

THE EFFECTS OF EXISTING LAND TENURE SYSTEMS ON LAND USE IN KENYA TODAY

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INTRODUCTION

Concern about land tenure and its impact on land use as well as the management of natural resources is not a recent phenomenon in Kenya and indeed in the whole of Africa. Prior to and after independence, radical changes have been deliberately initiated in tenure arrangements. These have mainly been justified on the basis of the expected improvements in productivity, land use planning and decision making which they would generate (Ogolla, Mugabe 1996).

Until recently the debate on the interface between land tenure and land use was restricted to enhance agricultural production. However land tenure, since it determines access to land is a critical variable in the management of natural and environmental resources, soil conservation, water resources as well as wildlife management.

Land tenure provides the legal and normative framework within which all agricultural as well as other economics activities are conducted. Tenure insecurity whether customary or statutory tenure regimes undermine the effectiveness of these activities. When tenure rights are certain, they provide incentives to use land in a sustainable manner or invest in resource conservation whether for the individual or group of individuals (Ogolla, Mugabe 1996).

Kenya having an agricultural based economy has majority of her people deriving their livelihood from various forms of agriculture. Different communities practice various forms of land used based on their social-economic needs and cultural practices and determined mainly by weather patterns, soil fertility, ecology and level of social development.

In the urban areas, there is intensive land use due to high population densities. Zoning laws are enforced to encourage development along pre-determined areas whether for commercial, industrial, residential and recreational areas. The greatest challenge in urban areas is the occupation of various government, trust or other peoples lands by people especially immigrants from, the rural areas.

The tenures adopted having an effect of land use, should among others aim at providing security of tenure to the persons holding the land, sustain and improve the environment be easily understood and acceptable to the communities as well as be equitable.

It is therefore imperative that the government pursues policies and land tenures that will lead to sustainable land use and development. The tenures adopted should therefore strive to satisfy various policy objectives such as the following:

- a) Efficiency in land use by providing a smooth functioning land market and permits maximum productivity of land resources for all types of uses. The system should also be responsive to various changes in demand.
- b) Aim at equity by ensuring that the tenure system provides reasonable access to all groups especially those of low income or vulnerable groups.
- c) System should be comparable with other policy instruments dealing with economic development and must not contradict existing legislation.
- d) Continuity such that it avoids abrupt breaks in the existing political and cultural set up.

These objectives should be achieved whether the land is held in freehold, leasehold, customary or other interests.

LAND USE SYSTEMS

Kenya has a total area of 582,646 Sq. Km and agriculturally can be classified into three broad zones high, middle and low.

The high and medium potential areas cover about 18% of the total land area while the low potential is the arid and semi arid areas covering about 82% of the total land area (Republic of Kenya Economic Survey 1994). The main economic activities in the high and medium potential areas is intensive agricultural and livestock husbandry while in the low potential areas is pastoral, ranching and wildlife based systems and in some places, dry-land farming.

In urban areas, land use is determined by various zoning laws, which prescribe the areas to be used for commercial, residential, industrial, recreational and public purposes.

THE CONCEPT OF LAND TENURE

The term land tenure is derived from the Latin word *tenere* which means “to hold.” Tenure defines the social relations between people in respect of the object of the tenure, in this case land. Tenure also defines the methods by which individuals or groups acquire hold transfer or transmit property rights in land (Ogolla, Mugabe 1996).

Property rights may include a variety of different rights for example to build, to use, to transfer, to mine etc. the rights may be transferred or transmitted either together or individually at the discretion of the holder with or without limitations depending on the tenure system. Formal rules of tenure therefore define the nature and content of property rights in land or other resources and the conditions under which those rights are to be held and enjoyed.

LAND TENURE SYSTEMS IN KENYA

Interests in land broadly fall into two groups. Rights and that are held through traditional African systems, and rights that derive from the English system introduced and maintained through laws enacted by colonial and then the national parliament. The former is loosely known as customary tenure bound through traditional rules (customary law). The latter body of law is referred to as statutory tenure, secured and expressed through national law, in various Act of parliament e.g. Government Land Act (cap 280), Registered Land Act (cap 300), Registration of Titles Act (cap 281), Trust Land Act (cap 288) of the Laws of Kenya.

a) Customary Land Tenure

This refers to unwritten land ownership practices by certain communities under customary law. Kenya being a diverse country in terms of its ethnic composition has multiple customary tenure systems, which vary mainly due to different agricultural practices, climatic conditions and cultural practices. However most customary tenure systems exhibit a number of similar characteristics as follows:

First, individuals or groups by virtue of their membership in some social unit of production or political community have guaranteed rights of access to land and other natural resources (Ogendo 1979). Individuals or families thus claim property rights by virtue of their affiliation to the group.

Secondly, rights of control are rested in the political authority of the unit or community. This control is derived from sovereignty over the area in which the relevant resources are located. Control is for the purpose of guaranteeing access to the resources and is redistributive both spatially and intergenerationally. Its administrative component entails the power to allocate land and other resources within the group, regulate their use and defend them against outsiders (Ogola, Mugabe 1996).

Thirdly, rights analogous to private property accrue to individuals out of their investment of labour in harnessing, utilizing and maintaining the resource. Thus the present cultivator of some piece of land has the greatest rights to it. These rights transcend mere usufruct and encompass transmission and in some communities transfer (Elias 1956).

Lastly, resources that do not require extensive investment of labour or which by their nature had to be shared, for example, common pasturage are controlled and managed by the relevant political authority. Every individual member of the political community has guaranteed equal rights of access thereto.

The regulatory mechanisms imposed by the political units such as exclusion of outsiders, seasonal variations in land use and social pressure ensured sustainable resource utilization.

This mode of ownership in Kenya is currently governed by the Trust Land Act by which all land in the rural areas which is neither government land nor individually owned is vested in the county council in trust for the residents living there.

b) Statutory Tenures

i) Freehold Tenure

This tenure confers the greatest interest in land called absolute right of ownership or possession of land for an indefinite period of time, or in perpetuity.

Freehold land is governed by the Registered Land Act (RLA) Cap 300 of the Laws of Kenya. The Act provides that the registration of a person as the proprietor of the land vests in that person the absolute ownership of that land together with all rights, privileges relating thereto. A freehold title generally has no restriction as to the use and occupation but in practice there are conditional freeholds, which restrict the use for say agricultural or ranching purposes only.

Land individualization was demanded by the colonial settlers who required legal guarantee for the private ownership of land without which they were reluctant to invest. The principle for privatisation was hence laid down and implemented as from 1956 mainly in central province. To date most of the agricultural regimes with high potential such as western province, Kericho, Uasin Gishu, Embu, Meru, Machakos and Kisii districts have been completely adjudicated and registered (Ogolla, Mugabe 1996).

With regard to the areas with lower agricultural potential, mostly arid and semi arid parts of the country where the dominant land use as pastoralism, a different registration system was instituted in 1968. This is the regime of land (group representatives) Act. Here the registration of group ranches was viewed as a compromise between individual ownership and the need for access to wider resources in dry lands. Under this system 'communal lands' are divided into smaller units 'ranches,' which are then registered in the names of group representatives (three to ten members) elected by the members of the group (Wanjala 2000).

Every member of the group has rights in the ownership for the group land in undivided shares. The members are entitled to reside therein free of charge with their family and dependants and make exclusive use for the grouped ranches resources. This appears to a marriage between the need to have exclusive use of an area of land and the communal ownership and use of land in these areas.

ii) Leasehold Tenure

Leasehold is an interest in land for a definite term of years and may be granted by a freeholder usually subject to the payment of a fee or rent and is subject also to certain conditions which must be observed. e.g. relating to developments and usage.

Leases are also granted by the government for government land, the local authorities for trust land and by individuals or organisations owning freehold land. The maximum term of government leases granted in Kenya is 999 years for agricultural land and 99 years for urban plots. There are few cases of 33 years leases granted by government in respect of urban trust lands. The local authorities have granted leases for 50 and 30 years as appropriate (GOK 1996).

c) Public Tenure

This is where land owned by the Government for her own purpose and which includes unutilised or unalienated government land reserved for future use by the Government itself or may be available to the general public for various uses. The land is administered under the Government lands Act Cap 280. These lands are vested in the president and who has, normally through the Commissioner of Lands, powers to allocate or make grants of any estates, interests or rights in or over unalienated government land. Categories of government land include forest reserves, other government reserves, alienated and unalienated government land, national parks, townships and other urban centres and open water bodies (GOK 1996).

The Government Lands Act does not contain any notion of trusteeship by government of the land to her people. Indeed the government at times acts as a private owner and allocates parcels to those in its favour.

d) Other Interests

These include:

- Reservations of other government or trust land to government ministries, departments or parastatals for their use.
- Minor interest such as easements, wayleaves or temporary occupation licences.
- Non formalised defacto tenure by which people, individually or in groups invade and occupy other people or government land particularly in major urban centres of Nairobi, Mombasa and Kisumu.

SOME EFFECTS OF REGISTRATION ON LAND USE

a) Freehold Areas

Registration transformed land from communal ownership to individual absolute ownership. This process also converted land into a commodity, which can be sold, leased, charged or mortgaged at the absolute discretion of the owner. The rationale was that the registration would enable peasant farmers to have credit from financial institutions, as they would use their lands as collateral. This has by and large been successful but it also caused considerable difficulties to those who defaulted as the financial institutions were given wide powers of sale in the event of default. Many families have found themselves

dispossessed of their land due to imprudence of certain members, drought, inexperience and other causes of default.

Absolute ownership and discretion on use has resulted in many instances of absentee landlords. Large tracts of land remain ideal notwithstanding landlessness and recurrent food shortages in the country. This is because private property rights have encouraged accumulation and speculation thereby withdrawing land resources from productive use (Wanjala 2000).

The process of tenure reform and its aftermath have caused considerable confusion and insecurity of tenure. In most rural areas, land is still regarded as a collective asset. The predominant belief is that registration did not oust family or clan ownership and in many instances registered land has been challenged on the ground that land is former family or clan land (Wanjala 2000).

Various land use practices which are based on customary practices of communal ownership have persisted even in areas where land is registered. This is especially so in areas where the land use practices are driven by the diversity of soil types and related crop diversity. Under such conditions communities have continued to use customary rules of access to multiple sites e.g. salt lakes, water points instead of relying solely on their registered parcels.

The practice of inheritance where normally a father shares his piece of land to his adult sons (and increasingly to unmarried daughters) has led to subdivisions of agricultural lands to a very high extent. Apart from increasing the number of boundary related disputes, the subdivisions have created intrinsically small parcels, some of which can hardly sustain a family unit even for subsistence. The small parcels are over exploited and lose their fertility quickly as a result of either overgrazing, soil erosion and other poor farming practices.

b) Areas under Group Representatives

As stated earlier, in the drier regions of Kenya land has been registered as group ranches. In some of these areas there has been considerable pressure especially from the well-educated members on the community to subdivide the group ranches into individual units. This is especially so in Narok and Laikipia districts. This move to subdivide group ranches portends an economic, ecological and a cultural disaster for the communities especially the Maasai (Ogolla, Mugabe 1996). This is because practical experience has demonstrated that faced with adverse climatic and ecological conditions the pastoralists can, and indeed do not respect the sanctity of private property (Wanjala 2000). For example, in 2000 there were frequent land intrusions in private lands including the Nairobi City centre by Maasai herdsmen in search of pasture.

At the same time in these pastoral areas, given the existing land use technology the nature of ecological factors in the area and the cultural context, land use in the region will for some time demand wider access to land and other natural resources. Restricting access

rights through the subdivision of group ranches and the creation of private property rights will not only imperil the existing pastoral economy but also adversely affect the cultural practices and traditions of the maasai (Ogola, Mugabe, 1996).

The land (Group representatives) Act was seen by government as a compromise between individual ownership and granting access to the communities for large tracts of land. This was an attempt to provide for customary rules within a statutory framework (Wanjala 2000).

The creation of group ranches with the members having exclusive use of the ranch resources have created conflicts and confusion regarding the locus of authority and uncoordination in the use of the common resources. Some members have agitated for and have managed to parcel out individual ranches or parcels. This is leading to over parcelation, over exploitation of land due to overgrazing, deforestation and landlessness.

c) Areas under Public Tenure (Government Land)

Government lands are often invaded and occupied by individuals or groups of people especially in urban areas and in forest reserves. Due to insecurity of tenure and lack of any registrable interest in the occupied lands, the occupants have a tendency to over exploit the resources therein leading to severe environmental degradation.

The law in Kenya does not recognise this type of tenure called squatting and it is infact regarded as trespassing. In land registers, such lands are treated as vacant. However more than 50% of the urban population in Kenya have lived in these settlements for more than two decades. These squatter or informal settlements are characterised by inadequate basic services and widespread poverty. They are subjected to constant harassment by local authorities as their dwellings are under constant threat of demolition. It is generally acknowledged that widespread poverty in those settlements is accentuated by lack of security of tenure in these settlements.

The problem of squatters is widespread also in forests where there are constant incursions by not only the poor and landless but also the 'high and mighty' for farming or expropriating high valued timber and other forest products. This has contributed to massive soil erosion and its disastrous consequences downstream, displaced wild animals from their natural habitat and other negative environmental consequences. With time the squatters demand to be allocated the occupied lands and have in the past, out of political expediency, succeeded thereby encouraging further and further incursions.

A bigger problem in these forest areas is the cultivation of various drug crops especially 'bhang' (cannabis sativa) and government efforts to stamp out this out of 'its own' lands appears lukewarm. There are hundreds of acres of this crop deep in the forests of Mt. Kenya.

At the same time, the land allocation process prescribed in the Government Lands Act has largely failed in that it rarely incorporates the ancestral rights of the people. The process is

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by and large insensitive to the landless. Allocations are often to the powerful, leaving the local people landless and very angry.

CONCLUSION

Land tenure types and policies tend to determine the nature of agriculture and influence other land use practises. In order to achieve sustainable agriculture the country needs to adopt policies and strategies that promote conservation of natural resources. This should be by devolving the natural resources to local communities and encouraging local level sustainable resource management.

Major changes would need to be introduced in the new constitution. The ongoing Njonjo land commission of enquiry in to land matters in this country must seek to marry ancestral land rights with current legislation. It must remove the sections of the law which allow statutory law to render customary law null and void. A positive constitution would give standing to traditional practices and allow them to evolve with time to become the basis of integrating indigenous practices into common law(Wanjala 2000). For example under the Government Land Act, the state acts like a private owner of the land and allocates large parcel as it wishes but in reality it should hold the land in trust for the people. This should be clearly defined and the current loopholes sealed.

Alternative land tenure and land use policies should be sought which aim at defining property rights in a manner that incorporates the use of resources in a sustainable manner as well as conservation for future generations. The control of natural resources should be vested in the local communities who should be educated on sustainable resource management (Ogolla, Mugabe 1996).

On privately registered land, laws should be made which would allow the government to intervene on private land for the purposes of sustainable resource use or conservation for the common good. This should be done through the legal mechanism which maximise the public good and minimize the potential abuse of authority (Ondiege 1996).

Challenges which must be addressed in Kenya so as to make land a more available and ideal resource are as outlined below, this is because the de-facto tenure regimes governing land are diverse and evolving, providing various challenges to an already complex problem.

- a) How far should land itself and the powers over land be vested on the government?
- b) How far should a market for land in both urban and rural areas be permitted and promoted?
- c) An easy and more acceptable and manageable way of resolving the plethora of land disputes in both the registered areas and in unregistered areas.
- d) How should unregistered, customary land holding and common rights be dealt with in the law?
- e) How should the rights of women in land be handled, especially given their major role in agriculture.

- f) How to bring all rights in land in to a simple efficient and accessible system of documentation and evidence.
- g) How should the occupancy of the still growing millions of urban poor thus far designated as squatters be dealt with? (Wily, Mbaya 2001).

There are no easy solutions and the land questions can only be ignored at our own peril. Some demand immediate answers while some require careful thought by both government and all stakeholders. A participatory approach is a must but the government must be prepared to make tough political and economic decisions.

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