

Securing Community Land Rights in the Kenyan ASALs: Available Legal Options

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Acronyms

ASALs	Arid and Semi-Arid Lands
CEC	County Executive Committee
DFID	Department for International Development
EIA	Environmental Impact Assessment
EMCA	Environmental Management and Coordination Act
ERS	Economic Recovery Strategy for Wealth and Employment Creation
IGAD	Intergovernmental Authority on Development
IIED	International Institute for Environment and Development
IUCN	International Union for Conservation of Nature
MCAs	Members of County Assemblies
MDNKOAL	Ministry of State for Development of Northern Kenya and Other Arid Lands
NDMA	National Drought Management Authority
NLC	National Land Commission
NRM	Natural Resource Management
PPP	Public Private Partnerships
RAP	Resource Advocacy Programme
StARCK+	Strengthening Adaptation and Resilience to Climate Change in Kenya plus project

Executive Summary

This report has been prepared for the Adaptation Consortium, which is a core component of the National Drought Management Authority (NDMA) and one of six components of the Strengthening Adaptation and Resilience to Climate Change in Kenya StARCK+ project funded by DFID. It presents legal options available to county governments for securing community rights over the management and use of land and land-based resources in the Arid and Semi-Arid Lands (ASALs) under the new policy and institutional context in Kenya underpinned by the Constitution of Kenya 2010, the National Land Policy and New Land and Natural Resource Sector legislation being developed to implement the policy and institutional reforms.

The StARCK+ project is implemented in ASALs counties in which natural resources play critical roles in local economies and community livelihoods strategies. As such, ongoing reforms of the policy and institutional framework for the governance of land and natural resources are of direct interest to the communities and leaders of these counties and to the project. The said reforms have introduced fundamental changes in the areas of governance; economic development; and land and natural resource management. The most important changes in this regard include: the introduction of devolved government; the privileging of equity, inclusiveness and participation in the planning and implementation of economic development; tenure reform, establishment of the National Land Commission (NLC) and devolution of land administration.

These reforms have created both opportunities and challenges that have a bearing on security of communities' access to and control of land and natural resources. ASALs communities can use the opportunities to play more active roles in the management of land and land-based resources; while county governments in the ASALs can use them to strengthen and institutionalize the role of communities in the management of natural resources. The main opportunities in this regard are:

- 1. Establishment of devolved government**, which enhances spaces for communities to be directly engaged in policy discussions and decisions on the use of land and natural resources.
- 2. Recognition of the need for and commitment to integrated resource management** based on ecosystem structures regardless of administrative or political boundaries; which provides a policy opening for mobility and multiple resource use, critical both for sustainable resource management use and resilience livelihoods in the ASALs.
- 3. Recognition of the right of communities to participate** in the conservation and management of natural resources and to share in the benefits derived from the utilization of such resources.
- 4. Formal recognition of traditional knowledge related to land-based resources**, which opens up policy space for the contribution of traditional institutions to land and natural resource management in the ASALs.

- 5. Recognition of multiple land and natural resource uses and values**, as well as recognition of transboundary nature of ecosystems both within and across national borders, which permits for securing pastoral land rights including their right to mobility, and rights to common property resources such as wood and non- wood based products, which are particularly important to women.

The key challenges that have to be addressed in order to optimize the benefits of the policy reforms include the following:

- 1. Persistence of mindsets** about communities and the capacity and relevance of their institutions and indigenous knowledge systems to manage natural resources sustainably, and associated tensions between formal natural resource management frameworks and traditional institutions will have to be managed or they will continue to undermine the prospects for realizing the change envisaged under the new order.
- 2. Capacity constraints within communities and their institutions** as a result of decades of policy subversion and neglect will have to be addressed for them to be able to operate effectively and engage meaningfully with other actors.
- 3. Appropriate institutions at the county level** will have to be established and provided with the requisite capacity, resources and skills to deliver the benefits of the new policy framework to the communities. In this connection, county legislation, community bylaws and structures have to be put in place.
- 4. Implementing legislation at the national level** have to be enacted, regulations put in place, structures established and resources allocated in order for the provisions of the Constitution and the National Land Policy to be implemented. This will require the nurturing of political will at the highest levels given the entrenched interests at play in the land sector

In these circumstances, the following are the options available to county governments for securing community rights over the management of land and land-based natural resources within the context of the new constitutional order and the ongoing land and natural resource sector reforms:

- 1. Create an enabling environment through county legislation** that shall, among other things: recognize community-based resource management through local bylaws; entrench environmental and land use planning as tools for the management of natural resources; privilege pastoralism and agro-pastoralism as the primary land use and production systems in the county; provide for fiscal and other incentives for communities to actively engage in conservation and management of natural resources; and recognize and strengthen the role of traditional institutions in governance and management of natural resources.

2. **Work with the national government** to develop and implement county land use plans as a means of rationalizing competing demands for land in the counties
3. **Facilitate cross-county land and resource use plans and agreements** taking into account the imperatives of seasonal mobility.
4. **Strengthen capacity of local resource users associations** to better organize and mobilize local communities for sustainable natural resource management.
5. **Strengthen institutional capacity at the county level** for land and natural resource management.

For its part, the Adaptation Consortium can support county governments to implement the foregoing activities in a number of ways, including:

1. **Dissemination of this report** among key stakeholders in the ASALs counties.
2. **Training of Members of County Assemblies (MCAs)** and other key actors at the county level on the provisions and implications of the key policy reform documents touching on land and natural resource management.
3. **Facilitating the convening of an ASALs-wide workshop on participatory land and natural resource use planning** for key policy actors from the county governments, including MCAs, CEC members, and natural resource sector personnel.
4. **Convening of County Working Groups on Participatory Land and Natural Resource Use Planning** in each of the ASALs counties; and
5. **Convening of a strategy meeting** bringing together key stakeholders from the five counties in which the Consortium is active, including neighbouring counties [e.g. county government officials, civil society and traditional institutions, and the numerous resource user associations, forums and networks] to agree a common framework for carrying on this work, building on what has been done to-date.

1. Introduction

This report presents legal options available to county governments for securing community rights over the management and use of land and land-based resources under the new policy and institutional context in Kenya underpinned by the Constitution of Kenya 2010, the National Land Policy and New Land and Natural Resource sector legislation being developed to implement the policy and institutional reforms. The report has been prepared for the Adaptation Consortium,¹ which is a core component of the National Drought Management Authority (NDMA) strategy and funded by the UK Department for International Development (DFID).

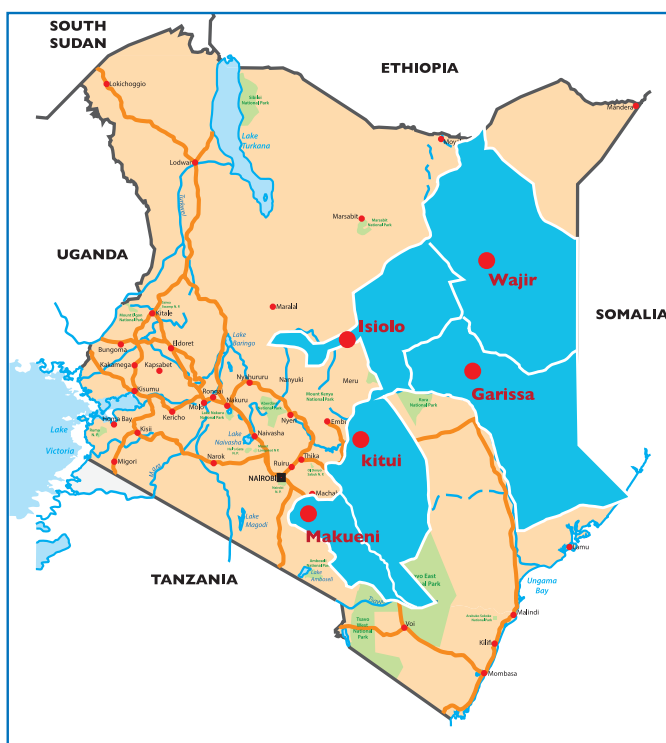


Figure 1. Counties that the Adaptation Consortium work in.

The report is divided into four sections. Following this introductory section, the second section presents the reforms that have been introduced in the areas of governance, development planning and natural resource management, in each case highlighting the implications of the reforms to ASALs generally and to the management of ASALs natural resources specifically. The section ends with a summary of the opportunities and challenges that come with the reforms.

Section three presents the options available to county government in the ASALs for securing community rights over the management of natural resources, emphasizing the need for county governments to create enabling environments for communities to effectively manage natural resources and to support them. Section four is the concluding section, where it is noted that although good policies are now in place, a lot more remains to be done for the policies to translate into actions that benefit communities. County governments in the ASALs have the opportunity and the responsibility to spearhead the process of translating the good policies into programmes, projects and actions that will benefit ASALs communities. A number of recommendations are presented on how the Consortium can support county governments to use the indicated options for securing communal land and natural resource rights. In this connection, the critical need at the county level is that of capacity building support to county governments (in particular the County Assemblies) and communities to better appreciate the opportunities and develop the skills for implementing them

¹ Members of which are: NDMA, IIED, Christian Aid, Kenya Meteorological Services and UK Meteorological Office

1.1. A note on methodology

The report is based on a desk review of the policy and institutional context for land and natural resource governance in Kenya in view of ongoing changes and reforms, with a particular focus on the implications of devolved government and the recognition of community land by the Constitution of Kenya 2010 and the National Land Policy. Of pivotal importance to the ASALs is also the adoption of the ASALs Policy and the integration of ASALs concerns into Kenya Vision 2030. The report further builds on work already done by the International Union for Conservation of Nature (IUCN) in the Waso Rangelands, Isiolo and the Lower Tana Catchment where they have supported communities to develop local bylaws for natural resource management and to strengthen local institutions of natural resource governance. The analysis was undertaken during March and April 2014 and involved visits to Nairobi and Isiolo. It had initially been envisaged that the desk review would be supplemented with key informant interviews and focus group discussions with the relevant statutory and community institutions in Nairobi and Isiolo. The expectation was that the interviews would generate feedback and perspectives on the legal options identified through the desk review.

However, once the exercise commenced, it became clear that there was little value-added coming out of interviews in Nairobi as officials of sector ministries spoken to made it clear that they too were interested in what the desk review and analysis would articulate as the **options for securing community land in the new policy and institutional context**. Our attention was drawn to ongoing reviews and revisions of sector policies and laws to align them to the new constitutional dispensation. These and the ongoing transition that involves distribution of roles between the national and county governments mean that there is little clarity at the sector levels about the situation, which is still evolving. In the end the only significant discussions in Nairobi were with the officials of the NDMA that are part of the implementation team for StARCK+.

A visit to Isiolo elicited much the same result. First, it proved impossible to pin down any official of the county government that could speak with authority about its perspectives on securing community rights over the management of land and natural resources. All the officials we tried to meet were unavailable either because of planning meetings going on within the county or because they had travelled out of the county on official duty. In the end, discussions were held with officials of Resource Advocacy Programme (RAP) who provided information about community-based initiatives they have spearheaded in Isiolo county, which StARCK+ and the county government are building on to strengthen communities' control over natural resources.

A presentation of preliminary findings, conclusions and recommendations was made to a number of StARCK+ project staff and stakeholders at the cross-county [resource mapping workshop held in Kitui in March 2014](#). Participants at the workshop validated the key findings and conclusions, and provided feedback that has been integrated in this final report. It is intended that the report shall be presented to the county governments and other stakeholders at the county level and

used as the basis for designing a road map for the development of legal options to strengthen communities' rights over land and natural resources.

1.2. Background: Changing context for governance, development and Natural Resource Management (NRM)

StARCK+ covers the five counties of Garissa, Isiolo, Kitui, Makueni and Wajir; all of them ASALs counties in which natural resources play a critical role in local economies and community livelihoods strategies. Access to and control over land, water, forests and rangelands have direct implications for security of livelihoods and opportunities for transformation of local economies. As such, ongoing reforms of the policy and institutional framework for the governance of land and natural resources are of direct interest to the communities and leaders of these counties.

Reforms of the policy and institutional framework for natural resource governance are taking place within an overall context of rethinking and reframing approaches to political organization and economic development in Kenya. The centrepiece of this new thinking and approach is the Constitution of Kenya 2010, which responds to the quest for a more accountable and transparent framework for decision-making, and the distribution and exercise of political power. Among the major issues in the quest for a new constitutional order was land, even though at some point there was a parallel process running for the formulation of a National Land Policy.

The policy and institutional reforms tend to be all-encompassing, essentially touching on every facet of life. Indeed the Constitution touches on virtually all aspects of life, even though it is often associated mostly with governance. However, three major trajectories of reform can be identified, namely: governance; economic development; and land and natural resource management. Fundamental changes have been introduced in each of the trajectories. Of relevance to this analysis are respectively, the introduction of devolved government; the privileging of equity, inclusiveness and participation in the planning and implementation of economic development; and tenure reform, establishment of the National Land Commission (NLC) and devolution of land administration. The changes have been introduced by specific policy instruments, and have entailed the design of new institutions as more clearly explained below.

2. Governance reforms: devolution, participatory democracy

The search for a new constitutional order in Kenya ran for nearly two decades before it climaxed in the adoption of the Constitution of Kenya 2010 in August of that year. The new constitution embodies the collective aspiration of the people of Kenya for a future free of corruption, ethnic conflicts, violation of human rights, poverty, and social injustices.²

Our interest in governance reforms is limited to the manner in which those reforms open up opportunities for securing the rights of communities in the management of land and land-based resources. In this connection, one of the most significant innovations of the Constitution of Kenya 2010 is the introduction of devolved government. Its significance lies in the fact that it diffuses power from the centre, while also strengthening citizens as key actors in political decision making. Devolution brings executive and legislative authority close to the people. Underpinned by imperatives of decentralization, democracy and participation, devolution responds to a key concern of ASALs communities since independence, namely their alienation both geographically and operationally from the centre of political power and authority in Nairobi. The objects of devolution spelt out in Article 74 of the Constitution [see Box 1] speak to issues that Kenyans living in the ASALs have long complained about as signifying their marginalization, accentuating their poverty and undermining opportunities for development in their regions.

Devolution provides a unique opportunity for the communities living in the ASALs to organize their affairs and redress the imbalance in development that a centralized political system had denied them. It strengthens the position of the ASALs as a geographic and political block in a manner that represents a total departure from what obtained in the country since independence in 1963. Out of the 47 counties in Kenya, 23 are arid or semi-arid, a situation that has tremendously changed the political clout and standing of the ASALs in the national balance of power. The fact that 23 of the 47 Governors in the country are in charge of ASALs counties is a significant departure from the past where representation of the ASALs and their interests in national policy discussions was a major problem.

Devolution underpins the new constitutional order. It is a fundamental edifice of the Constitution of Kenya 2010, providing the framework for realizing its promise. Devolution is critical for achieving the standards set by the national values and principles of governance

Box 1: Objects of devolution, Kenya

The objects of devolution of government are:

- [a] To promote democratic and accountable exercise of power;
- [c] To give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them;
- [d] To recognize the right of communities to manage their own affairs and to further their development;
- [e] To protect and promote the interests and rights of minorities and marginalized communities

Article 174, Constitution of Kenya, 2010

² Yash Pal Ghai and Jill Cottrell Ghai, 2011. *Kenya's Constitution: An Instrument for Change*. Nairobi: Katiba Institute, p.3



Merti dry season grazing land - Peter Cacah

set out in Article 10 of the Constitution [see Box 2]. These values and principles are binding on all State organs, State officers, public officers and all persons whenever they apply or interpret the Constitution, enact, apply or interpret any law, or make or implement public policy decisions.³ Many of these values and principles support the strengthening of community rights over the management of land and land-based resources.

While devolution is mainly concerned with political power, its distribution and exercise, within the ASALs it has implications for access to and control over natural resources, given that structures of political governance in the ASALs have traditionally been the ones that also exercised powers over natural resources, mediating access, managing conflicts and resolving disputes. The Fourth Schedule of the Constitution, which distributes functions between the national government and the county governments, also devolves functions that can be used as entry points to secure community rights over management of land and land based resources. These functions include: county planning and development including land survey and mapping, boundaries and fencing; implementation of specific national government policies on natural resources and environmental conservation, including water conservation and forestry; and ensuring and coordinating participation of communities in governance.

Box 2: National values and principles of governance

These include:

- (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
- (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized;
- (c) good governance, integrity, transparency and accountability; and
- (d) sustainable development

Article 10(2), Constitution of Kenya 2010

³ Article 10(1) of the Constitution of Kenya 2010

2.1 Development reforms: equitable, appropriate development in the ASALs

As has been intimated, development opportunities in the ASALs are directly linked to issues of natural resource management. Thus, the historical marginalization of the ASALs in national development processes was essentially underpinned by a failure to harness the natural resources of the region for the benefit of livelihood security and community development. As such, an examination of opportunities for community rights over land and natural resources cannot be complete without a review of the policy and institutional framework for development planning and implementation.

The historical marginalization of the ASALs in national development processes was institutionalized in [Sessional Paper No. 10 of 1965 on African Socialism and its Application to Planning in Kenya](#), the policy blueprint that set the pace for economic development priorities and processes in the country between 1963 and 2003. It focused on agriculture as the key strategy for national economic transformation, defining the country by reference to potential for rainfed agriculture. The nation's resources were invested in the so-called high potential areas, where rainfed agriculture could thrive, with the idea that this would ensure high returns on investments, which would then be used to develop the other less productive areas of the country, comprised largely of the ASALs. The policy defined how the ASALs were perceived in national development discourse and even in the collective psyche of the rest of Kenya. The ASALs and the people who inhabit them were far removed from the rest of the country in all respects.⁴

This policy discrimination had many adverse impacts on the livelihoods and development opportunities of the ASALs. In particular, the state and its agencies were absent in most of the ASALs. In the absence of the state and its agencies, traditional and local institutions continued to regulate and organize community affairs generally and in particular with respect to management of land and land-based resources. As a result, traditional institutions continued to be important players in the management of natural resources in the ASALs. But their effectiveness was always undermined by the absence of an appropriate policy environment, and in particular by the absence of statutory recognition of communal tenure.

In the mid-1980s policy makers started to appreciate the need for a more inclusive approach to national development that would integrate the ASALs. This policy shift was first articulated in Sessional Paper No. 1 of 1986 on *Economic Management for Renewed Growth*, which urged a more inclusive development approach that would tap the potential of the entire country including the ASALs. It made a strong case for strategies to mainstream the region into the national economy. However, it was the publication in June 2003 of the [Economic Recovery Strategy for Wealth and Employment Creation \[ERS\]](#) that marked the most significant policy shift in favour of mainstreaming ASALs concerns into national development processes. The Strategy highlighted

⁴ For a more comprehensive treatment of this see 'Moving beyond the rhetoric: the challenge of reform in Kenya's drylands, *IIED Briefing*, April 2013

the potential of the ASALs for wealth and employment creation and articulated challenges to be overcome in order to realize this potential, among them improvement of land tenure.

By the time the current economic development blueprint, Kenya Vision 2030 was published in 2007, the need to integrate the ASALs in national development planning was effectively part of policy. Vision 2030 thus acknowledges the need for rangelands management in order to realize the full potential of the ASALs, accepts that nomadic pastoralism is the production system with the largest potential for the ASALs at 50% [compared with 19% for irrigated agriculture and 31% for livestock keeping] and commits the government to focus attention on the ASALs as a means of promoting more equitable and inclusive development across the country.

The Grand Coalition government that came into power at the beginning of 2008 saw the creation of the Ministry of State for Development of Northern Kenya and other Arid Lands (MDNKOAL), marking the first time in the history of the country that a cabinet portfolio was created specifically to address the challenges of development in the ASALs. The Ministry reviewed Vision 2030 to align it to the needs of the ASALs in order to ensure that the region would fully benefit from and take advantage of the interventions envisaged in Vision 2030. The review resulted in the publication of *Vision 2030 Development Strategy for Northern Kenya and Other Arid Lands*. The document was adopted by the then Ministry of Planning, National Development and Vision 2030. It informed the completion of the [National Policy for the Sustainable Development of Northern Kenya and other Arid Lands \[the ASALs Policy\]](#);⁵ and together constitutes the two key achievements of the First Medium Term of Vision 2030 [2008-2012].⁶ The Strategy has been integrated into the Second Medium Term Plan of Vision 2030, which has adopted its articulation of both the challenges to sustainable development in the ASALs as well as its proposed strategies for addressing the challenges.⁷ Important in this regard is the acknowledgement of pastoralism as the dominant production system in the ASALs and the commitment to support it by checking the disruption of seasonal transhumance patterns, the expansion of community conservancies, the unchecked influx of people and livestock, and the spread of invasive species.

The ASALs Policy is underpinned by a delicate balance between the quest for rapid development in the ASALs and the need to maintain and support the unique livelihoods system that best utilizes the variable ecological conditions of the region.⁸ This delicate balance is well articulated in the goal of the Policy, which is to facilitate, and fast-track sustainable development in Northern Kenya and other arid lands by increasing investment in the region and ensuring that the use of those resources is fully reconciled with the realities of people's lives.

5 Republic of Kenya [2012] 'Sessional Paper No. 8 of 2012 on the National Policy for the Sustainable Development of Northern Kenya and other Arid Lands: Releasing our Full Potential'.

6 The other achievements were the formulation of the EDE strategy and approval of the institutional framework for ASALs development. See Government of Kenya, 2013. *Kenya Vision 2030 Second Medium Term Plan (2013-2017): Transforming Kenya: Pathway to devolution, socio-economic development, equity and national unity*. Nairobi: Ministry of Devolution and Planning.

7 See in particular chapter 3.8 at pages 41-43

8 Its full official title is Sessional Paper No. 8 of 2012 on *the National Policy for the Sustainable Development of Northern Kenya and other Arid Lands*

The Policy has four objectives, one of which is to strengthen the climate resilience of communities in the ASALs and ensure sustainable livelihoods. To realize this objective, the government commits to ensure sound land and natural resource management, and that the interests of pastoralists are adequately [See Box 3] and appropriately addressed in new land laws and institutions in accordance with the National Land Policy.

In effect, the ASALs Policy embodies policy commitments for ensuring appropriate, sustainable, community-owned development of the ASALs consistent with the livelihoods and ecosystem; commits government to support pastoralism and agro-pastoralism as the primary land use and production systems in the ASALs and the foundation upon which diversification of livelihoods shall be built; and privileges devolved planning and decision-making to ensure local imperatives prevail. At the heart of these commitments is an appreciation that livelihoods security and development in the ASALs is closely tied to the management of land and land-based natural resources.

2.2. NRM reforms: community land, traditional institutions and systems

The Constitution of Kenya 2010 creates an enabling environment for policy reforms on land and natural resource management by its provisions on land and land rights. It entrenches principles of land policy that include: security of land rights, sound conservation and protection of ecologically sensitive areas, and use of “recognized local community initiatives” for settlement of land disputes. It recognizes community land, and provides that the same shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest; defines community land to include land lawfully held, managed or used by specific communities as community forests, grazing areas or shrines [see box 4]⁹; and mandates the National Land Commission [NLC] to investigate and make recommendations for redress of historical land injustices.

Policy and legal recognition of community land is particularly significant for the ASALs, where most land is still held communally and rights thereto determined on the basis of non-statutory local institutions and rules many of which are derived from customary practice. This is particularly the case with common property resources such as rangelands and water, which are managed under various common property tenure regimes. Such recognition of community land combines with devolution to provide an opportunity and entry point for improving the coordination and

Box 3.

Government will ensure that devolved structures accommodate mobility and resource-sharing across administrative boundaries and draw on the knowledge and experience of customary institutions

ASAL Policy, 5.3.7

Box 4: Components of a Community land

Community land consists of –

- [d] land that is –
 - i. lawfully held, managed or used by specific communities as community forests, grazing areas or shrines
 - ii. ancestral lands and lands traditionally occupied by hunter-gatherer communities;
 - iii. lawfully held as trust land by the county governments

Article 63(2)(d), Constitution of Kenya 2010

⁹ This includes the bulk of the land in the ASALs which was previously designated as Trust Land and was held by county governments in trust for the people living in the area [Section 115 of the Constitution of Kenya]

integration of local and formal institutions, their rules and systems in the management of such resources.

The National Land Policy [NLP] proposes the documentation and mapping of existing forms of communal tenure in consultation with affected groups and incorporation of the same into broad principles that will facilitate the orderly evolution of community land law. This process implies the engagement of local community institutions in articulating their land and resource tenure. The Policy also calls for governing community land transactions using participatory processes, which implies the integration of local institutions and systems in land and natural resource governance.

A Community Land Bill has been drafted, which shall, among other things, provide a legal basis for enactment of county byelaws on planning and the management of natural resources that further devolve authority over these resources to community-level institutions. But even before the enactment of a law on community land, the new Constitution read together with the National Land Policy, has opened up new opportunities for strengthening community control and husbandry of natural resources and thereby enhancing the resilience of communities and improving their development prospects.

The Policy recognized community land, in part as a way of addressing the challenges of pastoral land rights. It is thus an important instrument for the protection of the land rights of ASALs communities, as it set the stage for statutory recognition of communal land rights, which had long lacked policy and legal recognition

Apart from recognition of community land, the National Land Policy affirms the equality of tenure regimes and of land rights under them;¹⁰ institutionalizes integrated and participatory land use planning at local, regional and national levels;¹¹ and privileges ASALs ecosystems for protection and management through, inter alia, participatory mechanisms with communities and other stakeholders.¹² It calls for “integrated resource management based on ecosystem structures regardless of political or administrative boundaries”.¹³ The Policy identifies pastoral land rights as one of the land issues requiring special attention and makes specific recommendations to secure the same [see Box No 5].¹⁴

Box 5: Securing pastoralist livelihoods and tenure to land

To secure pastoralists livelihoods and tenure to land, the Government shall:

- a. Recognize pastoralism as a legitimate land use and production system
- b. Review the Land [Group Representatives] Act and provide for pastoralism in the ‘Land Act’
- c. Establish suitable methods for defining and registering land rights in pastoral areas while allowing pastoralists to maintain their unique land systems and livelihoods
- d. Establish a legislative framework to regulate transactions in land in pastoral areas
- e. Ensure that the rights of women in pastoral areas are recognized and protected
- f. Provide for flexible and negotiated cross boundary access to protected areas, water, pastures and salt licks among different stakeholders for mutual benefit; and
- g. Ensure that all land uses and practices under pastoral tenure conform to the principles of sustainable resource management

National Land Policy, chapter 3.6.3

¹⁰ para 69(a)

¹¹ para 104(a)

¹² para 135

¹³ para 137(c)

¹⁴ para 183

The ASALs Policy likewise recognizes the critical need for appropriate mechanisms for managing land and natural resources as a means of securing livelihoods in the ASALs.¹⁵ Failure to strengthen communities' rights over management of land and land-based resources in the past has subjected local natural resource management systems to pressure from competing forms of land use. Yet secure land and natural resource rights are critical for enabling ASALs communities to cope with other challenges such as successive and more frequent droughts, and the proliferation of ever-smaller administrative units, which threaten the sustainable use of resources.

In the absence of appropriate mechanisms that empower communities, the danger of unsustainable land use practices has increased. Following the adoption of the new Constitution with its emphasis on citizen participation in decisions affecting their lives, sector policies and laws on natural resources are in the process of being reviewed to bring them in line with imperatives of the Constitution. The main relevant sector policies are those relating to environment, water, and forests. Others include those on wildlife conservation, irrigation and land reclamation. Draft new policies and laws have been issued for environment,¹⁶ water¹⁷ and forests,¹⁸ while a wildlife life conservation law has been enacted.¹⁹

The reviews of sector legislation seek to align the sectors to the new constitutional dispensation and to rationalize the exercise of powers over the environment and natural resources between the national government and the county governments while also recognizing the role of communities. In this connection, the laws are amended to embody provisions that apply the national values and principles of governance set out in Article 10 of the Constitution, and give effect to devolution.

This is an ongoing process, the full impact of which will only be assessed over time. Apart from the fact that many of the sector legislation are currently in draft form, even when they are finally enacted, it will be some time before they are fully implemented so that the changes introduced under the new dispensation are felt on the ground.

2.3. Opportunities and challenges

It is evident that the new constitutional order provides immense opportunities for communities in the ASALs to play more active roles in the management of land and land-based resources. County governments can use these opportunities to strengthen the role of communities in the management of natural resources.

15 para 5.4.2.2

16 Environmental Management and Coordination (Amendment) Bill, 2014

17 The Water Bill, 2014

18 The Forests Conservation and Management Bill, 2014

19 The Wildlife Conservation and Management Act, 2014

As has been emphasized in the preceding sections, the most fundamental of these opportunities arise from the establishment of devolved government and the imperatives of devolution of political power that drive it. Indeed, this analysis has only been rendered necessary by reason of devolution, which has resulted in the establishment of devolved governments that have the opportunity and potential to strengthen communities' rights over the management of land and land-based resources.

The importance of devolution is based on the critical role of governance in natural resource management. The focus of power and authority over natural resources, the manner in which it is exercised, and the opportunities available for users of the resources to influence the exercise of those powers has significant implications for the manner in which resources are utilized. In the past, traditional systems and institutions of natural resource management have been undermined by the lack of statutory recognition. Competing and conflicting imperatives between community institutions and statutory frameworks have undermined the management of natural resources. With devolution and recognition of the right of communities to participate in decision making over natural resources, opportunities now exist for reconciling these imperatives.

The National Land Policy acknowledges that “problems of rapid urbanization, inadequate land use planning, unsustainable production, poor environmental management, inappropriate ecosystem protection and management” are commonplace in Kenya, and commits government to put in place appropriate strategies for managing sustainable growth and development in urban and rural areas. The issues that the Policy interventions are to address in this regard include efficient and sustainable utilization of land and land based resources; and the protection of ecosystems and their sustainable management. Of direct relevance to the ASALs is the principle of integrated resource management based on ecosystem structures regardless of administrative and political boundaries. The Policy commits the government to “provide an appropriate framework for preparation and implementation of national, regional, and local land use plans and ensure that the planning process is integrated, participatory and meets stakeholder needs”.²⁰ Providing such a framework entails the enactment of an appropriate law, which is yet to be done.

Also of relevance in this regard are the principles of land policy entrenched in the Constitution of Kenya 2010. Among these are: sustainable and productive management of land resources and sound conservation of ecologically sensitive areas.

These and other principles provide the foundation for ensuring that land in Kenya “shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable” as stipulated by the Constitution.²¹

²⁰ para 105

²¹ Article 60(1) Constitution of Kenya 2010

Participation by communities in the conservation and management of natural resources and the sharing of benefit arising from the utilization of such resources are major incentives for sustainable resource use. The Constitution and the National Land Policy recognize this. The National Land Policy calls for development of strategies for benefit-sharing, and commits the government to take measures to that end.²² Among the measures proposed are the establishment of legal frameworks for recognition of community and private rights over land-based natural resources and incorporation of procedures for access to and sustainable use of such resources by communities and private entities;²³ and ensuring that the management and utilization of land-based natural resources involves all stakeholders.²⁴ It commits the government to develop procedures for co-management and rehabilitation of forest resources recognizing traditional management systems and sharing of benefits with contiguous communities and individuals.²⁵ All these policy options do however require the enactment of legislation in order for them to be translated into actionable commitments. Although there is no timeframe set for enactment of laws for implementation of the NLP, Article 261 of the Constitution has specified time limits for Parliament to enact legislation required to give effect to provisions of the Constitution. The time limits for enactment of laws on land and environment range from 18 months to five years from the date of promulgation of the Constitution.²⁶

Other opportunities introduced by the new constitutional order and policy frameworks, and which provide entry points for strengthening communities' rights over the management of land and land-based resources include: the development of fiscal incentives to encourage the efficient utilization of land;²⁷ commitment to formal recognition of traditional knowledge related to land-based resources and provision of infrastructure for its development and use;²⁸ recognition of multiple land and natural resource uses and values;²⁹ and recognition of transboundary nature of ecosystems both within and across national borders.³⁰

Nevertheless, there are many challenges that will have to be overcome before these policy and institutional opportunities can be actualized for the benefit of communities in the ASALs. The challenges are not unique to the ASALs but apply across the board throughout the country as the tensions between change and status quo play out. It is indeed a demonstration of how fundamental the changes proposed in the new order are that they should be facing these challenges. The challenges must be kept in mind while reflecting on and considering options available to county governments to strengthen the rights of communities in the management of land and land-based resources.

22 Article 66[2] provides that Parliament shall enact legislation ensuring that investments in property benefit local communities and their economies. See also paras 97-100 of the NLP

23 para 100[a]

24 para 100[e]

25 Para 135[c]

26 27th August 2010

27 para 69[d]

28 para 96[g]

29 paras 69[c] and 233[c]

30 paras 132[g], 135[a], and 183[f]

The history of state and nation building in Kenya since colonialism is a history of alienation of communities from the management of land and land-based resources. In this connection, the policy and institutional framework for management of land and land-based resources has been centralized, top-down, bureaucratic, even militaristic. This is probably best exemplified in the management of forests and wildlife resources, where policing has tended to take centre stage. This is as true for the rest of the country as it is for the ASALs; and the persistence of such mindsets will continue to undermine the prospects for realizing the change envisaged under the new order.

Even where there is willingness to integrate communities and their systems and institutions in natural resource management, it will be realized that the said systems and institutions have suffered decades of policy subversion and neglect, and cannot just be assumed to be wholesome and effective. Moreover, communities themselves are in transition on many fronts – political, social, cultural, economic and demographic – with the result that they are increasingly differentiated along class, gender and even ethnic lines. Such differentiation has conceptual and methodological implications for asserting the rights of communities to manage resources over which there are often competing interests.

The new policy context requires capacities and attitudes that are not necessarily already in place, whether at national, county or community levels. Capacities and mindsets that allow for the building of partnerships and working across interest groups, including the management of public private partnerships [PPP] are needed to manage the opportunities in the new policy context. These capacities will need to be built; while at the county level appropriate bylaws have to be enacted and institutions put in place.

The Constitution of Kenya 2010, the National Land Policy and the ASALs Policy are all framework documents that depend for their implementation on the enactment of laws and regulations and ultimately the allocation of resources and placement of technical capacities. Kenya has a bad record when it comes to making the transition from the adoption of policies to their implementation through appropriate laws and regulations. Already five years have elapsed since the adoption of the National Land Policy with very little in terms of concrete action for implementation. The slow progress in the development of a community land law is indicative of the challenges in this regard.

This situation is further complicated by the competing interests at play in the land sector. From the outset, land policy reforms have tended to accentuate the tensions between competing interests over land and land-based resources. Those who were opposed to the policy have continued to find fault with its provisions. These tensions and contradictions have been most manifest in differences between the NLC and the Ministry of Lands, which have played themselves out in public with the Chairman of the NLC and the Cabinet Secretary for Lands each blaming the other for the slow progress in implementation of the Policy. Overall, it has been evident that there is limited political will for reforms generally and even more so for land sector reforms.

3. Options available to secure community rights to land

It is the responsibility of the County Executive Committee (CEC)³¹ to implement county legislation, and national legislation within the county “to the extent that the legislation so requires”,³². The CEC may also prepare proposed legislation for consideration by the county assembly.³³

The County Assembly is vested with and exercises the legislative authority of the county, and “may make any laws that are necessary for, or incidental to, the effective performance of the functions and exercise of the powers of the county government” as set out in the Fourth Schedule of the Constitution.³⁴ The county assembly may also receive and approve policies for the management and exploitation of the resources of the county. This means that county governments have both legislative and executive authority, and can enact county legislation to give effect to any of the powers vested in them under the Fourth Schedule of the Constitution.



Noloroi River in Oldonyiro- Peter Cacah

In thinking about the options available for county governments to secure the rights of communities over the management of land and land based resources, it is important to appreciate that this essentially entails the creation of an enabling environment and the provision of technical

31 The County Executive Committee comprises of the Governor, the Deputy Governor and members in charge of different portfolios, appointed by the Governor and approved by the County Assembly. They constitute the ‘Cabinet’ of the County Government

32 Article 183(1)

33 Article 183 of the Constitution of Kenya 2010

34 Article 185

and material support for communities to meet the challenges of sustainable natural resource management. Where appropriate national policies are in place, the county governments are expected to implement those policies at the county level in line with the stipulation in the Fourth Schedule to the Constitution.³⁵

The following are the options available to county governments for securing community rights over the management of land and land-based natural resources:

Creating an enabling environment through county legislation is critical to the process. Such legislation may be enacted where there is no relevant national legislation or in order to adapt a national legislation to the specific circumstances of the county. Such laws have to be consistent with national law and across sectors. County legislation for natural resource management should seek to do the following, among other things:

- 1. Recognize community-based resource management through local bylaws** applying at catchment and sub-catchment levels. County legislation authorizing communities to develop bylaw should stipulate the procedure to be followed in the process, insist that all stakeholder groups be represented, and in particular that the imperatives of the Constitution and national laws regarding representation of gender, ethnic and other interests within the community are complied with. The legislation should also provide a procedure for validation of the bylaws at the county level and for enforcement of the same once validated, through the county enforcement authority. In this connection, the values and principles of participatory democracy stipulated under Article 10 and the objects of devolution set out under Article 174 of the Constitution must be adhered to.
- 2. Entrench environmental and land use planning** as tools for the management of natural resources in line with the Environmental Act (EMCA) and NLP. The legislation should also provide for the development of cross-county plans with neighbouring counties in line with ecosystem approaches to natural resource management.
- 3. Privilege pastoralism and agro-pastoralism** as the primary land use and production systems in the county and require that other land uses will be implemented with due regard to the interests pastoralism and agro-pastoralism as appropriate in line with the ASALs Policy. This may entail, for instance, requiring that before authorising any use of land, the county government shall consider and make a determination on its potential impact on mobility and access to pastoral resources. The law could also specify that any environmental impact assessment (EIA) shall include an explicit consideration of the impact of the project on pastoral land use.

³⁵ Implementation of specific national government policies on natural resources and environmental conservation, including (a) soil and water conservation; and (b) forestry

- 4. Provide for fiscal and other incentives** for communities to actively engage in conservation and management of natural resources. For instance, county legislation could provide for communities to retain a portion of fees paid for exploitation of any resources from the rangelands such as trees, sand, etc. Where commercial exploitation of resources within the rangelands are involved, the legislation could provide for the sharing of benefits between the investor and the local community.
- 5. Recognize and strengthen the role of traditional institutions** in governance and management of natural resources, and in managing conflicts and resolving disputes over natural resources. In this connection, county legislation should make traditional institutions an integral part of the institutional apparatus for natural resource management at the county level. Such recognition should also address enforcement of decisions of traditional institutions and prohibit forum shopping by stipulating that where traditional institutions have authority no other institution shall take up a matter except on reference from a traditional institution.
- 6. Land use planning is a critical issue in sustainable management** of land and land-based resources, and its importance for the ASALs cannot be gainsaid. County governments should undertake comprehensive land use planning as a means of rationalizing the competing demands for land in the counties. Land use plans will only be useful to the extent that they are integrated, comprehensive, and prepared through a participatory process that ensures the buy-in of communities and all major stakeholders. County governments are mandated under the Fourth Schedule to implement county planning and development, including land survey and mapping. But such county plans must be reconciled with national and regional plans for which the national government is responsible. County governments should ensure that such plans are used to secure access to grazing and other critical livelihoods resources across space and time. To this end, participatory mapping of natural resources is an integral input into the land use planning process.
- 7. Facilitation of cross-county land and resource use plans and agreements** is important for managing mobility and avoiding conflicts over access to natural resources. Neighbouring counties should negotiate and agree on cross-county access to key resources, taking into account the imperatives of seasonal mobility. Such arrangements should be embodied in Memorandums of Understanding signed between the respective counties and be backed by similar county legislation enacted by the respective County Assemblies. In this connection, contiguous county governments could develop and agree on common standards and models of legislation. Ultimately, county governments should involve the national government in facilitating similar arrangements with neighbouring communities that live across national borders in Ethiopia, Somalia, South Sudan, and Uganda within the framework of the Intergovernmental Authority on Development [IGAD].

- 8. Strengthening the capacity of local resource users associations** to better organize and mobilize local communities for sustainable natural resource management. The plurality of resource users associations (rangelands, water, forests, environment) whether on the basis of statutes or as a result of projects has the potential of engendering confusion and even conflict at the community level unless properly managed. In any case, the existence of multiple frameworks at the community level is likely to stretch the resources and capacities of the communities and undermine the benefits of such associations. County governments should facilitate the coordination of the establishment of resource user associations so that they are effective and beneficial to the communities and the counties. In this connection, county legislation could provide for an umbrella framework (County Natural Resources Forum) that brings together the different sectoral associations for engagement with the county government, but this would have to be developed through a participatory process with civil society and other partners active in natural resource management within the county.
- 9. Strengthening institutional capacity at the county level** for natural resource management including through allocation of resources for coordination and support to communities. This involves ensuring that the county government has the competence in terms of technical personnel, resources and equipment to promote sustainable land and natural resource management. It will require assessment of capacity development needs and the mobilization of resources to respond to those needs.

4. Conclusions and recommendations

This report has reviewed the new policy and institutional context Kenya in order to establish the options available for county government for securing community rights over the management of land and land-based resources. The Constitution of Kenya 2010, the National Land Policy and the ASALs Policy are among the major policy instruments that have come into force over the past five years, creating new opportunities for communities to play an active role in the management of resources on which their livelihoods depend.

The review confirms that the policy, legal and institutional environment for pastoral and agro-pastoral land rights has and continues to change in fundamental ways, opening up great opportunities for community rights to management of natural resources. Policy recognition of pastoralism as legitimate and the appropriate land use and production system for the ASALs and the mainstreaming of pastoralists concerns and priorities in national development planning are some of the major positive developments at policy level for the ASALs. Devolution, participatory development planning and implementation and recognition of community land are also of great significance for ASALs communities.

While adoption of these policies are of great significance and hold potential for ASALs communities, much more remains to be done to translate the policies into strategies and actionable plans that will translate into benefit for ASALs communities. ASALs county governments have both the opportunity and the responsibility to lead the way by piloting approaches for translating these policy stipulations into practice. There are however, critical challenges that have to be confronted, including the persistence of mindsets, lack of capacity and inadequate political will.

Initiatives such as the Adaptation Consortium have the potential to make a significant contribution to addressing these challenges so that communities living in the ASALs may realize the promise of these reforms. In this connection, the work that the Consortium has done in supporting the communities in Isiolo to do participatory resource mapping is a good starting point. In addition to that the Adaptation Consortium should consider providing support to county governments to implement the activities recommended in the previous section. This they can do by providing support for:

- 1. Dissemination of this report** among key stakeholders in the ASALs counties. This should entail meetings at which the key findings and recommendations of the study are discussed and the participants invited to develop strategies for carrying them forward.

- 2. Training of Members of County Assemblies (MCAs)** and other key actors at the county level on the provisions and implications of the key policy reform documents touching on land and natural resource management. In order for MCAs to exercise their legislative mandate in an effective and appropriate manner, they need to understand the opportunities that these documents offer, the extent of their legislative powers, and the procedures for exercising those powers. Similar training should also be provided to members of the CECs in charge of land and natural resources, members of traditional institutions, county legal officers, and natural resource sector personnel working within the ASALs counties so that they too can better appreciate the opportunities in the new dispensation and their respective roles.
- 3. An ASALs-wide workshop on participatory land and natural resource use planning:** for key policy actors from the county governments, including MCAs, CEC members, and natural resource sector personnel. In addition to disseminating and sharing the resource mapping work with other counties, the workshop should be used to make the case for a regional land use planning process in the ASALs that will give effect to the provisions of the NLP regarding the facilitation of mobility.
- 4. Convening of County Working Groups on Participatory Land and Natural Resource Use Planning** in each of the ASALs counties, comprising members from the county governments, natural resource sector management institutions, civil society, and the private sector to focus attention on participatory land and natural resource use planning, build capacity on the issues on an ongoing basis, and monitor implementation.
- 5. Convening of a strategy meeting** bringing together key stakeholders from the five counties in which the Consortium is active, including neighbouring counties [e.g. county government officials, civil society and traditional institutions, and the numerous resource user associations, forums and networks] to agree a common framework for carrying on this work, building on what has been done to-date.

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