

**SECURING LAND RIGHTS IN COMMUNITY
FORESTS: ASSESSMENT OF ARTICLE 63(2)(d) OF THE
CONSTITUTION**

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DEGREE OF MASTER OF LAWS (LL.M), OF THE
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DECLARATION

I CERTIFY that this thesis is my original work and has not been presented for the award of a degree or any other award in any other university.

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DEDICATION

This work is dedicated to God for His faithfulness.

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- Kyoto Protocol to the UNFCCC, 37 *ILM* 22 (1998).
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- United Nations Framework Convention on Climate Change, 31*ILM* (1992) 851.
- World Heritage Convention, 11*ILM* (1972) 1358.

LIST OF ABBREVIATIONS

CBD	Convention on Biological Diversity
CBNRM	Community-Based Natural Resources Management
CDM	Clean Development Mechanism
CFAs	Community Forest Associations
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
FAO	Food and Agriculture Organization of the United Nations
FOSA	Forestry Outlook Study for Africa
GEF	Global Environment Facility
NIE	New Institutional Economics
LULUCF	land-use, land-use change and forestry sector
MFPs	minor forest products
REDD	Reducing Emissions from Deforestation and forest Degradation
UNCCD	United Nations Convention to Combat Desertification
UNCED	United Nations Commission on Environment and Development
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
UNFCCC	United Nations Framework Convention on Climate Change

ABSTRACT

Forests provide environmental, socio-cultural and economic benefits to mankind. They are particularly important to forest dwellers and hunter-gatherers as they derive their livelihoods from there and consider them as their ancestral lands. Section 3 of the Forests Act 2005 defines forest communities as groups of persons who have a traditional association with a forest for purposes of livelihood, culture or religion or who have been registered as an association or other organisation in forest conservation. Access to forests by these communities has, however, been restricted by government policies inherited from the colonial powers, which were largely preservationist. Moreover, competing land uses over forest lands for human settlement, farming, industrial development, livelihood support for the forest dwellers, as carbon sinks and water catchment areas, is a major source of conflicts. This has impacted negatively on forest communities who traditionally had rights of access and control of forests which existed even if land belonged to a different legal entity. There have been efforts by government towards recognizing the rights of forest communities in Kenya.

These efforts culminated in the adoption of the Constitution of Kenya 2010 which in Article 61(2), recognizes community land. Community land is defined in Article 63(2)(d) to include land lawfully held, managed or used by specific communities as community forests, grazing areas or shrines; ancestral lands and lands traditionally occupied by hunter-gatherer communities or lawfully held as trust land by the county governments. This is an important development in securing the land rights of forest communities and access to forest and forest products. By reviewing relevant literature, laws and policies, this study sought to examine the treatment that such lands have received under formal laws in Kenya and the implications of protecting community land for forest communities in the Constitution 2010. It also sought to

come up with proposals and recommendations on how to improve the laws to ensure adequate protection of the land rights of forest communities in Kenya. This is important because the multiple uses to which forests can be put into present a challenge in coming up with an appropriate tenure arrangement that secures competing interests, including those of forest communities. The methodological approach adopted in this study was a review of relevant literature on land and forests in Kenya. The qualitative data gathered was critically analyzed and evaluated in the context of the research objectives.

CHAPTER ONE

INTRODUCTION

1.1 Background to the Problem

Communities living in or near forests are mainly hunters and gatherers and in Kenya they include the Ogiek, Swenger, Langulo and Sanye. The predominant ones are the Ogiek who were originally a forest dwelling community, surviving through hunting of wild game and gathering fruits and honey. The Ogiek are scattered in various parts of East Africa, with the majority living in Nakuru District. Others live in Mt. Elgon, Koibatek, Nandi, Samburu and Narok in Western and Rift Valley.¹ The study outlines the evolution of the forest and land laws and policies in Kenya as they both had some impact on these communities and their lands.

a) *Evolution of Forest Laws and Policies*

Forests are valued for their economic, social, cultural, religious, aesthetic and ecological functions. They are sources of timber, firewood, water, recreation, employment, wildlife habitat, tourism, genetic and biological resources, pharmaceutical and industrial purposes, grazing and non-wood forest products such as honey, food and medicinal herbs. They also protect water catchment areas, sequester carbon and prevent soil erosion.² Before the coming of colonialism forests were managed by local communities under traditional resource management institutions.³ Colonialism introduced forest laws and policies that encouraged forest conservation forcing communities out of their lands. This happened after the gazettement of community lands as

¹ Ministry of Lands and Housing, *Issues and Recommendations Report of the National Land Policy*, (National Land Policy Secretariat, 2005).

² Strategy Note for Forest Governance Reform in Kenya, (INDUFOR, 2011).

³ E. Mwangi, "Colonialism, Self-Governance and Forestry in Kenya: Policy, Practice and Outcomes," available at <http://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/5706/Colonialism%20self%20governance%20and%20forestry%20in%20Kenya.pdf?sequence=1>, (accessed on 22/06/2013).

forests or national reserves or after excision and allocation to the State or individuals who are later issued with titles to the land.⁴ This has been the result of colonial policies.

Under the 1902 East Africa Forestry Regulations, community forests were appropriated by the state and converted into government forests. Management of these forests was transferred from local communities to the state. The regulations provided, *inter alia*, for the gazettelement and de-gazettelement of forest areas; offences and punishment of offenders; authorized the issue of licenses to permit any act otherwise forbidden by the Regulations; impounding of offences and permitted the utilisation, free of charge, by *bona fide* travellers, of dead and fallen timber for fuel.⁵ The effect was that forest communities had to vacate their lands and had to be assimilated into neighbouring communities such as the Maasai and Kalenjin. Their rights to derive their livelihoods from forests were thus curtailed.⁶ By 1908 most forested territories had been declared forest areas by the colonial administration.

The Forest Ordinances of 1911, 1915 and 1916 expanded the scope of the 1902 Regulations. These Ordinances were revised in 1941 creating nature reserves within forest reserves. No form of consumptive utilization was allowed in nature reserves. It also provided that the terms of service of forest guards' be controlled by rules under the Forest Ordinance instead of a separate legislation. It also provided for a Forestry Advisory Committee to advise the Governor on forestry matters. Amending Ordinances were passed in 1949 and 1954, which

⁴ Sessional Paper No. 3 of 2009 on National Land Policy, (*Government Printer, Nairobi*, 2009), 48-49.

⁵ J.M. Klopp, "Deforestation and democratization: patronage, politics and forests in Kenya," *Journal of Eastern African Studies* Vol. 6, No. 2, May 2012, 351-370.

⁶ Sessional Paper No. 3 of 2009 (n4), 48-49.

mainly made alterations to fit in with constitutional changes taking place in the Colony at the time.⁷

Colonial forest laws were geared towards forest preservation.⁸ This excluded communities from forest management and irregular allocation of forests sparking a conflict between the government, local communities and companies engaged in logging activities.⁹ Even access to state forests was tightly controlled by forest guards who ensured continued forest health through exclusion, and only activities approved by the Forest Department were carried out. Despite these laws and policies Kenyan forests have continued to be plundered and mismanaged to the detriment of local communities.¹⁰

The 1942 Ordinance provided for the establishment, control and regulation of central forests and forest areas in Nairobi and on unalienated government land under the Forestry Department.¹¹ The law gave the Minister immense powers in forest management in Kenya. In section 4 thereof he could declare by notice in the gazette any unalienated government land to be a forest area; declare the boundaries of a forest and from time to time alter those boundaries and declare whether a forest area would cease to be a forest area.¹² The minister did not have to give any reasons in exercising his powers nor involve local communities. There was also no criterion for declaring an area to be or to cease to be a forest nor did it give any incentives to communities

⁷ J.P. Logie & W.G. Dyson, *Forestry in Kenya: A Historical Account of the development of forest management in the Colony*, (Government printer, Nairobi, 1962).

⁸ This was reflected in government policies, such as White Paper No. 85 of 1957 and Session Paper No. 1 of 1968.

⁹ Klopp (n 5), 351-370.

¹⁰ P. Wass, *Kenya's Indigenous Forests: Status, Management and Conservation*, (IUCN Conservation Program with the Overseas Development Administration, 1995).

¹¹ This Ordinance became The Forests Act, Cap. 385, Laws of Kenya (Revised Edition, 1992).

¹² *Ibid.*, section 4.

to manage forests.¹³ Due to its salient weaknesses the 1942 Act was repealed by the Forests Act in 2005.

The first forestry policy was formulated in 1957 when White Paper No. 85 of 1957 was published and reiterated the forest preservation policies of the colonial government. This policy was again restated in 1968.¹⁴ The 1968 policy sought to reserve, manage and protect forests due to their value and importance in the economy of Kenya. The National Food Policy emphasized on promoting food self-sufficiency and production of export crops and thus provided an impetus for converting gazetted lands into farming zones.¹⁵ Sessional Paper No. 1 of 1986 focused on economic empowerment for renewed growth especially in the production of wheat, coffee, tea and horticulture. This had the effect of encroaching into forested areas.¹⁶ Another policy was the Nyayo Tea Zones which were established adjacent to forests to act as buffer zones against encroachment by agricultural communities into forests designated as water catchment areas.¹⁷ This led to the clearance of large tracts of forests for tea farming. The 1968 policy was reviewed in accordance with the Kenya Forestry Master Plan recommendations of 1994 whose objective was to enhance the role of forests in socio-economic development and environmental conservation.¹⁸ The Master Plan recognized local communities as implementers of its objectives.

¹³ F.D.P. Situma, "Forestry Law and the Environment," in Okidi *et al* (eds), *Environmental Governance in Kenya: Implementing the Framework Law*, (EAEP, 2008), 235-259.

¹⁴ Sessional Paper No. 1 of 1968-A Forest Policy for Kenya. This policy also did not recognise stakeholder's participation in management of state forests as a viable option.

¹⁵ Sessional Paper No. 4 of 1981 on National Food Policy.

¹⁶ Sessional Paper No. 1 of 1986 on Economic Empowerment for Renewed Growth.

¹⁷ The Nyayo Tea Zone Development Corporation was initially established via a Presidential Order in 1986 and, later, through a Legal Gazette Notice No. 265 of 1986 as a State Corporation, with the aim of promoting forest conservation by providing buffer zones of tea and assorted tree species to check against human encroachment into the forestland.

¹⁸ Mwangi (n 3), 16.

It identified these communities as traditional forest dwellers, forest settlers/squatters and forest-adjacent communities.

In 2005 a Forest Policy¹⁹ was passed. It, *inter alia*, empowered local communities to participate in forest management through Community Forest Associations (CFAs) and in creating new forests and planting woodlots within their localities so that they have a sufficient supply of wood resources for their needs and for selling.²⁰ However, registration of CFAs only granted communities user rights and not ownership of the underlying lands. The Forests Act 2005 addressed most of the challenges that bedeviled the 1942 Act. It recognizes the important role played by forests in the ecosystem and its role in the economic, social and cultural development of the nation and thus seeks the development and sustainable management including conservation and rational utilization of forest resources.²¹ It also provides for the participation of local communities in forest management. This is through the registration of community forest associations for the purpose of participation in the conservation and management of state or local authority forests pursuant to permission granted by the Director on application.²²

Illegal logging of indigenous forests continues despite the 1982 ban, which limited consumptive utilization of indigenous forests to collection of non-timber forest products. Other threats include illegal settlement, grazing and cultivation, illegal logging for timber, poles, posts and charcoal.²³ The government is also evicting forest communities from forests in an attempt to

¹⁹ Sessional Paper No. 9 of 2005.

²⁰ Ibid., 8.

²¹ See Preamble to the Forests Act, 2005, Act No.7 of 2005.

²² Ibid., section 46 of the Act.

²³ National Charcoal Survey: Exploring the Potential for a Sustainable Charcoal Industry in Kenya, (ESDA,

protect and conserve water towers such as the Mau forest. This attests to the fact that the current problems facing the forestry sector are partly due to poor laws and general poor governance. It is clear that the evolution of formal laws, rising population and pressure to convert community forests into settlement and agricultural lands have been a major threat to the existence of community forests.

b) *Evolution of Land Laws and Policies*

Land is a crucial category of property, a valuable source of livelihood and material wealth which carries significant cultural aspects for Kenyan communities.²⁴ It is particularly important to forest communities such as forest dwellers and hunter-gatherers since they derive their livelihood from habitats. It is linked to the cultural, socio-economic and political organization of a people. Community land has been recognized in the law.²⁵

Before the introduction of formal laws land management in forest areas was managed by customary rules which ensured sustainable forest management. The introduction of English property laws emphasizing on private property rights impacted negatively on traditional land tenure systems.²⁶ This led to the existence of a dual system of tenure systems which consequently perpetuated a dual system of economic relationships consisting of an export enclave controlled by a small number of European settlers and a subsistence periphery operated

2005).

²⁴ Sessional Paper No. 3 (n4), 1.

²⁵ P. Kameri-Mbote *et al*, *Ours by Right: Law, Politics and Realities of Community Property in Kenya*, (Strathmore University Press, 2013), 34-36.

²⁶ Sessional Paper No. 3 (n4), 7-8.

by a large number of African peasantry.²⁷ This led to the marginalization of local communities in natural resources management.

The political and economic marginalization of forest communities can also be traced to the 1930 Kenya Land Commission.²⁸ Following this Commission, the settlers failed to recognize forest communities as a distinct community, but sought to assimilate them into the neighbouring communities like the Maasai or the Kalenjin. Although their ancestral territorial boundaries were recognized by the neighbouring communities, these were disregarded by the colonial government, who went ahead and seized their lands. They also gazetted the forests to become state property, thus rendering forest dwelling communities homeless. In this way, they became subject to dominant customs of the neighbouring communities who tried to assimilate them.²⁹

The Swynnerton Plan conceptualized the issue of access to land as one of tenure and the technology of production.³⁰ By modernizing agriculture the Plan created a landed African gentry which would have high stakes in the colonial administration and act as a bulwark against the nationalist movements which were forming at the time.³¹ To the pastoralists and hunter gatherer communities this policy undermined their economies, but also led to their political marginalization and deterioration of their production system and livelihood.³²

²⁷ Ibid.

²⁸ Morris Carter, *Report of the Kenya Land Commission*, (Cmd. 4556 of 1934).

²⁹ Ministry of Lands (n 1), 69.

³⁰ R.J.M, Swynnerton, *A Plan to Intensify the Development of African Agriculture in Kenya*, (Government Printer, Nairobi, 1955). This Plan introduced individual tenure in the African Reserves so as to intensify African agriculture.

³¹ M.P.K Sorrenson, *Land Reform in Kikuyu Country*, (Oxford University Press, Nairobi, 1967).

³² Ministry of Lands (n1), 72.

The colonial laws and policies of land alienation had more immediate impacts for pastoral communities and hunter-gatherers than for agricultural peoples. This is because they negatively impacted on the livelihoods of pastoralists and forest dwellers. For example, the gazettement of forests as forest reserves meant that access thereof by forest communities had been curtailed.³³

Efforts that have been undertaken by the government to secure community land in the past have been futile. Under the repealed Trust Land Act³⁴ county councils who are the trustees of Trust land, have in many cases disposed of trust land irregularly and illegally to the detriment of the local communities.³⁵ This has happened despite section 69 thereof recognizing the African customary law of communities. The Trust Land Act also provide for the creation of forest reserves, which are land areas that have been surveyed, demarcated and gazetted. They are gazetted either from trust land or from unalienated government land. Those gazetted from government land are managed by the Forest Department, while those on trust land are managed by local authorities.³⁶

Moreover, under the trust land concept, some areas of trust land can be set aside as national reserves under the Wildlife (Conservation) and Management Act³⁷ and managed by the local authorities. Further, the Trust Land Act makes provision for general conservation, protection and controlled utilisation of trees and other forest products on land, other than

³³ Ibid.

³⁴ Cap. 288, Laws of Kenya.

³⁵ Sessional Paper No. 3 (n4), 17.

³⁶ Forestry Outlook Study for Africa (FOSA) Country Report Kenya, available at <http://www.fao.org/docrep/003/ab569e/AB569E05.htm#TopOfPage>, (accessed on 22/06/2013).

³⁷ Cap.376, Laws of Kenya.

gazetted forest reserve. This, therefore, means that even areas inhabited by local communities can be set aside, thus depriving them of any rights to forests.

Since land tenure in trust lands and un-alienated government land is unclear, there was a need to recognize community land tenure in Kenya. For instance, the 2009, National Land Policy recognized and protected the rights of forest communities to access, co-manage and derive benefits from forests. It also recognized community land tenure.³⁸ By extension, the Constitution 2010 has sought to guarantee the security of tenure of forest communities by recognizing their rights to community lands.³⁹ Article 63(2)(d) captures land categories that have been neglected by the formal land laws over the years. Community land is defined in Article 63(2)(d) to include land that is lawfully held, managed or used by specific communities as community forests, grazing areas or shrines, ancestral lands and lands traditionally occupied by hunter-gatherer communities or lawfully held as trust land by the county governments. These are categories of lands to which communities are culturally and spiritually attached. Their recognition in the Constitution is a paradigm shift in land governance in Kenya. For instance, forest communities who have been deprived of their land for years, through the gazettelement of forest reserves and excision to individuals, now have a Constitutional basis for anchoring their land rights which was not there in the past.

The existing property regime favours private property rights over communal property and this may act as a disincentive for sustainable forest management. For instance, whereas the Land Act⁴⁰ and Land Registration Act⁴¹ have been enacted, the Community Land Act has not yet been

³⁸ Sessional Paper No. 3 (n4), 16.

³⁹ Article 63(2)(d) of the Constitution.

⁴⁰ Act No.6 of 2012.

⁴¹ Act No. 3 of 2012.

enacted. Moreover, the rising population and pressure to convert community forests into settlement and agricultural lands threaten the existence of community forests.

1.2 Statement of the Problem

Forest communities derive their livelihoods from forests. Over the years, forest communities have lost rights of access, use and control of their land after such areas were gazetted as forests or national reserves or excised and allocated to State or private persons. This was as a result of exclusionist government policies on forests. Recently, efforts to conserve forests as carbon sinks and water catchment areas have also deprived communities access to their lands and accruing benefits by virtue of their occupation and historical connection with such lands. Moreover, population pressure and pressure to convert forest lands into residential, industrial or farming areas continue to threaten the existence of community forests. This has been fuelled by a legal framework that encourages private over communal property rights. Consequently, the study argues that despite the recognition of community forests as a category of community land, in Article 63(2)(d) of the Constitution, the land rights of forest communities are yet to be secured.

1.3 Conceptual Framework

The evolution of formal laws in Kenya depicts a picture of a regime that has emphasized private property rights over community/communal property in land. Formalization of property rights has impacted negatively on preexisting traditional resource management institutions by undermining customary tenure and ignoring customary land rights not deemed to amount to

ownership such as communal rights to clan land.⁴² This study uses the property rights theory and the related new institutional economics (NIE) theory as its springboard.

The property rights theory requires that property rights be defined and correctly allocated to create wealth.⁴³ Definition and allocation of property rights must be done on a scale and at a level sufficient to ensure that the entity best placed to manage the resources has complete control and eliminates the possibility of contradictory rules being applied to one resource.⁴⁴ This explains why during the colonial days when individual tenure was introduced to native lands the “transaction costs of dealing with land went up creating tensions within communities as some members of these communities realized that the land previously available to them collectively was no longer available.”⁴⁵ Since private property ownership includes the right to exclude non-owners from access, their application to communal property means that certain interests will be excluded.⁴⁶ This was based on a wrong conceptualization of communal property rights to land which has been likened to “a web of interests”, with many different parties having a right to use, regulate, or manage the resource, based on a range of customary institutions or local norms as well as state law.⁴⁷ Similarly and as Libecap has observed, there are economic hazards that flow

⁴² Sessional Paper No. 3 (n4), 17.

⁴³ J.T. Mahoney, *Economic Foundations of Strategy*, (Thousand Oaks, 2005).

⁴⁴ P. Kameri-Mbote, *Property Rights and Biodiversity Management in Kenya*, (ACTS Press, 2002), 3-6.

⁴⁵ Ibid. It has, however, been found that community rights recognizes varying degrees of individual entitlements on the basis of use rights which may ensure optimal returns.

⁴⁶ Under the Land (Group Representatives) Act (Cap. 287), it has been seen that when one owner was registered, this meant that he could exclude the other group members.

⁴⁷ R. Meinzen-Dick & E. Mwangi, “Cutting the web of interests: Pitfalls of formalizing property rights”, *Land Use Policy*, (2007).

from a disruption or attempts to change property rights institutions.⁴⁸ Any institution seeking to protect communal property must consider this web of interests by different actors.

Property rights are social institutions that define or delimit the range of privileges granted to individuals or groups over a specific resource such as land.⁴⁹ They deal with value-enhancing relationship regarding assets such that a property law system operates to both protect and curtail the exercise of rights by holders so as to ensure an environment in which the rights of property owners and the larger public interest are safeguarded.⁵⁰ The social aspect of property is pertinent in relation to community land under Article 63(2)(d) because of the need to capture the diverse interests of community members in land. The social aspect is even more complex, with the need to address environmental imperatives, ensure equity in land rights, and protect the minority and marginalized communities.

Moreover, whereas property rights play a role as an economizing institution, they are created by and dependent on social norms. Consequently, the ability of formal property rights to provide economic benefits is largely dependent on how well those rights build on preexisting customs. This provides a strong case for integrating and aligning formal and informal systems in enhancing economic efficiency and sustainability. Property laws should therefore seek to not only set down clear regulations for people to follow and rules for them to respect but should also build on social understandings already in place. If property laws will not do this they will lose touch with realities of property practice where many people still hold land customarily.⁵¹ This is

⁴⁸ G.D. Libecap, *Contracting for Property Rights*, (Cambridge University Press, 1989).

⁴⁹ Mahoney (n43).

⁵⁰ J. Kieyah & P. Kameri-Mbote, "Securing Property Rights in Land in Kenya: Formal Versus Informal", in Christopher Adam *et al.*, (eds), *Kenya Policies for Prosperity*, (Oxford University Press, Oxford, 2010), 319-321. See also Kameri Mbote *et al* (n25)32.

⁵¹ J. Blocher, "Building on Custom: Land Tenure Policy and Economic Development in Ghana", *Yale Human*

important in securing the land rights of forest communities whose claims are based on occupation, long residence and social acceptance by those with claims ranking in priority.⁵²

Property has also been conceptualized as a legal relationship where the legal enforcement of property rights secures the owner's title to land. This ensures that the right to sell, exclude, possess, right to appropriate the right to use and dispose of by will are guaranteed.⁵³ In Kenya individualization has ensured that all the legal entitlements to community land falling under Article 63(2)(d) of the constitution are held by individuals or the state thus disinherit local communities. Individualization has been advanced on the pretext that informal systems do not offer adequate security to land rights.

The subjugation of community land rights can also be viewed through the distinction between traditional African cultures and human rights. It is said that these two cannot be reconciled as human rights represent the dominant culture, while customary laws are founded on an inferior culture.⁵⁴ However, an actor-orientated perspective on human rights may reconcile the conflict between human rights and culture and help understand the role of cultural norms in land-holding, management and use. This is because an actor-orientated perspective on human rights acknowledges that communities exist within a context of legal and cultural pluralism from which they draw their cultural or religious norms and formal rights in dealing with situations that face them.⁵⁵

Rights & Development Journal Vol. IX, (2006), 171.

⁵² Ibid., 152.

⁵³ Kameri Mbote *et al* (n 25)30. See also Mahoney (n43).

⁵⁴ S.E. Merry "Changing Rights, Changing Culture", in J. K. Cowan, M.B. Dembour, *et al.* (eds), *Culture and Rights: Anthropological Perspectives*, (Cambridge University Press, Cambridge, 2001), 31-55.

⁵⁵ C.N. Musembi, "Towards an Actor Orientated Perspective on Human Rights" in N Kabeer, ed. *Inclusive Citizenship: Meanings and Expressions* (2005), 31-49.

The NIE theory recognizes the value of both formal and informal institutions and applies a transaction costs-based approach to property rights and social norms. The theory emphasizes practice as well as law, and takes a broad view of the institutions that make up an economy. Institutional theory attends to the deeper and more resilient aspects of social structure such as customary land laws in Africa. It considers the processes by which structures, including schemas, rules, norms, and routines, become established as authoritative guidelines for social behavior.⁵⁶

The NIE explains the nature of institutions and their functions. Since according to this theory institutions can reduce transaction-costs by regularizing interactions and spreading knowledge through norms and other mechanisms, it is arguable that informal property institutions like social norms and custom can equally perform an economizing function just as formal property institutions.⁵⁷

The suitability of this theory is further bolstered by the property rights theory. This is because the ability of formal property rights to provide economic benefits is also largely dependent on how well those rights build on preexisting customs.⁵⁸ Community land claims under Article 63(2)(d) of the Constitution will thus be adequately safeguarded in a system that appreciates the nature of community property rights in that they are based on existing social relations which play an economizing function, just as with private property rights.

1.4 Literature Review

The bulk of literature on community/customary tenure in Kenya has, to a great extent, given a historical perspective on formalization of tenure in Kenya without offering

⁵⁶ W.R. Scott, *Institutional Theory: Contributing to a Theoretical Research Program*, available at <http://icos.groups.si.umich.edu/Institutional%20Theory%20Oxford04.pdf> (accessed on 08/12/12).

⁵⁷ Blocher (n 51) 173.

⁵⁸ Ibid., 171.

solutions/models of protection that acknowledge the dynamics of communal land holding. This has largely been influenced by an over-emphasis on private property rights. Even after noting that communal tenure has been suppressed through the instrumentality of formal laws, most scholarly works have tended to prescribe privatization of community lands.⁵⁹ The effect has thus been the protection of customary land rights within the formal system.⁶⁰ The protection under these legislations has not been adequate in safeguarding community land rights.

This study reviews the existing literature thematically. The main themes are the imposition of English laws and their impact on land and forest communities; community participation in forest management and tenure arrangements relevant to forests and protection of community land rights under the Constitution of Kenya 2010.

a) Imposition of English Laws and their Impact on Customary Land Tenure Systems

Before the advent of colonialism land among most African societies was owned by the community. However, access rights to land were guaranteed by a political authority which did not own land but ensured access rights were enjoyed equitably.⁶¹ The social and cultural life of each traditional society was important in influencing tenure systems and property relations in general.⁶² Under colonialism various policies and legal instruments were enacted between 1897-1963 in an attempt to secure title to land and entrench capitalist relations in land ownership in Kenya.⁶³ According to Wanjala, this brought land alienation, imposition of English property

⁵⁹ See for example, *Report of the East Africa Royal Commission of 1953-1955*, Cmd.9475.

⁶⁰ For example, under the Trust Land Act, Cap. 288, and the Land (Group Representatives) Act, Cap. 287, Laws of Kenya.

⁶¹ S.C. Wanjala, "Land Ownership and Use in Kenya: Past, Present and Future", in Smokin C. Wanjala, (ed), *Essays on Land Law: The Reform Debate in Kenya*, (Faculty of Law, University of Nairobi, 2000), 25-44.

⁶² Ibid.

⁶³ K Kibwana, "Efficacy of State Intervention in Curbing the Ills of Individualization of Land Ownership in

laws and transformation of customary property relations. Colonialism was an agent of disruption as it interfered with the development of traditional tenure systems and forced them to conform to English property laws.⁶⁴ Law was used to destroy communal land tenure and to replace it with individual tenure.⁶⁵ This explains the fixation with private property rights in Kenya.

According to Ojienda, the colonial policy and legislative instruments were promulgated with the aim of wresting control over land from natives without regard to their interests in land and to neutralize the influence of indigenous communities and institutions in the ownership and control of land.⁶⁶ Okoth-Ogendo observes that radical title to the commons was thus relocated from indigenous communities to the imperial sovereign without recognizing rights of indigenous communities.⁶⁷ He further notes that indigenous land administration systems were replaced and indigenous social systems disrupted resulting in indiscriminate expropriation of the commons.⁶⁸ There were economic hazards that followed this disruption of traditional property rights institutions.⁶⁹ For example, African lands and community forests were taken away, leaving the African landless.

Kenya”, in Smokin C. Wanjala,(ed), *Essays on Land Law: The Reform Debate in Kenya*, (Faculty of Law, University of Nairobi, 2000), 180-181.

⁶⁴ Wanjala (n 61).

⁶⁵ Swynnerton (n30).

⁶⁶ T Ojienda, “Customary Land Rights and the Adjudication Process: Reviewing the Procedure for Ascertaining and Recording Land Rights in the Light of Customary Claims”, in *Land Law Reform in Kenya, Vol. 2* (The Law Society of Kenya, 2003), 7-8.

⁶⁷ H.W.O. Okoth-Ogendo, *Tenants of the Crown: Evolution of Agrarian Law & Institutions in Kenya*, (ACTS Press, Nairobi, 1991), 54.

⁶⁸ H.W.O. Okoth-Ogendo, *The Tragic African Commons: A Century of Expropriation, Suppression and Subversion*, Keynote Address to African Public Interest Law and Community-Based Property Rights Workshop, Usa River-Arusha, Tanzania, published in CIEL/LEAT/WRI/IASCP, 5-7.

⁶⁹ Libecap (n48).

The report of the East African Royal Commission of 1953-1955 foresaw the adverse consequences that would flow from individualization of tenure.⁷⁰ Nonetheless, and despite the fact that it had been set up to consider measures to improve the standard of living of a rising East African population and the development of land already in occupation, the adaptation and modifications of customary tenure for the development of land, the Commission recommended individualization of tenure.⁷¹ It, however, noted that individualization could be extended to groups, such as companies, cooperatives and customary associations of Africans. In this regard Kameri-Mbote *et al* note that the tenure reform process in Kenya has emphasized control by the state and the individual and that group tenure is recognized only in exceptional cases.⁷²

Further attempts to extinguish claims to land based on customary land laws were effected through the Registered Land Act,⁷³ as illustrated in the famous case of *Muguthu v. Muguthu*⁷⁴ where it was ruled that registration extinguished customary rights to land, vesting in the registered proprietor absolute and indefeasible tenure. This situation still persists in Kenya today where the legal framework continues to favour individual tenure and to undermine customary land tenure systems by subjecting them to repugnancy clauses.⁷⁵ The study does not merely lament the subjugation of customary land tenure, but seeks to determine the most

⁷⁰ Kibwana (n 63)179.

⁷¹ *Report of the East Africa Royal Commission of 1953-1955*, Cmd.9475.

⁷² Kameri-Mbote *et al* (n25) 32.

⁷³ Sections 27, 28 & 30 of Cap. 300 of the Laws of Kenya (*Repealed by Act No.3 of 2012*).

⁷⁴ H.C. Civil Case Number 377 of 1968 (*Unreported*).

⁷⁵ Repugnancy clauses are applied in the laws and by the courts to reject certain traditional customs and practices on the ground that they are against natural justice and public policy. This study makes a case for the application of traditional customary land laws that conform to the rules of natural justice and public policy.

effective model for securing community land rights, not only for agricultural development and for ecological reasons, but also for the benefit of local communities.

b) Formal Laws and their Impact on Forest Communities

The evolution of forest laws and policies in Kenya has tended to favour forest conservation to the detriment of the rights of forest communities. This happens through the gazettelement of community land as forests or national reserves or excision and allocation to the State or individuals who are later issued with titles to the land.⁷⁶ Such acts have had more immediate impacts on forest dwellers and hunter-gatherers compared to agricultural communities, as they directly derive their livelihoods from forests.

The recommendations of the 1930 Kenya Land Commission set the pace for the political and economic marginalization of forest communities.⁷⁷ In its recommendations, it failed to recognize forest communities as a distinct community but sought to assimilate them into the neighbouring communities like the Maasai or the Kalenjin.⁷⁸ Although their ancestral territorial boundaries were recognized by the neighbouring communities, these were disregarded by the colonial government who went ahead and seized their lands. Gazetted forests become state property, thus rendering forest communities homeless and subjecting them to dominant customs of the neighbouring communities who tried to assimilate them.⁷⁹

The Swynnerton Plan conceptualized the issue of access to land as one of tenure and the technology of production.⁸⁰ By modernizing agriculture, the Plan created a landed African

⁷⁶ Sessional Paper No. 3 of 2009 (n4) 48.

⁷⁷ Morris Carter, *Report of the Kenya Land Commission*, (Cmd. 4556 of 1934).

⁷⁸ Ministry of Lands (n1) 68.

⁷⁹ Ibid.

⁸⁰ Swynnerton (n30).

gentry which would have high stakes in the colonial administration and act as a bulwark against the nationalist movements which were forming at the time.⁸¹ To pastoralists and hunter-gatherers, this policy undermined their economies and also led to political marginalization and deterioration of their production systems and livelihoods.⁸²

The gazettement of forests as forest reserves meant that access thereof by forest communities was restricted.⁸³ Policies by the post-colonial government, such as the Nyayo Tea Zones led to the clearance of large tracts of forests for tea farming.⁸⁴ The National Food Policy⁸⁵ emphasized food self-sufficiency and production of export crops and, thus, provided an impetus for using gazetted land for agriculture. Similarly, Sessional Paper No. 1 of 1986, focusing on economic empowerment for renewed growth in the production of wheat, coffee, tea and horticulture, had the effect of encroaching onto forested areas.⁸⁶ The effect of these policies was thus to pave way for the clearance of forests for agricultural purposes.

Under the Forest Act, community participation in forest management is encouraged through the formation of community forest associations.⁸⁷ It has, however, been argued that the rights and responsibilities of concerned parties, processes for developing and approving management plans or benefit-sharing arrangements with forest communities are not articulate.⁸⁸

⁸¹ M.P.K Sorrenson, *Land Reform in Kikuyu Country*, (Oxford University Press, Nairobi, 1967).

⁸² Ministry of Lands (n1) 68.

⁸³ Ibid.

⁸⁴ The Nyayo Tea Zone Development Corporation established via a Presidential Order in 1986 and later through a Legal Gazette Notice No. 265 of 1986 as a State Corporation.

⁸⁵ Sessional Paper No. 4 of 1981.

⁸⁶ Sessional Paper No. 1 of 1986.

⁸⁷ Section 46 of the Forests Act, Act No.7 of 2005.

⁸⁸ E. Lowe & M. Ombai, "*Process Framework for NRM Project in Mount Elgon and Cherangany Hills,*"

Moreover, issues of decision-making, management responsibilities and benefit-sharing are left to subsidiary legislation.⁸⁹ Moreover, sustainable conservation of forests as envisaged in Act and Policy might require the involuntary physical and/or economic access restriction to protected and non-protected forests.⁹⁰ This may impact negatively on forest communities who rely on forests for their livelihoods. Moreover, while local authority and private forests are premised on the ownership of the underlying land, community forest management is based on the registration of a community forest association.⁹¹ This does not create incentives for people to conserve forests as they do not own the underlying land. There is need to review the forest laws and policies to conform to the constitutional provisions on community land. As pointed out earlier, efforts to secure community land in the past have not been effective⁹² and have led to loss of more forest lands to the state and private individuals.

c) Interactions between Land, Tree and Forest Tenure

Within the context of forest management, land, tree and forest tenure arrangements interact in various ways. Tenure refers to the content or substance of rights and to the security of rights. It refers to rights from different points of view, to overlapping rights and sometimes to conflicts over resources.⁹³ Understanding the tenure system operative in a given situation is

(Kenya Forest Service, 2013), 10.

⁸⁹ Ibid.

⁹⁰ Ibid.

⁹¹ P Kameri-Mbote, “*Land Tenure and Sustainable Environmental Management in Kenya*,” in Okidi *et al* (eds), “*Environmental Governance in Kenya: Implementing the Framework Law*”, (EAEP, 2008), 276. See Section 46 of the Forests Act, Act No.7 of 2005.

⁹² See Discussions on the Repealed Trust Land Act (Cap. 288) and Wildlife (Conservation and Management) Act (Cap. 376).

⁹³ A.M. Larson, *Tenure rights and access to forests: A training manual for research*, (Center for International Forestry Research, 2012), 9-10.

important because those with tenure rights have a certain status vis-à-vis natural resources in comparison to those without tenure rights to those resources.⁹⁴ Land tenure defines the methods by which rights to land are acquired, held, transferred or transmitted by individuals or groups.⁹⁵ To know the tenure system operating in an area has been said to be an attempt to answer the tripartite question as to who holds what interest in what land.⁹⁶ It has also been said that land tenure represents the relationship that people in a given society have with respect to land. It, therefore relates to people, time and space.⁹⁷

Land tenure is also conceptualized as a web of intersecting interests in land.⁹⁸ In most African societies land tenure has been conceptualized as “a web of interests.” Different persons have rights to use, regulate or manage the resource based on a range of customary institutions or local norms.⁹⁹ This is not the case under individual and state ownership of land.¹⁰⁰ For example, through land titling and registration, certain rights, such as those of forest dwellers, are ignored thus creating tenure insecurity. This is because their uses of land, such as hunting and gathering of forest products, may not be recognised by the legal system.¹⁰¹ Government policies may also

⁹⁴ Ministry of Lands (n1) 23.

⁹⁵ Kameri-Mbote (n91) 261. See also ‘Sessional Paper No. 3 (n36) 15.

⁹⁶ Okoth-Ogendo (n67) 54.

⁹⁷ Kameri-Mbote (n91) 262.

⁹⁸ FAO, *Land Tenure and Rural Development* (FAO, 2002), available at <http://www.fao.org/docrep/005/y4307e/y4307e05.htm>, (accessed on 02/08/2013).

⁹⁹ Meinzen & Mwangi (n47) 1.

¹⁰⁰ Ibid.

¹⁰¹ FAO (n 98).

reduce or eliminate rights of access to forest lands. For example, through the policy of creating Nyayo Tea Zones, forest communities were prevented from accessing forests.¹⁰²

The interaction between land and tree tenure is important. This is because land and trees can be controlled, owned and used distinctly.¹⁰³ In most traditional societies, rights in land and rights in trees are completely separate, such that an individual might have the right to use the land for growing annual crops, while the larger community has the right to use the trees on the land. It is also common for male descendants of a land owner to inherit land, while his daughters inherit the trees on it.¹⁰⁴ Trees can, thus, be a basis for rights by communities who derive their livelihood from forests, such as hunters and gatherers.

A relationship exists between land and tree tenure in that by securing land rights, one creates motivation for planting trees whose benefits accrue to the planter after some time. Consequently, land and forest degradation is said to be the result of insecure property rights caused by lack of incentives to improve land, conserve soil, and protect forests or plant trees.¹⁰⁵ Granting rights to trees or ownership of underlying land can therefore foster sustainable forest management as local communities will have incentives to plant trees and conserve forests.

Another correlation between land and tree tenure is that tree planting significantly influences the evolution of tenure systems and even enhances security of land tenure.¹⁰⁶ In

¹⁰² The Nyayo Tea Zone Development Corporation established via a Presidential Order in 1986 and later through a Legal Gazette Notice No. 265 of 1986 as a State Corporation.

¹⁰³ A. Neef and R. Schwarzmeier, *Land Tenure Systems and Rights in Trees and Forests: Interdependencies, dynamics and the role of development cooperation-Case studies from Mainland Southeast Asia*, available at http://www.landcoalition.org/sites/default/files/legacy/legacypdf/08_gtz_land_tenure_systems.pdf?q=pdf/08_gtz_land_tenure_systems.pdf, (accessed on 30/07/2013).

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

traditional African society, trees symbolized ownership.¹⁰⁷ Under traditional tenure systems, rights of *control* of land and rights of *use and access* were distinct. It was possible to have tenure arrangements where tree ownership and exploitation rights were held separately from land.¹⁰⁸ However, under English law, trees are considered part of the land and cannot be vested in a different person other than the landowner.¹⁰⁹ Individualization of land tenure thus vested rights of control of land and use of land-based resources in the landowner, curtailing all other interests held under customary law. Under the now repealed Registered Land Act¹¹⁰ of 1963 customary law could not apply to land registered under that Act.¹¹¹ The Act thus changed tree tenure and conferred powers on land owner to determine if an individual could use trees growing on his land. It also affected the landless who may have had rights to use trees based on customary law but which were extinguished upon the registration of a person as the owner.¹¹² Before the Constitution of Kenya 2010 the existing tenure regimes did not adequately protect customary rights of access to trees on community land. Moreover, tree resources which were managed and utilized on a communal basis under customary law were no longer accessible to people who may have needed them.¹¹³ Recognition of community land will guarantee rights of access and use of trees in community forests.

¹⁰⁷ Ibid.

¹⁰⁸ P.A. Dewees, *Social and economic incentives for smallholder tree growing- A Case Study from Murang'a District, Kenya*, (Community Forestry Case Study Series, 1995), available at <http://www.fao.org/docrep/U8995E/U8995E00.htm>, (accessed on 30/07/2013).

¹⁰⁹ Ibid.

¹¹⁰ Cap. 300, Laws of Kenya.

¹¹¹ Dewees (n108). See also sections 4 and 27 of the Act.

¹¹² Ibid. See Section 27 of the Act on effect of registration.

¹¹³ Ibid.

There are also instances when land and tree tenure may overlap. This can arise where one user group is entitled to harvest fruits from trees; another group of users owns the right to the timber of these trees, while the trees are located on land owned by another group or an individual.¹¹⁴ It is important that access to land and forest resources under different tenure regimes be reconciled as they may negatively affect the livelihood of people who depend on those resources.¹¹⁵ Recognizing the interaction between land and tree tenure is useful in determining who benefits and who is affected by various forest policies.¹¹⁶

d) Land Tenure and Forest Tenure

Although it is widely argued that secure land rights can stimulate agricultural productivity, the ‘ideal’ tenure regime to realize sustainable forest management has not been identified yet.¹¹⁷ This is mainly due to conflicting interests in the multiple functions, services, and benefits that forests and trees provide to mankind. The diversity of interests in forest management led to the concept of forest tenure. Forest tenure is broad and includes ownership, tenancy and arrangements for the use of forests. It also determines who can use what resources, for how long, and under what conditions.¹¹⁸ It is not just a question of extracting forest products and protecting natural resources, but also deals with issues to do with land use, settlement, rights of indigenous and underprivileged people, and human rights.¹¹⁹ Recognition of these issues is as a result of increasing deforestation, leading to loss of biodiversity on one hand, and the clash

¹¹⁴ Larson (n 93).

¹¹⁵ Andreas & Rainer (n103).

¹¹⁶ Ibid.

¹¹⁷ Ibid.

¹¹⁸ FAO, *Reforming Forest Tenure: Issues, Principles and Process*, (FAO Forestry Paper No. 165, 2011).

¹¹⁹ Andreas & Rainer (n103).

between the needs of local people and national and global interests to conserve interests for environmental sustainability on the other.¹²⁰

e) Land Tenure vis-à-vis Land Use

Land tenure can impact the uses to which land is put and conversely land use patterns develop in close relation with land tenure systems.¹²¹ Land use conflicts are prevalent in forests because of competing needs by different land users, that is, forest dwellers versus cultivators, conservationists versus hunters and gatherers, amongst other land users. Conflicts over forests, therefore, have two dimensions, namely, the use of land for forests and use of land for other purposes, i.e., residential, industrial development, farming, livelihood support for the forest dwellers, environmental function as a carbon sink and water catchments.¹²²

This has been a big challenge to policy makers in determining the best uses to put forests land into, in light of competing interests. For instance, in the Mau Forest Complex, there is the threat that the Ogiek will have to get out of the forest to pave way for its conservation as a water tower.¹²³ These conservation efforts must be reconciled with the protection of community land tenure as they may weaken the land claims of forest communities. This study argues that these factors may work towards weakening the protection of community land rights among communities living in or adjacent to forests. For instance, while forests host and sustain a wide range of biodiversity and are critical water towers, competing land uses have led to a decline in

¹²⁰ Ibid.

¹²¹ ECA/SDD/05/09, *Land Tenure Systems and their Impacts on Food Security and Sustainable Development in Africa*, (Economic Commission for Africa, 2004).

¹²² Ibid.

¹²³ Report of the Prime Minister's Task Force on the Conservation of the Mau Forest Complex (*Government of Kenya, 2009*).

forest cover in Kenya.¹²⁴ Forests have also been excised and allocated to private persons, while in other areas, government policies have emphasized agriculture at the expense of protecting forests as ancestral sites and sources of livelihood of forest communities.¹²⁵ The multiplicity of land uses to which forests can be put, therefore, present a challenge in coming up with an appropriate tenure arrangement that secures all these claims.

f) Article 63(2)(d) of the Constitution

The Constitution 2010 recognizes community land. Community land includes land that is lawfully held, managed or used by specific communities as community forests, grazing areas, shrines, ancestral lands and lands traditionally occupied by hunter-gatherer communities or lawfully held as trust land by the county governments.¹²⁶ Community forests are therefore a category of community land under the constitution. Community land is given similar treatment as public and private land in the Constitution, suggesting that customary land rights shall have equal force of law and receive equal treatment like any other interests in land.¹²⁷ According to Article 60(1) of the Constitution community land must be held, used and managed in a manner that is equitable, efficient, productive and sustainable and in accordance, *inter alia*, with the principles of equitable access to land, security of land rights, sustainable and productive management of land resources, and the sound conservation and protection of ecologically sensitive areas.¹²⁸ Recognition of culture¹²⁹ and the rights of minorities and marginalized groups

¹²⁴ National Land Policy Reform Process, *Concept Paper*, (Ministry of Lands, 2004).

¹²⁵ ECA/SDD/05/09 (n119).

¹²⁶ Article 63(2)(d) of Constitution of Kenya.

¹²⁷ *Ibid.*, Article 61.

¹²⁸ *Ibid.*, Article 60(1).

obligates the state to put in place affirmative action programmes to ensure that such groups, *inter alia*, develop their cultural values, languages and practices.¹³⁰ By recognizing culture and minority communities, the Constitution acknowledges that certain communities such as hunter-gatherers have suffered marginalization in landholding in this country. This recognition provides a basis for securing land rights amongst forest communities and a basis for equitable access to forests. The State is also obliged to achieve and maintain a tree cover of at least ten percent of the land area of Kenya,¹³¹ protect traditional ecological knowledge,¹³² and encourage public participation in the management, protection and conservation of the environment.¹³³ Implementation of these provisions will guarantee the land rights of forest communities since the law has now recognized community land.

However, equitable access to land and security of land rights amongst forest communities is threatened by many factors. These communities have lost rights of access, use and control of land, either after gazettelement of such areas as forests or national reserves or after excision and allocation to State or private persons. Moreover, conservation of water catchment areas, may necessitate the restriction of access to forests by forest communities. In addition, population pressure and conversion of forest lands into settlement or agricultural lands have led to the destruction of community forests. Further, the legal framework tends to encourage private ownership over communal ownership under which forests are held. For instance, despite recognition of community land in the Constitution, the draft Community Land Bill is yet to be

¹²⁹ Ibid., Article 11.

¹³⁰ Ibid., Article 56(d).

¹³¹ Ibid., Article 69(1)(b).

¹³² Ibid., Article 69(1)(c).

¹³³ Ibid., Article 69 (1)(d).

enacted a year after the enactment of the Land Act¹³⁴ and Land Registration Act.¹³⁵ This demonstrates the preference accorded to private property rights and leaves community land under the old regime which may contribute to its loss to private persons.¹³⁶ There is however a draft Community Land Bill 2013.

g) Draft Community Land Bill 2013

The definition of community land in the draft Bill leaves out community forests in clause 2 thereof and only provides for measures to facilitate access, use and co-management of forests by communities who have customary rights to forests.¹³⁷ It seems that the Bill separates ownership of forests/trees and the underlying land. Whereas this may be in line with certain customary rights, it may weaken the land rights of communities if rights to trees and the underlying land are distinct and separate.

In terms of securing community land the draft Bill provides that pursuant to Article 40 of the Constitution, every person shall have the right either individually or in association with others to acquire and own property of any description and in any part of Kenya.¹³⁸ It also states that no right in community land may be expropriated or confiscated save by law in the public interest and consideration of payment in full of just compensation to the person or persons.¹³⁹ Where there are customary land rights being held by any person or group of persons before the commencement of the Act, the Bill states that such rights shall be held subject to its

¹³⁴ Act No.6 of 2012.

¹³⁵ Act No. 3 of 2012.

¹³⁶ Kameri-Mbote *et al* (n25) 155.

¹³⁷ Clause 36 of the Draft Community Land Bill, June 2013.

¹³⁸ *Ibid.*, clause 7 (1).

¹³⁹ *Ibid.*, clause 7(2).

provisions.¹⁴⁰ Under the draft Bill, 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 transaction.¹⁴¹ These provisions are meant to protect community land rights. It is not however clear whether this protection will suffice to counter the competing interests over forests.

As argued by Knight, recognizing community land rights must be based on the lived realities of the people as practiced daily on the ground. This would create an environment in which communities can maintain their land claims, make investments and achieve national economic development.¹⁴² This will also require an acknowledgement of the role of traditional societies in environmental sustainability by developing cultural and social means of managing renewable resources and regulating access by their members in a way that ensures resource use sustainability.¹⁴³

This review shows that there is over-emphasis on individual tenure which has led to the suppression and destruction of communal land tenure in Kenya. It also shows that informal systems provide effective and equitable land rights for all holders, occupiers and users without discrimination and ensures that land is held sustainably.¹⁴⁴ The review highlights the multiple claims over forests which threaten land rights among forest communities. However, the

¹⁴⁰ Ibid., clause 7(3).

¹⁴¹ Ibid., clause 7(5).

¹⁴² R.S. Knight, *Statutory recognition of customary land rights in Africa: An investigation into best practices for lawmaking and implementation*, (Food and Agriculture Organization Of The United Nations Rome, 2010).

¹⁴³ L. P. Breckenridge, "Protection of Biological and Cultural Diversity: Emerging Recognition of Local Community Rights in Ecosystems under International Environmental Law", *Tennessee Law Review*, Vol.59, 747.

¹⁴⁴ The Commission of Inquiry into Existing Land Law and Tenure Systems (Njonjo Commission Report, 2002), 48.

reviewed literature has not discussed ways of securing land rights among forest communities, in light of Article 63(2)(d) of the Constitution.

1.5 Research Objectives

1. To critically examine the protection that has been accorded to the land rights of forest communities under formal laws in Kenya.
2. To examine the implications of the recognition of community land rights for forest communities in light of competing interests over these lands.
3. To make recommendations on measures to secure the land rights of forest communities in light of competing interests over these lands.

1.6 Hypotheses

1. Formal laws and policies have not been adequate in protecting the land rights of forest communities.
2. There are competing land uses over forests which may weaken the land rights of forest communities.

1.7 Research Questions

1. What kind of protection has been accorded to the land rights of forest communities under formal laws in Kenya?
2. What are the implications of the recognition of community land rights for forest communities in light of competing interests over such lands?
3. What recommendations need to be made to secure the land rights of forest communities in Kenya in light of competing interests over such lands?

1.8 Scope

This study examines the protection that has been accorded to the land rights of forest communities under formal laws in Kenya. It thus examines the implications of the recognition of community land rights for forest communities in Article 63(2)(d) of the Constitution.

1.9 Justification of the Study

The rising population and competing land uses over forests poses a serious threat to the existence of community forests. This is because the legal framework has encouraged private rights while undermining communal property rights. Moreover, gazettment of such lands as forest reserves, and excision and issuance of titles to individuals and the government, threaten the livelihood of forest communities. There is need to secure the land rights of forest communities due to their strong social, cultural, religious and political association with such lands.

1.10 Methodology

The methodological approach adopted in this study is the review of literature on community/communal property.

i) Data Collection

The study used the descriptive, analytical and prescriptive modes of research. Both primary and secondary sources of data were utilized in the study. Primary sources include the Constitution of Kenya, statutes and relevant conventions. Primary sources are useful to this research in that they state the legal framework governing land in Kenya, which forms the substratum of critique in this study. Secondary sources include the internet and on-line libraries, journal articles, newspapers and other media reports, conference papers and textbooks.

Secondary sources are useful in their own right as they give insights on the need to secure the land rights of forest communities for sustainable forest management.

Primary data in the Constitution, statutes and other official publications will be obtained through accessing and analyzing them. Scholarly journals and books were accessed by visiting various libraries such as the University of Nairobi Libraries, online access through Journal Storage (JSTOR) and Lexis-nexus library.

ii) Data Analysis

The data obtained is qualitative. Primary and secondary data collected were analyzed and evaluated in the context of the research objectives.

1.11 Chapter Breakdown

I Chapter One – Introduction to the Study

This chapter contains an introduction to the study, the statement of the problem, literature review, the objectives of the study, the hypotheses, theoretical and conceptual framework, the gap in knowledge that the study fills and methodology of the study.

II Chapter Two – Colonial Land Laws and their impact on Forests and Forest Communities in Kenya

This chapter looks at the imposition of English land laws in Kenya, their evolution and impact on forests and the land rights of forest communities in Kenya. It shows the origins of the suppression of communal land tenure in Kenya in favour of individual tenure and how it has impacted communal land tenure.

III Chapter Three – Forest Laws and the Land Rights of Forest Communities

This chapter discusses the legal framework on forests in Kenya and its impact on the land rights of forest communities.

IV Chapter Four – Securing the Land Rights of Forest Communities in Kenya

This chapter assesses the protection of the land rights of forest communities under the Constitution and its implication for these communities.

V Chapter Five – Conclusion and Recommendations

This chapter contains the findings, recommendations and conclusions of the study.

CHAPTER TWO

EVOLUTION OF LAND LAWS AND THEIR IMPACT ON LAND RIGHTS IN FORESTS

2.1 Introduction

Land is a crucial category of property, a valuable source of livelihood and material wealth which carries significant cultural aspects among Kenyan communities.¹⁴⁵ It is particularly important to forest communities,¹⁴⁶ including forest dwellers and hunter-gatherers, since they derive their livelihood from forest lands. It is linked to the cultural, socio-economic and political organization of a people.¹⁴⁷ It is, therefore, important to examine how the evolution of land laws in Kenya has affected the land rights of forest communities. This is necessary because while land tenure changes were taking place, tenure arrangements within forests were also changing, occasioning loss of community forests as they were being gazetted as forests and through commercial exploitation of timber.

Forests are based on land. Before colonialism, land and forests were held communally by traditional communities. Evolution of land laws has had some impact on forest management in Kenya. This chapter examines the imposition of English land laws in Kenya, their evolution and impact on forests and the land rights of forest communities. It examines the origins of the suppression of communal land tenure in favour of individual tenure and how it has impacted communal land tenure. The interactions between land tenure and land use within the context of forests is examined. It also discusses other tenure arrangements within the forest context, such as

¹⁴⁵ Sessional Paper No. 3 of 2009 National Land Policy, (*Government Printer*, 2009).

¹⁴⁶ These are groups of persons who have a traditional association with a forest for purposes of livelihood, culture or religion or who have been registered as an association or other organisation in forest conservation. See section 3 of the Forests Act, Act No.7 of 2005.

¹⁴⁷ P Kameri-Mbote *et al*, *Ours by Right: Law, Politics and Realities of Community Property in Kenya*, (Strathmore University Press, 2013), 34-36.

tree tenure and forests tenure. More importantly, the study interrogates whether trees can be a basis of rights distinct from the underlying land. The study notes that the multiple uses to which forests can be put into present a challenge in coming up with an appropriate tenure arrangement that secures competing interests including those of forest communities.

2.2 Land Tenure Systems in the Pre-Colonial Era

The foundations of the law of property in Kenya are traceable to customary land law tenure and colonial administration. These are the factors that have defined the evolution of property laws and the existing property regimes and proprietary transactions in Kenya.¹⁴⁸ Before the introduction of formal laws, land management was guided by customary rules. This was the case even in forest areas and it ensured sustainable forest management. Land belonged to the community and each person had rights of access to land based on his needs. Access rights were guaranteed by a political authority which did not own land, but merely exercised political authority over land. The political authority facilitated the structural framework within which rights of access were to be enjoyed equitably. Access rights were determined by virtue of membership in the community or a unit of the community. In essence, membership into a community or unit required the performance of certain obligations which in turn defined the rights of access and use of land.¹⁴⁹

To guarantee rights of access and use, land was communally held in most traditional African communities. This meant that the social and cultural life of each community was

¹⁴⁸ H.W.O. Okoth-Ogendo, *Tenants of the Crown: Evolution of Agrarian Law & Institutions in Kenya*, (ACTS Press, Nairobi, 1991), 7-19.

¹⁴⁹ S.C. Wanjala, "Land Ownership and Use in Kenya: Past, Present and Future", in Smokin C. Wanjala, (ed), *Essays on Land Law: The Reform Debate in Kenya*, (Faculty of Law, University of Nairobi, 2000), 25-44; T Ojienda, "Customary Land Rights and the Adjudication Process: Reviewing the Procedure for Ascertaining and Recording Land Rights in the Light of Customary Claims", in *Land Law Reform in Kenya, Vol. 2* (The Law Society of Kenya, 2003), 5-7.

important in influencing tenure systems and property relations in general.¹⁵⁰ For example, the economic and cultural activities, such as hunting, gathering, herding and farming, where practised, significantly influenced the prevailing land relations. Similarly, to some communities, land had significant spiritual values. For example, among the Agikuyu land was highly valued as it was considered to be sacred. In the traditional set up, therefore, land meant more than the physical soil.¹⁵¹

In essence, property rights to land in traditional African society comprise of “a web of interests” with many different parties having a right to use, regulate, or manage the resource based on a range of customary institutions or local norms as well as state law. Each of these interests often play a critical role in livelihoods, social relations, and ecological functions and that is why formalization of property rights has led to a disruption of peoples livelihoods by cutting of this web.¹⁵² Formalization of property rights may therefore cut this web of interests. Chimhowu and Woodhouse rightly observe that land titling generally provides for the registration of primary (cultivation) rights and excludes secondary or seasonal rights (e.g. grazing, firewood and wild food gathering) under customary tenure.¹⁵³ This was the impact of the introduction of English property law system which aimed at individualizing tenure in the native reserves.

¹⁵⁰ Ibid.

¹⁵¹ Ibid.

¹⁵² R Meinzen-Dick & E Mwangi, “Cutting the web of interests: Pitfalls of formalizing property rights”, *Land Use Policy*, (2007), 1-3.

¹⁵³ A Chimhowu & P Woodhouse, “Customary versus Private Property Rights? Dynamics and Trajectories of Vernacular Land-markets in Sub-Saharan Africa”, *Journal of Agrarian Change*, Vol.6 No.3, July 2006, 346-371.

Private property rights impacted negatively on traditional land tenure systems by disrupting property relations and led to loss of land previously held communally.¹⁵⁴ This led to the existence of dual tenure systems and a duality in economic relations with an export enclave controlled by a small number of European settlers and a subsistence periphery operated by a large number of African peasantry.¹⁵⁵ This occasioned the marginalization of local communities in natural resources management. Despite the introduction of formal property regimes, some communities and areas in Kenya are still under the authority of customary land law over which application of formalization processes has had no significant consequences.¹⁵⁶

2.3 Colonial Policies and Legal Instruments and their Impact on Communal Land Tenure

Colonialism in Kenya can be traced back to the Berlin Conference of 1885 which set the motion for the partitioning of Africa, either for economic or strategic reasons. According to Mungeam, Britain's interest in East Africa was in the wider field of international diplomacy triggered by the need to control the head waters of River Nile in Uganda following the opening of the Suez Canal in 1869.¹⁵⁷ Economically, the colonial powers needed raw materials for their industries and markets for their products. The rich soils and climatic conditions in East Africa, especially in the highlands, also raised hopes of good trading relations with Europe.¹⁵⁸

¹⁵⁴ Sessional Paper No. 3 (n1). P Kameri-Mbote, *Property Rights and Biodiversity Management in Kenya*, (ACTS Press, 2002), 3-6.

¹⁵⁵ Ibid.

¹⁵⁶ H.W.O. Okoth-Ogendo, *The Tragic African Commons: A Century of Expropriation, Suppression and Subversion*, Keynote Address to African Public Interest Law and Community-Based Property Rights Workshop, Usa River-Arusha, Tanzania, published in CIEL/LEAT/WRI/IASCP, 10.

¹⁵⁷ G.H Mungeam, *British Rule in Kenya, 1895-1912*, (Clarendon, Oxford, 1966), 7-ff.

¹⁵⁸ R.D Wolff, *The Economics of Colonialism: Britain and Kenya 1870-1930*, (Yale, New Haven, 1974), 28-29.

2.3.1 Land Alienation

To further their economic and/or strategic interests in East Africa, the colonial powers had to acquire effective control over the region. They needed some control that would give them power to acquire title to land and to deal with the land resources of the region.¹⁵⁹ The declaration of a protectorate status over Kenya in 1895 was sought to achieve this objective, but was not sufficient to confer legal jurisdiction to alienate land. This is because by an opinion of the Law Officers of the Crown in 1833, protectorate status did not confer “radical title” to the land in the protected territory on the protecting power.¹⁶⁰ This meant that the colonial authorities had limited powers to deal with land within a ‘foreign territory.’

In 1899 the legal impediments of the 1833 opinion were overcome. The law officers informed the Foreign Office that the Foreign Jurisdiction Act 1890 gave Her Majesty a power of control and disposition over waste and unoccupied land in protectorates where there was no settled form of government and where land had not been appropriated either to the local sovereign or to individuals. In such cases, Her Majesty would declare such lands to be Crown lands or make grants of them to individuals in fee or for any term.¹⁶¹ The 1899 advice was incorporated in the East Africa (Lands) Order in Council 1901 which purported to confer on the Commissioner of the Protectorate power to dispose of all public lands on such terms and conditions as he might think fit subject only to any directions which the Colonial Secretary of State might give.¹⁶² The Ordinance defined crown lands to mean all public lands within the East

¹⁵⁹ Okoth-Ogendo (n4)11.

¹⁶⁰ Ibid. Rights over land in these circumstances could only be acquired by conquest or agreement, treaty or sale from the indigenous people.

¹⁶¹ See Foreign Office Confidential Papers (FOCP) 7403 No.101, as quoted in Okoth-Ogendo (n4)11.

¹⁶² Ibid.

Africa Protectorate which for the time being are subject to the control of His Majesty by virtue of any treaty, convention or agreement or by virtue of His Majesty's Protectorate and all lands which have been or may hereafter be acquired by His Majesty under the Land Acquisition Act, 1894 or otherwise howsoever.¹⁶³

In 1902, the Crown Lands Ordinance was enacted and it provided for an expanded concept of crown lands than the 1901 Ordinance, as it conferred upon the protectorate administrator's enormous powers with respect to what land they could lawfully dispose of within the protectorate.¹⁶⁴ The Ordinance met the demands of settlers who wanted secure title, including freeholds or long leases and not rights of occupancy. The Commissioner could sell freehold estates in land, but regard had to be had to the rights and requirements of the natives in dealing with crown land. However, natives' rights were merely occupancy rights and where land was no longer occupied, it could be sold or leased as if it were "waste and unoccupied land" and there was no requirement of seeking the consent of any tribal chief before disposition.¹⁶⁵

The 1902 Ordinance was amended in 1915 and the Crown Lands Ordinance of 1915 was enacted. In section 5 thereof it declared that crown land:

shall mean all public lands in the protectorate which are for the time being subject to the control of His Majesty by virtue of any treaty, convention or agreement, or by virtue of His Majesty's protectorate, and all lands which shall have been acquired by His Majesty for the public service or otherwise howsoever, and *shall include all land occupied by the native tribes of the*

¹⁶³ Ibid.

¹⁶⁴ Ibid.,14.

¹⁶⁵ T Mweseli, "The Centrality of Land in Kenya: Historical Background and Legal Perspective," in Smokin C. Wanjala, (ed), *Essays on Land Law: The Reform Debate in Kenya*, (Faculty of Law, University of Nairobi, 2000), 8.

protectorate and all lands reserved for the use of the members of any native tribe. (emphasis added).

Although the Ordinance reserved land for native tribes, such reservation did not confer on any native tribe or members of any tribe any right to alienate the land so reserved or any part thereof. Moreover, such land as reserved for the use of the native tribes could, at any time, be appropriated and thereafter alienated to settlers.¹⁶⁶ The impact of the 1915 Ordinance on customary lands has been described by Ghai and McAuslan as the complete “disinheritance of Africans from their land.”¹⁶⁷ The state of affairs prevailing after the 1915 Ordinance was sealed by the judgement of Barth C.J. in *Isaka Wainaina & anor v. Murito wa Indagara & others* to the effect, *inter alia*, that whatever rights the natives may have had to the land had been extinguished by colonial legislation leaving them as

“mere tenants at the will of the Crown, of the land actually occupied, which would presumably include land on which huts were built with their appurtenances and land cultivated by the occupier-such land [including] the fallow.”¹⁶⁸

Moreover, the Ordinance marked the beginning of discrimination in landholding, both in the agricultural and urban areas.¹⁶⁹ For example, crown lands could be disposed through public auctions in both the agricultural and urban areas to the highest bidder, which meant that Africans were, in effect, prohibited from acquiring land under the provisions of the Crown Lands Ordinance.¹⁷⁰ The Governor had powers to create reserves for use and occupation by the natives,

¹⁶⁶ Ibid.

¹⁶⁷ Y.P. Ghai & J.P.W.B. McAuslan, *Public Law and Political Change in Kenya: A Study of the Legal Framework of Government from Colonial Times to the present*, (Oxford, Nairobi, 1970).

¹⁶⁸ (1922-23) 9(2) KLR 102.

¹⁶⁹ Okoth-Ogendo (n4) 42.

¹⁷⁰ A Mumma, “Titles Issued Irregularly,” in *Land Law Reform in Kenya, Vol. 2* (The Law Society of Kenya,

which meant that Africans and Indians were excluded from owning land in the white highlands so as to secure settler security.¹⁷¹

These legal instruments were part of a new and entirely alien juridical dispensation that had drastic implications for land relations in colonial Kenya. For instance, the assertion that the imperial power rather than the indigenous people held radical title to land set the stage for the expropriation of land held by indigenous people and its allotment to settlers and other private agencies who, otherwise, would not have qualified to receive it under customary law. Such allocations had negative consequences on forests since the new allottees held the land under tenure arrangements that did not allow for access and user rights as known under customary law. Consequently, legal procedures and processes were put in place to ensure not only that allottees received land under terms and conditions determined by English property laws, but also that indigenous inhabitants lost claims to all land to the colonial power whether such land was expropriated or not.¹⁷²

2.4 Land Management in the Native Reserves

The 1915 Ordinance had laid to rest the question of native land rights and if any land occupied by the natives was found to be suitable for settler farming, it could be taken for the benefit of the settlers. This situation created insecurity and frustration among natives who started agitating for their land rights. This culminated in reforms in the African reserves between 1921 and 1939. These reforms were not geared towards addressing injustices arising from land alienation, but were pre-emptive measures. The settlers needed to silence African agitation for

2003), 27.

¹⁷¹ Ibid.

¹⁷² Report of the Commission of Inquiry into Existing Land Law and Tenure Systems, (Njonjo Commission Report, 2002), 24-25.

land rights by introducing a stable property regime in the African reserves.¹⁷³ A stage had been set for the introduction of individual landholding in African reserves which was alien to African landholding.

Several commissions were formed to look into African land rights. The report of the East African Commission, for instance, noted with concern the issues raised by Africans over the land question. It noted that, the subject of the African land rights was particularly disturbing, but did not make recommendations on how to allocate and secure native land rights.¹⁷⁴ The Hilton Young Commission of 1927-1929 defined the boundaries of the native reserves and recommended that there should be no ambiguity as regards the principles governing land allocation and security of title to native lands.¹⁷⁵ The governor, as the trustee of native lands, had to address the needs of the natives in dealing with such lands. It also entrenched the dual policy of reserving separate areas for Europeans and Africans (called native reserves) which were not to be encroached into.¹⁷⁶ These recommendations found their way into the 1930 Native Lands Trust Ordinance which made provision for the creation of native reserves, granted the governor power to set aside additional land as native reserves, and established a Native Lands Trust Board to manage native reserves. However, by granting the governor the power to grant 33 years leases and licences to Europeans within African reserves and also giving him power to set aside land

¹⁷³ Okoth-Ogendo (n 4),55.

¹⁷⁴ *Report of the East African Commission*, Cmd 2387(1925).

¹⁷⁵ *Report of the Commission on Closer Union of Dependencies in Eastern and Central Africa*, Cmd 334 (1929).

¹⁷⁶ *Ibid.*

for public purposes subject to compensation with land from Crown land, the stage had been set for the expropriation of native reserves.¹⁷⁷

In 1930 the Kenya Land Commission was appointed to look into, among other things, the grievances of Africans caused by past alienation of land to Europeans and how to address these grievances, the present and future African land needs and measures to meet them, the position of the white highlands, and to examine the operation of the 1930 Native Lands Trust Ordinance.¹⁷⁸ Its recommendations were, *inter alia*, that native reserves already established should remain exclusively for Africans and there should be no further encroachment, that in small and insecure native reserves, more land should be added, that Africans should be granted leasehold interests just like settlers, that where settlers had leasehold interests, natives rights be extinguished and the affected parties be relocated, and that the White Highlands should remain exclusively for Europeans and they also be expanded.¹⁷⁹

The implementation of the recommendations of the Carter Commission via various legislative instruments was a clear recognition of the Africans' land rights which had been expropriated by the 1915 Crown Ordinance. For instance, in *Stanley Kahahu v. A.G.*,¹⁸⁰ it was held that both the 1930 and 1934 Native Lands Trust Ordinances recognized individual landholding by Africans in the reserves despite earlier decisions denying them such rights. The Native Lands Trust Ordinance 1938 required all areas formerly known as 'native reserves' to be redesignated 'native lands' and removed from the 1915 Crown Land Ordinance. Similarly, the 1915 Crown Land Ordinance was further amended to make available, out of crown lands,

¹⁷⁷ Mweseli (n 21)10-11.

¹⁷⁸ Morris Carter, *Report of the Kenya Land Commission*, 1934, (Government Printer, Nairobi).

¹⁷⁹ *Ibid.*

¹⁸⁰ (1936) 18 KLR 5.

additional lands for future use, called variously as ‘native reserves’, ‘temporary reserves’ and ‘native leasehold areas’. The other legislation implementing the recommendations was the Kenya (Native Areas) Order-in-Council 1939¹⁸¹ which provided that native areas be categorized as native lands, temporary native reserves and native leasehold areas. In these areas the applicable law was to be African customary law. A Native Lands Trust Board was formed to protect native interests.

Regarding the White Highlands, the Kenya (Highlands) Order-in-Council¹⁸² was enacted and it, *inter alia*, stipulated that the boundaries of the Reserves and Highlands were not to be changed except as provided in the Crown Lands Ordinance 1930 and the Native Lands Trust Ordinance 1938. It established a Highlands Board which was to protect the interests of the settlers and to advise the Governor on matters affecting the Highlands.

However, the political and economic marginalization of forest communities can be traced to the Carter Commission as it failed to recognize forest communities as distinct communities, but sought to assimilate them into the neighbouring communities like the Maasai or the Kalenjin. Although their ancestral territorial boundaries were recognized by the neighbouring communities, these were disregarded by the colonial government who went ahead and seized their lands. They also gazetted the forests to become state property, thus rendering forest dwelling communities homeless. In this way, they became subject to dominant customs of the neighbouring communities who tried to assimilate them.¹⁸³ This marginalization can now be

¹⁸¹ Number 138 of 1939.

¹⁸² SRO No. 517 of 1939.

¹⁸³ Ministry of Lands and Housing, *Issues and Recommendations Report of the National Land Policy*, (National Land Policy Secretariat, 2005).

addressed under the existing legal framework, which has elaborate provisions addressing the needs of marginalized and minority groups.

2.4.1 Implication of Colonial Laws and Policies on Communal Landholding in the Reserves

Colonial policies and legislative instruments had far reaching ramifications on African landholding and forests management, which were largely communal and organized around traditional tenure arrangements.¹⁸⁴ For instance, under the Forest Department, Africans were displaced from their land without considering their rights and strict regulations imposed on the use of forest products by forest-adjacent communities.¹⁸⁵ African rights to the forests were not recognized, as the Africans were considered illegal squatters or tenants-at-will of the Crown.¹⁸⁶ Under the Native Lands Ordinance of 1930, displaced natives were confined within native reserves. Moreover, forests within native reserves were declared native forest reserves under this Ordinance.¹⁸⁷ This meant that access thereto by natives had been curtailed. Uhler asserts that the effect of confining Africans to native reserves and restricting access to large forest blocks and charging for fuel was the depletion and over-exploitation of forests within native reserves.¹⁸⁸

Okoth-Ogendo notes the impact of colonial policies on settlement patterns and systems of allocation, control and use of land resources. He cites the problems of overcrowding due to

¹⁸⁴ Njonjo Report (n 28) 27.

¹⁸⁵ E. Mwangi, *Colonialism, Self-Governance and Forestry in Kenya: Policy, Practice and Outcomes*, available at <http://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/5706/Colonialism%20self%20governance%20and%20forestry%20in%20Kenya.pdf?sequence=1>, (accessed on 22/06/2013).

¹⁸⁶ Ibid. See also the 1915 Crown Ordinance which rendered Africans tenants at will of the Crown.

¹⁸⁷ Ibid.

¹⁸⁸ M.N. Uhlar, "The other lost lands: The forest department in colonial Kenya," (Working paper, History Department, Kenyatta University, 1982).

population growth leading to land fragmentation, overstocking and soil erosion in native reserves.¹⁸⁹ Pastoral¹⁹⁰ and agricultural communities,¹⁹¹ whose economic activities involved free movement in search of pastures and rich farming lands, respectively, were heavily affected.

The Native Reserves boundaries were based on ethnic boundaries which fanned ethnicity among Africans as they excluded both non-Africans and other African communities.¹⁹² Consequently, ethnicity became an essential attribute of land tenure and tenure relations in Kenya, a fact attested to by Article 63(1) of the Constitution which recognizes one of the basis of holding community land as ethnicity.¹⁹³ In essence, the territorial fixity created by the reserve concept was a factor of disruption to the existing equilibrium between patterns of land use and the available land as it made it impossible for Africans to acquire land elsewhere, a phenomenon which was common under both pastoralism and shifting cultivation as practiced by most communities.¹⁹⁴ Existing social and cultural institutions and substantive norms of African property law were also affected, especially those dealing with the allocation of land rights and control of land use. For example, the introduction of permanent cash crops, such as coffee and tea, within the reserves undercut the economic basis of traditional authority as it came with new land use patterns alien to those practiced by Africans, that is, pastoralism and shifting cultivation.

¹⁸⁹ Okoth-Ogendo (n4) 61.

¹⁹⁰ These communities were faced with famines and livestock diseases and plagues as they struggled to adapt themselves to their new ecological areas.

¹⁹¹ Agricultural communities were displaced from the rich highlands to pave way for settlers. This led to massive landlessness and discontent among the peasants creating insecurity and political consciousness in the 1950s and 1960s, e.g., the Mau Mau movement in Central Kenya.

¹⁹² See, generally, section 3 of the Native Authority Ordinance No. 20 of 1940 which gave the Provincial Commissioner the power to order any native found cultivating land outside his reserve to return there.

¹⁹³ See, generally, Article 63 of the Constitution.

¹⁹⁴ Okoth-Ogendo (n 4), 61-65.

In effect, there was a breakdown of social institutions, such as the *githaka* system of landholding among the Agikuyu, which could not be sustainable in light of private land rights.¹⁹⁵

It is instructive to note that whereas, in practice, landholding in the native reserves was influenced by English property laws, theoretically, the substantive law of the native reserves under the Native Lands Trust Ordinance 1938 was the customary law applicable to the area in which the land was situated. Section 68 of the Ordinance declared that ‘in respect of the occupation, use, control, inheritance, succession and disposal of any land situate in the native lands, every native tribe, group, family and individual shall have all the rights which they enjoy or may enjoy by virtue of existing native law and custom or any subsequent modification thereof...’ Even though this was in pursuance of the dual policy of development then, the development of customary property law was seen as strictly ancillary to the needs of the colonial system as a whole.¹⁹⁶ In a nutshell, the colonial laws and policies of land alienation had more immediate negative impacts for pastoral communities and hunter-gatherers than for agricultural peoples. For example, the gazettement of forests as forest reserves meant that access thereto by forest adjacent communities had been curtailed.¹⁹⁷

2.4.2 Land Reforms in the Reserves and their Implications on Native Lands

The native reserves policy led to serious problems as it could not support shifting cultivation or pastoralism as practiced by Africans. Africans, thus, began to clamor for their land rights through nationalist movements, such as the Mau Mau in the 1950s. Attempts were made to address these problems.¹⁹⁸ Some colonialists conceived the problem in terms of population

¹⁹⁵ Ibid.

¹⁹⁶ Ibid., 64.

¹⁹⁷ Ministry of Lands (n 39), 72.

¹⁹⁸ Njonjo Commission Report (n28), 25-29.

pressure, inferior land and inadequate technology, for which resettlement, destocking, soil conservation and better farming methods offered the solution. There were, therefore, resettlement programmes in empty spaces in the reserves, soil conservation campaigns, new farming technologies, and cash-crop farming in the native reserves.¹⁹⁹

The colonialists also conceptualized the problem as arising from the indigenous tenure arrangements which hindered agricultural development and caused uncertainty in decision-making. Individualization was thought to be a solution as it would enhance decision-making in land use and encourage initiative. Moreover, the ambiguity over the rights of use was seen as a factor contributing to conflicts and disputes, hampering agricultural development. By individualizing tenure, the owner of land would have exclusive rights over his land, thus minimizing disputes. Further, there was a view that indigenous systems of land inheritance led to fragmentation of holdings into smaller units that were not suitable for commercial agriculture.²⁰⁰ The thinking was that individualization of tenure could lead to agricultural development.

In 1955 the Swynnerton Plan was adopted. This Plan conceptualized the issue of access to land as one of tenure and the technology of production. According to the Plan, these two strategies would enable Africans to be able to make sufficient returns on their small plots of land and abandon their demand for land rights. By modernizing agriculture, the Plan created a landed African gentry which would have high stakes in the colonial administration and act as a bulwark against the nationalist movements which were forming at the time.²⁰¹ To the pastoralists and

¹⁹⁹ Ibid., 28. See also Mweseli (n21)15.

²⁰⁰ Sessional Paper No. 8 of 1945 on *Land Utilization and Settlement in Kenya*, (Government Printer, Nairobi).

²⁰¹ M.P.K Sorrenson, *Land Reform in Kikuyu Country*, (Oxford University Press, Nairobi, 1967).

hunter gatherer communities, this Plan undermined their economies and led to their political marginalization and the deterioration of their production system and livelihood.²⁰²

So as to provide the legal basis for individualization, the Native Land Tenure Rules 1956 in Rule 2(1) empowered the Minister for African Affairs to set up machinery for the adjudication and consolidation of those areas of native lands within which he considered that a private right holding exists.²⁰³ The legal status of holdings consolidated under the Rules was not evidently clear. The Rules did not expressly state that the entry into the adjudication register would extinguish customary rights and thus the Rules could not confer individual ownership.

To prevent any action as a result of tenure reform measures in the native reserves, two laws were enacted. First, the African Courts (Suspension of Lands Suits) Ordinance²⁰⁴ sought to bar all land litigation in all areas to which the Rules applied. The effect of this Ordinance and the 1956 Native Land Tenure Rules was to close any avenues to courts that may have been available to aggrieved or disposed natives. The Indemnity Ordinance²⁰⁵ sought to absolve any person in government service from liability arising from any act, matter or thing done within the Kikuyu Native Land Unit during the emergency.

In 1957, a Working Party on African Land Tenure was tasked with the role of examining and making recommendations on measures necessary to introduce a system of land tenure capable of application to all areas of native lands. Its recommendations were, *inter alia*, that the adjudication and consolidation process be based on the pre-existing system which was based on local committees. That the legal title to the consolidated plot be derived from the fact of

²⁰² Ministry of Lands (n39), 73.

²⁰³ LN 452/1956.

²⁰⁴ Ordinance No. 1 of 1957.

²⁰⁵ Ordinance No. 36 of 1956.

registration rather than being conferred by an act of government and the title be absolute and, except for matters of succession, registration should take place outside the provisions of the Native Lands Trust Ordinance. It also recommended a simple code of modern land law to be introduced to provide a framework for transactions in the registered land. Lastly, it recommended measures similar to those in existence in the highlands under the Land Control Ordinance 1944 to control land transactions to prevent rural indebtedness and landlessness.²⁰⁶

The recommendations were incorporated in the Native Lands Registration Ordinance 1959 and the Land Control (Native Lands) Ordinance 1959 which superseded the 1956 Rules. The Native Lands Registration Ordinance 1959 applied to any native area where it appeared to the Minister that adjudication, consolidation and registration of rights should take place. It also re-enacted all the demarcation, adjudication and consolidation provisions of the 1956 Rules and a registration system that radically transformed the legal status of the registered land. For instance, a right of occupation under African customary law and custom, if shown on the register, was deemed to have been converted under section 33(6) into a periodic tenancy from year to year, otherwise it was extinguished. Further, under section 37(a) the registration of land as freehold title vested in the registered proprietor '*an estate in fee simple in such land together with all rights and privileges belonging or appurtenant thereto...*' Section 89(1) declared that a first registration was indefeasible even if obtained by fraud. In essence, this Ordinance extinguished all existing rights and interests that the natives had over land under customary law. After independence this Ordinance was re-enacted as the Registered Land Act²⁰⁷ (now repealed). Private property rights in landholding in Kenya had, thus, been effectively institutionalized and communal notions of landholding disrupted.

²⁰⁶ Mweseli (n 21)18, & Okoth-Ogendo (n 4) 73.

²⁰⁷ Cap. 300, Laws of Kenya.

The Land Control (Native Lands) Ordinance was almost similar to the 1944 Land Control Ordinance applicable to the white lands. It sought to control transactions in registered land²⁰⁸ by stipulating that before any disposition, the parties must obtain the consent of the Land Control Board of the district in which the land was located. This law was later replaced in 1967 by the Land Control Act.²⁰⁹

2.4.3 Effects of Reforms on Native Lands

Generally, the social and cultural way of life of African traditional communities was important in influencing tenure systems and property relations. First, tenure reforms led to structural re-organization in the native areas. The process of adjudication, consolidation and registration led to many being uprooted from familiar terrain, thus destroying established social relations.²¹⁰ Secondly, the land registration process extinguished any rights of occupation under African customary law not noted on the register causing massive landlessness among Africans.²¹¹ After independence, the Native Lands Registration Ordinance 1959 was re-enacted into the Registered Land Act²¹² whose effect, in section 28 thereof, was to extinguish claims to land based on customary land laws.²¹³ This has led to many disputes in court seeking interpretation of sections 27 and 28 of the Registered Land Act whose effect was to confer absolute title on the registered proprietor. The rights of the registered proprietor under the Act

²⁰⁸ Mweseli (n 21)18. & Okoth-Ogendo (n 4) 73.

²⁰⁹ Cap. 281 laws of Kenya.

²¹⁰ Mweseli (n 21)18. & Okoth-Ogendo (n 4) 73.

²¹¹ Section 33 (6) of the Native Lands Registration Ordinance 1959. See also *Thuku Mbuthia v. Kaburu Kimondo* (1964) COR No.17.

²¹² Cap.300 Laws of Kenya.

²¹³ See the decisions in *Obiero v. Opiyo and others* [1972] EA 227, and *Esiroyo v. Esiroyo and others* [1973] EA 388.

have caused confusion and insecurity of tenure in many parts of the country.²¹⁴ This is particularly so where a family had entrusted one member to be registered in trust for the rest of the family, only to realize later that registration had conferred absolute title on the individual.

Thirdly, from 1938 onwards radical title to native lands was now vested in the Trust Board and not the Crown.²¹⁵ Later on, under the Native Lands Registration Ordinance, the Trust Board was divested of this radical title and vested in the Africans. The import of this is that it gave Africans more than mere quietude of possession. Rather, it placed African landholding on the principles of English property law.²¹⁶ This position applies even today in that land rights based on customary law are still regarded as inferior to rights based on English property laws.²¹⁷

2.5 Efforts to Secure Community Land

Before the Constitution 2010, community tenure was not given adequate protection in law.²¹⁸ Land was categorized as government land, trust land and private land.²¹⁹ Efforts to secure community land under the repealed Trust Land Act²²⁰ have been futile. Under the trust land concept, county councils are the trustees of Trust land and in many cases have disposed of trust land irregularly and illegally to the detriment of the local communities.²²¹ Disposition of

²¹⁴ Ibid. See also *Mwangi Muguthu v. Maina Muguthu* [HCCC No. 337 of 1968] and *Gatimu Kinguru v. Muya Gathangi* [1976] KLR, where the courts sought to circumvent the rigours of the RLA by applying notions of customary land ownership.

²¹⁵ Okoth-Ogendo (n4) 76.

²¹⁶ Ibid.

²¹⁷ For example, the Community Land Bill is yet to be enacted into law, a year after the passage of the Land Act and Land Registration Act, 2012.

²¹⁸ Kameri Mbote *et al* (n3) 43.

²¹⁹ Sessional Paper No. 3 (n1) 15.

²²⁰ Cap. 288, Laws of Kenya.

²²¹ Sessional Paper No. 3 (n1) 11-12.

trust lands to individuals and the government was sanctioned by sections 116 and 118 of the repealed Constitution. These dispositions also affected forest lands.

This happened despite section 69 thereof recognizing the African Customary law of communities. For instance, in *Kinyanga and others v. Isiolo County Council and others*,²²² the Plaintiffs, who were members of the Maasai community, sought declarations, *inter alia*, that they were the rightful occupants of the suit land, held for them in trust by the Council, which was in breach of the trust. They wanted the court to order the Commissioner of Lands to declare the suit area an exclusive trust land for the Maasai community. The court rejected this argument, stating that any intended division of this country into tribal or community groups in order to promote a particular tribe or community welfare, wellbeing of tribal interests, be they of commercial or political nature would be unconstitutional and unacceptable.

This ruling was reached despite the Constitution (now repealed) obligating the county councils, in whom trust lands are vested, to hold them for the benefit of the persons ordinarily resident thereon and to give effect to such rights, interests or other benefits in respect of the land as may, under the African customary law for the time being in force and applicable thereto, be vested in any tribe, group, family or individual. However, no right, interest or other benefit under African customary law could have effect if it was repugnant to any written law.²²³

The Trust Land Act also provides for the creation of forest reserves, which are land areas that have been surveyed, demarcated and gazetted. They are gazetted either from trust land or from unalienated Government land. Those gazetted from government land are managed by the

²²² [2006] 1KLR (E and L) 229.

²²³ Section 115(2) of Constitution of Kenya, *Repealed*.

Forest Department, while those on trust land were managed by local authorities.²²⁴ Further, the Trust Land Act makes provision for the general conservation, protection and controlled utilisation of trees and other forest products on land, other than gazetted forest reserves.²²⁵ Moreover, under the trust land concept, some areas of trust land can be set aside as national reserves under the Wildlife (Conservation) and Management Act²²⁶ and managed by the local authorities. This, therefore, meant that even areas inhabited by local communities could be set aside thus depriving them of access rights to forests. The Trust Land Act still applies to trust land as it has not been repealed by the Land Act 2012 and Land Registration Act 2012.

Similarly, under the Land (Group Representatives) Act²²⁷ the group representatives entrusted with the management of grazing lands in many cases dispose of group land without consulting the other members of their groups.²²⁸ Group ranches have failed because the group representatives lack the backing of traditional leaders. This has led to the disregard of group rules. In addition, over-emphasis on individualization has led to the assumption that group rights will mature into individual rights.²²⁹ Just like the Trust Land Act, the Land (Group Representatives) Act is still in force. Furthermore, attempts to extinguish claims to land based on customary land laws were effected through the Registered Land Act.²³⁰ Because of the

²²⁴ Forestry Outlook Study for Africa (FOSA) Country Report Kenya, available at <http://www.fao.org/docrep/003/ab569e/AB569E05.htm#TopOfPage>, (accessed on 22/06/2013).

²²⁵ Ibid. See also section 68 of the Trust Land Act (Cap. 288), providing for repossession of trust land by the government.

²²⁶ Cap.376, Laws of Kenya.

²²⁷ Cap. 287, Laws of Kenya.

²²⁸ Sessional Paper No. 3 (n1)11-12.

²²⁹ Kameri Mbote *et al* (n3) 45.

²³⁰ Sections 27, 28 & 30, Cap. 300 of the Laws of Kenya.

ambiguous nature of tenure in trust lands and un-alienated government land and the failure of the group ranches, there was a need to recognize community tenure in Kenya.

The National Land Policy recognizes community land and the rights of forest communities to access, co-manage and derive benefits from forests.²³¹ Likewise, the Constitution 2010 recognizes community land and defines it to include community forests.²³² Article 40 of the Constitution protects property including community land. It provides that subject to the police power of the state, every person shall have the right, either individually or in association with others, to acquire and own property of any description and in any part of Kenya.²³³ Community land is given similar treatment as public and private land in the Constitution, suggesting that customary land rights shall have equal force of law and receive equal treatment like any other interests in land.²³⁴ Further, the Constitution provides that land in Kenya be held, used and managed in a manner that is equitable, efficient, productive and sustainable and in accordance with principles that, *inter alia*, ensure equitable access to land, security to land rights and transparent and cost effective administration of land.²³⁵ Implementation of these provisions may guarantee forest communities security to community land.

²³¹ Sessional Paper No. 3 (n1) 16-18.

²³² Article 63(2)(d) of Constitution of Kenya.

²³³ Ibid., Article 40(1).

²³⁴ Ibid., Article 61.

²³⁵ Ibid., Article 60(1).

2.5.1 Community Land Law

Despite recognition of community land in the Constitution, the Community Land Act is yet to be enacted²³⁶ a year after the enactment of the Land Act²³⁷ and Land Registration Act.²³⁸ This demonstrates the preference accorded to private property rights and leaves community land under the old regime which may contribute to its loss to private persons. There is, however, a draft Community Land Bill 2013. The definition of community land in the draft Bill leaves out community forests in clause 2 thereof. Clause 36(1) of the draft Bill provides that the National Land Commission may make rules and regulations for the sustainable conservation of land-based natural resources within community land. It further provides unlimited powers to the Commission to make rules and regulations on protection of critical ecosystems and habitats and for measures to facilitate access, use and co-management of forests by communities who have customary rights to forests.²³⁹ The Commission may, thus, make rules and regulations that restrict access to forest resources by communities making this a critical land use issue. Moreover, it seems the Bill separates ownership of forests/trees and the underlying land. Whereas this may be in line with certain customary rights, it may weaken the land rights of communities if rights to trees and the underlying land are distinct. This is also unconstitutional as the Constitution does not recognize community access rights to forest resources only. It recognizes community land, which includes community forests.

²³⁶ Kameri Mbote *et al* (n3)155.

²³⁷ No.6 of 2012.

²³⁸ No. 3 of 2012.

²³⁹ Clause 36 (2) of the Draft Community Land Bill, June 2013.

Clause 15 of the Draft Bill establishes a community land management committee in respect of every parcel of community land comprising of members of the community who live on the land. Its functions and powers, as enumerated in clause 20, include to manage and administer community land on behalf of the community, facilitate the recording and issuance of titles for the community land by the Commission, facilitate land use planning and provision of infrastructure by the government, and promote co-operation and participation among community members in dealing with matters pertaining to the land. The Bill also establishes a Community Land Board in respect of every sub-county, in clause 26, whose functions include overseeing the committees in their management and administrative functions over community land. These institutions are appropriate in land management.

In terms of securing community land, the draft Bill provides that, pursuant to Article 40 of the Constitution, every person shall have the right, either individually or in association with others to acquire and own property of any description and in any part of Kenya.²⁴⁰ It also states that no right in community land may be expropriated or confiscated save by law in the public interest and consideration of payment in full of just compensation to the person or persons.²⁴¹ Where there are customary land rights being held by any person or group of persons before the commencement of the Act, the Bill states that such rights shall be held subject to its provisions.²⁴² More importantly, it states that 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 transaction.²⁴³ These provisions are meant to protect

²⁴⁰ Ibid., section 7 (1).

²⁴¹ Ibid., section 7(2).

²⁴² Ibid., section 7(3).

²⁴³ Ibid., section 7(5).

community land rights. It is not, however, clear whether this protection will suffice to counter the competing interests over forests.

2.6 Interactions between Land, Tree and Forests Tenure

Tenure refers to the content or substance of rights and to the security of rights. It refers to rights from different points of view, to overlapping rights and, sometimes, to conflict over resources.²⁴⁴ Understanding the tenure system operative in a given situation is important because those with tenure rights have a certain status vis-à-vis natural resources in comparison to those without tenure rights to those resources.²⁴⁵ Land tenure defines the methods by which rights to land are acquired, held, transferred or transmitted by individuals or groups.²⁴⁶ To know the tenure system operating in an area has been said to be an attempt to answer the tripartite question as to who holds what interest in what land.²⁴⁷ Land tenure represents the relationship that people in a given society have with respect to land. It, therefore, relates to people, time and space.²⁴⁸

Land tenure is also a web of intersecting interests in land.²⁴⁹ It comprises overriding interests, such as where a sovereign power has the powers to allocate or reallocate land through expropriation.²⁵⁰ There are also overlapping interests when several parties are allocated different

²⁴⁴ A.M. Larson, *Tenure rights and access to forests: A training manual for research*, (Center for International Forestry Research, 2012), 9-10.

²⁴⁵ Ministry of Lands (n39) 23.

²⁴⁶ P Kameri-Mbote, "Land Tenure and Sustainable Environmental Management in Kenya," in Okidi *et al* (eds), *Environmental Governance in Kenya: Implementing the Framework Law*, (EAEP, 2008), 261. See also Sessional Paper No. 3 (n37)15.

²⁴⁷ Okoth-Ogendo (n 4).

²⁴⁸ Kameri-Mbote (n102) 262.

²⁴⁹ FAO, "*Land Tenure and Rural Development*" (FAO, 2002), available at <http://www.fao.org/docrep/005/y4307e/y4307e05.htm>, (accessed on 02/08/2013).

²⁵⁰ Ibid.

rights to the same parcel of land.²⁵¹ The interests can also be complementary in that different parties share the same interest in the same parcel of land or even competing interests when different parties contest the same interests in the same land.²⁵² Forest lands are under competing interests as traditional lands, catchment areas, protected areas, agricultural lands and human settlement areas. There is need to reconcile the land tenure and land use systems in forests. In relation to natural resources, land tenure, defines who controls and manages the resource and how the underlying land is managed.²⁵³ This is an attempt at reconciling the interests to resources and underlying land.

In most African societies, land tenure was conceptualized as “a web of interests” as discussed above. Different persons had rights to use, regulate or manage the resource, based on a range of customary institutions or local norms.²⁵⁴ However, communal property rights to land have been affected by the introduction of individual and state ownership of land.²⁵⁵ This has created tenure insecurity to land held under customary tenure. For example, through land titling and registration, certain rights, such as those of forest dwellers, are ignored. This is because their uses of land, such as hunting and gathering of forest products, may not be recognised by the legal system.²⁵⁶ Government policies may also reduce or eliminate rights of access to forest lands. For example, through the policy of creating the Nyayo Tea Zones, discussed in Chapter 1, forest

²⁵¹ Ibid.

²⁵² Ibid.

²⁵³ Kameri-Mbote (n102) 263.

²⁵⁴ Meinzen & Mwangi (n8).

²⁵⁵ Ibid.

²⁵⁶ FAO (n 105).

communities could not have access to forests.²⁵⁷ Such factors can create tenure insecurity. The interaction between land and tree tenure is important, and has been discussed in Chapter 1.

2.7 Forest Tenure and it's Relationship with Land and Tree Tenure

Although it is widely argued that secure land rights can stimulate agricultural productivity, the 'ideal' tenure regime to realize sustainable forest management has not been identified yet.²⁵⁸ This is mainly due to conflicting interests in the multiple functions, services, and benefits that forests and trees provide to mankind. This diversity of interests presents a complex net of ownership, control and use rights which has led to a highly polarised debate on the 'right' forest and tree tenure policies.²⁵⁹ This mirrors the divergent views in forests and tree management in many countries. One view argues for state management of forests and ignores the role of forest dwellers, while the other advocates for involvement of local communities in managing forests. This group argues that loss of forests is a result of destruction and undermining of communal systems of forest management by national forest policies and commercial interests.²⁶⁰ This exemplifies the state of forest degradation in Kenya. The divergent interests in forests management have led to the concept of forest tenure, which encompasses land and tree tenure arrangements.

Forest tenure is broad and includes ownership, tenancy and arrangements for the use of forests. It also determines who can use what resources for how long and under what

²⁵⁷ The Nyayo Tea Zone Development Corporation established via a Presidential Order in 1986 and later through a Legal Gazette Notice No. 265 of 1986 as a State Corporation.

²⁵⁸ Ibid.

²⁵⁹ Ibid.

²⁶⁰ Ibid.

conditions.²⁶¹ It is not just a question of extracting forest products and protecting natural resources, but also deals with issues to do with land use, settlement, rights of indigenous and underprivileged people and human rights.²⁶² Recognition of these issues is as a result of increasing deforestation, leading to loss of biodiversity on one hand, and the clash between the needs of local people and national and global interests to conserve interests for environmental sustainability, on the other.²⁶³ It is, thus, evident that land use is a key factor in forest tenure.

2.8 Land Tenure vis-à-vis Land Use

Land tenure can impact the uses to which land is put and, conversely, land use patterns develop in close relation with land tenure systems.²⁶⁴ For instance, before the Constitution 2010, inappropriate land tenure systems, coupled with high population growth in high potential areas, pushed a significant part of the population among farming communities away from their traditional areas to less productive lands and forest areas, resulting in deforestation and destruction of indigenous forests and water-towers.²⁶⁵ This has resulted in land use conflicts because of competing needs by different land users, that is, forest dwellers versus cultivators, conservationists versus hunters and gatherers amongst other land uses. Conflicts over forests, therefore, have two dimensions namely, the use of land for forests and use of land for other purposes, such as residential, industrial development, farming, livelihood support for the forest

²⁶¹ FAO, “Reforming Forest Tenure: Issues, Principles and Process,” (*FAO Forestry Paper No. 165, 2011*).

²⁶² A. Neef and R. Schwarzmeier, *Land Tenure Systems and Rights in Trees and Forests: Interdependencies, dynamics and the role of development cooperation-Case studies from Mainland Southeast Asia*, available at http://www.landcoalition.org/sites/default/files/legacy/legacypdf/08_gtz_land_tenure_systems.pdf?q=pdf/08_gtz_land_tenure_systems.pdf, (accessed on 30/07/2013).

²⁶³ Ibid.

²⁶⁴ ECA/SDD/05/09 -Land Tenure Systems and their Impacts on Food Security and Sustainable Development in Africa (Economic Commission for Africa, 2004).

²⁶⁵ Ministry of Lands (n39) 17.

dwellers, environmental function as a carbon sink and water catchments.²⁶⁶ This has been a big challenge to policy makers in determining the best uses to put forests land into, in light of competing web of interests. Despite the competing land uses, Kenya has not had a national land-use policy. The study argues that these factors may work towards weakening the protection of community land rights among communities living in or adjacent to forests. For instance, while forests host and sustain a wide range of biodiversity and are critical water towers, competing land uses have led to a decline in forest cover in Kenya.²⁶⁷ Forests have also been excised and allocated to private persons while, in other areas, government policies have emphasized agriculture at the expense of protecting forests as ancestral sites and sources of livelihood of forest communities.²⁶⁸ The multiplicity of land uses to which forests can be put, therefore, present a challenge in coming up with an appropriate tenure arrangement that secures all these claims.

2.9 Conclusion

The chapter has shown that while land and forests were held communally by traditional communities, colonialism introduced private property rights. It also introduced a forest preservation and native reserves policy which displaced Africans from their traditional homes, the forests. Forest communities could, therefore, not have access to and control over forests. It has been shown that whereas community forests were held communally, the evolution of property laws in Kenya has emphasized individual tenure. This created incentives for

²⁶⁶ Ibid.

²⁶⁷ National Land Use Policy, *Draft Concept Paper* (Ministry of Lands, 2010), 16-17.

²⁶⁸ ECA/SDD/05/09 (n120).

neighbouring communities to encroach into forests for agriculture, settlement and logging purposes.

It has been argued that despite the recognition of community land rights in the law, population increase, conservation of water catchment areas and pressure to convert community forests into settlement and agricultural lands threaten the existence of community forests and the land rights of forest communities. It is noted that the multiple uses to which forests can be put present a challenge in coming up with an appropriate tenure arrangement that secures competing interests, including those of forest communities. There is need to come up with innovative ways of securing the land rights of forest communities in light of the competing interests over such lands, as will be discussed in Chapter 4. Chapter 3 examines the implications of formal laws and policies on forests and the land rights of forest communities.

CHAPTER THREE

FOREST LAWS AND LAND RIGHTS OF FOREST COMMUNITIES

3.1 Introduction

This chapter discusses the legal framework on forests in Kenya and its impact on the land rights of forest communities. It looks at the legal framework on forest management in the pre-colonial, colonial and post-colonial periods to assess the way it has treated the land rights of forest communities. Before colonialism, forests were held and managed communally by traditional African communities in ways that ensured forest sustainability.²⁶⁹ As discussed in Chapter 2, there were arrangements where access and use of trees and other forest products could be held by a distinct entity from the one owning underlying land.²⁷⁰ Trees could, thus, form a basis of ownership in traditional African communities. This scenario changed with colonial laws and policies where forests were being protected from destructive indigenous land use practices, private ownership by European settlers and sale of timber.²⁷¹ Post-colonial policies focused on catchment protection, industrial forestry development and protection of forests from encroachment by local communities.²⁷²

Forests provide both material and non-material benefits to local communities. Material benefits include water, medicinal herbs, honey, fuel wood, construction material and fodder from

²⁶⁹ L Emerton, "Mount Kenya: The Economics of Community Conservation," *Evaluating Eden Series, Discussion Paper No.4*, (1999), 3.

²⁷⁰ P.A. Dewees, "Social and economic incentives for smallholder tree growing- A Case Study from Murang'a District, Kenya," (Community Forestry Case Study Series, 1995), available at <http://www.fao.org/docrep/U8995E/U8995E00.htm>, (accessed on 30/07/2013).

²⁷¹ E. Mwangi, *Colonialism, Self-Governance and Forestry in Kenya: Policy, Practice and Outcomes*, Available at <http://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/5706/Colonialism%20self%20governance%20and%20forestry%20in%20Kenya.pdf?sequence=1>, (accessed on 22/06/2013).

²⁷² Ibid.

forests. Non-use benefits include spiritual, cultural, heritage, bequest and aesthetic values.²⁷³ The forest sector also contributes in excess of Kshs. 20 billion worth of goods annually to the economy and is a source of employment to over 350,000 people directly and indirectly. Moreover, over 1 million people living within a radius of 5 kilometers from forest reserves depend on forests.²⁷⁴ Most of the benefits from forests are not traded in the formal markets and/or market prices are non-existent for them.²⁷⁵

Colonial laws and policies on forests were largely preservationist, seeking to protect forests from encroachment by local communities. While the policies sought to protect forests from destruction by natives, extraction of forest products, such as timber by colonialists, was encouraged.²⁷⁶ This Chapter reveals that the colonial policy was to completely disinherit Africans of any entitlements to forests. These colonial policies were continued by the independent government. The chapter also examines existing forest laws and policies and their implication to land rights. It is argued that the notion of community participation, based on user rights alone, is bound to change since community land now includes community forests, meaning that both access and user rights of forest products and ownership of underlying land will be held by communities. Securing land tenure in forests will create incentives to conserve forests as discussed in chapter Two. There is, therefore, need for innovative tenure arrangements in forests to ensure sustainable forest management and secure land rights among forest communities.

²⁷³ Sessional Paper No. 9 of 2005, 18.

²⁷⁴ Ibid. Kenya Forest Service, Strategic Plan (2009/10-2013/14).

²⁷⁵ V. Matiru, Forest Landscape Restoration-Kenya Country Report, (*IUCN/EARO & WWF/EARPO*, 2002), 6-7.

²⁷⁶ Sessional Paper No.1 of 1968-A Forest Policy for Kenya, (*Government Printer, Nairobi*), pp.2-7.

3.2 Overview of Pre-colonial Governance of Forests

Before the coming of colonialism, forests were managed by local communities under traditional resource management institutions.²⁷⁷ Similar practices, norms and institutions were developed to govern access and use of forest products to ensure that the needs of local communities were met.²⁷⁸ Resource use was based on communal rules which laid emphasis on conservation for the benefit of both the present and future generations.²⁷⁹ Apart from this utilitarian approach, forests were also protected as ritual and cultural sites. There were sacred groves and religious taboos guiding forest management.²⁸⁰

Land within forests was held communally and each person had rights of access based on his needs. Such access rights were guaranteed by a political authority which did not own land, but merely exercised political authority over land. The political authority facilitated the structural framework within which rights of access were to be enjoyed equitably.²⁸¹ The social and cultural life of each traditional society was thus important in influencing tenure systems and property relations in general.²⁸² For example, among the Agikuyu and Aembu who were agricultural communities, it is reported that forest land was owned by clans, but only up to a

²⁷⁷ Ibid.

²⁷⁸ Emerton (n1) 3.

²⁷⁹ J Kenyatta, *Facing Mount Kenya*, (Vintage Books, 1965), 21-51. See also Hilary Wambugu *et al*, *The Agikuyu: Their customs, Traditions & Folklore*, (Wisdom Graphics Place, 2006), 28-47.

²⁸⁰ Among the Agikuyu *ngai* lived in the Mount Kenya forest. The *kaya* forests were also protected for cultural and religious reasons.

²⁸¹ S.C. Wanjala, "Land Ownership and Use in Kenya: Past, Present and Future", in Smokin C. Wanjala, (ed), *Essays on Land Law: The Reform Debate in Kenya*, (Faculty of Law, University of Nairobi, 2000), 25-44.

²⁸² Ibid.

maximum of two miles into the forest. Land above that was held by the community.²⁸³ Land within forests was thus held communally.

In relation to trees, there was a distinction between rights in land and rights in trees. For instance, an individual could have the right to use land for growing annual crops, while the larger community had the right to use the trees on the land. It was also common for male descendants of a land owner to inherit land, while the daughters inherited the trees on it.²⁸⁴ Trees also symbolized ownership.²⁸⁵ It was thus possible to have tenure systems where rights of tree ownership and exploitation could be held separately from land.²⁸⁶ However, under English law trees are considered part of the land and cannot be vested in a different person other than the landowner.²⁸⁷ Under customary law, trees can be a basis for rights and can be used by communities to assert their claims over forested areas.

3.3 Colonial Policies on Forests

The earliest forest legislation was done in 1891 for the protection of mangrove forests at Vanga Bay. It was later extended to protect mangrove forests throughout the coast in 1900.²⁸⁸ In 1897, the Ukamba Woods and Forest Regulations were enacted. They reserved trees within 5 miles of the Nairobi County House and within 2 miles of the railway line. This strip was

²⁸³ A.P. Castro, "The Southern Mount Kenya Forest since Independence: A Social Analysis to Resource Competition," *World development*, Vol. 19, No. 12, (1991).

²⁸⁴ Andreas Neef and Rainer Schwarzmeier, "Land Tenure Systems and Rights in Trees and Forests: Interdependencies, dynamics and the role of development cooperation-Case studies from Mainland Southeast Asia" available at http://www.landcoalition.org/sites/default/files/legacy/legacypdf/08_gtz_land_tenure_systems.pdf?q=pdf/08_gtz_land_tenure_systems.pdf, (accessed on 30/07/2013).

²⁸⁵ Ibid.

²⁸⁶ Dewees (n2).

²⁸⁷ Ibid.

²⁸⁸ Kenya Forest Service (n 6), 6.

effectively placed under the control of District Forest Officers and railway authorities. Later on in 1900, the 1891 and 1897 Regulations were extended to cover all forests in the coastal region and all those along the railway line.²⁸⁹ These Regulations merely paid lip service to forest conservation as they did not establish adequate policy mechanisms to halt forest destruction taking place at the time.²⁹⁰ This shows that the colonialists were interested at the exploitation of forests for their own economic interests. For example, through the construction of the Uganda railway, there was massive forest destruction as the railway relied on wood fuel from Kenyan forests.

The East Africa Forestry Regulations of 1902 provided the legal basis for forest reserves and for appropriate regulations forbidding any cutting, grazing or trespassing without a permit.²⁹¹ They also provided for the gazettelement and de-gazettelement of forest areas, offences and punishment of offenders, the issuance of licenses to permit any act otherwise forbidden by the Regulations, and the utilisation, free of charge, by *bona fide* travellers, of dead and fallen timber for fuel.²⁹² Moreover, a number of key reserved forests were declared Crown Lands at this time.²⁹³ The effect was that forest communities had to vacate their traditional lands and their rights to derive livelihoods from forests curtailed.

²⁸⁹ Matiru (n 7) 6-7.

²⁹⁰ Ibid

²⁹¹ T.P. Ofcansky, *Kenya Forestry under British Colonial Administration, 1895-1963*, *Journal of Forest History* Vol. 28, No. 3, Jul., (1984), 136-143.

²⁹² J.M. Klopp, "Deforestation and democratization: patronage, politics and forests in Kenya," *Journal of Eastern African Studies* Vol. 6, No. 2, May 2012, 351-370, available at <http://www.columbia.edu/~jk2002/publications/Klopp12b.pdf>, (accessed on 07/07/2013).

²⁹³ Emerton (n1) 3-5.

The position of Chief Conservator of Forests was also established in 1902 to oversee the management of regulated forests at the national level. The office of the Conservator of Forests was later transformed into the Forest Department and has since been involved in forest management in Kenya, without the full involvement of local communities. The effect was the exclusion of communities from forest management and irregular allocation of forests sparking a conflict between the government, local communities and companies engaged in logging activities.²⁹⁴

Destruction of forests taking place at the time, and the need to generate revenue for the forest department through the sale of timber and minor forest products, led to various government interventions. One of these was the *shamba* system. The *shamba* system was designed to provide a framework where communities could assist the forest department in the establishment of forest plantations by inter-cropping young trees with food crops till the trees became established.²⁹⁵ Under the system, re-planting of exotic plantations after they had been felled was encouraged and local communities could settle inside forest reserves and intersperse young trees with food crops. The communities were also allowed to occupy specific areas of forest for re-planting until the trees reached specified heights, when they would be moved to another area.²⁹⁶

Major gazettement of forest blocks, boundary surveying and marking took place in 1908 so as to bring the majority of forest blocks under the control of the government.²⁹⁷ It is documented that by 1908, approximately 264,400 acres of forest land was under the control of

²⁹⁴ Jacqueline (n 24).

²⁹⁵ Matiru (n 7) 6-7.

²⁹⁶ Ibid.

²⁹⁷ Ibid.

Europeans for farming and industrial purposes.²⁹⁸ This was necessary so as to provide a source of wood fuel to the Uganda Railway which relied on wood fuel from Kenyan forests.²⁹⁹ The 1915 Crown Lands Ordinance also brought forests under the occupation of native tribes under state control. In 1932, the remaining expansive forests were gazetted, thus bringing most of the forests in high potential areas under state control.³⁰⁰ Introduction of exotic plantations and the creation of forest reserves have also been cited as causes of the wanton destruction of natural forests and replacement of indigenous forest cover which provide the livelihood of forest communities.³⁰¹

Around 1930, the Kenya Land Commission was tasked to look into the land problems in the colony.³⁰² However, it failed to recognize forest communities as distinct communities but sought to assimilate them into the neighbouring communities, like the Maasai or the Kalenjin. They, thus, became subject to dominant customs of these communities.³⁰³ They were deprived of their tribal status and their claim to their ancestral land was denied.³⁰⁴ It also sought to concentrate them either on European farms as squatters and labourers or in Forestry Department labour camps.³⁰⁵

²⁹⁸ Ofcansky (n 23) 136-143.

²⁹⁹ Ibid.

³⁰⁰ Matiru (n 7) 6-7.

³⁰¹ John Kamau, *The Ogiek: An In-depth Report*, available at www.ogiek.org/report/ogiek-ch1.htm, (accessed on 4/07/2013).

³⁰² Morris Carter, *Report of the Kenya Land Commission*, (Government Printer, Nairobi, 1934).

³⁰³ Ministry of Lands and Housing, *Issues and Recommendations Report of the National Land Policy*, (National Land Policy Secretariat, 2005).

³⁰⁴ Kamau (n 33).

³⁰⁵ Ibid.

The Forest Ordinance was revised in 1941 and 1942. The revised law made provision for the establishment, control and regulation of central forests and forest areas in Nairobi and on unalienated government land under the Forestry Department. It also provided for the creation of nature reserves within forest reserves and for forest guards' terms of service to be controlled by rules under the Forest Ordinance, instead of a separate legislation. It also made provision for establishment of a Forestry Advisory Committee to advise the Governor on forestry matters.³⁰⁶

In attempts to centralize forest policy and to encourage the business of forest plantation, the colonial government published 'An Economic Survey of Forestry in Kenya and Recommendations Regarding a Forests Commission.' It was a reforestation and employment creation strategy in native areas after the Mau Mau revolt. Similar reforestation strategies were carried out under the Swynnerton Plan so as to repair and restore water catchment areas.³⁰⁷ These uncoordinated efforts were necessary since the government did not have a formal forest policy until 1957.

The first formal forest policy was White Paper No. 85 of 1957. It reiterated the forest preservation policies of the government. It set out the colonial government plan of creating forest reserves to meet national and export demands for timber and other forest products.³⁰⁸ It formally put forest communities' land under the control of government.³⁰⁹

Colonial policies on forests were preservationist. They sought to protect forests from traditional farming practices which were thought to be destructive to forests. They also sought to prevent European settlers from obtaining private ownership over forests. Moreover, they were

³⁰⁶ Ofcansky (n23), 136-143; See also Kenya Forest Service (n 6) 6.

³⁰⁷ Ibid., Ofcansky, 142.

³⁰⁸ Ibid.

³⁰⁹ Kamau (n 33).

geared towards the generation of revenue for the forest department through the sale of timber and minor forest products.³¹⁰ According to Ofcansky, colonial policies succeeded in restoring forests in Kenya.³¹¹ However, this view is not entirely correct as local communities' land rights were lost through gazettelement of community lands as forests or national reserves or excision and allocation to the State or individuals who were later issued with titles to the land.³¹² Access to state forests was tightly controlled by forest guards who ensured continued forest health through exclusion, and only activities approved by the Forest Department were carried out.

3.4 Post-Colonial Laws and Policies on Forests

Post-colonial policies on forest management focused on catchment protection, industrial forestry development, and protection of forests from encroachment by local communities.³¹³ The 1942 Ordinance was adopted in 1964 as the Forests Act.³¹⁴ The law gave the Minister immense powers in forest management in Kenya. For example, in section 4 thereof, the Minister could declare, by notice in the gazette, any unalienated government land to be a forest area, give the boundaries of a forest and from time to time alter those boundaries, and would also declare when an area would cease to be a forest area.³¹⁵ Further, the law did not require the minister to give any reasons in exercising his powers nor involve local communities. Neither was there a need for parliamentary approval of the Minister's decision. There was also no criterion for declaring an area to be or to cease to be a forest nor did it give any incentives to communities to manage

³¹⁰ Mwangi (n 3).

³¹¹ Ofcansky (n23).

³¹² Sessional Paper No. 3 of 2009 on National Land Policy. This policy also did not recognize stakeholder's participation in management of state forests as a viable option.

³¹³ Mwangi (n 3).

³¹⁴ Cap. 385, Laws of Kenya.

³¹⁵ Section 4 of the Forests, Act Cap. 385.

forests.³¹⁶ Abuse of these powers by the Minister led to the displacement of many forest communities from their ancestral lands. There was also loss of indigenous forests and exclusion of communities from forests management.³¹⁷

The preservationist policies of White Paper No. 85 of 1957 were reiterated by the post-colonial government in Sessional Paper No.1 of 1968.³¹⁸ It, *inter alia*, provided for the need to reserve more land for forestry in light of the role of forests in soil and water conservation. It recognized the need for managing forests sustainably to ensure Kenyans continue to receive forest products in perpetuity. It recognized the importance of forests for recreation and wildlife habitats. It also provided that forests under the respective county councils would be managed jointly by the Forestry Department and the relevant county councils.³¹⁹ However, this policy did not present an opportunity for the participation of communities and other key stakeholders in forest management in Kenya.³²⁰

The National Food Policy 1981 emphasized promoting food self-sufficiency and production of export crops and, thus, provided an impetus for converting gazetted lands into farming zones.³²¹ Sessional Paper No. 1 of 1986 on economic management for record growth focused on economic empowerment for renewed growth especially in the production of wheat, coffee, tea and horticulture. This had the effect of encroaching into forested areas.³²² Another

³¹⁶ F.D.P. Situma, "Forestry Law and the Environment," in Okidi *et al* (eds), *Environmental Governance in Kenya: Implementing the Framework Law*, (EAEP, 2008), 235-259.

³¹⁷ Kenya Land Alliance, *Forest Dependence in Kenya: A Case Study of Hunter-Gatherer Communities in Kenya*, (Kenya Land Alliance, 2009), 41.

³¹⁸ Session Paper No. 1 of 1968.

³¹⁹ Ibid.

³²⁰ G Mbugua, *Status of Implementation of Forest-related Clauses in the CBD*, (Forest Action Network Kenya, 2002).

³²¹ Sessional Paper No. 4 of 1981 on National Food Policy.

policy was the Nyayo Tea Zones which were established adjacent to forests to act as buffer zones against encroachment by agricultural communities into forests designated as water catchment areas.³²³ This led to the clearance of large tracts of forests for tea farming.

In 1987, there was a ban on the *shamba* system so as to resettle communities outside gazetted forest areas due to wide-spread abuse, whereby communities living in the forest were engaged in timber extraction and charcoal burning, usually with the collusion of forest officers.³²⁴ In the 1990s, the *shamba* system was reinstated in efforts to encourage community forest management by forest adjacent communities.³²⁵

The 1968 policy was reviewed in accordance with the Kenya Forestry Master Plan recommendations of 1994 whose objective was to enhance the role of forests in socio-economic development and environmental conservation. It also sought to stop deforestation and improve the management of government-controlled indigenous forests and forest plantations.³²⁶ It did not, however, address the issue of deforestation and land rights of forest people as evidenced by the passage of forest policies in 2005 and 2007.

Notwithstanding a government ban on logging of indigenous forests in 1982, indigenous forests continued to be under threat from illegal settlement, grazing and cultivation, illegal logging for timber, poles, posts and charcoal throughout the 1990s.³²⁷ This shows that the

³²² Sessional Paper No. 1 of 1986 on Economic Management for Record Growth.

³²³ The Nyayo Tea Zone Development Corporation established via a Presidential Order in 1986 and later through a Legal Gazette Notice No. 265 of 1986 as a State Corporation.

³²⁴ Matiru (n7) 6-7.

³²⁵ Emerton (n1) 5-6.

³²⁶ Mwangi (n 3).

³²⁷ Kenya's National Charcoal Survey Report, 2005.

challenges facing the forestry sector are partly due to historical load and general poor governance. They are also cross-sectoral touching on other sectors such as land, wildlife, water and agriculture.

In 2005, a Forest Policy³²⁸ was passed. It recognizes the rights of forest adjacent communities to derive spiritual and material benefits from forests. It recognizes that these benefits are part and parcel of the livelihood of these communities, but also notes that forest benefits are not limited to forest adjacent communities. It seeks to encourage sustainable use of forests, protect traditional interests of communities and respect cultural practices that are compatible with sustainable forest management.³²⁹ It also empowers local communities to participate in forest management through Community Forest Associations (CFAs).³³⁰ Local communities can organize themselves into CFAs and the government would allow them to participate in management of the forests and woodlands within their localities. They can also organize themselves to participate in creating new forests and planting woodlots within their localities so that they have a sufficient supply of wood resources for their needs and for selling.³³¹

There was another forest policy in 2007 whose main objective was to provide continuous guidance to all Kenyans on the sustainable management of forests.³³² While Sessional Paper No. 1 of 1968 did not provide for adequate harmonisation between natural resource policies, the 2007 policy took cognizance of other existing policies relating to land and land use, tenure,

³²⁸ Sessional Paper No. 9 of 2005.

³²⁹ Ibid., 18.

³³⁰ Ibid., 8-9.

³³¹ Ibid.

³³² Sessional Paper No. 1 of 2007.

agriculture, energy, environment, mining, wildlife and water. It also stresses the need for greater cooperation and linkage among resource owners, users, and resource planners.³³³

The Forests Act enacted in 2005 addresses most of the challenges that bedeviled the 1942 Act. The Act makes recognition of the role of forests in the ecosystem and in the economic, social and cultural development of the nation.³³⁴ It, thus, seeks the development and sustainable management including conservation and rational utilization of forest resources.³³⁵ It also encourages community participation in forest management through the registration of community forest associations (CFAs).³³⁶ Participation of forest communities in CFAs has not been without challenges. This is because communities have to organize themselves into a legally recognized association under the Societies Act.³³⁷ Since the Act provides that any group of people around the forest can organize themselves into an association³³⁸ and enjoy similar rights, genuine forest communities groups have to face competition from other groups driven by self-interest.³³⁹ There has also, been lack of capacity in managing CFAs, insincerity and lack of consultation with communities in decision-making amongst most CFAs management

³³³ Ibid.

³³⁴ See Preamble to the Forests Act, No. 7 of 2005.

³³⁵ Ibid.

³³⁶ Ibid., section 46.

³³⁷ Cap. 108, Laws of Kenya.

³³⁸ Section 46 (1) of the Forests Act, No. 7 of 2005.

³³⁹ Kenya Land Alliance (n49), 42-43.

committees.³⁴⁰ In addition, CFAs in many cases do not have the capacity to prepare management plans³⁴¹ as required under the Act.³⁴²

Alienation of State forests still continues without the participation of the public despite the fact that some of these forests were previously community land. For example, in *Republic v. Kenya Forest Service Ex parte Clement Kariuki & 2 others*³⁴³ the Kenya Forest Service advertised in the newspaper and called for individuals and interested institutions to apply for concessions in State forest plantations for parcels of land between 1000-12000 hectares each. If allowed this would have resulted in thousands of forest land being allocated to individuals and companies for a period of 30 years and more. This would have been against the Constitution 2010, Forests Act 2005 and rules of natural justice, as parliament and the government had not enacted rules and regulations for the equitable sharing of resources. There was also no public consultation before the issuance of the notice in the newspaper. The court held, *inter alia*, that by purporting to have been satisfied under section 37 (2) of the Forests Act, without involving the people, the Respondent had denied Kenyans an opportunity to make representations on the issue, yet it was constitutionally bound to do so. The forestry sector institutions have thus not been concerned with the interests of the local communities in forest management. Their aim is to conserve forests for commercial purposes with little concern for communities' interests.

Another factor acting as a disincentive for sustainable forest management is the existence of a property regime favouring private property rights and neglecting communal property institutions for resource management. Local communities, therefore, lack adequate incentives to

³⁴⁰ Ibid.

³⁴¹ Ibid.

³⁴² Section 46 (4) of the Forests Act, No. 7 of 2005.

³⁴³ (2013)eKLR.

sustainably manage forest resources. They thus engage in destructive activities occasioning loss of forests. Moreover, conservation of catchment areas, rising population and pressure to convert community forests into settlement and agricultural lands threaten the existence of community forests. These factors may weaken the security of community land rights.

3.4.1 Land, Tree and Forest Tenure

Land tenure and forest tenure are different because of the services provided by forests, stakeholders involved, and management requirements.³⁴⁴ The term ‘tenure’ as used in the context of land has a different connotation when used in relation to forests.³⁴⁵ Land tenure refers to the terms and conditions under which rights to land and land based resources are acquired, retained, used, disposed of, or transmitted.³⁴⁶ It has also been argued that a search for the land tenure system operative in a particular area is an attempt to answer the tripartite question on who holds what interest in what land.³⁴⁷

In relation to forests, land tenure defines who controls and manages forest resources, and to what degree, and provides mechanisms for managing the underlying land.³⁴⁸ An over-emphasis on private rights to land has made the individual the focal point of forest management and fails to foster sustainable forest management as it does not involve all the key

³⁴⁴ FAO, “Understanding Forest Tenure in Africa: Opportunities and Challenges for Forest Tenure Diversification,” *Forestry Policy and Institutions Working Paper, No. 19,*(2008).

³⁴⁵ P Kameri-Mbote, “Land Tenure and Sustainable Environmental Management in Kenya,” in Okidi *et al* (eds), *Environmental Governance in Kenya: Implementing the Framework Law*, (EAEP, 2008), 261-263.

³⁴⁶ Sessional Paper No. 3 (n 44)15.

³⁴⁷ H.W.O. Okoth-Ogendo, *Tenants of the Crown: Evolution of Agrarian Law & Institutions in Kenya*, (ACTS Press, Nairobi, 1991).

³⁴⁸ Kameri-Mbote (n 77) 276.

stakeholders.³⁴⁹ This is important as research has shown that forest communities owned forests as their ancestral lands and could, for instance, bequeath honey collecting rights to other persons or lineages.³⁵⁰ In addition, individualization of tenure means that the land owner owns everything on land, including trees, whereas under communal tenure rights to trees were guaranteed separately from underlying land.³⁵¹

In most traditional societies, rights of tree ownership and exploitation were distinct from land rights. Individualization of tenure under the now repealed Registered Land Act³⁵² meant that the land owner could own everything on land, including trees.³⁵³ The rights of landless people to use trees, based on customary law, were thus extinguished upon the registration of a person as the landowner.³⁵⁴ Before the Constitution of Kenya 2010, the existing tenure regimes did not adequately protect customary rights of access to trees on community land. Moreover, tree resources which were managed and utilized on a communal basis, under customary law, were no longer accessible to people who may have needed them.³⁵⁵ It is hoped that recognition of community land will guarantee rights of access and use of trees in community forests.

Forest tenure is broad as it comprises ownership, tenancy and arrangements for the use of forests. It determines who can use what resources, for how long, and under what conditions. This novel concept has arisen due to efforts to reduce greenhouse gas emissions from deforestation

³⁴⁹ Ibid.

³⁵⁰ R.H. Blackburn, "The Ogiek and their History," *Azania* vol. 9 (1974), 146.

³⁵¹ Dewees (n2).

³⁵² Cap.300, Laws of Kenya.

³⁵³ Ibid., see also Section 4 of the Act.

³⁵⁴ Ibid., see section 27 of the Act on effect of registration.

³⁵⁵ Ibid.

and forest degradation (REDD).³⁵⁶ It has also has been triggered by a failure of tenure regimes to deliver key forest management objectives, such as sustainable forest management, poverty reduction and improved livelihoods of local communities.³⁵⁷ By recognizing the role of key stakeholders in forest management, including local communities, forest tenure is in consonance with community-based natural resources management (CBNRM), an approach that encourages social and community forestry. CBNRM is also viewed as a modern attempt of reviving traditional and indigenous cultural and institutional mechanisms for managing and conserving natural resources.³⁵⁸ Recognition of the concept of forest tenure requires that structures and processes of accessing land rights and forest resources under different tenure regimes be reconciled as they may negatively impact the livelihoods of those who depend on those resources.³⁵⁹ In addition, recognizing the interaction between land and tree tenure is useful in determining who benefits and who is affected by various forest policies.³⁶⁰

Forms of communal tenure that could have suited the forest communities have not been effective in Kenya. Group ranches are negatively impacted by the subdivision of ranches irregularly and not benefitting concerned communities.³⁶¹ Trust land is held by local authorities for the benefit of communities, but has been poorly managed and at times allocated to private institutions and individuals, negatively affecting communal holding.³⁶² Forest reserves, which

³⁵⁶ Available at www.fao.org/forestry/tenure/en/, (accessed on 22/06/2013).

³⁵⁷ FAO, "Reforming Forest Tenure: Issues, Principles and Process," *FAO Forestry Paper No. 165*, (2011).

³⁵⁸ S Kellet *et al*, "Community Natural Resource Management: Promise, Rhetoric and Reality," *Society and Natural Resources, An International Journal*, Vol.13 (8), (2000), 705-715.

³⁵⁹ Andreas & Rainer (n16).

³⁶⁰ Ibid.

³⁶¹ Sessional Paper No. 3 (n 44) 16-17.

³⁶² Ibid.

are now public land, have been allocated to individuals at the expense of communities who live around specific forests and who benefit from forest products. Poor management of forest reserves, restrictions on communities in using and managing forest reserves leads to apathy towards conservation and promotes exploitative and unsustainable practices, such as charcoal burning and timber harvesting.³⁶³ There is therefore a need to ensure that the recognition of community land holding will foster sustainable forest management by dealing with the services provided by forests, key stakeholders, and forest management requirements.

Government recognizes that due to their close association with land, forests, water, wildlife, and other natural resources, the physical relocation of forest communities, or other measures which restrict their access to livelihood-related forest resources has complex implications, and may entail significant adverse impacts on their identity, culture, and customary livelihoods.³⁶⁴ That is why the Ogiek of Chepkitale in Mount Elgon, who live in a gazetted game reserve to which they can only get to by passing through the forest, have resisted resettlement at Chebyuk. Similarly, the Sengwer that live in Embobut in Cherangany Hills have insisted that they are only ready for resettlement under certain conditions.³⁶⁵ Securing the land rights of these communities, therefore, remains as the most viable way of protecting their interests.

3.4.2 Land Use, Environmental Conservation and Forest Communities' Land Rights

³⁶³ Ministry of Lands (n 35).

³⁶⁴ Esther Lowe & Margaret Ombai, *Process Framework for NRM Project in Mount Elgon and Cherangany Hills*, (Kenya Forest Service, 2013), 10.

³⁶⁵ *Report of the NRMP Social Assessment of IPs in Cherangany Hills and Mount Elgon*, (Kenya Forest Service, 2010).

Chapter Two discussed how land tenure can impact land use and, conversely, how land use patterns can impact land tenure systems.³⁶⁶ It has been seen that the multiplicity of land uses to which forests can be put present a challenge in coming up with an appropriate tenure arrangement that secures all the competing claims. Conservation of forests in water catchments is identified as an important aspect in supporting the realization of Kenya's long term development agenda, the Vision 2030.³⁶⁷ Conservation of forests complicates the land rights of forest communities. For instance, the Water Act 2002 requires the protection and conservation of water catchment areas, which happen to be forests.³⁶⁸ In the Mau Forests Complex, the Ogiek might have to get out of the forest to pave way for its conservation as a water tower.³⁶⁹

Similarly, wildlife management provides for the gazettement of areas of biodiversity significance for the sake of conserving wildlife without due regard to land rights of forest people.³⁷⁰ Although the wildlife law and policies recognise that long-term protection and sustainable conservation must address the social and economic needs of the people living near parks, the Act and Kenya Wildlife Service prohibit all consumptive utilization of wildlife and other resources, including forest products, within national parks.³⁷¹ Protection of forests as catchment areas and wildlife protected areas are land uses which are in competition with the interest of hunters and gatherers who derive their livelihoods from forests. The importance of the

³⁶⁶ ECA/SDD/05/09, *Land Tenure Systems and their Impacts on Food Security and Sustainable Development in Africa*, (Economic Commission for Africa, 2004).

³⁶⁷ Kenya Forest Service, REDD Readiness Preparation Proposal, 2010.

³⁶⁸ Section 8 of Water Act 2002.

³⁶⁹ Report of the Prime Minister's Task Force on the Conservation of the Mau Forests Complex, *Government of Kenya*, 2009.

³⁷⁰ Section 15 of the Wildlife (Conservation and Management) Act, Cap. 376.

³⁷¹ Mbugua (n 52).

multiple land uses to the country demands that a tenure regime that reconciles all interests be developed under the community land law.

The Environmental Management and Co-ordination Act³⁷² also has explicit provisions on conservation of forests. There are, *inter alia*, provisions on protection of traditional interests,³⁷³ and protection of hill tops, hillsides, mountain areas and forests.³⁷⁴ The Act also provides for reforestation and afforestation of hill tops, hill slopes and mountain areas to increase tree cover.³⁷⁵ Section 54 of the Act gives the Minister in charge powers to declare, by notice in the Gazette, an area of land, sea, river or lake as environmentally significant areas. This is for purposes of promoting and preserving specific ecological processes, natural environment systems, natural beauty or species of indigenous wildlife or the preservation of biological diversity in general.³⁷⁶ As such, the Act does not provide adequate mechanisms for addressing the interests of forest dependent communities, who may have to move out of forests for conservation purposes.

The National Biodiversity Strategy and Action Plan (NBSAP) seeks to support and promote the integration and incorporation of traditional knowledge, innovations and practices in development plans to enhance environmental conservation. This response was more of a co-option, not a participatory strategy, where decisions are made through consensus.³⁷⁷ There is need to ensure environmental conservation efforts are reconciled with the protection of

³⁷² Act No. 8 of 1999.

³⁷³ *Ibid.*, section 43.

³⁷⁴ *Ibid.*, section 44.

³⁷⁵ *Ibid.*, section 46.

³⁷⁶ *Ibid.*, section 54.

³⁷⁷ *Ibid.*

community land tenure. This is because such efforts may weaken land claims by forest communities on the basis that their activities are causing environmental degradation. However, forest communities, such as the Ogiek, have maintained that their activities foster sustainable forest management.

3.4.3 Community Participation in Forest Management

The role of communities has been promoted in recent years in natural resources management. Community forestry is encouraged under the community-based natural resources management (CBNRM) approach, which is viewed as a modern attempt of reviving traditional and indigenous cultural and institutional mechanisms for managing and conserving natural resources.³⁷⁸ CBNRM also promotes decentralization in natural resource management, stakeholder participation, equitable and sustainable resource management, and provides a forum for conflict resolution.³⁷⁹ In Kenya, community participation is being encouraged since the exclusionist forms of forest protection have not been successful in ensuring sustainable forest management.³⁸⁰ This is also because the government does not have the capacity to effectively police and protect large and inaccessible forests.³⁸¹ The Forest Policies of 2005/2007 and Forest Act have recognized local communities as key stakeholders in forest management. For example, the Forest Act provides for community forest associations which are registered for the purpose of participating in the conservation and management of state or local authority forests pursuant to permission granted by the Director on application.³⁸²

³⁷⁸ Kellet (n 90), 705-715.

³⁷⁹ Ibid.

³⁸⁰ Emerton (n1) 6.

³⁸¹ Ibid.

³⁸² Section 46 of the Forests Act, No.7 of 2005.

It has, however, been argued that although provision is made for community participation in law, the rights and responsibilities of concerned parties, processes for developing and approving management plans or benefit-sharing arrangements with forest communities are not articulate.³⁸³ Moreover, issues of decision-making, management responsibilities and benefit-sharing are left to subsidiary legislation.³⁸⁴ In addition, sustainable conservation of forests, as envisaged in the Forest Act and Policy, might require the involuntary physical and/or economic access restriction to protected and non-protected forests.³⁸⁵ This may negatively impact forest communities who rely on forests for their livelihoods. There is also need to review the forest laws and policies to conform to the constitutional provisions on community land.

Moreover, while local authority and private forests are premised on the ownership of the underlying land, community forest management is based on the registration of a community forest association.³⁸⁶ This is expected to change, since community land now includes community forests, meaning that both access and user rights of forest products and ownership of underlying land will be held by the community. Although CFAs were meant to include and benefit all forest communities, they have been faced with issues of exclusion, poverty and equity, which have negatively affected vulnerable and marginalized groups.³⁸⁷

³⁸³ Lowe & Ombai (n 96) 10.

³⁸⁴ Ibid.

³⁸⁵ Ibid.

³⁸⁶ Kameri-Mbote (n77)276. See section 46 of the Forests Act, No.7 of 2005.

³⁸⁷ E. Obonyo *et al*, *Exclusion, poverty and inequality in decentralized Kenyan forests: Bridging the Divide*, (Kenya Forestry Research Institute), 3.

3.5 Impact of Forest Laws on the Land Rights of forest communities

The evolution of forest laws and policies in Kenya has tended to favour the conservation of forests, causing forest communities to lose their rights to land. This arises when community lands are gazetted as forests or national reserves or are excised and allocated to the State or individuals who are later issued with titles to the land.³⁸⁸ This has been the result of colonial policies as explained hereunder. Colonial laws and policies had more immediate impacts for pastoral communities and hunter-gatherers than for agricultural peoples. This is because they negatively impacted the livelihoods of pastoralists and forest dwellers.³⁸⁹

As discussed in Chapter 2, one of the impacts of formal laws and policies was political and economic marginalization of forest communities. Failure to recognize them as distinct communities subjected them to the dominant cultures of neighbouring communities. They thus ended up losing their lands, forests and their cultural identities. For instance, through the 1930 Kenya Land Commission, the Ogiek were deprived of their tribal status and denied any claim to their ancestral land.³⁹⁰ It also sought to concentrate them either on European farms as squatters and labourers or in Forestry Department labour camps.³⁹¹

The Swynnerton Plan conceptualized the issue of access to land as one of tenure and the technology of production.³⁹² By modernizing agriculture the Plan created a landed African gentry which would have high stakes in the colonial administration and act as a bulwark against

³⁸⁸ Sessional Paper No. 3 (n 44) 48.

³⁸⁹ Ibid.

³⁹⁰ Kamau (n 33).

³⁹¹ Ibid.

³⁹² R.J.M, Swynnerton, *A Plan to Intensify the Development of African Agriculture in Kenya*, (Government Printer, Nairobi, 1955).

the nationalist movements which were forming at the time.³⁹³ It led to the destruction of forests, since much of the potential agricultural land was in forested territory. It was also associated with a large-scale reforestation strategy to repair and restore water catchment areas.³⁹⁴ To the pastoralists and hunter gatherer communities, this policy not only undermined their economies, but also led to political marginalization and deterioration of their production system and livelihood.³⁹⁵ In addition, massive agricultural activities during the colonial period threatened the sustainable use of forests as practiced by local communities before the coming of Europeans to Kenya. This is what necessitated the formal designation of areas as forest reserves to protect them from clearance for agricultural cultivation and cattle ranching.³⁹⁶

The gazettement of forests as forest reserves meant that access thereof by forest communities had been curtailed. Policies by the post-colonial government, such as the Nyayo Tea Zones policies, led to the clearance of large tracts of forests for tea farming.³⁹⁷ The National Food Policy emphasized promoting food self-sufficiency and production of export crops and thus provided an impetus for converting gazette lands into farming zones.³⁹⁸ Similarly, Sessional Paper No. 1 of 1986, focusing on economic empowerment for renewed growth in the production of wheat, coffee, tea and horticulture, had the effect of encroaching onto forested areas.³⁹⁹ These policies paved the way for the clearance of forests for agricultural purposes.

³⁹³ M.P.K Sorrenson, *Land Reform in Kikuyu Country*, (Oxford University Press, Nairobi, 1967).

³⁹⁴ Ofcansky (n 23) 142.

³⁹⁵ Ministry of Lands (n 35) 73.

³⁹⁶ UNEP, *The Making of a Framework Environmental Law in Kenya*, (ACTS-UNEP, 2001), 68.

³⁹⁷ The Nyayo Tea Zone Development Corporation established via a Presidential Order in 1986 and later through a Legal Gazette Notice No. 265 of 1986 as a State Corporation.

³⁹⁸ Sessional Paper No. 4 of 1981.

³⁹⁹ Sessional Paper No. 1 of 1986.

Efforts that have been undertaken by the government to secure community land in the past have also been futile. Under the repealed Trust Land Act⁴⁰⁰ county councils which are the trustees of Trust land, in many cases have disposed of trust land irregularly and illegally to the detriment of the local communities.⁴⁰¹ Management and exploitation of forests in trust lands was not well regulated leading to destruction and degradation.⁴⁰² This happened despite section 69 thereof providing for rights in trust land by virtue of existing African Customary law or any subsequent modifications thereof, in so far as such rights are not repugnant to any of the provisions of the Act, or to any rules made thereunder, or to the provisions of any other law for the time being in force.

The Trust Land Act provided for the creation of forest reserves which are land areas that have been surveyed, demarcated and gazetted. They were gazetted either from Trust land or from unalienated Government land. Those gazetted from government land were managed by the Forest Department, while those on Trust Land were managed by local authorities.⁴⁰³

Moreover, under the trust land concept some areas of trust land can be set aside as game reserves under the Wildlife (Conservation) and Management Act⁴⁰⁴ and managed by the local authorities.⁴⁰⁵ Further, the Trust Land Act made provisions for general conservation, protection and controlled utilisation of trees and other forest products on land, other than gazetted forest

⁴⁰⁰ Cap. 288, Laws of Kenya.

⁴⁰¹ P Kameri Mbote *et al*, *Ours by Right: Law, Politics and Realities of Community Property in Kenya*, (Strathmore University Press, 2013), 32.

⁴⁰² Kenya Forest Service, REDD Readiness Preparation Proposal, 2010.

⁴⁰³ FOSA Country Report Kenya available at <http://www.fao.org/docrep/003/ab569e/AB569E05.htm#TopOfPage>, (accessed on 27/08/2013).

⁴⁰⁴ Cap.376, Laws of Kenya.

⁴⁰⁵ FOSA (n135).

reserves. This, therefore, meant that even areas inhabited by local communities could be set aside, thus depriving them of any rights to forests.⁴⁰⁶

Setting aside forest lands for the settlement of forest communities has been used for political reasons.⁴⁰⁷ For example, between 199 –1994 about 40,000 hectares of Mau forest, set aside for settlement of the Ogiek communities, was highly abused by the local administration by settling other communities from other districts far from Mau including Baringo District.⁴⁰⁸ This has continued the political and economic marginalization of forest communities, making their land rights even more insecure.

The protectionist approach to wildlife management in Kenya has focused on the establishment of protected areas. In these areas, forest communities cannot enter to harvest forest products.⁴⁰⁹ The effect has been the criminalization of the way of life of forest communities.⁴¹⁰ This has allowed neighbouring communities to encroach onto forest reserves for agriculture and settlement as the forest department is unable to control the extraction of forest products and massive destruction of forest reserves witnessed in many of these reserves.⁴¹¹

While local authority and private forests under the Forest Act are premised on the ownership of the underlying land, community forest management is based on the registration of a

⁴⁰⁶ Ibid.

⁴⁰⁷ In past regimes this was mostly done through presidential decrees and pronouncements authorizing the Forest Department to allocate certain forests for settlement of squatters and forest communities.

⁴⁰⁸ Matiru (n 7) 13.

⁴⁰⁹ Ofcansky (n 23) 142.

⁴¹⁰ G.H.Yeoman, *High Altitude Forest Conservation in Relation to Dorobo People*, (Kenya Past and Present, 1993), 10.

⁴¹¹ Matiru (n 7) 19.

community forest association.⁴¹² In defining community land, the draft Community Land Bill 2013 leaves out community forests in clause 2 thereof and only provides for measures to facilitate the access, use and co-management of forests by communities who have customary rights to forests.⁴¹³ This means that communities do not have ownership of land in forests, but are merely granted user rights of forest resources. However, land in community forests will now have to be owned and managed by the relevant community as envisaged in the Constitution.

3.6 Implications of Recognizing Community Land on Forest Communities' Land Rights

The National Land Policy recognizes community land and the rights of forest communities to access, co-manage and derive benefits from forests.⁴¹⁴ Likewise, the Constitution 2010 recognizes community land and defines it to include community forests.⁴¹⁵ It protects property in Article 40 and provides that subject to the police power of the state, every person shall have the right either individually or in association with others to acquire and own property of any description and in any part of Kenya.⁴¹⁶ Community land is given similar treatment as public and private land in the Constitution, suggesting that customary land rights shall have equal force of law and receive equal treatment like any other interests in land.⁴¹⁷ Further, the Constitution provides that land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable and in accordance with principles that, *inter alia*, ensure equitable access to land, security to land rights and transparent and cost

⁴¹² Kimeri-Mbote (n 77) 276. See section 46 of the Forests Act, No.7 of 2005.

⁴¹³ Clause 36 of the Draft Community Land Bill, June 2013.

⁴¹⁴ Sessional Paper No. 3 (n 44).

⁴¹⁵ Article 63(2)(d) of Constitution of Kenya.

⁴¹⁶ *Ibid.*, Article 40 (1).

⁴¹⁷ *Ibid.*, Article 61.

effective administration of land.⁴¹⁸ The Constitution also recognizes the rights of minorities and marginalized groups and obligates the state to put in place affirmative action programmes to ensure that such groups, *inter alia*, develop their cultural values, languages and practices.⁴¹⁹ The State is also obliged to achieve and maintain a tree cover of at least ten percent of the land area of Kenya,⁴²⁰ protect traditional ecological knowledge,⁴²¹ and encourage public participation in the management, protection and conservation of the environment.⁴²² Implementation of these provisions may guarantee forest communities security to community land.

Although recognition of community land in the Constitution is the strongest indication by government of protecting the land rights of forest communities, reluctance in enacting the enabling legislation after laws dealing with private and public land have already been passed may worsen the plight of these communities. This is because illegal allocation of community land could be taking place under the old and ineffective land law regime. In addition, while the Constitution and the National Land Policy require that there be equitable sharing of benefits accruing from natural resources exploitation,⁴²³ Kenya has not come up with mechanisms for facilitating benefit-sharing, especially where communities lose their rights to forests. There is need to operationalize provisions on benefit-sharing as it relates to natural resources such as community forests whose loss may deny communities of their livelihoods.

⁴¹⁸ Ibid., Article 60(1).

⁴¹⁹ Ibid., Article 56(d).

⁴²⁰ Ibid., Article 69(1)(b).

⁴²¹ Ibid., Article 69(1)(c).

⁴²² Ibid., Article 69(1)(d).

⁴²³ Ibid., Article 69(1)(a). See also Paragraph 96 of Sessional Paper No.3 (n 44).

Moreover, the multiplicity of land uses to which forests can be put present a challenge in protecting community land and some uses may weaken land rights of forest communities. For example, conservation of catchment areas has to be reconciled with the claims of local communities to the land as their ancestral land and as a source of livelihood.⁴²⁴

As argued by Knight, recognizing community land rights must be based on the lived realities of the people as practiced daily on the ground. This would create an environment in which communities can maintain their land claims, make investments and achieve national economic development.⁴²⁵ This will also require an acknowledgement of the role of traditional societies in environmental sustainability by developing cultural and social means of managing renewable resources and regulating access by their members in a way that ensures resource use sustainability.⁴²⁶

3.7 Conclusion

While in the pre-colonial period forests were communally held in ways that were sustainable, the legal framework on forests in the colonial and post-colonial periods ignored the claims of forest communities in forest management. In the colonial period, forests were being protected from indigenous land use practices which were thought to be destructive. While the policies sought to protect forests from destruction by natives, extraction of forest products, such as timber by colonialists, was encouraged. It has been shown that the colonial policy was to completely disinherit Africans of any entitlement to forests. This preservationist policy was

⁴²⁴ Kameri Mbote *et al* (n133)154.

⁴²⁵ R.S. Knight, *Statutory recognition of customary land rights in Africa: An investigation into best practices for lawmaking and implementation*, (Food and Agriculture Organization Of The United Nations Rome, 2010).

⁴²⁶ L.P. Breckenridge, "Protection of Biological and Cultural Diversity: Emerging Recognition of Local Community Rights in Ecosystems under International Environmental Law," *Tennessee Law Review*, Vol.59, 747.

continued in the post-colonial period where there was emphasis on catchment protection, industrial forestry development, and protection of forests from encroachment by local communities. Colonial and post-colonial government policies on forest management denied local communities rights to their ancestral lands, including rights to trees and to forests.

It is hoped that the recognition of community land will ensure the sustainability of community forests in Kenya. However, the conservation of catchment areas, encroachment by neighboring communities into forests for farming and settlement may problematize the security of land rights in community forests. There is need to come up with more innovative ways in ensuring sustainable forest management and guaranteeing the land rights of forest communities. Since the claims of forest communities go beyond land to forests resources, their claims will include ownership, tenancy and arrangements for the use of forests as envisaged in the concept of forest tenure. It will also involve a determination of who can use what resources for how long and under what conditions. Chapter 4 assesses ways of securing the land rights of forest communities in Kenya.

CHAPTER FOUR

SECURING THE LAND RIGHTS OF FOREST COMMUNITIES IN KENYA

4.1 Introduction

This chapter examines ways of securing the land rights of forest communities in Kenya. It also discusses relevant Conventions touching on forests and the protection of the rights of tribal and forest dwellers in India to find ways of securing the land rights of forest communities in Kenya. While there is no single convention specifically dealing with forests, there are numerous conventions recognizing particular functions of forests to mankind. Some recognize forests as habitats and sources of livelihood for forest communities. Others have recognized the rights of indigenous peoples to their culture, religion, natural resources, development and right to self-determination.

Nationally, the Constitution has recognized community land rights, including the rights of forest communities to their ancestral lands and community forests. In Article 40 the right to property is protected. Article 60 outlines the principles of landholding, including equitable access to land and security of land rights. Community land is given similar treatment as public and private land in Article 61, suggesting that customary land rights shall have equal force of law and receive equal treatment like any other interests in land. Article 69 imposes obligations on the State to work towards achieving and maintaining a tree cover of at least ten percent of the land area of Kenya, to protect traditional ecological knowledge and encourage public participation in the management, protection and conservation of the environment. Implementation of these provisions may secure the land rights of forest communities.

It is, however, noted that equitable access to land and security of land rights for forest communities is threatened by competing land uses over forests which is mainly a contestation

between the use of land as forests and use of land for other purposes, including residential, industrial development, agriculture, habitats for forest dwellers, carbon sinks, and as water catchment areas. An emphasis on private property over communal property by the legal framework is also a threat to community land rights.

4.2 International Instruments on Forests and Forest Land Rights

Globally, forests play vital economic, ecological and social functions.⁴²⁷ They are important repositories of biodiversity, containing 60-90% of all terrestrial species on the planet. Their protection reduces desertification and land degradation and is essential for watershed protection. They also play a crucial role in global climate regulation and are one of the largest carbon sinks. They absorb carbon from the atmosphere through photosynthesis and release carbon when destroyed or degraded. Forest conservation and reforestation can, therefore, reduce atmospheric carbon concentrations by sequestering carbon in trees and soil. Economically, forests provide timber which is an important source of revenue and a major foreign exchange earner. Finally, forests serve as habitats and a source of livelihoods for indigenous peoples and forest dwellers who depend on forests for their livelihood.⁴²⁸

Despite the importance of forests, there is no legally binding international instrument in which the environmental, social and economic functions of forests are addressed. This is due to lack of political goodwill among states.⁴²⁹ Negotiations over the creation of a treaty on forests in Rio in 1992 were sharply divided between developed and developing countries. Developing

⁴²⁷ UNFF Memorandum, available at www.iucnael.org/en/.../doc.../849-unit-3-forest-game-backgrounder.html, accessed on 16th July 2013; See also UNEP, *Global Environment Outlook 5: Environment for the future we want*, (UNEP, 2012), 145-154.

⁴²⁸ Ibid.

⁴²⁹ B.M.G.S. Ruis, *Global Conventions Related to Forests*, (FAO, 2001), available at <http://www.fao.org/docrep/003/y1237e/y1237e03.htm>, (accessed on 16th July 2013).

countries were opposed to the proposal by developed states to protect forests as carbon sinks and reservoirs, instead of recognizing them as the home of forest communities.⁴³⁰ As a result UNCED only adopted a non-legally statement of principles on forests.⁴³¹ The principles apply to all forests⁴³² and require that they be protected for their ecological, subsistence and economic value to local communities. They require national forest policies to recognize and to support the identity, culture and the rights of indigenous people, their communities and forest dwellers. The principles require appropriate conditions be promoted for forest communities to enable them have an economic stake in forest use, perform economic activities and achieve and maintain cultural identity and social organization, as well as adequate levels of livelihood and well-being, through, *inter alia*, land tenure arrangements which serve as incentives for the sustainable management of forests.⁴³³ The statement of principles is thus explicit on the need to recognize the rights of forest communities on the basis of developmental policies and national policies that are in place.

Whereas developed states support a forest convention as a tool to combat global warming, developing countries want forests to be conserved as habitats and sources of food for poor and indigenous peoples.⁴³⁴ Failure to come up with a forest convention means that forest

⁴³⁰ D. Hunter *et al*, *International Environmental Law and Policy*, (Foundation Press, 4th Edition, 2011), 157.

⁴³¹ Annex III to the Rio Declaration, Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests, A/CONF.151/26 (Vol. III), 14th August 1992.

⁴³² *Ibid.*, Preamble.

⁴³³ *Ibid.*, Article 5 (a).

⁴³⁴ Hunter *et al* (n4) 619-620. See also B.M.G.S. Ruis (n3).

issues are addressed in a myriad of conventions without much detail. International efforts on forests largely address issues of sustainable forest management.⁴³⁵

4.2.1 United Nations Framework Convention on Climate Change⁴³⁶

This convention seeks to stabilize greenhouse gas emissions at levels that would prevent dangerous anthropogenic interference with the climate system.⁴³⁷ From this objective, the relationship between climate and forests is evident.⁴³⁸ On one hand, forests act as reservoirs storing carbon in biomass and soils and as carbon sinks.⁴³⁹ Moreover, forestry practices do have a significant role in carbon sequestration. On the other hand, forests are a source of greenhouse gases when biomass burns or decays, and some activities in forestry tilling and use of natural fertilizers can release greenhouse gases.⁴⁴⁰

The Kyoto Protocol to the UNFCCC⁴⁴¹ sets out emission reduction targets and methods of addressing greenhouse gas emissions and is more explicit on forest issues. It provides, *inter alia*, that industrialized states shall implement and/or further elaborate policies and measures such as the promotion of sustainable forest management practices, afforestation and reforestation.⁴⁴² Article 3 thereof requires Annex I parties to offset their emission targets by undertaking certain human-induced activities in the land-use, land-use change and forestry sector

⁴³⁵ UNFF (n1).

⁴³⁶ United Nations Framework Convention on Climate Change, 31 *ILM* (1992) 851.

⁴³⁷ *Ibid.*

⁴³⁸ Hunter *et al* (n4) 619-620.

⁴³⁹ *Ibid.*

⁴⁴⁰ *Ibid.*

⁴⁴¹ 37 *ILM* 22 (1998).

⁴⁴² *Ibid.*, Article 2.

(known as LULUCF) that remove greenhouse gases from the atmosphere, namely afforestation, reforestation and tackling deforestation.⁴⁴³ Conversely, changes in these activities that deplete carbon sinks, such as deforestation, will be subtracted from the amount of permitted emissions by an Annex I party.⁴⁴⁴ The Clean Development Mechanisms under Article 3 of the Kyoto Protocol makes provision for the implementation of LULUCF project activities by Parties. Such activities are limited to afforestation and reforestation in non-Annex I parties. These project activities assist Annex I Parties in achieving compliance with their emission reduction commitments under Article 3, while simultaneously assisting non-Annex I Parties to achieve sustainable development.⁴⁴⁵

The UN-REDD Programme initiative launched in 2008 focuses on Reducing Emissions from Deforestation and forest Degradation (REDD) in developing countries. The launch of this programme was prompted by increased deforestation and forest degradation, through agricultural expansion, conversion to pastureland, infrastructure development, destructive logging, fires etc., which account for nearly 20% of global greenhouse gas emissions. REDD is thus an effort to create a financial value for the carbon stored in forests and to offer incentives for developing countries to reduce emissions from forested lands and invest in low-carbon paths to sustainable development.⁴⁴⁶ The REDD+ programme goes beyond deforestation and forest degradation, and includes the role of conservation, sustainable management of forests and enhancement of

⁴⁴³ Ibid., Article 3 (3) & (4).

⁴⁴⁴ Ibid.

⁴⁴⁵ UNFCCC, “*LULUCF under the Kyoto Protocol*” available at <https://unfccc.int/methods/lulucf/items/4129.php>, (accessed on 27/08/2013).

⁴⁴⁶ The United Nations Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries available at <http://www.un-redd.org/AboutREDD/tabid/102614/Default.aspx>, (accessed on 27/08/2013).

forest carbon stocks. It promotes the informed and meaningful involvement of all stakeholders, including indigenous peoples and other forest-dependent communities, in national and international REDD+ implementation.⁴⁴⁷ These programmes are necessary in as much as they seek to protect forest resources. However, they do not recognize the land rights of forest communities.

4.2.2 Convention on Biological Diversity⁴⁴⁸

The Convention on Biological Diversity is the main instrument dealing with conservation and sustainable use of biological diversity⁴⁴⁹ and the fair and equitable sharing of benefits arising from use of genetic resources.⁴⁵⁰ It is relevant to forests since the world's terrestrial biological diversity is found in forests.⁴⁵¹ It also supports the recognition of the traditional forest-related knowledge of indigenous peoples and forest dwellers.⁴⁵² Article 8 (j) thereof obligates each state party to respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities relevant for the conservation and sustainable use of biological diversity and to promote the application of such knowledge, innovations and practices. This imposes an obligation on States to protect the livelihoods of forest communities, including the protection of their land rights.

⁴⁴⁷ Ibid.

⁴⁴⁸ Convention on Biological Diversity, 31 *ILM* (1992) 818.

⁴⁴⁹ Ibid., Articles 6-11.

⁴⁵⁰ Ibid., Articles 15, 16 & 19.

⁴⁵¹ UNFF (n 1).

⁴⁵² Ibid.

4.2.3 United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa⁴⁵³

UNCCD seeks to combat desertification, mitigate the effects of drought and contribute to sustainable development. To combat desertification, the Convention requires states to undertake long-term integrated strategies that focus on improved productivity of land and on the rehabilitation, conservation and sustainable management of land and water resources leading to improved living conditions of people at the community level.⁴⁵⁴ It requires the protection and expansion of forests due to their ecological functions that mitigate effects of drought and prevent desertification. In dealing with drought and desertification, the Convention works towards minimizing forest loss. Forest protection is important in dealing with desertification, since forest ecosystems help to stabilize the soil. On the contrary deforestation fosters both desertification and land degradation.⁴⁵⁵ State parties are thus, under an obligation to undertake strategies that improve the living conditions of forest communities as their activities have been shown to foster sustainable forest management. In addition, by guaranteeing the land rights of forest communities, State parties will have contributed to the improvement of living conditions among these communities. This is because forests are their habitats and sources of livelihoods.

4.2.4 Convention on Wetlands of International Importance Especially as Waterfowl Habitat (Ramsar Convention)⁴⁵⁶

The objective of the Ramsar Convention is the conservation and wise use of wetlands through national action and international cooperation. It designates wetlands in different parts of

⁴⁵³ Convention to Combat Desertification, 33*ILM* (1994) 1014.

⁴⁵⁴ *Ibid.*, Article 2(2).

⁴⁵⁵ UNFF (n 1).

⁴⁵⁶ Convention on Wetlands of International Importance 11 *ILM* (1972) 963.

the world as wetlands of international importance. Some of the designated sites contain forest ecosystems such as mangroves. For instance, there are extensive and diverse mangrove systems protected in the Tana River Delta which is one of the Ramsar Sites in Kenya.⁴⁵⁷

The criteria for designating a wetland to be of international importance since 1999 has been that the site supports vulnerable, endangered or critically endangered species or threatened ecological communities and it supports populations of plant and/or animal species important for maintaining the biological diversity of a particular biogeographic region.⁴⁵⁸ Under this criterion, one can argue that forest communities in areas with mangrove forests, are threatened ecological communities because of the competing land uses over their lands. Such mangrove ecosystems can therefore be protected to support their needs.

4.2.5 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)⁴⁵⁹

This Convention aims at the protection of certain endangered species of wild fauna and flora from overexploitation through international trade, via a system of import/export permits. It focuses exclusively on international trade and is premised on the view that the control of international markets will contribute to the preservation of endangered species. Article II outlines the fundamental principles of CITES by providing for three appendices. Trade in specimens of species in the three appendices is not allowed except in accordance with the Convention. There are numerous forest animal species which have been included in the appendices but at present

⁴⁵⁷ The Annotated Ramsar List of Wetlands of International Importance-Kenya available at, http://www.ramsar.org/cda/en/ramsar-pubs-notes-anno-kenya/main/ramsar/1-30-168%5E16536_4000_0_, (accessed on 16/07/2013).

⁴⁵⁸ UNFF (n 1).

⁴⁵⁹ Convention on International Trade in Endangered Species of Wild Fauna and Flora, 12 ILM 1085 (1973).

only 16 tree species have been listed, mainly species used for timber.⁴⁶⁰ The Convention is relevant to forests as it may restrict trade in forest species which support the livelihood of forest communities.

As the foregoing discussion illustrates, international forestry efforts have focused on conservation and sustainable management of forests. Conservationists would thus, consider forests as vital for the environmental services they provide and as sources of biodiversity, while proponents of sustainable management of forests, would support sustainable trade or international trade in forest products and also recognize the rights of local communities to access forest resources.⁴⁶¹

4.3 Indigenous Peoples and Land Rights in Forests

The rights of forest communities are closely related to the rights of indigenous peoples. There is no consensus on the meaning of the term “indigenous.” However, the term seems to embrace the notion of a distinct and separate culture and way of life, based upon long-held traditions and knowledge which are connected fundamentally to a specific territory.⁴⁶² Indigenous peoples cannot survive as a people without conserving, reviving, developing and teaching traditional knowledge inherited from their ancestors.⁴⁶³ They have also been described as descendants from the original inhabitants of an area that has been taken over by more powerful outsiders, with a distinct language, culture, or religion.⁴⁶⁴ Indigenous peoples consider

⁴⁶⁰ B.M.G.S. Ruis (n3).

⁴⁶¹ UNFF (n1).

⁴⁶² E. Daes, *Protection of the Heritage of Indigenous People*, (United Nations, 1997), 1.

⁴⁶³ Ibid.

⁴⁶⁴ J.K. Asiema & F.D.P. Situma, “Indigenous Peoples and the Environment: The Case Study of the Pastoral

themselves as the custodians of their heritage, they retain a strong sense of their distinct culture and have a strong identity with ancestral lands.⁴⁶⁵ Amongst indigenous peoples, land is sacred and it defines their existence and identity. Their existence and identity is thus inextricably attached to land. Other resources such as trees, plants, animals and fish in their territories form part of their social and spiritual universe and are not just natural resources in the popular sense.⁴⁶⁶ The rights of forest communities can be viewed as rights of indigenous peoples because of their distinct cultures, strong identities with land and for being the custodians of their heritage. Several international instruments have recognized the rights of indigenous peoples.

In its preamble, Convention No.169/1989 recognizes the aspirations of indigenous peoples to exercise control over their own institutions, ways of life, economic development and to maintain and develop their identities, languages and religions. Article 1 (b) provides that it applies to “*peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.*” It, further, provides for “self-identification as indigenous or tribal” as a fundamental criterion for determining indigeneity.⁴⁶⁷ Self-identification as indigenous peoples is an appropriate criterion for forest communities in countries such as Kenya where indigeneity is contested. Governments are urged to develop, with

Maasai of Kenya,” *Colorado Journal of International Environmental Law and Policy*, Vol. 5 (1) (1994), 149-171.

⁴⁶⁵ Ibid., 150.

⁴⁶⁶ Ibid.

⁴⁶⁷ Article 1 (2) International Labour Organization, Indigenous and Tribal Peoples Convention, No. 169/1989.

the participation of the peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity.⁴⁶⁸ Governments are to ensure that indigenous peoples benefit on an equal footing from the rights and opportunities granted to other members of the population, promote the full realisation of the social, economic and cultural rights of these peoples and assist them eliminate socio-economic gaps between indigenous and other members of the society.⁴⁶⁹

The Convention recognizes the importance of the territorial basis for indigenous peoples, including their relationship with the lands or territories they occupy and the collective aspects of this relationship.⁴⁷⁰ In this regard governments are to take the necessary steps to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.⁴⁷¹ It, further, safeguards the rights of peoples to the natural resources pertaining to their lands including the right to participate in the use, management and conservation of those resources.⁴⁷² Indigenous peoples are not to be removed from the lands they occupy except where the removal is considered necessary as an exceptional measure, the relocation is with their free and informed consent and full compensation for loss or injury suffered by relocation.⁴⁷³ Whenever possible, they shall have the right to return to their traditional lands as soon as the grounds for relocation cease to exist.⁴⁷⁴ If return is not possible,

⁴⁶⁸ Ibid., Article 2 (1).

⁴⁶⁹ Ibid., Article 2 (2).

⁴⁷⁰ Ibid., Article 13 (1).

⁴⁷¹ Ibid., Article 14 (2).

⁴⁷² Ibid., Article 15.

⁴⁷³ Ibid., Article 16 (1) and (2).

⁴⁷⁴ Ibid., Article 16 (3).

they shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them and suitable to provide for their present needs and future development.⁴⁷⁵ Even though Kenya is not a party to Convention 169, the Constitution 2010 recognizes the land rights of forest communities and other marginalized communities. By recognizing minorities and marginalized groups, the Constitution addresses the rights of indigenous peoples as encapsulated in the Convention.

Article 26 of the UN Declaration on the Rights of Indigenous Peoples recognizes the rights of indigenous peoples to their lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired and to ownership of those resources.⁴⁷⁶ It also recognizes the right of indigenous peoples to a livelihood according to their traditional culture and requires states to consult and obtain an agreement from these peoples in respect of any use of their lands, territories and natural resources.⁴⁷⁷ Indigenous peoples also have the right to free, prior and informed consent before any developments touching on their lands are undertaken.⁴⁷⁸ The African Commission on Human and Peoples' Rights⁴⁷⁹ has also stated that indigenous peoples have recognized claims of ownership to ancestral land according to Articles 26 and 27 of the UN Declaration on the Rights and Fundamental Freedoms of Indigenous Peoples. According to the Commission, such claims of ownership can only be guaranteed if indigenous peoples are

⁴⁷⁵ Ibid., Article 16 (4).

⁴⁷⁶ United Nations Declaration on the Rights of Indigenous Peoples, New York, U.N. Doc. A/ Res/61/295 (13th September 2007).

⁴⁷⁷ Ibid., Articles 8, 10, 20, 26, 28, 29 and 32.

⁴⁷⁸ Ibid., Article 32.

⁴⁷⁹ In Communication 276/2003, *Centre for Minority Rights Development (CEMIRIDE) and Minority Rights Group International (MRG) v. Kenya (Decision of February 2010)*.

granted full ownership rights with respect to their customary lands.⁴⁸⁰ In *Saramaka v. Suriname*⁴⁸¹ the conditions that a state must fulfill before it exploits natural resources in lands occupied by indigenous peoples were outlined. They are that the natural resource should not be in use traditionally and culturally by the community; exploitation and exploration should not interfere with the survival, development and continuation of the communities' way of life and where natural resources are not relevant to traditional communities their exploitation by the state should not affect the integrity and access to other resources that are vital to indigenous communities.⁴⁸²

Forests are recognized as sacred sites by indigenous peoples. Article 25 of the UN Declaration on the Rights of Indigenous Peoples' thus recognizes the rights of indigenous peoples to '*their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.*' Since forest communities access forests to, *inter alia*, exercise religious rites, there should be no restrictions on access as it would violate their right to religion as enshrined in the Constitution.⁴⁸³ This provides a basis for securing land rights and ensuring equitable access to forest lands by forest communities.⁴⁸⁴

⁴⁸⁰ K Sing'Oei, "Disarming the Leviathan: Endorois' Decision and the Search for Inclusive Socio-economic Rights in Kenya," in J. Biegon *et al*, "*Judiciary Watch Report-Judicial Enforcement of Socio-Economic Rights under the new Constitution: Challenges and Opportunities for Kenya*," Vol. 10 (ICJ Kenya, 2011), 311-339.

⁴⁸¹ Inter-American Court of Human Rights (Ser.C) No. 172, (2007); See also Article 26 of the UN Declaration on the Rights of Indigenous Peoples.

⁴⁸² Ibid.

⁴⁸³ Article 32, Constitution of Kenya.

⁴⁸⁴ Ibid., Article 60(1)(a) & (b).

The relationship between culture and natural resources is clear in Article 27 of the International Covenant on Civil and Political Rights which provides that where there are ethnic, religious or linguistic minorities '*persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.*'⁴⁸⁵ In addition, General Comment 23 on Article 27 by the Human Rights Committee provides that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, such as fishing, hunting or the right to live in reserves protected by law, and that the enjoyment of these rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.⁴⁸⁶ Consequently, access to forests to hunt and gather is a form of land use which requires protection like other land rights.

Forest communities also have a right to development. Article 7 of Convention No. 169/1989, provides that indigenous peoples '*shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development.*'⁴⁸⁷ This means that efforts to relocate them in other areas may entail changes to their cultural identity, religion and customary livelihoods, thus violating their right to development. This will create difficulties in obtaining

⁴⁸⁵ International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966); 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976.

⁴⁸⁶ General Comment No.23: the rights of minorities (Art.27), 04/08/1994. CCPR/C/21/Rev.1/Add.5; See also Article 27 of the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, A/RES/47/135, 92nd plenary meeting, 18th December 1992.

⁴⁸⁷ Convention No. 169/1989.

food as the new areas would not ensure access to forests for hunting and gathering other forest products.

The African Charter on Human and Peoples' Rights⁴⁸⁸ recognizes collective rights and is thus relevant in discussions on community land. Kenya has ratified the Charter and the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, and is therefore a party to both instruments. The Charter obligates member states to recognize the rights, duties and freedoms enshrined in the Charter and to adopt legislative or other measures to give effect to them.⁴⁸⁹ The rights and freedoms enshrined in the Charter are to be enjoyed by every individual without discrimination of any kind.⁴⁹⁰ It also guarantees the right to property which is not to be violated except in the public interest or in the general interest of the community and in accordance with applicable laws.⁴⁹¹ It recognizes the right of every individual to freely, take part in the cultural life of his community⁴⁹² and enjoins the State to promote and protect the morals and traditional values recognized by a community.⁴⁹³ Collective rights such as the right of all peoples to self-determination,⁴⁹⁴ to freely dispose of their natural resources and wealth,⁴⁹⁵ development,⁴⁹⁶ national and international peace⁴⁹⁷ and environment⁴⁹⁸ are well enshrined in the Charter.

⁴⁸⁸ African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986.

⁴⁸⁹ *Ibid.*, Article 1.

⁴⁹⁰ *Ibid.*, Article 2.

⁴⁹¹ *Ibid.*, Article 14.

⁴⁹² *Ibid.*, Article 17 (2).

⁴⁹³ *Ibid.*, Article 17 (3).

⁴⁹⁴ *Ibid.*, Article 20.

⁴⁹⁵ *Ibid.*, Article 21.

The Charter establishes the African Commission on Human and Peoples' Rights,⁴⁹⁹ which has been instrumental in promoting human and peoples' rights and ensuring their protection by hearing communications on violations of rights enshrined in the Charter. In *Centre for Minority Rights Development (CEMIRIDE) and Minority Rights Group International (MRG) v. Kenya*⁵⁰⁰ the Endorois community went to the Commission claiming restitution of its ancestral land, compensation for wrongful displacement from Lake Bogoria Game Reserve and a declaration that their right to property, culture, religion, natural resources, development and religion had been contravened by the Kenyan State. The Commission found that religion is often linked to land, cultural beliefs and practices, and that freedom to worship and engage in such ceremonial acts is at the centre of the freedom of religion. As a consequence, the Commission found that denying the Endorois access to Lake Bogoria was a restriction on their right to religion, and the restriction was not necessitated by any significant public security interest or other justification. It, further, noted that allowing the Endorois to use the land to practice their religion would not detract from the goal of conservation or developing the area for economic reasons.⁵⁰¹

Concerning the right to property the Commission stated that mere access to land as provided in the trust land concept under Kenyan law did not meet the requirements of Article 14 of the Charter, because the trustees of trust land could always excise trust land and allocate it to

⁴⁹⁶ Ibid., Article 22.

⁴⁹⁷ Ibid., Article 23.

⁴⁹⁸ Ibid., Article 24.

⁴⁹⁹ Ibid., Article 30.

⁵⁰⁰ Communication 276/2003, *decision delivered on February 2010*.

⁵⁰¹ Ibid., paragraph 173.

third parties to the detriment of the community.⁵⁰² It, also, found that the cultural activities of the Endorois posed no harm to the Game Reserve and therefore, the restriction on the practice of their culture was not justified since no suitable alternative was given to the community.⁵⁰³ In relation to the right to natural resources, the Commission applying the test in the *Saramaka case (supra)* found that the exploitation of red ruby in Endorois land should have been preceded by prior informed consultations with the community and payment of compensation.⁵⁰⁴ Lastly, the Commission found that the right to development had been violated because the temporary areas they were settled were not conducive for cultivation or practice of their traditional activities, such as hunting and gathering.⁵⁰⁵ This decision is a major advancement in the protection of the rights of indigenous and other minority groups in Kenya. It marks a significant step towards the recognition of communal property systems. The decision is a necessary platform for compelling the government to take necessary steps to protect the rights of indigenous or minority groups as enshrined in the Constitution.

The Principles and Criteria for Forest Stewardship, by the Forest Stewardship Council have recognized the rights of indigenous peoples' to forests. These principles require that the legal and customary rights of indigenous peoples to own, use and manage their lands, territories, and resources be recognized and respected. They further provide that communities have the right to control forest management on their lands and territories unless they delegate control to other government agencies freely and after informed consent has been given. In addition, forest management must not threaten or diminish directly or indirectly the resources or tenure rights of

⁵⁰² Ibid., paragraph 215.

⁵⁰³ Ibid., paragraph 249.

⁵⁰⁴ Ibid., paragraphs 263-267.

⁵⁰⁵ Ibid., paragraph 285.

indigenous peoples. Where forests are sites of special cultural, ecological, economic or religious significance to indigenous peoples they should be identified, recognized and protected by forest managers. It also requires that indigenous peoples be compensated for the application of their traditional knowledge regarding the use of forest species or management systems in forest operations. Such compensation must be formally agreed upon with the free and informed consent before forest operations commence.

It is clear that at the international level the rights of forest peoples' to natural resources, culture, religion, forests, property and development are well recognized. These rights provide a strong basis for ensuring equitable access to forests and securing the land rights of forest dwellers.

4.4 Rights of Tribal and Forest Dwellers: Lessons from India

India has enacted a law that makes provision for the land and forest rights of tribal and other forest dwellers. The Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, notified for operation with effect from 31.12.2007 seeks to address historical injustices done to tribal and forest dwellers for the last three generations before 13th December 2005.⁵⁰⁶ The Act was the result of a protracted struggle by the marginal and tribal communities in India to assert their rights over the forestland over which they were traditionally dependent.⁵⁰⁷ It recognizes and vests secure community tenure on 'community forest resources' which are defined as common forest land within the traditional or customary boundaries of the village or seasonal use of landscape in case of pastoral communities, including reserved forests,

⁵⁰⁶ Press Information Bureau, Government of India available at, <http://pib.nic.in/newsite/erelease.aspx?relid=35264>, (accessed on 13/07/2013).

⁵⁰⁷ Forests Rights Act available at, <http://www.fra.org.in/new/>, (accessed on 13/07/2013).

protected forests and protected areas such as sanctuaries and national parks to which the community had traditional access.⁵⁰⁸

Section 3 of the Act provides the rights of forest dwelling Scheduled Tribes and other traditional forest dwellers on all forest lands. These, include the right to hold and live in the forest land under the individual, or common occupation for habitation, or for self-cultivation for livelihood by a member or members of a forest dwelling Scheduled Tribe or other traditional forest dwellers.⁵⁰⁹ It also covers community rights such as usufruct (nistar), or by whatever name it is called, including those used in erstwhile princely states, zamindari or such intermediary regimes.⁵¹⁰ It confers the right of ownership and access to collect, use and dispose of minor forest products (MFPs) traditionally collected within or outside the village boundary.⁵¹¹ Minor Forest Produce (MFPs) are defined in the Act to include all non-timber forest produce of plant origin, including bamboo, brushwood, stumps, cane, tussar, cocoons, honey, wax, lac, tendu or kendu leaves, medicinal plants and herbs, roots, tubers and the like.⁵¹²

Community rights of uses or entitlements such as fish and other products of water bodies, grazing (both settled or transhumant) and traditional seasonal resource access of nomadic or pastoralist communities are recognized in the Act.⁵¹³ In addition, community tenures of habitat

⁵⁰⁸ Final Report, Recognition of Community Rights under Forest Rights Act in Madhya Pradesh and Chhatisgarh: Challenges and Way Forward, (UNDP, India, 2012).

⁵⁰⁹ Section 3 (1) (a) of the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, No. 2 of 2007, available at http://www.prsindia.org/uploads/media/vikas_doc/docs/acts_new/1214303111_The_Scheduled_Tribes_and_Other_Traditional_Forest_Dwellers_Recognition_of_Forest_Rights_Act_2006.pdf, (accessed on 15/07/2013).

⁵¹⁰ Ibid., section 3(1) (b).

⁵¹¹ Ibid., section 3(1) (c).

⁵¹² Ibid., section 2 (i).

⁵¹³ Ibid., section 3(1) (d).

and habitation for primitive tribal groups and pre-agricultural communities are well articulated in the law.⁵¹⁴ The Act also recognize the right of tribal and forest dwellers to protect, regenerate or conserve or manage any community forest resources which they have been traditionally protecting and conserving for sustainable use.⁵¹⁵

There is also recognition of the right of access to biodiversity and community right to intellectual property and traditional knowledge related to biodiversity and cultural diversity.⁵¹⁶ Most importantly, the Act provides for the right to *in situ* rehabilitation which includes provision of alternative land in cases where the Scheduled Tribes and other traditional forest dwellers have been illegally evicted or displaced from forest land of any description without receiving their legal entitlement to rehabilitation prior to the 13th day of December, 2005.⁵¹⁷ It also provides for any other traditional right customarily enjoyed by forest dwelling Scheduled Tribes or other traditional forest dwellers, as the case may be, but excluding the traditional right of hunting or trapping or extracting a part of the body of any species of wild animal.⁵¹⁸

Section 4 (2) (a) of the Act prohibits displacement and resettlement of forest communities until all rights are recognized following proper procedures outlined in the Act. Further, section 4 (5) of the Act states that ‘*Save as otherwise provided, no member of a forest dwelling Scheduled Tribe or other traditional forest dweller shall be evicted or removed from forest land under his occupation till the recognition and verification procedure is complete.*’ Section 6 provides for an

⁵¹⁴ Ibid., section 3(1) (e).

⁵¹⁵ Ibid., section 3(1) (i).

⁵¹⁶ Ibid., section 3(1) (j).

⁵¹⁷ Ibid., section 3(1) (m).

⁵¹⁸ Ibid., section 3(1) (l).

elaborate recognition and verification procedure aimed at curbing any irregularities in displacements and relocations.

The Indian Act offers some lessons to Kenya. The Indian Act addresses historical injustices meted out on tribal and forest dwellers in India. Forest communities in Kenya have also suffered historical injustices since the colonial days and there will be need to redress these injustices in ensuring equitable access to forests and security of land rights. The Indian Act grants the right to hold and live in forest land under individual or common occupation for habitation or for self-cultivation. The draft Community Land Bill provides for user rights and participation in forest management but restricts habitation in forests.

4.5 Land Rights of Forest Communities: Challenges and Opportunities

As discussed in Chapter Three, forests were held communally by Kenyan communities.⁵¹⁹ Communal property systems have, however, been disrupted by overemphasis on private property rights. This has led to the loss of community land including community forests.⁵²⁰ It has also led to the existence of dual tenure systems, setting the stage for the marginalization of local communities in natural resources management.⁵²¹ Chapter Two has discussed the competing land uses over forests and their impact on the land rights of forest communities. Chapter Two has also examined efforts that have been taken in securing community land in the past and their futility. Under the Trust Land Act⁵²² county councils act as

⁵¹⁹ R.H. Blackburn, "The Ogiek and their History," *Azania* vol. 9 (1974), 146.

⁵²⁰ Sessional Paper No. 3 of 2009 National Land Policy, (*Government Printer*, 2009); P Kameri-Mbote, *Property Rights and Biodiversity Management in Kenya*, (ACTS Press, 2002), 3-6.

⁵²¹ Ibid.

⁵²² Cap. 288, Laws of Kenya. Trust land refers to land that was occupied by natives during the colonial period and has not been consolidated, adjudicated and registered in the name of an individual, group or by the government.

the trustees of Trust land and hold it in trust for the benefit of persons ordinarily resident on that land.⁵²³ The law recognizes the African customary rights of local communities.⁵²⁴ However, such rights have been extinguished when the county council decides to transform the land into other public uses,⁵²⁵ or by being set aside by the president for government purposes,⁵²⁶ or if the applicable African customary law is repugnant to any written law.⁵²⁷ Courts have also not upheld the customary land rights of communities. In many instances, therefore, trust land has been irregularly and illegally allocated to the detriment of the local communities.

The state of affairs as regards the poor management of trust land is exemplified by the case of *William Yatich Sitetalia and others v. Baringo County Council and others*.⁵²⁸ In this case, the Endorois community challenged the manner in which the joint trustees of the Lake Bogoria land, that is Baringo and Koibatek County Councils, had exercised their trusteeship. The community argued that the revenue from the game reserve was not applied for their benefit. They also challenged their eviction from the game reserve, denial of access to grazing sites and cultural and religious sites within the game reserve. The community thus sought a declaration that the land around L. Baringo was their property held in trust for their benefit by the joint trustees under sections 114 and 115 of the repealed Constitution of Kenya. They also sought a declaration that the joint trustees were in breach of their fiduciary duty by failing to use the accruing benefits from the game reserve for the benefit of the community contrary to sections

⁵²³ Section 115 (2) of the *Repealed* Constitution of Kenya.

⁵²⁴ *Ibid.*

⁵²⁵ *Ibid.*, section 117.

⁵²⁶ *Ibid.*, section 118.

⁵²⁷ *Ibid.*

⁵²⁸ High Court Miscellaneous Civil Case No. 183 of 2000; (2002)eKLR.

114 and 115 of the repealed Constitution of Kenya. They also sought a declaration that the applicants and the Endorois community were entitled to all the benefits generated through the game reserve exclusively and/or in the alternative, the land under game reserve should revert to the community under the management of a trustee appointed by the community to receive and invest the benefits for the interest of the community under section 117 of the repealed Constitution. The court dismissed this claim on 19th April 2002 on the basis that the law did not allow individuals to benefit from a resource simply because they happen to be born close to it. The judges further stated that they did not believe that the law should extend any special protection to a people's land based on historical occupation and cultural rights. After the dismissal of this case, the Endorois filed a complaint with the African Commission on Human and Peoples' Rights in 2003.

In *Kinyanga and others v. Isiolo County Council and others*,⁵²⁹ discussed in Chapter Two, the court stated that any intended division of the country into tribal or community groups so as to promote a particular tribe or community welfare, wellbeing of tribal interests, be they commercial or political would be unconstitutional and unacceptable. These cases portray the courts indifference to the notion of communal property systems and neglect of community lands. Kenya courts narrow and restrictive approach communal property rights explain why communities such as the Ogiek and Endorois have resorted to regional courts to have their matters heard there. The African Commission in *Centre for Minority Rights Development (CEMIRIDE) and Minority Rights Group International (MRG) v. Kenya (supra)* has also faulted the Trust Land regime in Kenya for not providing adequate protection to the rights of

⁵²⁹ (2006) 1KLR (E and L) 229.

communities.⁵³⁰ Both the Trust Land Act and the Land (Group Representatives) Act are still in force and continue to apply to community land as they were not repealed by the Land Act 2012 and Land Registration Act 2012.

Under the Land (Group Representatives) Act,⁵³¹ pastoral communities, acquire large tracts of land under a single title for carrying out commercial livestock farming.⁵³² In a group ranch which is land demarcated and legally allocated to a group, such as a tribe, a clan, section, family or other group of persons,⁵³³ pastoral communities access resources such as pasture and water within their boundaries.⁵³⁴ Encroachment by other communities onto ranches has led to overuse of resources, land subdivision restricting pastoralism and environmental degradation.⁵³⁵ In addition, group representatives entrusted with the management of grazing lands end up disposing group land without consulting the other members.⁵³⁶ Group ranches have also failed because the representatives lack the backing of traditional leaders and disregard group rules. The assumption that group rights will mature into individual rights also undermines group ranch concept.⁵³⁷ For

⁵³⁰ Communication 276/2003, paragraph 199.

⁵³¹ Cap. 287, Laws of Kenya.

⁵³² Kenya Land Alliance, *Forest Dependence in Kenya: A Case Study of Hunter-Gatherer Communities in Kenya*, (Kenya Land Alliance, 2009), 40.

⁵³³ S.K.O. Seno & S. Tome, "Socioeconomic and Ecological Viability of Pastoralism in Loitokitok District, Southern Kenya," *Nomadic Peoples Vol. 17 (1), (2013), 66–86*.

⁵³⁴ Ibid.

⁵³⁵ Ibid., 68.

⁵³⁶ Sessional Paper No. 3 of 2009 (n94) 11-12.

⁵³⁷ P Kameri-Mbote *et al*, *Ours by Right: Law, Politics and Realities of Community Property in Kenya*, (Strathmore University Press, 2013), 45.

example, some hunter-gatherer communities such as the Ogiek and Yaaku who obtained titles under this Act ended up subdividing the land into individual titles and selling it.⁵³⁸

Moreover, policies on forest preservation and native reserves led to the displacement of Africans from forests. This denied communities access to and control over forests. It also created incentives for neighbouring communities to encroach into forests for agricultural, settlement and logging purposes. Other policies such as, the creation of national parks and game reserves prohibited the economic activities of forest communities, such as hunting and gathering.⁵³⁹ These policies have not recognized the land rights of forest communities at all. Courts have also not recognized the rights of forest communities as epitomized by the case of *Kemai & 9 others v. Attorney General & 3 others*.⁵⁴⁰ In this case, the applicants, members of the Ogiek community, sought a declaration that their eviction from the Tinet Forest by the government contravened their right to life, the protection of the law and the right not to be discriminated against. They based their claim on the fact that they had lived in the forest since time immemorial and derived their livelihood by gathering food, hunting and farming in that forest. They further argued that their culture preserved nature so as to sustain their livelihood and that they had never been a threat to the natural environment. They contended that they would be left landless if evicted from the forest. Evidence was tendered to show that the government had allowed them to remain in the forest through the issuance of allotment letters. On their part, the respondents maintained that the applicants were not genuine members of the Ogiek community and that they had entered the forest unlawfully.

⁵³⁸ Kenya Land Alliance (n106) 40.

⁵³⁹ Ibid., 10.

⁵⁴⁰ KLR (E & L) 1; Civil Case No. 238 of 1999 (OS).

On the claim that their culture was concerned with the preservation of nature, the court noted that “...whilst in his undiluted traditional culture the Ogiek knew their environment best and exploited it in the most conservational manner, they have embraced modernity which does not necessarily conserve their environment.”⁵⁴¹ It further stated that Tinet forest was not the Ogiek’s land and their source of livelihood as they had been allowed to live in the area by the government on the basis of allotment letters. On that basis the court questioned how, “...If the applicants maintain that the land was theirs by right, then how could they accept allocation to them of what was theirs by one who had no right and capacity to give and allocate what it did not have or own?”⁵⁴² In essence the court was saying that the Ogiek did not own the land since time immemorial. The claim by the Ogiek that eviction from the forest would deprive them of their source of livelihood was countered by the court saying that “...You do not have to own a forest to hunt in it. You do not have to own a forest to harvest honey from it. You do not have to own a forest to gather fruits from it...”⁵⁴³ This case portrays the struggles that forest communities have gone through in their clamor for land rights in community forests in Kenya and the conservative attitude of our courts in dealing with communal property .

The court dismissed the application finding, *inter alia*, that the Ogiek had embraced modernity and were not a traditional forest-dependent community and were thus living in the forest forcefully and contrary to the Forests Act. It also held that the Ogiek had recognized the government as the owner of Tinet forest and they could not say the land was theirs since time immemorial. It further held that eviction from the forest did not bar the community from

⁵⁴¹ Ibid., 333.

⁵⁴² Ibid., 337-338.

⁵⁴³ Ibid.

exploiting the forest resources nor deprive them a means of livelihood and right to life. The court missed an opportunity to develop jurisprudence on the land rights of forest communities in Kenya, but rather sought to advance the exclusionist forest policies of the government. It failed to recognize the political and economic marginalization of forest communities. It remains to be seen how courts will deal with cases of this nature now that Article 63(2)(d) of the Constitution has recognized community forests as a category of community land.

In spite of the decision in the *Kemai case (Supra)*, the Ogiek community has continued to agitate for their land rights even in regional courts. For example, *In the Matter of the African Commission on Human and Peoples' Rights v. Republic of Kenya*⁵⁴⁴ the Applicant had received a complaint against the Republic of Kenya on behalf of the Ogiek community of the Mau Forest. In the application it was asserted that the Ogiek are an indigenous minority group and despite their dependence on the Mau Forest as a source of their sacral identity, the Government of Kenya had in 2009, through the Kenya Forestry Service, issued a 30 days eviction notice to the Ogiek and other settlers of the Mau Forest, demanding that they move out of the forest as it constituted a reserved water catchment zone and was in any event government land under section 4 of the Government Lands Act. The Applicant was concerned, that eviction would impact negatively on the social, political and economic survival of the community and lead to the destruction of their means of survival, livelihoods, culture, religion and identity, which would amount to massive violation of the rights enshrined in Articles 1, 2, 4, 14, 17 (2) and (3), 21 and 22 of the African Charter on Human and Peoples' Rights.

In the application, the applicant sought orders requiring the government of Kenya to halt the eviction of the Ogiek from the Mau Forest and to refrain from harassing, intimidating or interfering with the community's traditional livelihoods. Secondly, the application required the

⁵⁴⁴ (2013)eKLR, African Court on Human and Peoples' Rights, Application 006 of 2012.

Respondent to recognize the Ogiek's historic land, and to issue the community with legal titles preceded by consultative demarcation of the land by the government and the Ogiek community, and for the respondent to revise its laws to accommodate communal ownership of property. Thirdly, the applicant sought orders for the Respondent to compensate the community for all the loss suffered through the loss of their property, development, natural resources and loss of freedom to practice their religion and culture.

While the main application was still pending in court, the court received a request for provision measures on 31st December 2012, since by a letter dated 9th November 2012, the Respondent had lifted restrictions on land transactions for all parcels of land measuring five acres or less within the Mau Forest Complex and this could have the effect of causing further irreparable damage to the Ogiek and would perpetuate and expand the prejudice the subject of the applicant's main application. Pending resolution of the main application, the applicant, thus prayed the court to order the Respondent to reinstate the ban on transactions of land in the Mau Forest Complex and to follow up on implementation in accordance with rule 51 (5). In a ruling delivered on 15th March 2013, the court observed that Kenya had ratified the Charter and the Protocol, and had deposited its instruments of ratification on 18th February 2005 and is thus a party to both instruments. In addition, the court found the existence of a situation of extreme gravity and urgency and risk of irreparable harm to the Ogiek community with regard to violation of their rights guaranteed under the Charter to, *inter alia*, enjoy their cultural rights and protection of their traditional values under Articles 2 and 17 (2) and (3), protection before the law under Article 3, integrity of their persons under Article 14 and the right to economic, social and cultural development under Article 22 of the Charter. In light of the circumstances, the court found it fit to order, as a matter of urgency, provisional measures in accordance with Article 27

(2) of the Protocol and Rule 51 of its Rules to preserve the status quo pending the determination of the main application.

The government of Kenya was ordered to immediately reinstate the restrictions it had imposed on land transactions in Mau Forest and to refrain from doing anything that would or might irreparably prejudice the main application pending the decision of the court on the matter. The government was also enjoined to report on execution of the measures within 15 days from the receipt of the order. The decision was a major success in the struggle by forest communities for their land rights. What comes out clearly from this decision is the lack of political goodwill from the government to respect, promote and safeguard the land rights of forest communities even after the promulgation of the Constitution 2010. It is, to be noted, that this application was made on 12th July 2012, two years after promulgation of the Constitution, suggesting that forest communities do not even have faith in our judicial system as far as their land rights are concerned. This could be true in light of the holding in the *Kemai case (supra)*. There is thus a need to go beyond what is stipulated in the law, to finding practical solutions on ways of safeguarding the land rights of forest communities. It, further suggests that constitutionalizing the land rights of forest communities could be inconsequential without political goodwill and practical measures aimed at implementing the law.

4.5.1 Article 63(2)(d) of the Constitution: Opportunities for Forest Communities'

Land in Kenya is classified as public, community or private land.⁵⁴⁵ Community land is defined to include land that is *lawfully held, managed or used by specific communities as community forests, grazing areas or shrines, ancestral lands and lands traditionally occupied by*

⁵⁴⁵ Article 61(2) of the Constitution of Kenya.

*hunter-gatherer communities or lawfully held as trust land by the county governments.*⁵⁴⁶

Community land is vested and is to be held by communities identified on the basis of ethnicity, culture or similar community of interest.⁵⁴⁷ This is a departure from the existing regime where such lands are held by county councils or as group ranches. Article 63(2)(d) of the Constitution deals with a category of land that has been neglected by formal laws in Kenya. They are categories of land to which the African customary law of the various communities was to apply, but due to overemphasis on private property rights, these lands ended up being gazetted as government land or excised and allocated to the State or private individuals. This is because the land law regime under which they were governed was riddled with a number of weaknesses as discussed in Chapter Two. This study discusses how to secure community forests which are a category of community land in Article 63(2)(d).

4.5.2 Defining ‘Community’ in the Context of Forest Communities

Since community land is vested and is to be held by communities on the basis of ethnicity, culture or similar community of interest,⁵⁴⁸ there is need to identify the criteria for defining ‘community’ in the context of forest communities. Over the years, forest communities have lost rights of access, use and control of their land after gazettelement of their lands as forests or national reserves or after excision and allocation to the State or private persons. There is, thus a huge challenge in determining the rightful claimants to forest lands as demonstrated by the *Kemai case (supra)*. The problem arises because of the continued encroachment into forests by

⁵⁴⁶ Ibid., Article 63(2)(d).

⁵⁴⁷ Ibid., Article 63 (1).

⁵⁴⁸ Article 63 (1) of the Constitution.

neighbouring communities for settlement and agricultural reasons. This makes it difficult to differentiate between genuine forest dwellers and intruders.

Kameri-Mbote *et al*, have used the example of the Ogiek of East Mau and Kasigau people to demonstrate how ethnicity and culture, when used in defining ‘community,’ can be used to include and exclude different groups competing for natural resources.⁵⁴⁹ In relation to natural resources, such as forests, they argue that community of interest is discernible where communities are brought together by land principally and secondly by natural resources such as forests and water.⁵⁵⁰ However, despite their limitations in defining the term ‘community,’ culture and ethnicity are the most appropriate in relation to forest communities. This is because the social, spiritual, cultural and economic life of forest communities is tied to forests. Such a connection with forests has also to be of a longer duration. Community of interest cannot create such a link between the cultural and spiritual way of life and land. The Community Land Bill recognizes this, as it defines ‘community’ in clause 2 to mean a homogenous and consciously distinct group of users of community land who share either common ancestry; similar culture or unique mode of livelihood; ethnic language; socio-economic interest; geographical interest or ecological space.

4.5.3 Mapping of Community Forests

So as to protect community land, there is need to identify and map the categories of land classified as community land in Article 63(2)(d) of the Constitution. In relation to this study, there is need to carry out a mapping exercise of all community forests across the country. This will help in identifying those who currently hold community land and investigating how they got

⁵⁴⁹ Kameri-Mbote *et al* (n 111) 152.

⁵⁵⁰ Ibid.

that land. This is necessary since forest communities have continually lost their lands after gazettelement of such lands as forest or nature reserves or excision and allocation to private individuals or State functionaries. After identifying community forests, it will then be possible to move to court to seek the revocation of all titles involving community land held by the government or private persons. The National Land Commission will play a critical role in this regard.

4.5.4 Securing the Land Rights of Forest Communities

As the discussion on international instruments has shown, there is a basis in international and regional legal instruments for the protection of the land rights of forest communities. There is sufficient ground for protecting forest communities as indigenous peoples as exemplified by the Endorois case at the African Commission on Human and Peoples' Rights (*supra*) and the application by the African Commission on behalf of the Ogiek community (*supra*). At a national level the Constitution has recognized community land and has defined it to include community forests.⁵⁵¹ Article 40 of the Constitution protects property including community land. It provides that subject to the police power of the state, every person shall have the right either individually or in association with others to acquire and own property of any description and in any part of Kenya.⁵⁵² Community land is given similar treatment as public and private land in the constitution suggesting that customary land rights shall have equal force of law and receive equal treatment like any other interests in land.⁵⁵³ Article 60(1) of the Constitution provides that land shall be held, used and managed in a manner that is equitable, efficient, productive and

⁵⁵¹ Article 63(2) of the Constitution of Kenya.

⁵⁵² *Ibid.*, Article 40 (1).

⁵⁵³ *Ibid.*, Article 61.

sustainable and in accordance, *inter alia*, with the principles of equitable access to land; security of land rights; sustainable and productive management of land resources and the sound conservation and protection of ecologically sensitive areas.⁵⁵⁴ Securing land rights will guard against wrongful evictions that communities living in forests have been subject to in the past.

Establishment of the National Land Commission⁵⁵⁵ whose mandate, *inter alia*, include initiating investigations into present or historical land injustices and recommend appropriate redress,⁵⁵⁶ is another ray of hope and opportunity in addressing the challenges of forest communities in Kenya. One of the recommendations that the Commission should make in this regard is the revocation of titles over community land.

The Commission will also advise the national government on a comprehensive programme for the registration of title in land throughout Kenya.⁵⁵⁷ Although, it is not clear whether the registration process will include community land, clause 31 of the Draft Community Land Bill envisages the registration of community land and according to clause 33 a certificate of title shall be conclusive evidence of proprietorship. Registration and issuance of titles to communities will secure their land rights. Because of the danger of individualizing landholding forest communities should be issued with a block title and any sub-division within the block title be an internal matter, dictated by the need to zone different land uses. This is necessary since individualization of title would also dilute the claim to indigenous status as a community. Proponents of private titles support individualization because there is no more land for future allocation and in light of diverse interests and ways of life that are incompatible. They also argue

⁵⁵⁴ Ibid., Article 60(1).

⁵⁵⁵ Ibid., Article 67(1).

⁵⁵⁶ Ibid., Article 67(2)(e).

⁵⁵⁷ Ibid., Article 67(2)(c).

that private title creates incentives for development, access to credit and minimizes land disputes.⁵⁵⁸ Because of the attachment that forest communities have to their land beyond the physical soil, a block title would be more appropriate. Private title would lead to subdivision of land that has a sacral identity occasioning the loss of the cultural identity and existence of the communities.

The Constitution also recognizes culture as the foundation of the nation and the cumulative civilization of the Kenya people and nation.⁵⁵⁹ This means that forest communities can exercise their cultures such as hunting and gathering. Since these cultural activities are connected to their lands and territories, the recognition of culture also is an acknowledgement of the land rights of these communities. Further, the Constitution has recognized the rights of minorities and marginalized groups and the State is under a duty to put in place affirmative action programmes to ensure that such groups, *inter alia*, develop their cultural values, languages and practices.⁵⁶⁰ The definition of a marginalized community in the Constitution clearly contemplates communities such as the Ogiek and the Endorois. A marginalized community refers to “*a traditional community that, out of a need or desire to preserve its unique culture and identity from assimilation, has remained outside the integrated social and economic life of Kenya as a whole.*”⁵⁶¹ It also means an “*indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy,*” or “*pastoral*

⁵⁵⁸ C.N. Musembi & P. Kameri-Mbote, “Mobility, Marginality and Tenure Transformation in Kenya: Explorations of Community Property Rights in Law and Practice,” *Nomadic Peoples Vol. 17 (1)*, (2013), 16-17.

⁵⁵⁹ *Ibid.*, Article 11.

⁵⁶⁰ *Ibid.*, Article 56(d).

⁵⁶¹ *Ibid.*, Article 260.

persons and communities.”⁵⁶² Forest communities are therefore marginalized communities. By delimiting the minorities and marginalized communities and outlining measures for protecting their interests, the State acknowledges that there has been political and economic marginalization occasioned by various government policies to such communities.

The State is also obliged to achieve and maintain a tree cover of at least ten percent of the land area of Kenya,⁵⁶³ protect traditional ecological knowledge,⁵⁶⁴ and encourage public participation in the management, protection and conservation of the environment.⁵⁶⁵ In fulfilling its obligations in relation to the environment, the government must not use environmental protection as a justification for evicting forest communities from forests. Environmental protection must not trample on the land rights of forest communities as enshrined in the Constitution. Forest conservation complicates the land rights of forest communities. This is because equitable access to forests will have to be curtailed in the interest to conserve forests. Argument has been that the activities of forest communities lead to forest destruction. However, forest communities have always maintained that their activities foster sustainable forest management. Consequently, the conservation of forests will make the land rights of forest people insecure. In the Mau Forests Complex, the Ogiek might have to move out of the forest to pave way for its conservation as a water tower.⁵⁶⁶ There is, therefore, a need to ensure environmental conservation efforts are reconciled with the protection of community land rights.

⁵⁶² Ibid.

⁵⁶³ Ibid., Article 69 (1)(b).

⁵⁶⁴ Ibid, Article 69 (1)(c).

⁵⁶⁵ Ibid., Article 69(1)(d).

⁵⁶⁶ Report of the Prime Minister’s Task Force on the Conservation of the Mau Forests Complex, *Government of Kenya*, 2009.

Government recognizes that due to their close association with land, forests, water, wildlife, and other natural resources, the physical relocation of forest communities, or other measures which restrict their access to livelihood-related forest resources has complex implications, and may entail significant adverse impacts on their identity, culture, and customary livelihoods.⁵⁶⁷ That is why the Ogiek of Chepkitale in Mount Elgon living in a gazetted game reserve to which access is via the forest have resisted resettlement at Chebyuk. Similarly, the Sengwer in Embobut in Cherangany Hills have insisted that they are only ready for resettlement under certain conditions.⁵⁶⁸ Rather than relocate them, the best thing would be to secure their land rights and empower them so as to sustainably manage forests. Alternatively, initiatives aimed at minimizing pressure on protected areas can be developed to provide surrounding communities with other forms of livelihood.

Kenya can learn from India which has sought to address the historical injustices done to tribal and forest dwellers for the last three generations in its Act on tribal and forest dwellers. It has also made the procedure of displacement and relocation of these people difficult as a way of securing their land rights.

4.5.5 Land Tenure Arrangements

Recognition of communal land tenure and land rights is a necessary factor in protecting the land rights of forest communities. Chapter Two has examined the Draft Community Land Bill and pointed out some of its salient weaknesses in protecting the land rights of forest communities. There is need to address these weakness and to enact the Bill into law so that

⁵⁶⁷ Esther Lowe & Margaret Ombai, *Process Framework for NRM Project in Mount Elgon and Cherangany Hills*, (Kenya Forest Service, 2013), 10.

⁵⁶⁸ *Report of the NRMP Social Assessment of IPs in Cherangany Hills and Mount Elgon*, (Kenya Forest Service, 2010).

Kenya can have the framework for the recognition, protection and registration of customary rights to land and land-based resources. The Land Act 2012 and Land Registration Act 2012 do not deal with community land. These laws have not repealed the Trust Land Act and Land (Group Representatives) Act meaning community land is still governed by these laws. The effect is that the status of community land is somehow relegated vis-à-vis public and private land. In addition, the longer time frame given for enactment of the Community Land Bill creates room for confusion and conflicts as the older legal regime dealing with community land is still in force.⁵⁶⁹ There is need for communities and other actors to compel government to ensure that the relevant legislation on community land is enacted to stop further loss of community land in the transition period.

To secure community land rights in forests, there is need to define the range of persons controlling and managing forests and the form of land management to apply to the land in question. Community land tenure must also determine who may participate in extraction of resources from forests and to what degree.⁵⁷⁰ A paradigm shift is necessary so that the individual is no longer the focal point of forest management leaving out other key stakeholders in sustainable forest management.⁵⁷¹ Land tenure arrangements in forests must also serve as incentives for the sustainable management of forests.⁵⁷² Due to the competing land uses in forests, tenure arrangements must reconcile the various land uses in forests in a way that

⁵⁶⁹ Musembi (n132), 23.

⁵⁷⁰ P Kameri-Mbote, "Land Tenure and Sustainable Environmental Management in Kenya," in Okidi *et al* (eds), *Environmental Governance in Kenya: Implementing the Framework Law*, (EAEP, 2008), 276.

⁵⁷¹ Ibid.

⁵⁷² Article 5 (a) of Annex III to the Rio Declaration.

recognizes the rights of forest communities. This would also require the formulation of a national land use policy as a measure to address the problem of inappropriate land uses in forests.

Securing land rights does not entail mere provision for community participation in forest management as envisaged in the Forests Act.⁵⁷³ It requires that there be ownership of underlying land and access rights to forests.⁵⁷⁴ Community forest management is based on registration of a community forest association.⁵⁷⁵ It does not clearly articulate the rights and responsibilities of concerned parties, processes for developing and approving management plans or benefit-sharing arrangements with forest communities. Moreover, issues of decision-making, management responsibilities and benefit-sharing are left to subsidiary legislation.⁵⁷⁶ In addition, sustainable conservation of forests as envisaged in the Forests Act and Policy might require the involuntary physical and/or economic access restriction to protected and non-protected forests.⁵⁷⁷ CFAs have faced a number of challenges, such as exclusion, poverty and inequity yet they were intended to benefit local communities. This has negatively affected vulnerable and marginalized groups.⁵⁷⁸

4.5.6 Role of the Courts in Safeguarding the Rights of Forest Communities

Courts play an important role in safeguarding rights and particularly the rights of the minorities, marginalized and vulnerable groups. This has, however, not been the case with Kenyan courts in arbitrating disputes touching on forest communities and their land rights. This

⁵⁷³ Section 46 of Forests Act, No.7 of 2005.

⁵⁷⁴ Kamari-Mbote (n 144) 276.

⁵⁷⁵ Section 46 of Forests Act, No.7 of 2005.

⁵⁷⁶ Lowe & Ombai (n 141) 10.

⁵⁷⁷ Ibid.

⁵⁷⁸ E. Obonyo *et al*, *Exclusion, Poverty and Inequality in Decentralized Kenyan Forests: Bridging the Divide*, (Kenya Forestry Research Institute), 3.

view is illustrated by the *Kemai case (supra)* and *William Yatich case (supra)*, which clearly depict a restrictive and narrow interpretation by the courts of the law relating to the rights of indigenous communities in Kenya. Realizing that they could not find justice in these courts, the Endorois and now the Ogiek sought redress at the African Commission on Human and Peoples' Rights, with great success. The legal battles and challenges that the Ogiek and Endorois have had to surmount in the Kenyan courts, suggests that our courts must be prepared to interpret the Constitutional provisions in the most progressive manner so as to safeguard the rights of indigenous peoples. Courts must safeguard the rights of forest communities to their lands and territories, their right to religious freedom, to exercise culture, right to natural resources amongst other rights enshrined in the Constitution. They must also apply the law in ways that will redress the historical land injustices suffered by forest communities such as revoking titles that have been issued illegally over community forests.

As demonstrated by the case of *Republic v. Kenya Forest Service Ex parte Clement Kariuki & 2 others*⁵⁷⁹ courts must be in the forefront in safeguarding forests by applying the principles and values enshrined in the Constitution. In this case the court stopped the allocation of thousands of forest land to individuals and companies for a period of 30 years and more without involving the people as required under the Constitution.

4.6 Conclusion

There is no single convention at the international level on forests. However, there are conventions recognizing specific functions of forests to mankind. Some recognize forests as habitats and sources of livelihood for forest communities. Several other international and regional instruments have recognized the rights of indigenous peoples to their culture, religion,

⁵⁷⁹ (2013)eKLR.

natural resources, development and right to self-determination. These rights provide necessary basis for securing the land rights of forest communities and ensuring they have equitable access to forest lands.

Nationally, the Constitution has recognized community land rights, including the rights of forest communities to their ancestral lands and community forests. It also provides for principles of landholding, such as equitable access to land and security of land rights. However, equitable access to land and security of land rights for forest communities is threatened by a number of issues, including gazettelement of areas as forests, allocations to private persons, need to conserve forests as catchment areas, rising population and encroachment into forests for settlement and agriculture and emphasis on private property over communal property. There is need to address these challenges so as to secure the land rights of forest communities, drawing lessons from other states like India that have enacted laws on forest dwellers, and addressing the historical injustices suffered by forest people. The next chapter outlines the findings, recommendations and conclusions of the study.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

This chapter contains the findings, recommendations and conclusions of the study. The study sought to investigate and find ways of securing the land rights of forest communities in Kenya in light of the provisions of Article 63 of the Constitution.

5.2 Findings

a) Formal Laws and Policies

Formal laws and policies on forests have tended to restrict and deny forest-dependent communities access to forests. This has been the result of the colonial government policy which was to preserve forests by denying natives access thereof while allowing for commercial extraction of forest products by colonialists. Natives occupying forest lands were forced to abandon their ancestral lands after such areas were gazetted as forest reserves. Access to such lands was severely restricted. The problem of forest communities was further compounded by political and economic marginalization following the recommendations of the Kenya Land Commission of 1930. This saw communities, such as the Ogiek, being assimilated into the neighbouring dominant tribes and could, therefore, not adequately agitate for their rights to forests. The Colonial government policies were adopted by the independent government as evidenced by the application of the 1942 Forests Act⁵⁸⁰ and the 1968 Forest Policy which was similar to the 1957 Forest policy.

On the evolution of land laws, the study has found that there has been an overemphasis on private property rights and individualization of tenure at the expense of communal property. Communal and/or customary land tenure as practiced by most African communities has, in the

⁵⁸⁰ Cap. 385 Laws of Kenya.

words of Okoth-Ogendo, suffered expropriation, suppression and subversion at the altar of Western notions of property relations.⁵⁸¹ The study has shown that while land tenure changes were taking place, tenure arrangements within forests were also changing, occasioning loss of community forests as they were being gazetted as forest reserves and through commercial exploitation of timber. This impacted negatively on forest communities who had since time immemorial held forestlands and resources communally.

Moreover, individualization of tenure has been seen to cut the ‘web of interests’ that people may have had traditionally over natural resources such as forests. When forests are declared protected areas, rights to trees and forest products and to exercise cultural and religious rites are denied. This immediately poses negative threats to the survival and well-being of communities as a people. The study has shown that recognition of community land may be a step towards recognizing this web of interests over forest resources.

b) Tenure and Land Use

The discussions in Chapter Two have shown how tenure can impact land use and conversely on how land use patterns develop in close relation with land tenure systems.⁵⁸² For example, it has been shown how the pre-2010 inappropriate land tenure systems coupled with high population growth in high potential areas pushed a significant part of the population among farming communities away from their traditional areas to less productive lands and forest areas, resulting in deforestation and destruction of indigenous forests and water-towers.⁵⁸³ As

⁵⁸¹ HWO Okoth-Ogendo, ‘*The Tragic African Commons: A Century of Expropriation, Suppression and Subversion*,’ Keynote Address to African Public Interest Law and Community-Based Property Rights Workshop, Usa River-Arusha, Tanzania, published in CIEL/LEAT/WRI/IASCP, 5-7.

⁵⁸² ECA/SDD/05/09 -Land Tenure Systems and their Impacts on Food Security and Sustainable Development in Africa (Economic Commission for Africa, 2004).

⁵⁸³ Ministry of Lands and Housing, “*Issues and Recommendations Report of the National Land Policy*”

discussed in Chapter Two, there are multiple and competing land uses over forests. Despite the recommendations of the National Land Policy 2009 for the government to formulate a land use policy to guide rural and urban development, avoid land use conflicts and spur development, Kenya has not had a national land-use policy yet. As hinted above, there is need for a tenure arrangement that recognises the diverse and competing interests over land and interests in forest resources.

Discussions in Chapter Two have shown that trees can be a basis of ownership under tree tenure. It has also been shown that under the concept of forest tenure, tenure is not just a question of extracting forest products and protecting natural resources, but also deals with issues to do with land use, settlement, rights of indigenous and underprivileged people and human rights.⁵⁸⁴

The study finds that the provisions on community participation in forest management in section 46 of the Forests Act 2005 are not adequate and do not provide an appropriate legal framework for guaranteeing access and tenure security in community forests. This is because community participation in forest management is not based on ownership of the underlying land, but on registration of a community association. This is expected to change since community land now includes community forests, meaning that both access and user rights of forest products and ownership of underlying land will be held by the community.

However, the proposed Community Land Bill seems to offer only user rights to forests as under the Forests Act 2005. For instance, the definition of community land in the draft Bill

(National Land Policy Secretariat, 2005), 39.

⁵⁸⁴ Andreas Neef and Rainer Schwarzmeier, "Land Tenure Systems and Rights in Trees and Forests: Interdependencies, dynamics and the role of development cooperation-Case studies from Mainland Southeast Asia" available at http://www.landcoalition.org/sites/default/files/legacy/legacypdf/08_gtz_land_tenure_systems.pdf?q=pdf/08_gtz_land_tenure_systems.pdf, (accessed on 30/07/2013); FAO, "Reforming Forest Tenure: Issues, Principles and Process," (*FAO Forestry Paper No. 165, 2011*).

leaves out community forests in clause 2 thereof and only provides for measures to facilitate access, use and co-management of forests by communities who have customary rights to forests.⁵⁸⁵ It seems that the Bill separates ownership of forests, trees and the underlying land. Whereas this may be in line with certain customary rights, it may weaken the land rights of communities if rights to forests, trees and the underlying land are distinct. However, the proposed draft Bill elevates customary land rights, including those held in common, to the same pedestal as freehold or leasehold rights acquired through allocation, registration or transaction.⁵⁸⁶ It also reiterates the constitutional provisions on protection of the right to property.

The study has also shown that securing land rights does not entail mere provision for community participation in forest management as envisaged in the Forests Act 2005⁵⁸⁷ and Forests Policy 2005.⁵⁸⁸ From the reviewed literature, it has been found that provisions on community participation in the Forests Act have not clearly laid out the rights and responsibilities of concerned parties, processes for developing and approving management plans or benefit-sharing arrangements with forest communities. Moreover, issues of decision-making, management responsibilities and benefit-sharing are left to subsidiary legislation.⁵⁸⁹ In addition, sustainable conservation of forests as envisaged in the Forest Act and Policy might require the involuntary physical and/or economic access restriction to protected and non-protected forests.⁵⁹⁰

CFAs have led to exclusion, poverty and inequity among communities, yet they were intended to

⁵⁸⁵ Clause 36 of the Draft Community Land Bill, June 2013.

⁵⁸⁶ Ibid., clause 7(5).

⁵⁸⁷ Section 46 of Forests Act No.7 of 2005.

⁵⁸⁸ Sessional Paper No. 9 of 2005 on Forest Policy, 3-8.

⁵⁸⁹ Esther Lowe & Margaret Ombai, *Process Framework for NRM Project in Mount Elgon and Cherangany Hills*, (Kenya Forest Service, 2013), 10.

⁵⁹⁰ Ibid.

benefit local communities. This has negatively affected vulnerable and marginalized groups.⁵⁹¹ The forests laws and policies need to be reviewed to align them with the constitutional provisions on community land.

With the competing land uses over forests, there is need to reconcile tenure systems and land uses in forests. The study has shown that by securing land rights one creates incentives for forest protection among communities. This shows the need to reconsider land, tree and forest tenure arrangements to strengthen tenure among forest communities. This is because as discussed in Chapter Two, trees can be a basis of rights and ownership.

c) Developments Under Constitution 2010

Article 63(2)(d) of the Constitution has recognised community land which includes community forests. Failure to recognise community land tenure in the past was used as a basis for denying forest communities their land rights. Chapter Four has shown how Article 63(2)(d) is an opportunity both for securing the land rights of forest communities and for moving to court to safeguard land rights. The Constitution also provides a good legal basis for protecting the land rights of forest communities as minorities and marginalized communities. The definition of a marginalized community in the Constitution clearly contemplates communities such as the Ogiek and the Endorois.⁵⁹²

However, despite the recognition of community land in Article 63(2)(d), the study finds that the community land law is yet to be enacted. This law is to be enacted within a time frame of five years. However, the law relating to private and public land has been enacted. This has left the category of community land in Article 63(2)(d) under the old and ineffective land law

⁵⁹¹ E. Obonyo *et al*, *Exclusion, poverty and inequality in decentralized Kenyan forests: Bridging the Divide*, (Kenya Forestry Research Institute), 3.

⁵⁹² See Article 260 of the Constitution and discussions in Chapter Four.

regime, which has not been repealed as yet.⁵⁹³ There is a likelihood of community land being lost during the transition period.

The discussions in Chapters Two and Three have revealed that there are competing land uses over forests, which is mainly a contestation between the use of land for forests and use of land for other purposes, i.e., residential, industrial development, farming, livelihood support for the forest dwellers, environmental function as a carbon sink, and water catchments.⁵⁹⁴ This has been a big challenge to policy makers in determining the best uses to put forests land into in light of the competing interests. Although the competing land uses may work towards weakening the land rights of forest communities, the Constitution guarantees security of land rights and equitable access to land. It also protects the right to property in Article 40.

The study however, notes that despite the recognition of community forests in the Constitution as a category of community land, there are factors that may weaken their protection and there is need for innovative solutions that will foster the sustainable management of such forests and guarantee land rights. In that regard the study makes the following recommendations.

5.3 Recommendations

a) Need to Enact the Community Land Law

There is need to put in place the law on community land. Despite the Fifth Schedule to the Constitution stipulating that this law should be in place within a period of five years, there is need for expedition in enacting the same since the old regime with its attendant weaknesses continues to govern community land in Kenya. The category of land in Article 63(2)(d) of the Constitution could therefore be lost during the transition period.

⁵⁹³ See generally, the Land Act No.6 of 2012 and Land Registration Act No. 3 of 2012.

⁵⁹⁴ See discussions in Chapter Two and Three.

In relation to defining the term ‘community’ in the context of forests, culture and ethnicity are the most appropriate basis. This is because the social, spiritual, cultural and economic life of forest communities is tied to forests. Such a connection with forests has also to be of a longer duration. ‘Community of interest’ cannot create such a link between the cultural and spiritual way of life and land. Moreover, forest communities do not lay their claims to every forest in Kenya. It is only in specific forests, based on culture or ethnicity, and not on community of interest. The study, thus, recommends that in relation to forests, ‘community of interest’ should not be used as basis for owning community land in forests. The law should be clear on how access, use and co-management of forests by communities who have customary rights to forests will be facilitated considering that they also own underlying land. It should also recognize the tenurial arrangements recommended in this study. The law should provide for the issuance of a block title to community forests rather than private titles to prevent subdivision of land that is a source of their sacral identity.

b) Mapping Community Forests

The National Land Commission should carry out a mapping exercise of all community forests across the country. This will help in identifying those who currently hold community land and investigating how they got that land. After identifying community forests, it will then be possible to move to court to seek the revocation of all titles involving community land held by the government or private persons.

c) Imposing a Ban on Transactions in Community Land in Article 63(2)(d) of the Constitution

Because of the delay in enacting the community land law, there is need for the National Land Commission to impose a ban on all land transactions in community forests as defined in

Article 63(2)(d) of the Constitution. This is necessary because the old and inadequate legal framework relating to trust land and group ranches is yet to be repealed, and there is a threat of community forests being lost in the 5 year transition period.

d) Revocation of All Titles over Community Forests

As shown in the study, forest communities have lost their land rights after their lands were gazetted as government land or excised and irregularly and illegally allocated to private individuals or the State. Where it is found that community forests are either gazetted as government land or in the hands of private individuals, the National Land Commission should recommend the revocation of all those titles, and the land be vested in forest communities. Such radical measures must be taken if the land rights of forest communities are to be realised.

e) Tenure to Forests

The study recommends that, in light of the competing claims over forests and forest resources, there is need for appropriate tenure arrangements that recognize all the diverse interests. This is because securing tenure in forests land and forest resources will create incentives for conservation and sustainable management of forests. Recognition of community land will go a long way in ensuring sustainable forest management. There is need to ensure that the tenure arrangements over forests ensure not only user rights, but also ownership arrangements. The existing literature has shown that under tree tenure, trees can be a basis of ownership, distinct from land. Forest tenure is also broad and includes issues to do with land use, settlement, rights of indigenous and underprivileged people and human rights and not just extraction of forest products. The community land law that is anticipated must consider these tenure arrangements as they will further secure rights in forest lands and forest resources.

The study has shown that due to their close association with forests, the physical relocation of forest communities or other measures which restrict their access to livelihood-related forest resources has complex implications, and may entail significant adverse impacts on their identity, culture, and customary livelihoods.⁵⁹⁵ Under the current legal framework, relocation, resettlement, or eviction of forest communities should not even be in the contemplation of the policy makers. What is necessary for now is to better secure land rights in forests since this will empower communities and act as an incentive for sustainable forest management. Alternatively, initiatives aimed at minimizing pressure on protected areas can be developed to provide surrounding communities with other forms of livelihood. These are communities who encroach on forests for agricultural activities and settlement, but who are not traditionally dependent on forests. This would create a buffer and ensure that it's only communities whose activities in forests are known to foster sustainable management are allowed within forests. Under such a regulatory framework, it would even be easier to assess and determine whether the assertion by forest communities that their activities are in consonance with forest conservation is true.

f) Need to Review Forests Act 2005

The study has shown that the Forests Act 2005 is in need of review so as to conform to the Constitution 2010, as far as recognition of community land is concerned. This is because the Act only allows for user rights in forests which are only recognized after the formation and registration of a community forest association. It is not based on ownership of land.⁵⁹⁶ Under the Act, community participation in forest management is encouraged through the formation of

⁵⁹⁵ Lowe & Ombai (n10) 10.

⁵⁹⁶ See discussion in Chapter Three.

community forest associations.⁵⁹⁷ Recognition of user rights only may impact negatively on forest communities who rely on forests for their livelihoods. It, also, does not conform to international instruments protecting the rights of indigenous peoples to their territories and ancestral lands. In addition, best practices on forest management and programmes aimed at mitigating the impacts of climate change, such as REDD+, now acknowledge indigenous peoples and forest-dependent communities as key stakeholders in curbing deforestation and forest degradation. This suggests that sustainable forest management does not mean restricted access to forests by communities. There is, therefore, a need to review the Forests Act 2005 and Forests Policy 2005 in line with the provisions of the Constitution 2010.

g) Forest Policy

Forestry policies should ensure that tenure and use rights to the land and forestry resources are clearly defined, documented and legally established. The rights of indigenous peoples to own, use and manage their lands, territories and resources must be recognized and respected in line with international instruments to which Kenya is a party.⁵⁹⁸ Such a policy should recognize that trees can be a basis of rights. It should also provide for benefit-sharing where forest resources are exploited by other parties, mechanisms for settlement, land use, and the rights of indigenous and underprivileged communities.

It has been recognized that the activities of forest communities are not always destructive of the environment. In fact, their traditional ecological knowledge is sought after as it ensures sustainability. Traditional knowledge of these communities that ensure sustainability in

⁵⁹⁷ Section 46 of the Forests Act No.7 of 2005.

⁵⁹⁸ Forest Stewardship Council-Principles and Criteria for Forest Stewardship, (Forest Stewardship Council, 1996), available at <https://ic.fsc.org/principles-and-criteria.34.htm>, (accessed on 12/08/2013).

managing forest resources and associated lands to meet the social, economic, ecological, cultural and spiritual needs of present and future generations, should be recognized.

h) Need for a Land Use Policy

The study has shown that there are competing land uses over forests. Despite the recommendations of the National Land Policy 2009 for the government to formulate a land use policy to guide rural and urban development, avoid land use conflicts and spur development, Kenya has not had a national land-use policy yet. There is need for a land use policy that will guide and reconcile the conflicting land uses in forests. In relation to community forests regard should be had to the need to conserve and protect the forests for the benefit of concerned communities.

i) Redressing Historical Land Injustices

One of the functions of the National Land Commission is to investigate present or historical land injustices and recommend appropriate redress.⁵⁹⁹ Recognizing that there are historical land injustices suffered by forest communities is important in securing their land rights. It will also require operationalizing Article 56 which addresses the specific challenges minorities and marginalized communities are facing in Kenya. In addition, mechanisms for fair and equitable benefit sharing of the profits arising from exploitation of biological diversity in protected areas which they have been denied access to over the years should be devised. Kenya has not come up with mechanisms for facilitating benefit-sharing, especially where communities lose their rights to forests. There is need to operationalize provisions on benefit-sharing as it relates to natural resources such as community forests whose loss may deny communities of their livelihoods.

⁵⁹⁹ Article 67(2)(e) of the Constitution.

Impacts of forest conservation measures on communities should be conducted where government goes ahead with such measures in their territories. Forest communities should be granted ‘*prior and meaningful consultation*’ and ‘*informed participation*’ to ensure that their needs are adequately met rather than further marginalized by environmental conservation.⁶⁰⁰

j) Resettlement Policy

Where communities have to be displaced from their territories, there is need for a resettlement policy. Resettlement could arise where, for example, continued habitation in forests cannot be tolerated due to concrete reasons which have been made known to the communities. Such a policy should spell out the rights and options pertaining to resettlement, consultation, alternative choices, and provision for technical and economic feasible resettlement alternatives and provide for prompt and effective compensation mechanisms, as in the Indian Act as discussed in Chapter Four. Resettlement should, however, be the last resort.

k) Courts Role in Safeguarding the Land Rights of Forest Communities

Securing the land rights of forest communities will also depend on the court’s interpretation of the constitutional provisions guaranteeing community land. Courts will play an important role in safeguarding rights and more so the rights of the marginalized and vulnerable members of the community. They have to depart from the restrictive and conservative approach taken by the courts in the *Kemai case (supra)* and *William Yatich case (supra)*, which denied indigenous communities land rights to their ancestral lands.

⁶⁰⁰ Rose Nakayi, *Land rights and the forest peoples of Africa-Historical, legal and anthropological perspectives-Historical and contemporary land laws and their impact on indigenous peoples’ land rights in Uganda: The case of the Batwa*, (Forest Peoples Programme, 2009), available at http://www.rightsandresources.org/documents/files/doc_1205.pdf, (accessed on 12/08/2013).

5.4 Conclusion

In light of the objectives, statement of the problem, hypotheses and theoretical framework, the study has achieved its intended objectives and addressed the statement of the problem. The objectives of the study were to

- 1) critically examine the protection that has been accorded to the land rights of forest communities under formal laws in Kenya;
- 2) examine the implications of the recognition of community land rights for forest communities in light of competing interests over these lands; and
- 3) make recommendations on measures to secure the land rights of forest communities in light of competing interests over these lands.

Objective 1:

The study has examined the protection that has been accorded to the land rights of forest communities under formal laws in Kenya. The discussions in Chapters Two and Three show that land and forest laws and policies have not offered adequate protection to the customary rights of forest communities. However, there are numerous opportunities offered by Article 63(2)(d) of the Constitution in safeguarding the land rights of forest communities as discussed in Chapter Four. The objective has thus been met.

Objective 2:

The study has examined the implications of the recognition of community land rights for forest communities in light of competing interests over these lands. The various tenure regimes have been discussed and it has been found that individual tenure has been encouraged to the detriment of communal tenure. The effect has been loss of community land. However, due to multiple and competing uses of forests it has been found that the protection of community land

rights is under threat. This is also because the community land law is yet to be enacted and such lands are still under the old legal regime.⁶⁰¹ The objective has thus been met.

Objective 3:

This study has explored various measures to secure the land rights of forest communities in light of competing interests over these lands. The relationship between land tenure and land use has been canvassed. It has been seen that by securing tenure in community land, communities will have incentives to conserve and manage forests sustainably. Chapter Four, has discussed the challenges and opportunities in securing the land rights of forest communities. The protection of the rights of tribal and forest dwellers in India has also been assessed. The study has made a raft of measures in terms of policy and legal measures that need to be taken to secure the rights of forest communities.

To attain these objectives and investigate the statement of the problem, the study has examined the impact of imposition of English laws on communal property rights, tenure systems and their interactions with land use and vice versa and the laws and policies on land and forests in Kenya. The statement of the problem was that despite the recognition of community forests as a category of community land, there are competing land uses over such lands which may weaken the land rights of the communities. The difficulty of reconciling the multiple land uses has been discussed, and the reluctance to enact a community land law despite laws dealing with private and public land having been passed. A raft of measures has been suggested in reconciling multiple land uses including the formulation of a national land use policy. The study was premised on the hypotheses that

⁶⁰¹ P Kameri-Mbote *et al*, *Ours by Right: Law, Politics and Realities of Community Property in Kenya*, (Strathmore University Press, 2013).

3. formal laws and policies have not been adequate in protecting the land rights of forest communities; and
4. there are competing land uses over forests which may weaken the land rights of forest communities.

Hypothesis 1:

The study has tested and proved this hypothesis by showing that formal laws and policies in Kenya have sought forest preservation, and hence, restricted the rights of forest communities to access forests. This is because these policies have not recognized communal tenure arrangements under which communities have rights of access to forest lands and forest resources. Moreover, the need to conserve forests, as carbon sinks and catchment areas, has meant that communities cannot access forests as their activities are considered destructive to forests. Chapter 4 has provided the international framework guaranteeing land rights of forest communities and constitutional provisions protecting property in Kenya.

Hypothesis 2:

This hypothesis has been proved since there are competing land uses over forests which may weaken the security of community land rights. There is, thus, a need for tenure arrangements that take account of the needs of forest communities. Chapter Two has discussed the issue of competing land uses and its implication to tenure arrangements in forests. The formulation of a national land use policy has been suggested as one recommendation to address this problem.

In the theoretical framework it was argued that property rights constitute a web of interests. In Chapter Two it was shown how traditional societies had tenure arrangements where trees were a basis of ownership and rights of access and control of forests were distinct from the

underlying land. It has, however, been argued that owing to the recognition of community land in law, forest communities have even stronger legal basis for asserting their lands not only to access forest resources, but also to own the underlying land. This is important, since if rights of access to forests are denied, the web of interests in property relations under communal tenure, will be broken.

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