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KENYA SECURE PROJECT
LEGAL REVIEW OF THE DRAFT LEGISLATION ENABLING RECOGNITION OF COMMUNITY LAND RIGHTS IN KENYA

JANUARY 2012
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ACRONYMS AND ABBREVIATIONS

ARD	Tetra Tech ARD
CIC	Commission for the Implementation of the Constitution
CLB	Community Land Board
DLB	District Land Board
GoK	Government of the Republic of Kenya
LRTU	Land Reform Transformation Unit
MoL	Ministry of Lands
NLC	National Land Commission
NLP	National Land Policy
PRRG	Property Rights and Resource Governance Program
USAID	United States Agency for International Development

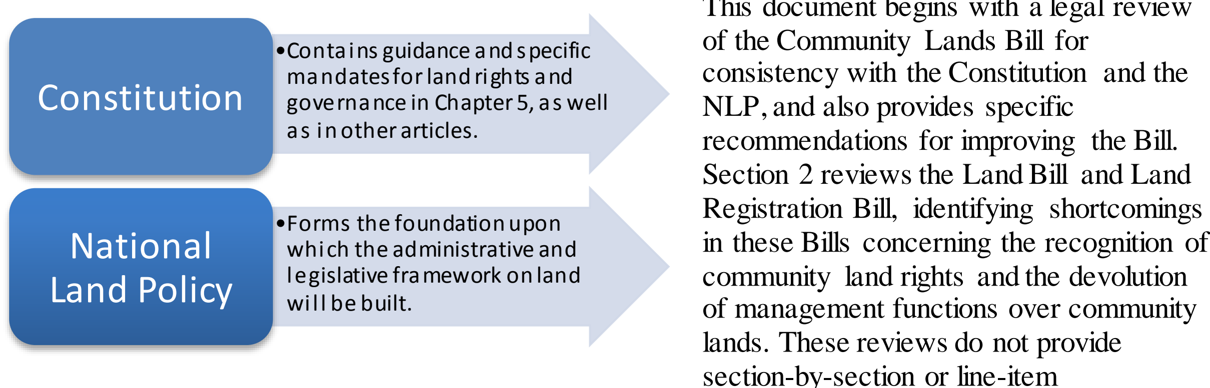
EXECUTIVE SUMMARY

This document summarizes a legal and policy review of the Community Land Bill (Oct. 2011 draft), the Land Bill (5 Dec. 2011 draft), and the Land Registration Bill (12 Dec. 2011 draft) with respect to the recognition of community land rights. This review was commissioned by the USAID Kenya SECURE Project upon request of the Ministry of Lands and Land Reform Transformation Unit. The review was conducted by Adarkwah Yaw Antwi, a land tenure expert who assisted the SECURE Project in the development of the Community Land Rights Recognition Model with the Ministry of Lands, and Patricia Kameri-Mbote, a Kenyan lawyer who worked extensively with the Government of Kenya in the development of the National Land Policy. The Kenya SECURE Project is a sub-component of the USAID Property Rights and Resource Governance Program (Contract No. EPP-I-OO-06-0008-00).

The 2010 Constitution of Kenya and the Sessional Paper No. 3 of 2009 on National Land Policy (NLP) established provisions for a new classification of land in Kenya to be known as "Community Lands." Under the Constitution, Community Lands are to vest in and be held by communities that are identified on the basis of ethnicity, culture or similar community of interests. The NLP provides additional details on the historic need for greater protections for community lands, and directions for how the government should frame the legislative framework for such rights. Specifically, the NLP, under Chapter 3.1 paragraph 33, seeks to adopt a plural approach, in which different systems of tenure co-exist and benefit from equal guarantees of tenure security. The rationale for this plural approach is that the "equal recognition and protection of all modes of tenure will facilitate the reconciliation and realization of the critical values which land represents." The NLP directs the government to craft legislation for Community Lands to ensure that customary land rights, such as "family interests in land, the rights of "'strangers'…and communal rights to clan land…" have equal legal recognition as do other forms of private and public land rights (para. 64).

The Ministry of Lands (MoL), in collaboration with the USAID-funded Kenya SECURE Project, has developed a model process – the Community Land Rights Recognition (CLRR) Model – to formally recognize and register community lands in Kenya. This model is grounded in the Constitution and NLP, and was developed using best practices from other countries that recognize customary land rights. CLRR provides a systematic roadmap for the development of Community Lands legislation.[1]

In light of this collaboration, and at the MoL's request, the SECURE project undertook this review of the Community Land Bill (October 2011) as well as the treatment of community land within the Land Bill (5 December 2011) and the Land Registration Bill (12 December 2011).



This document begins with a legal review of the Community Lands Bill for consistency with the Constitution and the NLP, and also provides specific recommendations for improving the Bill. Section 2 reviews the Land Bill and Land Registration Bill, identifying shortcomings in these Bills concerning the recognition of community land rights and the devolution of management functions over community lands. These reviews do not provide section-by-section or line-item

[1] Background on the CLRR Model can be found in Annex 1.

commentary on the Bills, nor do they provide a comprehensive list of all areas for potential improvement in the current drafts. Rather, the reviewers have focused on what they consider to be the most important issues with the Bills, vis-à-vis their relationship and conformity to the Constitution and the NLP, as well as enabling the aforementioned CLRR model.

This document concludes that the initial draft Community Land Bill deviates substantially from the requirements and intent of the Constitution and the NLP in critical areas or does not adequately incorporate the mandates of these seminal documents. Nor do the other major pieces of land-related legislation currently under consideration—the Land Bill and the Land Registration Bill—address Community Land rights or issues in more than a nominal way. The review notes that although the Land Bill has significant implications for community land, it does not elaborate provisions on conversion of land from private or public to community, and vice versa, nor does it provide even the most basic information on the framework for recognition, protection, and management of community lands. By leaving out community land from the master registration statute, the Land Registration Bill replicates the current situation where community land is treated differently and perceived as inferior to other tenure types.

Below are key recommendations to bring the Bills, particularly the Community Land Bill, in line with the said requirements. Other comments and recommendations on all three bills are contained in this report.

1. **The Community Land Bill does not respect and recognize existing community institutions' right and authority to govern customary lands.** The Constitution establishes as a foundational principle that community lands are to vest in and be held by communities. The NLP further clarifies this principle by stating that the government shall vest ownership of community lands in the community. However, the creation of the Land Administration Committee (CLB Sections 4-8), as it stands, would supplant customary land institutions and should therefore be redrafted to recognize and respect the rights of existing community institutions to govern customary land rights.

2. **The Community Land Bill would assign key land management and administration functions over community lands to institutions (Community Land Boards) that are not representative of the communities over whose lands are being managed.** While the need to create a government supervisory body, the Community Land Board, to ensure that safeguards are in place to protect individual rights guaranteed by the Constitution is appreciated, the Community Land Bill appears to go well beyond this regulatory function and grant land management powers to a Board whose members are appointed by the Cabinet Secretary as opposed to being elected or determined by the community. Powers such as a) the cancellation of customary rights and b) the withdrawal of lands from Community Lands category (Sections 23(1)(c) and 23(2)), should be redrafted so as to rely on the customary rules in the case of cancellation, or to subject them to compulsory acquisition (eminent domain) legislation, in the cases where the state takes back community lands.

3. **The Community Land Bill identifies its own brand of customary rights as opposed to respecting and recognizing rights actually practiced in communities.** The part of the Community Land Bill dealing with the allocation of rights in respect to community land (Sections 26-36) deviates substantially from the requirements of the Constitution and NLP. Instead of providing legal status to customary land rights as practiced in communities (the NLP requirement), the Bill attempts to introduce its own brand of customary rights. Extensive recommendations for re-drafting of this part of the Bill have been made in this review, including the need to differentiate between rights obtained through extant customary rules and the legislative framework warranted by these rights on the one hand, and rights obtained by "strangers" through transactions on the other.

4. **The Bill does not provide an adequate or clear process for the registration of community land rights.** Other general guidelines for re-drafting are also made to ensure that the registration of customary land transactions, where necessary, is conducted through a national land registration

system and not in a separate, potentially under-funded and inferior, register to be compiled by the Community Land Board, as the Bill appears to provide.

5. **Neither the Land Bill nor the Land Registration Bill incorporates community lands in more than a nominal manner.** The failure to address and incorporate provisions related to community lands into these framework land bills creates confusion regarding the governance, management and administration of community lands and may be interpreted as reducing the legal stature of community land holdings as compared with other forms of land tenure. As a result, there is a significant risk that yet-undefined community lands rights will not withstand pressure from recognized and more clearly defined public and private land rights unless these rights are clearly specified and adequately protected. Towards that end, the NLP specifically requires that the Land Act lay out a "clear framework and procedures" for the "recognition, protection and registration, of community rights to land and land based resources…." The Land Bill fails to incorporate these protections. The need to protect community land rights in the Land Bill exists even if a separate Community Land Act is adopted so as to ensure legislative consistency including consistent treatment of all forms of tenure, as provided for in the NLP and the Constitution.

6. **The CLLR model could provide guidance and serve as a model for recognition of community land rights in future versions of the Community Land Bill.** For guidance on how the Community Land Bill may be implemented, it is recommended that the Ministry of Lands-endorsed CLRR model be consulted, and time permitting, that the CLRR model be piloted as soon as possible in order to gain empirical insights to aid the further development of the legislation.

1.0 REVIEW OF THE COMMUNITY LAND BILL

This section provides a review of the Community Land Bill (October 2011) taking into consideration provisions of the Constitution and the NLP that relate to community lands. This section also points out anomalies and inconsistencies in some provisions of the proposed Bill and identifies revisions necessary to align the Community Land Bill with the Constitution and the NLP. The section then provides comments and recommendations for how the MoL might re-draft the Bill to better ensure compliance with the letter and spirit of these two foundational documents.

1.1 THE CONSTITUTION'S LEGISLATIVE REQUIREMENTS FOR COMMUNITY LANDS

Article 63(1) of the Constitution establishes Community Lands and provides that they "shall vest in - and be held by communities identified on the basis of ethnicity, culture, or similar community of interest." Article 63(4) of the Constitution states that, "Community land shall not be disposed of or otherwise used except in terms of legislation specifying the nature and extent of the rights of members of each community individually and collectively." Article 63(5) then instructs Parliament to "enact legislation to give effect to this Article [63]." The current Community Land Bill should be seen as an attempt to respond to this constitutional provision.

The NLP, which actually informed the provisions in Chapter 5 of the Constitution, including those on Community Lands, is quite explicit in Paragraph 64 on the "wrong" that an Act governing community lands is to rectify, stating in the following terms:

> *The process of individualization of tenure, that is, land adjudication and/or consolidation, the eventual registration of interests in land under the Registered Land Act (Cap 300) and declaration of whole districts in the pre-independence period as Government land has affected customary tenure in two material respects:*
>
> *(a) Undermining traditional resource management institutions and;*
>
> (b) *Ignoring customary land rights not deemed to amount to ownership, such as family interests in land, the rights of "strangers" …………..and communal rights to clan land………"* (Paragraph 64 of NLP)

Paragraph 66(d)(i) of the NLP directs the "Act" to lay out, "a clear framework and procedures for, the recognition, protection and registration of community rights to land and land-based resources taking into account multiple interests of all land users, including women."

As the Constitution is the supreme law of Kenya, neither the Community Land Bill nor the Land Bill may reinterpret Constitutional provisions that vest ownership of community lands with communities thereby rectifying a historical "wrong." Kenyan land legislation must create a framework that recognizes, protects and registers customary land rights–in a manner that treats community land rights as equal to other forms of tenure and does not allow for them to be usurped by other, more established forms of tenure. The recognition and protection of community land rights should not be deferred until

the Community Land Bill is passed at some future date, rather these provisions should be incorporated into the Land Bill.

1.2 THE COMMUNITY LAND BILL IS NOT PROPERLY FOCUSED ON THE RECOGNITION OF CUSTOMARY LAND RIGHTS

By recognizing customary land rights the government acknowledges that communities have evolved rights that are well attuned to their circumstances but operate outside the formal legal regime because the existing legal regime is difficult and/or costly to access. Increasingly, countries are recognizing that to increase efficiency, ensure equity, reduce poverty and enable all communities to be brought within the formal economy, it is essential to amend formal legislation to recognize and protect customary land rights and associated transactions. This is what the Kenyan Constitution and the NLP intend a Community Land Act to accomplish.

The Community Land Bill needs to be drafted to allow for the discovery of existing customary land institutions and the property rights they supply as a condition precedent for formal legal recognition.

Unfortunately, the Bill does not provide for such discovery. Rather, in Sections 26 and 28 the Bill stipulates what customary rights consist of and their duration, rather than allowing these rights to be discovered. Furthermore, rather than creating a legal framework to identify and provide legal status to existing customary land rights institutions, the Bill attempts to prescribe what these institutions ought to be. This approach is inconsistent with internationally accepted best practices for recognizing customary land rights as embodied in the CLRR Model which relies on community participation to identify and document communities' customary institutions and rules for land holdings.

1.3 NUMEROUS ARTICLES OF THE BILL CONTRADICT CONSTITUTIONAL AND NATIONAL LAND POLICY REQUIREMENTS

The following articles of the Community Land Bill are inconsistent with the Constitution and the NLP and so should be revised:

Community Land Institutions. As drafted, the Bill creates two structures – Land Administration Committees and Community Land Boards. This administrative structure is likely to increase confusion regarding authority to make binding determinations related to community lands. The involvement of the Cabinet Secretary is contrary to the intent of devolution. It is not clear how these institutions relate with the Registration Districts established in the Land Registration Bill and the 'Community Land Committee of the village' in the Land Bill. It is not clear on what basis the Secretary decides how many of such committees to establish in a given area. Section 4 gives the Cabinet Secretary wide powers to establish and disband Land Administration Committees with no guidelines given on the exercise of that power.

The Land Administration Committee. The Bill would create Land Administration Committees (LAC) (Sections 4-8) that ostensibly would serve as the community entity that governs land management and administration. This in itself is not a bad idea. There are, however, a number of problems with respect to the creation, purpose, and function of these LACs, as contemplated under the Bill.

First, rather than carefully crafting provisions in the Bill that will enable the identification and enhancement, if need be, of any existing customary institutions for land administration in the community, the Bill attempts to establish a LAC from naught. The Bill should endeavor to enable the discovery and enhancement, if any, of an existing land administration body in a community. Doing so would give meaning to the principle of devolution and would, more importantly, respect communities' right to determine their own form of governance.

Second, the Bill exempts any person holding a traditional leadership position (sec. 5(1)) in a community from serving on the proposed LAC. This could be interpreted to mean that persons holding traditional leadership positions conferred by traditional institutions of the community, i.e. persons with intimate knowledge of the history, particulars and nuances of all land issues in a given community, are barred from the LAC. Normally, traditional leadership in customary communities is attached to, and a focal point of, land administration and/or land allocation and access arrangements in community land rights recognition schemes. The attempt to prevent this may well undermine the LAC, make it an alien creation of the Act and therefore render it irrelevant to customary land rights among communities. Here again, if the Act's intent is to enable the discovery of existing institutions at the community level, these provisions are unwarranted.

Third, the powers conferred on the LACs to allocate land, establish and maintain registers and records, resolve disputes, etc., presuppose the existence of certain competencies in the membership. This is not provided for in the Bill and the provisions in the NLP on the need to build the capacity of community actors to perform their roles is also not provided for. It is also not clear how the registers prepared under this Bill relate to the ones under the Land Registration Bill. Further the Land Bill and the Land Registration Bill contain provisions on dispute resolution yet the role of the LACs is not linked to these structures.

The Community Land Board. In the Bill, the section establishing the Community Land Board (CLB) appears to be intended to serve as a government regulatory mechanism for Community Lands. Having a body to regulate the LACs (discovered and enhanced in the manner described above) is potentially a positive stance so as to ensure that community governance entities (LACs) respect individual protections afforded in the Constitution. However, the regulatory body should not have the authority to exert control over the management and administration of community lands given that these lands are owned by communities under Article 63(1) of the Constitution. Under the Bill's current configuration, CLBs appear to have powers that could, in practice, transform it into the real land owners and managers of Community Lands. The CLB is designed to have the power to approve all allocations, effect cancellations of allocations, and take other measures under the LAC. What is not clear is whether this power extends to customary land rights possessed by community members individually and as a collective, as well as rights transferred to "strangers." As explained below in the section entitled *Allocation of Land Rights*, the level of regulation of land claims by members of the community may be completely different from the level of regulation warranted by claims by "strangers." This difference needs to be clarified in the Bill.

The provisions of the Bill regarding CLBs do not make this distinction and appear to be giving the CLB powers to cancel land rights held since time immemorial by families, clans, or individuals at its discretion and to effectually control the allocation and management powers purportedly provided to the LAC. This is certainly not what the Constitution and the Land Policy envisage for Community Lands. Furthermore, the Board is to have powers to withdraw lands already declared Community Land and cede these back to government with weak compensation provisions. For example, as discussed more below, it provides for compensation only to persons holding rights to taken lands but it is silent on compensation to the community as a whole for losing any communally-held customary lands so taken. Recommendations for how best to rework these provisions are provided below.

The CLBs are also mandated to establish and maintain registers and a system of registration. (sec. 10(c). Interestingly, LACs are also required to establish and maintain a register (sec. 7(3)(b)), raising the question of how these registers are different and purpose each is intended to serve. It is also not clear how equipped the Boards are to carry out this function.

The composition of the CLBs in Section 11 is not aligned to the functions of the CLBs. It would help to know the requisite technical competence of the board members considering their functions. More fundamentally, the relationship between the CLBs and the LACs is not articulated. The CLB also has many public servants and it is unclear why all these are needed in all areas. For instance, a public servant in livestock may be better suited for a pastoral area than one from agriculture. There may also be no council of elders in some areas of community land (sec. 11(f)).

Provisions for Withdrawing Community Land. Once an area is declared community land, it becomes, in essence, the equivalent of private property for the community as a whole. Government should not have the power to withdraw, or take back, lands arbitrarily as appears to be allowed under Section 23(1) (c) and (2). The government's ability to take back community land should be exercised only through compulsory purchase powers and be subject to all the legal tests and requirements set by compulsory purchase (eminent domain) legislation in the country. Section 23 appears to be providing that only individual land rights held by "persons under this Act" are entitled to compensation. The Section should be expanded to provide for the payment of just and fair compensation for rights held communally by the community as a whole to avoid the use of this Act to take back declared community lands without compensation. More importantly, the basis of assessing compensation for customary rights compulsorily taken by government should be brought under and harmonized with legislative provisions in Part V (Compulsory Acquisition of Interests in Land) of the Land Bill.

Allocation of Rights in Respect of Community Land. As currently drafted, Sections 26 through 36 the Bill would extend the use and control over community lands to the government by fiat, and continue the very control that the Constitution and the NLP intended to extinguish. (*See* NLP at Chapter 3.3.1.2 (65).). This is so because the use and management of community lands is left to the discretion of appointees of the Cabinet Secretary rather than communities. For example, while Sections 27 and 29 appear to grant the LAC the authority to allocate or cancel customary land rights, Section 29 takes this authority back by granting to the CLB, which is comprised of Cabinet Secretary appointees, the power to ratify and/or veto allocations made by the LAC. This structure for allocation of rights would undermine the devolution of customary land rights, as envisioned in the Constitution and the NLP. It is therefore recommended that Part IV of the Bill be redrafted to clearly vest the management authority over community lands to communities.

Rights in Respect of Community Lands. Sections 26 and 28 of the Bill 39) identify the two rights that may be allocated in Community Lands: customary land rights and rights of leasehold. This approach of separating customary land rights and leaseholds is problematic because it confuses the nature of customary land rights by creating an artificial distinction between these two rights. When one observes customary land rights in practice, one encounters a number of different types of rights utilized by communities, including, the equivalent of freeholds (perpetual interests), leaseholds (time-limited interests) and other interests akin to licenses and liens. Therefore, to attempt to distinguish between customary land rights and leaseholds is a confused approach by the Bill. More damaging than the confusion around the nature of these rights is the fact that Bill would limit the type of customary rights that may be allocated to farming units and residential units. This arbitrary limitation on the type and scope of customary rights available to communities, runs counter to the notion embodied in the Constitution that communities should have authority to identify the nature and scope of rights available on their lands.

For customary land rights among community members, the job of legislation should be to clarify and eliminate any ambiguities regarding the legality of undocumented customary land rights claimed through accepted and agreed customary rules. Legislation should emphasize the legality and guarantee the security of such undocumented customary rights. That is what the constitutional provision of "equal guarantee" means. As much as possible, legislation should not introduce any constraints to these rights except when the rights offend modern notions of environmental sustainability or constitutional guarantees of equity, like women's rights to land, as well as other rights afforded to citizens in the Constitution's Bill of Rights.

Rather than distinguishing between customary land rights and rights of leasehold, as is being proposed in the Bill, it would be better – to ensure existing rights are not diminished – to distinguish between customary rights assigned by existing customary institutions to community members, on the one hand, and rights that result from transactions with strangers (non-community entities, including government bodies) on the other hand. Then the Bill can deal adequately with these rights and provide the level of regulation warranted by the different categories of land rights, as alluded to under the *Community Land Boards* section above.

Recognition and Protection of Community Lands that are Currently Held as Trust Lands. Article 63(d)(iii) of the Constitution provides that Community Land includes land that is "lawfully held as trust lands by the county governments, but not including any public land held in trust by the county government under Article 62(2)." Although this delineation may sound straightforward, Article 62(2), which defines public lands that are to be held in trust by counties, is not clear in that it provides that public lands include "land in respect of which no individual or community ownership can be established by any legal process." A significant problem with the Community Lands Bill is that it does not identify a legal process for resolving and establishing community ownership of these trust lands. In absence of a clear process, it is highly likely that individual private claims to these trust lands will prevail and these lands which have been used by communities for generations will be lost to private owners.

Likewise, there is not a legal process in place for identifying and recognizing as community land claims on existing trust lands that have been illegally or irregularly acquired. Some legal mechanism or process to resolve this problem is specifically required by the NLP at paragraph 64(d)(ii).

Customary Rights Resulting from Transactions with "Strangers." Rather than distinguishing between customary land rights and rights of leasehold, as is being proposed in the Bill, it would be better – to ensure existing rights are not diminished – to distinguish between customary rights assigned by existing customary institutions to community members, on the one hand, and rights that result from transactions with strangers (non-community entities, including government bodies) on the other hand. For transactions with strangers (non-community entities, including government bodies), the high potential for abuse calls for well-thought-through provisions to ensure land allocation abuses do not occur. To protect against the erosion of community land rights, provisions should be added to the Bill that proscribe: (1) the type of legal rights in property that can be created for "strangers", (2) limits to leaseholds, size of land, etc., and (3) the need for these transactions to be in writing and subject to verification by the Land Board. Drafters should seek to identify a framework that will prevent abuse in transactions with non-community member/entities, but, at the same time, should not stifle investments in Community Lands by outside investors as such investments can stimulate economic growth and development in communities.

1.4 OTHER RECOMMENDED CHANGES TO THE COMMUNITY LAND BILL

To ensure that the constitutional provision that "equal recognition and protection of all modes of tenure" is preserved, customary rights should be treated in the same way as other land rights. Therefore:

1. **There should be no special provisions in a Community Land Act on how rights are passed on to the next generation (inheritance), gifted away, transacted, willed away or cancelled, provided such transfers are consistent with the Bill of Rights**. These should be subject to customary rules in any given community (enhanced as appropriate following the procedures in the CLRR) on the one hand, and, relevant formal laws of Kenya that apply to all modes of tenure in this respect. Section 33 of the Community Land Bill is therefore completely inappropriate and should be omitted in its entirety. Section 34 should be redrafted to require the LAC to rely on and empower agreed customary law within the community regarding circumstances for abandonment, cancellation of rights, etc. As the Section stands, it appears to be making reliance on customary law in this regard only optional.

2. **There should be no special registration bureaucracy created for community lands**. The dangers for doing so is that the community land registration system is likely to be under-resourced and therefore incapable of providing the service at the same level of efficiency provided by the government-funded national registration system. If customary transactions do not appear in the national registry but in a register compiled haphazardly by an obscure Land Board, what will be the security of tenure for transacting parties? Furthermore, if community land transactions are not recorded in the national registry along with other land transactions, it

undermines the equity principle for all forms of land tenure, as provided for in the NLP, and relegates community land tenure as a "second class" form of tenure. As it happens, Section 3 of the Land Registration Bill makes provision for the registration of Community Lands. The Community Land Bill should specify and develop in detail the types of interests in community lands capable of registration and how such interests could be processed for registration under that Section of the Land Registration Bill. A redrafting of Section 10(c) of the Community Land Bill, which purports to vest the power to establish a register for recording the allocation, transfer and cancellation of customary land rights, so as to place this function in Section 3 of the Land Registration Bill referred to above, is therefore needed.

2.0 REVIEW OF THE LAND BILL AND LAND REGISTRATION BILL WITH RESPECT TO COMMUNITY LANDS

This section comprises a legal review of the Land Bill and the Land Registration Bill with a view of appraising whether the Bills adequately incorporate the requirements of the Constitution and the NLP for recognizing and registering community lands in Kenya. The consultant has determined that both Bills suffer from significant shortcomings in their integration of community lands, resulting in confusion around the governance, management and administration of community lands and the denigration of community land holdings as unequal to other forms of land tenure.

2.1 CONSTITUTION AND NATIONAL LAND POLICY FRAMEWORK

Article 68 of the Constitution lays out the legislative agenda for Parliament to give effect to the land provisions of the Constitution. In regards to the provisions on land, Parliament is expected to revise, consolidate and rationalize existing land laws; revise sectoral land use laws in accordance with the land policy principles; and enact legislation to:

- Prescribe minimum and maximum land holding acreages in respect of private land;
- Regulate conversion of land from one category to another;
- Regulate the recognition and protection of matrimonial property, particularly the matrimonial home during and on the termination of marriage;
- Protect, conserve and provide access to all public land;
- Enable the review of all grants or dispositions of public land to establish their propriety or legality;
- Protect the dependents of deceased persons holding interests in any land, including the interests of spouses in actual occupation of land; and
- Provide for any other matter necessary to give effect to the provisions of Chapter Five (Land and Environment).

The remainder of this section addresses the extent to which the Land Bill and the Land Registration Bill incorporate provisions that will allow for the recognition and registration of community land rights as contemplated by the Constitution and the NLP.

2.2 THE LAND BILL

The Land Bill does not address community lands in any meaningful or systematic way, resulting in confusion around the governance, management and administration of community lands and the denigration of community land holdings as unequal to other forms of land tenure. It is recommended, therefore, to either have one Land Bill for all categories of land or develop the Community Land Bill alongside the Land Bill to ensure that there are no ambivalences and contradictions. There has to be clear provisions on how the diverse tenure categories relate with each other and clear cross-references.

The Land Bill is defined as an "Act of Parliament to give effect to Article 68 of the Constitution to revise, consolidate and rationalize land laws, and to provide for the sustainable administration and management of land and land-based resources and for connected purposes." This definition is misleading because the Bill only deals with public and private land, and almost entirely omits mention of community land rights.

Both the Constitution and the NLP proposed land legislation to give effect to the principles expounded in the NLP and to generally provide for:

- The equal recognition and enforcement of land rights arising under all tenure systems;
- Non-discrimination in ownership of, and access to land under all tenure systems;
- The protection and promotion of the multiple values of land; and
- The development of financial incentives to encourage the efficient utilization of land.

The NLP anticipates that such legislation would be a Land Act to govern *all* categories of land (para. 58). It is also expected to provide for the establishment of "[t]he office of Keeper/Recorder of Public Lands who shall prepare and maintain a register of public lands and related statistics"; and "[a] Land Titles Tribunal to determine the *bona fide* ownership of land that was previously public or trust land." (NLP para. 62.) These functions are expected to be performed under the National Land Commission. Under the NLP, the Land Act is also expected to define the term "community" and to lay out a clear framework and procedures for:

i. The recognition, protection and registration of community rights to land and land-based resources taking into account multiple interests of all land users, including women;

ii. Resolving the problem of illegally acquired trust land;

iii. Governing the grant to, and regulation of, rights of use to members;

iv. Reversion of former Government land along the Coastal region to community land after planning and alienation of land for public usage;

v. Governing community land transactions using participatory processes;

vi. Accountability of groups, individuals and bodies entrusted with the management of community land, and community participation in the allocation, development and disposal of community land;

vii. Incorporating mechanisms for community land management and dispute resolution;

viii. Members opting out of the communal arrangements and buying out of non-members;

ix. Reviewing and harmonizing the Land (Group Representatives) Act (Cap 287) with the proposed Land Act;

x. Setting apart of community land for public use; and

xi. Vesting fish landing sites to appropriate local institutions. (NLP para. 66.)

The Land Act is also expected to provide a framework for identifying, verifying and recording genuine landless people; acquisition of land for establishment of settlement schemes; planning, survey and demarcation of land in settlement schemes; and equitable and accountable allocation of settlement scheme land (para. 152(b)). It should also harmonize existing modes of statutory tenure (para. 68(a)) and provide for pastoralism as a way of securing pastoralists' livelihoods and tenure to land (para. 183(b)).

Implications of Separating Community Lands from the Land Bill. Unless there are compelling reasons to legislate a separate Community Land Act, it is the consultant's view that it may be most appropriate to legislate one Land Act in order to avoid denigrating Community Land holdings as unequal to other forms of land tenure. Given the absence of a framework for identifying and dealing with community tenure, the maintenance of separate laws for public and private land on the one hand and community land on the other creates a perverse incentive to secure tenure through private tenure. If community land legislation is left for design and enactment at a later date within the political context currently prevailing in Kenya, there will be a move to have private rights to land even where community rights are perhaps more appropriate because of the prevalent community tenure insecurity. This is especially the case because the Land Bill currently has no provision on conditions for conversion of community land to private or public land, leaving such land open to alienation unless safeguards are put in place to protect it from wanton conversion to public or private land. This could mean that land on which communities have viable claims could be alienated prior to those claims being recognized.

Separating community land from public and private lands in legislation also obfuscates land management and governance responsibilities, especially at the local level. For example, the Constitution vests certain types of public land, as well as unregistered community land, in the county government (arts. 62(1) & 63(3)). Thus, two important categories of land rights – public and community – vest in county government. However, county authority over governance matters for each category may be quite different, as public lands are to be held by the county, but administered by the National Land Commission, which is not the case with community lands. To avoid confusion and mismanagement, it will be important to spell out the institutional authority over each category of land right vis-à-vis the other, at both the national and county level, and the Land Bill is the logical place to do this.

The Land Bill Does Not Make Adequate Reference to the Framework and Principles Governing Community Lands. The Constitution sets forth three classifications of land: public, community, and private (Const. art. 61(2)). The NLP indicates clearly that the national "Land Act" shall address "all categories of land." (NLP at sec. 58.) The only indication in either the NLP or the Constitution that community lands should be addressed in separate legislation comes in Schedule 5 of the Constitution, which lists "legislation on land" on an 18-month implementation track, and "community land" on a 5-year track. However, given the Constitutional directive that Parliament "revise, consolidate and rationalise existing land laws" (Const. art. 68(a)), and the NLP's support for consolidating legislation pertaining to all categories of land into one "Land Act," a strong case can be made for an institutional directive to include community lands within the scope of the Land Bill.

The current Land Bill does not address community lands in any systematic way, however, nor does it reference a Community Lands Act.[2] The most significant reference to community lands is in Section 3(c), stating that "This Act shall apply to…such parts of community land as the Cabinet Secretary shall specify." The Bill does not give further detail about what this means, dropping mention of community land almost completely from this point.

Separating community land legislation from public and private land legislation in Kenya is problematic for several reasons.

[2] Again, the reviewers recognize that independent legislation on Community Lands is contemplated. Nevertheless, for purposes of harmonizing institutional authorities and developing a clear land governance framework, and for the reasons identified in this section, it is imperative that the Land Bill include a governance and rights framework for community lands.

First, postponing inclusion of provisions governing community lands has the likely *unintended* effect of preventing continued use of and transactions in community lands. Per the Constitution, Article 63(3), community lands may not be "disposed of or otherwise used" outside of "legislation specifying the nature and extent of the rights of members of each community individually and collectively." Thus according to the Constitution, community land rights may not be exercised – even in use – until Parliament enacts legislation governing such rights.

Second, legislating for public and private land allocations and transactions, without doing so for community lands at the same time, creates the risk that yet-undefined community land rights will not withstand pressure from recognized and more clearly defined public and private land rights. This danger increases with the amount of time between the passage of the Land Bill and future potential legislation on community land rights.

The Land Bill's provisions on unlawful occupation of public land (Section 185) underscore the importance of defining and acknowledging community land rights at the same time that public land rights are so defined and acknowledged. If this section is enacted before communities have the chance to vet their land claims or register their rights under appropriate legislation, it could be used to indict entire communities enjoying traditional use of certain lands.

Third, the Constitution mandates that Parliament "regulate the manner in which any land may be converted from one category to another." (Art. 68(c)(ii).) The Land Bill currently does not provide comprehensive direction for such conversion. Including a clear framework for conversion in the Land Bill will help to avoid loopholes and contradictions, and will help to protect community lands against diminution vis-à-vis other tenure regimes.

Fourth, separating community land from public and private lands in legislation obfuscates land management and governance responsibilities, especially at the local level. For example, the Constitution vests certain types of public land, as well as unregistered community land, in the county government (Const. art. 62(1) & art. 63(3), respectively). Thus two important categories of land rights—public and community—vest in the county government. However county authority over governance matters for each category may be quite different, as public lands are to be held by the county but administered by the National Land Commission, which is not the case with community lands,[3] and community lands are to be held in trust specifically for the benefit of local communities. To avoid confusion and mismanagement, it will be important to spell out clearly the institutional authority over each category of land right *vis-à-vis the others,* at both the national and county level. The Land Bill is the logical place to do this.

Application of Act to Community Lands. In Section 3(1)(c), it is stated that the Act shall apply to "such parts of community land as the Cabinet Secretary shall specify." The meaning of this clause is unclear. This lack of clarity is confounded by the guiding principles of land administration and management, which include at Section 3(3)(b) "the principle of participation, accountability and democratic decision-making within communities …" It is not clear whether these are the communities in the parts designated by the Cabinet Secretary or all communities; if it is only those in the designated areas, the rationale for the distinction is not evident.

Institutional Powers and Functions vis-à-vis Community. Part II of the Land Bill is entitled "Management of Public Land." Section 6 outlines the general functions of the Cabinet Secretary in relation to land. Although the provisions have widespread implications for community land, it is unclear which, if any, of these powers and functions are applicable to community land.

The failure to clarify these functions with respect to community land in the Land Bill leaves communities open to the exercise of the powers that might disregard community interests. For instance, what are the conditions for the conversion of community land to public or private land? With which entity in the community does the Cabinet Secretary work in implementing land policy reforms,

[3] Note that the Land Bill as currently drafted does not address issues of county-level governance for either type of land, as discussed *infra*.

and in regulating the use and development of community land, regulating benefit sharing and management of land-based resources, facilitating efficient transactions in land and developing and maintaining an efficient and accurate land information system?

The failure to cross-reference the Community Land Act with the Land Bill leaves major gaps in the exercise of the Cabinet Secretary's powers and creates significant uncertainty in terms of which powers the Cabinet Secretary can legally exercise and under what conditions.

Section 16 gives the NLC powers to determine rules and regulations for the sustainable conservation of land-based natural resources. These resources include those in community land from a reading of Section 16(2), which details some types of regulations that could be made such as protection of critical ecosystems and habitats that could be in community land; incentives for communities to invest in natural resource conservation; access, use and co-management of forests, water and other resources by communities with customary rights to the resources, etc. There is no definition of customary rights in this Bill and though the Community Land Bill defines this, there is no cross-reference

On the whole, it is unclear why some powers are to be exercised by the NLC and others by the Cabinet Secretary. There is need for a sharper delineation of roles with regard to community land to avoid overlaps.

Charges. Sections 77 thru 105 govern "Charges. Section 78(3) on the power to create charges refers to a "customary charge of a matrimonial home," yet there is no definition of "customary charge." The ascertainment of what this customary charge means is critical considering Section 80(3) on priority of charges, where it is stated that "a customary charge shall be deemed to be an informal charge, and registration of a customary charge in a register of village land shall have the same effect as regards the priority of such a charge." It is unclear what this means because firstly, it is neither clear what an informal charge is nor what comprises village land. The nomenclature used in the Community Land Bill is "Land Administration Area," while the one used in the Land Registration Bill is "Registration District."

Secondly, it is unclear what register is being referred to here – is it the one anticipated under the Land Registration Bill or the one kept by the Land Administration Committee under the Community Land Bill? Further, is this charge to be dealt with in the way that other charges under the Land Bill are proposed to be dealt with in terms of tacking, consolidation, transfer, discharge etc.? Part V of the Community Land Bill deals with charges and it is not as detailed as the part on charges in the Land Bill, hence the need for this clarification.

At Section 89(4), there is provision for the remedies of the lender with respect to customary land. It is not clear what "customary land" means and the reference at subsection (4)(b)(ii) to selling "the charged land to any person or group of persons referred to in Community Land Act" does not have a corresponding provision in the Community Land Bill. What does this mean in essence?

The customary charge is also referred to in Section 95(3) on the lender's power of sale where it is stated that the notice is to be served on the "Community Land Committee of the village." Neither "community land committee" nor "village" is defined in the Bill and they are not provided for in the Community Land Bill. Customary charge is also dealt with in Section 96(2), which deals with the duty of the lender in exercising the power of sale. It is therefore imperative that it is defined for the avoidance of doubt.

Land Settlement. Part VI on Land Settlement (Sections 138-147) will impact community rights as settlement schemes are one way by which community land has historically been created and issues of divestiture of that land can and do arise. Section 140 should be more elaborate on the mode of holding land by settlers – is it as individuals or as communities, or can it be either? In both cases, cross-references should be made to the laws dealing with private and community tenure. Section 143 refers to "Registrar of Titles," a position established at Section 11 of the Land Registration Bill. It is also recommended that the Bill define whether settlers include members of all communities or only members of those communities in areas that the Cabinet Secretary has placed under the Land Registration Bill, as provided for in Section 3 of that Bill.

Easements and Analogous Rights. Part VII on Easements and Analogous Rights (Sections 164-178) maintains common law requirements for easements, which are restrictive and do not allow for conservation/environmental easements. Conservation/environmental easements are provided for under the Environmental Management and Co-ordination Act (EMCA) of 1999, which came into effect in July 2000. EMCA did away with the common law requirements for a dominant and servient tenement by creating the environmental easement in gross.

Aside from not allowing for environmental easements, the Land Bill makes no mention of easements on community lands. Failure to address this issue will create confusion over whether easements can be used on community lands, and potentially limit the uses and functionality of community lands. . The Land Bill should be revised to address environmental/conservation easements applicable on all categories of land, including community land.

Section 173 puts a communal right of way and interest in the environment together. It is not clear exactly what this means. The use of "'right of way under customary law" makes the provision even more confusing. What do "customary" and "communal" mean here and why is the NLC involved?

2.3 THE LAND REGISTRATION BILL

Like the Land Bill, the Land Registration Bill fails to provide for an integrated register that would facilitate transparency in land dealings. It has no provisions for change of registration from one tenure type to another. By leaving out community land from the master registration statute, the Bill replicates the situation operating currently where community land is treated differently and perceived as inferior to other tenure types. As presently drafted, the Land Registration Bill gives communities incentives to convert community land to private land in order to better protect their rights. This appears to be in contravention to the intent of the Constitution.

It is recommend that registration for community land is embedded in the Land Registration Bill to ensure that dealings in community land have the same treatment as dealings in other land categories and to provide an integrated land information system. The processes in the CLRR Model provide guidance that can be used in demarcating community land.

The remainder of this Section highlights the most concerning issues under the Registration Bill.

Interpretation. Whereas the Land Registration Bill purports to be "An Act of Parliament to give effect to Article 68 of the Constitution; to revise, consolidate and rationalize the law governing the registration of title to land, to regulate dealings in registered land, and for connected purposes," it excludes community land altogether. The Bill omits the definition of community land implying that it had no intention of dealing with that category of land. There is no definition of "person" yet Section 23 on the effect of registration explains it in terms of "the registration of a person as the proprietor of land." A definition may have allowed for expansive rendition of the term to include a community recognized as such under the Community Land Bill. Similarly, the Bill does not define "proprietor" and therefore excludes communities by implication.

The NLP proposed that a "Land Registration Act" be enacted to recognize and protect all legitimate rights and interests in land held under all categories of land set out in the Policy. By excluding community land, the Bill fails in a fundamental respect – providing a registration framework as a way of validating a neglected tenure category.

Application. Community Land is defined by the Constitution, so it is unclear why the application of the Bill to community lands is limited to "any area of community land to which the Cabinet Secretary shall by order apply." The implication is that registration is not intended for all areas of community land. This is not in consonance with the Constitution or the NLP. The scope of the Registration Bill needs to include interests in all community land.

Organization and Administration. The provision for registration districts is confusing given that the unit of devolution is the County. It is not clear how structures under the Community Land Bill (Land

Administration Committees), the Land Bill (village) and the County relate to the Land Registration Districts. It also appears like the land registers provided for under Section 7 exclude community land.

Registrar of Titles. Section 7(2) provides that the Registrar shall make information in the land registers easily accessible to every citizen and to the NLC. There is no clear linkage between the Registrar and the NLC and the Cabinet Secretary. One of the functions of the NLC under Article 67 of the Constitution is to advise the national government on a comprehensive program for the registration of title in land throughout Kenya so there needs to be a link between the registration actors and structures and the NLC.

Under Section 10, there is provision for public access to records by electronic means. The question is whether this is also anticipated for community land records given the illiteracy levels.

On appointment of officers at Section 11, the Public Service Commission is mandated to appoint a Registrar of Titles, but the qualifications for the Registrar are not given. It is also not clear whether and how the NLC and the Cabinet Secretary will be involved.

Maps. The Bill fails to ensure that the land information system facilitates the accurate classification and mapping of all land – private, public, *and* community. This was a major concern raised in the NLP. On the issue of maps prepared under this Bill, it is not clear how community land will be mapped. In this regard, the community-led demarcation process provided for in the CLRR Model (See Appendix 1) could be incorporated in this part of the Land Registration Bill. The CLRR developed a process by which community boundaries are traversed and, ultimately demarcated, with knowledgeable and credible community representatives (i.e., members of community land administration institution, respected elders, women and youth representatives, etc.) to clarify and confirm the bounds and limits of a community's lands, which include settlement areas, farming areas, common resource areas (forests, watering points, beach land sites, salt licks, grazing areas, and wildlife habitat, corridors and dispersal areas, etc.). A community then arrives at a common understanding with its neighbors and other users (e.g., pastoralists, etc.) in the form of agreements. Any disputed boundaries are acknowledge and are referred to Alternative Dispute Resolution (ADR) mechanisms between the disputants. Contested decisions to be referred to the Environment and Land Court.

Overriding Interests. On overriding interests, the Bill provides for environmental easements at Section 27(i) yet these are not provided for in the Land Bill. Being interests in land, such easements should have been provided for in the Land Bill for them to operate on registered land. Given that not all community land falls under this Bill, the question is what will happen to environmental easements in community land because there is no similar provision in the Community Land Bill. Environmental easements would facilitate sustainable management of environmental resources in view of conflicting land uses.

Certificate of Title. Section 29 would be beneficial in securing community rights to land. There is no reason why this provision excludes community land. Indeed, even the powers of the Registrar could apply to community land but they are framed very generally.

APPENDIX 1: BACKGROUND ON THE COMMUNITY LAND RIGHTS RECOGNITION MODEL

The Community Land Rights Recognition (CLRR) Model was developed by the Ministry of Lands (MoL) with the technical assistance of the Kenya SECURE Project (funded by USAID/Kenya and implemented by Tetra Tech ARD). The process involved officials from the MoL, four targeted communities in Lamu County, local administration and other stakeholders. It is cast within the context of processes that the Ministry has used to adjudicate land rights for coastal communities under the Squatter Settlement Scheme under the Agriculture Act (Cap. 318).

Essentially, the CLRR Model provides steps and processes that enable the divestiture of land from one category to the Community Land category (See Figure 1 below for key steps). It acknowledges that community land rights may incorporate overlapping claims of land rights and therefore ensures that in the conversion of lands from their previous tenure regime to Community Lands, all layers of overlapping claims are captured while at the same time serving to provide evidence for any conflicting land claims that require special attention to be resolved. Furthermore, the Model deals with the National Land Policy's call for the establishment of Community Land Boards by incorporating steps for the establishment of an appropriately constituted land holding and governance entity to be registered and become the legal entity in which ownership of Community Lands would reside. The Model also envisages the need for a speedy, cost-effective, dispute resolution mechanism to help resolve boundary and other land-related disputes. In this regard an alternative dispute resolution (ADR) agenda is enshrined in the Model through the identification of existing local ADR mechanisms and institutions, and training and enhancement to provide community land dispute resolution services.

In more specific terms, to recognize and register community lands, the proposed Model offers six stages of activities. These are: (A) the generation of demand for community land rights recognition among communities; (B) community engagement to educate them about the steps involved in the process; (C) the recording of community land claims and governance rules; (D) field demarcation of the extent of a community's lands; (E) the validation of community's claims by relevant government agencies; and (F) the issuance of certificate of title to the community.

The main rationale behind these six stages is captured by Chapter 3 of the National Land Policy, which calls for the equal recognition and protection of all modes of tenure in Kenya to facilitate the reconciliation and realization of the critical values land represents.

The Model aims to achieve three main objectives: 1) to develop a customary land tenure and property/

resource rights recognition model that, among other characteristics, is cost-effective for the Government of Kenya, affordable to beneficiaries, equitable and fair, and legally recognized; 2) to pilot principles and ideas that will inform the design of law and institutions envisaged

by the Constitution and National Land Policy for securing community land rights; and 3) to build capacity among key stakeholders towards the implementation of the Constitution and the National Land Policy with regards to protection of community land rights.

Finally, the CLRR Model recognizes that there would be potential challenges to achieving its objectives and, therefore, endeavors to offer built-in solutions to general challenges, ranging from political manipulations to the perception that Community Lands would stymie investments in land. It also offers solutions to potential operational challenges such as the lack of clear definition of communities, cost implications of community titling to beneficiaries, and mechanisms for recognizing individual entitlements within communities,

From the perspective of the reviewers, the CLRR Model conforms with the Constitution of Kenya 2010 and the NLP, both of which provide for recognition and registration of community land on equal terms with public land and private land. The NLP specifically requires that communal tenure, whether customary or non-customary, is documented and mapped in consultation with the affected groups and the CLRR Model provides the processes through which this can be done. The Model also tackles the issue of governance of community land within a devolved government structure, taking land administration to the community level and articulating the roles of the County government with regard to community land consistent with the Fourth Schedule of the Constitution.

Figure 1:

Key Steps in Land Rights Recognition Model[4]

(Version: September, 2011)

[4] For full description of this model, refer to: Government of Kenya, Ministry of Lands, "Community Land Rights Recognition Model for the Recognition, Protection and Registration of Rights to Land and Land Based Resources." September 2011.

APPENDIX 2: ADDITIONAL RESOURCES

In addition to referring to the CLRR Model for guidance on enhancing the current Community Land Bill, the drafters may also wish to refer to the Food and Agriculture Organization Legislative Study 105, *Statutory recognition of customary land rights in Africa: An investigation into best practices for lawmaking and implementation* (FAO, Rome, 2010). The study examines community land tenure security in the context of legal pluralism, and provides analytical case studies for the recognition of community lands in Botswana, Tanzania, and Mozambique. It then provides conclusions and recommendations for elevating customary law, management structures and processes, downward accountability, protections for the land rights of vulnerable groups, the role of state officials, merging and streamlining justice systems, managing markets in customary land rights, transactions between communities and outside investors, and the registration of customary land rights. The booklet then provides salient recommendations on drafting appropriate laws on all of the above.

Full version available free-of-charge at: www.fao.org/docrep/013/i1945e/i1945e00.htm

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