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Beyond Land Titles: Pastoralists Find Security Amid Climate Change in Community Land Governance Mechanisms

A Case Study of How Stronger Local Community Land Governance Promotes the Climate Resilience of Local and Indigenous Communities in Kenya

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Key Messages

- Kenya's land laws, passed by colonial and post-colonial administrations, have replaced customary structures and practices that had served pastoralist communities well by enabling them to govern communal land effectively amid recurring droughts.

- The communities' heritage of robust resilience building practices is being eroded as more and more of their land is privatized or controlled by external interests. The new owners stand in the way of the communities' continued practice of their rich adaptation and resilience-building traditions.

- A land title is merely evidence of a community's land claim. Tenure security, however, is dependent on good governance at the community-level and making sure that community members understand the law – and how to use it – to protect their rights and lands.

- In the face of current challenges from outside interests, pastoralist communities require legal recognition of their customary tenure and local community land governance structures. With strong governance mechanisms at the community level, communities will not only have improved tenure security, but will also be able to effectively implement their climate resilience strategies. In particular they will be empowered to participate in environmental governance, such as in the carbon trading projects.

Between July 2011 and mid-2012, a severe drought affected the entire East African region. Said to be "the worst in 60 years," the drought caused a severe food crisis across Kenya, Somalia, Djibouti, and Ethiopia that threatened the livelihood of 9.5 million people. The lack of rain resulted in crop failure and the loss of as much as 40 to 60 percent of livestock in some areas.

Drought and extreme heat will continue unabated in the African continent. The State of the Climate in Africa 2020 estimates that by 2030, up to 118 million extremely poor people in Africa will bear the full force of these extreme weather events (WMO, 2020).

Pastoralists, who make their living from herding livestock to graze on outdoor lands, are particularly vulnerable to drought induced shocks. In Kenya, pastoralists who work on arid and semi-arid lands (ASALs) face even greater risks to their livelihood from drought. The ASALs are

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marginal lands for various reasons, including poor water supply or soil quality, extreme temperatures, steep slopes, and remoteness.

Kenya's ASALs make up over 80 percent of Kenya's total land area, and support about 10 million people or 20 percent of the population (IUCN, n.d.). This paper will focus on the pastoralist tribes of Kenya, including the Maasai, Samburu, Turkana, Somali, El Molo, Boran, Burji Dassenich, Gabbra, Orma, Sakuye, Boni, Wata, Yaaku, Daholo, Rendille, and Galla. Livestock accounts for 95 percent of the household income in these communities.

Seventy percent of the country's livestock is raised through pastoralism. The pastoral livestock sector (meat, milk, and other products) is estimated to be worth over a billion US Dollars annually, and supplies approximately 90 percent of all meat consumed in the country.

Despite the important role pastoralism plays in supporting local livelihoods, and in contributing to the national economy, its capacity to adapt to change is now under strain (Nori, et al., 2008). The quality, quantity and spatial distribution of natural pastures is mainly shaped by rainfall. Recurrent low rainfall will result in increasingly scarce, scattered, and unpredictable pastures (Bai and Bent, 2006). Severe recurrent drought periods will lead to a shortage of forage and water, causing cattle starvation and malnutrition.

Many years of surviving under such environmental pressures have taught pastoral and agro-pastoral communities to develop various forms of adaptation and coping strategies. Such strategies are guided and overseen by their customary institutions, whose priority is the proper use of the vast pastoral rangelands where these communities reside.

However, in order for the communities to effectively practice the adaptive and resilience-building strategies that they have developed and practiced, they need stronger land tenure security and the ability to govern their lands by themselves.

The current legal framework, which is defined by the Land Act of 2016, provides that unregistered community lands shall be held in trust by the county government (local government) until the communities are able to register and receive legal title to them. In the meantime, all land-related decisions would be made by the county authorities. Seven years after the Land Act was passed, only 44 communities out of potentially tens of thousands of communities across Kenya (number to be determined after registration) have been able to register their lands and receive titles. Lacking land titles, the other communities cannot revert to their traditional land management institutions, which the government regards as obsolete. This has contributed to the deterioration of local communities' governance systems and has thus undermined their resilience to the impacts of climate change.

Response by the Communities

Over time, the pastoral communities in Kenya have developed comprehensive and robust resilience strategies which reflect their rich local knowledge. These practices would be best implemented in the context where communities legally own their lands, and can govern, and make decisions based on their rich wealth of experience. Below is an articulation of some resilience strategies learned and employed by pastoral communities of Kenya.

- **Mobility and grazing strategies.** Mobility promotes pastoral resilience (Fratkin, 1997) because it allows pastoralists to track greener pastures and avoid forage supply scarcity associated with the ASAL environments. It is common for pastoralists to move their livestock to temporary camps that are closer to areas of underutilized pastures during times of stress (Moritz, et al., 2013). However, of late, this mobility has led to the escalation of disputes on access rights due to poor governance, and the lack of competent land administrative structures at the community level.
- **Social security networks.** Pastoral societies have social safety nets that are intricately connected to a system of obligations upheld through the exchange of gifts and loans (Dahl and Hjort, 1979). Livestock plays a crucial role in establishing entitlements, meaning that individuals without livestock are not entitled to access the resources of others (Sobania, 1979). These

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entitlements are a fundamental component of social security networks based on clan membership (e.g., Boran and Gabra in Northern Kenya) or stock associations (e.g., Rendille, Samburu, and Turkana). They come into play when livestock is lost due to factors like drought and raids, and to a lesser extent, when livestock succumbs to disease (Dahl and Hjort, 1979). Typically, shortages in milk are alleviated through stock loans from stock associates, who are often relatives and friends (Baxter, 1970; Dahl, 1979). Clan members collectively share the responsibility of transferring livestock from the more fortunate to the less fortunate, a practice sanctioned by the clan elders (Oba, 1994b; Turton, 1985). However, this system has gradually weakened over time due to the erosion of traditional land governance structures.

- **Gender perspectives.** Pastoralist communities acknowledge that women often fall victim to hunger and destitution. In pastoral communities and among the minority groups, women share relationships of bond friendship with one another, which are established through family contacts and initiated by the sharing of gifts. The provision of goods and services serves as “investments” that are reciprocated when the need arises. Households where women are absent lose access to social security networks that are controlled by other women. The abuse of culture and traditions due to the lack of strong governance mechanisms has sometimes compromised this practice among women.

- **Integration of pastoral production into the consumer and monetary market.** The incorporation of pastoral production into consumer and financial markets is becoming increasingly prominent. This trend involves economic diversification and aligning pastoral production with consumer and monetary markets. Consequently, the loss of livestock due to drought is no longer viewed merely as a source of meat for immediate consumption but is seen as a burden on both the local and national economy (Grandin et al., 1990). With effective management, pastoral communities have significant potential to generate greater economic advantages from their livestock.
- **Agro-pastoralism.** When food conditions are less severe, pastoralists dispose of their livestock according to a predetermined order. Initially, small stock is marketed, while large stocks are sold only when the need for cash becomes greater. When grain supplies decline, pastoralists may find themselves with cash that they cannot spend. To mitigate food shortages, they have, therefore, opted to diversify their economy by mixing grain production with livestock management. Farming is increasingly becoming practiced to make up for lost income from declining herds, but it is still not being developed as a substitute for pastoralism (Oba, 1990). Such development needs to be regulated under strong local governance mechanisms.
- **Livelihood diversification.** Pastoralists, such as Boran herders in Kenya, believe that engaging in other income-generating activities provides more options, given that livestock herding is becoming increasingly difficult. In pastoral contexts, where the human population increases too fast to allow each household to maintain a minimum number of herds, diversification into other livelihoods becomes inevitable (Brown, 1971).

Legal recognition of customary tenure and local community land governance structures will enable communities to employ these rich adaptation and resilient practices to their advantage. With insecure land tenure and inability to govern their lands, local communities cannot effectively benefit from their rich traditional knowledge on climate resilience. Without legal registration, communities have limited control over their land, and will continue to lose their lands to large scale land acquisition and bad deals.

Response by Authorities

Land Rights Disenfranchisement: The Legacy of Disempowering Laws

The erosion of customary structures and practices governing the use and ownership of Kenya's lands began with land laws crafted and enforced by the British colonial administration.

Until the 1900s, all land in Kenya was owned communally. People defined themselves according to their respective ethnic or user groups. These groups collectively managed and owned open, unfragmented lands that were ideal for supporting their livelihoods. Land and natural resources were governed by customs and oral rules that were passed on from one generation to the next. Communities developed comprehensive land management systems based on the availability of water and pasture, traditional ways of coping with diseases, relationships with neighboring communities, and socio-cultural activities and ceremonies. These customary systems of land management and governance were not perfect. For instance, women and other marginalized people were sometimes excluded from decision-making processes. In general, however, the systems functioned and effectively supported the communities' livelihoods.

Beginning in 1901, the colonial administrators passed different land and legal reforms to further their aspiration of taking control of Kenya's lands. These laws significantly impacted land management and governance, causing negative repercussions on livelihoods and land tenure security.

The **Crown Lands Ordinance (1902)** declared land, especially those inhabited by Kenya's indigenous people, as Crown Land, and classified them as "waste and unoccupied" land. The colonial administration allocated such lands to private individuals/entities or earmarked them for the construction of administrative facilities and public infrastructure.

The **Trust Lands Act (1939)** further entrenched the Crown Land Ordinance by declaring that all Crown Land would be held in trust by county councils, who were granted all power to allocate land and manage it on behalf of communities.

Land laws passed following Kenya's independence in 1963 did not reverse the disenfranchisement of communities of their land rights. The colonialists were simply replaced by the new political elite who used the chiefs and the local leadership to enrich themselves.

For example, **the Land (Group Representatives) Act of 1968** enabled small groups of representatives to own and manage pastoral land (called Group Ranches) on behalf of the larger community. The group ranch

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scheme was viewed as a mechanism to confine Kenya's pastoral people into demarcated pieces of land so that the rest of the lands could be allocated for other uses.

The unfortunate legacy of these laws has been the replacement of customary structures and practices by artificial formal structures put in place by the colonial and post-colonial administrations to control the ownership and governance of lands. These structures bore no connection to the communities' customs and social identities, leading to devastating effects. They undermined the customary structures and further weakened them. The county councils privatized and illegally allocated huge chunks of land to powerful individuals or entities. Group Ranches were characterized by massive corruption, as land was allocated without community participation, and power was abused by the ranch leaders.

Following Kenya's independence, many settlers left and handed over their lands to the new leaders. The people's dissatisfaction with the prevailing legal frameworks at the time prompted the formulation of Kenya's Land Policy of 2009. This Policy recognized and sought to protect customary rights to land.

The 2010 Constitution was informed by this land policy and thus provides for land rights. The Constitution formally recognizes three land tenure systems, namely: Freehold, Leasehold, and Customary. This was seen by many as a step towards recognizing collectively owned customary lands.

The 2010 Constitution also paved way for the development of legal and policy instruments related to land, including the Land Act of 2012, the National Land Commission — a land administrative body, and the Community Land Act of 2016. Since the enactment of the latter, however, only 44 community land titles have been issued — a miniscule number compared to potentially thousands of community land titles that should have been handed out in the last seven years of the law's implementation.

Community Land Act of 2016 — The Exception to the Rule?

In 2016, the Government of Kenya enacted the Community Land Act, a progressive new law that enables local communities to legally register and own their communal lands. Despite past challenges, this law provides an opportunity for strengthening community land tenure security and devolving land governance to local communities themselves. If implemented as designed, this law would reinforce indigenous practices that would help build robust climate-resilient livelihood systems based on communities' customary way of life.

The Act not only requires communities to acquire legal title over their lands but puts emphasis on the strengthening of local governance through the drafting of by-laws for the management of the land and natural resources; democratic elections of community land management committees; completion of inclusive community land registers listing the names of all members regardless of gender and social status; and, harmonizing boundaries and resolving all conflicts within and among communities.

However, it must be noted that thus far, only 44 community land titles have been issued under this law — a miniscule number compared to potentially thousands of community land titles that should have been handed out in the last seven years of the law's implementation.

Carbon Market: Emerging Hegemony Created by Climate Change

Since 2012, there has been growing discourse in Kenya regarding climate change and the carbon market. Today, there are about 23 different carbon credit projects being implemented in Kenya. The largest of these is the Northern Rangeland Trust (NRT)'s Carbon Project, which started in 2013 and will be implemented for 30 years.

The avowed goal of the project is to increase the overall forage cover of Kenya's ASALs through improved rangelands management, thus enhancing the carbon capture capacity of the ASALs. The NRT reports that the project has provided increased pasture and forage for herders' animals, hence improving livelihoods for more than 175,000 local people.

NRT works with 14 community conservancies, comprised of 27 communities covering 1.9 million hectares of Kenya's ASALs.

A board of trustees selected from the different communities manages the project.

The project's partners are as follows:

- **Northern Rangeland Trust** is the project administrator;
- **The Nature Conservancy** provides technical assistance and funds for the project's development;
- **Soils for the Future**, a soil science consulting firm, designed the project methodology, facilitated its verification through the VCS methodology, and continues to support the project by providing monitoring, reporting and technical advice; and,
- **Native** is a carbon project developer and offset provider that partners with leading brands to help them implement and scale new climate action.

The Nature Conservancy, Soils for the Future, and Native also take on verification and marketing roles.

Between 2013 and 2020, the project reportedly generated a total of 7,379,523 carbon credits. In 2022, NRT raised 14.6 million US Dollars

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through carbon credit sales, out of which NRT is supposed to have paid 324,000 US Dollars – the first of three such payments from the sale of carbon credits — to each of the 14 community conservancies. Companies such as Netflix, Meta and NatWest have reportedly purchased carbon credits from the project.

NRT's revenue is divided as follows: communities receive 30 percent; NRT retains 20 percent as its administration fee, while the other partners doing verification and ecological monitoring receive 50 percent.

NRT approves how communities use their 30 percent share of the revenue. Communities are also expected to contribute from their 30 percent share towards the administration of the carbon project, including by paying the salaries of conservancy managers and rangers.

This begs the question: Since the NRT is the project administrator, why then are the communities being required to bear part of the administration costs while the NRT retains in full its 20 percent cut?

The NRT project is regarded as "a darling of carbon market supporters," winning a series of awards at the 27th Conference of Parties of the UN

Framework Convention on Climate Change (UNFCC) in 2022, where it was hailed as “exemplary” by Kenyan President William Ruto.

On the other hand, a number of questions have been raised about the project. The fact that many community members do not understand what carbon credits are and how the carbon market operates raises concerns, including in regard to their ability to participate in the project’s governance. Secondly, although the communities acknowledge that the proceeds of the project have been used for laudable purposes, such as the construction of schools, dispensaries, etc., it is not clear how the communities’ 30 percent share was decided and if the communities were consulted and agreed to it. Thirdly, observers wonder if the 30 percent cut that the communities receive of the project revenue is commensurate to the land they have set aside for the project.

On 16 March 2023, the advocacy group, Survival International, reported that the carbon offset project was altering long-standing indigenous herding practices. It also claimed that the project could not accurately account for how much carbon it was removing from the atmosphere. It further asked questions about the involvement of local communities in the governance of the project. Verra, the carbon offset certifier, suspended the project by end of March 2023 and initiated a “quality control review” of the project’s claim of storing carbon by managing indigenous livestock grazing routes.

The apparent profitability of Kenya’s carbon projects has prompted the government to develop a national legal regulatory framework. Two related bills are currently being debated in the Parliament: The Climate Change (Amendment) Bill of 2023 and The Carbon Credit Trading Bill of 2023, with the latter being in the 11th draft stage.

Among the perceived defects of the bills are, first, they tend to centralize the governance of carbon credit trading. Second, they do not ensure Free, Prior and Informed Consent (FPIC) from the communities. Third, they do not clearly define the requirements for benefit-sharing. Fourth, by seeking to set up a national registry and requiring an ESIA and community development agreement for all carbon trading projects, the government is anticipated to retain a percentage of all income from carbon trading.

Nevertheless, these bills are expected to be passed and assented to this year given the government’s keen interest in climate change mitigation, not to mention the income from carbon sales.

Recommendations

Namati has developed one of the first guidelines geared towards realizing community land tenure security in Kenya while strengthening local-led climate resilience strategies. The guidelines provide detailed recommendations on how local communities can be supported to leverage the implementation of Kenya’s Community Land Act (2016) to address the climate change challenge. These guidelines do not seek to replace the traditional/customary climate change resilience practices that the communities have adopted over time, but rather to build on, strengthen, and enshrine these in the local community governance mechanism.

The process that communities must undergo to fulfill the requirements of the Community Land Act of 2016 offers a unique opportunity and entry point for integrating and mainstreaming resilience enhancing processes. The expected outcome is two-fold: increased land tenure security and strengthened climate resilience strategies by local communities.

However, while the Community Land Act 2016 gives communities a path to increase their land tenure security, strategies must be put in place to avoid the negative impacts of previous efforts to register community land in Kenya, such as the group ranch scheme which instead enabled the trustees to entrench themselves in power.

Legal empowerment – or strengthening the capacity of all people to exercise their rights, either as individuals or as members of a community -- is an approach that has had great success in supporting communities to increase their tenure security, while also strengthening land governance, inclusion, and accountability. At its core, legal

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empowerment is about grassroots justice - ensuring that the law is not confined to books or courtrooms, but rather is available and meaningful to ordinary people.

Experience has shown that a title is merely evidence of a community's land claim. Tenure security, however, is dependent on good governance at the community-level and ensuring that community members understand the law – and how to use it – to protect their rights and lands. With strong governance mechanisms at the community level, communities will not only have improved tenure security, but they will also be able to effectively implement their climate resilience strategies. In particular, they will be empowered to participate in environmental governance, such as in the carbon trading projects. ■

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