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COMMUNITY LAND IN EA IS NOT A 'PRIMITIVE' PRECURSOR OF PRIVATE OWNERSHIP

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Community land in EA is not a 'primitive' precursor of private ownership

Legal recognition of rights is not a measure of legitimacy and is insufficient to guarantee the rights. The challenge with community land in East Africa is to confer legitimacy on legality. Illustration/John Nyagah Nation Media Group

Many valuable land-based resources are in land held by communities — oil in Turkana; wildlife in Kajiado, Narok, and Ngorongoro in Tanzania — and water catchment areas.

Governance and management of land is critical to the quest for cohesive nations and democratising societies. The recently released report of the Truth, Justice and Reconciliation Commission in Kenya identifies land as a major source of discontent in Kenya generally and among communities specifically.
Communities have borne the blunt of the historical injustices that true reconciliation and justice must address.

In Tanzania, the Maasai of Loliondo have cried foul over the government's treatment of their land rights. The recent advert in *The EastAfrican* (May 25-31, 2013) by these Maasais is a strong indication that something is amiss. The Hadza'be and Batwa of Tanzania and Uganda respectively have also expressed their dissatisfaction at the way community land rights are being handled.

The Kenyan Constitution recognises community rights and requires that benefits accruing from resources on their land are shared with them.

It also recognises the rights of communities to their language and culture (core to a community's body politic) and has a robust definition of community that transcends ethnicity and culture to cover "community of interest." This allows for the inclusion of users of land

that contains commonly available resources such as wetlands and water sources as part of community.

The Constitution goes further by providing for equality of community rights with private and public land rights, shielding communities from appropriation of their rights by powerful actors within and outside the community. Tanzania and Uganda also have frameworks for addressing community rights.

Realising community rights in practice, however, remains a daunting task.

Firstly, in Kenya for instance, the history of neglect and abuse has led to the individualisation of community land as a defence against perceptions that community land is owned by nobody, even in areas where the suitable land use and cultural norms favour community ownership of land.

This is likely to be the case in the other East African countries as pressure over land and land-based resources mounts.

This trend needs to be reversed through documentation of norms, land use practices and instances of sustainable management of land by communities while subjecting the former to scrutiny to ensure that they do not offend constitutional sanctions of non-discrimination, gender equality, stakeholder participation and sustainable development.

Second, there is a need to challenge the dominant world view that relegates customary norms of land holding and interests to an inferior status requiring uplifting to the more desirable and superior private/individual ownership status.

This is what is happening in Kenya, Tanzania and Uganda. Investment in policy, institutional and legal frameworks for community land is imperative. The constitutional recognition of customary law as law in the three countries has not addressed the historical perception of it as backward and inferior to written law.

Third, land includes resources such as minerals, wildlife, forests and water. Policies and laws on these resources must take community rights into consideration as entitlements, not charity from the government.

Devolved and local governments have a role here to ensure that resources such as wildlife, forests and water are integrated into land rights.

Fourth, and in relation to mineral resources, laws on community land must avert the resource curse where abundance of mineral resources could result in the neglect of other economically viable activities such as pastoralism.

Pastoralism has been a neglected land use despite its resilience in many arid and semi-arid areas. It needs to be recognised, not delegitimised as mineral resources and their extraction take centrestage.

In Turkana, which has been neglected by successive governments and where oil has been discovered, community land rights and land uses must be considered to avoid multiple

exclusions of the people as resources are appropriated through rent-seeking and corrupt deals over the newly found wealth.

This needs mechanisms for sharing benefits with communities; identification of speculative deals on community land concluded with communities who had no knowledge of the value of the land; requiring that benefits from oil be shared with local communities that have lived on that land for years; and transparency and accountability measures to prevent the use of divide and rule tactics within communities as happened in Kwale in Kenya over titanium.

Related to this is the need to address illegally and irregularly acquired community land. Given the opaque way in which community land has been dealt with over the years, there is a likelihood that by the time a community land law is in place, there will be no community land to protect and secure rights over.

Scrutinising dealings in land after the promulgation of the Constitution in 2010 in Kenya for instance, can help identify instances of irregular and illegal dealings with community land.

The investigation should however also open avenues for redress for community members who have had their rights appropriated illegally and irregularly by powerful members of their communities or by non-members of communities in all the three countries.

Finally, it should be recognised that institutions are critical in securing community land rights. Institutional structural rigidities are not best suited to articulate dynamic and living tenets of community rights, especially where customary tenure is concerned. There should be investment in institution-building and strengthening in communities.

Dealing with land is one measure of governments' success and dealing with community land will determine their ability to forge cohesive nations and pave the way for more solid regional integration.

Dealing with actual and perceived marginalisation by communities, requires a radical departure from past practice that is deferential to private property rights however acquired, reducing communities' concerns to issuance of title deeds.

National constitutions provide a good anchor for community land rights. Property is a social relationship between the owner of the property and non-owners predicated on acceptance of legitimacy of the owner's rights.

Legal recognition of rights is not a measure of legitimacy and is insufficient to guarantee the rights. The challenge with community land in East Africa is to confer legitimacy on legality.

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