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Will community rights secure pastoralists' access to land? The Community Land Act in Kenya and its implications for Samburu pastoralists

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ABSTRACT

Pastoralists depend on access to communal rangelands but ongoing privatisation of land threatens their access. Further, globally, proponents of pastoralism call for state-sanctioned communal land rights to secure pastoralists access. In Kenya, the government has enacted the Community Land Act to secure communal land rights. This article examines how the implementation of this law affects pastoralists access to communal rangelands in Samburu county. Contrary to expectations, the legislation undermines pastoralists' customary institutions and their authority in relation to land. It also speeds up subdivision of communal lands into private individual plots. This constrains rather than secures pastoralists access to communal rangelands.



KEYWORDS

Kenya; land rights; communal land; pastoralists; access to land; pastoralism

Introduction

All over the world, pastoralists' mode of production involves migrating with livestock over long distances in search of pasture and water. Pastoralists' routes change from year to year and from one season to the next depending on the weather and the changing climate. It is therefore crucial to pastoralists' subsistence and resilience that they have secure access to large tracts of land (Lund 2000; Milgroom and Ribot 2020). However, many factors threaten pastoralists' access to such land, including strong current trends toward individual private landholdings.

Historically, many scholars and practitioners have considered state-recognized private individual property the best model for securing access to and sustainable management of land (Hardin 1968; de Soto 2000). The main argument, which is rooted in neoliberal thinking, is that private property gives individuals full control over land, including the right to buy and sell it as a commodity, and thereby motivates them to invest in land, maximizing its productivity, value, and profitability (Mitchell 2005). This is in contrast to an 'open access situation' where no one owns and manages the resource, and everybody exploits it until nothing is left. Taking herders' use of land for pasture as an example, Hardin (1968) famously called this 'the tragedy of the commons.' The tragedy-of-the-commons

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argument has since often played a central role in the criticism of the pastoralist mode of production.

Many scholars argue, on the contrary, that pastoralists all over the world have managed common property sustainably for centuries (Goetter and Neudert 2016; Behnke 2018). They tend to see pastoralists' systems for utilizing and managing common lands and the ways in which they cope with uncertainties as innovative and as a source of inspiration for others, especially in times of climate change (Scoones 2021). They argue that sedentary farming, fenced property, and fixed boundaries, which are central features of private individualized property, do not fit well with pastoralists' mobility (Scoones 1994; Conway 2009; Pas Schrijver 2019). Globally, there are now calls for state-recognized communal land rights to protect pastoralists and their (sustainable) mode of production from external pressure on lands they as communities have traditionally managed (Kameri-Mbote et al. 2013; GoK 2010).¹

In Kenya, as elsewhere, many different factors threaten pastoralists' access to land for pasture and mobility. These factors include large-scale state appropriation of land for conservation, agriculture, the building of roads and other infrastructure (Lind, Okenwa, and Scoones 2020; Galaty 2013), increasing competition over access to land due to population increase, and the impact of climate change (Mwangi and Ostrom 2009; Opiyo, Wasonga, and Nyangito 2014). Climate change has caused new and more unforeseeable weather patterns, such as prolonged droughts and erratic rainfalls, forcing pastoralists to follow new patterns of migration. This, too, cause increasing competition for land among the pastoralists themselves and new conflicts with sedentary farmers (Thornton et al. 2007; IPCC 2015). Another main factor is the on-going processes of privatization and individualization of land. In Kenya, this happens through subdivision and transformation of rangelands into individually owned plots and by handing over large tracts of land to individual owners (Peters 2002). These processes are sometimes justified by the tragedy-of-the-commons argument, which still deeply influences how some government institutions think about land management in pastoral areas.²

All these challenges have pushed to the fore the debate about how best to secure and protect pastoralists land rights (Odote, Hassan, and Mbarak 2021). In Kenya, this debate was at its height after the post-election violence in 2007. Much of the violence is linked to long-standing disputes about land amplified by instigation from leaders seeking political gains (Veit 2011). With the 2010 Constitution, which came into existence in the aftermath of the 2007 crisis, and the Community Land Act of 2016, the government for the first time in Kenya's history formally recognized communities' rights to hold land. Alden Wily (2018) called this legislation the most supportive of community land rights in Africa. The Government of Kenya (GoK) itself has termed the legislation as a move towards securing the rights of communities and safeguarding their livelihoods (GoK 2016).

¹UN (2007) speaks about indigenous peoples. The declaration defines indigenous peoples by different criteria, the most important being that they identify as such. Not all pastoralists identify as indigenous peoples. Kenya's 2010 Constitution does not apply the concept 'indigenous,' but it does include minorities and marginalized communities. This category includes pastoralists (GoK 2010). In 2006, the African Commission on Human and Peoples Rights identified the Turkana, Samburu, Maasai, Rendille and El Molo people in Kenya as indigenous peoples (<https://old.danwatch.dk/undersogelseskapitel/indigenous-peoples-or-not/>).

²Samburu County Government (2018, 9) states in its Second County Integrated Development Plan: 'To enhance productivity and avoid "tragedy of common," there is need to sustainably subdivide group ranches of high potential zones so that individuals can manage their portions.'

The current article contributes to the debate about what state recognition of communal land rights implies for pastoralists' access to land, and therefore for their subsistence and resilience. We understand 'access to land' in accordance with Ribot and Peluso (2003), as the ability to derive benefits from it. By benefits, we mean all kinds of resources and services that come from land, such as pasture and water, but it could also be agricultural products, profits from buying and selling land, or provision of space for housing (Bromley 1992). By focusing on the ability to access land and benefits rather than on rights, we, as Ribot and Peluso (2003), want to bring attention 'to the wider range of social relationships that can constrain or enable people to benefit from resources' without focusing on property rights alone. In this regard, we examine whether the formalization of common property rights secures pastoralists' access to land or whether it leads to new forms of exclusion (de Soto 2000; Kabubo-Mariara 2005; Coello 2017).

Our article draws on primary data from field research conducted for approximately three months in July, November, and December 2019 in Samburu County, Kenya. Samburu County is located in the northern part of the Great Rift Valley within both an extensive arid and semi-arid rangelands region and with sections of mountainous highlands and forest cover. Before proceeding to the results of our fieldwork in Samburu, we first position our study by looking at theory and debates about access to land and the importance of state recognition through reforms of formal law. Second, we contextualize our study empirically by taking a brief look at the historical background of land management in Kenya in general and Samburu in particular and a closer look at the current legal framework for governing community land in Kenya. This framework mainly comprises the 2010 Constitution, the Community Land Act of 2016, and the Community Land Regulations of 2017. Third, we explain the current land management system in Samburu and then proceed to the results. We inquire into how the new laws affect customary pastoralist institutions and land governance practices in Samburu, how the law affects the participation of pastoralists in land management decisions, the extent to which the legislative framework succeeds in securing pastoralists' access to land, and in particular communal rangeland. This carries us on to the conclusion.

Theory and debates about access to land and state recognition through reforms of formal law

As mentioned, Hardin's influential argument about the tragedy of the commons has elicited much scholarly debate. Ostrom (2000) disagreed and argued that 'open access' is a situation that rarely exists in reality. Moreover, she observed that many scholars who refer to the tragedy of the commons mistakenly assume that community-managed land is open access (Ostrom 2000). Migot-Adholla, Place, and Oluoch-Kosura (1993) argue that community members utilize community land in many ways and that they continuously negotiate and renegotiate access. Further, both sets of authors argue that community land is usually subject to regulation by the communities' institutions and that these institutions are likely to ensure both sustainability and communities' well-being. In most pastoralist societies in Kenya, for instance, the authority to regulate community land vests in councils of elders (Okoth-Ogendo 1991). According to Bruce and Migot-Adholla (1994), these institutions have facilitated stable access to land for generations. Some scholars, moreover, have emphasized the strength and complexity of pastoralists' tenure

systems and the ability to cope with uncertainties (Moritz 2016; Robinson 2019; Scoones 2021).

The debates about the commons have shaped international as well as national policies on access to land. Internationally, much attention has been paid to legal recognition of communal as opposed to individual private property rights, since many assume that by transferring ownership rights to well-defined communities it is possible to avoid the worst pitfalls of Hardin's open access, while still supporting pastoralists' way of living. In Kenya, as in the rest of Africa, the debate about the commons has affected many aspects of land and land policies. This includes the role of the state in the allocation and appropriation of land, different approaches adopted by communities in the control and utilization of natural resources, property rights, and the challenge of landlessness (Bryant 1998; Borrás and Franco 2013; Yunan 2020). Most obvious, the arguments of the commons have affected the implementation of land policies in pastoralist areas (Kameri-Mbote 2006; Samburu County Government 2018), in attempts to legally recognize pastoralist communities' access to land, and through the growing interest in and attention to private and individual land (Galaty 1992; Mwangi 2007; GoK 2016).

There is a persistent belief that improved land security and changes in who can access land and how, as a minimum require reforms of relevant legislation and cannot be left to administrative fiat (Tuma 1965; Feder and Feeny 1991). Berry (1993) argues, however, that the law is not static but subject to interpretation, adaptation, and revision depending on the political, social, and economic context. Hence, the enactment and implementation of reformed land laws maybe just one condition for viable improvements. This is in accordance with Ribot and Peluso (2003) who, as mentioned, argue that a larger array of social and political-economic institutions and relations, including state recognition, shape how benefits flow (Ribot and Peluso 2003). MacPherson (1999) echoes this view in associating property with enforceable claims – backed up not only formally by the state but also by informal institutions and powers.

Community land differs from individual land in that it is subject to multiple usages by different members of a community. In pastoralist societies, usages may differ between men and women, between different clans, rich and poor. Communities and community members therefore continuously negotiate their access to land, and community land is subject to regulation whether by government institutions or communities' institutions. Ghani (1995) and Ribot and Peluso (2003) conceptualize access as 'bundles of power' as opposed to 'bundles of rights' (Maine 1917). Bundles of power constitute the material, cultural, economic, and socio-political strands within the 'bundles' and 'webs' of powers that configure resource access (Ribot and Peluso 2003). These avenues of access highlight that access to natural resources is not equal for all. Those in positions of authority have easier access. Others may have limited or no access. In understanding what determines access to land, it is, therefore, necessary to look not only at statutory laws but also at informal institutions and social dynamics (Sikor and Lund 2009). Ostrom (2009) and Elmhirst (2011) remind us that informal rules change over time as they are constantly negotiated and adjusted to specific social, political, and economic situations and therefore must also be understood in the light of their historical trajectories. In the following section, we will therefore take a brief look at the historical background of the current land management system in Kenya and Samburu.

A brief history of land governance in Kenya and Samburu

Throughout Kenya's colonial and post-colonial period, changing land laws and land policies have affected Samburus' and other pastoralists' lives (Sanford 1983; Hughes 2006; Lesorogol 2008; Pas Schrijver 2019; Simpson and Waweru 2021). The colonial government did not directly alienate the Samburu, as it did in some cases with the Maasai pastoralists (Waller 1976; Hughes 2006), but its land policies and land laws such as the Grazing Control Regulations of 1936 affected the Samburu in many other ways (Spencer 1973; Lesorogol 2008).

For instance, the colonial government established ethnically defined territories in northern Kenya districts including in areas occupied by the Samburu. The establishment of these territories affected the Samburu by restricting the movement of people and animals beyond these territories (Tarus 2004; Simpson and Waweru 2021). Pastoralists, such as Samburu people, had often moved across district borders to the neighboring plains during droughts. Furthermore, the colonial settlers, who now occupied land in some of the areas neighboring Samburu, were also interested in keeping Samburu people out, and thus in limiting their mobility towards the South however sporadic it was (Waweru 2022).

The colonial government did not find the then Samburu District economically valuable and therefore preferred 'government on the cheap' (Simpson and Waweru 2021). In other words, there were no substantial public investments in the district. The effect was the marginalization of Samburu and other communities in Northern Kenya. The marginalization continued after independence (Markakis 1987), as the new government also did not invest in any substantial programs for education, social amenities, or development (Turton 1972).

After independence, the government did institute a land reform program for all of Kenya. The Land (Group Representatives) Act of 1968 provided for communities to own 'group ranches.' The group ranches consisted of large tracts of collectively titled rangeland held on behalf of the communities by an elected community representative under the authority of local government (GoK 1968). The declared objective was to secure pastoralists' access to land through communal ownership (Sanford 1983). Some scholars have argued, however, that the real purpose was to isolate pastoralists to prevent their livestock from spreading diseases and to prevent them and their cattle from 'invading' cultivated lands (Kimani and Pickard 1998; Fratkin 2001).

In the subsequent years, some group ranches were subdivided to create individual private parcels (Mwangi and Dohrn 2008). Scott (2017) and Lenaola, Jenner, and Witchert (1996) suggest that subdivisions occurred because the government favored private individual ownership. Lesorogol (2008) suggests that younger and educated community members had embraced private individual property values from neighboring areas. Yet other scholars argue that it was in particular group ranches with high-value fertile land suitable for cultivation, which preferred to subdivide (Sanford 1983). No matter the motive, subdivision often resulted in some of the former group ranch members selling off their newly acquired individual land to raise cash for various reasons. The result of subdivision was that communities lost access to land (Rutten 1992; Mwangi 2007; Galaty 2013).

There were also challenges for some of the remaining group ranches. Those in a position of power could accumulate individually owned land by manipulating the processes

of group ranch registration (Fratkin 1994 ; Okumu et al. 2017), and if it was in the interest of the county councils and the Commissioner of Lands, they could parcel out land to wealthy local elites (Kimani and Pickard 1998; Klopp 2000). At the national level, the president and the government parceled out community land as patronage to people, who were loyal to them and the ruling party (Kanyinga 1998). In other words, the Group Representative's Act could not always guard pastoralists against loss of land (Graham 1988; Sperling and Galaty 1990). Nor could it fully serve its purpose of enhancing livestock production, safeguarding land rights, and increasing economic contributions (GoK 1968; Mwangi 2009). At the same time, some local people used the law to block corrupt allocations by filing court cases, sometimes with successful outcomes, sometimes not (Kanyinga 1998). All this contributed to politicizing land rights and land issues.

Kenya began the struggle for multiparty democracy in the early 1990s and throughout the decade, the demands for land justice intensified and, in many instances, led to political violence and eviction of communities from certain areas and ethnicities (Kimenyi and Njunga 2005; Boone 2012). In 2003, a new government came into power and set out to address the many issues surrounding land and to meet the strong public demands for returning illegally acquired land to its rightful owners (GoK 2003). The government established the Commission of Inquiry into Illegal/Irregular Allocation of Land, the Ndung'u commission. Its mandate was to investigate the illegal allocations of land and recommend solutions to the government (GoK 2003). The Ndung'u commission recommended that all illegally acquired public land be returned to the government. The commission also recommended the establishment of a land commission and harmonization of land laws in Kenya (GoK 2003).

In 2009, following a period of consultations and collection of views from the public, the government produced a national land policy. This policy provided a framework to address the critical issues of land administration, access to land, and historical injustices. The policy recognized community land rights and identified measures to resolve the problems of group ranches (GoK 2009). It provided for documenting and mapping existing forms of communal land tenure, whether customary or contemporary, rural or urban, in consultation with the affected groups in order to 'incorporate them into broad principles that will facilitate the orderly evolution of community land law' (GoK 2009). It considered that land users, including women, have multiple interests, and aimed at resolving the problem of illegally acquired land (GoK 2016). The policy was thus a result of a long struggle for land reforms and land justice. This struggle also shaped the constitutional reforms that came about in 2010 and the related current legal framework for governing community land in Kenya (Cottrell and Ghai 2007; Lind 2018).

The current legal framework for governing community land in Kenya

The Constitution of Kenya (2010) devotes an entire chapter to land and environment (GoK 2010: Chapter Five), and for the first time in the history of Kenya, the Constitution recognizes communities' rights to own land. Thus, Article 61 states that all land in Kenya 'belongs to the people of Kenya collectively as a nation, as communities, and as individuals.' The Constitution, moreover, categorizes all land in Kenya into public land, private land, and community land. Public land is land held by the state or public institutions

and 'vested in the national government to be held in trust for the people of Kenya.' Private land is held by a person either under freehold (owned privately by individuals) or under leasehold by private entities organizations or individuals (GoK 2010, 61). Community land is the land that 'shall vest in and be held by communities' (GoK 2010, Article 63).

'The Fourth Schedule of the Constitution' establishes two levels of government: the national and the county level. The object of devolved government includes giving powers of self-governance to the people and protecting and promoting the rights and interests of marginalized communities and minorities. The county governments are responsible for land surveys and mapping, and boundaries and fencing. The national government is responsible for policymaking, which the county governments implement. The Constitution also requires the county governments to coordinate the participation of communities in governance and to build their capacity to participate effectively in community affairs.

The Constitution lays the foundation of a devolved institutional framework for the management of community land and delineates national and county government responsibilities. Based on 'democratic principles and the separation of powers,' it provides for County Governments to hold unregistered community land in trust on behalf of the communities, and County Assemblies as the elected legislative arm of the County Governments (GoK 2010, Article 63 and Chapter 11). Finally, the Constitution makes the Parliament responsible for enacting legislation to provide for the rights of individual and collective members of each community in relation to community land (GoK 2010, Article 63).

The Community Land Act of 2016 gives effect to the Constitution's Article 63 by providing definition, recognition, protection, registration, and management and administration of community land rights (GoK 2016). The Act provides definitions for core concepts such as community, community land, and customary land rights. It defines a *community* as 'a consciously distinct and organized group of users of community land, who are Kenyan citizens' that share attributes such as ancestry, a unique mode of livelihood, socio-economic or other similar common interests, geographical or ecological space, or ethnicity. It defines *community land* as land held or used by specific communities in undivided shares; land lawfully held in trust by county governments, and as land declared as community land under any law. *Customary land rights* are rights conferred by or derived from African customary law, customs, or practices provided such rights 'are not inconsistent with the Constitution or any written law' (GoK 2016).

The Community Land Act provides recognition of communities' rights to hold land but also recognizes customary tenure systems as equal to other tenure systems.³ Further, it recognizes customary law as applicable in solving disputes. Thus, any court or dispute resolution mechanism can apply 'customary law prevailing in the area of jurisdiction of the parties of a dispute' as long as it is not in contradiction with the Constitution (GoK 2016). The recognition of community land and customary law is particularly relevant for pastoralists because their mode of production historically has been built on undivided shares of land and customary institutions. In an unprecedented manner, the Community Land Act

³Customary land rights 'shall be recognized, adjudicated for and documented for purposes of registration in accordance with this Act and any other written Law' (article 4.2); 'customary land rights, including those held in common shall have equal force and effect in law with freehold or leasehold rights acquired through allocation, registration or transfer' (5.3).

thus, *de jure*, opens for pastoralists and other groups to hold, use, and transfer land under their customary institutions and for using these institutions to protect access to land (see also Alden Wily 2018).⁴

The Community Land Act seeks to provide for the protection of communities' land rights in various ways. Most importantly, it provides for adjudication and registration of community land. The law does not explicitly mention the former group ranch system, but it implies that communities must register their land, regardless of whether or not it formerly had status as a registered group ranch or was unregistered land. Thus, in practice, the legislation transforms group ranches into community land (see also GoK 2016). Taken together, the Constitution and the Community Land Act seek to protect communities' land rights by limiting the discretionary powers of the state over community land. Thus, as mentioned, the Constitution transfers authority over unregistered community land from the nation-state to the County Governments. Section 5 of the Act determines that the state can acquire a person's or a group of persons' land only if it is for a legal public purpose and if the state provides prompt and just compensation to the community.

Finally, the law provides for the management and administration of community land. Especially, it lays out the roles and responsibilities of County Governments as trustees of unregistered community land (Section 6). Moreover, it establishes the Community Assemblies and Community Land Management Committees. The Community Assembly consists of all adult members of a community, including men and women. The Community Land Management Committee consists of seven to 15 members elected by the Community Assembly of whom, according to the Constitution, no more than two-thirds must be of the same gender (GoK 2016). The committee manages the day-to-day land-related functions of the community (GoK 2016). In many pastoralist communities, the councils of elders have traditionally performed these functions. The councils have most often consisted exclusively of men (GoK 2009; Lengoiboni, Molen, and Bregt 2011). In this sense, the Community Land Act replaces traditional land management systems by introducing new, more inclusive ones. Furthermore, the law formally gives equal rights to women and young adults to co-own and access community land (GoK 2016, 30; Boone et al. 2019).

In 2017, Kenya enacted the Community Land Regulations to operationalize the Community Land Act. These regulations place even more emphasis on inclusion by explicitly referring to the 'not more than two-thirds' gender rule, and by referring to other groups, such as young people. Thus, it is decreed: 'The assembly shall by way of secret ballot, or any other method approved by the Community Assembly, elect between seven and 15 members into the management committee, taking into account geographical considerations, cultural diversity, the two-thirds gender rule, special interests, youth and persons with disabilities' (GOK 2017). This regulation is also more explicit and detailed on how to transfer responsibility from the group representatives (who had the formal responsibility for land belonging to the group ranches) to the community assemblies, but neither the Constitution nor the Community Land

⁴The Community Land Act does not explicitly mention pastoralist groups, but the Constitution mentions pastoralists under the category of marginalized people (GoK 2010, Article 260).

Act or its regulations has explicit provisions on the processes according to which land should be subdivided.

Finally, the Constitution and the Community Land Act set out the roles and responsibilities of different other institutions in implementing the law. The national Ministry of Lands and Physical Planning oversees the adjudication and registration process in the county, and it stations national government officers in the counties for this purpose. At the national level, there is also the office of the National Land Commission. The commission's mandate is to manage public land on behalf of the national and county governments as well as safeguard public land when communities convert the land into individual parcels (GoK 2010). At the county government level, there is a county executive committee responsible for land matters at the local level, including being the trustee of community land until such land is fully registered (GoK 2016). In the following section, we will look at how the current land governance system works at the county level taking Samburu as an example.

The current land governance system in Samburu

As mentioned, the Constitution divides all land in Kenya into public land, private land, and community land. According to the Samburu County Government (2018), public land constitutes 16 percent of Samburu's total area. It is not apparent from available public records exactly how much land is currently under private ownership (individual leasehold), but most of it is located within the urban areas. Community land comprises registered and unregistered land and overlaps with the group ranches, which are now dissolving. According to Samburu County Government (2018), there are 37–43 group ranches of varying sizes occupying 40 percent of Samburu's total area.⁵ The group ranches have around 27,000 registered members, approximately 8 per cent of the total population. Unregistered community land is land that the county government holds in trust, and which local people use for pasture and other purposes. The county government (2018) estimates that 8,453 km² or 40 percent of all land in Samburu is unregistered and that most of it is community land. The rest is private.

The county government purposed to issue title deeds to a representative from each group ranch under the previous land law, but the process was not completed. Only a few areas around the main towns of Mararal and Kisima as well as Porro in Samburu West have completed registration and titling. Very few people have title deeds.⁶ The County Government reports that one of the main challenges in managing land has been disagreements among different clans from the same or adjacent group ranches. The conflicts center on boundary disputes and who should be bona fide members (Samburu County Government 2018).⁷

⁵The records of the county government on the actual number of group ranches have not been updated. Interviews from fieldwork in 2022 shows that the County Government now operates with a total number of 50 group ranches in Samburu.

⁶Interview with a county land official (male) in Samburu County, November 2019.

⁷According to Samburu County Government (2018) there are 'approximately 107,000 individuals (13,400 households)' who are not registered as group ranch members. These could be landless especially because registered members are the only ones allocated parcels of land. Those not registered are in effect without 'ownership' of land. It is not clear from the report, however, who these individuals or households are, or what their general situation is. There is, in other words, not much knowledge about how many households in Samburu are landless.

As mentioned, the Community Land Act and the regulations mandate national and county level government institutions to manage the process of converting the group ranches into community land (GoK 2016). However, the allocation of responsibilities among these institutions is far from always clear. A presentation of our fieldwork findings, including the role these government institutions play in implementing the Community Land Act and the implications to pastoralists' access to land, follow in the next sections.

Government institutions and the Community Land Act in Samburu

When asked about the role of government institutions in the process of registering community land, some respondents said they did not know what the county government should do to assist the local communities. Some said that national government officers at the county level had undertaken land planning and adjudication while educating the community members. However, they found that the national government had not collaborated with the communities. Many did not know what to expect. It was not clear to them what processes they had to follow in order to convert the group ranches into community land or subdivide it. One respondent said, 'We are in the dark, we do not know to which office we should present our land papers.' Others said they were reluctant to convert their community land to other uses because they had heard how some communities had lost land to government officers and corrupt individuals. They preferred not to hand over their documents to any office. This, on its own, is a pointer to the communities' lack of knowledge about and mistrust of the Community Land Act.⁸

Respondents from the local communities complained that they had inadequate knowledge about the relevant laws. Some reported that national government officials had assembled people and told them that the law was about the subdivision of land.⁹ Others said that civil society groups had organized workshops to educate community members, that the emphasis of these groups was different from that of the government officials, and that these awareness campaigns ran only for a short time. As a result, there was limited information and contradictory knowledge about the process, and very few community members were aware of the legal requirements for registering community land. This provided a basis for mistrust to grow in the process.

Institutional incoherence added to the challenges. A community leader observed that the National Ministry of Lands and the county government office responsible for land had disjoint ideas on how to proceed. It was therefore difficult for him to decide what decision would best promote the well-being of pastoralists.¹⁰ Despite pastoralists moving from place to place with their animals in search of water and pasture, there were no mobile outreach units to serve populations wherever they were and educate them on the requirements of the new law. Consequently, the different interviewed community members and state officials had different interpretations of the law, partly depending on what suited them.

⁸Interviews with community members (male) July and November 2019.

⁹Community member (male) in a focus group discussion on 2 November 2019.

¹⁰Interview with a community leader (male) in Samburu County, November 2019.

Land officials working both for the national and the county government saw this ambiguity as a major hurdle for creating awareness in the communities and called for a clear road map for how to implement the law. The county government officials blamed the national government for failure to provide directions on the implementation process and for starting the process without reference to the county officials.¹¹ The national government officials on their side blamed the county government for hijacking the process, e.g. by paying private companies for doing land surveys, a task that the national government officials considered belonged to their own office (GoK 2010).¹² Furthermore, land officials at both levels considered the lack of institutional clarity a major constraint for the communities to convert their land into community land. Especially, they thought the communities couldn't comply with the new law's short deadline of one year for transforming the land. These dynamics between the national and devolved governments have also brought to the fore the inherent power dynamics which affect effective operation (Achiba and Lengoiboni 2020).

Additionally, some community members believed that the law aimed at abolishing communal land. Others would dispute this view. One community member even said that the law did not apply to pastoralists and belonged to the people of the city, that is, those who live in Nairobi.¹³ The respondent said, 'We have our own rules and will not be bothered with the new land law anyway.'¹⁴ The description of the law as the 'law of Nairobi people' shows a clear gap in the knowledge about the law and its implementation.

The law declares to protect community land rights, but our interviews indicate that a lack of coordination between different government institutions, as well as between government institutions and civil society organizations, results in conflicting information and mistrust and that this challenges the purpose of the law. As the next section will show, our interviews also indicate that there is a major hurdle in relation to existing customary institutions.

The Community Land Act and customary institutions

As mentioned, the Community Land Act formally recognizes the existence of customary institutions by stating that customary tenure systems are equal to other tenure systems and that customary law, to a certain extent, is as applicable in solving disputes. Nevertheless, as one of our respondents observed, the Community Land Act does not specify any role for the pastoralist institutions that have governed access to land for generations and still are present and active, namely the council of elders.¹⁵ The Community Land Act introduces a new institution, the Community Land Management Committee, which requires the election of representatives (GoK 2016). The elected committee makes decisions about land on behalf of the community. Paralleling the council of elders with a new institution without clarifying roles, however, is likely to result in disputes and conflicts

¹¹Interview with a county land official (male) in Samburu County, December 2019.

¹²Interview with a national land official (male) in Samburu County, December 2019.

¹³Nairobi is the capital city of Kenya and the use of the words 'Nairobi laws' represents how people in rural communities feel alienated from the laws.

¹⁴Community member (male), focus group discussion in Samburu County, November 2019.

¹⁵Community member (male) in a focus group discussion in Samburu County, November 2019.

between these two groups of leaders. In principle, all community members, including the council of elders, can challenge the committee's decisions through the Kenyan court system. The significance of this may be relatively limited, however, because pastoralists who take such cases to court must travel hundreds of kilometers to the neighboring towns of Nyahuru and Nanyuki, and because hiring lawyers is expensive and unaffordable for many of them.¹⁶

Elders in the communities directly told us that they felt sidelined in the process, and they complained, for instance, that land officials rarely came to them to inform them about decisions or to seek their opinion on land matters.¹⁷ Other community members agreed and found that formal laws and modern institutional arrangements ignore the elders.¹⁸

The new requirement for all community members to participate in the annual general assembly meeting was also not popular. Some of the elderly respondents felt that such a process would disregard the existing customary practices, and constrain access to land for all.¹⁹ In addition to this, some community members noted that the qualifications of the representatives included education or the ability to read and write, given the demands of their new role to keep records and minutes of the community assembly meetings. They expected this change to result in the election of leaders who would not necessarily enjoy community respect, and who would not be custodians of community values.²⁰ They did not consider young people as custodians of community norms, practices, and institutions. They saw the law as imposing a new group of leaders. Other members of the community felt that Community Land Act implementation ignored the important function of negotiating access during droughts and resolving conflicts.²¹ Neglecting the role of elders, carried the risk of jeopardizing the patterns of reciprocity that traditionally have allowed pastoralists to access other grazing and watering areas during droughts.

The implementation of the legislation on community land caused tensions not only between government and customary institutions but also within the community. The community members disagreed on whether or not to subdivide their group ranch or how to allocate subdivided land among themselves. Some of these disagreements have been so serious that they have ended up in court despite the difficulties of filing cases. Some community members ostracize those who take matters to the courts of law by sidelining them in community activities.²²

According to an officer from the national land office, there is widespread suspicion in the community about the motives of leaders and elites. We find that this is to some extent owing to earlier experiences. Specifically in the 1970s when group ranches were registered, some local elites and influential families annexed huge tracts of land and registered it as individually owned land. Often, they had more knowledge than others about what processes to follow in order to get individual titles but used this information for their own benefit. Some community members saw this as theft of their land, but since some of those who annexed land now have individual land titles even inside the group

¹⁶Interview with a land official (male) in Samburu County, December 2019.

¹⁷Interview with a community elder (male) Samburu County, July 2019.

¹⁸Community member in a focus group discussion (male) in Samburu County, November 2019.

¹⁹Community members in focus group discussion (male) in Samburu County on 3 December 2019.

²⁰Interview with a community member (female), in Samburu County December 2019.

²¹Community members in a focus group discussion (male) in Samburu County, 1 December 2019.

²²Interview with a community member (male) in Samburu County, November 2019.

ranches, other community members find it impossible to challenge them.²³ These past forms of accumulation by elites and their families have been an intractable source of conflict in the area because the problem cannot be addressed, and yet there is not sufficient land available for all.

The Community Land Act emphasizes the need for inclusion of all groups in the new land governance institutions (Alden Wily 2018) including men and women and young people. In this sense, the Act democratizes decision-making and makes it more inclusive. In the past, only elderly men participated in taking important decisions regarding access to land. In the view of some respondents, the inclusion of women and youth in decision-making neglects a fundamental aspect of Samburu values and customs.²⁴ Accordingly, both women and men informed us that women did not take part in any general assembly meetings about the implementation of the Community Land Act, or in any community meetings held during our fieldwork. The youth were also not significantly involved in the process. It is therefore still to be seen whether these groups will actually be more involved in decision-making when the new system is fully implemented.

Some of the elders questioned whether the youth would safeguard the interest of the community and be mindful of the pastoralist lifestyle.²⁵ Likewise, a national government officer often heard elders complain over the inclusion of youth and women in making decisions on community land. The officer said that this is because the elders do not trust women and young people 'to safeguard the interests of the community and that some of the people in the community are greedy and dishonest; such people are likely to be elected to make decisions on land.'²⁶ The elders' expressing concerns about losing power to women and young people reflects the tension between the customary practices and new proposals in the formal law.

In sum, the elders feel that their powerful and respected roles are not acknowledged in the process of formalizing community land ownership and that they are ignored despite the critical roles they continue to play in the community. Furthermore, they find that the new committees and faces brought on board in decision-making undermine their power and authority. Indeed, the Community Land Act presumes roles for younger people and women that elders previously have performed.²⁷

Based on these findings, the implementation of the Community Land Act is full of contradictions. The process creates new structures and establishes them through processes that neglect the rules established by customs and existing community practices. While this could potentially give women and youth more power, in reality, it creates tensions and conflicts. This may weaken pastoralists' land governance and access at least in the short term, and it is difficult to find solutions given the communities' suspicion against government institutions and officials.

²³Interview with a land official (male) in Samburu County, July 2019.

²⁴Community member in a focus group discussion (male) in Samburu County, November 2019.

²⁵Interview with a community elder (male) in Samburu County, November 2019.

²⁶Interview with a community elder (male) in Samburu County, November 2019.

²⁷Community member in a focus group discussion (male) in Samburu County, December 2019.

Pastoralists' participation in decision-making

The Community Land Act provides for public participation in decision-making about land (GoK 2016). This participation predicates registered membership of the communally owned land. Our interviews revealed many problems associated with this requirement, especially when the communities decide whether to continue as community land or sub-divide. First, some of the respondents consider this decision problematic because there has been a population increase and thereby an increase in potentially registered members, while the size of the land has remained constant. This is a problem particularly when members decide to share land equally among themselves because there will then be only small portions of land for each household. Many community members, therefore, have an interest in excluding others from membership in order to get a larger share of land. Among those who are at risk of exclusion are community members, who have emigrated several decades earlier.²⁸ Some of them may not be registered members in their new communities, and now return and claim a share of the old land.²⁹ Likewise, most communities have hosted immigrants, who now also face the risk of exclusion, because they and their families have not previously registered as members of their new community.

As noted earlier, the community assembly brings the community together to agree on important community decisions on access to land (GoK 2016). The law also attempts to bring onboard voices of previously excluded groups such as women and youth, because cultural practices allow only elderly men to speak in gatherings (Kameri-Mbote et al. 2013). The law provides for the participation of women and youth, but the implementation process fails to resolve the old problem of their inclusion and participation in land governance (Musembi 2007). Unmarried and widowed women continue to face challenges of access.³⁰ The process excludes them because most of those who participate in community meetings represent households. Husbands represent married women at meetings; therefore, single women and widows cannot participate in deliberations. Some of the interviewed women said they were not certain of their membership in the community, yet they have lived within it all their lives. They are not certain they will get access to the land, and they are not certain that their brothers will agree to share the land with them.³¹

The venue of government-initiated community meetings often also excludes people from attending and participating. Such meetings are often held at a 'central' place far from where the pastoralists are and, in some cases, it is costly for them to travel to attend.³² Sometimes, none of the community members, therefore, have a voice and influence in decision-making regarding land.

In sum, we find that the Community Land Act has not genuinely sought to address the specific challenges faced by pastoralists in participating in the process. The obstacles that have always hindered women and youth in pastoralist communities from participating in decision-making remain unaddressed (Kipuri 1983). If the implementation of the

²⁸Interview with a community member (male) in Samburu County, July 2019.

²⁹Interview with a community elder (male) in Samburu County, November 2019.

³⁰Interview with a community member (female) in Samburu County, December 2019.

³¹Interview with a community member (female) in Samburu County July 2019.

³²Community member in a focus group discussion (male) in Samburu County, November 2019.

Community Land Act does not deal with the local context, the challenges in the process will persist. This is because there is a gap between the provisions of the law and pastoralist practices.

This suggests that whereas the law on the face of it seeks to democratize decision-making, its implementation has not adapted to the inherent challenges in the community and therefore presents a risk of disharmony in the coexistence of new rules and traditional practices. Even if it has addressed the age-old problem of participation of men and women, it has not solved it. Moreover, the general community meetings, i.e. the community assemblies, are likely to remain the assemblies of older men.

The law and the consequences of subdivision

The Community Land Act seeks to safeguard collective ownership (GoK 2016). The communities do, however, increasingly call for subdivision of their communally owned lands.³³ Subdividing land into private plots creates obstacles for pastoralists' movements. In the minds of some government officials in Samburu, the Community Land Act is mainly about privatization or subdivision to create individual holdings for members or households. In this sense, the process of conversion of group ranches into community land itself pushes processes of subdividing land for individual ownership.³⁴ The wish for subdivision in Samburu is loudest in the agricultural zones suitable for crop farming. However, there are also strong calls to subdivide the vast arid lands used mainly by pastoralists for communal grazing.

The pastoralists' own demand for subdivision comes from several factors. First, changing land use among pastoralist communities creates a need for them to diversify their livelihoods and adopt agricultural practices.³⁵ Moreover, community members fence their land to protect their crops from animals grazing in nearby fields. Fencing has blocked the grazing corridors, making it impossible for pastoralists to move their animals in the search for pasture.³⁶ We found that subdivision, among other things, addressed the individual needs of members who had adopted farming and agro-pastoralism.

Second, the law has implied that many community members have returned to their original group ranches to claim their rights and become beneficiaries of access (GoK 2016). The law further requires the group ranches to update their registers and include all adult members, male and female alike. In order to circumvent this requirement, group ranches opt to subdivide their land using the original group ranch register to benefit the original members and their families.³⁷ This is because they fear that opening the register to new members will increase the number of community members and therefore decrease the possible land size each family can get once the subdivision is complete. Further, some people anticipate that the growing population in the area will mean that the membership will keep increasing, thus depleting available

³³Interview with a county land official (male) in Samburu County, July 2019.

³⁴Interview with a county land official (male) in Samburu County, July 2019.

³⁵Interview with a national land official (male) in Samburu County, November 2019.

³⁶Community elder in a focus group discussion (male) in Samburu County, December 2019.

³⁷Interview with a community member (female) in Samburu County, December 2020.

resources to the disadvantage of current members.³⁸ Our respondents envisioned subdivision as a step to forestall such a future crisis.

Third, some respondents explained that they found it increasingly difficult to continue to exist as communal land when neighboring lands have been fenced off. They argued that it would be impossible to open their land for communal grazing while those who would previously have been part of a reciprocal arrangement of sharing pasture and water with them now had individualized landholdings. They feared that in the future, individual owners would still need pasture and water from communal lands, but would not be willing to share resources from their private lands. Some respondents expressed similar worries with regard to the future relationship between members of the same community land. They argued that rich people who keep large herds of animals benefit disproportionately from communally owned land.³⁹ Some of those who had few animals found that subdivision would cure this unequal access and that those who own fewer animals and a private plot would be free to sell their grazing areas to the richer pastoralists. They, thus, see subdivision as an avenue to negotiate equal access within the group ranches (Jeppesen and Hassan 2022)

Finally, some of the respondents expressed fear of dispossession and loss of land in the process. This fear was linked to the ambiguity in the implementation process that left the communities without clear information. Some community members suspected that richer families were building permanent homes in strategic areas in the group ranches so that they could later argue for obtaining individual title to those pieces of land.⁴⁰ Some of these strategic areas could be land near the road network, agricultural land, and land near rivers and boreholes. Some of these respondents, therefore, meant that sharing of land should happen without considering current residences. Those who owned the residences, on the other hand, feared that they would lose them, and all the time and money they had invested in constructing them. Fear of dispossession is also linked to the registration process and mistrust of land officials involved in the process. Some respondents indicated that their community would formally subdivide land to avoid the risk that land officials would allocate parcels for themselves inside their group ranch, but in reality keep the land, or part of it, as communal land⁴¹

The reasons the respondents gave for demanding subdivision, even with the tensions it creates in the community, point to challenges inherent to the implementation of the law. The law does not address any of the issues that arise when community members see the conversion process from group ranches to community land as an opportunity to acquire individual land and titles. Further, the process of implementing the law has left the community with inconsistent information, if any at all. Communities are therefore rushing to secure their rights by subdividing group ranches and fencing off their parcels of land, which again form part of the motivation for others to do the same.

Our interviews revealed, moreover, that yet another form of exclusion is likely to happen in the process of subdividing group ranches. This is because historically, it is almost only the heads of families who are registered members of the group ranches, and who therefore are entitled to a plot of private land, which they can keep

³⁸Interview with a community member (male) in Samburu County, November 2019.

³⁹Community elder in a focus group discussion (male) in Samburu County, November 2019.

⁴⁰Interview with a community member (male) in Samburu County, November 2019.

⁴¹Community member in a focus group discussion (male) in Samburu County, December 2019.

or sell.⁴² If they keep it, all adult sons and their families will then live on and share the household head's proportion of individual land until they inherit it. This implies that less and less land will be available for the coming generations. For polygamous heads of households with children in each family, this becomes even more complicated. Community members informed us, moreover, that this is likely to disadvantage unmarried women without (generous) male relatives since they will not have access to any land at all.⁴³ We also interviewed two brothers, where the family had registered the oldest as a group ranch member but not the young one. The older brother would therefore be entitled to his own plot of land, the other not. In addition, some expected that family-related emigrants would return home to subdivide their family plots further.

Ethnic minorities in Samburu also risk that the ethnic majorities will exclude them in the process of transforming group ranches into community or individual private land. Thus, some of the group ranches disregard new members or those who have lived there for a few years. A land official said that because most of the community members belong to group ranches based on their clans, minority groups would risk exclusion. Some of the respondents from the minority groups feared that their community would force them to leave. They would then have to find another group ranch with familial or clan relations and hope for generosity. Some of the respondents belonging to the ethnic majority argued that this would be a necessary step to take.

Many respondents informed us that most group ranch registers were more than four decades old, and therefore had names of members who did not exist anymore and did not contain numbers of younger people or people who have come to and lived in a particular ranch since then. There was agitation to include new names or replace those who had passed away with their kin.⁴⁴ There is also the anticipation of inequalities in the process of community land subdivision.

These findings are consistent with previous studies, which found gross inequalities in land in some pastoralist areas. Thus, Mwangi (2007) found that village chiefs and people who had received a formal education got larger parcels of land in more favorable areas during subdivision. Others like Galaty (1992) have reported that there were instances when non-members got land inside the group ranches. An interesting observation in this study is the divided opinions on whether the group ranches should be subdivided. Veit (2011) attributes the decision of communities to avoid subdivision to the fear that individual ownership would lead to erosion of cultural ties when immigrants move in to purchase the subdivided land. In our study, however, the main driver for subdivision was the Community Land Act which requires all members to own land equally, thus creating anxiety around the inclusion of more members and ultimately resulting in less land for each member.

Conclusion

In sum, the new legislation on land contributes to undermining pastoralists' access to land in at least two ways: it creates new institutions for land management that are likely to

⁴²Interview with a county land official (male) in Samburu County July 2019.

⁴³Interview with a community member (female) in Samburu County, November 2019.

⁴⁴Interview with a county land official (male) in Samburu County, July 2019.

substitute or parallel pastoralists' customary institutions. Further, it legitimizes and speeds up the process of subdividing and individualizing communal lands. In the process, it creates new patterns of inclusion and exclusion, and thereby new winners and losers. Yet, the legislation had the declared purpose of protecting and promoting access to land for communities. It sought to guarantee all members of the communities a voice in land governance and to ensure that local and national state institutions would not undermine community rights. The government introduced the law in line with the letter and spirit of the Constitution, the drafting of which happened in the context of political conflicts over land, which had been going on for many years and in a global atmosphere in favor of securing communal land rights for indigenous peoples. It was also responding to past forms of injustice where communities would lose their land, or some members would lose land rights to powerful individuals or groups.

However, the findings show that although the legislation has wide-ranging impact on communities, it has not secured community land rights among the pastoralists. Instead, its implementation has had several unexpected consequences. Rather than promoting access to community land, the law has occasioned private individualization. Government officials sanction and support sub-division of community land and by that, the implementation of the Act brings new challenges for pastoralism to the fore.

The law and its implementation create losers in access to community land. There are community members who lack rights of access even though they are *de facto* members of a community. At the same time, government institutions appear oblivious to community rules and procedures for regulating access to land, and even though the Act mentions existing customary institutions of land governance, it does not deal with the role of these institutions in the process of instituting new procedures for access. The tensions brought about by the provisions of the Community land law have equally not envisaged the changing nature of land use other than pastoralism. Indeed, the literate younger people are taking the place of elders, even though the latter are the only ones whose decisions on land are binding. The new and formal institutional arrangements for land governance are operating based on formal land law without integrating the rules and customs embedded in traditions thus creating community tensions. The decisions from the new institutional arrangements can be challenged in courts, but they do not necessarily have a socially binding effect, as would be the case with decisions by elders.

With access to land increasingly becoming difficult and communities under pressure to exclude others, the implementation of the Community Land Act is creating a category of people who will be landless without any security of rights. The rights of some of the group members are thus curtailed through the different social processes of access that favor one group over another.

Our study shows that formalization of community land rights is far from the silver bullet that will secure pastoralists' access to land. Rather, formalization may enforce existing patterns of exclusion and marginalization or even create new ones. There is, therefore, a need to recognize that the outcome of law reforms and the significance of formal land rights depend on these laws and rights taking social dynamics and customary practices and values into account. Addressing the challenges of access for pastoralists therefore requires not only state recognition of their land rights, but also increased attention to community values in the process of formalization.

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