

The Kenyan Constitution and Its Implementation

Working Report

Triple L - Land, Livestock and Livelihood Dynamics
in Dryland Systems, West Pokot, Kenya

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Abbreviations

ASAL Arid and Semi-Arid Lands

CLB Community Land Bill

GRA Group Ranch Act

NLC National Land Commission

NLP National Land Policy

LUP Land Use Policy

1. Introduction

Land in Kenya has been the reason for conflict in the country's colonial and post-colonial history (Manji, 2014). In Kenya's new Constitution, ratified in 2010, land issues are at the centre of attention and, for the first time, addressed specifically (Akech, 2010). Previous land politics were driven by modernisation and privatization attempts, influenced by globalization and global stakeholders (e.g. World Bank), seeking to individualise land tenure. Thus, there has not been any legal policy framework that provided tenure security for community lands on which pastoralists access natural resources. In the new Constitution, however, there is an increasing recognition of community rights over land and natural resources (Boone, 2012; FutureAgricultures, 2014). Communities, such as pastoralists, should be provided with increasingly secured rights to land, grazing and water. This should be facilitated through an extensive devolution that is implied by the Constitution. The power over land is devolved from the president to the parliament and the 47 newly established county governments with democratically elected governors (Akech, 2010; Harbeson, 2012; Boone, 2012; FutureAgricultures, 2014). Through devolution, local participation should be fostered and the stakes of civil society and communities that have been marginalized in previous politics should be enhanced (Akech, 2010). Devolved governance of resources to local levels should imply that pastoralists could have a stronger role in decision making and about their livelihoods (FutureAgricultures, 2014).

As yet, it remains uncertain how the new Constitution will be implemented in order to effectively address land issues since many challenges, such as corruption, tribal conflicts, socio-economic and gender inequalities, have to be met. The implementation of the Constitution, which is shaped by stakeholders from global to local levels, will in either case lead the way in the country's future since the land resource is critical to economic, social and cultural development (Hakijamii & IBP, 2012).

This working report is building on findings by and contributes to the multidisciplinary Triple L Land, Livestock and Livelihood research initiative. Triple L bases its research interests around the land-use and livelihood transformations in arid and semi-arid lands from nomadic pastoralism on communal rangeland to increasingly sedentary, private and market oriented livestock-based agro-pastoralism. Such transformations have also been observed in West Pokot for the last three decades (Nyberg et al., 2015). This report focuses on the current state of the formulation and implementation of new land policies in Kenya in regard to social and environmental developments in relation to land. Regarding devolution of land and natural resource governance this report will especially take into account the situation regarding community lands and pastoral livelihoods, as we can find in West Pokot. It illustrates current concerns and engages with questions about what policies should be implemented, and in what manner, in order to ensure sustainable outcomes in future. It will consider what political and social issues have to be addressed in practice to realise what is stated in the Constitution, giving examples from West Pokot as well as other pastoral areas in Kenya.

2. Background

2.1. The National Land Policy

Despite the important social, economic and political role of land in Kenya there has not been any particular policy on land since the country's independence in 1963 which resulted in an arbitrary land administration and management system. Civil society activists have long been working on exposing and defining land problems and issues in Kenya (Manji, 2014). In order to resolve major problems, such as tenure insecurity and conflicts in relation to land, the government finally committed to developing a National Land Policy in 2002. Through establishing accountable and transparent institutions this land reform should improve Kenyans' livelihoods. Land issues, such as historical injustices, land rights of minority communities and vulnerable groups should be addressed by integrating such groups in decision making over land and land-based resources (Nzioki, Kariuki, & Murigu, 2009). Legislation should further support both, individual as well as collective rights to land. Management and use of land should be governed to benefit individuals and communities who claim access and ownership to certain land (FutureAgricultures, 2014).

The NLP stipulated land in three categories: public/state, private with individual title deeds, and community where pastoralists access land and natural resources through customary practices (Harbeson, 2012; FutureAgricultures, 2014). It thereby changed the category of what was previously called "trust land" to "community land". The aim is to demarcate all community land and allocate titles to respective communities in order to access resources upon which they depend. Institutionally, Community Land Boards should be elected by the communities themselves who should manage access to land. The policy also provides for secondary users what applies to access of water points, grazing reserves, or mineral licks (FutureAgricultures, 2014). "Community" as defined in the National Land Commission Act 2012, and often referred to in this report, is understood as "a clearly defined group of users of land identified on the

basis of ethnicity, culture or similar community of interest [...] which holds a set of clearly defined rights and obligations over land and land-based resources". (National Land Commission, 2015, pp. 182-3) The basic guidelines of the NLP were approved by Parliament in 2009 (Harbeson, 2012; Manji, 2014).

2.2. The Constitution

The NLP directly informed the new Constitution in regard to land reform (Akech, 2010) and its guidelines were incorporated in the commonly called "land and environment" chapter of the Constitution (Harbeson, 2012; Manji, 2014). According to Kenya's Constitution land should be managed in an "equitable, efficient, productive and sustainable" manner that implies "equitable access to land, security of land rights, sustainable and productive land management, transparent and effective land administration, sound conservation of ecologically sensitive areas, elimination of gender discrimination [...] and encouragement of local land dispute resolution mechanisms." (Harbeson, 2012, S. 18) The NLP and accordingly the Constitution have established a framework that finally allows addressing long standing grievances in land tenure in an equitable, peaceful and productive way (Harbeson, 2012).

The Constitution further sets out inputs for future legislation, such as prescriptions for minimum and maximum sizes of land holdings; how land can be converted from one category to another; or the protection, conservation and accessibility of all public land. According to Manji, introducing and debating new land laws is an important and one of the first tests for the new Constitution (Manji, 2014).

2.3. The National Land Commission

Proposed in the NLP, the Constitution further established the National Land Commission to, among many other functions, manage public land (Harbeson, 2012) on behalf of the national and county governments, ensuring sustainable management for the intended purpose and for future generations. It should also manage and administer unregistered trust and community land on behalf of the county governments as well as ensure the registration of all unregistered land until 2022. The NLC is conducting research related to land and the use of natural resources, and makes recommendations to appropriate authorities, including the recommendation of allocations of land. It should analyse historical injustices of land and competing claims of land rights since there are many conflicts arising about land in Kenya that have to be solved. The NLC should monitor and have advisory and supervisory responsibilities regarding land use planning throughout the country and it should develop and maintain an effective land information management system at national and county levels. It, thus, comprises over devolved structures that should allow for actual devolved management in the County Land Management Boards (National Land Commission, 2015; Akech, 2010).

2.4. West Pokot

West Pokot has been established as one of 47 counties by the 2010 constitution. It comprises over a population of 512,690 (2009 census) within an area of 8,418 km² (County Government of West Pokot, 2016). It is located in northwestern Kenya, bordering Uganda in the West, Turkana county in the North, Baringo in the East, and the counties of Trans Nzoia and Elegeyo-Marakwet in the South.

It is inhabited by the Pokot whose dominant livelihood system is nomadic pastoralism in the lower altitudes and agro-pastoralism as well as mixed farming in southern-central parts with higher altitudes and more rainfall (Nyberg et al., 2015).

Pastoral land in West Pokot has been managed communally with certain regulations regarding access and use of resources. Today, it is registered under different tenure systems: there is statutory tenure with individual title deeds, especially in the higher altitude areas as well as group title deeds for group ranches. There is state or public land with, for example, hospitals, schools, or water dams. Customary tenure applies on community land and can be found especially in lower altitude areas. However, there have also been ongoing processes of sub-division, privatization and enclosing of communal grazing land in some areas of West Pokot for the last 30 years. Along with those processes go changes in land use, livestock management, livelihoods and infrastructure. It remains an open question if or how Kenya's new Constitution will have an impact on the tenure system in West Pokot (Saxer, 2014).

While this report discusses changes that come with the new Constitution, I will mainly focus on changes, new land policies and issues that concern West Pokot and the livelihood conditions there. Using West Pokot as a case enables the illustration and exemplification of issues and concerns in terms of implementing new land policies. Especially with regard to social and environmental developments in the context of pastoralist community land.

3. Method

This study was funded by the Triple L initiative and performed in Kenya in November 2015. It was inspired by a previous study that I conducted in 2013, also within Triple L, about the changing land tenure system from communal to private in West Pokot (Saxer, 2014). This time the data was conducted during ten expert interviews with persons involved in research, politics on national as well as county levels, and governmental as well as non- governmental organizations in Kenya. All my respondents are working closely connected to land issues in Kenya and contributed their expertise in terms of the new constitution, land legislations, institutional changes, land tenure, land use as well as pastoralism and livelihoods. I could identify and contact them through the Triple L network as well as through other research contacts working in Kenya.

I met my respondents at their respective offices and institutions in Nairobi and have conducted the semi-structured interviews with the help of an interview guide in English. Semi-structured interviewing allowed me to ask specific questions of interest for this study while each interviewee could give insights into his/her area of expertise.

All the interviews were audio-recorded and I transcribed them in order to start working on them in their written version. I coded the interviews according to frequently occurring themes and merged them into a coherent text.

The structure of how the findings are presented in this working report has been informed by those themes, by the secondary literature discussed in section 2 of this report, as well as by conditions that apply in West Pokot.

4. Findings

4.1. Devolution in Kenya and Institutional Changes in Relation to Land

Devolution has created space for institutional growth. The Constitution is very clear about the importance of allowing for engagement and association of different stakeholders. One of the reasons for why devolution has been initiated was the perceived power concentration in the hands of a centralized national government, with little or no space for the different communities to participate. Therefore, there was not only a concern about the law but also about land management, governance and administration. Participation is in fact one of the main objectives for devolution. Having national, county and sub-county governments as well as village administration means that there is an opportunity for communities take be part in politics and policies regarding land use, planning and management. As a requirement of the new constitution, citizens and institutions that represent them must have a role in the devolved governance. There are already structures in place with existing institutions, for example in charge of land adjudication. One of my respondents stated that it is now critical to have an institutional reform in order to have transparent institutions and institutional frameworks that increase the level of participation. At the same time, another respondent emphasized the potential danger with the devolution process and the creation of a new big administration apparatus to open more room for corruption. Corruption can be shifted from the central government to the county governments. Institutions in Kenya are often weak and there are structural gaps that can be taken advantage of. Regarding devolution, two of my respondents think that land issues should still be solved from a national point of view, rather than from single community views. An advantage of the devolution is that communities are being empowered while at the same time there is a risk that the bigger picture is lost which would lead to exclusion again. Other respondents raise general concerns about the capacity of the devolution process. They raise concerns about to what extent the context of the 47 different counties can be understood in order to plan according to the regional needs; or how far can devolution go in terms of the lowest level possible.

4.1.1. The National Land Committee NLC and the Ministry of Lands

The NLC creates an opportunity for a broader horizontal engagement of participants in governance. One respondent, though, criticises the NLC for working too focused on implementation processes, for example with land registration that is still informed by the past. Hence, nothing effectively new about land issues has been done yet.

In the new Constitution, the Ministry of Lands was basically cut out in terms of policy. The Ministry continues working on “business as usual” since the paradigm shift brought about in the new land legislation, including the establishment of a new institution for land, the NLC, is only appreciated on a low level. Furthermore, one respondent argues that the NLC and the Ministry of Lands are not efficiently working together but are rather involved in conflicts and oppose each other. One reason for this is that their functions have not properly been defined.

4.1.2. The County Governments

The county becomes a space that begins to recognise its inhabitants’ identities and to represent their interests. The devolved county governments receive funding from the national government that should contribute to each county’s development. One respondent perceives an advantage of county governments that lies in the county governors who ought to understand the need for cooperation with their communities, especially in largely pastoralist counties, such as West Pokot. According to another respondent, whether the county is cooperating with the communities or not, however, depends on the involved interests, the persons in power, as well as on their orientation towards development. According to yet another respondent, land problems and issues have devolved from the national to the county governments. County governments are pretending to act on behalf of their citizens and communities while historical land issues are perpetuated. Since county governments are constituted by elite with their personal agenda this elite capture is contributing to contemporary land injustices. The NLC aims to address such issues but it is facing overwhelming pressure to deliver results in terms of implementation. Other respondents are also mentioning problems with the county governments, for example that they are trying to take over the jurisdiction of land. One respondent claims that counties should only govern what used to be trust land. However, other respondents are expressing doubts about county governments being trustees of community land. There is much evidence that county governments would misuse their trust and allocate lands opposing interests of the local communities.

4.1.3. The Role of Community Elders

Besides formal institutions, community elders are often strong authorities on the ground. In the context of devolution and resource allocation to devolved units, village elders still play an important role. Land management must recognise the local level governance structures. The NLC is working closely with elders because they are the custodians of the land and they become the voice of their community. As an example, the land record system on the national level is unreliable which leads to a lot of mismanagement. Elders can help to shed light on ownership relations on the ground since they know about land ownership within their community. The NLC also acknowledges the importance of indigenous people and marginalised communities that have organized governance structures on the local level.

However, one of my respondents sees the role of elders slowly changing due to different reasons. With the privatisation of land and a gradual process of community members moving to and owning land in territories of other communities, the authority of elders will slowly

disappear. Their authority is built upon respect by their community, but members of other communities will not tolerate such authority and rather follow formal statutory laws. In relation to this, the elders' role is also expected to change when all land is formally registered under individual title deeds, which implies a shift to a formal land registration regime that involves formal institutions. In general, all aspects in transformations of land and livelihoods towards a "modern system" and cash economy will involve formal institutions as authorities. My respondents see elders remain as traditional advisors, involved in customary questions and consulted for conflict resolution. Another respondent, on the contrary, thinks that transformations of pastoralist livelihoods do not necessarily undermine their customary institutions. The modernisation of livelihoods does not imply a decrease in customary institutions, especially in communities where those institutions are still strong, for example in the Borana and Gabra communities.

4.1.4. New Community- or Grassroots Institutions

In areas like West Pokot changes in livelihoods, such as increasing education or cash economy, will create new demands with which contemporary traditional and formal institutions might not be able to cope with. The change of governance is important for West Pokot because it could not only address the different gaps that exist in institutional management within the context of devolution, but also within the management by traditional institutions. In this context, some of my respondents are discussing the introduction of new institutions.

One respondent says that there is a need for another level of management in the form of community representatives working on village levels. Introducing community institutions would empower people to make them leaders in the development on their levels. Such institutions should include more than elders, namely youth, religious groups, culture (respective tribes) and gender. This diversity of representatives would prevent people from feeling excluded. Functioning as a representative should further be voluntary and based on the interest in serving the community and in preserving it. It should not be compensated through money. My respondent hereby argues that if leaders will be identified through their service corruption will go down since bribing is not required in a true service culture. At present, for a community to establish their official community institution, the members have to register their organisation. It is a bureaucratic process that does not facilitate a real community based approach. Another respondent, opposing the previous argument, argues that remaining strong customary institutions in respective areas should be recognised without forcing the community to undergo the bureaucratic process of forming new organisations or institutions. Where customary institutions are still strong while the community is forced to introduce a new institution there is a danger of creating competition for legitimacy between old and new institutions. Another risk is to duplicate what actually already exists if there is no capacity to recognize already existing institutions, for example in cases of rangeland user associations. This applies to all types of resource user associations that are strong, already existing institutions in certain areas, and that constitute a well functioning community association. In order to avoid such cases, one respondent is talking about grassroots institutions that should be catalysing and facilitating, rather than forming. The goal is to create

an institutional infrastructure that can make the formal and traditional work together by creating a process that can formalise parts of the traditional to be broadly accepted by different players. Thereby, the expressed need in the constitution for participation and inclusion of communities could be addressed by facilitating the communication of their needs across scales. This has been tested in five different counties, among them Laikipia, and was much appreciated by the county governments. In terms of participation and established structures on county levels another respondent mentions stakeholder forums that are legal institutions with the function to address the absence of participation by pastoral or ASAL communities in mainstream politics. It is a space that can be used by civil society to engage in development. It has so far been established in eleven counties, of which West Pokot is one of them.

4.2. Land Policies

Land is a very problematic asset in Kenya. With the NLP land was, for the first time, acknowledged as a major resource for socio-economic development. It gives women rights to access and own land while recognising traditional land ownership and gives power to communities to own their land. It provided for a strategic law – the Community Land Law – about how communities would get involved in establishing governance. However, there is still confusion about community rights and the government. Even when the communities should be consulted in governance questions, the government remains the institution with more power. The roles of different stakeholders are formulated in a weak way and are not clear.

My respondents argue that land should be used according to its optimal production potential rather than being held for speculations. One issue that was proposed in the NLP was the need for land use planning and a Land Use Policy. Hereby, different land in different areas has different potentials which should be categorized to facilitate the definition of its prime uses. There should be agreements about what livelihood system can be practiced on which kind of land. The NLC is supposed to come up with the guidelines for land use planning in certain areas, particularly county spatial planning. The counties should take over the spatial planning and map the land to create an overview of the land sizes, tenure types, soil potentials etc. So far, most of the attention in developing guidelines for a LUP was on urban planning but there is also a need to address sustainable land use planning regarding environmental and rangeland management in dryland areas. There has always been a lack of official agreements about access to pastures and planned grazing on former trust land, today's community land. In general, according to a respondent, dry areas should be designated for grazing lands and pastoralism rather than transformed into farmland. Otherwise, people would depend on irrigation systems for the farming to be fruitful. This would also apply to areas in West Pokot. With such agreements in place people could decide if they want to be pastoralists and move to land designated for pastoralism, or if they want to engage in agriculture and move to a suitable area for that. On communal rangeland, according to one respondent, different areas should be identified, for example where settlement is allowed, where temporary mobile camps are allowed, and areas that are open for new permanent settlements and

transformations towards agriculture. By doing so, pastoral rangelands can be legitimised and protected. There is an increasing push from a lot of stakeholders, especially from land tenure and planning sides, to integrate communities by creating new institutions or to reconfigure the traditional institutions to start with such planning efforts in pastoral management. The few attempts that have been made in that direction, so far, have been undermined by the lack of supporting government frameworks. In Isiolo County, for example, local NGOs worked on a rangeland scale on community levels within one of the Burano tribe's traditional rangeland territory. They were working with traditional institutions and the community at large, articulating what the rules for land use used to be, agreeing among the community members what the rules should be now, and setting up their planned grazing. However, the county government did not legitimise its implementation. The recognition is increasing, though, and there are a lot of efforts such as in West Pokot, Samburu, or Isiolo, to start implementing such planned grazing.

One respondent mentions the big concern about how participatory land use planning will be. In the contemporary development of land registration or land use planning frameworks in areas with community based resource management, generally, are elaborated without involving the local communities. For example, there are some counties that are already hiring consultancies to elaborate a land use plan for them. Those frameworks often demand too much from the communities, assuming that community members have higher consultants and data, and thus fail to be implemented. When this happens there will be very little participation involved and consequently, little awareness about the new regulations. NGO interventions or donor funded projects that need to be invested in those cases to raise awareness are rarely successful. If land use planning was done in a genuinely participatory way awareness raising would not be needed since the community would be involved in the whole process. Another respondent states that the LUP should have been developed at the same time as the NLP. Working on it now might be too late and the work could be overtaken by time. It will be difficult to enforce it because more and more people are changing their land use in different areas, not according to the actual potential of the respective land. As an example, in areas where people practiced mainly dairy farming, today, there are flower farms or greenhouses for growing vegetables.

Closely connected to the land use planning is the understanding of what kind of land tenure works in what area. The NLP recognized the various land tenure types community, public and private. However, according to a respondent, even if this is incorporated in the new constitution today, people have not yet started to distinguish between those three categories. In West Pokot there are settlement schemes, community lands, private land and different livelihood systems from farming to pastoralism. That interplay creates different ways in how to understand the user rights on land and different ways in which people understand these overlapping claims to the same land. For example, in wet season there is agriculture and in dry season you can have access to the otherwise private land. The new constitution is putting an effort in understanding all land in terms of all rights being claimed on that land. Another respondent state that new land records about the private, public and community land can

help to create an overview about the tenure systems in each county. Without proper mapping there will be double allocations because of the existing unreliable land records. The present records differ on regional and national levels which triggers confusion in the administration of land. For the investigation of land records the respondent suggests that community elders should be consulted since they can verify the actual land use and ownership on the ground.

The constitution further expresses the need to define the minimum and maximum size of land any individual can own. This is due to the subdivision and privatisation of land that are unsustainable practices when the land sizes keep shrinking. There is a Land Size Bill being drafted that is presently at the stage of investigating how big the minimum size of land should be in order to be able to sustain on it. This links back to the LUP since the quality of land as well as the resources have to be taken into account. The LUP could thus help to define the minimum size of land for a certain land use practice to be sustainable. One of my respondents estimates land consolidations in areas where land sizes will be too small for people to sustain themselves on them. He suggests that urbanisation will be the only way out of this problem. When land is being subdivided and land sizes are shrinking people often engage in building estates because the prize of the estate convinces owners who do not see the need to further engage in agriculture. A LUP would prevent such developments because it would not be allowed to change the use of land, for example in an area designated for agriculture.

4.3. Community Lands

4.3.1. The Community Land Bill

Different communities are using different community lands. The use and access is often negotiated, but can also involve conflicts. The pastoralists in drylands of Kenya have been moving into each others' territories for a long time and the boundaries have always been blurred. From a statutory perspective, however, community lands, or previously called trust lands, are open access without any statutory legal control or management.

Different ethnic groups have different degrees of land management and different degrees of traditional practices and institutions still in place. This customary management includes rules within or between communities about seasonal access to water points, grazing areas, etc. One respondent states that regarding the sustainable management of rangeland, in some places the issue of livestock numbers needs to be addressed because often the number is too high and leaves rangelands in a poor condition. Certain agreements about the amount of livestock that can be sustained in a certain area should be negotiated between counties and community representatives in order to be implemented successfully. In some parts of West Pokot, community land is mismanaged, for example trees are being cut for charcoal production. Thus, there is a need for policies that enforce sustainable management of community land. In the constitution it becomes clear that in order to operationalise the issue of community land there is a need for a Community Land Bill that should provide the details on how the community land is supposed to be managed. Current problems in this regard are, as mentioned in 3.1.2., county governments that hold community lands on behalf of the communities, though, misuse

their trust and allocate lands opposing interests of the local communities. Since community land is held by county governments there is also an inherent point of tension because customary institutions on that land are not recognised. Thus, according to two of my respondents, community land as for now does not necessarily give residence to community or customary structures.

The constitution, however, states the implementation of community tenure. One respondent argues that the CLB should therefore provide a framework with a formal legitimacy about the community institutions, whether they are formal, traditional or hybrid, for them to make decisions about the management of these lands, for example about planned grazing. There are some already existing intercommunity agreements about rangeland management, for example in northern Kenya; increasing community conservancies; and in areas with strong remaining customary institutions there are approaches about reintegrating them in management agreements. For example in Samburu and Laikipia, an increasing number of conservancies are negotiating farming clusters whereby the clusters are negotiated together and coordinated according to where and when people are moving. There are challenges regarding awareness with more distant pastoralists coming into a territory, even within the same ethnic group. For example, Samburus from the north-west are moving to the south-east, where there are a lot of community conservancies, and pass through into Laikipia. However, there are more and more community level agreements. Those agreements also have to be made on county levels. The respondent claims that whether the CLB is going to be in support or undermining these kinds of agreements is uncertain for now.

According to another respondent, the CLB is the most controversial Bill currently negotiated in parliament. It has received a lot of comments and people have divergent views on how the CLB should look like. There are consultations with different community and county representatives and there is an attempt in trying to capture their thoughts and ideas in order to take them into account when drafting the Bill. Such processes, however, are very political and it is questionable whose voices will be included. Then, the Bill will be further discussed in the Senate but this is most likely going to be a long process until it is negotiated. The process is difficult due to many land injustices where community land has been transformed and communities are now reclaiming their land. But even if the specific land was reverted, there will still be the question of how that land should be used.

The CLB should further give the avenue and space for converting community land into private land. The question that remains is what will happen when this Bill comes into place. One of my respondents hereby thinks that despite there is an effort in introducing a CLB people all over Kenya are becoming increasingly sedentary, move into agriculture and demand legal ownership of private land. He believes that eventually, all the community land will be subdivided and owned individually. Two other respondents emphasise the need for a certain governance structure that takes care of shifts and movements from community to private. They estimate that how this is going to be described in the legislation and how it is going to be implemented is the key issue that will determine the future of pastoral community lands. If this is not implemented the question of who is sub-dividing the land, and issues such as

shrinking land sizes and low food production will continue. At the moment, food production is lower than it used to be. There is a development towards a food insecure nation, especially through privatisation of land and shrinking land sizes which is introducing a new dimension of food insecurity.

The goal with the new constitution should be to minimize conflicts and allow communities to manage their land. However, the right to exclude livestock and other communities by creating a regime that strengthens territorial boundaries is not going to be successful, states one respondent, rather it creates new conflicts. Potentially, the recognition of community tenure rights should not give rights to excluding other communities. Instead, communities should get the right to manage their territories and demand outsiders to follow the same rules when they enter. When negotiating the CLB it is important to keep in mind that community lands transverse counties and that communities move around on different community lands. While county governments claim that community land is part of the county, this land as well as all natural resources on it are actually trans-boundary and cross-county. It is difficult to fence it off and put ownership rights on it.

4.3.2. Group Ranches

Group ranches were introduced through the Group Ranch Act in the early 1980s with the purpose of securing pastoralists' land tenure. By nature of pastoralism and its land use, one respondent argues, it made sense to demarcate pastoralists' perceived area of jurisdiction in form of group ranches. Clans were supposed to manage their group ranch according to wet and dry season to preserve pasture. The respondent explains, however, that there is a general feeling about the GRA having failed because it did not fulfill its purposes. Group ranches often had a weak capture and did not lead to effective range land management but rather to fragmentation. In some cases, people became more sedentary and ownership of land was getting more important. When there was one clan owning a bigger number of livestock compared to another clan on the same group ranch there was an inequity about the resource use on the group ranch which became an issue of ownership conflicts. Thus, inhabitants were subdividing the group ranches that were initially defined as ecological unit. The introduction of agriculture was brought in and people started cultivating crops. The owners started leasing out land to farmers who wanted to do agriculture and the land use system changed. With the subdivision of group ranches people have or are in the process of getting individual title deeds. In some areas, for example south of Nairobi, the former group ranches have transformed to urban areas. In other areas, people un-subdivided their group ranch again because they preferred their initial livelihood system of pastoralism. One of my respondents states that it is unlikely that the current land legislation will cater for such cases. In yet other areas, group ranches underwent a time of struggle in terms of resource management on them. Eventually, people restructured the ranches and escaped the misguided organisational model that was imposed on them and reorganized their own models that are working better. There is a potential in destroying these models with the new legislation. Yet another problem with group ranches is associated in the context of county governments selling a ranch when the group living on it is not paying its taxes.

The new constitution does not mention group ranches anymore so there is a question about what is going to happen with them. According to a respondent, there are rumours that in the latest version of the CLB the group ranches should be treated as community land which is a surprising shift since group ranches are a form of private tenure for a group. Community land has so far only applied to what has previously been trust land. It would make sense to hand out individual title deeds to people who have subdivided their group ranch and own private plots on them.

4.4. Pastoralism and Livelihood Transformations

Pastoralists have so far been left out in the discussion about land. As a result, their resources, particularly land, have not been informed by what the pastoralists themselves think but rather by what policy makers think and what civil society sees as a need. The new Constitution, for example in form of the previously discussed CLB, is now making an attempt to include their voices. So far, the NLC has been working very broadly with land use planning and has not identified details that need to be analysed in pastoralist systems, for example the relationship between different types of land tenure and land use.

The land use patterns are changing, for example in West Pokot from nomadic pastoralism to sedentary agro-pastoralism. In general, in West Pokot the incentives are more oriented towards sedentarisation, mainly because of the availability of certain sections where people have settled permanently, but also because of conflicts. Largely this has been informed by the county. According to one respondent, when there is a mixed livelihood system, such as agro-pastoralism, the tenure regime tends to change from communal to individual nature. With the privatisation of land in pastoral areas and its titling come changes in land use. For example, when land is subdivided and titled, pastoralism is changing and does not exist in its original form anymore. Once having moved to a sedentary lifestyle, the ownership of land becomes the key issue and the value of the common good is disappearing. The new generations are not interested in practicing pastoralism anymore but rather use their land for farming. Intensification in livestock production, for example, further implies a change from local to improved breeds. The respondent further argues that if pastoralists want to engage in livestock business they cannot do it any longer in their traditional way because much of their land has been taken. The forest areas are public land which is often a source of conflict when people during dry season bring their livestock there. They fight with the government because they are hungry and want to feed their animals. These situations trigger a need to engage in active pasture management and preserving food for the livestock. During wet season the food should be grown so it can be preserved and used during dry season.

In a traditional pastoralist view, the resources on land are in the foreground, not so much the form of land tenure. Cash economy is taking over, but it is important to look at what costs. What has happened in many cases is that pastoralists sell their land when they have private tenure over it because they culturally do not see the value in private land, but only the value of livestock. What can be observed frequently is that pastoralists graze their herds on land that does not belong to them, not being aware of or not acknowledging the meaning of private

land. For example, today you can see Maasais herding their livestock on grass patches in Nairobi because they have sold their land.

Livelihood transformations can also be seen around Mara where the southern Maasai have transformed to slightly more settled and more diversified livelihoods, though still with livestock as a big part of it. In Burano as well as in Baringo there are transformations that come with community enclosures. They are managed for the lactating animals that stay around the household, as well as for the calves. The rules are to keep those animals close to the homestead to provide enough milk. The community enclosures are protected from the bigger herds to get better pasture conditions inside. They tend to be on more moist land that stays wet longer during dry season in higher elevated areas to provide better pasture conditions. Some community enclosures with the best land are converted for agriculture.

Another respondent states also that in different areas there are still pastoralists who defend their communal land tenure and their traditional land use to preserve their pastoralist culture.

4.5. The Land Market

Land has previously been perceived as a tradable good but with the new Constitution land goes beyond the soil or the ground. According to one respondent there is also a vertical aspect now in terms of estates. The Constitution says that everyone should have access to land but at the same time it states that land is available at a market price. Accordingly, anyone can buy land in a favoured area. The Constitution does not guard the ones who are disadvantaged. One of my respondents estimates that with the changing economic patterns the land tenure system will change as well, and tends to be completely private. Consequently, fewer people will own land because it will be bought by those who have the required financial means. As an example, land in Turkana or West Pokot is bought for speculations. It is already quite common that people living in urban areas buy land in rural areas as an investment, anticipating that the value of land will increase, for example through the installation of roads or other infrastructure. This is connected to devolution since the county governments are trying to develop areas that have been forgotten previously. Another example is cases where certain people get to know that mines should be established in an area. They buy land in the same area and will be financially compensated for their property when the mines are built.

When urban people buy land somewhere else they convert it according to their own ideas, for example to estates or commercial farms. A lot of land is also left bare and what often appears as wasteland is unused private land bought for speculations. During urbanisation processes more people are going to buy land for speculation purposes. People who live in areas where the value of land increases will focus on the financial profit rather than the potential of the land for usage. Thus, many will want to sell their land because they get offered an amount of money that they have never owned before. Four of my respondents think that people will want to sell and move somewhere else, but this process would make them end up landless and in poverty. They will have to live different lifestyles, for example move to a town and find a job. In this context, one respondent is talking about a generational shift towards how land is

addressed. This shift becomes visible, for example, when the older generation is aiming to possess as much land as possible since this is perceived as an expression of wealth. The new generation, however, is using land in a different way and rather tends to sell access to land in order to buy a plot in a different area. The younger generation does not see the need in owning big sizes of land.

4.6. Landlessness

People who have no land at their display often see the forest lands and the national parks as the last refuge areas. There are many petitions at the parliament right now that ask to designate such public lands to the people. But my respondents think that when this land is given to them, people will subdivide, privatise and sell which in turn makes them landless again. People who cannot access land often move to towns to become watchmen or start other jobs to survive. One respondent mentions the example from Nairobi where people who live in slums today did own land but sold it for various reasons which made them landless.

Thus, one of my respondents thinks that the privatisation and commoditisation of land should go hand in hand with awareness raising about risks and put laws in place that make it more difficult for people to sell their land. If there is no awareness people will end up landless. Pastoralists, such as the Pokot, are seen as a group at risk because they tend to sell their private land, use the earned money until nothing is left and are forced to sustain in a different way.

Another respondent claims that landlessness is situation specific and suggests that today's claimed landlessness should be questioned. For example, there are people from Turkana who go to Kitale in Trans Nzoia County and claim that this is their ancestors' land. The new Constitution allows such claims for ancestral land but they have to be validated. There are government projects about development attempts, some of which include resettling and compensating people for their actual legitimate land. According to the respondent, the investigation of the genuineness of landlessness and the reasons for it involves a lot of work.

4.7. Conflicts

One of my respondents says that there is much discussions about women's land rights, user rights, land property, etc., and that the new Constitution clearly addresses the present situation in Kenya. The constitutional moment is a good moment but it can also be misused, particularly regarding land. Institutional intersections, such as customary or statutory authority and legality, give space to violation of land rights and overlapping claims. At the moment there is an information gap about land ownership, land sizes, and about the conditions on land, such as previously mentioned in the discussion about the need for land use planning. There is a lot of anonymity and anger attached to the land sector. As an example, someone living on a piece of land might be accused of being a squatter while the land has actually been sub-divided and the process of issuing a title deed for the same person is delayed.

People and communities have not internalised the constitutional organisation of ownership rights on the different tenure types of land. This is a big challenge, especially in areas like West Pokot, because where livelihoods are changing and pastoralism is moving towards more sedentary agriculture. It has brought in another dimension of life and brings about new conflicts about natural resources on community land.

Another challenge is that the constitution has recognised the rights of communities but at the same time has entrenched sustainable resource management, for example the protection of forests. In other words, while declaring the need of protecting a forest there is also the right of communities to claim that land when it is their ancestral heritage. Younger generations are reclaiming land, for example today registered as public land, that they argue was their ancestors' and legally belongs to them. Communities are taken to court on a daily basis because they are violating the laws of protected areas of which they believe are their ancestral lands. The NLC, thus, wants to undertake an audit about public land that has been broadly defined as to include forests. There is a lot of international pressure in terms of rights of indigenous people. One of my respondents thinks, though, that the term indigenous is problematic in terms of definition: who can be defined as indigenous? Rather, the terms minority or vulnerable community should be used in such contexts. She says that there is a lot of contestation at various levels out of a Constitution that needs to be understood and appreciated. The issues that people present are based on a lack of basic understanding that the Constitution has shifted and categorised land.

One respondent criticises the new Constitution and its focus on land issues. My respondent thinks that land issues cannot be solved through isolating them and making them appear as very big and urgent. By doing so, polarised stances are created in the society each defending their interests. Similar, another respondent thinks that the Constitution gave people the feeling that it is their time to claim their rights. Communities, especially those who have been silenced historically, now want a voice in the new Constitution and start claiming their rights, to solve 100 year old historical land injustices. Those claims can be too overwhelming to be solved, though. The NLC is, thus, also trying to reduce the appetite for land ownership and instead promote its optimal usage.

4.8. Future Research

The social, political and economic changes in the context of Kenya's new Constitution open up many areas of interest for future research. Substantial issues that should be included in research are questions of gender and land rights, as well as climate change.

Further research could look at the interaction among the different tenure types, for example where private and community land are next to each other and where agriculture and enclosures expand. It could also look at the transformation of different tenure types, including cases where it has not happened formally, for example group ranches that have been subdivided but that is not formally recognised; where there is a degree of access and rights for individuals or where community organisations express more control over land.

Understanding those dynamics would be important, particularly with a forward looking eye of what to do about tenure in a governance perspective. Even if the results are out after a CLB is written they can still inform the legislation when the Bill is turned into regulations and frameworks. It is important to analyse how the CLB should look like or later how its regulations should look like. How will it deal with questions where land is being converted and tenure types interacting? How can land use planning deal with such situations? What are the implications for county governments? A possible case study site in this context would be the border area between Laikipia, Isiolo, Samburu, West Pokot and Turkana in northern Kenya. In Laikipia all land is divided into private land or group ranches and government protected areas. Across the border there is mostly community land although with more community conservancies coming in. There is more open access of land in the north developing towards community tenure, more private tenure in the south but often with remaining governing community institutions. Hereby, questions about the interactions among tenure types, future developments regarding livestock access and land use issues arise. If land use planning and land registration is happening on a scale smaller than counties, what implications do they have and how do they relate to cross county issues?

A related issue regarding land tenure that would be interesting for further research is cases in which communities are claiming certain lands as their legitimate ancestral heritage. Such conflicts could be analysed from a local or community perspective as well as from a county or national governance perspective and could shed light on how such cases are dealt with by the NLC or later the CLB.

At the same time, one of my respondents emphasises the importance of implementation of research findings in the current situation in Kenya. People do research on issues to find sustainable solutions but the findings and results are often not taken into account in politics.

5. Conclusion

What becomes clear through my respondents' takes is that the issues around the constitution, the development of a new legislation and the formulation and implementation of policies, how institutions, participation and democracy are framed, highly interrelate with the land market, the future of community lands, livelihoods on them, landlessness as well as old and new conflicts.

Current concerns regarding the process of devolution, as illustrated by my respondents, address the potential opening of room for corruption. Further, there are questions about the capacity of devolution and to what extent it can be realised. Hereby, clearer institutions and frameworks should be implemented in order to increase the level of participation. Closely connected, the majority of my respondents see the newly established county governments as constituted by elite with their personal agenda which has no benefits but is rather contributing to contemporary land injustices. What poses further challenges to developing and implementing new land policies is the inefficient cooperation between the NLC and the Ministry of Lands whose functions have not been properly defined and thus often oppose each

other. Similar, the formulation of certain legislation creates contradictions when it is implemented. One case is the recognition of community rights to claim back land that has been dispossessed from them while proclaiming environmental protection of public lands that often are ancestral lands.

According to most of my respondents, as well as arguments in literature (FutureAgricultures, 2014), there is a need for a people-driven land reform process that enables sustainable land use, control and management. The remaining authority of elders, as can be found in West Pokot, implies that land management must recognise the local level governance structures. Elders become the voice of their community and they can shed light on ownership relations and local governance of natural resources within their community. However, the elders' role is expected to change through transformations towards a formal land registration regime that involves formal institutions. In areas like West Pokot changes in livelihoods will create new demands in terms of governance in order to address existing gaps in statutory as well as customary management. My respondents hereby suggest changes on the institutional levels. Whether these should be community representatives working on village levels, grassroots institutions that are facilitating cooperation between formal and traditional institutions, a formalisation of traditional institutions, or similar approaches, remains discussable. However, only by integrating communities through institutional changes land policies, such as the LUP or the CLB can be successfully undertaken and implemented. In terms of the CLB my respondents estimate that the way it is formulated and implemented will determine the future of pastoral community lands and thereby issues about shrinking land sizes and food security. In pastoralist systems it is especially important to analyse the relationship between different types of land tenure and land use as well as institutional arrangements and their transformations as can be observed in West Pokot. Such findings are much needed as they can directly feed into the formulation of policies in Kenya that should ensure sustainable environmental and social development on community lands.

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