

**PART II:**

**NATURAL RESOURCES**

**GOVERNANCE**



## Chapter 10:

# Wildlife conservation and community property rights in Kenya

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## 1 Introduction

Property rights are granted for a variety of purposes including providing incentives for proper management of land. A property owner has a bundle of entitlements that include using, excluding others and alienation.<sup>1</sup> Kenya's pre-2010 law provided for the protection of property rights as constitutional rights. This protection did not, however, extend to according communities rights to own land. The Carter Commission<sup>2</sup> dealt with the allocation of land to communities in the 1930s, while the Swynnerton Plan<sup>3</sup> introduced the Torrens registration system for native-occupied land in the 1950s. Interestingly, the Swynnerton Plan acknowledged that there were communities in Kenya for whom private/individual rights to land were not suitable on account of their land uses. It recommended the establishment of group ranches, a form of group tenure, which is discussed below.

Policy and law over the years have, however, explicitly favoured private rights and encouraged the parcelling of community lands into private holdings. Indeed, the expectation was that all community land rights would eventually be converted to private rights. Another factor that has greatly influenced land-rights holding in Kenya is the preference for cultivation agriculture. This is despite the fact that only a third of Kenya's land mass is suitable for cultivation, with the rest being arid and semi-arid. Approximately 75% of the country's population lives within the medium to high potential (20% of land area) and the rest in the vast arid and semi-arid lands.<sup>4</sup>

Before the promulgation of the Constitution of Kenya (2010) (2010 Constitution) and the subsequent enactment of the Community Land Act (2016)<sup>5</sup> (Community Land Act), group/community ownership in Kenya was dealt with under trust land and group ranches. Trust land comprised of areas that were occupied by the natives during the colonial period and which had not been consolidated, adjudicated and registered in individuals' or group names, and native land that had not been taken over by the

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1 Honoré (1961).

2 The Kenya Land Commission Report (1934).

3 Swynnerton (1955).

4 Ministry of Lands and Physical Planning (2017: 13).

5 Act 27 of 2016.

government.<sup>6</sup> It was governed by the Trust Lands Act<sup>7</sup> and vested in local authorities designated as county councils.<sup>8</sup> County councils managed all the resources within the trust land under their jurisdiction and controlled the development of that land.

With regard to group ranches, the Report of the East Africa Royal Commission of 1953-1955, concluding the policy on land tenure in the East African Protectorate as Kenya then was, noted that individualisation of land ownership ought to be the main aim. It, however, noted that such ownership need not be confined to individuals but could also extend to groups such as companies, cooperatives and customary associations of Africans.<sup>9</sup> Group ranches are demarcated areas of rangeland to which a group of pastoralists, who graze their individually or owned herds on it, have official land rights. It was designed for groups of herders shown to have customary rights over the range or pastureland in question which were governed by the now repealed Land (Group Representatives) Act.<sup>10</sup> Most group ranches are in the areas occupied by pastoral communities in Kenya. The composition of group ranches was an attempt at formalising traditional community structures. Group ranches did not, however, work well for a variety of reasons. Firstly, the group representatives lacked the authority of traditional leaders. Secondly, government policy emphasised individual rights and there was a prevalent view that group rights would eventually morph into individual rights. Despite this neglect, community claims to land remained.<sup>11</sup>

The absence of clear and secure property rights for communities has been an impediment to full enjoyment by communities of the incidents of property holding, productive use of land and national development. This presented a perverse incentive for communities to move away from community rights leading to defensive titling of land into individual holdings to protect their land from encroachment by government or other entities both within the trust lands and the group ranches. The latest available statistics indicate that over 60% of the total land area in Kenya is held under customary arrangements.<sup>12</sup> Much of this land is, however, being converted to private tenure through the process of land adjudication and there are no up to date figures on how much land still remains under community tenure. Some group ranches had already designated areas for wildlife conservation before the 2010 Constitution, but the lack of secure tenure left such areas open to conversion to alternative tenure and land uses.<sup>13</sup>

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6 Section 115 of the Constitution of Kenya (1983) (Repealed).

7 Chapter 288 of the Laws of Kenya.

8 Section 114 of the Constitution of Kenya (1983) (Repealed).

9 East Africa Royal Commission (1955).

10 Chapter 287 of the Laws of Kenya, introduced as an Act of Parliament to provide for the incorporation of representatives of groups who have been recorded as owners of land under the Land Adjudication Act Chapter 284 of the Laws of Kenya.

11 Akech (2001).

12 Republic of Kenya (2004).

13 Interviews with group ranch leaders at Kaulo in Samburu and Isiolo in 2011.

It is within this context that both the 2010 Constitution and the first ever National Land Policy in Kenya (Sessional Paper No. 3 of 2009) provided for the recognition of community rights to land. The 2010 Constitution and the National Land Policy presented the yearned for opportunity to craft new land laws for the protection of public, private and community land.<sup>14</sup> The 2010 Constitution vests community land in communities identified on the basis of ethnicity, culture or similar community of interest.<sup>15</sup> It also provides that unregistered community land shall be held in trust by county governments (entities established under the 2010 Constitution in a bid to devolve power) on behalf of communities.<sup>16</sup> It comprises of: group ranches; land lawfully transferred to a specific community by any process of law; land declared to be community land by an Act of Parliament; and land lawfully held, managed or used by specific communities as community forests, grazing areas or shrines; ancestral lands and lands traditionally occupied by hunter-gatherer communities; or lawfully held as trust land by county governments.<sup>17</sup> No disposition or use of community land is allowed if it does not conform to legislation specifying the nature and extent of the rights of members of each community individually and collectively. The 2010 Constitution required Parliament to enact this law and this was done in 2016.

The Community Land Act and Regulations to implement it are now in place. The question that this chapter seeks to answer is the extent to which this law facilitates wildlife conservation granted the close relationship between pastoral communities to whom it applies and wildlife. This is within a context of unabated conversion of community land to private tenure before the promulgation of the 2010 Constitution and after its promulgation before the enactment and implementation of the Community Land Act.<sup>18</sup>

In designing the wildlife law and policy in the 2000s, among the key issues identified as barriers to wildlife conservation in Kenya were: land tenure insecurity; a failure to provide for multiple and compatible land uses through zoning; the lack of a legal framework for involvement of local communities in sustainable wildlife management despite the fact that wildlife shares land with communities and that the bulk of wildlife is outside protected areas; that communities have no rights to wildlife resources and no legal basis for claiming part of the benefits accruing from wildlife conservation and management or appropriating any value of wildlife despite the fact that they are obliged to keep the wildlife on their land and bear the costs; and the absence of incentives for landholders to conserve wildlife on their land.

The 2010 Constitution dealt with the equality and security of tenure under all tenure types. The Community Land Act and the Wildlife Conservation and Management Act

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14 Article 61 of Constitution of Kenya (2010).

15 Article 63 of Constitution of Kenya (2010).

16 Article 63 of Constitution of Kenya (2010).

17 Article 63(2) of Constitution of Kenya (2010).

18 Musembi & Kameri-Mbote (2013: 5).

(2013)<sup>19</sup> (WCMA) were enacted to both align the land law and wildlife law to the 2010 Constitution and to respond to the concerns raised above. Additionally, the National Land Use Policy<sup>20</sup> seeks to guide “Kenya towards an environmentally and socially responsible use of land and land-based resources for socio-economic transformation of the people of Kenya”<sup>21</sup> and “to promote best land use practices for optimal utilization of the land resource in a productive, efficient, equitable and sustainable manner”.<sup>22</sup>

This chapter assesses the extent to which the Community Land Act and the WCMA support wildlife conservation on community lands. Part one is the introduction. Part two conceptualises issues of wildlife conservation and land rights. Part three lays out the legal and policy framework for wildlife conservation and land rights assessing the extent to which community land rights have factored in wildlife conservation and vice versa. Part four provides the conclusion.

## 2 Conceptual framework

### 2.1 Wildlife conservation as a land use

Kenya boasts a varied diversity of flora and fauna.<sup>23</sup> It has over 7,800 animal and plant species and various other species that constitute wildlife, counting as a key revenue earner for government.<sup>24</sup> It is important to note that wildlife conservation is predicated on the manner in which land is held and used. Of the total land acreage in Kenya, community land is the largest, constituting nearly 66% of the total land mass while public land is 12%, with the remaining 22% being private land.<sup>25</sup> Given that community land forms the bulk of the total land mass in Kenya, it then follows that it is a crucial resource in terms of providing a habitat and migratory routes for wildlife. In another sense, community land alongside private land, which constitutes more than 85% of the total land mass in Kenya,<sup>26</sup> must be used if proper wildlife management is to be achieved. Most community lands in Kenya are in the arid and semi-arid parts of the country and lag behind in terms of economic development. Many of these lands have in recent times been earmarked for large infrastructural projects, which are likely to affect both communities and wildlife.<sup>27</sup> Moreover, while Article 62 of the 2010 Constitution envisages a total forest cover of 10% of the total land mass in Kenya, only

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19 Act 47 of 2013.

20 Ministry of Lands and Physical Planning (2017).

21 Ibid: 4.

22 Ibid.

23 Kiambi & Opole (1992: 53).

24 World Conservation Monitoring Centre Kenya (1998).

25 Kimeu & Kairu (2016).

26 Ibid.

27 See for instance the Isiolo Resort City and the Standard Gauge Railway projects.

6.3% of the land mass at present is forested.<sup>28</sup> This means that Kenya still lags behind in terms of meeting the constitutionally and internationally recognised standard on forest cover, with forests forming a key habitat for wildlife.

Wildlife situated on community land usually share the land with the communities and their livestock, while wildlife on public land resides in protected areas - national parks and game reserves. It is estimated that 70% of Kenya's wildlife resides outside protected areas<sup>29</sup> as national parks comprise only 8% of Kenya's total land acreage.<sup>30</sup> Particular problems arise with respect to the delineation of land rights' regimes in areas hosting wildlife owing to the special nature of wildlife. To begin, wildlife is a 'fugitive resource', which is not easily associated with a particular user as owner in its *in situ* condition.<sup>31</sup>

Land on its part, being a finite and scarce resource, has multiple competing and sometimes incompatible values and uses.<sup>32</sup> Wildlife conservation is one of the uses to which land can be put and is invariably at odds with cultivation, urban or infrastructural development.<sup>33</sup> These latter uses are more economically lucrative in the short term and have greater support in national development policies compared to wildlife conservation.<sup>34</sup> It is therefore not surprising that because of the emphasis on crop production in national policy, agro-pastoralism is more common than pure pastoralism in many pastoralist areas that can support agriculture.<sup>35</sup> This shift in land use is accompanied by conversion of land tenure from group to individual rights. Many group ranches have been subdivided to individual holdings, which are perceived to be more secure and beneficial to the owners than group holdings.<sup>36</sup> The absence of a secure legal framework for community land rights largely fuelled this conversion.<sup>37</sup> Conversion of tenure is accompanied by conversion of land use from pastoralism, which is compatible with wildlife conservation, and has grave implications for conservation. It is worth noting that the change in tenure has not been accompanied by a change in lifestyle for many pastoralists who still keep large herds of livestock for livelihood and security against the economic uncertainties of life. Most of them have large herds on

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28 Ministry of Lands and Physical Planning (2017: para. 4.21).

29 See generally: Western (1994).

30 Ibid.

31 Kameri-Mbote (2002: 29).

32 Republic of Kenya (2009: para. 29).

33 Ministry of Lands and Physical Planning (2017: 16). See <<http://www.ardhi.go.ke/wp-content/uploads/2016/06/Draft-National-Land-Use-Policy-May-2016.pdf>> (accessed 28-6-2016).

34 See, for example, the recently completed Standard Gauge Railway Line passes through the Nairobi National Park, Olingo (2016). The southern bypass road is also set to pass through the park.

35 This is the case in Amboseli area and Narok, which are home to the Maasai community. See Campbell et al. (2000: 337). The authors note that the Maasai are becoming partially or fully sedentary and embracing crop production to supplement their livestock production and support their families.

36 See generally: IUCN (2011).

37 Seno et al. (2013: 75).

land that is not able to sustain them leading to overgrazing. Drought and overall changes in climate have pushed the carrying capacity of many pastoral lands to the brink. In the quest for survival, herders have in recent times invaded private lands belonging to smallholder farmers and ranchers in places like Laikipia.<sup>38</sup> These pressures on land have implications for wildlife conservation.

The greatest threats to wildlife are loss of habitat, human interventions in ecosystems, poaching and over-use of resources.<sup>39</sup> The quest to optimise the uses to which land is put places wildlife in a disadvantaged position as urbanisation and agriculture take centre stage. The contest between deontological<sup>40</sup> (moral/equity) approaches to land and efficiency/utilitarian<sup>41</sup> approaches lies at the core of promotion of property rights' systems in spaces that host wildlife. Where conservation of wildlife is concerned, the situation is complicated by anthropocentric approaches that place human needs ahead of nature conservation. The emphasis on economic returns leads to the neglect of social and ecological concerns. The development of mega projects without taking into account habitat needs of wildlife is justified on grounds of the economic benefits of such projects in improving the lives of people. Where landscapes that host wildlife are occupied by poor people who hold land collectively, tenure reform geared towards individual ownership of land leads to the fragmentation of habitats and fencing of wild lands which affect the movement of animals.

The drive towards individual land rights follows from the exposition by Hardin<sup>42</sup> who proposed the institution of private property rights as a way to stem the tragedy of the commons and deal with the problem of unsustainable resource use in commonly held lands. It has however become increasingly clear that the fragmentation of community land into individual holdings does not guarantee sustainable resource management and can, to the contrary, fuel unsustainable harvesting of resources.<sup>43</sup> More recently, tenure reform has been informed by the perceived need to unlock the economic potential of 'dead capital' that land held communally is perceived to have remained for a long time.<sup>44</sup> In computing the value of land, nature conservation has unfortunately not been factored in. The competition for resources between humans in communally held landscapes and the wildlife pits conservation against people's welfare, and conservation is perceived as compounding poverty by taking land that would otherwise be available for use.

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38 Kubania (2017).

39 Steidl & Powell (2006: 50).

40 See <[http://lsolum.typepad.com/legal\\_theory\\_lexicon/2003/11/legal\\_theory\\_le\\_2.html](http://lsolum.typepad.com/legal_theory_lexicon/2003/11/legal_theory_le_2.html)> (accessed 28-10-2016).

41 Solow & Polasky (1999: 17). A utilitarian/efficiency approach to wildlife conservation is one that evaluates conservation on the basis on costs and benefits deriving therefrom.

42 Hardin (1968: 1243).

43 Kameri-Mbote (2002).

44 De Soto (2000). For a contrarian view on the same particularly within the African and Kenyan context, see Nyamu-Musembi (2006); and Okoth-Ogendo (2006).

Land rights are vested in various entities – individuals, communities or states granting such entities varying levels of exclusivity as regards usage and occupation of land. The existence of wildlife on land in many instances requires owners of the land to desist from some uses, which are incompatible with wildlife conservation. For poor people sharing landscapes with wildlife, the lure of alternative land uses is real in the quest for survival.<sup>45</sup> This is fanned by policies that over-emphasise private land rights and fail to take into account the needs of fugitive resources such as wildlife for vast lands. The situation is exacerbated by population growth leading to competition for land and resources between humans and wildlife.

## 2.2 Land rights and wildlife law

As noted above, the rights that accrue to landowners are referred to as a ‘bundle of sticks’<sup>46</sup> or entitlements and include the rights to use, dispose, exclude, possess, manage, right to security, right to capital and to transmit.<sup>47</sup> Entitlements flow from the grant of land rights, which are delineated according to the bundle encapsulated in the grant. This explains why holders of freehold<sup>48</sup> and leasehold<sup>49</sup> titles have different bundles of rights. Rights to wildlife would therefore naturally be an incident of property. However, wildlife remains public property despite the fact that it is also found on community and private land. This challenges William Blackstone’s eighteenth-century full liberal ownership theory where a private owner was perceived as having total exclusionary rights over their property over every other person.<sup>50</sup> Blackstone described property as:<sup>51</sup>

...that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.

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- 45 It is, therefore, not surprising that a number of landowners in areas such as Kajiado County have opted to dispose of their land in a bid to secure a bigger return on their capital. See Muiruri (2015).
- 46 Bundle of sticks is a metaphor used within the context of property law to denote the complexities of ownership and more specifically to connote the full extent/entitlements of private property ownership. The metaphor is credited to Justice Benjamin Cardozo. See further Ellickson (2011: 215).
- 47 Honoré has titled these as incidents of entitlements in property under the full liberal ownership concept. See further Honoré (1961).
- 48 Freehold title refers to an interest in land which upon the death of the holder, can descend to heirs or continue in perpetuity.
- 49 Leasehold title is an interest in land for a defined period/duration of time, upon expiry of which the land reverts to the lessor/grantor of the lease.
- 50 We use the phrase ‘appeared to suggest’ since there are serious doubts as to whether he was unaware of the qualifications to the concept of exclusivity of property. See in particular Blackstone (1769).
- 51 Blackstone (1769: 2).

This physicalist conception of property as the exclusive right to use and abuse the ‘res’ (thing that was the object of property) was used in Johnson’s view to justify private property as a means:<sup>52</sup>

...to secure freedom and autonomy for individuals; the only obligation was to do no harm to others in the exercise of one’s rights. People viewed ownership of land as the path to wealth, autonomy, and status. Ownership provided a circular justification for property rights that were themselves seen to naturally flow from ownership.

The full liberal ownership is less applicable in modern day due to ecological concerns, issues of social justice<sup>53</sup> and the emergence of new forms of intangible property. Indeed, the entitlements one has over land have been qualified over time with concerns about aviation, planning and environmental conservation being allowed to fetter the rights of landowners.<sup>54</sup> Further new forms of intangible property such as intellectual property,<sup>55</sup> electromagnetic spectrum<sup>56</sup> and more recently data,<sup>57</sup> have raised a need to reconsider the physicalist notion of property.

Land rights entitling owners to use their property pits communities against wildlife conservation authorities, which is a major challenge in Kenya’s conservation arena. This is compounded by human-wildlife conflicts occasioned by the encroachment of wildlife and humans into each other’s terrain. Increasing urbanisation is also a major factor in these threats in Kenya as people move from the rural areas to urban areas in search of employment. For instance, between 2010 and 2015, Kenya’s urban population grew by 4.4%.<sup>58</sup> In 2013, the total urban population comprised 25% of the total population in the country.<sup>59</sup> This figure is projected to have increased since 2013. Increased urbanisation has necessitated destruction of ecological zones to construct houses for settlement thus exacerbating human-wildlife conflicts. Increased urbanisation has also contributed to the fragmentation of land and conversion of what was formerly pastoral and agricultural land into residential and commercial uses, thus creating conflict of these land uses with wildlife conservation.<sup>60</sup>

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52 Johnson (2007: 250).

53 For a view that the exclusivity concept with regard to property as stated by Blackstone was more mythical than real and that Blackstone was misunderstood, see Rose (1998: 602).

54 See, for instance, *Baron Bernstein of Leigh v. Skyviews and General Ltd* [1978] QB 479 where Justice Griffiths referred to the *cujus* maxim as a “colourful phrase upon the lips of lawyers...” that is not as applicable in modern day.

55 Ministry of Lands and Physical Planning (2017).

56 Ibid.

57 Ibid.

58 Ibid: 13.

59 Ibid.

60 Ibid: 21.

## 2.3 Broader policy issues

### 2.3.1 Devolution

The new governance architecture that was ushered in by the 2010 Constitution is also of importance. It features devolution and some sharing of functions between the national and 47 county governments. This is a fundamental shift from the centralised approach that informed wildlife management in Kenya for a long time under the Wildlife (Conservation and Management) Act (1976).<sup>61</sup> While protection of the environment and natural resources and specifically the protection of animals and wildlife is a function of the national government,<sup>62</sup> there are interfaces with county governments. The latter are expected to implement specific national government policies on natural resources and the environment.<sup>63</sup> Counties are also required to develop County Integrated Development and County Physical Plans, which can facilitate sustainable management of wildlife.<sup>64</sup> The interface is further buttressed by the values in Articles 10 and 60 of the 2010 Constitution, which include public participation and community involvement. Participation and involvement are best realised at the local levels, which are within counties and have implications for the devolution of wildlife management that has been a concern for many African countries since the 1980s.<sup>65</sup>

Devolution radically departs from the previous situation where centralised wildlife authorities alienated wildlife resources from local communities.<sup>66</sup> Indeed, devolution has the potential to enlist community support for conservation<sup>67</sup> as it enhances community participation and promotes wildlife conservation particularly outside protected areas.<sup>68</sup> The engagement of communities is critical to framing incentives in conservation, to facilitate communities availing land for conservation and to provide a framework for involving them in dealing with poaching. This is in line with the chief objects of devolution namely, the enhancement of good governance and public participation at the community level.<sup>69</sup> Communities are then empowered to monitor and check abuses of wildlife and to participate in land-use planning and zoning in a manner that is compatible with proper wildlife management.<sup>70</sup> The WCMA and the Community

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61 Kameri-Mbote (2008: 291).

62 Fourth Schedule Part I (Paragraph 22) of Constitution of Kenya (2010).

63 Fourth Schedule Part II (Paragraph 10) of Constitution of Kenya (2010).

64 Article 220(2) of the Constitution of Kenya (2010).

65 Roe et al. (2000: 3).

66 Kameri-Mbote (2002: 171).

67 For a characterisation of the benefits of decentralising wildlife management, see: Cirelli (2002: 58).

68 For further insights on the consequences of devolution of wildlife management, see: Poole & Leakey (1996: 55 and 58).

69 Olowu & Wunsch (2004: 2). Also see, Article 174(c) and (d) of the Constitution of Kenya (2010).

70 Kameri-Mbote (2010: 184).

Land Act are steps forward in terms of enhancing devolution of wildlife management and giving effect to the constitutional principles.

### 2.3.2 Vision 2030

Conservation in Kenya has also to be seen within the context of the country's Vision 2030<sup>71</sup> – the economic blueprint that seeks to transform Kenya to a middle-income economy by 2030. Infrastructure development, which depends on the availability of land, is a key component of this Vision. Many infrastructure projects have pitted communities and wildlife conservation organisations against the government as the former resist compulsory acquisition of their lands.<sup>72</sup> For instance, Kenya began the construction of a Standard Gauge Railway in 2014 and it was completed in 2017.<sup>73</sup> The railway runs through Nairobi National Park dividing it from north to south, though it is being built on a viaduct to ensure that only pillars will touch the ground of the park.<sup>74</sup> Nonetheless, the disruption caused will have negative effects to wildlife inhabiting the national park. However, the construction of the railway line through the park has been justified on the basis that it would save half the cost that would otherwise be incurred were the railway line to pass around the park.<sup>75</sup> This park, however, is hemmed between the city, residential areas and community lands and has survived years of wanton public land conversion to private land.<sup>76</sup> Opening up the park for the railway will disrupt the lives of communities who share the southern border with the park as well as provide a window for future conversion of the land from conservation use to urban development. The value of land in Nairobi has risen exponentially<sup>77</sup> and this is likely to fuel the drive towards conversion for other uses. It is indeed worth noting that the cost of the Standard Gauge Railway rose considerably on account of payments for land compulsorily acquired for the construction of the railway.<sup>78</sup> There are plans to expand the railway to link it to western Kenya. Compulsory acquisition of 100 acres of the park and 40 acres of Ololua forest is required for this in addition to 1,000 parcels of private land bordering the park.<sup>79</sup>

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71 Government of Kenya (2007).

72 For instance, a conservation lobby group named Kenya Coalition for Wildlife Conservation and Management sued the government against the intended construction of the Standard Gauge Railway through Nairobi National Park. See further: Ochieng (2016).

73 Cuddihy (2016).

74 Ibid.

75 Ibid.

76 Republic of Kenya (2004), popularly referred to as the 'Ndung'u Report'.

77 Mutanu (2015).

78 Anon (2014) and Anyanzwa (2016).

79 Rajab (2017).

Another example is the proposed construction of the Isiolo resort city and an international airport to enhance tourism within the region.<sup>80</sup> Significantly, the Lewa Wildlife Conservancy to the south, Samburu Game Reserve and Ewaso Ng'iro River to the west, and Buffalo Springs and Shaba National Reserve to the north, borders the land on which this development is proposed to take place, which are all habitats for wildlife.<sup>81</sup> Without doubt, the construction of these amenities, while meant to promote wildlife tourism, is likely to have deleterious effects on wildlife conservation. The idea seems to be to maximise the benefits from wildlife tourism through improved infrastructure. This, however, does not seem to consider the fact that the development may lead to negative impacts on the livelihood of communities who have lived with wildlife for many years. The developments are also likely to lead to destruction of the very resource they are seeking to enhance access to, as habitat is destroyed and opened up for settlement. It is important to note that poaching continues to be one of the greatest threats to wildlife in Kenya<sup>82</sup> and will likely be further fueled by opening up of conservation areas to influxes of humans. It is within this context<sup>83</sup> that the WCMA enhanced the penalties for poaching.<sup>84</sup> Needless to say, this approach is likely to be unsustainable in the long term as economic factors justifying infrastructure projects are hoisted over ecological concerns.

### 3 The legal framework for land rights and wildlife conservation

#### 3.1 Land rights

The 2010 Constitution radically altered the land law terrain by redefining land categories and classifying them into: private, public and community land. Article 61 of the 2010 Constitution provides that all land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals. Article 61(2) classifies all land in Kenya as public, community and private. Wildlife is found in all these land categories. Article 66 of the 2010 Constitution mandates the state “to regulate the use of any land or any interest in or right over any land” including land-use planning. Protected areas that constitute national parks, national reserves and gazetted forests are public land but as pointed out above, public land alone cannot sustain wildlife<sup>85</sup> and

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80 KNA (2012).

81 Ibid.

82 Vaughan (2016).

83 Nellemann et al. (2014).

84 Some of the penalties under the statute include life imprisonment for poachers and fines of up to Ksh. 20 million (Section 92 of the WCMA).

85 Watson et al. (2010: 8).

most of the wildlife in Kenya lives outside these national protected areas.<sup>86</sup> This calls for innovative ways of managing land taking wildlife habitat needs and the needs of individual and community landowners into account. It is noteworthy that most community land that hosts wildlife is also situated in the country's poorest areas.<sup>87</sup> The respective land law regimes present unique problems as far as wildlife conservation is concerned; and these concerns need to be addressed if land rights are to be supportive of conservation.

One of the most problematic issues is ownership of wildlife. As pointed out above, wildlife as a fugitive resource is not amenable to private ownership.<sup>88</sup> A private owner's interest to maximise the use of his land for optimum gain pits wildlife conservation as a land use against other more beneficial uses. With market forces driving up land values, this can be a hard choice. There have, however, been innovations developed and applied to promote wildlife conservation on private land such as the use of environmental easements.<sup>89</sup> In this context, the easements are used to restrict the rights of a landowner to put land to uses that are inimical to wildlife management.<sup>90</sup> While easements were developed under common law,<sup>91</sup> they have been included in Kenya's land rights<sup>92</sup> and environmental<sup>93</sup> regimes. Environmental easements are particularly relevant within the context of private land regimes and can serve as a useful tool for conserving wildlife particularly outside protected areas.<sup>94</sup> This is the tool that has been used in the establishment of wildlife conservancies on private lands.<sup>95</sup> Additionally, the Land Act (2012) contains detailed mechanisms on conservation of natural resources and ecologically sensitive parts of public<sup>96</sup> and private land.<sup>97</sup> The National Land Commission (NLC) is required to take appropriate action to maintain public land that has endemic species of flora and fauna, critical habitats or protected areas.<sup>98</sup> The Commission is also required to identify ecologically sensitive areas that are within

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86 See <<http://www.kws.go.ke/content/overview-0>> (accessed 30-10-2016).

87 It is little surprising that pastoralist communities such as Maasais in Kajiados have been selling away land. See Muiruri (2015).

88 Kameri-Mbote (2002: 13).

89 Watson et al. (2010: 8).

90 Ibid.

91 Ibid.

92 See part X of the Land Registration Act (2012).

93 See Section 6 of EMCA and Section 68 of Wildlife Management and Conservation Act 2013.

94 Watson et al. (2010: 9).

95 For instance, the Northern Rangelands Trust (NRT) is a community based organisation that enables communities run conservancies allowing pastoralist communities to graze on the land while allowing for wildlife conservation on the same land.

96 Public land as provided under Article 63 of the Constitution of Kenya (2010) is a tenure classification where land is vested in the state (national government/county government or state agencies).

97 Private land as provided under Article 64 of the Constitution of Kenya (2010) is a tenure classification whereby land vests in an individual/private person.

98 Ministry of Lands and Physical Planning (2017: para. 2.5.10).

public lands, demarcate or take any other justified action on those areas and act to prevent environmental degradation.<sup>99</sup> In doing so, the Commission should work in consultation with the relevant institutions like Kenya Wildlife Service or Kenya Forest Service.

Significantly, the 2010 Constitution requires the state to ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resource and the equitable sharing of the accruing benefits.<sup>100</sup> Further, the state is compelled to protect the indigenous knowledge, biodiversity and genetic resources of communities.<sup>101</sup> These are enabling provisions for harnessing community knowledge of ecosystems and habitat that are shared with wildlife.

The National Land Use Policy<sup>102</sup> (2017) proposes that the government should:

1. Identify, map and gazette critical wildlife migration and dispersal areas and corridors in consultation with the local communities and individual land owners;
2. Encourage the development of wildlife sanctuaries and conservancies and involve local communities and individuals living contiguous to the parks and protected areas in the co-management of such areas; and
3. Review the gazettelement of forests and protected areas to foster the realization of their multiple values and ensure that they are protected for their ecosystem values and not merely to physically exclude human activities.

These recommendations aim to stem conflicts that arise where communities live in ecologically sensitive lands that have been placed under public authority's curatorship through gazettelement, but which communities claim rights over by virtue of having occupied them before the gazettelement. Section 24 of the Community Land Act addresses this by enabling the NLC to convert public land to community land on a case by case basis in accordance with the Land Act (2012).

Communal land in Kenya has the greatest potential to conserve wildlife and there have been efforts geared towards enabling the communities, particularly those that live with wildlife and those that border protected areas, to recognise the benefits of wildlife conservation through community benefit-sharing schemes relating to revenues derived from wildlife tourism.<sup>103</sup> More sophisticated mechanisms have been proposed in the WCMA which include the formation of community wildlife conservancies where a community or a number of communities come together and decide to set aside land collectively for wildlife management with a set of governing rules.<sup>104</sup>

While the Community Land Act does not expressly provide for conservation of wildlife, a reading of it as a whole points to ways of conserving wildlife. The Act in its entirety seeks to protect and promote the right of communities to manage their

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99 Section 11(2) of the Land Act (2012).

100 Article 69(1)(a) of the Constitution of Kenya (2010).

101 Article 69(1)(c) of the Constitution of Kenya (2010).

102 Ministry of Lands and Physical Planning (2017).

103 Section 80 of the WCMA.

104 Section 39 of the WCMA.

lands. This will have a positive effect on the conservation of the wildlife resources on community land as communities identify with wildlife conservation as a land use. Moreover, the security of tenure provided for under the Act provides a good context for incorporating wildlife as part and parcel of the community, with the assurance that the benefits of conservation will be shared with the community.

Part II of the Community Land Act provides for the recognition, protection and registration of community land.<sup>105</sup> Significantly, communities may hold land as freehold, leasehold or under customary tenure.<sup>106</sup> The Act requires the maintenance of a community land register for each registration unit, which register should contain: a cadastral map showing the extent of the community land and identified areas of common interest; the name of the registered community; a register of members of the registered community which shall be updated annually; the user of the land; and such other particulars of members of the registered community as the Registrar may determine.<sup>107</sup> Section 17 underscores the rights of a registered community as proprietor of land whether acquired on first registration or subsequently for valuable consideration or by an order of court. It is categorical that such rights “shall not be liable to be defeated except as provided in this Act or any other written law, and shall be held on behalf of the community, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever”, subject to leases, charges and other encumbrances and to the conditions and restrictions, shown in the register; and such overriding interests as may affect the land. It remains to be seen how titling of community land will impact on wildlife conservation. It is important to note that easements on community land facilitate the designation of wildlife migratory routes and hence co-existence between communities and wildlife.

Under Section 12, there are different classes of holding community land which include: communal; family or clan; and reserve land. The provision for reserve land opens a pathway for the use of community land for conservation. Indeed among the uses for which a community may reserve land is community conservation.<sup>108</sup> Related to this is the provision that enables a registered community to submit a plan for the development, management and use of their land for approval to the county government on its own volition or at the request of such government.<sup>109</sup> The community is required to consider any conservation, environmental or heritage issues relevant to the development, management or use of the land before submitting such a plan.<sup>110</sup>

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105 Act 27 of 2016.

106 Section 4 of the Community Land Act.

107 Section 10 of the Community Land Act.

108 Other uses are farming, urban development; cultural and heritage sites (Section 13(3) of the Community Land Act).

109 Section 19 of the Community Land Act.

110 Section 19(2)(a) of the Community Land Act.

Inadequate organisation or lack of a formalised central source of management and control of land resources in community lands has been the greatest challenge in integrating and appreciating wildlife resources as a land use in community land. Section 15 of the Act provides for the establishment of both a community assembly (consisting of all adult members of the community) and a community land management committee. These institutions are responsible for the management and administration of community land; coordinating the development of community land use plans in collaboration with the relevant authorities; and prescribing rules and regulations. The community assembly ratifies the rules and regulations and governs the community operations. These two institutions are therefore responsible for the formulation of the wildlife conservation and management policy within the respective community land.

Section 20 is devoted to conservation of natural resources on community land. It provides that registered communities should abide by applicable laws, policies and standards on natural resources, and further that they should establish measures to protect critical ecosystems and habitats. Registered communities are also required to provide: incentives for communities and individuals to invest in income generating natural resource conservation programmes; measures to facilitate the access, use and co-management of forests, water and other resources by communities who have customary rights to these resources; procedures for the registration of natural resources in an appropriate register; and procedures for the involvement of communities and other stakeholders in the management and utilisation of land-based natural resources.

If implemented, these measures can bridge the divide between land rights holding and conservation. They can also stem the impoverishment of communities by conservation initiatives that exclude them.

Under Section 28 of the Community Land Act, pastoral communities are entitled to grazing rights within community land. This entitlement is, however, subject to conditions that may be imposed such as: the kind and number of livestock that may be grazed; the part of land the pastoralists may graze on; and a grazing plan. Despite Section 13 of the Act providing for exclusivity of special purposes, the provision has not been strictly observed leading to prevalence of cultural practices that lead to unsustainable land use and inappropriate ecosystem management.<sup>111</sup> This has led to severely degraded rangelands, reduced productivity levels and unsustainability due to overgrazing, poor land husbandry practices and conversion of rangeland to crop farming and ultimately to the reduction of land available for wildlife conservation.<sup>112</sup>

The National Land Use Policy (2017) proposes that the government should address the problem of rangelands' degradation to secure pastoralists' livelihoods and tenure to land by: planning and developing rangelands according to their potential in livestock production, tourism, mining and energy production; establishing mechanisms for

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111 Ministry of Lands and Physical Planning (2017).

112 Ibid: 17.

enforcing adherence to the optimum stocking rates for each area; establishing a framework for livestock management in rangelands including provision of water, pasture and fodder development; discouraging open access to grazing land by and among pastoralists by developing communal grazing area plans; establishing suitable methods for defining and registering land rights in pastoral areas while allowing pastoralists to maintain their unique land systems and livelihoods; ensuring that the rights of women in pastoral areas are recognised and protected; providing for flexible and negotiated cross-boundary access to protected areas, water, pastures and salt licks among different stakeholders for mutual benefit; mainstreaming climate change adaptation and mitigation in rangeland management; and ensuring that all land uses and practices under pastoral tenure conform to the principles of sustainable resource management.<sup>113</sup>

Section 29 of the Community Land Act provides for setting aside some land within the community land for special purposes, which include community conservation areas. Such areas can only be used for those specific purposes. The community could set up wildlife conservation areas using this provision. Section 35 requires the resources found in the community land to be sustainably and productively used for the benefit of the whole community including future generations. Indisputably, the community assembly, the community land management committee and community members bear a burden of conserving the wildlife resources on community land and sharing the benefits that accrue from such use.

Secure tenure for communities, incentives for investments and benefit-sharing are most likely to attract investment in wildlife conservation on community land. Such investments could include wildlife conservation centres run by the communities or by outsiders with the approval of the community. The community must ensure that such investments do not impact on the environment negatively. Communities can also use alternative dispute resolution mechanisms, including traditional dispute resolution mechanisms and mediation, to resolve disputes that arise among land uses or even community members under part VII of the Act. Dispute resolution procedures can be provided for in by-laws developed by the community. Fast-tracked dispute resolution is vital for sustainable conservation of wildlife resources.

### 3.2 Wildlife conservation

The principal statute governing wildlife is the WCMA. While the final version of the policy is yet to be completed, the latest version of the Draft National Wildlife Management Conservation Policy (2017)<sup>114</sup> aims to –

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113 Ibid: 45-46.

114 Ministry of Environment and Natural Resources (2017: 2).

... promote a positive cultural relationship between people and wildlife, through the incorporation of indigenous and local knowledge systems; and negotiate a social contract with communities living with wildlife to provide space for wildlife.

It also aims at providing fiscal incentives to community owners and “support landowners and communities to set aside wildlife conservation areas and sanctuaries within the framework of approved land use plan of the area”.

Other laws that constitute the wildlife conservation legal regime are mainly sectoral laws that govern specific sectors that have an impact on wildlife. Such laws include the Forest Conservation and Management Act (2016), the Environment Management and Coordination Act (1999) (EMCA) and the various land-use planning laws. Article 69 of the 2010 Constitution provides for the protection of biodiversity and natural resources (which include wildlife) by the state. This constitutional provision gives legal and constitutional mandate to the state to put in place laws, measures and policies to ensure the sustainable exploitation, utilisation, management and conservation of the environment and natural resources. It is in this light that the WCMA should be viewed.

The EMCA is the framework law for environmental management. Being overarching and cross-sectoral in nature, it has provisions that impact on wildlife conservation in general. For instance, under the EMCA, there is a requirement to conduct an environmental impact assessment before any activity with potential negative consequences on the environment may be carried out.<sup>115</sup> Furthermore, before the establishment of a protected area such as a national park or a game reserve, an environmental audit and a licence issued by the relevant authority (National Environmental Management Authority) is required.<sup>116</sup> The law also designates Kenya Wildlife Service (KWS) as the lead agency for matters relating to wildlife.<sup>117</sup>

Land-use planning laws also have an impact on wildlife conservation as they direct the use of land in different parts of the country. Their potency lies in their ability to guide management of natural resource management and can lead to sustainable or unsustainable practices depending on how they are framed. Kenya’s land use policy was only concluded in 2017.<sup>118</sup> This implies that land use has historically been haphazardly planned with no proper zoning according to ecological regions.

The WCMA establishes KWS as the competent body responsible for protecting, managing and acting as the custodian of the country’s wildlife resources.<sup>119</sup> Its functions include liaising with communities and private landowners in management and consultation, and offering security for wildlife.<sup>120</sup> Notably, wildlife resources are found in forests, lakes and maritime zones. Cooperation mechanisms between KWS, the

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115 Section 58 of the EMCA (1999), Cap 387.

116 Ibid.

117 Section 6 of the WCMA.

118 Ministry of Lands and Physical Planning (2017).

119 Section 6 of the WCMA.

120 Section 7 of the WCMA.

NLC, Community Land Management Committees, county governments and the Kenya Forest Service are therefore critical. The cooperation will reduce duplication of roles and blame games that lead to inefficient resource management.

Section 11 of the Land Act (2012) requires the NLC to take appropriate measures to maintain public land that has endangered or endemic species of flora and fauna situated on it. This obligation includes demarcating such ecologically sensitive areas in consultation with the relevant institutions. The WCMA mandates the Cabinet Secretary, in consultation with the NLC, to develop a list of endangered species warranting special protection measures.<sup>121</sup> This protection is only possible through cooperation between KWS and the NLC. The creation of migratory wildlife corridors is also possible because the Land Act (2012) provides for rights of way and easements, while the WCMA provides for easements and protection orders.

The WCMA lays out values that guide conservation of wildlife as follows: devolution of wildlife conservation and management; effective public participation; conservation and management shall be encouraged using an ecosystem approach wherever possible; encouragement and recognition of wildlife conservation as a form of land use on public, community or private land; sustainability; benefits of wildlife conservation be derived by the land user in order to offset costs and to ensure the value and management of wildlife does not decline; and equitable sharing of the benefits accruing from wildlife conservation.<sup>122</sup>

This Act further defines KWS functions as to: conserve and manage national parks, wildlife conservation areas and sanctuaries under its jurisdiction; set up a county wildlife conservation committee for each county; develop mechanisms for benefit sharing with communities living in wildlife areas; assist and advise in the preparation of management plans for community and private wildlife conservancies; undertake and conduct enforcement activities such as anti-poaching operations, wildlife protection, intelligence gathering, investigations and other enforcement mechanisms to effect the provisions of the Act; promote and undertake extension programs to enhance wildlife conservation, education and training; advise the NLC, the Cabinet Secretary and the Council on the establishment of national parks, wildlife conservancies and sanctuaries; and grant licenses and monitor the observation of conditions of grant of such licenses.<sup>123</sup>

The WCMA also provides that benefits for wildlife conservation shall accrue to the land user to offset the costs of conservation.<sup>124</sup> In addition, benefits accruing from the use of wildlife resources shall be equitably shared between the county and national government, private landowners and communities.<sup>125</sup> Essentially, the WCMA

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121 Section 46 of the WCMA.

122 Section 4 of the WCMA.

123 Section 7 of the WCMA.

124 Section 4(e) of the WCMA.

125 Section 19 of the WCMA.

introduces incentives to encourage conservation of wildlife by all stakeholders and as a source of income.<sup>126</sup> It also provides for the establishment of a Wildlife Endowment Fund whose functions are to: develop wildlife conservation initiatives; manage and restore protected areas and conservancies; protect endangered species, habitats and ecosystems; and support wildlife initiatives.<sup>127</sup>

To conserve wildlife, the Cabinet Secretary, upon recommendation of the relevant county government and after consultation with the NLC, may declare by notice in the Gazette any land under the jurisdiction of the county government to be a national reserve where such land is rich in biodiversity and wildlife resources, contains endangered species or is an important wildlife buffer zone, migratory route or dispersal area.<sup>128</sup> In the same spirit, the Cabinet Secretary may: acquire by purchase any land suitable to be declared a national park, wildlife corridor, migratory route or dispersal area under the Act;<sup>129</sup> or by notice in the Gazette publish a national list of wildlife ecosystems and habitats that are endangered and threatened and are in need of protection on the advice of the KWS and in consultation with the NLC.<sup>130</sup>

The WCMA provides the framework for setting up community wildlife associations or conservancies in Kenya.<sup>131</sup> Once registered, the conservancy is mandated to prepare management plans for the conservation of wildlife; assist KWS in combating illegal activities such as poaching and bushmeat trade; assist in problem animal control; and keep regional wildlife conservation areas informed of any development changes in their area that may affect wildlife.<sup>132</sup> Landowners are encouraged to donate land to the national government, county government, community or educational institutions for wildlife conservation.<sup>133</sup> The Act provides that any person or community who owns land inhabited by wildlife may individually or collectively establish a wildlife conservancy or sanctuary in accordance with the Act and the Wildlife Conservation and Management (Conservancy and Sanctuary) Regulations (2015). A community under this regulation is defined as a group of individuals or families who share common heritage or interest in an identifiable piece of land or natural resources. The regulations provide a procedure for the establishment and registration of conservancies; to promote the development of conservancies on private and community land; and to harmonise the standards for maintaining the conservancies.

KWS is tasked with the duty of registering conservancies. To register a conservancy, the community is required to submit: a concept proposal in the format provided

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126 Section 70 of the WCMA.

127 Section 23(3) of the WCMA.

128 Section 35(1) of the WCMA.

129 Section 38(2) of the WCMA.

130 Section 46(1) of the WCMA.

131 Section 40 of the WCMA.

132 Section 41 of the WCMA.

133 Section 42 of the WCMA.

in the 5<sup>th</sup> schedule in not more than 1,000 words; a benefit-sharing plan; minutes of conservancy members agreeing to the establishment of the conservancy; and a receipt signifying the payment of the requisite fee. Qualifications for registration are set out in Section 10 and include an indication of the following: the acreage of the land to be dedicated to conservation; a concept proposal by the applicant; a land tenure system; the socio-economic and ecological viability of the conservancy; the diversity of the wildlife resources; and contiguous land use patterns and their effect on the proposed conservancy. Upon successful registration as a conservancy, a certificate is issued to the applicant.

It is important to point out that many individuals and communities had already established conservancies before the enactment of the WCMA.<sup>134</sup> The Act is, however, important as it provides the framework for the management of all conservancies.

### 3.3 Wildlife conservation on community lands

The problems identified as plaguing conservation on community lands before the promulgation of the 2010 Constitution included: land tenure insecurity; a failure to provide for multiple and compatible land uses through zoning; the lack of a legal framework for involving local communities in sustainable wildlife management despite the fact that wildlife shared land with communities and that the bulk of wildlife is outside protected areas; the fact that communities had no rights to wildlife resources; the lack of a legal basis for claiming part of the benefits accruing from wildlife conservation and management or appropriating any value of wildlife despite the fact that they were obliged to keep the wildlife on their land and bear the cost thereof; and the absence of incentives for landholders to conserve wildlife on their land. Other problems included the degradation and overuse of community land, which impacted on the ecosystems shared with wildlife.

The 2010 Constitution, the WCMA, the Community Land Act and their accompanying regulations have addressed these issues. What now remains is the implementation of these legal and policy provisions. Once successfully implemented, communities should be able to contribute to wildlife conservation and benefit from their efforts.

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134 The Northern Rangelands Trust had already established about 15 community conservancies in Northern Kenya and a number of community conservancies had been established in the Narok area. Private land owners had also established conservancies in areas like Laikipia and a Kenya Wildlife Conservation Association had been set up.

## 4 Conclusion

Wildlife conservation is now every citizen's responsibility regardless of the category of land on which wildlife resources may be situated. The enabling legal and policy framework is in place for everybody's participation with incentives provided for land-owners to avail their land for conservation. The National Land Use Policy (2017) provides an opportunity to synergise land tenure and land use. It requires that the allocation of land and issuance of title deeds be done on the basis of approved physical development plans; approved survey plans; approved local area zoning regulations; and policy guidelines. It also provides that areas of public land that have been identified as having high public value (such as watershed protection, important botanic or wildlife habitat and/or landscape values, cultural significance, road reserves for potential future highways) should not be allocated except under leases with conditions that reflect the high value or period by which the land may be required for a reserved use. The crafting of community area conservation plans taking into account human, livestock and wildlife needs will contribute to sustainable management of community lands and resources on them.

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