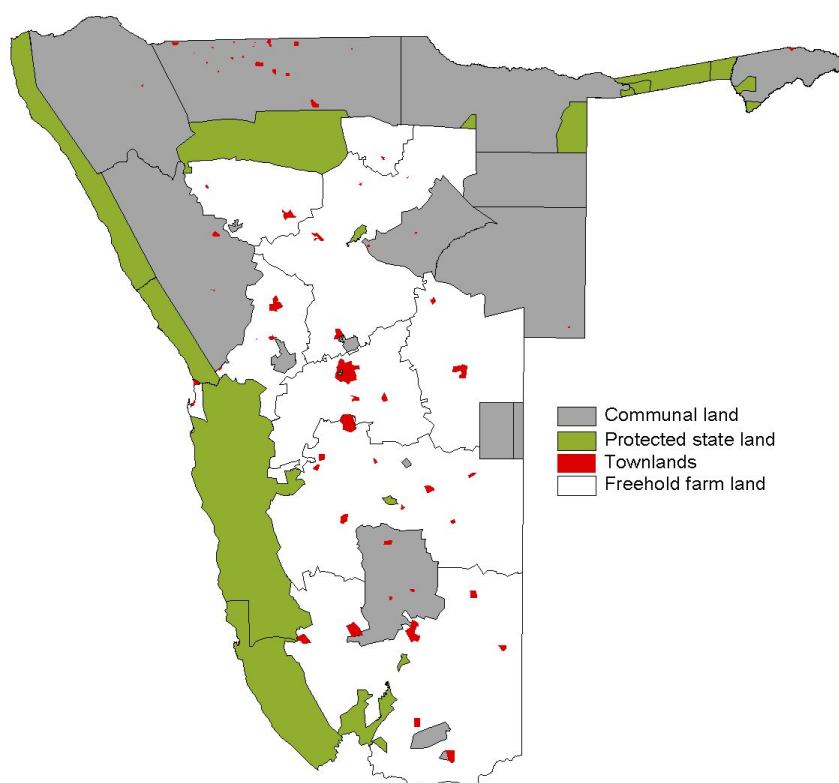
Group rights are usually granted on condition that the land is sustainably used. In this way, group rights aid conservation. More than 10,000 communities around Africa today now formally own shared rights to local forests and rangelands under group entitlement. This makes it easier for them to make and uphold rules about how the lands are used. It also makes it easier for traditional leaders and governments to hold local communities to account for sound land use, for the right is granted to a particular group for a particular area.

There are also occasions where holding land as a group may be fairer. Group tenure provides a mechanism through which *everyone* resident in a particular area is legally included, rich or poor, livestock owners or non-livestock owners. Family tenure, reflecting shared rights and responsibilities within the family is also preferred in many societies.

These Guidelines have been prepared -

- To guide residents of Communal Areas how to apply formally for group rights
- To guide Traditional Authorities and Land Boards how to assess applications.

Communal Areas cover 38% of the country (Map 1). Over 1.1 million people live in Communal Areas. It is with their land interests that these guidelines concern themselves.



## Content

The guidelines are presented in five chapters.

*Chapter 1* provides an overview on group land rights.

*Chapter 2* describes legal support for group rights.

*Chapter 3* provides a step-by-step process for groups to apply for rights.

*Chapter 4* guides Traditional Authorities and Land Boards in assessing and approving applications from groups.

*Chapter 5* lists measures through which land administrators can encourage existing groups to apply for formal recognition of their existing collective land rights.

## Chapter 1

### An Overview of Group Land Rights

This chapter provides a general background about group land rights in questions and short answers. More detailed information is available in *Frequently Asked Questions & Answers About Group Land Rights in Communal Areas*, 2014, also available from the Ministry of Lands & Resettlement.

1. *What do 'group rights' mean?*
  - a. Group rights means group land rights. This means that a group of persons hold the right to a piece of land together as their *shared* property.
  - b. Group rights are held in undivided shares. This means that an individual member of the group cannot take out his or her share or transfer it. When a member abandons his right or died, the remaining members continue to hold the land together.
  - c. Note that no one in Communal Areas owns the land itself. Individuals, married spouses or groups may own *the right to* the land.
  
2. *Who are group rights for?*
  - a. Residents of Communal Areas.
  - b. Note that group rights are provided for outside Communal Areas. Group tenure is quite common in Rehoboth District and settlers in Commercial Areas are often granted the land as a group.

3. *Who may be a group?*

Any group of persons living in Communal Areas, other than individuals, or spouses applying jointly for a parcel; some examples -

The group could be an existing collective formation such as a village, or members of several villages, who share a local tract of rangeland or other resource and now wish to formalise this arrangement.

Or the group could be new, formed for a special purpose, such as to be granted land around a borehole, or to acquire land for a women's project.

Of a community based organization could apply for land as a group.

4. *Do groups have to form legal entities to hold the land for them?*

No. Group land may be held directly or indirectly. Villages, clans and other traditional social entities applying for a customary group right may apply directly.

Groups applying for leasehold tenure and groups which are new formations without a traditional basis or organizations set up to use land in a particular way, need to form and register a legal entity or use an existing legal entity such as a conservancy cooperative for this purpose.

5. *What land may be held by a group?*

- a. Any land in Communal Areas.
- b. Most applications are expected to be for local commonage rather than for residential and farming lands.

6. *May a village apply to bring its entire area brought under a single group right?*

Yes. Examples of where this might be relevant include where the community or group -

- Holds all land collectively, as an extended family or village in accordance with its customs
- Sometimes move their houses or farms within their village area
- Barely cultivates or cultivate by shifting cultivation
- Maintains grazing, foraging or fishing as their principal or only land uses
- Do not want to subdivide their shared land into individual parcels for other land use or social reasons.

7. *Most rangelands in communal lands are under conservancies. Where do they fit in?*

- a. The members of a Conservancy own the right to protect and sustainably use wildlife, including developing tourism projects. They do not own the land within the declared Conservancy area.
- b. Conservancies may apply to be the land right holder but many will prefer to help individual villages or clusters of villages within the Conservancy to apply.
- c. This is because Conservancies are usually too large and made up of too many different villages to serve as workable landholding units. Conservancies need vast areas because animals move. Land holding units need to be scaled to the demands of efficient land holding; that the holders can easily know who is using the land and how and ensure they are following the group's rules. All members

need to be able to attend ad hoc meetings. This is often impossible in a conservancy.

- d. A village cannot ignore existing Conservancy commitments that affect its area. It cannot abandon benefit-sharing arrangements with other communities in the conservancy, even if a revenue-generating hunting area or lodge falls within its land.

8. *What is the difference between individual and group rights?*

*They are the same* in that -

they are both *forms of private entitlement*. One right is held by an individual and registered in his or her name. The other is held by a group, and registered in its chosen name,

*They are different* in that -

- a. *Governance*: groups need to have a system for members to participate in decision-making. Individual owners of rights need only consult themselves.
- b. *Use patterns*: individual parcels are used only by individuals or their immediate family members. Group parcels are used by many people: this means that a *system for managing use* is required.
- c. *Duration*: customary rights for individuals are granted for the lifetime of the holder. Rights granted to groups may be for the lifetime of the community.
- d. *Land type*: individual holdings are mainly for residences and farms. Group rights will be mainly for commonages.
- e. *Size of parcel*: as group rights will apply mainly to commonage, the Ministry is likely to approve parcels that are much larger than usually sought by individuals for houses and farms.
- f. *Assessment*: most group rights will be subject to on-site consultation and review.

9. *What main steps does a group need to take to get a group right?*

The ten main steps are -

- 1) *Forming the group*: agreeing its purpose and membership
- 2) *Management*: establishing the quorum of members for decision-making, and appointing a committee to manage the land on the members' behalf;
- 3) *Defining the land*: agreeing the limits of the parcel with neighbours



- 4) *Land use planning*: assessing current use of the land, and agreeing future uses, including creating sub-zones for different uses, if needed
  - 5) *Regulation*: preparing simple use rules, including rights and responsibilities, and the means through which the group will ensure that rules are upheld
  - 6) *Mapping*: preparing sketch or other maps of the land and boundaries (customary entitlements) and/or formal maps (leasehold entitlements)
  - 7) *Participation & consent*: involving the Traditional Authority from the outset, and securing support and consent<sup>1</sup>
  - 8) *Application*: formally applying for the land to the Traditional Authority (customary) or to the Board (leasehold)
  - 9) *Review*: Land Board with Ministry assistance assesses the application, visits the site, meets with the group, and if above 100 ha makes recommendation to the Minister as his consent is required
  - 10) *Ratification & Registration*: if approved, confirmation by the Board of customary allocations (ratification) and grant of leasehold group rights, including recordation in the Communal Lands Cadastre and issue of evidential certificates of entitlement.
10. *What will land authorities look for in applications from groups?*
- 1) *Inclusiveness*: that no one has been unfairly excluded as a member.
  - 2) *Representation*: that sub-groups are adequately represented, including women and poorer households with no livestock (if the land is rangeland).
  - 3) *Fairness*: that opposing or additional claims to the land have been considered, including the interests of outsiders who *routinely* enjoy seasonal access to the land, this to be attended to in group land rules
  - 4) *Clarity*: that boundaries of the parcel have been agreed with neighbours and agreements put in writing with an adequate number of signatures
  - 5) *Sustainability*: that the intended use of the land is sustainable, and for the achievement of which may require modifications in how the land is presently used
  - 6) *Forward planning*: that the group has considered future needs such as when their children mature into households of their own and need residential land
  - 7) *Conservation*: that existing Conservancy and Community Forest commitments have been taken into account in rules and any alterations made with the Conservancy or Community Forest Managers

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<sup>1</sup> Bearing in mind that Traditional Authority refers not only to the most senior representative but also to senior and junior councilors and headmen and headwomen whom he appoints to support his work.

- 8) *Removal of potential conflicts*: that the occupancy of cattle posts and private water sources has been considered and appropriate agreements drawn up with their holders
- 9) *Reasonable scale*: that the parcel sought is not so large that it will be difficult to protect against encroachment or pasture poaching or enable rules to be easily upheld
- 10) *Commonality*: that the group is not too large or scattered, and has sufficient internal socio-spatial connection for decisions to be easily arrived at and offenders punished.

11. *May a group sub-divide its parcel?*

Yes. But only through -

- a. a transparent decision-making process involving the majority of members and which is carefully considered over a stipulated period, and
- b. With the consent of the TA, Land Board, and on the advice of the Ministry, all of who will want to see the sub-division plan and its justification and terms.

12. *Who will allocate rights within group land?*

- a. Once a group right is granted over a land parcel, this is the responsibility of the owner of the right - in this case, the group members.
- b. No other institution may issue rights within the parcel.
- c. Customary group owners may issue usufruct rights to the land, rent out some part of the parcel for a special purpose under a customary agreement, or make other decisions, so long as these are made by the majority of members and in a fair manner. A group holding leasehold tenure may formally sub-lease part of the land provided the terms and duration are fully agreed by the members of the group.
- d. Complaints may be lodged with TAs and Land Boards if decisions are not taken democratically, transparently and fairly.

## Chapter 2

### Present & Future Legal Support

*Note: this chapter should be redrafted following issue of amended law and subsequent regulation relating to group land rights.*

1. The Constitution provides for group tenure as well as individual tenure and protects those rights where they exist (Article 16 (1)).
2. Other laws promote group rights to wildlife, water, forests or other natural resources on the land, and to the land itself (Box 1).

#### Box 1: Outline of Laws Relevant to Group Rights

The *Traditional Authorities Act, 2000* does not vest lands in traditional authorities (TA). Nor does the law permit TA to acquire or hold land on behalf of communities without their explicit consent (s. 18). The Act does open the way for other laws to give TA responsibilities.

The *Communal Land Reform Act, 2002* takes this up; it vests the primary power to allocate or cancel any customary right in the Chief of the traditional community, or where the Chief so determines, in the Traditional Authority of that traditional community (section 20).

The wording is important. The chief is the head of the Traditional Authority but the Traditional Authority includes all persons designated to assist him by appointment or election such as senior and junior councillors and village headwomen and headmen (sections 1 & 2 (1) of the Traditional Authorities Act). The head of the Traditional Authority (Chief, or as otherwise named) may delegate authority to senior and junior councillors.

TA authority is circumscribed. No allocated customary right has legal effect unless ratified (confirmed) by the relevant Land Board (*Communal Land Reform Act, s.24*).

The *Communal Land Reform Act, 2002* establishes that Communal Lands are owned by the state in trust for residents (section 17). Therefore residents may only obtain *rights to the land*, not the land itself.

The *Community Courts Act, 2003* brings the traditional dispute resolution system into the formal system, by allowing community courts to function as lower courts. These courts have jurisdiction over local, social and customary law matters including communal land and housing issues.

The *Local Authorities Act, 1992* declares local authorities as municipalities, towns or villages and describes the powers and duties of the councils elected to serve these areas. Villages in this context refer to small towns, not to rural settlements/villages. The main relevance of the to rural lands is where the commonage of a village is absorbed into the boundaries of large settlements declared as local authorities (urban villages).

The *Nature Conservation Amendment Act, 1996* provides for any group of persons residing on communal land to apply to the Minister of Environment and Tourism for a Conservancy to be registered for sustainable local utilization of game within the area and equitable sharing of benefits relating to wildlife utilization (s. 24A). The group must provide a list of members. The law does not stipulate that all members of the community are automatically conservancy members. It may set

conditions for membership. Conservancies vary as to whether they include all adults within their boundaries as members. The Act also requires that the group make a constitution and plan to manage wildlife. The conservancy area must also be defined and formally mapped. Registration and gazettment of the Conservancy confers rights, privileges and duties in relation to wildlife conservation and use. It does *not* confer land rights.

The *Forest Act, 2001* (amended in 2005) introduces Community Forests as a category of Classified Forests along with State Forest Reserves and Regional Forest Reserves. Community Forests may be established on communal lands by communities holding rights to those lands, and with the consent of the TA (s. 15). The Community Forest is registered and announced in the Gazette following agreement with the Ministry of Agriculture, Water and Forestry as to the local plan for sustaining the forest. Thirteen Community Forests had been registered by 2013, covering 438,500 ha. Most fall within the boundaries of conservancies. Over 30 more Community Forests are in process of gazettment. A critical difference between conservancies and community forests is that the forest law opens the possibility for communities to formalize what are usually customary rights to the concerned forestland. That is, customary owners could easily apply for a formal group right to the Community Forest.

The *Water Management Act, 2004* establishes that all water is owned by the state but that any group of households may create a non-profit water point user association *to manage its local supply*. Once its committee membership and constitution is approved, the Minister responsible for water may register the association, after which point it is exempt from water related taxes. Water groups are not easily transformed into land holding groups.

The *Environmental Management Act, 2007* makes it a core principle that community involvement in natural resource management and equitable benefit-sharing should be promoted and facilitated (section 3). Environmental assessments are obligatory where impacts of actions or development upon the environment are anticipated (s.27). This mainly affects intended commercial developments in communal lands, such as for livestock developments under leasehold tenure.

3. Collective or group land ownership is provided for outside Communal Areas, and widely practised in Rehoboth District,<sup>2</sup> and in commercial areas where settler groups may be allocated former freehold commercial farms.<sup>3</sup>

4. The governing law over Communal Areas is the *Communal Land Reform Act, 2002* (CLRA). Box 2 provides general points.

#### Box 2: General Provisions of the Communal Land Reform Act, 2002

1. Land ownership in Communal Lands (CLA) means *owning rights to the land*, not the land itself.
2. The Government is *not a private owner*. It owns Communal Lands strictly *in trust* for traditional communities, and is obliged to attend to the rights of landless and jobless residents in particular (CLRA, s. 17(1)).
3. Government is also *the legal controller* of Communal Lands.
4. Government has *delegated* allocation and registration functions to Communal Land Boards (CLB).

<sup>2</sup> This came about through the inheritance of lands jointly by heirs and state protection of those rights so that land was held in undivided shares, as provided for in *Subdivision of Agricultural Land Act, 1970*. This law only applies in Rehoboth District.

<sup>3</sup> Frequently the state buys private commercial freehold land in order to reallocate this to individuals and also to groups of citizens, in accordance with section 14 and 37 of the *Agricultural (Commercial) Land Reform Act, 1995*.

5. Land Boards are government agencies. They are not elected by the population, but are *appointed* by the Minister of Lands and Resettlement (CLRA, s.2). Each Board includes representatives from four ministries, one representative Traditional Authority, one Regional Councillor, one farmer, and one or more representatives from Conservancies (CLRA, s.4). Four members of the Board must be women.
6. The area of jurisdiction of Communal Land Boards follow regional administrative boundaries. They do not follow the boundaries gazetted as forming Traditional Authority Areas. It is usually for a Communal Land Board to cover two or more areas under TA.
7. The legal powers of the Ministry of Lands & Resettlements include -
  - To regulate on all matters relating to Communal Lands (Regulations issued by the Minister)
  - To provide secretarial/administrative services for the Board
  - To keep a register of all land rights
  - To verify applications as in accordance with all national laws
  - To carry out on site verification of applications as required by the Board
  - To survey parcels
  - To produce certificates of registration
  - To hear appeals.
8. The legal powers of Land Boards include -
  - To oversee the allocation and cancellation of customary rights by Traditional Authorities
  - To decide if applications for leasehold rights should be approved
  - To establish a register of all land rights (Communal Land Cadastre)
  - To manage the system for applications, grant, transfer, or cancellation of registered rights
  - To advise the Minister on land matters including where Regulations are needed (CLRA, s. 3).
9. The legal powers of Chiefs and Traditional Authorities include -
  - To allocate or cancel customary land rights, *subject to confirmation by the Board*
  - To consent or veto applications for leasehold rights but for which appeal exists should the TA not approve the application
  - To determine the size and boundaries of parcels for which a right is granted or consented provided these are 20 ha or less for customary rights and 50 ha or less for leasehold rights
  - To establish conditions whereby livestock may be grazed on commonage (CLRA, s.20, 22, 27, 29).
10. Land rights in Communal Areas *already exist* or may be *newly created* through allocation. Most rights stem from customary practices. New rights are only lawful when allocated by or consented to by Chiefs or Traditional Authorities, and following ratification by Land Boards.
11. Chiefs and Traditional Authorities (TA) do *not* own the land. They do have legal authority to allocate customary *rights to land* within their gazetted area of jurisdiction (as defined under the TAA), subject to Board approval.
12. The type of land rights that Chiefs and TAs may issue is presently restricted to residential, farming and grazing rights. The Minister may stipulate other types of rights (section 21) but has not yet done so. Farming rights are not defined but are presumed to refer to cultivation and to creation of livestock kraals within parcels.
13. New land allocations have no legal effect until ratified by the Board (section 24). All existing customary land rights must be formalized through application and grant (section 28).

5. Often it is said that the CLRA does NOT provide for groups to collectively hold land. *This is not precisely the case.* In legal fact -

- 1) The CLRA *does* allow for group holding under *leasehold tenure* although in an *indirect* manner. This occurs when a cooperative, a close corporation, a registered company, a conservancy, a trust, or other registered entity is granted a parcel and holds this *on behalf of its members*. Several legal entities have made applications for large areas of lands on these grounds.
- 2) While CLRA does not directly provide for groups to apply for rights, neither does the law *prevent* an application from a group. That is, in theory, there is nothing to prevent a TA or Board allocating a right to a group, with the approval of the Minister.
- 3) The CLRA acknowledges that collective land rights customarily exist. The law states (with *emphasis* added here) that -
  - a. The commonage of a traditional community is available *on a collective basis* to the lawful residents of that community for purposes of grazing (s. 29).
  - b. No individual may curtail that *local collective right* by occupying, building, ploughing, or living on that shared land (commonage) or by obstructing a shared watering place (s. 29 (4)).
  - c. No fence may be erected which interferes with *collective commonage rights* (s. 28 (8) (b)).
  - d. No TA or Land Board may allocate or ratify customary or leasehold rights to individuals which are reserved for *common usage* (s. 24 (4) (iii)) or which encroaches upon the *community's commonage* (s. 28 (10) (d), s. 30 (3) (a)).
- 4) Government has recently clarified that groups may apply for and be registered as owners of customary and leasehold rights to land in Communal Areas. It has done this through two measures -
  - a. In late 2013 Parliament amended the CLRA (*Communal Land Reform Amendment Act, 2013*). One change now enables a community-based organization (CBO) to apply for and be granted *leasehold* rights and in turn to sub-let some land to another body. This was introduced principally to enable conservancies to acquire a head lease on their land area in order to sub-lease a portion to tourist companies such as lodges. A CBO was defined as -
 

“... an organization, group, trust, foundation, or a body established by and for a community and having its aims and objectives to serve and benefit the community” (amendment of section 1; Definitions).

Although it is not explicit that the CBO must be a registered legal entity, the use of the term ‘organization’ implies this.
  - b. In February 2014 the Minister amended Regulations under the CLRA so that all Application Forms for rights in Communal Lands enable groups, families, married couples and legal entities as well as individuals to apply for customary or leasehold rights (*Government Gazette No. 5412, 21 February 2014*). The important provision is that a married couple, family, or group, does not need to form a legal entity before applying to register a customary right.

If an individual or a married couple, information on marital status is required including proof of marriage if applicable. If the applicant is a legal entity it must provide its registration certificate. If a group or a family, a list of members details such as name and ID number must be provided.

All applicants must provide contact details, a description of the parcel, current and applied for land uses. The category of 'Other' is provided, indicating that even for customary right applicants, uses need not be limited to residential or crop farming purposes.

In summary, this means that as of February 2014, residents in Communal Areas may now apply for customary or leasehold rights as families, married couples or groups, and those rights may be formally registered if approved.

6. Government intends to provide more direct legal guidance. This will be delivered through -

- a. amendment of the CLRA in the process of the law's integration along with other land laws into a single comprehensive land act (Land Bill); and
- b. issue of a new regulation under the CLRA providing detailed stipulations. The Minister is empowered to issue regulations on a variety of matters, including provision that he may recognise and describe "any other form of customary tenure" other than residential and farming rights, by notice in the Gazette (section 21 (c)).

## 7. New Legal Provisions

These are the matters about group land rights that will be addressed in the law -

1. Direct provision for residents to apply as groups as well as individuals
2. Groups will define themselves and may be traditionally constituted units, community based organizations or any other group of persons
3. Groups may apply for either customary or leasehold tenure, but with different conditions
4. Groups may apply to use the land for other than only residential and farming purposes
5. The term of group rights will vary according to the application and purpose of the right
6. Smaller rather than larger groups will be favoured to better enable the members to manage the land proactively and inclusively
7. No resident of a traditionally constituted group such as a clan or village may be excluded as a member of a group without the consent of majority of members
8. Groups will be required to establish a system for genuinely inclusive decision making by all group members
9. Customary rights held by groups as well as rights held by individuals and married spouses must be identified and registered by February 2016

10. Existing customary group rights will be protected ahead of registration by stronger requirement that local residents give their consent prior to allocation of local commonage to an individual
11. Once registered, a right granted to a group will provide the same protection as granted to an individual or married spouses
12. The duration of group rights may be of unspecified term, such as 'for the lifetime of the group'
13. No limit will be placed upon the size of parcel that a group may apply for; its viability will be assessed in each case
14. Award of a right in leasehold to an individual or group will be dependent upon evidence that customary rights active in the applied for parcel have been satisfactorily identified and dealt with; applicants will be advised that wherever possible customary right holders should be made co-holders of the leasehold to compensate for the loss of customary rights to the same land
15. Grant of rights to groups will be subject to conditions including the obligation of the group to state how it will ensure that decisions are made by consensus of majority will, how it will protect the resources of the land, and how it will subdivide the land in the event of its right being cancelled or surrendered. In addition members of a group must meet at least twice a year to consider plans presented to it by its appointed group land management committee
16. Groups have the same right as individuals to devise and apply rules of access and use to the group land parcel
17. Where a group is a village it must include the local headwoman or headman as an ex officio member of the group land management committee
18. Groups may issue a right to part of the group land to an individual provided this is approved by the majority of members of the group in a public meeting attended by a quorum of members
19. The same limitations of transfer of the right applies to groups as to individuals and married spouses; this may be undertaken only with the consent of the TA and Board and which will expect to see that the majority of members have approved the decision and are aware of the implications
20. Traditional Authorities as allocation and consenting authorities are legally bound to assist residents in their areas to apply for rights as groups if they so wish
21. No rights may be allocated over land that has been granted to a group, without its free, prior and well informed consent.



## Chapter 3

### Applying for a Group Land Right

#### 1 Background

##### 1. Audience

This chapter is addressed to residents who wish to apply for a parcel of land as a group. It is also addressed to those who assist them to do so.

These facilitators are likely to be project personnel, conservancy managers, civil society organizations, as well as Traditional Authorities, Land Boards and Ministry officials.

##### 2. Group Rights

It is expected that most groups will be rural communities and especially villages. The terms 'community' and 'group' are therefore used interchangeably.

Groups may also be referred to as co-owners, as meaning co-owners *of the right* to a specified parcel of land.

##### 3. Stages & Steps

This chapter describes the process of application. This cannot be properly undertaken simply by completing an Application Form.

Each set of information needs first to be based upon discussion and agreement by the group. In addition, some decisions need the group to take action beforehand (such as agreeing boundaries with neighbours).

The aim is for each group -

- a. To have given their plans enough thought and planning to be confident that everyone (or the vast majority) in the group is in general agreement and committed to manage the land as a group; and
- b. To avoid time-wasting and making it difficult for authorities to consider the application by guiding the group to cover all possibilities in their planning.

##### 4. Obligatory Decisions

Some steps and actions are *legally required*. Legal requirements come from the main law, the *Communal Land Reform Act, 2002* and *Regulations* under the Act. Application Forms list *minimal* information requirements for groups, families and legal entities. Recently gazetted Application Forms require statement of -

- a. The type of right applied for (new customary right, existing customary right, leasehold)

- b. The nature of the group (family, group, legal entity)
- c. Name of the legal entity or group
- d. Description of the entity or group
- e. Provision of either the registration certificate of the entity, or names and IDs of members
- f. Location and description of the parcel
- g. Current and applied for uses of the land
- h. Intentions to fence
- i. Other parcels that the group already holds if any
- j. Names and details of right holders on the land who are not part of the group and arrangements made with them.

These guidelines recommend that group applicants provide much more information, such as

- a. how they intend to manage the group land
- b. evidence that the boundaries with neighbours have been agreed
- c. establishment of use rules for the land.

A special **Application Form for Group Rights** has also been drafted. If approved and gazetted by the Minister will require the group to provide such additional information.

5. A systematic approach is provided for applicants to follow. Box 3 provides an overview. Next sections provide details for each stage and step.

<b>Box 3: Summary of Recommended Stages &amp; Steps to Application</b>		
	<b>Stages &amp; Steps</b>	<b>Actors &amp; Action</b>
<b>1</b>	<b>STAGE 1: LAUNCHING THE PROCESS</b>	
1.1	Understanding What a Group Land Right Means	Group Members Meeting 1
1.2	Appointing an Interim Committee To Lead	Group Members Meeting 1
1.3	Defining the Group Land	Group Members Meeting 1 & Interim Committee
1.4	Defining Group Membership	Group Members Meeting 1 & Interim Committee
1.5	Deciding Next Steps & Following Up	Group Members Meeting 1 with follow up by Interim Committee
<b>2</b>	<b>STAGE 2: AGREEING BOUNDARIES WITH NEIGHBOURS</b>	
2.1	Establishing a Boundary Team	Interim Committee
2.2	Informing Neighbours	Interim Committee
2.3	Adopting Sound Procedure	Boundary Team
2.4	Meeting Neighbours on Site	Boundary Team
2.5	Recording Boundary Agreements	Boundary Team
<b>3</b>	<b>STAGE 3: PUTTING THE MANAGEMENT SYSTEM IN PLACE</b>	
3.1	Getting the Context Right	Group Members Meeting 1 & 2
3.2	Establishing Members as the Final Authority	Group Members Meeting 2
3.3	The Group Land Committee as Manager	Group Land Committee
3.4	Regulating the Use of Group Land	Group Land Committee with presentation of proposals, discussion & agreement by Group Members Meeting 2
3.5	Ensuring Rules will be Upheld	
3.6	Establishing Procedure for Resolving Conflicts	
3.7	Simple Land Use Planning to Aid Management	
<b>4</b>	<b>STAGE 4: ADDRESSING OVERLAPPING INTERESTS</b>	
4.1	Tackling Private Occupation of Group Land	Group Land Committee (with TA)
4.2	Adopting Conservancy Commitments into Land Rules	Group Land Committee (with Conservancy)
4.3	Catering to Commercial Interests in Fair Ways	Group Land Committee, with proposals agreed by Group Members Meeting 2 or 3
4.4	Planning for the Unexpected	
<b>5</b>	<b>STAGE 5: FINAL STEPS TO APPLICATION</b>	
5.1	Deciding on Leasehold or Customary Tenure	Group Land Committee
5.2	Mapping the Parcel	Group Land Committee
5.3	Bringing Information & Plans Together	Group Land Committee
5.4	Ensuring Consensus	Group Members Meeting 3
5.5	Making Formal Application	Group Land Committee

## STAGE 1 LAUNCHING THE PROCESS

*Facilitators: this first stage principally comprises a meeting of members of the community or other group (Group Meeting 1) and upon follow up discussions led by the Interim Committee*

The objective of the first Group Meeting is for all community or group members to meet together -

1. To better understand group land rights
2. To designate who should lead action ('Interim Committee')
3. To begin identification of the area to be brought under group tenure
4. To agree criteria for being part of the group ('members')
5. To define tasks for the Interim Committee to undertake and to set the date for report-back (Group Meeting 2).

### Step 1 Understanding What a Group Land Right Means

*Facilitators: Provide group leaders with a copy of background points made in Chapter 1 and the more detailed FAQ document about group rights. In addition, ensure that all group members understand the basic facts presented in Box 4 below.*

#### Box 4: Main Points About Group Land Rights

1. A group may apply for either a customary group right or a leasehold group right. The choice will depend upon the nature of the group and its intentions for the land.
2. A group right is owned in undivided shares. No individual member can claim a particular portion of the land or take this away from the parcel.
3. Once a group is the registered holder of the group land, no other rights can be allocated over the group land (unless a majority of the group members consent to this).
4. Although a group may allocate the land or parts of the land to others, it may not transfer its right without the majority of group members agreeing to this or without the formal approval of the Board.
5. A customary group right may be for "the lifetime of the group" and for a limited number of years for leasehold rights. With good reason and which must be recorded, the Board may limit the term of the grant. Or it may make the right provisional pending fulfilment of requested actions by the group.
6. The group does not need to register itself as a legal entity. But it must provide a list of adult members at application and the basis upon which new members may join the group.
7. Communities and existing groups need to be aware that it is compulsory to register existing customary rights before February 2016. Without this, group rights (as well as individual rights) may risk being extinguished.
8. Lands may be used for other than farming and residential purposes. Intended uses need statement and approval at application.
9. All parcels applied for by groups are subject to approval by the Minister if they are above 100 ha.
10. Group rights means *group governance*. All group members have a right to participate in making decisions. A system for inclusive decision-making by a majority of members is obligatory.

11. Group rights mean that more than one person uses the land. This means that rules need to be established by the group, and preferably agreed to before they apply for the land.
12. The role of Chiefs/Traditional Authorities is the same for grant of individual and group rights. In both cases their consent is needed. Traditional authorities are also directly involved in most stages of planning and application by groups. The TA is also represented on any management committee established by a group.
13. A group right gives a group the same recognition as owner of a right as given to an individual or married spouses when their right is registered and a certificate of title issued.

## 2. Rights and Responsibilities of Group Rights

### Box 5: Rights and Responsibilities of Collective Right Holding

Group land rights give group members these -

#### Rights

1. To use the land for the stated purposes
2. To be legally protected as the lawful right holder and therefore not vulnerable to other rights being allocated over that land
3. To make access and use rules for the land binding upon all persons entering and using the group land, not only upon the group members (co-owners of the right)
4. To allocate use rights to certain parts or resources of the group land for specified purposes
5. To establish a Group Land Committee to manage the land and which may also be designated as a Village Land Committee as appropriate and mandated with powers and responsibilities by the Traditional Authority and Land Board.

#### Responsibilities

1. To manage and use the land in the interests of the majority
2. To conserve the natural resources of the land
3. To operate in a fair and transparent manner in all matters relating to the land
4. To retain and respect any agreements concerning wildlife and forest protection, utilization, and benefit-sharing in their regard
5. To seek and take into account the guidance of technical land use agencies, the Traditional Authority and other agencies
6. To bring disputes with neighbours to the attention of the Traditional Authority and Board for neutral resolution; and
7. Any other responsibilities that the Board may impose as conditional to grant of the right.

#### Non-rights

Groups/communities holding group rights under customary tenure do *not* have these rights -

1. To sell the land which remains in the trust of the State
2. To sell or otherwise transfer the right to the land without the consent of the TA and Board
3. To rent out the land without formal consent
4. To fence the land without the explicit permission of the Board
5. To unreasonably prevent outsiders who have historically and consistently over time visited the area on a seasonal basis, although the group may establish conditions for this
6. To charge fees of members, unless the majority of members agree to collect funds for a particular purpose to serve its shared land purposes.

## Step 2 Appointing an Interim Committee To Lead

*Facilitators: Note reasons for designating specific persons to follow up ('Interim Committee').*

### 1. Interim Committees focus responsibility and therefore action

It is useful for groups of persons to designate specific persons to be responsible for follow up to firm up arrangements. Otherwise, little happens. Where the group is an extended family, it may wish to appoint an individual. Where the group is a village or larger units, it should appoint a committee of persons.

### 2. An existing Committee may be used

Often a relevant committee already exists in the community, and this may serve as the interim committee. For example, many villages set up a land committee to adjudicate the boundaries of private parcels during systematic registration. In other cases, local members of a Conservancy Committee may like to take the lead, or any other existing local committee. Some villages already have a committee under the chairmanship of the headman. This may be suitable although the group may wish to adjust/add to membership of the headman's committee to be more representative of all members.

### 3. The Interim Committee need not be formal

There are no rules about creating an interim committee, because it will not be permanent. In due course the group will elect a formal Group Land Committee.

However, principles of inclusiveness and representation are advised from the outset. Even if a temporary committee, this should include -

- a. At least one woman, one adult younger than 35 years, and one person who owns no livestock
- b. Several persons known for being non-partisan, able to put community interests above individual interests and who are also able negotiators; this will be especially important for boundary agreements
- c. The local headman/headwomen or junior councillor as the representative of the Traditional Authority; this is not necessary where the group is a family, or where the group land does not affect local commonage.

### 4. Purposes of the Interim Committee

The tasks of the Interim Committee, acting on behalf of the community/group members could include to -

- a. Collect information from the Traditional Authority and Land Board about group rights, along with copies of the Application Form
- b. Serve as a contact point for government officials and projects
- c. Announce in advance and call meeting of members of the group
- d. Distribute or read out points about group rights if members are uncertain

- e. Lead discussions as to the land to be applied for, how the group should be defined, ensuring that no one is unfairly excluded (see later)
- f. Sketch maps of the land or other aids to decision making
- g. Meet with neighbours to visit and agree boundaries on site
- h. Meet with individuals who have parcels within the proposed group land, who participate in a rotational grazing scheme, or who are involved in any other use of the land which requires specific discussion by the group as to how their interests may be made consistent with those of the group as a whole; and
- i. Take responsibility for resolving conflicts in a fair manner.

### Step 3 Defining the Group Land

*Facilitators: Use sketch maps to help identify the concerned land, features, boundaries, neighbours, and potential problem areas within the proposed group land. Most groups will already know which land they want to bring under a group right; e.g. if the group is a village, it is likely to want to include all unallocated commonage under a shared village group right. Other groups may need to debate the matter. Discussion in Group Land Meeting 1 may need to be continued in further meetings. Four general guiding points follow.*

#### 1. Decisions on group lands should not be rushed.

Where land is commonage, group members need to be in agreement as to where private farms and commonage begins.

Where commonage adjoins another community, no final decision can be made until those neighbours have agreed. It is wise not to rush to decisions and to keep the process open-minded and amicable.

#### 2. Group rights are not restricted to commonage.

Most collective property is held in respect of shared commonage such as forest/woodlands, *iishana* or grazing lands.

However, it is possible for a group (such as a village) to decide to bring the entire village land area under a single group right, and which would therefore include lands upon which members have built houses and their kraals and fields.

This may suit an extended family wanting a shared right precisely so that decisions about where each member farms are able to be kept flexible to suit soil fertility, crop type, and relative needs of each member family.

Including the entire community or group land area may also suit a pastoral or hunter-gatherer group.

Wherever the proposed group land includes houses and farms, the group must explicitly agree on the status of these private areas. Owners need to know that their land are protected. The group should make a rule concerning this.

### **3. Manageable scale of group lands is critical.**

Groups need to consider carefully whether the land is too large for the group to easily regulate access and use. This includes actively protecting the property against encroachment and unlawful uses. The group should not imagine that fencing in the land always solves problems; fencing is too expensive for most groups and communities. Fences also need regular inspection and repair. The ability of group members to take active control of the parcel should be a factor in deciding a reasonable size of the land to be applied for.

The group should also be mindful of the need for every member of the group to be an active decision-maker if he or she wishes. Where the planned group land is so large and involves so many communities that many are unable to attend meetings, the group should consider whether it would be more practical for each community cluster to apply individually for a respectively agreed local area.

### **4. A village is an ideal unit for a group landholding.**

Experience shows that the most practical level for group landholding is the village level. This is because villages are already built around the idea of sharing local resources and have experience in working together and dealing with problems together. They have systems for accountability built into their social norms or can develop these fairly easily. It is easier for members of an individual village rather members of five or ten villages to meet together at short notice, to agree on rules, and to ensure that everyone obeys the rules.

## **Step 4 Defining Group Membership**

*Facilitators: Note the guiding pointers given below. These mainly affect land groups that are village communities and where members are often not resident. Extended families may also need to define precisely who are members.*

### **1. Listing members**

Groups that are not legal entities are required to list members at application. Two decisions which groups need to make are -

- a. Should family members who are not resident in the locality be included?
- b. What should be the grounds upon which new members may join the group?

Each group may make its own decision. However, the principle of inclusion must be observed.

### **2. Inclusion**

If a family chooses to apply to register land as a group then the law will presume that all adult members of the family are equal members. No family member may be unreasonably excluded. Reasonable cause could be because the individual does NOT want to be a



member and/or lives permanently elsewhere and has no intention of sharing in the use or decision-making about the land.

The group may also decide that these categories of villagers should not be listed as members of the landholding group -

- a. absentee cattle post owners who have homes in other areas (see later)
- b. persons who have fields in several villages in order to increase their land access.

These are matters for each group to decide.

If the group is a village no *resident* household or person may be excluded. For example, even although the main purpose of acquiring commonage may be to secure grazing land, the group cannot exclude resident villagers who do not own livestock or who have no house of their own, relying on others for a place to live.

### 3. Residence

As above, residence emerges as the core criterion for membership.

In some cases, the group will decide to also include all immediate family members, whether or not they live in the locality. It is important for the status of non-resident members of groups to be clear early on to avoid conflicts at a later date.

### 4. Distinction may be drawn between members and decision-making powers

It is difficult for those who live outside the locality to be active decision makers. It may be sensible for the group to define the quorum for decision making as a minimum of 50% of adult members *who are resident*.

### 5. Ensuring women are not forgotten

It is important that the names and IDs of every adult man *and woman* are listed to ensure that women are treated as equal co-owners with men co-owners.

If a member has no ID, then name and date of birthday is important. Sometimes this reveals that the person is in fact a minor.

### 6. Providing for future members

In traditional social formations such as extended families and villages, the composition of the group changes with every birth, marriage, and death. The group can only list present-day adult members.

However, the group needs to make an early decision as to how new members will be added. These may be new wives or husbands who settle in the area and who should be assumed to be equal members with existing residents.

The group should also clarify that when children of existing members reach maturity they will also be considered as members of the group and therefore will also hold an equal but undefined share in the group land.

Below the following definition of membership may be useful for some groups to adopt-

*The members of the group shall be all adults over the age of 18 years who permanently reside within xxx village area, including adults who were born within xxx village but who reside outside its boundaries for the purposes of full time employment, and shall automatically include the children of members when they reach 18 years.*

*Adult persons from outside xxx village may apply to become a member of the group only on the basis of taking up permanent residence in xxx village and as agreed at a meeting of group members.*

#### **7. Distinguishing between primary & secondary customary land rights**

Among pastoral communities and in land-rich areas well beyond settlements, it is frequently the case that there are three categories of customary land right holders:

- A. those who live in the locality and consider the commonage as primarily belonging to themselves;
- B. non-residents but who have a well established history of using the land seasonally, with the consent of the local community; and
- C. other users who have only rarely turned up in the area requesting access, due to extreme drought or other factors.

The group does not need to include either B or C as members.

However, the group should identify and maintain a list of B persons. If they have a long and consistent history of arriving in the area every year for a limited period, the landholding group should take account of this in their rules. The seasonal arrivals may be subject to rules as to where they may live for the duration of their stay, which resources they may use, and how they may use those resources. That is, they are 'known visitors with rights' but also must obey the local land use rules that the group makes.

#### **8. Clarifying rights of absentee cattle post owners**

In some communities, issues arise over the status of persons unknown locally but who have received permission from senior or local councillors to establish cattle posts within the commonage of a local community. They may not live at the cattle post, hiring herd boys to manage their stock for them.

Villagers need to decide if absentee cattle post owners should be considered members of the group or considered as *permit-holders* - that is, as persons who have permission to use the land of the group.

Each group will discuss and decide this individually. It may be necessary to engage the Traditional Authority in these discussions.

## 9. Belonging to more than one landholding group

This will be unusual. This is because most group lands will be applied for on a village basis and an individual cannot name two villages as his primary place of residence.

However, there will be instances where a family or person is a member of two groups applying for a group right to two different areas. This could occur where -

- a. Members of a village apply as a group for local commonage and also apply with two sister villages for the land right over an area they jointly share such as a Community Forest
- b. a large livestock owner applies for a shared land area in a commercial part of the Traditional Authority Area along with seven other borehole owners in the area, and who is also a member of a village community seeking a group entitlement over the local commonage.

## 10. Dual grazing

Most group land rights will be for commonage, and grazing is a major use of commonage. Some group members may ask if they will be allowed to use the group's land if they have a ranch or similar significant grazing land access outside the area.

This is a matter for group decision. The group will bear in mind existing law which allows the Chief or Traditional Authority to withdraw a right to use commonage where an individual has access to a freehold farm, a group settlement farm, or another large area allocated under leasehold or a private farming scheme (CLRA, s. 29 (2c)). This principle recognises that grazing lands are now scarce and that it is often unfair to poorer members of the group for an individual with significant access to other grazing lands to maintain a large herd in the shared commonage.

## 11. Grazing Shares

This does not preclude a group making alternative arrangements. One such arrangement is to award all adult members the right to graze a set number of animals on the group land.

This is awarded equally to all members whether they have animals or not. Those without animals may trade their shares to those who want the right to graze more than the set share. Should this mechanism be adopted, the group is advised to -

- a. Seek independent technical advice as to the maximum carrying capacity of its group land;
- b. Seek the support of the Ministry of Agriculture for this approach; and
- c. Require that any transfer of rights by those with no or few animals is done in front of the Group Land Committee and recorded, along with any remuneration that the buyer of the shares will pay.

## Step 5      Following Up

*Facilitators: On-site inspection of the group land by the Village Land Committee is **indispensable**. Although elders may claim they know the area so well they are able to make all decisions in a sit-down meeting, visiting the proposed group land and seeing its problems first hand always brings issues to light and opens the path to needed actions and to sensible rules which will need to be adopted.*

Provide the secretary of the Committee with pen and notebook to record decisions at meetings.

The **Group Land Meeting 1** will define actions that the Interim Committee needs to take. Although each case will be different, these are likely to include the following.

### 1.      Land Review

This involves the Interim Committee walking throughout the proposed group land to get a first-hand and shared idea of -

- a. the nature and the condition of the resources
- b. its natural boundaries, if any
- c. potential sub-zones which suggest themselves as either of a certain resource type or ideally subject to specific uses.

All members of the Interim Committee should participate in this on-site review. The Committee should appoint a secretary to bring pen and paper on all site visits, so that problems, ideas, possible zones or rules may be recorded.

It is wise to encourage interested community/group members to accompany the Interim Committee on these trips. This will aid their own understanding and also make it easier for the Committee when it is reporting back to the whole community/group members on its proposals.

Also note that natural leaders tend to emerge during site visits. This will be useful when it comes to formally electing the Group Land Committee.

#### 1.1      Confronting realities of parcel size

One of the most important aspects of field visits to the land is that it shows the Committee just how large the proposed group land is. Often this arises when the Committee finds the land to big to walk around or to reach its boundaries.

If it takes a lot of time in each part of the group land the Committee may need to make several visits. The Committee may conclude that the land should be divided into several management portions with different sub-groups of the community (e.g. different settlements) allocated responsibility for each.

Or the Committee may conclude that the land is too large even for devolved management and that it will be more effective to subdivide the area into two or more parts, and for which the most local villages apply independently for.

## **1.2 Identifying Hot Spots**

This refers to areas or occupation needing action. For example, this could include -

- a. where farmers are encroaching on rangeland shared by all
- b. evidence of illegal farming, settlement, or fencing deep within the commonage
- c. evidence of encroachment by neighbours extending their fields into land which was presumed to be shared commonage.

Each of these will need to be followed up by the Interim Committee with the concerned persons, to arrived at solutions which the Committee will put to the next community meeting for approval, or if not resolved, which the community needs to share a role in resolving.

## **1.3 Provisional Development of Rules**

Both during the site visits and after, the Interim Committee will get lots of ideas for the most important rules which need to be imposed in order to -

- a. Protect severely degraded areas against use
- b. Make maximum but sustainable use of other areas; or
- c. Identify areas that could be earmarked for future uses.

## **2. Obtaining maps from the Regional Land Office**

This will be very useful for recording agreed boundaries (and sub-zones within the area) on available maps of the area.

## **3. Meeting with neighbours to arrange boundary meetings**

This will be a major activity in itself (see next Stage).

## **4. Involving Traditional Authorities**

All groups other than family units will be expected to make the local representative of the Traditional Authority a member of the Committee.

It is also useful to inform the Senior Councillor Chief/Traditional Authority of plans and engage their participation in decision making.

## STAGE 2 AGREEING BOUNDARIES WITH NEIGHBOURS

*Facilitators: boundary agreement is critical to securing lasting collective land rights. Although every group will be in a hurry to submit an application for shared lands, this process should not be rushed. Provide the Interim Committee with flip chart paper and felt tip pens to sketch locations of boundaries, significant landmarks, etc.*

### Step 1 Establishing the Boundary Team

1. In many cases, the Interim Committee can satisfactorily serve as the boundary team. However, the Committee may decide to designate others for this task because they have special knowledge of boundaries or are known for their ability to keep meetings calm.
2. If the group is a village community, it is sensible to ensure that local TA representative (Headman/Headwoman, or Junior Councillor) is a member of the Boundary Team.
3. If the two parties are within the same ward or district, they may wish to engage the Senior Councillor as Chair of boundary meetings. Or they may decide to reserve the Senior Councillor if needed as a mediator or arbitrator when the two groups cannot agree.
4. Where group land proposals are within conservancies, and/or using conservancy boundaries, conservancy management should also be involved.

### Step 2 Informing Neighbours

1. Agreement as to group land will needs to be made with two sets of neighbours -
  - a. in-village neighbours: those whose private farms within the overall community land area adjoin the proposed group commonage; and
  - b. village neighbours: adjoining villages.

*In-village neighbours:* the main task of agreement with these persons is to agree with them the limits of their personal farms/homesteads, as adjoining the group land.

*Village neighbours:* this can be more difficult, especially where grazing has been open until this point. Neighbours will be concerned that their traditional access is being curtailed. This can be overcome by separating out ownership of the land right from use rights, which can be granted to neighbours (see below).

#### 2. Informing neighbours

- a. The Interim Committee or Boundary Team needs to neighbours of the dates when it would like to meet with the individual or neighbouring community. They should be informed who will be coming so that they can complement the meeting with their own representatives.

- b. In the case of neighbouring villages, site meetings should be prefaced by a personal visit by the Boundary Team Chair and one or two others to explain group land intentions. This is doubly important where those neighbours are unlikely to know much about group land rights.
- c. **Promoting shared interest:** a key aspect should be to let the neighbouring community members know that they too may set about identifying and formalizing their right to local commonage, and that they should treat the boundary exercise as a first stage in defining their own area.

### Step 3            Adopting Sound Procedure

#### 1.            Take time

- a. It is normal for villagers to presume they know their lands and that boundary agreements will be no more than confirmation of existing knowledge. This is rarely the case in practice. Traditional boundaries are often vague on the ground. The process of defining exact boundaries also tends to trigger anxieties, because everyone wants as much land as possible under their own authority.

At each step, neighbours should have time to think about what is being proposed. If agreement as to boundaries collapses because grievances have not had a chance to come to the surface, to be aired and resolved, collective land management and use will be handicapped and even halted.

- b. Agreeing that an agreement is *provisional* is useful where parties need more time to think about the decision.
- c. Groups are advised to finalise agreement only after discussing use and management needs as well as boundaries. This can also influence where the exact boundary should be located, and make agreement easier.
- d. Formal mapping of the boundary should not be undertaken too quickly. Three months is suggested as the minimum time that should be allowed to lapse between agreement and formal mapping.

#### 2.            Make sketch maps to aid identification

It is useful to sketch out the proposed boundary, indicating location of neighbours, and physical features which could be used as markers of the boundary.

#### 3.            Accept that traditional boundaries may not work

It makes sense to use traditional boundaries *as far as possible*. However, these are often vague, already disputed, or impractical. Both parties need to consider what is *practical* and what is *fair* to them both.

#### 4. Use permanent features as boundaries wherever possible

In due course, GPS readings may be taken of main points along a boundary but this will not help local people 'see' the boundary and be aware of it. Use of natural features such as roads, riverbeds, special trees or other permanent features is advised, even if this means shifting the traditional boundaries to make use of these. Where natural features are not available, it is strongly recommended that artificial beacons be installed jointly by the two parties.

#### 5. Be prepared to compromise

Compromises are always possible. These more easily come about if the group encourages its neighbour to *also secure its own adjacent group land holding*. This is realistic in Communal Areas where more or less every settlement has some local commonage that it should be looking to secure under a group right.

#### 6. Keep the temperature down

Disagreements over land boundaries are common, including among individuals. Sometimes it is good to establish ground rules at the beginning of site meetings: such as agreement that no one will get angry or violent; that everyone participating will have a chance to speak; that patience by all parties will be exercised - and that the final decision does not have to be made today.

### Step 4 Meeting Neighbours On Site

#### 1. Go to the boundary

Boundaries can only provisionally be agreed in the office or under a tree. Parties must visit the site together and agree the boundary on site. This usually also opens up scope for compromise.

#### 2. Resolving conflicts

Where agreement proves impossible, these compromises are useful -

- a. Agreeing that the disputed area comes under one of the claimants but with agreement that access (e.g. for grazing) by the other group *will be formally permitted*.
- b. Agreeing "to split the difference" - to partition the disputed land down the middle, giving part to each neighbour.
- c. Agreeing to hold the disputed area *jointly*. This is less useful as it could require the two groups to secure a grant of land for this specific area in addition to the recognition they seek for their remaining group lands. Less formal agreements on this can be made.

#### 3. Mediation or arbitration

- a. *Mediation* is where the two parties secure the services of an outsider to help them reach agreement amicably.



- b. *Arbitration* is where the two parties agree to hand the decision over to an arbitrator. The parties have to agree first that they will abide by the decision of the arbitrator, even if one party does not like the result.
- c. The two groups may call in elders or an external person such as the Senior Councillor or Traditional Authority to mediate or arbitrate.

## **Step 5            Recording Final Boundary Agreements**

Until formal mapping is undertaken, there are no legal obligations around how the boundary is described and agreed. However groups are advised to do the following as this can be used to help define the boundary location at the time of mapping. A written record is also very helpful in the event of disputes.

- a. Write a description of the boundary's location in as much detail as possible.
- b. Read out the description and three persons of each party to sign that it is an accurate description of what was agreed.
- c. Sketch the location of the boundary with key features noted; and
- d. If applicable, install permanent beacons at key points.

## STAGE 3 PUTTING THE MANAGEMENT SYSTEM IN PLACE

*Facilitators: developing a practical system takes time and some trial and error. Not everything needs to be decided at once. Eventually the outputs should be -*

- *A clear & shared vision of the future of the proposed group land*
- *A decision-making system that allows for active, not passive member participation*
- *Fair & workable land use rules that can be sustained*
- *An accessible process for resolving conflicts in a lasting way.*

### Step 1 Getting the Context Right

#### 1. Principles

It is useful for group members to understand the following -

- a. **Requirements:** Groups are expected to institute a Committee to manage the land on behalf of the members. Groups are also expected to follow principles of inclusion and transparency. Each group is also advised group to specify minimum number of adult members who must consent to a major change in the use, users, or rules relating to the group land (see Box 6).
- b. **Oversight:** collective land holding in Communal Areas is new. Traditional Authorities and Boards will be watching carefully to see that grants to groups work fairly and well.
- c. **Flexibility:** different kinds of groups will apply for lands. What is needed for a large community group may not be needed for a small group of five persons seeking to share a parcel.
- d. **Tools:** despite different needs, all groups can make use of these useful tools -
  - 1) Holding regular meetings of members (**Group Members Meetings**)
  - 2) Appointing a **Group Land Committee** to manage the land on behalf of owners
  - 3) Adopting **Rules & Sanctions** to guide use and users
  - 4) **Zoning** the land into sub-parts to focus use and make control easier.
- e. **Practicality:** groups should avoid being over-ambitious. It is easy to make rules but less easy to apply them. Groups should also take the long view: it is best to start in a modest manner, and gradually refine or add to rules as needed.

#### Box 6: Minimum Management Requirements of Group Lands

The Application for Group Land Rights (**draft**) requires the group to -

- Describe measures the group has taken to ensure sound management of the land
- Indicate the quorum of group members needed to change uses of the land or rules
- Provide a constitution or rules for the group land if these have been prepared.

The Regulation of Group Land Rights (**draft**) requires the group to -

- Abide by the uses that it proposes at application for the group land
- Not make agreements about the land without the consent of the majority of members
- Include the local headman/councillor as an *ex officio* member of a group land committee if the group is a village or similar traditional social entity
- Be clear and agreed as to the term of office, duties and powers of committee members.

## Step 2 Establishing Members as the Final Authority

Group land rights mean that every member of the group is an equal shareholder or owner of rights to the shared land. They are co-owners. As co-owners they make final decisions and bear final responsibility for meeting commitments. Meeting together regularly is critical to deliver on this.

These co-owner meetings are referred to here as 'group member meetings'.

This Committee works for the members, not for itself. It is important that the members meet fairly regularly to remind the Group Land Committee of this.

### 1. Towards application for a group land right

Around three Group Member Meetings will be required for a group/community to reach the point of confidently applying for a group land right (Box 7). One of the Rules (see later) will state how often a Group Members Meeting must be held, and how often the elected Committee will meet.

Box 7: Group Member Meetings towards Application for Group Land Rights	
Group Members Meeting 1	Called to discuss group land rights, to decide to go ahead with the group land right application, to appoint an Interim Committee to launch the process, to provisionally identify the group land, to agree criteria of who belongs to the group, to list tasks for action by the Interim Committee including reviewing the proposed land, and meeting & agreeing boundaries with neighbours
Group Member Meeting 2	Following an adequate notice period to ensure high attendance including by non-resident members, the Interim Committee reports progress, presents boundary agreements with neighbours, proposes use rules, zones if appropriate, protection plans if needed, and general problem solving. This is also the likely point when the group elects a Group Land Committee, based on criteria of membership agreed, and agrees on terms, duties, powers, etc.
Group Members Meeting 3	Called by the Group Land Committee to present the draft application form and attachments for approval, to collect names and IDs of every adult who will be a member of the group, to have all final Rules and Procedures read out and approved by the majority, and to agree who will complete the final form, sign it on behalf of members and present to the TA and Board.

### 2. Establishing the Quorum

A quorum is the minimum number of persons who should attend a meeting in order for decisions to be formally taken.

The quorum will depend on the type of group. A small special purpose group could require that 80% of members be present. A larger group such as a village, or cluster of villages may decide that because so many members live and work *outside* the locality, that the quorum should be 60% of adults resident in the locality. Decisions need to be approved by an absolute majority present at the meeting.

### Step 3 The Group Land Committee as Manager

There are no fixed requirements about Committees other than these must be appointed in a participatory and transparent manner, and the term and conditions of their office agreed. However, groups are advised to consider conditions as listed in Box 8.

#### Box 8: Recommended Conditions for Members

1. The Committee should be elected or appointed at a Group Members Meeting and where the quorum has been met.
2. Membership should broadly reflect the composition of the group; e.g. if half the households are female headed, then, ideally, half the representatives should be female heads of households. If half of members own few or no livestock, they too need to be equitably represented. If there are many cattle posts in the group land, permanent cattle post workers should be represented as well as cattle post owners.
3. Younger people should be represented.
4. At least one person of high standing in the community (and known not to break rules) should also be appointed/elected.
5. The Committee should be established on a voluntary basis. It is unlikely that the group will be able to afford stipends for Committee members.
6. Committee members need to be able to commit to being able to meet regularly to deal with routine and emergency land issues.
7. Mainly for the above reason, members should be resident in the locality.
8. Members should be appointed for a fixed period (e.g. 3 years).
9. The powers and duties of the Committee should be specified and agreed by a Group Members Meeting.
10. The most important limitation on the Committee is that it may not allocate rights in the group land, change rules, or make other major decisions without the approval of a full Group Members Meeting.
11. The Committee must inform the group members immediately of any proposal by a community based organization or public service body to apply to use any part of the group land for a public, commercial or other specific purpose.
12. No member (or the Committee as a whole) may charge fees of members, collect and expend fines from offenders, raise funds or any other monetary dealing unless and until a plan for the safe collection and expenditure of any funds has been approved by a Group Members Meeting and at which a system of accountability is defined and established.
13. The Committee is obliged to report at least once every six months to a Group Members Meeting.

#### 4. Responsibilities

When appointing a Committee, the Group Members Meeting should also decide -

- a. How often the Committee should meet and where it will meet
- b. The quorum of the Committee (how many members must be present)
- c. Who will keep minutes of meetings (Secretary)
- d. For how long members should serve and how vacancies will be filled
- e. Appointment of the Chair of the Committee; and
- f. Immediate tasks of the Committee.

## 5. Involving Traditional Authority

**Ex-officio membership:** groups that are village or other traditional communities of persons are required to include a representative of Traditional Authority on Group Land Committees/Village Land Committees. This will usually be the local headman/woman. Where the TA has appointed a Village Secretary, it is advised that this person is also made a member of the Committee, and charged with keeping the Minutes of the Committee.

It is also advised that the Group Land Committee -

- a. Notify the head of the TA as soon as possible of intentions to apply for group rights, and request his support and participation planning this
- b. Keep the TA regularly informed of progress
- c. Involve the TA directly in the event of boundary disputes or other thorny problems encountered during application
- d. Work with all local councillors in cases where several traditional leaders represent the same community, where the area of a TA's jurisdiction has not been specified (the case in Kunene Region), or where the areas of gazetted and non-gazetted traditional leaders overlap.

## Step 4 Regulating the Use of Group Land

### 1. Users

Generally, all occupants of an area are members, and therefore have rights to use the group land. Non-members fall into these categories -

- A. People from *immediately adjacent communities* and who may (for example) be permitted to graze in adjoining zones of the group land on agreed conditions (numbers, seasons, herders required, etc.) or to access water from an in-village water point (also on conditions).
- B. People who come from afar but who have *practised customary access* to a certain resource within the group land every year (e.g. to a particular lake for fishing, to a particular natural water source for animals during the dry season or who have historically routinely collected a certain herb for medicinal purposes). The group may decide that these uses can continue, but on condition that the user first seeks the written consent of the Committee, and that the Committee takes into account whether the use is sustainable.

- C. People who seek to enter and use the land *only during severe droughts*; the Committee is advised to make this conditional upon consent, granted on a case-by-case basis depending upon the ability of the land to sustain that use.

Some groups may decide that *no person* other than a resident member of the group may use the group land, due to its smallness and level of degradation. In other cases the group may permit established seasonal users to use the land on these conditions; that

- a. The user may not use the land or resources without the written consent of the Committee
- b. The Committee reserves the right to reject application if it considers the land unable to sustain the use
- c. The period of permitted use is stipulated
- d. The user must reside in a specified place while occupying the group land; and
- e. The use right may be terminated if use is expanded or extended beyond that permitted.

## 2. Uses

An easy way to classify use rights is to distinguish between -

1. Freely permitted uses by all members of the group
2. Uses permitted with the permission of the Committee
3. Uses that can only be permitted by a Group Members Meeting
4. Uses that are absolutely not allowed under any circumstances.

## 3. Grazing Rules

Grazing rules will be prominent in most group lands. Therefore special attention to this is needed. For example -

- 1) where communities have already set up Managed Grazing systems on their lands, but where not all villagers participate, this will be a good time for all group members to discuss whether or not all villagers should be obliged to participate in and follow the rotational grazing plan.
- 2) The rights of those who have large cattle posts within the village land area also need to be discussed, so that all group members are comfortable with the arrangements.
- 3) Discussion should also be held with owners who graze large numbers of animals in the group land area but who also have access to commercial or private ranches.
- 4) The group may decide to impose a limit on the number of livestock numbers each adult member of the community/group may graze on the shared land.<sup>4</sup> This has made it impossible to apply. Group right holders now have an excellent opportunity to bring livestock numbers under control. It may decide that 300 large livestock units are too many for its limited group land area to sustain and may decide to lower this total. It may decide to do this by agreeing as a group that those with

<sup>4</sup> The law says that a family may graze 300 large livestock or 1800 small stock on commonage, but it does not state where that commonage begins or ends (CLRA Regulation 10 (1)).

more than the permitted number must pay fees to the group. As discussed earlier, the group may also decide to allow those who live in the community but who have no animals of their own may trade their right to hold stock to livestock owners.

These are matters the group/community will be well advised -

- a. to seek the technical assistance of rangeland officers; and
- b. to consult with the TA.

## **Step 5            Ensuring Rules Will be Upheld**

### **1.            Responsibility for upholding rules**

Rules have no point if there is no way to ensure the rules are followed.

It is usual in collective land holding to make *every member of the group/community responsible* for reporting seen offences to the Committee. Failure to report an offence that the individual is known to have observed is often made subject to a fine.

Where a group land is large or prone to encroachments and unlawful uses, the group may decide to appoint guards. Paying a guard is expensive for most communities. Therefore some of the options that might be considered include -

- Establish as a Rule that every family is to provide guard service for one week a year (or two weeks a year, depending upon the number of families)
- Hire a full-time guard paying him through collection of fees from every family
- Compensate the guard with fines charged on offenders
- Develop a sub-zoning system (see below), with one Committee member responsible for each zone, reducing the area into more manageable units.

### **2.            Being clear on punishments for offences**

- Rules rarely work unless the prospect of punishment exists, known to all.
- The community/group need to agree on punishment for each type of offence.
- The punishments may be in cash or kind. Traditional punishments may be used if these are permitted under customary law and stay within the bound of national laws. For example, no offender may be tortured, beaten, or imprisoned.
- The group should take advice from the Traditional Authority as to what fines or punishments are acceptable.
- In severe cases, and when the offender is not a member of the group, the Committee should take or report the offender to the Traditional Authority to be dealt with.

- Cases will also arise where the person denies the offence. In that event, the group would request the Traditional Authority to investigate.

### 3. Ensuring the Rules have Legal Force

- Once a community/group obtains a registered group right, as the legal right holder to that parcel, it has legal authority to decide how the land is used and by whom, so long as it keeps within the boundaries of the Communal Land Reform Act and its Regulations, and obeys any caveats or conditions that have been set by the Board.
- Administrators and courts will uphold the right of the owner (in this case, the group) to make and enforce rules for so long as these do not contradict human rights or provisions under any national laws.
- The community/group should submit its proposed Rules to the Traditional Authority in advance of application to secure provisional approval. This is especially important in matters of sanctions; the Traditional Authority will want to confirm that the proposed punishments for breaking rules are fair and within the bounds of acceptable customary practice as well as national law.
- The final Rules should be attached to the Application so that the Board may be informed about the group's intentions for managing the land.

## Step 6 Establishing Procedure for Resolving Conflicts

### 1. Planning in advance

Conflicts routinely arise over land matters so it is wise for the group landholder to decide ahead of time how these will be addressed. The procedure should be included in its Rules.

A community or group may make its own arrangements for solving land conflicts so long as these are resolved peaceably and fairly.

These procedures are recommended -

- a. In the first instance, the Committee will try to resolve the conflict. If it fails, it may appoint one or two elders in the group to resolve the problem.
- b. If neither can find a resolution, the Committee will invite the Senior Headman/Councillor to mediate.
- c. If the dispute is between a group member and the Committee then the individual or Committee may appeal to the Senior Councillor to mediate, or to any other person who both parties agree should be the mediator or arbitrator.
- d. If the dispute is between two groups/communities, this must be placed before the Senior Councillor of the area or directly to the highest Traditional Authority.



- e. If the Traditional Authority cannot resolve the dispute, then the matter may be submitted to the Land Board. The Board may decide to appoint an Investigating Committee to investigate and report to the Board.
- f. The Board may also ask for the assistance of the Ministry.

Not all problems are conflicts. Some present a conundrum of balancing interests of different parties. Others present management challenges. Next steps address commonest challenges that can be expected.

## **Step 7          Simple Land Use Planning to Aid Management**

### **1.          Zoning**

The main tool for simple land use planning is zoning. This means dividing the group land into sub parts. The purposes of zoning are -

- a. To indicate which parts of the group land may be used for which purposes
- b. To indicate different management zones, each of which may be made the responsibility of a sub-set of the group (e.g. the hamlet to which the area is immediately adjacent).

Zoning is not compulsory and will be most useful where the group land is large and diverse.

Zoning is also useful for forward planning. It encourages the group/community to think about future land needs and different uses than are currently practised. A common use is to earmark land where future families may build houses and open fields.

### **Future Expansion Areas for Settlement**

This allows the community or group to plan for population growth. This will usually be located as an extension area to the existing settlement area. To plan ahead, the group needs to define early on who will be eligible for such new parcels; children reaching adulthood and establishing their own homes will in most cases be the priority.

This will also help the community and Committee to be realistic about what is fair limitation on individual parcel size for the area. This may be far lower than the present suggested maximum of 20 ha, which is already too large for many settlements. Each community has the right to determine its own ceilings on individual parcel size.

### **2.          Examples of zones**

Examples of zones are given below. A single group land is unlikely to need all these zones.

- 1. **Settlement zone:** this may refer to an existing settlement area where this has been included in the group land or it may refer to an expansion area.
- 2. **Public service area:** for locating school, health and other services, shops, etc.
- 3. **Water area:** such as *iishana*, natural ponds and wells or community boreholes.

4. **Fishing zone:** this especially applies to riverine areas or to *iishana* where the group wants to indicate where fishing may be undertaken
5. **General grazing area:** where livestock belonging to group members may freely graze
6. **Reserve grazing zone:** which may be grazed only when the Committee/group agrees, such as to save the grass for the driest months
7. **Managed Grazing Area:** where managed rotational grazing has already been adopted or where the group/community decides to adopt this system, setting aside the area as only to be used in accordance with the rotational grazing plan
8. **Cattle-post zone:** this would earmark an area where larger stock owners may locate wells and kraals, with the intention to confine these to one part of the group land
9. **Hunting zone:** where wildlife use is permitted in accordance with conservancy and natural resource management law
10. **Protected wildlife breeding areas:** some conservancies have already earmarked such areas and these will be retained
11. **Forest:** where community forest is located. If a Community Forest is already gazetted then it is doubly important that the group or community take account of this (see later)
12. **Sacred sites:** such as a mountain, cave, cemetery, etc.
13. **Commercial development area:** this will be applicable where the community has applied for a group right under leasehold tenure so that it is able to sub-let some portion of its land to a private rancher, commercial cultivator, tourist lodge, or some other income-generating enterprise.

## STAGE 4 ADDRESSING OVERLAPPING INTERESTS

### Step 1 Tackling Private Occupancy on Group Land

#### 1. Private lands within the commonage

Until now villages have not had the opportunity to set aside their commonage under secure entitlement. The only route open for formal entitlement has been in respect of individual house and farm parcels. This has prompted the idea that any land that is not under an individual is open to all.

Many headmen have also not been careful where they allocate new farms or cattle post sites. Villagers may find that one of their number, or a newcomer, has been allocated a cattle post or farming parcel in the middle of land villages have customarily thought belonged to all members of the village.

There are other cases where villagers or newcomers have established houses, farms, cattle-posts and even erected fences without permission of any Traditional Authority.

The opportunity to take up this challenge now comes with group rights. The objective of many villages will be to apply for group rights so that they may halt *ad hoc* allocations of local commonage and bring the land under use rules that benefit all villagers, not only a few individuals.

#### a. Meet with the occupant

The first step is for the Committee to meet with the occupant and find out how s/he came to settle, farm, or fence the area and on whose authority? The Committee may also find out where the occupant comes from and if s/he has other lands such as access to a ranch or group settlement that gives him or her access to substantial grazing. Is he or she an absentee farm or cattle post owner, with a home in another community?

#### b. Aim for voluntary removal

The Committee will be wise to be conciliatory, explaining the intentions of the community as a whole and aiming for the occupant to decide to remove himself and his farm, fence, house or animals.

Alternatively, the Committee should -  
Involve the local and then senior TA in the case; and  
Work towards compromise solutions.

#### c. Finding solution

If the Committee finds that -

- i. the occupant self-allocated the land or the right to fence, the Committee may request him to remove himself within a set period. The Committee should notify the local councillor, senior councillor and TA of its action. The occupant may appeal if s/he wishes;

- ii. the occupant was given authority to settle, build, farm, dig a well, install a borehole or erect fences by a lawful Traditional Authority, the Committee may request that Authority to find another place for the occupant, explaining why it is critical for conservation and equitable use of the local commonage that the occupant leave the group land;
  - iii. the Committee may also ask the Authority to not approve any self-expansion of the parcel that has occurred, and request the occupant to remove fences illegally erected;
  - iv. or if the occupation is lawful in all aspects, the Committee may offer the occupant an alternative parcel within the settlement area or immediately adjacent to it;
  - v. or where the parcel is a registered entitlement, the Committee may request the Land Board to reallocate another parcel to the occupant;
  - vi. or the Committee may measure and map the parcel and impose a strict limit upon its expansion, but accept the parcel as a private island in the middle of the commonage. Depending upon the history of his/her acquisition of the parcel and the size of the land, the occupant may or may not be permitted to also access the commonage for his livestock or other uses.
- d. If the Committee is unable to tackle the issue satisfactorily, or if relations severely deteriorate into a threat of aggression, the Committee should immediately report the case to the Land Board requesting its assistance. The Board will likely appoint a small Investigation Committee to address the matter.

## **Step 2            Adopting Conservancy Commitments into Group Land Rules**

### **1.        Many group lands are within Conservancies**

More than half all land in Communal Areas is under conservancy management.

Conservancies are *not* land holdings. They are created to conserve and sustainably use wildlife. Most conservancies are therefore also committed to resource conservation. Most Community Forests are also located within Conservancy boundaries.

A village or other group that wants to apply for tenure needs to take note of conservancy commitments.

### **2.        Shared Objectives**

Conservancies and group land applicants have these common interests -

- a. Commonage is their main focus
- b. Both operate on a community based system
- c. Both aim to conserve commonage as a shared resource rather than convert the land into housing, cultivation or fenced ranches.

### 3. The pros and cons of Conservancies as title-holders

**Advantages:** in some cases Conservancies are an appropriate entity to apply for group landholding on behalf of all residents. Advantages are -

- a. That the boundaries of the area have already been agreed
- b. A management system has been set up
- c. Conservancy managements want to hold title so that they can sub-lease lands to tourism entities
- d. Recent amendment to the Communal Land Reform Act specifies conservancies as among community based organizations that may hold land leases.

Many see encouraging Conservancies to apply for lands as the ideal shortcut to bring millions of hectares of Communal Areas under secure tenure.

**Disadvantages:** however, there are important disadvantages in a Conservancy holding title on behalf of residents within the area. **Scale:** most of the disadvantages to Conservancies as titleholders stem only from the fact that they usually *cover vast areas* and *involve many communities* within their boundaries. Communities need to be aware of the following factors before they decide that the conservancy should hold entitlement on their behalf -

- a. **The sense of “our land” is weakened due to scale.** Lasting collective tenure requires that every member of the group feels and *acts like* an equal and active co-owner. Without this sense of ‘ownership’ even the commitment to conserve the land against strong individual interests is difficult to sustain. Obtaining this sense of ownership is more difficult when much of the land is remote to any one community and where multiple communities are involved.
- b. **The incentive for active management is diluted.** In large Conservancies, management is necessarily centralised in the hands of a committee or hired managers and whom many residents never meet. Many members feel they can sit back and leave everything to the remote managers. This may work for large-scale wildlife use but does not help local groups or villages protect immediately lands from incursions, unsound use, or encroachment.
- c. **Popular participation may be token.** Collective decision-making and therefore commitment to rules is handicapped where the land is vast and the communities many. Even members of one village often have difficulty agreeing decisions and holding to them. This difficulty is multiplied when many communities are involved.
- d. **Representation is centralised.** Meaningful representation is difficult in large Conservancies. Chiefs and TA tend to represent local interests. Meetings are often too remote to enable residents to attend; many fail to attend even the annual general meeting. Poor people tend to be most excluded without the means to travel to meetings.
- e. **Land rights may be lost rather than gained.** Centralization of land rights into the hands of a conservancy disempowers rights held by individuals, families and communities to the immediately local area. Should a conservancy obtain a leasehold right, these rights may even be extinguished and customary and leasehold rights cannot be held over the same land. Communities within a conservancy need to be made aware that they will be surrendering their right to register customary interests (either for

homesteads, or as groups) if they approve the conservancy holding the land on their behalf.

- f. **Membership in Conservancies can be uncertain.** Many conservancies began with local interest groups so that not all residents are included as members, even until the present. Newer Conservancies generally now state that all residents are members. However, because of the large size of the Conservancy and the involvement of many different villages, this can remain fact only on paper. Some villagers in Conservancies are still not sure if they are members or not. Additionally, some conservancies have members who do not live in the locality but who are interested in wildlife use. This also does not dispose conservancies to being viable landholding units in all cases.
- g. **The Conservancy area does not distinguish between private land and commonage.** This is not a problem when the objective of the body is to manage wildlife, not to own the land itself. It is problematic when members of settlements within a Conservancy do not want to sacrifice their private entitlements to a single conservancy leasehold title. This may not be of major concern to hunter-gatherer or pastoral groups but will be of major concern to settled communities within a Conservancy area.

#### 4. Conservancies as important facilitators of group rights

When communities consider the above they may decide that the Conservancy is not fit for purpose when it comes to ownership of land rights.

Some Conservancy managers have already reached this conclusion. They have decided that it will be more advantageous to conservation of wildlife if member communities of the Conservancy secure group rights to respective local areas. They have become active facilitators in this.

This can present a win-win situation for local land rights and for Conservancy objectives -

- a. The member communities will not feel their rights have been subordinated to the Conservancy, thereby avoiding potential conflict and breakdown of the Conservancy in the longer term.
- b. The member communities may also tailor local tenure arrangements to fit their own needs and to work in social units with which they feel most comfortable.
- c. More flexible tenure arrangements can result. For example, one or two communities in the Conservancy may decide to exclude all private areas from group applications for their local areas while other communities decide to bring the entire locality under a single shared title. Other villages within a Conservancy may decide it will be most workable for three related villages to apply together for a single shared right and to manage their commonage jointly.
- d. Additionally, where there is genuinely a resource area that is shared by all members of the Conservancy, such as a Community Forest, then the communities may decide to apply for this distinctly under a group right as belonging to them all.
- e. Smaller units of land rights and responsibility within the Conservancy will also open the way for those units to be more protective and active managers of those lands.

- f. The member communities will become stronger and more active sub-parts of the Conservancy when it comes to decision-making about shared wildlife or other interests; this will represent a maturation of Conservancy development.
- g. In turn the Conservancy will have much stronger and more accountable actors at the village/village cluster level to demand performance to uphold those agreed actions.

#### **4. Obligatory coordination of conservation and tenure objectives**

Irrespective of which tenure solution is arrived at, no individual or group may ignore obligations that they have made as a result of being members of a Conservancy.

Group applicants are required to meet with Conservancy and Community Forest management committees and reach agreement on these matters -

- a. Upholding and/or adjusting as necessary Conservancy Rules as to use of wildlife;
- b. Upholding and/or adjusting as necessary Conservancy zones such as a designated for wildlife breeding, wildlife corridors, keeping these free from fences, or an area that has been agreed by all Conservancy members as the most viable for siting a future lodge;
- c. Ensuring that benefit-sharing arrangements are retained or adjusted in the case where the source of revenue (such as a lodge site or hunting concession) lies within the lands of the applicant community
- d. Restructuring representation on the Conservancy Committee to reflect changed arrangements; it will be most viable for a village or village cluster that has secured a group right over local commonage to send a representative from its Group Land Committee to the wider Conservancy Committee. This will also advantage the Conservancy as it will then have a ready-made contact group with which to work on wildlife related matters and to make responsible for actions, including fair distribution of benefits, if this should arise.

### **Step 3 Catering to Commercial Intentions in Fair Ways**

Some parts of each Traditional Authority Area have been gazetted as available for leasehold tenure with the implied objective that these lands will be made available to individuals or entities with commercial intentions, mainly relating to livestock development. This section is mainly addressed to such areas.

#### **1. Customary rights exist in these areas and must be accounted for**

Legal entities may not ride roughshod over customary rights. The CLRA is already clear on this matter; it states that-

A right of leasehold may not be granted in respect of a portion of land which another person holds under a customary land right, unless such person agrees to relinquish his or her right in respect of the land, subject to the payment of compensation, as agreed to by such person and suitable arrangements for his or her resettlement on alternative land (section 31 (2)).

It is rare to find land 'empty' of customary right holders, whether they have formalised their rights in registered entitlement or otherwise. It is now recognised that even the remotest parts have well-established customary owners, and who have the right to regularise those rights. They may do so on an individual, family or collective (group) basis.

Award of a leasehold right extinguishes customary rights. At best, customary right holders will be permitted to continue to occupy and use the land, but this will be at the will of the lessee.

Proposed regulations will emphasise the obligation of group applicants seeking leasehold tenure to identify all customary right holders resident in the locality and to make suitable arrangements. In all cases satisfactory arrangements require the fully informed consent of those affected and therefore their participation in decision making.

The options are -

- 1] That the affected customary right holders are made full and equal members of the entity (e.g. conservancy or cooperative). In addition, they need to be as officially assured of sufficient representation in decision making by the entity of which they are part. They are then in a better position to willingly to surrender their right to establish themselves as registered customary owners of the land in favour of their equitable inclusion as co-owners of the leasehold right.
- 2] Alternatively, and preferably, the affected customary right holders may be assisted to apply for the land themselves as individuals, families or groups, under leasehold tenure. These customary right-holders will then be in a position to sub-lease parts of the land or all the land to the business or other entity. In this event, failure of the company, cooperative or other business entity will not jeopardise their original rights.
- 3] The business or other entity or individual leaseholder may also come to an arrangement with those affected that they remove themselves to another location, which is of equal or improved condition. Assistance and compensation for losses incurred through moving will also have to be negotiated and paid.
- 4] Affected customary landholders may agree to be paid compensation for the loss of their rights. Considering that their losses concern not only residential and farming rights but also loss of access and therefore livelihood to commonage, and that the losses affecting their children's future should also be calculated, this is the most expensive option.

## **2. Planning for equitable exercise of occupancy and use is critical**

The question of whether the customary right holders may continue to occupy and use the leased land is distinct from the above. In this regard, the advised principle is that occupation and use rights should remain unaffected by grant of leasehold. This should be the default position even where the affected persons have surrendered their rights to register customary rights in favour of being party to group leasehold or as members of the legal entity. The status of individual residential and farming rights within the area needs particularly judicious planning. The likelihood of population growth and expansion of areas needed to support residence and farming also need to be taken into account. Traditional Authorities and Land Boards are advised to check on all these matters when reviewing applications from entities or groups for leasehold tenure (see later).



## **Step 4 Planning for the Unexpected**

### **1. Being prepared**

Groups need to be aware that circumstances may arise in which the group wishes to surrender its right or is forced to do so for one reason or another. Such circumstances might be -

- a. Where the legal entity which holds the right on their behalf fails, leaving the rights of members and occupants in some uncertainty
- b. Where allocations to individuals of the group land results in there being no group land left for the group to hold or manage
- c. Where the group land is swallowed up by urban expansions, or required for occupational use by a Government entity, or more formally acquired through acquisition for public purpose
- d. Where the group land remains intact but the group wishes to sub-divide this into several parts, possibly because the area has proven to be too large to manage as one unit, or because different communities would prefer to hold their own portion of group land
- e. Where the group fails to operate successfully and wishes to dissolve itself; or
- f. Where the group wishes to transfer its shared holding from customary to leasehold tenure.

### **2. Procedure**

The outstanding requirement indicated in all these circumstances is that the members of the group must meet together and plan carefully how they wish residual lands to be distributed. These conditions pertain; that -

- a. Ample notification of meetings on the subject and its importance is given to encourage as many members of the group as possible to attend
- b. The group aims for consensus in its decisions
- c. Arrangements must be equitable and beneficial to all group members, rich or poor.

The group members will then submit their proposal for its dissolution and fair distribution of interests to the Traditional Authority and Board for their approval.

## STAGE 5: FINAL STEPS TO LAND APPLICATION

### Step 1 Deciding on Leasehold or Customary Tenure

Like individuals, groups need to decide whether they will apply for a group right under customary or leasehold tenure. Families, groups and legal entities may apply for either. Generally this matter will be decided early. These differences need to be considered.

#### 1. Determinants

Whether a group decided to apply for a customary or leasehold land right depends upon-

- the location of the land
- The type of group; and
- The use intentions of the group.

##### a. Location

As noted above, the law requires each TA to set aside areas for agricultural purposes and which were then gazetted (VLRA, s. 30 (2)). The scope of 'agricultural purpose' is not elaborated in the law. However, the intention of the law was to enable individuals and groups to acquire large parcels for ranching and also as areas where Government could create resettlement schemes.

Although most of the areas were gazetted on the basis of being presumed more or less 'empty' lands, communities already lived in these areas and had established individual and collective rights. Occupation of these areas has also since grown.

It is not compulsory that a resident community within these gazetted zones seek leasehold entitlement for their individual or group land rights. However, the zoning of the area encourages them to do so.

##### b. Type of group

While a traditionally instituted group such as a village may apply for a right under either customary or leasehold tenure, legal entities (such as companies, trusts, cooperatives, closed corporations and conservancies) and other non-traditional groups must apply for leasehold tenure.

Community based organizations (CBO) may apply for leasehold tenure. These may be traditional organizations, non-traditional organizations, or a hybrid of both. CBO is defined as meaning "an organization, group, trust, foundation or a body established by or for a community and having its aims and objectives to serve and benefit the community" (CLRA Amendment, 2013).

Where a resident or group of residents seeks land for a use not covered under customary provisions (such as residential or farming use), they may apply for a leasehold right to the land (CLRA, s. 35).

##### c. Intended use of the land

The implication of the law is that any group intending to use the land for other than a customary purpose must apply for leasehold tenure. This includes commercial purposes.

## **2. Different Conditions Apply**

### **a. Requirements**

Special conditions apply in the case of leasehold, such as -

- a. The Board may charge an amount for the land. Regulation 14 sets out how the amount will be determined;
- b. Formal survey and mapping of the leasehold parcel is required, in accordance with the Land Survey Act, 1993, and the Board may require the leasehold applicant to pay for this (CLRA, s. 32);
- c. Beacons marking the perimeter must be installed and preserved;
- d. Authorised persons may enter the land at any time;
- e. No roads through the land may be closed to people, animals or traffic (Regulation 15); and
- f. The leasehold applicant must provide the Board with an Environmental Clearance Certificate from the Ministry of Environment and Tourism, and which might involve paying for an independent environmental impact assessment being carried out (Environmental Management Act, 2007, s. 27-28).

### **b. Duration of tenure**

The term of leasehold and customary rights are different; a group holding customary entitlement may be granted title for the duration of the lifetime of the group. Leasehold tenure is granted for fixed terms, and which may extend to 99 years.

### **c. Reversion**

On cancellation of the right and/or dissolution of the group holding the land, the land reverts to the Board if it is a leasehold entitlement and to the Traditional Authority if it is a customary entitlement.

### **d. Right to Sub-Let**

A group right in leasehold allows the group to formally sub-lease portions of the land, such as to a tourist company. A group right in customary tenure does not allow the group to lease the land but it may enter a contract allocating a particular part of the land to a particular user, and on conditions it stipulates. The agreement between the group and tenant also has the force of law as a contract.

## **Step 2 Mapping the Parcel**

### **1. Formal survey and mapping is not obligatory**

The applicant may require the leasehold applicant to have the land formally surveyed and mapped (CRLA, section 32 (4)). This is costly and applicants generally have to provide this only once provision consent is obtained.

It is not obligatory for individuals or groups applying for customary tenure to have the proposed parcel formally surveyed and mapped.

However applicants are asked to provide at least a sketch map of the location of the proposed parcel and an estimate of its size in hectares.

## **2. Obtaining maps & mapping services from the Ministry**

The Ministry of Lands and Resettlement provides a limited survey and mapping service. The group should find out from the regional land office if and when this may be undertaken. Alternatively, the group may need to hire a private surveyor to survey and map the land.

No surveyor will wish to undertake the task unless it is assured that the boundary has been fully discussed and agreed with neighbours. The group should be able to present minutes documenting boundary agreements.

## **3. Preparing a sketch map**

Groups applying for customary rights need only provide sketch maps of the proposed parcel. These may be hand-drawn or drawn onto topographical or orthophoto maps which may be available from the Regional Land Office. Information could include -

- a. Lines showing the location of the boundary around the land. Wherever possible, these should follow existing features such as cut-lines, roads, ponds/lakes, boreholes or hills.
- b. Names of individuals or communities sharing the boundary, located in the appropriate area of the boundary.
- c. Marks to indicate settlements next to or within the parcel.
- d. Marks indicating special physical features within the parcel.
- e. Location of boreholes, areas of settlement, or other definable parts of the group land.
- f. If illegal occupants have been asked to remove their farms, houses or fences, their location should also be indicated in the sketch map.

The group should also provide an estimate of the total size in hectares of the proposed group land area, and a written description of the boundary sufficient to enable identification of the boundary without the aid of a map.

## **Step 3 Bringing Information and Plans Together**

The Application Form provides the obligatory framework for information and intentions to be expressed. Most groups will wish to attach more information. A constitution and by-laws is generally required for registration of a community based organization, cooperative, company or conservancy. Groups that are not legal entities may also find it useful to bring all their decision-making and plans under a similar document, suggested below as Group Land Right Rules. A guideline for content (headings) is provided in Box 9.

### Box 9: Suggested Framework for Group Land Right Rules

#### 1 THE GROUP

- 1) Name and address
- 2) Membership of the group
- 3) Basis upon which the group is formed
- 4) Residence of members
- 5) Grounds upon which other persons may become members of the group
- 6) Duties of members

#### 2 OBJECTIVES

- 1) Objectives of the group as a landholder

#### 3 THE GROUP LAND

- 1) Location
- 2) Description with special features
- 3) Boundaries
- 4) How the boundaries of the group land have been agreed
- 5) Estimated size of group land
- 6) Current uses of group land
- 7) Planned uses of group land
- 8) Sketch maps or formal maps of the group land and its location

#### 4 RIGHTS & RESPONSIBILITIES

- 1) Rights of members to the group land
- 2) Rights of established traditional seasonal users of the land
- 3) Rights in the event of extreme drought
- 4) Duties of all members in respect of the group land
- 5) Oversight authority of Traditional Authority

#### 5 MANAGEMENT OF THE GROUP LAND

- 1) Group Land Manager (Committee)
- 2) How the Committee is appointed
- 3) Term of service of members of Committee and grounds for removal
- 4) Duties and powers of Committee
- 5) Meetings of the Committee
- 6) Quorum of Committee
- 7) Reporting to Members: Group Member Meetings
- 8) Quorum of Group Member Meetings
- 9) Decisions for which Committee must seek consent of Group Members Meeting

#### 6 RULES

- 1) Zoning plan for management purposes (sub-zones) (if applicable)
- 2) Zoning plan for uses (sub zones for different uses) (if applicable)
- 3) General group land rules
- 4) Rules specific to each zone
- 5) Date and meeting at which rules have been agreed
- 6) How new rules may be added, rules removed, or other changes made
- 7) Conservancy agreements
- 8) Fines for offences
- 9) Procedure for handling offences

#### 7 FINANCIAL MATTERS

- 1) Rules relating to the expenditure of fines collected from offenders
- 2) Rules relating to the collection and expenditure of fees from members for a particular purpose
- 3) Rules relating to the raising of funds and expenditure from external persons or agencies
- 4) General consent and accountability procedures

8	CONFLICT RESOLUTION
1)	Procedures for resolving conflicts -
2)	among group members
3)	between group members and the committee
4)	between group and neighbours
5)	between group with other non-members
6)	Role of Traditional Authority
7)	Role of Land Board
9	ALLOCATION OF INDIVIDUAL RIGHTS ON GROUP LAND
1)	The status of existing occupation and cultivation rights on group land (if applicable)
2)	Application for new rights of private occupation, cultivation, cattle post development, or other purpose with conditions, procedure and consent requirements listed
3)	Status of granted rights
10	DISSOLUTION OF THE GROUP
1)	Principles of land distribution that will apply in the event of voluntary or coerced dissolution of the group, surrender of its right, or cessation of existence of group land

## Step 4 Ensuring Consensus

### 1. Group Members Meeting

A meeting of all members of the group should be called prior to submission of the Application (Group Members Meeting 3). Advance notice should be sufficient to encourage and enable members of the group who are not normally resident in the area to attend.

If the group comprises members of several hamlets or villages, then the leaders of those communities should bring with them the list of all resident members and their IDs, along with a list which the village has prepared of persons who are immediate family members but not resident in the area.

Attendance of the following should also be encouraged -

- a. Headmen/Junior Councillors of neighbouring villages to which the proposed group land adjoins
- b. The Senior Councillor of the District
- c. The Chief/Traditional Authority
- d. Members of the Land Committee of the Traditional Authority
- e. A representative of the Communal Land Board
- f. A representative of the Regional Office of the Ministry of Lands & Resettlement
- g. The Conservancy Manager if the group land is located within a conservancy; and
- h. The Chair of the Community Forest Committee if the Forest is included in the proposed group land area.

### 2. Agenda

The agenda of this Group Members Meeting may include -

- a. Report on progress by the Group Land Committee
- b. Report of discussion of the proposal with the Conservancy Manager if the group land is within a Conservancy and information on agreement on shared issues of concern

such as conservation rules, protected areas, and limitations on fencing affecting the group land

- c. Presentation of boundary agreements reached with neighbours
- d. Presentation of the sketch map which will accompany the Application
- e. Final agreement of Rules and Sanctions
- f. A zoning plan, if prepared
- g. Confirmation of the members of the Group Land Committee
- h. Reading of the Application Form for Group Land Rights and a draft of how it will be completed
- i. Collection of names and IDs of all members of the group including those not present
- j. Authorization of signatories on behalf of the group.

### **3. Signing Ceremony**

This is a useful stratagem to consolidate group identity and commitment to secure and sustain the group land area. If the group is small (e.g. members of an extended family, or clan, or members of a special interest group) then all members could sign. If the group is larger, then heads of families could sign.

*What do they sign?*

The Group Land Committee should prepare a statement which says that the members of the group agree to apply for a shared right to the specified land and to use and manage the land in accordance with group agreed rules and with inclusion of all members and fairness always in mind.

The group members might also ask Committee members to sign that they will give honest and active service to the community as Committee members.

Note that the Application Form requires confirmation that the contents of the Application Form and attached documents have been read to the members of the group, and the date of that meeting to be indicated. This Signed Statement may be attached to the Form as evidence of the meeting and the discussion.

Even without this requirement, the opportunity for members to come forward and publicly sign that they support the intention to secure shared title is very important for group cohesion and commitment.

## **Step 5 Formal Application**

### **1. Completing the form and attaching additional information**

The Form is straightforward as to what information is required. The group should provide whatever additional information it considers relevant even if it is not specifically requested.

### **2. Securing Agreement**

#### **Conservancy Authority**

The Application Form requires evidence that the group has consulted with the Conservancy Manager or Committee if its proposed land falls within a Conservancy. It must also show that issues of mutual or conflicting concern have been agreed or resolved.

### **3. Submitting Application**

#### **Traditional Authority**

When the Form is complete, the Committee will submit the Application to the Traditional Authority for his/her consent/allocation.

The Committee should also offer to present the Application to the Land Committee of the Traditional Authority and to respond to any questions. This will be most needed in early applications where the TA's Land Committee (usually made up of Senior Councillors) may be unfamiliar with group rights.

#### **Land Board**

This follows signature of consent or allocation by the Traditional Authority.

As group applications are new, it is recommended that Boards invite the designated representatives of the group to present and explain the application to the Board.

Chapter Four lays out procedure for the Board to follow in evaluating the application.



## Chapter Four

### Assessing Applications by Groups

#### Background

The key actors are now Traditional Authorities (TAs) and Land Boards, to whom this chapter is now addressed. The order for grants of rights is -

1. **Consent:** the Traditional Authority considers the application and if satisfied, allocates the right pending Board ratification or gives consent if a leasehold application
2. **Notification:** The Traditional Authority forwards notification to the Board
3. **Investigation:** The Board makes enquiries, consults persons, discusses, makes a decision, and forwards its findings and recommendations to the Ministry (in the event of application being for a parcel larger than 20 ha (customary) or 50 ha (leasehold). This stage also includes adjudication as to boundaries if this has not been completed and documented prior to application, as recommended in respect of group land rights
4. **Approval:** The Ministry considers the case, approves or rejects or requests more information
5. **Ratification:** if approved, the Board confirms the customary allocation or grants the leasehold
6. **Survey:** formal survey of the parcel if a leasehold entitlement
7. **Registration:** the Ministry records the details in the Communal Deeds Registry
8. **Certification:** the Board issues a Certificate of Customary or Leasehold Right.

Traditional Authorities are -

- a. **Allocation authorities** in respect of customary group right applications
- b. **Consenting authorities** in respect of both customary group rights and leasehold group rights.

Boards are -

- a. **Allocation authorities** in the case of leasehold group rights
- b. **Ratification authorities** in respect of customary rights without which the allocation has no legal force
- c. **Registration authorities** (along with the Ministry) in respect of both customary and leasehold group rights and without which a certificate of title may not be issued to a group.

The Ministry of Lands & Resettlement is -

- a. The **ultimate authority** as to allocations and conditions
- b. Responsible for maintaining the Communal Cadastre listing and locating entitlements
- c. Providing technical and other guidance on all matters.

TAs, Boards and the Ministry share -

- a. the **same legal duty** to ensure that majority land interests and particularly of poorer landless residents in Communal Land Areas are respected (CLRA, s. 17);

- b. the obligation to ensure that allocations are made fairly and do not interfere with rights already allocated to the same land, including that allocations do not interfere with local commonage rights (CLRA, s. 24 & 30);
- c. authority to investigate and consult with the local population to add to or clarify details of application, to hold hearings at community level to collect views and objections, to summon individuals to hearings to respond to questions to present evidence, and to launch formal investigations on any matter related to application and grant of title (CLRA, s. 27, 37 & Regulations 9, 18, 21-23, 25, 28-29);
- d. authority to cancel rights if conditions attached to entitlement are not met (CLRA, s. 27, 36); and
- e. as agencies of recourse in the event of conflicts (see below).

Although Traditional Authorities, Boards and the Ministry have different roles, what they expect of group land applicants is similar. Therefore the procedure listed below does not deal with the consent, ratification or registration stages distinctly.

For example, as suggested earlier, the TA and Board may join forces in inviting the group to present and explain its application to them, and they may also decide to go jointly to the site to make further inquiries directly to group members.

#### **The right of appeal of applicants**

As is the right of individual residents, groups in Communal Areas may appeal decisions of the TA or Board. Appeal against an allocation or action by the TA may be made to the Board. Appeal against an allocation or decision by the Board may be made to it directly, and which is required to investigate the matter, or to the Ministry of Lands and Resettlement. The Ministry may set up a tribunal to resolve the issue (CLRA, s. 37, 39).

Appeals come about for many different reasons. For example -

- A group may appeal when its application is rejected
- A group may appeal to the Board against an allocation made by the local TA over its shared commonage to prevent this being ratified and registered by the Board;
- A group may appeal to the Ministry when it finds that a Land Board has issued a lease over its local commonage to a business entity without consulting the community or ensuring that satisfactory losses are accounted for; or
- A group may appeal against the short time given to submit objections to a published proposal to allocate, the community being too remote to learn about the application in time, or to have the opportunity to come together to discuss the implications and prepare a response.

Appeals are important, because these cumulatively encourage changes in procedures where these prove unfair or unsatisfactory. For example, presently, it is not obligatory for a Board to publish or broadcast lease applications; this can be unfair to remoter communities,

especially where the proposed grant affects commonage.<sup>5</sup> When individual applications are made the immediate neighbours are usually aware of the proposal.

## **Step 1 Adopting Fair Procedure**

Sound procedure in respect of group applications is especially necessary as large areas of land may be involved and large numbers of people affected.

Therefore the (draft) Regulation on Group Land Rights requires -

That public notification of all group right applications including by legal entities for areas larger than 100 ha be posted in all immediately adjacent villages, published in newspapers, and announced on the radio; and that the public have seven days from the date of the last publication to submit objections to the Board.

## **Step 2 Checking that the Applicant has Provided Obligatory Information**

It is compulsory for groups to provide certain information at application. This is listed below. Before giving consent the Traditional Authority should check that this information is provided. The Land Board should also check that adequate information is provided.

### **1. Currently Obligatory Information**

The official (gazetted) Application Forms are Form A for customary applications and Form B for leasehold applications.

Form A requires groups applying for a right under customary tenure to provide -

1. The name of the group
2. The type of group (group/family or legal entity)
3. A brief description of the group
4. Contact details of the group
5. A list of members of the group with their IDs if not a legal entity
6. Current use of the land
7. Indication if the land is located in a conservancy or community forest with names
8. Indication if any other persons hold rights to the land, their details, if compensation for surrender of those rights has been agreed or other arrangements made
9. Intention of the group to erect fences or not
10. Information on any other land held by group
11. Consent of the Traditional Authority.

Form B requires groups applying for rights under leasehold tenure must in addition provide -

1. The duration of leasehold applied for; and
2. A business plan, if applicable.

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<sup>5</sup> Regulation 11 only requires the Board to display the application at its offices for seven days. Publication in newspapers or broadcast on the radio is voluntary.

## 2. Additional Information

In addition, groups are here advised to provide -

1. Estimate of the percentage of group members who live permanently in the locality
2. Whether the parcel applied for includes residential and farming units as well as commonage
3. Rules which the group has agreed to manage the land
4. Other land management measures taken or intended by the group
5. The quorum of group members who must consent to a change in rules of use or users of the group land
6. Description of the land such as type of land and special features
7. Evidence that boundaries have been agreed with neighbouring right holders
8. Evidence that where the land is within a Conservancy or includes a Community Forest in its boundaries that agreement has been reached with their management bodies in respect of matters of shared concern
9. Evidence that the application and attached documents have been approved by the quorum of members
10. A sketch map of the land
11. Statement that the Committee has been formed through a transparent and participatory procedure at a meeting of adult member of the community and by agreement of 75% of residents; and
12. That the committee has fixed rules as to the term of office of members, procedures for filling vacancies on the committee or removing members and the frequency, notice periods and procedures for community meetings.

### Step 3 Additional Criteria by which to Assess Applications

The above provide criteria against which a Traditional Authority and Board may assess the application. Box 10 provides examples of useful questions that these bodies may choose to ask in order to flesh out the above. These are not compulsory. TA and Boards may have other questions also to ask.

Responses will help the Traditional Authority and Board to assess the application. The information will also guide the Land Board whether any conditions need to be stipulated with the grant.

Inquiries of groups may be made -

- a. in writing; or
- b. verbally to representatives when they present an application to the Traditional Authority and/or his land committee when seeking consent; or
- c. during a site visit to verify the application.

**Box 10: Strictly Illustrative Questions for TAs and Boards to ask Applicants**

**Membership**

- On what basis has membership of the group been defined? Has anyone resident in the locality been excluded and if so, on what grounds? For example, have you included female headed households even although they may own no house or farm of their own, those without any livestock, and cattle post workers who live permanently in the area?
- How will the group ensure that other members of community but who do not have the locality as their principal residence will be informed in good time of group member meetings?

**Representation**

- How are the women, those without livestock, and other less well-off members of the group represented on the committee?

**Viable Scale**

- Is the size of the proposed group parcel too large for the group members to satisfactorily regulate for sustainable and fair use over the long term?
- Are too many people or communities involved in the group to make inclusive decision-making and protection of the land viable? If not, does the group have a sound basis upon which smaller units could be applied for?

**Boundaries**

- How did you come to agreement over boundaries? What compromises were made? Are you expecting any complaints about what has been agreed? If so, how will you deal with this?
- Are you expecting to change the boundaries at any time?

**Roles & powers**

- Will the Group Land Committee also serve as a Village Land Committee? If so, what powers have you given the Committee?
- When does the Committee have to report to group member/community meetings?
- What decisions can only be taken by a quorum of group members/the community?
- How often has the Committee met?
- How often have members of the group/community met? How many people were present?
- What number of members have you established as the quorum for making final decisions?

**Plans**

- What plans do you have for using and managing the group land?
- What longer-term plans do you have for the land if they are different from plans for today?
- Are you planning that the group land will always remain shared land? If not, how will you sub-divide the land or part of the land?
- If the group land you are applying for is not only commonage but covers the entire land of the group/community including private homesteads and farms, how will you assure the owners' security of occupancy? Have you reserved a special area for private houses and farms?

**Rules**

- What rules have you made and how will you ensure these are followed?
- What will be the penalties if someone breaks the rules?
- What are the rules concerning outsiders who want to come into and use your lands?
- Have the rules been agreed by the majority of group/community members?
- Do you plan to charge any fees from members, and if so, what for?
- How will you protect the group land against encroachment or misuses?

**Special Questions for Leasehold Applicants**

- Are all residents in the land full members of your organization or legal entity?
- What investigations and arrangements have you made to protect customary rights in the local area? Are customary right holders aware they will lose their rights if you are awarded a leasehold entitlement?
- How will the uses you plan to make of the land benefit people living in the area?

- Are you planning to sub-lease any part of the lands, and if so, on what terms?
- What systems have you set up to ensure that residents have an effective say in decisions?
- If your organization/entity breaks down or is formally dissolved, how will the rights of members be restored or distributed?

**Special Questions for Sub-Groups Seeking Commonage**

- If the land you seek is within the commonage of an existing community, how have you secured consent from the community to apply for the land as your own?
- What will be the access and use rights of other community members?

## **Step 4 Site Verification**

Site verification is not obligatory but is expected for most group applications. This is because the land areas will be large and often whole communities involved.

It is recommended that the Traditional Authority join with designated Board members to visit the site.

Advance notification should be given to the representatives or Committee with a request that they call a group members/community meeting on that date. Representatives of right holders/communities whose lands adjoin the group parcel being applied for should also be requested to attend.

Those participating in the site visit should have prepared a list of matters on which they want clarification or more information.

Main matters on which the TA and Board will want to be able to draw conclusions are -

1. Whether the planned uses of the land are sustainable
2. Whether the group is a viable unit to allow inclusive decision-making and effective regulation of the group land
3. Whether the management system established or proposed by the group will be sufficient to ensure equitable and effective use by co-owners, the conservation of the land and its resources, and to meet the intentions of the group
4. Whether the size of the land and its boundaries are reasonable for the purposes intended
5. Whether the quorum set by the group for decision-making is sufficient to reflect the interests of the majority, with the ideal being 75% of adults who have the area as their primary residence

## **Step 5 Making a Decision: Criteria**

The basis upon which the Board makes a decision to approve or reject an application from a group will be based upon -

1. The accurate completion of the Application Form
2. Provision of sufficient additional information in attached documents
3. Satisfaction that other legal requirements have been met (see Step 2 above)
4. Satisfaction that other queries have been satisfied met (see Step 3 above)

5. The results of field verification
6. Confirmation by the Ministry that no rules proposed by the group to manage or use the land contradiction national legislation; and
7. The decision of the Ministry on parcel size.

In addition, the Board will want to discuss and conclude on these matters -

1. The duration for which the right should be granted (see below);
2. Conditions which should be attached to the grant of the land; and
3. Any other matter upon which the Board, in close consultation with the Ministry of Lands and Resettlement considers important to settle in the specific case.

The Board does have the right to refer the application back to the group applicant, with instructions as to additional matters to be resolved by the members of the group prior to submission.

## **Step 6 Deciding on Parcel Size**

Most group land applications will be for areas larger than legally provided for without the Minister's consent. The size of parcels requested will vary widely.

The Ministry will expect a recommendation from the Board. Factors the Board should consider include -

- a. The grounds on which the group decided on the size of parcel
- b. Whether the area and size selected has a traditional basis, such as being the recognised area of a village or village cluster if two or more villages are applying jointly
- c. Whether the area has natural boundaries that have helped define its size
- d. The purpose to which the group intends to put the land
- e. Whether the area is too large for the group to practically regulate the use of.

## **Step 7 Term of Entitlement**

Issue of customary rights for residential and farming uses are presumed to be to individuals and are allocated "for the natural life of the person to whom it is allocated" (CLRA, s. 26).

A more appropriate term for groups is "for the natural lifetime of the group". The end of a group will be signalled by its formal dissolution or by other conditions that cause the Traditional Authority or the Board to consider the group as no longer existing for the purposes for which the land was granted.

Conditions for shorter terms or for the renewal of customary rights are not provided for in the law. This is because any allocation is considered to have a basis in custom, such as that the village community has established existing rights over the commonage being applied for and expects to continue to exercise that right collectively.

Leasehold entitlements may be for up to 99 years but leases for longer than 10 years require the approval of the Minister (CLRA, s.34). Leaseholds may be renewed by agreement with the Board.

Board decision to not grant the group the term which it seeks might be based upon one of the following -

- The Board is not convinced that the group will last for the period indicated
- The Board sees no justification for the term requested in light of the purpose for which the group is formed and intends to use the land
- The Board is not fully confident that the group can deliver on its intentions to use the land or to manage the land in the manner stated and wants to see how well it performs over the provisional term.

The Board reserves the right to issue a leasehold right for a lesser term than requested.

## **Step 8 Deciding on Reasonable Conditions**

Although many groups (such as villages or an extended family) have held collective rights for a long time, their formalization as registered entitlements is new. Traditional Authorities and Boards may therefore wish to impose conditions on the entitlement.

The law already lists restrictions and conditions on entitlements and these do not need to be repeated as specific conditions of entitlement (e.g. that the right holder uses the land for the purposes stated, and in respect of leaseholds, does not use the land in contravention of any laws relating to drugs or alcohol, and pays any annual fees that have been agreed).

### **General conditions**

General conditions recommended for attaching to entitlement to a group include -

1. That a meeting of members of the group and which comprises at least 70 percent of members normally resident in the locality must be held at least twice every calendar year;
2. That any changes to agreed rules of use of group land may be formalized only at a meeting of group members as agreed by a minimum of 70 percent of participants;
3. That, should the group not yet have implemented management intentions stated at application, including creation of a representative management committee, sub-zoning of the group land to aid management of regulation of use, or the preparation and approval of rules relating to the use of the group land, that it must do so within one year of being issued a certificate of entitlement.

## **Step 9 Issue & Register of Title**

The procedures for this are the same as for registration of the allocation of individual entitlements in the Deeds section of the Communal Lands Cadastre.



## Chapter Five

### Facilitating Land Applications by Groups

This chapter is addressed to Boards and Traditional Authorities.

#### Step 1 Making it Easier for Groups to Secure Rights

Application and registration of land rights in Communal Areas is compulsory. A cut-off date for this has been established as February 2016. After this date all untitled lands risk being considered empty of owners and available for new allocation. This will most affect communities who customarily hold local commonage collectively, but who failed to regularise this right ahead of the cut-off date.

The (draft) primary policy principle around group rights is that -

Existing and customarily collective rights held by extended families, clans and villages will be the priority target for the identification and registration of group rights in Communal Areas. The concerned areas will mainly be local commonage.

Land administrators need to be proactive to meet this target. This includes Communal Land Boards, as assisted by the Ministry of Lands and Resettlement and Traditional Authorities.

Therefore the draft Regulation on Group Land Rights in Communal Areas requires that these measures be instituted to facilitate speedy identification and registration of existing customary group rights -

- a. Dissemination of information to all communities within their area of jurisdiction on how to apply for group land rights, including dissemination of this Manual of Guidelines;
- b. Conduct of training sessions on application of group land rights with Land Boards, Traditional Authorities, Regional Offices of the Ministry of Lands and Resettlement, Conservancies and other community based organizations operating in Communal Areas;
- c. Opening up of a section of the Communal Deeds Registry into which allocation of rights to groups will be recorded;
- d. Instituting a group land rights committee in the Ministry of Lands and Resettlement charged with promoting and monitoring progress on issue of customary entitlements to groups;
- e. Contextualization of all applications including from individuals within simple land use planning and zoning plans within each Traditional Authority area to limit ad hoc allocations in commonage areas;
- f. Restructure of systematic titling procedures to require identification of rights held collectively at village level as well as rights held by individuals and married spouses.

## **Step 2            Adopting an Integrated Approach to Systematic Titling**

Targeted assistance to communities is already practised by the Ministry of Lands and Resettlement and assisting land projects. Individuals within a particular village are helped to agree boundaries of their private parcels and to apply for formalisation. This procedure should now be expanded to enable the community as a whole to also apply to regularise lands that members of the community jointly hold customary rights to. This is usually commonage within and adjacent to the settlement. An outline of how this is nested in the current focused approach is given below.

### **1.            Retaining the village as focus**

Villages are already the focus of systematic identification of rights as carried out by projects under the aegis of the Ministry of Lands and Resettlement or directly by the regional offices of the Ministry. This should be retained. Changes relate to how rights are identified by the villagers.

### **2.            Village Land Committee**

In addition, projects and the Ministry already require the target village to identify a group of villagers who will in effect, adjudicate land rights within the area. The local councillor is generally the chair of this committee and elders are usually members.

It is proposed that this is also retained but that appointment of this Adjudication or Boundary Committee be appointed or elected at a public meeting in the community, following explanation of its duties and powers.

### **3.            Identifying the Village Land Area**

The first task of the Committee is to provisionally identify the outer limits of the operating village land area inclusive of commonage as well as lands held customarily by individuals/families for homesteads and farms.

### **4.            Negotiating Boundaries with Neighbouring Communities or Right Holders**

The two key tasks of the Committee are -

- a. to meet with and agree boundaries of the village land area with those who border the proposed perimeter; and
- b. to identify areas which the village community holds jointly with neighbouring communities for consideration as distinctly applied for areas jointly by those communities.

### **5.            Identifying the Area for Collective Entitlement**

This will mainly be commonage over which the immediate community has historical and sustained priority rights.

In some cases the village may prefer to include the entire village land area in a proposed group rights application. This may be the case where the village comprises an extended family, a hunter-gatherer dependent band, or a pastoral group which declares it has no

intention to distinguish areas held under homestead and other related private occupancy and the larger grazing area.

Key tasks for the Committee will be to -

- a. Using these guidelines, alert the community to the need to be clear as to which lands should be included under a group entitlement as any changes to this following registration will require consent and alteration of the parcel;
- b. Carry out a simple exercise of population projection with the community to alert members to the need to concentrate residential and farming areas so that lands which they take for granted as available for grazing and other communal uses are necessarily protected and secured for those purposes;
- c. Carry out simple on site provisional zoning of the proposed commonage with representative villagers from the community to clarify sustainable uses and use areas, and to develop provisional rules; and
- d. Holding a community meeting to identify the composition of the community (membership), objectives and other matters as outlined in Chapter 3.

These steps can be provisional at this stage.

## **6. Adjudication of Boundaries of Individual Parcels**

This necessarily follows after the above in order to heighten local awareness of the limits of land available and to make it easier for the Committee to challenge undue self-expansion of parcels ahead of entitlement. By this stage, community members will be aware that they will be both entitled individually to parcels and are entitled to be co-owners of shared lands under a group right. Incentives to grab as much land as possible through individual entitlement are accordingly lessened.

## **7. Planning for Applications**

This is geared to -

- a. assisting the community to pursue detailed planning in order to make a well-informed application for collective entitlement (details provided in Chapters 2 & 3); and
- b. similarly assisting individuals/married spouses to complete application forms for residential and farming purposes.

## **8. Provisional Mapping of Parcels**

This step sees the Ministry of Lands and Resettlement team or private provider undertake mapping of both the group parcel and individual parcels.

## **9. Public Display of Parcels**

This is now a standard procedure and involves the printing and display of all proposed parcel applications. This includes any parcel which the community intends to hold as a group.

The Committee needs to coordinate discussion, answer queries and record objections.

## **10. Final Planning for the Group Right**

Outstanding queries, objections, and meeting of planning and documentation needs for the group right application now need to be undertaken.

This will be finalized in a Group Members Meeting (see Chapter 3).

## **11. Adjustment of Parcel Boundaries**

The Mapping Team of the Ministry will also be requested to make adjustments to both the group right land area boundary and individual boundaries following resolution of objections and agreed changes.

## **12. Submission of Application Forms**

Completed Application Forms are collected by the Committee and submitted to the Traditional Authority for consent.

Ideally, the Committee will present these at a pre-arranged meeting of the Traditional Authority Land Committee and explain all the details.