

UNIVERSITY OF NAIROBI

SCHOOL OF LAW

MASTER OF LAWS

**AN EXAMINATION OF THE COMMUNITY-BASED NATURAL RESOURCE
MANAGEMENT CONCEPT IN THE CONTEXT OF KENYA'S DEVOLVED
GOVERNMENT SYSTEM**

A thesis submitted in partial fulfillment of the requirements for the award of the degree of Master
of Laws (LLM) of the University of Nairobi

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DECLARATION

I **Muthumbi Peter Kioni** the undersigned hereby declare that this is my original work and that it has not been presented in any other university or institution. Where other works have been used, reference have been provided. In this regard, it is hereby presented in partial fulfillment of the requirements for the award of the LLM Degree in International Environmental Law.

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DEDICATION

I would like to dedicate this work to my wife, Rachel, from whom I wouldn't have done much without her love, encouragement and understanding as I sat long hours studying and writing.

I would also like to dedicate the work to my grandparents, the late Peter Kioni Warugongo and Loise Nyawira Kioni for their ethos on education, leadership and hardwork.

Lastly, I also dedicate this work to my mum, Grace Kioni for always believing in me and encouragement throughout my school life.

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I would like to acknowledge the encouragement and wise of my supervisor, Prof Albert Mumma who showed belief in my work and pushed me to perfecting the same.

I would like to acknowledge the encouragement of my larger family, my mum and grandmother and my friends for the encouragement.

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3. Mureithi and Others –vs- Attorney General & Others, the High Court of Kenya at Nairobi
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LIST OF ABBREVIATIONS

CBNRM -	Community Based Natural Resources Management
CBO –	Community Based Organization
CFA –	Community Forest Association
EMCA –	Environmental Management Coordination Act
KFS –	Kenya Forest Service
KWS –	Kenya Wildlife Services
NGO –	Non-Governmental Organization
NLC –	National Land Commission
NRTC –	Northern Rangelands Trust Community
WRMA –	Water Resources Management Authority

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CHAPTER ONE

1.0 INTRODUCTION

1.1. Background

Communities across Africa have for many years utilized the natural resources around them as the central theme of their relations amongst themselves. The importance attached to these resources went beyond the need to just utilize them. The importance of sustaining them was key to their way of managing them. This research will set out first to describe what the concept of CBNRM is.

1.1.1 Definition of Community Based Natural Resource Management

The concept of Community Based Resource Management of Natural Resources (CBNRM)¹ has been defined as an environmental mechanism which takes into account the need to balance exploitation and conservation of ecosystems. In addition, it involves the development of new or existing institutions that characterize local decision making in environmental matters. It further takes into account basic issues of access and control of common resources by local actors and beneficiaries.

In that regard, it is the view of this thesis that CBNRM can be depicted as the method or system that generally seeks to encourage better resource management outcomes through wide participation of local communities in decision-making activities and the incorporation of local knowledge systems in management processes.²

Therefore, CBNRM attempts at looking at the various uses of natural resources, and validating the argument that communities have a responsibility of overseeing how these natural resources can be exploited and sustainably used in their immediate local settings. On the contrary, in many

¹ See Ayoo C, "Community- Based Natural Resource Management in Kenya" (2007) 18 International Journal on Management of Environment Quality 5, 531.

² Measham T & Lumbasi J, 'Success factors in the Community Based Natural Resource Management - The Case for Australia and Kenya' (2013) Environmental Management at 650.

places where the approach is successful, the central Governments have been keen to place themselves at the heart of it³.

But that aside, the key question that will form the hypothesis of this paper is, in view of the presence of the devolved government system, will local communities that have practiced CBNRM be disenfranchised in management, use and enjoyment of their natural resources. For purposes of discussion and illustrating the likely discord in the way the CBNRM can be affected by the devolved system of governance, this research will focus on water and forest resources in order to bring out the point.

A short description of history is important for clarity.

1.1.2 Historical overview of the place of CBNRM

Historically, Kenya like many countries in Africa, was confronted by colonialism and which imposed an econo-centric model of exploiting and sustainably utilizing natural resources. There was a massive shift in the traditional right system as well as participation and empowerment, of governing land, these latter two having been curtailed by the well marshaled “village system”. This was the practice of having African indigenous communities live in controlled areas. Colonial authorities were interested in utilizing the land, forest resources, woodlands and using the water resource base to further their economic dominance and interests.

This approach was fraught with difficulty since the colonial authorities had no interest considering the interest of the local inhabitants or even traditional rights in as far as helping them exploit the natural resources there. The pattern had followed one of ignorance, where the belief systems, in the way natural resources were protected and harnessed, were completely ignored or deliberately misunderstood and the same colonial administrators took the direction of satisfying their own values, priorities and practices which were alien to African societies⁴.

³The Ishaqbini Hirola Community Conservancy was formed for the protection and management of the hirola antelope (an umbrella species) in the northeastern part of Kenya in 2007. The formation of the Trust included the Kenya Wildlife Service which is the appointed government body charged with taking care of the wildlife in Kenya. For a detailed analysis, see Measham & Lumbasi at 652.

⁴Infra note 6 at 109.

The thrust of this argument emanates from the fact that Africans were not allowed to participate in decision making and establishment of programmes that were helpful to the sustainable use of the natural resources at their disposal⁵. The keeping of Africans in this camps meant that the colonial government had the intent to establish areas of influence that culminated in the supplanting of English law. In tracing the history of the way the concept of CBNRM was as it had initially applied, dispersed and dismembered, it starts with the British declaration of 1899 through the Foreign Jurisdiction Act, that foreign lands will henceforth be subjugated and controlled under that law⁶. The intonation was set that what was indigenously applying in terms of local rules of natural resource management was no longer relevant.

Throughout the colonial period, the semblance of community resource management that prior to the colonial days was stripped apart in a senseless maniacal disregard of the African way of resource utilization. The consequences of this policy was that, first, the radical title of property was removed from the indigenous communities to the imperial sovereign whereby the same was to be used at the whims of the Crown.⁷ Secondly, this sovereign set out to install land adjudication and settlement structures, thus introducing a category of rights to land hitherto unknown to the local communities.⁸ Thirdly, the breakdown of local social systems whereby communities were relocated to reserves led to the deterioration of land and associated natural resources and increased poverty.⁹

The malaise continued into independence, where there was no impetus by the powers that be to reconstitute the mechanisms for community based natural resource management¹⁰. The command and control culture adopted meant that the Government was not obligated to use discussions with the local communities in as far as management of resources was concerned. It is noteworthy that the breakdown of what community resource management was as a result of the

⁵FDP Situma, *'Legislative and Institutional Framework for Community Based Natural Resource Management in Kenya'* (2003) 1 University of Nairobi Law Journal, 56.

⁶Okoth Ogendero. *'The Tragedy of the African Commons'*(2003) 1 University of Nairobi Law Journal, 110.

⁷Ibid note 6 at 111.

⁸ Ibid note 6.

⁹Ibid note 6 at 112.

¹⁰ Ibid note 6.

marginalization of the local community regimes that existed and the enactment of many post-colonial state oriented laws that had little do with community interests¹¹.

It's been further noted that the traditional approach to the way natural resource management has been done, stems from the idea that land as a natural resource and a critical source of food production and security, must be considered with the competing interests of national government and community interests. This consideration and even CBNRM as a whole cannot be considered without the hindsight of the New Constitution. The coming of the new Constitution brought with it a re-alignment of competing interests. The creature of the county was introduced in the governance structure and with it; a sense of confusion now reigns on who really has the land use rights in spite of the law in place¹².

As part of the expansive human rights in the Constitution, the presence of environment as a second generation right¹³ means that the Government now has a greater responsibility in ensuring the general public has an environment that is sustainably managed. However, beyond that, the concept of land tenure seems to have developed whereby the definitions that had existed previously have now been expanded to examine other notions. Much of that has been credited to the unrecognized work that indigenous communities have been undertaking in ensuring that natural resource management is done in accordance to set principles.

It is therefore the contention of this thesis that a likely cavity exists in understanding the Constitutional principles set forth on land use and the tenure system especially so because of the what the devolved government systems has brought as compared to what existed previously. The aim remains that of achieving the aspirations of the people when they agreed to introduce devolution. Therefore, there is need to address the benefits of natural resource exploitation if there is an expectation of having them reach the communities.

This thesis also seeks to examine whether the devolved system of governance is the solution to articulating user and access rights in the context of the CBNRM. Further, the thesis will seek to

¹¹Mumma A, 'The Role of Local Communities in Environmental and Natural Resource Management- The Case for Kenya' (2011) in Paddock L et al, (eds) Compliance and Enforcement in Environmental Law - Toward a More Effective Implementation, IUCN at 624.

¹²Caldwell L.K, 'Rights of Ownership or Rights of Use?- The Need for a New Conceptual Basis for Land Use Policy' (1974) 15 Wm. & Mary L. Rev., 2.

¹³Article 42.

look at the legal regimes that apply to natural resource management, with specific emphasis on natural occurring resources such, water and forests. In addition, an examination of the conflicting issues between community objectives and national objectives in natural resource management shall be attempted.

Finally, the paper will seek to examine whether the responsibilities placed on these levels of government are able to articulate the constitutional principles of land use especially in natural resource management. It will also seek to propose policy interventions that are aimed at expressing the concept of CBNRM in light of devolved governments. It will seek further to provide solutions in enhancing the capacity of non-state actors while safeguarding the CBNRM narrative, seek to recommend the implementation of the Community Land Bill 2013 and reintegrate customary law in the traditional property rights discourse.

1.2 Statement of the Problem

The question of rights to use and right of ownership in the discourse of managing natural resources has often been approached somewhat casually¹⁴ and there feels a need to have the same redefined in its approach. The traditional approach has always been the assertion of the state, from a centrism point of view that, they themselves have the absolute right to have ownership over natural resources. The State sees itself as the only organ that can have the power to decide on the fate of the use of natural resources in a given area.

Therefore, and in examining that issue, this research will aim at explaining the CBNRM concept and how the said concept may encounter challenges in fitting within the new devolved governance system

1.3 Objectives of the Study

1.3.1 Main Objective

- (a) Ascertain the role of community based natural resource management (CBNRM) in the context of the devolved government structure in Kenya.

¹⁴Supra note 5 at 66. The failure to recognize rights of local communities and the failure to recognize community based natural resource management where rights of access and use are not well defined is a major policy failure on the part of the environmental policy makers.

1.3.2 Sub- Objectives

- (i) The role of the national governments in supervising county government's use of natural resources.
- (ii) The evolving nature of CBNRM and the Constitutional safeguards thereto.

1.4 Research Questions

The research project will aim at laying bare the following question especially where viewed in the contextual analysis of a naturalist in view of the state of the globe and the diminishing natural resource base.

1.4.1 Main Question

In undertaking this research, the researcher hopes to :-

- (i) Find out if the concept CBNRM has any place in the current constitutional dispensation that seems to impose county governments as the de facto custodians of managing local based natural resources.

1.4.2. Sub- Questions

- (a) Has the Constitution created an avenue of challenging the concept of CBNRM?
- (b) Are the current contemporary natural resource management tools being used, taking into consideration all the actors who are key in the management of the same. These include communities directly benefitting from the said resources, populations deriving benefit from the said resources but not living within the geographical confines of where the natural resources are domiciled, national or state actors, international actors, interested conservation groups and others.
- (c) Is the county government "experiment" in managing strategic natural resources for the country viable in the face of the demystification between use and ownership in contemporary natural resources law?

- (d) Is the concept of community based natural resource management engineered to work in a devolution style governance where the creature of the “community” is losing its traditional meaning?.

1.5. Hypothesis

The research is predicated upon the following hypothesis:-

- (i) The devolved system of governance is detrimental to the concept of the community based natural resource management in Kenya.

1.6 Theoretical Framework

This thesis will seek to explain the concept of CBNRM by first stating that the communities that seek to continue to draw from the benefits of CBNRM must first point out their locus on why they should assert the right to use and benefit. If these two issues are only guaranteed through ownership, is there a place for local communities to say they are asserting ownership.

This thesis asserts that historically, Kenyan communities have been marginalized from having ownership rights to property. This means that the making any claims over the so called ‘ancestral’ lands, has been difficult at best. However, all is not lost as the said communities are able to assert their ownership rights explained in many forms.

First, the theory of community property seeks to criticize the treatise of **John Locke** where he argues that the introduction of money facilitated the need to continue amassing property¹⁵. This state of nature was seen later as precarious where the continued amassment would have left many people disenfranchised. The community property theory came in to mitigate this strong push for individual ownership by stating that communities can assert their inalienable rights as a group, to collectively own property¹⁶. This means that when brought together by factors such as ancestral kinship, family ties and common language, they can invoke their rights to land that they

¹⁵ Alexander S. & Penalver E ‘*An Introduction to Property Theory*’ (2012) Cambridge University Press , 41.

¹⁶ Infra note 140 at 47.

perceive and have attachments to that land. In Kenya, factors of ethnicity, residence and assimilation form the basic assertion of membership¹⁷.

Therefore, this thesis is of the view that through community property theory, there is an important link that drives the community quest to assert rights over property which provide a platform for them to exercise ownership and user rights to land. Similarly, there is the argument that community property theory helps in the articulation of marginalized and minority groups quest to also assert their. The National Land Policy (NLP) defines these persons as ‘culturally dependent on specific geographical habitats’ In this case, communities such as the Ogieks who live on the edge of forests are enabled to have access to natural resources that are important to their livelihoods¹⁸.

The second theory that applies in contextualizing the issues herein is the theory of legal pluralism. The maxim refers to communities working together and under a multiple legal system and different natural resource management frameworks.¹⁹The multiple frameworks on CBNRM mean that the relationship between the Constitutional mandated system that has entrenched devolution and the community based styled structures of environmental management will be constantly in the state of antipathy²⁰. Legal pluralism encompasses the restatement of hitherto community ownership and user rights, particularly with respect to land²¹.

The need to re-introduce the legally pluralistic frameworks is important since, the hope of the communities that devolution is the answer to CBNRM is more or less looking like it will be lost. Bureaucratic connotations that are synonymous with the national government are now visible in the counties and it is important that communities be allowed to reassert their rights in order that in the broad context of the constitutional governance regime, they are able to determine the authority structures to have which must endorse articulation of democratic governance of environmental and natural resource management systems²².

¹⁷ Infra note 140 at 46.

¹⁸ Supra note 11 at 640.

¹⁹ Supra note 11 at 620.

²⁰ Supra note 11 at 621.

²¹ Supra note 11 at 622.

²² Supra note 11 at 622.

Thirdly, equity implies that similar interests are availed to participants who are expectant of a given benefit whereby the Intra generational, intergenerational, cross cultural and cross- sectoral equity²³ must be viewed in light of the aspirations of the people living in the counties and their expectations. It also implies persons who are presently living in this generation have an equal and unalienable right to use and benefit from the planet's vast resources.

The theory of Inter-generational equity has the elements of intra-generational parallels to it. In the context of community based management of natural resources, the present generation has an obligation to ensure they equitably and sustainably use existing natural resources so that future generations may have a chance of enjoying the benefits²⁴. There are dangers of not implementing this theory, chiefly and most importantly, conflict which often arises out of fear and the misconceptions that emanate from the community about the sustainability of use of natural resources. A trans generational obligation, though controversially viewed as failing because it fails to 'prove' how future generations are to be protected by decisions that we take now,²⁵ is vital in the context of generational holding rights as a group or community whereby, the said generation holds rights as groups in relation to other groups that will appear in future since rights only attach to individuals as they are born²⁶.

In actualizing this idea, participation and subsidiarity intertwine in considering the concept of CBNRM. There is an inherent obligation to a community to ensure the use and ownership of natural resources is geared towards the understanding that the decisions made at the lowest level of governance are first and foremost defined in the context of relative dogmatic principles that apply to local community and are thereafter collectively understood by the members of the said

²³Kibugi R.M. "Assessing the viability of the group ranch concept in the present day Kenya" (2006) Thesis submitted in partial fulfillment of the requirements for the Degree of Master of Laws of the University of Nairobi, at 9. (Unpublished). In the case of *Minors Oposa v Secretary of the Department of Environment and Natural Resources, Supreme Court of the Philippines, 33 ILM (1994) 173*, the concept of intra generational equity was upheld when the Court agreed that the petitioners had *locus standi* in the matter. See Fitzmaurice M, ' *Contemporary Issues in International Environmental Law*'. (2009) Edward Elgar, at 137.

²⁴Kibugi R.M., 'Assessing the viability of Group Ranch concept in the present day Kenya', 2006 10.

²⁵ Also called The Non-Identity Problem which states that it is impossible to either benefit or harm future persons through decisions which themselves determine the identity of those persons. See Slobodian L. N, " *Obligations to Trans Generational Groups: A Justification for Sustainable Environmental Policy*", (2012) 24 *The Georgetown International Environmental Law Review* at 388.

²⁶Ibid note 25 at 390.

community. In addition, the decisions made by or on behalf of these communities, are made with the determination of what they really stand for in mind.²⁷

Expanding further, the concept of CBNRM has in its character, the need to have intra-generational appreciation of how humanity takes care of its planet. It basically submits that the present members of that community have an equal right to use and benefit from the planet. The preservation and conservation efforts should begin with the community. The lack of that equity therefore spells possible conflict and non-compliance by the people living within that community or with other neighbouring communities.²⁸

Lastly, the theory of sustainable development is applicable to this discourse on safeguarding use of natural resources. This theory is defined as development that meets the needs of the present without compromising the ability of the future generations to meet their own needs²⁹. This theory further presupposes that there should be respect for national, local ethnic and cultural multiplicity which allows full participation of the people in peaceful coexistence and further ensuring the quality of life of future generations.³⁰

The Constitution deliberate use of the term 'public participation'³¹ submits that the decentralization of decision making should facilitate the intended local community participation. The very nature of the decision making model at the community level should be integrated in terms of refining the concept of community based natural resource management not only at the lowest possible level, but also at the county level as the Constitution dictates. However, the threat exists for CBNRM in Kenya to exist as it has often being, the persons given the mandate by the Constitution may not be the safeguards of it.

The use and ownership model is being subsumed by counties with emphasis on exploitation only at the expense of conservation rather than exploitation with conservation in mind. It is imperative that at any level of governance in environmental matters, an appreciation of the need to use natural resources sparingly is promoted in order to realize sustainable development. The same is

²⁷ Supra note 24 at 26.

²⁸ Kibugi (2006) 10.

²⁹ Kiss A & Shelton D, "International Environmental Law' (2012) United Nations Environment Program at 119.

³⁰ Ibid note 29 at 120.

³¹ Ibid note 29.

expected by the Constitution to be applied with soberness to the traditional definition of a community as the evolution of the community continues to take different identities.

The Constitution provides that devolved governments³² must be able to show guidance in the discussion of ownership, use and right to use natural resources³³. In the context of natural resource management, the objects of devolved governments shall be to ensure the right of communities to make decisions affecting their lives and managing their own affairs are secured and promoted³⁴ and also the equitable sharing of benefits, responsibilities, control and decision making especially between local natural resource users and the government is encouraged³⁵.

The Constitution further espouses that in the context of natural resource management, there are certain functions that will be shared in the ensuring that the objects of devolution are promoted and protected. This means there is an acceptance of the concept of legal pluralism in the sense that devolved co-management of natural resources seems on one hand to be the best method to take in defining how resources should be utilized. It further provides that the national government shall have the responsibility of protecting the environment and natural resources with a view to establishing a sustainable development of the following resources:-

- (i) Fishing, hunting and gathering;
- (ii) Protection of Animals and Wildlife;
- (iii) Water Protection, hydraulic Engineering and the safety of dams and
- (iv) Energy policy ³⁶

Sustainable management of natural resources requires therefore that the harmonization of the laws created at the national and county level be structured in a way that not only maintains economical development but also takes into consideration the role of local communities in the decision making process on environmental protection and responsible use of the natural resources, without compromising future generations.

³²Article 174.

³³Article 14 of Part 2 of the Fourth Schedule.

³⁴Article 174 (d).

³⁵Article 174 (g); See also Supra note 13 at 630.

³⁶Article 22 of Part 1 of the Fourth Schedule.

In addition, the functions of the devolved governments in as far as the natural resource management are concerned include, the implementation of precise national government policies on natural resources and environment conservation including:-

- (i) Soil and water conservation and
- (ii) Forestry³⁷.

Within the context of sustainability development as viewed under the CBNRM concept, there is a re-definition in the Constitution that on one hand seems to develop the idea of direct participation of the communities in determining the affairs of their communities, while on the other hand, it seems to be taking the same right, away from them, pre-selecting the natural resources that the national government should have complete control in the way it directs their use and those that the same national government should have leading influence in the way the decision making is directed.

It is therefore the position of this research project that this Constitutional conundrum in the way vital natural resources management should be managed needs to be cured in the face of vested cross-sectoral interests and the palpable divergent views by local inhabitants in the counties on how management of natural resources should be handled. Further, it is also the view of this research project that community based natural resource management should not only be seen to facilitate the advancement of sustainable development of natural resources in Kenya, but rather as the prime mover of the process. It is for that reason that the laws the Constitution has envisaged to formulate³⁸ should be sensitive to the concept of community based natural resource management and especially in as far the question of public participation is concerned.

³⁷Article 10 of Part 2 of the Fourth Schedule.

³⁸ See the Fifth Schedule of the Constitution on the deadlines of enacting laws. Laws geared towards land use and property and agreements relating to natural resources should be in place within five years of the date of promulgation of the Constitution.

1.7 Literature Review

The primary focus of this research is to examine and critically appraise the place of CBNRM in the context of devolved government as provided for in the Constitution. It seeks to find out if the Constitution is actively promoting the “community” as it is currently loosely known in Kenya to assert its communal rights and in the face of the devolved government structure, create co-management or joint management functions on environmental governance with local communities in order that to conserve and manage their own resources.

In addition, the research will seek to show that the Constitutional principles on land policy are very likely to be alienated by the inability of the devolved governments to superintend the principle of equitable access to land with the hindsight of the local communities who have for centuries managed the use and benefits of land without the formality of legislation.

To achieve that, the research will seek to look at the historical issues that have been utilized to manage natural resources in Kenya and whether the systems as they are provide the answer to the way natural resource management should be steered now and in the future. The research will also seek to know the constitutionally accepted mode of ownership of natural resources, their use and rights of use, the respective rights and responsibilities of natural resources management as between county governments and the local communities, is secure and further, whether the national government is still an interested party in promoting co-management in both county involvement and local community involvement of managing natural resources.

In establishing the devolved government’s role in managing natural resources, one would ask whether the Constitution set the tone of intrusion through devolved units with the already established community based natural resource management especially where the emphasis is towards the empowerment of the communities and reduction of direct state involvement³⁹. Would one say that the devolved governments are the answer to provide the direction of protecting and promoting the rights of the communities to manage natural resources, especially so because of the proximity and interaction that they have with the resources at issue.

³⁹ Article 63 of the Constitution provides for community land that is held by communities identified on the basis of ethnicity, culture, or similar community of interests. This may seem to be a first step towards formally recognizing the interests of the local communities towards managing their own environment.

In the area of natural resource management, many scholars have captured the problems that are connect to land tenure, community ecological management initiatives and systemic failures on the environmental governance structures, especially in the way there is deliberate exclusion of community involvement in participatory decision making of natural resource management. In this part, we highlight some of the significant literature on the subject.

Author Prof. Albert Mumma in his article, ‘ The Role of Local Communities in Environmental and Natural Resources Management: The Case for Kenya⁴⁰’ has underscored the reality of the fallacy of relying wholesomely on state agencies capability of providing holistic and sustainable management of the environment and natural resources. He argues that historically, African cultures have not widely internalized these state based legal systems and the reliance on enforcement and implementation of actions by state actors, is a smokescreen which fails to appreciate the dynamics of local communities involvement in the decision making of natural resource management⁴¹.

He argues that for the concept of CBNRM to be rehabilitated, the rights of access by the communities to the benefits of the utilization of the natural resources, whereby the net effect will be to reduce incidences of antipathy between local communities and state agencies.⁴²

Author Prof Francis D. P. Situma in his article, ‘Legislative & Institutional Framework for Community Based Natural Resource Management in Kenya’⁴³ writes that in the utilization of natural resources, the laws and regulations must define the rights that a state, institution or natural persons determine how, when and by whom natural resources can be utilized, either for commercial or subsistence purposes. He advocates for a creation and sustainability of a viable institutions or centers of authority to control the use of the resources. In this context, he emphasizes the need to appreciate the critical role community based natural resources management play in the proper utilization of natural resources.

⁴⁰ Supra note 11 at 619.

⁴¹ Supra note 11 at 620.

⁴² Supra note 11 at 630 – 631.

⁴³ Supra note 62.

He further states that, the ability of these communities to determine access to and the right to participate will be severely weakened if these communities are not provided with the necessary legal power to actualize these objectives.

He gives a damning indictment of the current law on environment by saying that the Act⁴⁴ makes a veiled attempt of trying to recognize the rights of local communities in natural resource management and in the process, it fails to provide mechanisms for the local communities to participate in the decisions making process related to management of natural resources.

While he has emphasized more on community involvement in the management natural resources within their area, he provides a useful insight on the direction that policy and law should go in terms of creating the necessary capacity at county level to augment the efforts of local communities in the management of their resources.

Author Donald Kaniaru in “The Concept of Sustainable Development: From Theory to Practice⁴⁵ emphasizes the point that sustainable development in the realm of environmental law has taken a hugely significant direction in the integration of decision making at the national level and with NGOs. The fact that our Constitution makes specific reference to the widely acclaimed concept provides the impetus to focus on the principle of subsidiarity where national decisions can be delegated to the counties and with provision of capacity, the ethos of what sustainable development is can begin to be seen.

The author provides interesting insights in the way subsidiarity as a principle should guide the policy of entrenching proper environmental governance. He has not particularly emphasized on the role of devolved governments in the equation.

Author Bruce H Moore⁴⁶ in *Empowering the rural poor through land reform and improved access to productive assets* write that current initiatives are placing a greater emphasis on the

⁴⁴EMCA. It is criticized as having a centralized approach to natural resource management. It confers no rights of tenure, no rights of access to and use of natural resources to local communities whose survival depends on these resources. Supra note 47 at 66.

⁴⁵(2004) International Environmental Law- Making and Diplomacy Review, UNEP, 20- 24.

⁴⁶ Bruce H.M, “*Empowering the rural poor through reform and improved access to productive assets*” in Krishna B.G. and Bruce H.M. eds, “*Whose land? Civil Society Perspectives on Land and Rural Poverty Eradication: Regional*

local participation, supporting the construction of social capital and linking the poor to dynamic sectors of the economy.

The author has emphasized the need to focus more on creating opportunities for participation by the rural poor in the proactive management of natural resources and provokes further contextual research to ensure involvement of the rural poor in local natural resource use and management.

In the book, “Community Management of Natural Resources in Africa: Impacts, Experiences and Future Directions, editors Roe Dileys, Nelson F and Chris Sandbook, among others have underscored the role of community based natural resource management (CBNRM) in Africa and the need to redefine it in the face of the techno-interventionist model which has dominated modern formal CBNRM and further the need to revisit and modify it to fit African rural ecological and aspirational realities⁴⁷.

They have argued that formalizing CBNRM where the same is state structured and also state-funded may not necessarily be effective as against the informal system which is guided by traditional sanctions and authority. In solving this dichotomy, they insist that community based natural resource management should be viewed as a continuum of management regimes from traditional to modern, which are effective in their own way and which should be applied to work hand in hand as opposed to precluding one over the other.

The authors do provide a very able assessment of case studies in certain African countries which though not entirely a legal study, are useful for this research in articulating the devolved governments role which is a de-facto subsidiarity underpinned concept to natural resource management when viewed *vis a vis* the traditional community based natural resource management in light of the Constitutional principles of sustainable use of natural resources.

In providing a historical perspective, the book, *Essays On Land Law: The Reform Debate in Kenya*, editor Smokin C. Wanjala⁴⁸ traces the history of land ownership and use in Kenya, where land is seen as the most critical basis of natural resource management discourse. He contends

Experiences from Africa, Asia, and Latin America” (International Fund For Agricultural Development & United Nations Research Institute for Social Development, 2001.

⁴⁷ Supra note 23 at 106.

⁴⁸2000, University of Nairobi, Faculty of Law, 25.

that in pre-colonial Kenya, land tenure was ‘communal’ whereby no particular person in the community laid claim to land, but it was viewed as belonging to the whole community.

He further states that upon the advent of colonialism, there was a relentless pursuit to reform the tenure systems that the communities had established for themselves, into formal structures revolving around the alien econocentric concept of ‘security of tenure’, This transformation was realized by the adoption of Swynnerton Plan⁴⁹, which emphasized on providing the African farmer with a dependable system of land tenure so that he “owns “ a unit of land on whose production there will be an assurance of agricultural produce, that will sustain his family.

The author narrates how the Plan’s introduction of adjudication, consolidation and registration of land realigned the question of rights of use and access whereby both economic and political issues had to be solved. The transplanting of foreign law on land marked the beginning of the slow death of the ‘community’ and CBRMN by extension as we know it and it formed the basis of alienation of land from those deserving cases to a more neo-colonial affirmation by the powers that land was to be provided to those who had the means to pay for it.

It can be seen that the issues of use and ownership when viewed in light of the changing legal and environmental governance is at the core of the principles driving sustainable development of natural resources. The question is on whether CBNRM as viewed in these dichotomy of interests that is now as between the devolved governments and the national government will promote or derail the proper and sustainable management of the environment and natural resources.

1.8 Scope of the Study

The research paper seeks to examine the concept of community based natural resources management (CBNRM) and analyses it in the context of devolution as espoused in the Constitution and further whether there is need to reexamine its role especially where devolved governments are concerned and whether the case for co-management can be approached as a way of safeguarding community interests.

⁴⁹ Supra note 68 at 30.

Because this is a legal study, the aim will be to show how the legislation, policy documents and empirical research done by other scholars in this subject have lend any credence to the changing landscape of environment and natural resource management.

The paper will pursue an investigation and later find holistic solutions that will converge the dichotomous interests between the local communities and the devolved and national governments in provision of a workable and legally sound framework that will bring a realization of the sustainable use of natural resources management in Kenya.

1.9 Research Methodology

The research will be conducted based on both primary research and secondary research but mainly on library research. Primary data will include inter alia:-

- The Constitution of Kenya
- Acts of Parliament
- Government Reports
- Government Policies
- Subsidiary Legislation.

Secondary Data will include:-

- Text Books
- Journals articles
- Reviews
- Internet Sources including online libraries.
- Conference Papers and Reports.

Further, the research shall employ descriptive, prescriptive and analytical modes of research.

1.10 Summary of Chapters

Chapter One sets out the introduction of the research topic. It also seeks to set the tone of the study and the understanding of the legal provisions that underlie the historical basis of the CBNRM and the question of whether the Constitution has provided proper safeguards to the

local communities role in managing the environment and natural resources, especially since devolved governments have similar roles but a different persuasion of the same task. The chapter also explains the theoretical framework of the research, the scope, justification and recognizes academic and other literature on the subject.

Chapter Two shall define the concept of use and ownership of natural resources. The Chapter shall also look at the legal regimes that apply to natural resource management, with specific emphasis on two natural occurring resources; water and forests. It will examine further the trusteeship and administrative responsibilities as enshrined in the Constitution. In addition, the rights of use of these resources by local communities shall be looked at in the context of the county government's role.

Chapter Three will seek to set out the rights and responsibilities over natural resources as between county governments and the local communities. The juxtaposed responsibilities that the county governments has and where the Constitution has placed it with the responsibility of being the custodian of community interests, and the community rights to access and benefits of the resources within their area shall be discussed. The chapter will further examine if the Constitution principles on natural resource management are redefining the concepts of use and ownership. The study at this part poses the question of whether the concept of CBNRM is under threat from the county government or will it work in hand in hand with devolved government responsibilities on natural resource management in Kenya. Further, the research examines the concept of "community" and whether the geo-political landscape has changed to examine other qualities. Lastly, the study shall also seek to find if the national government maintains the supervisory role over management of natural resources especially where the questions of ownership are not resolved.

Chapter Four proposes that one way that communities and the two levels of national and county government can work towards the realization of community management of natural resources is through institutionalizing collaboration or joint management where the management of natural resources will spearheaded by a locally formed body comprising local communities organizations that are in existence and representatives of county and national government

systems to enable them find solutions that can keep CBNRM alive within the local community setting.

In achieving that goal, the key support systems that can be utilized towards the achievement of the same include:- harmonization of county and national governments policies on environmental management, the enhancing of capacities of community based organizations (CBOs) to safeguard the concept of CBNRM in light of devolved governments, the enactment of the Community Land Bill 2013 and its full implementation, the pursuit of co- management as a remedy of the entrenching access and benefits of the environment and natural resources. Finally, the thesis will seek to see if reintegrating customary law and reinstating the *juridical persona* of the community captures the motive of placing local communities at the centre of community resource management.

Chapter Five will offer recommendations and a conclusion on the object of this thesis. The key considerations would be if we are to take the issue of joint management as one way of delivering the local community aspirations of having a functional CBNRM mechanism, then it is quite in order to say, that devolution as it concerns management of land and associated natural resources will be possible in the current legal dispensation.

CHAPTER TWO

OWNERSHIP AND USE OF NATURAL RESOURCES

2.0 Introduction

The concept of community based natural resources management has either grown in leaps and bounds or has stagnated to the point of near extinction⁵⁰. In Kenya for example, it has been seen that this concept is evolving, whereby previously agrarian societies that had their mainstay as agriculture, hunting and gathering with particular emphasis on collective communal rules are adopting communal approaches on the environmental exploitation mechanisms in order to sustain and preserve future generations.⁵¹

In that context, the key ingredient of the set up in terms of use of these natural resources was the availability of land and assertion of certain rights over it. Kenya has a total, land mass of 569,251 square kilometres⁵². It is bordered to the north by Ethiopia and South Sudan, to the west by Uganda, to the east by Somalia and the Indian Ocean and to the South by Tanzania. By land use, it is estimated that twenty (20%) of the total land mass is considered medium to high potential arable land, and 30% of the said land is forests and woodlands. The country has an inland water mass of 1.9 %⁵³.

Kenya has an unpredictable pattern in the reliability, and distribution of rain. The areas around the central highlands whose terrain are elevated and have mainly forest vegetation and fertile soils. Below this and to the south-east of these highlands, the land deviates to low lying plains and plateaus where the climate is generally tropical with savannah and arid regions permeating the land all the way to the coast⁵⁴.

⁵⁰ Some scholars have argued that the concept has been “caught up in complex administrative and policy structures mired in bureaucracies with competing political interests and in management priorities” See Dressler *et al* infra note 23 at 6.

⁵¹ Kameri-Mbote P, ‘*Land Tenure and Sustainable Environmental Management in Kenya*, in Okidi C.O *et al* (2008)“*Environmental Governance in Kenya- Implementing the Framework Law*’ East African Educational Publishers at 263

⁵² Oyoo supra note 1 at 2.

⁵³ Supra note 3. See also *Gachimbi L et al* State of Environment Report ‘Land Agriculture and Livestock in Kenya’ (2009) in

http://www.nema.go.ke/index.php?option=com_phocadownload&view=category&id=49:soe&Itemid=567 accessed on 21st July 2014.

⁵⁴ Supra note 71 at 260.

In terms of the resource base, Kenya has had little mineral resource base. This has not augured well with the rate of population growth and the converse need to conserve the environment. With the agrarian base being the mainstay in a small portion of the land mass, the notion of communal responsibility of management of natural resource gets the heightened attention.

In this chapter, the research will attempt to find out if the communities have rights of ownership and therefore the right to manage natural resource lying within their jurisdictions..

2.1 Ownership and Use of Natural Resources by communities in Kenya

In the discourse of CBNRM, the key issue that arises in determining whether communities are able to exercise ownership rights is if the ownership by communities of land and therefore natural resources is allowed by law. Ownership of property in Kenya, it is argued has only but until recently, remained the purview of private ownership rights or state owned. The community has remained marginalized in owning property.

Ownership of natural resources by communities has remained an elusive dream. Historically, ownership of land and associated natural resources was vested in communities which were defined through specific lineages and families⁵⁵. Access to the resources was basically availed to all persons provided that one was able to show their social connection within the defined membership criteria reinforced internally by obligations that individual members were placed with.

The application of the commons approach showed that the grant of exclusive ownership rights and use to communities was not guaranteed as English common law principles which emphasized more on private ownership, were preferred. Therefore, for ownership to be guaranteed, access remains a key component that would assure proper use over natural resources.

Ownership has been invariably described as the responsibility, obligation care imbued by citizens for both the problem and processes of public resource planning and management. In terms of community land rights, community ownership was secured under trust lands and group ranches⁵⁶. The presence of group ranches was said to be exceptional during this colonial time as

⁵⁵ Supra note 13 at 623.

⁵⁶ Kameri Mbote *et al* at 44.

the emphasis on individual tenure rights. Ownership of land that extended to groups could only be secured where there were companies, co-operatives and customary associations where the said communities congregated themselves in these kind of institutions. This marked the presence of land related ownership rights to communities in Kenya.

2.2 The legal regimes permitting ownership of land and associated natural resources by communities in Kenya

The concept of community based natural resources has often been looked at from an environmental knowledge perspective as well as a concept more focused on the donation of rights rather having rights inalienable to it within the marginal underpinnings in law⁵⁷. As a concept, the legal regime has been held as a subservient ideology that was placed in diverse parts of the environmental law discourse but having a refuge under the theory of the commons⁵⁸.

There are two sets of legislation that seem to create the notion of ownership by communities of land and associated natural resources. These are the Constitution and the land (Group representatives) Act. As currently constituted, these are the only pieces of legislations that seem to secure ownership rights of communities to natural resources.

2.2.1 Constitutional tenure assertions on land

2.2.1.1 Public land.

Public land has taken up a broad definition in the Constitution⁵⁹ and it moves beyond the traditional definition⁶⁰ to cover aspects hitherto not conclusively defined such as lakes, rivers, the territorial sea and continental shelf among others⁶¹. Away from the definition, the Constitution brings clarity in the ownership mandate of public land. It sets out clearly who has control of what

⁵⁷ Supra note 11 at 6.

⁵⁸ Previously and before the enactment of the 2010 Constitution, the concept could only be grasped under the general concept of land tenure and even then, it was not fully defined. The theory of the commons reignited the idea of local environmental management. See Okoth Ogendo supra note 8.

⁵⁹ Supra note 37.

⁶⁰ It was hitherto land being the surface of the earth and anything above and below it. But it was viewed as too general hence the wide definition. See *The Final Report of the Committee of Experts on Constitutional Review*, 2010 at 61

⁶¹ None of the repealed legislations on land definitively provided how these natural occurring features should be defined.

has been defined as public land. It says that the county government will hold public land in trust for the people of Kenya. This at a glance would endear CBNRM supporters in the sense that it brings accountability further down the food chain at the local level. The Constitution envisages five different types of land that county governments have trusteeship responsibilities.

These include:-

- (i) Land that from the day the Constitution was enacted in 2010 was unalienated Government land as defined in an Act of Parliament that was in force at the time. This brings to mind land that was not recognized under the repealed Government Lands Act⁶² regime and had been registered⁶³.
- (ii) Land that is lawfully held or used by a State Organ⁶⁴.
- (iii) Land transferred to the State by way of sale, reversion or surrender.⁶⁵
- (iv) Land in respect of which no individual or community ownership can be established by any legal process⁶⁶.
- (v) Land in respect of which no heir can be identified by any legal process⁶⁷.

On the contrary and in determining national government ownership, it would seem the Constitution envisaged reserving the bigger share of responsibilities on natural resources including land for the centre. The national government has control of traditional CBNRM related resources and which have been put to good use in other jurisdictions by communities. For example, forests, wildlife protected areas and water catchment areas fall under the responsibility of the national government⁶⁸.

In terms of implementation, the Land Act⁶⁹ sets out the mode of ownership and management of natural resources including land and how it should be handled. The Act first provides a critical umbrella as to how all the three recognized tenure regimes under the Constitution should be managed. It states that the general principles set out under Article 68 of the Constitution⁷⁰ should

⁶² Cap 280 Laws of Kenya (Repealed).

⁶³ Article 62 (1)(a).

⁶⁴ Article 62 (1) (b).

⁶⁵ Article 62 (1) (c).

⁶⁶ Article 62 (1) (d).

⁶⁷ Article 62 (1) (e).

⁶⁸ Article 62 (1) (g).

⁶⁹ Act No. 6 of 2012.

⁷⁰ It provides for the obligations of the 'State', with respect to the environment. A critical appraisal of the Land Act would mean that the same is taking in more than it can handle since there are provisions still in effect with respect

be the mantra to wit land resource management should be set. This also means that whether the ownership is set out for the counties or the national government, the Act shall be the implementation tool that these institutions will use⁷¹.

The Act has further set out to establish the co-relationship of ownership, use and right to use the natural resources by setting out the requirements of public or state officers that National Land Commission (NLC) should follow in dealing with land based resources. It states generally that principles of sustainable management of land based resources⁷², democracy and inclusive participation of the people⁷³ and participation of ‘communities’, the ‘public’ and the Government in decision making⁷⁴ must be the guiding points which are meant to demonstrate that there is holistic participation and not legal participation of CBNRM in that context.

2.2.1.2 Community land ownership and rights to use

The creature of the community has now been emboldened such that in the discussion of what should happen to community rights in face of Government largesse and private *bourgeoisie* tendencies of amassing for oneself, the vulnerability of the community was going to come into the fore⁷⁵.

The Constitution has examined community land in a revolutionary way reminiscent with what CBNRM used to be known for. A fair description of what a community is has been attempted. The notion that the same could be a challenge is misplaced as the attempted definition seems to have taken into consideration various facets of the Kenyan society⁷⁶. The Constitution on the other hand has set out to examine how community land shall vest in land lawfully registered in

to other environmental related legislations that seem to promote the aspirations of Article 68. See generally Section 3 of the Environmental Management and Conservation Act No. 8 of 1999.

⁷¹ Section 3 of the Act states the Act is applicable to public, private and community land.

⁷² Section 4 (2) (c).

⁷³ Section 4 (2) (l).

⁷⁴ Section 4 (2) (h).

⁷⁵ The growing fear of unrest engendered by the widening inequality and human suffering and also the emancipatory themes grew in stature after independence all through to the multi-party era in the 1990s where there was pressing need for the Government to involve communities more in the decision making of what was dear to them. See Dressler W et al, “From hope to crisis and back again? A critical look of the global CBNRM narrative” (2010) 37 Environmental Conservation Vol 1, at 6.

⁷⁶ See Section 3 of the Community Land Bill 2013.

group representatives under provisions of any law. Group ranch schemes which have been used previously to protect community interests are an example⁷⁷.

In addition, land that has been transferred to any community by any process of law and other land declared to be community land by an Act of Parliament shall be considered community land.⁷⁸ It is important to note that even though the outlining feature here is the community, the acquiring of rights to use and ownership in this category is a historical correction that is meant to revive the importance of participation of the community in environmental management. It is assumed that historical injustices perpetrated first by the colonial government and thereafter by successive regimes post-independence have led to the general understanding that the community land rights and associated natural resources should now form part of our legal system.

The recognition of communal rights over natural resources exemplifies the notion that rights over natural resources cannot only be exercised in line with private rights. Private rights are set out in such a way that they alienate other people's rights despite their location, geographical position or status. In Kenya, communal ownership has existed outside of the law. Now that there is a constitutional requirement to recognize communal interests, it is interesting to see how a country like Kenya that has been aggressively advancing private interests will take the formal community interests in place.

The yet to be enacted Community Land Bill has sought to entrench constitutional principles regarding community land interests. The Bill sets out the management of community land and for the first time validates customary land rights⁷⁹. The ownership of land for communities as stipulated in this Bill has been vested in the communities, and they can alienate the same in accordance with the Constitution and any other law. In terms of management of community land, the Bill sets out Community Land Management Committees⁸⁰.

These Committees are body corporates made up of a maximum of twelve members from the community⁸¹. One of the functions of these Committees is to manage and administer community

⁷⁷See generally the Land (Group Representatives) Act.

⁷⁸Article 63 (2).

⁷⁹Section 11.

⁸⁰Section 15.

⁸¹Section 17 (1).

land on behalf of the community. It's interesting to note that the Bill introduces a new registration regime outside traditional systems such as the Companies Act, Registration of Business Names and Partnership Act, whereby the existence of the Committees will be validated by registrars appointed under the Bill.

The Bill has gone further than establishing communal rights. It seeks to set out the mode in which the user rights to land based resources shall be articulated when it comes to community land. The rights to use stipulate the contents that the Agreements related to exploitation shall have and of what is owned communally by a community⁸².

In addition, the Bill has underscored an important missing link in the protection of community interests. The formalization of informal community institutions has been made possible under this Bill. This recognition under the law has been lacking and had previously been used to stifle communities and their decision making processes⁸³. It requires the National Land Commission to facilitate⁸⁴ the running of the Community Land Management Committees and also ensure that they are formally allowed to operate. Further, it allows for the full participation of members of that community to elect persons to sit in those committees on their behalf⁸⁵.

2.2.2 The Land (Group Representatives) Act⁸⁶

This Act enacted as one way of facilitating ownership of land and associated natural resources by communities. Group ranches are defined as delineated areas of rangelands that communities whose mainstay is pastoralism and who have herds, ensure that they have official land rights.⁸⁷ The Act envisaged that for purposes of orderly conduct of the communities that sought to exploit the land resources in their locality, it was best that the Registrar of Lands appointed for that purpose assist in the creation of these groups⁸⁸.

⁸²Section 53.

⁸³ See Mumma supra note 13 at 655. See also *Kemai & Others –vs- The Attorney General & Others Civil Case No. 238 of 1999 (Unreported)*.

⁸⁴Section 15 (1).

⁸⁵Section 20.

⁸⁶Chapter 287 Laws of Kenya. It is in an Act that allows for the incorporation of representatives of groups who have been recorded as owners under the Land Adjudication Act Chapter 284 Laws of Kenya.

⁸⁷Kameri- Mbote *et al* infra note 116 at 44.

⁸⁸Section 5.

The Act further provides that the groups shall be incorporated by not more than ten persons as the representatives of the community in the said group ranch. It was said that by having these person exercise such rights, ownership of land and associated land based natural resources. The group ranch has helped in delivering the promise of community land rights and contributed in the journey towards finding recognizing community corporate compositions that can allow tenure to exist.

2.3 Constitutional objectives on the concepts of ownership and use of natural resources.

The Constitution has established a two level institutional structure to manage land and the concomitant elements⁸⁹. There is the national government whose responsibilities are focused on land that is viewed to have general benefits for the country⁹⁰. On the other hand, there are the county government, whose mandate is ostensibly two fold. The responsibility is placed on the county governments as trustees to hold land that is *ipso facto* county land on behalf of the people living in their counties. Secondly, counties are seemingly mandated to be custodians of what the Constitution has set out to be community land⁹¹ and also community interests on land based resources.

In terms of ownership and use, the national government has for a long time held sway when it came to ownership of the resources, in the country. The policy framework was created in such a way that the institutional and administration position was always going to be centralized. Now, the Constitution only provides certain land to be administered by the national government. This would mean that the national government has by law, ceded ownership and therefore use to the county government over the environment and natural resource management over these areas. By devolving ownership and use to the counties, the Constitution aims at reducing the gap of public participation by the people in the way they want resources to be exploited in their jurisdictions.

The yielding of this authority to the counties brings in itself challenges that the Constitution alone cannot solve. First, the historical political discrimination of lower level management, is such that community management has been delegated to the extent that there hasn't been any

⁸⁹Article 62 (2).

⁹⁰Article 62.

⁹¹ Under Article 63 (2) (d) (iii), community land is defined as land lawfully held as trust land by the county governments.

incentives or proper financial support to ensure that it succeeds. The focus on national institutions of management in areas such as forest conservation, wildlife protected areas and water catchment does not provide wholesome solutions in the quest to entrench devolution of land resources management⁹².

Secondly, the pace of devolution of these functions is seen to be limited from the available capacity and the financial resources that have been availed. For instance, the pace at which counties currently have utilized the funds allocated to them on environmental and natural resource management has been minimal, one year after the function was devolved⁹³. In addition, counties have been slow in setting out policy directives in the management of environment and natural resources within the counties. Management in land use, water management and protection of biodiversity has therefore been disjointed and inadequate.

The other emerging realization is the apparent marginalization of community groups, indigenous populations and the marginalization of communities in being part of the county government in terms of governance. Communities especially those living around natural resources and in rural areas have unalienable attachments to the land based resources in their localities. They want to be intimately involved in their use and management. However, the recruitment of the officials to fill the positions in the management of land resources in the county is predominantly based on other criteria⁹⁴ and less of what is considered indigenous knowledge of the community interests. This calls into question the difference in interpretation of the constitutional principles that provide for local communities participation in the use of land based natural resources.

Secondly, the county governments' need to assert authority in the wake of increased funding courtesy of the Constitution is likely to increase tension between themselves and the present community groups that have managed to exist through informal systems of governance. The fear of these community systems of governance is that county governments will interfere with the

⁹² White A & Martin A, "*Who Owns the World's Forest? - Forest Tenure and Public Forests in Transition*" (2002) Centre for International Environmental Law, Forests Trends, 18.

⁹³ Supra note 75.

⁹⁴ The County Government Act sets out the criteria of recruiting county officials. The generic mode of recruitment seems to be emphasizing more on academic knowledge rather than intimate familiarity with the way local communities' resources should be managed.

way they engage within their communities. One must remember that in certain counties, the description of communities goes beyond the ethnic, cultural or ancestral description. Communities that are brought together by economic interests may not appreciate unilateral intrusion of their affairs. It therefore seems that counties must chart out innovative legal mechanisms of working together with the leadership of these communities in order that they may jointly manage land based resources found in their localities.

A third issue is the competing concerns of authority that may arise between counties and local community institutions. The Community Land Bill envisages the setting up of Community Land Management Committees which will be charged in administering community land. The key issue would be if these committees will be enabled financially by the national government through the National Land Commission or through the county government. The danger of little or no political will either from the national government or the county government without direct interference, is that the intended action of pushing their agenda of sustainable management of natural resources will be lost⁹⁵.

It's important to understand the issue of ownership and rights of use in the context of the specific regimes that have been used in the context of Kenya's natural resources management and environmental conservation.

2.3.1 Forests.

Kenya's forest cover estimated to be around 1.7% of the total land mass, is in dire need of restoration.⁹⁶ In order to archive the recommended 10% which we have also captured in our Constitution⁹⁷, it's important that a holistic approach to management of forests be approached. In the context of community interest, forests have historically played an important role to many communities assertion of ownership and rights of use. However, the advent of colonialism and transplantation of English law to form part of our law dealt a blow to community assertions of

⁹⁵Supra note 116 at 36.

⁹⁶Gachimbi L, et al, "State of Environment Report -Land Agriculture and Livestock in Kenya' (2009) in http://www.nema.go.ke/index.php?option=com_phocadownload&view=category&id=49:soe&Itemid=567 accessed on 30th July 2014.

⁹⁷Article 69.

ownership⁹⁸. The enactment of the 1942 Forest Act⁹⁹ commenced the theme of central management of forests whereby the Minister had the power to unilaterally declare the cessation of forest area, alter the boundaries of existing forests and declare unalienated Government land as forest.¹⁰⁰

It is important to note that even if this Act was enacted to curtail environmental degradation other key issues arise out of this legislation. Firstly, the issue of strict enforcement was seen to be counterproductive with the failure to take advantage of the positive traditional conservation that were observed by local communities for many generations¹⁰¹. This marginalization of the communities' ability to assert their own rights of ownership and use made it impossible for the tested community approaches to be used to ensure there was community participation.

This centralist approach was undermining government efforts in forests conservation and it led to massive destruction of forest areas. In 2005, The Government took a different approach when it enacted a participatory Forest Act¹⁰² which brought on board communities to participate in forest conservation by having them register with the Kenya Forest Service (KFS).¹⁰³ In essence, the Act granted far reaching user rights to communities over resources such as harvesting of honey, grass harvesting and grazing, ecotourism and commercial recreational activities. KFS has been on the forefront in driving initiatives of involving local communities in forest conservation efforts.

Communities could have ownership rights through the management agreements entered into with the KFS and which allow them to utilize the forests for cottage industries, collection of medicinal herbs and development of wood and non- wood industries that are allowed them to benefit financially. These in turn has motivated them to conserve the forests and with technical guidance provided by the KFS, they are able to manage effectively.

⁹⁸ Supra note 8 at 45.

⁹⁹ Chapter 385 Laws of Kenya

¹⁰⁰ Situma F.D.P, " Forestry Law and the Environment" , in Okidi C.O, Kameri-Mbote P & Akech M (2008)" *Environmental Governance in Kenya- Implementing the Framework Law*' East African Educational Publishers at 237.

¹⁰¹ Ibid note 100 at 240.

¹⁰² Act No.7 of 2005.

¹⁰³ Section 46. See Situma Supra note 100 at 251.

In a study done by the World Bank in 2007 in Hombe Forest, within the Mount Kenya ecosystem, it was found that the Community Forest Associations (CFAs) formed in that area had placed a lot of trust in the structure of community forest management that they had formulated for themselves. In addition, it was found that despite their limitations on issues such as financial capacity and lack of professional knowledge in the managing forests, the associations were well equipped in terms of manpower and immense local knowledge of the forests resources available in that area. The areas that were identified for investment and benefit sharing between the state through KFS and the CFAs include:-

- Timber Production.
- Fuelwood for plantation.
- Grazing Licences.
- Beekeeping and grass harvesting.
- Water catchment management.
- Carbon Trading.
- Sustainable use of bamboo and other non- timber species¹⁰⁴.

This illustration is an example of how the delegation of rights of ownership and use can be practically secured in the management of forests in Kenya.

2.3.2 Water

Governance in water management has undergone many changes in Kenya especially in the last two decades. The reforms that have been undertaken have been as a result of a key observation in the way water is managed. Just like in forests, water management was operated by the Minister then in charge of Water and who had the mandate over ‘every body of water under or upon any land’.¹⁰⁵ . The key component of water governance was how the Minister applied the powers supplied to him by the law to govern the supply of water. In the general context of CBNRM, the essence of governing water supply stems from two qualities that water as a resource has over other natural resources.

¹⁰⁴ The World Bank, “Strategic Environment Assessment of the Forest Act 2007” at 28-29.

¹⁰⁵ Water Act, Chapter 372, Laws of Kenya (Repealed) . See also Migai J.MA., “*Governing Water & Sanitation in Kenya*”, in Okidi C.O, *et al* (2008)“ *Environmental Governance in Kenya- Implementing the Framework Law*’ East African Educational Publishers at 315.

In the first place, naturally occurring water had had ‘ownership’ problems because its displacement and replacement means it has to be formalized in legislation as being ‘owned’ by the State¹⁰⁶. Therefore, while it may emanate from a certain source that is within the territory of a certain group, the flow of it means that it is impossible to ameliorate it at the expense of others. Secondly, the user rights of water must be contemplated with regard to current and future populations and the need to conserve and protect its source. It therefore means that its discussion must be conducted contemporaneously with the other resources such as forests.¹⁰⁷ Now, the governance aspect that was inherited by the current Water Act 2002 from the previous Water Act, missed the opportunity to set in motion the multi-layered approach in governing its use.

First, the powers that were hitherto supplied to the Minister in the previous Act have also been supplied to him in this Act¹⁰⁸. The concentration of power in the Minister and the centralization of how water should be used based on permit requirements means that there is difficulty in articulating the devolution of water to every part of the country, whether economically endowed or not¹⁰⁹.

Secondly, the Act insistence on use of water only on the basis of permits implies that the pluralistic nature of communities, who use water despite the side by side with the existence of legislation, will be curtailed¹¹⁰. This means that the Act will be put not only the communal land tenure in a spiral of ruin, but also threaten the communal rights to use of natural resources as a guaranteed constitutional right.¹¹¹

Thirdly, the fragmented nature of regulation to the water resource and the deliberate omission of community involvement in water management means the institutional framework envisaged in

¹⁰⁶Section 3 of the Water Act 2002. This categorization ignores the informal nature of law that forms part of our legal system and attendant rights thereto.

¹⁰⁷ See generally the National Policy on Water Resources Management and Development, Sessional Paper No. 1 of 1999 at 2. It states that one of the four specific principles in the address of problems affecting water is “*preservation, conservation and protection of water resources and their sustainable, rational and economical allocation*”.

¹⁰⁸ See Migai supra note 124 at 324.

¹⁰⁹ Mumma A, “*Kenya’s New Water law: An Analysis of the implications to the rural poor*”, (2005) Paper presented in the International Workshop on ‘African Water Laws: Plural Legislative Frameworks for Rural Water Management in Africa’, 26-28 January 2005, Johannesburg, South Africa at 5.

¹¹⁰ Ibid note 109 at 8; Article 42 as read together with Article 69.

¹¹¹ Ibid note 109 at 9.

the Act lacks the legitimacy to superintend the governance of water matters in a holistic and sustainable nature¹¹².

In addition within the discussion on the constitutional objectives of natural resource management, the National Environmental Management Authority (NEMA) has taken the role of promoting the environmental monitoring programs geared towards sustainable utilization of environmental resources. In this regard, as the principle implementing authority for the national government, the institution main mandate is to harmonize policies that would ensure proper management a holistic management.

In terms of its place in the devolved governance structure, the place of NEMA has to be realigned in order for the institution to have the necessary impact. Having certain environmental functions devolved to counties requires NEMA to utilize its mandate in order to engage the counties. Under the Fourth Schedule of the Constitution, the mandate of NEMA requires that when it comes to promotion and implementation of national government policies, they will take a lead role in driving the agenda of sustainable development, utilization of natural resources throughout the country. In ensuring the promotion of its mandate, NEMA has set up a number of programmes. It has the National Resource Management Programme¹¹³. Under this programme, it has established centres called Green Points, in counties whereby it will use them to provide advocacy support in enhancing green economy by entering into partnerships with local communities on the question of comprehensively promoting environmental management¹¹⁴.

The areas that NEMA seeks to partner with local communities include designing and approval of projects for funding under the adaptation fund of the UNFCCC, renewable energy and energy efficiency, low energy consumption¹¹⁵. The Centres have been designed in such a way that they offer policy direction and demonstration areas where local communities can be educated on different approaches of utilizing and sustainably exploiting natural resources.

¹¹² See Migai supra note 105 at 325.

¹¹³ See ' NEMA NRM Success story in <http://www.nema.go.ke/index.php?option=com> accessed on 25th November 2014.

¹¹⁴ Ibid.

¹¹⁵ Ibid.

2.4 Conclusion

It is clear that implications of current legislative structures to the rights of ownership and use of natural resources guaranteed to the communities cannot be ignored. It is important for this thesis to cross-examine the issues raised in the context of the devolved governments functions guaranteed under the Constitution. It is clear that the approach of counties in management of natural resources must not be pursued in isolation. Further, the sectoral laws that apply to the different natural resources must be overhauled in light of the new county government dispensation over natural resources.

Last but not least, the Constitution, while laying the foundation on how the competing interests of the counties and the communities must be handled, the general obligation of providing leadership in county natural resource use is vested in the county governments. Therefore, the values that define communities must be upheld by the counties in the management of natural resources.

CHAPTER THREE

WHAT DOES DEVOLUTION PORTEND TO COMMUNITY RIGHTS TO NATURAL RESOURCE MANAGEMENT

3.0 Introduction

The need to place emphasis on communities abilities and knowledge and empowering these communities to have the necessary impetus in adjudicating what they wish to have as the driving force to emancipation, is at the core of the desire for closer management of natural resources. Some scholars have argued that the reason of assigning rights to communities cannot stand simply because it's not alienable as of right due to foreseen state involvement in dictating the rights thereto¹¹⁶.

We have now the creature of devolution within our legal system. The spontaneous thought for proponents of the community ownership and management school would be, does it mean that the actual existence¹¹⁷ of rights to own and therefore mandate to manage natural resources, is now in sight?. Further, is it now obligatory of the national and county governments to not only recognize, but also to assimilate the contributions of the communities in the innate knowledge and adaptability of the community natural resource management end result?.

It has been noted that for the concept of CBNRM to survive, a critical appraisal of its market dynamic and examined alongside the idea of long term security of tenure will provide the benchmark for the sustainable use and efficient management of natural resources in the counties.¹¹⁸.

In examining this concept, the key underlying concern for this research would be whether the idea of collective rights of CBNRM override those of the Constitution. In addition, the trustee responsibilities placed on counties and the national government will be examined as well as contextualizing the administrative role of the National Land Commission in securing land and associated natural resources.

¹¹⁶Kameri-Mbote P *et al' Ours by Right: Law, Politics and Realities of Community Property in Kenya'* (2013) Strathmore University Press, 27.

¹¹⁷ Ibid note 116 at 90.

¹¹⁸Tumushabe G.W, '*The Theoretical and Legal Foundations of Community Based Property Rights in East Africa'*, (2005) ACODE Policy Research Series No. 12 at 5.

3.1 The Constitutional derivations of rights and responsibilities over natural resources of the national and county governments in Kenya.

It has been said that the permit structure that exists in Kenya's legal structures whereby corporate and individual entities are recognized¹¹⁹ has distorted the environment and natural resource management motif and what one sees is a confused state of assertion of rights. Having promulgated the Constitution in 2010 after some struggle, the thought was that the clear setting out of mandates on who has which rights and responsibilities will help in addressing the governance gaps that have characterized the management of our environment for a long time. An examination of these rights and responsibilities as stipulated in our law is hereby attempted.

3.1.1 Trustee responsibilities on the national government and counties in land based resource management.

The responsibilities of the national government regarding the management of the environment and natural resources are set out in the Constitution. However, the description of these obligations must be read carefully when describing what a 'state' is¹²⁰. In line with devolution principles¹²¹, there is an expectation that there is sharing of power. Therefore, the functions in the Constitution must be administered collaboratively between the national government and the county governments.

The trusteeship responsibilities, that are visible and which require the national government to act in a fiduciary position for the benefit of the country and for purpose of this research, on behalf of the local communities. These include the implementation of policies that take into consideration the local communities initiatives to land dispute settlement¹²², creation of legislation that will

¹¹⁹Mumma supra note 11 at 628.

¹²⁰ Article 260 states a state to be the collection of offices, organs and entities comprising the government of the Republic of Kenya. This seems to say that any organ that has a description of 'government' in the Constitution must be construed to referring to the 'State'. In addition, the reference also extends to the institutions established under this Constitution. And these institutions include all forms of offices that make up the county governments. In the same vein, the description of 'land' under Article 60 and the definition of 'natural resources' under Article 260 seems to overlap with the former subsuming the definitive components of the latter.

¹²¹ Article 174 (h) provides that one of the principles is 'to facilitate the 'decentralization' of State organs, their functions and services, from the capital of Kenya'.

¹²² Article 60 (g).

give effect to specifications on the nature and extent of the rights of each community individually and collectively when dealing with community land¹²³.

In the case of responsibilities, the same can be assumed in two ways. First, there are those responsibilities that counties assert singularly as required by law. They include the provision of for instance water services¹²⁴ and the ensuing coordination and participation of communities and locations in governance at the local level and further assisting communities develop capacity for the effective exercise of functions and participation in governance at the local level¹²⁵. Secondly, there are those responsibilities that counties share with the national government. These responsibilities apply in the regulation of use and right over land where interests of defence, public safety, public order and land use planning apply. Further, the counties are responsible for community land and should hold in trust for them.¹²⁶

By dividing the sphere of influence in the categorization, the Constitution aims at properly reflecting the different aspirations that people had and what rights can be assumed over property¹²⁷. It provides that these kinds of public land should only be administered, exploited, managed and utilized by the national government¹²⁸. In addition, the national government has rights exercised through the National Land Commission, to ensure for instance optimal management of land, to assess tax on land, to monitor and have oversight responsibilities over land use planning throughout the country¹²⁹.

In terms of responsibilities, the Constitution bestows a number of them on the national government. These responsibilities can be categorized into three. Firstly, there are those singular responsibilities which apply to the national government specifically because of its enormous capacity to implement. These responsibilities include the protection of the environment and natural resources with the aim of having a sustainable system of development in fishing, hunting, gathering, protection of wildlife, water protection and securing residual water and the energy

¹²³ Article 63 (4).

¹²⁴ Article 11 of Part Two of the Fourth Schedule.

¹²⁵ Article 14 of Part Two of the Fourth Schedule.

¹²⁶ Article 63 (2) (d) (iii).

¹²⁷ See Kameri *et al* supra note 116 at 34. 'The 'land fever' is said to have gripped Kenyans from all walks of life, often intertwining modern and traditional values since it offers basic survival opportunities in an insecure situation where there is no welfare system '.

¹²⁸ Article 62(3).

¹²⁹ Article 67 (a), (g) and (h).

policy¹³⁰. In addition, the national government must ensure that it sets out the parameters of land planning and the coordination of planning in the counties¹³¹.

Secondly, there are collective responsibilities, which require the national government to implement with the cooperation of the county governments. These responsibilities include, the creation of national policies on natural resources and environment conservation which will be implemented by counties¹³². In addition the two levels of governments are required to work together in order to regulate the use or right or interest in any land in the interest of defence, public safety, public order, public morality, public health, and land use planning¹³³.

The implementation of these provisions has in some cases been done¹³⁴ and in others, deliberations are ongoing in implementation of the same¹³⁵.

3.1.2 Rights over natural resources management as guaranteed by the Constitution.

The devolution requirements under the Constitution place more impetus on the county governments to manage land based natural resources on behalf of the people of Kenya. The objectives of devolution for purposes of this research include giving of powers of self-governance to the people¹³⁶, the recognition of rights of communities to manage their own affairs and to further their development¹³⁷, promotion of social and economic development and the provision of proximate, easily accessible services throughout Kenya¹³⁸ and further ensuring the equitable sharing of national and local resources throughout Kenya¹³⁹.

In terms of the rights that the national government is provided for managing the environment and natural resources, the Constitution takes sides by only recognizing public land as the land that includes several natural resources such as forests, water bodies, the continental shelf, the

¹³⁰ Article 22 of Part One of the Fourth Schedule.

¹³¹ Article 21 of Part One of the Fourth Schedule.

¹³² Article 10 of Part Two of the Fourth Schedule.

¹³³ Article 66 (1).

¹³⁴ See the Land Act 2012, Land Registration Act 2012, National Land Commission Act 2012.

¹³⁵ See the Community Land Bill 2013,

¹³⁶ Article 174 (c).

¹³⁷ Article 174 (d).

¹³⁸ Article 174 (f).

¹³⁹ Article 174 (g).

exclusive economic zone and minerals¹⁴⁰. The rights over these areas have been carefully selected with the emphasis being on the national government capacity to manage such resources for the benefit of all citizens, which remain unalienable to it as of right.

Counties are bestowed with unalienable rights to natural resources by the Constitution. These rights include, holding of public land that was not alienated by any Act of Parliament in force at the time the Constitution was promulgated¹⁴¹, public land in respect of which no individual or community ownership can be established by any legal process¹⁴² and land transferred to the State by way of sale, reversion or surrender¹⁴³. Further counties can assert rights over community land that is unregistered, but held in trust on behalf of those communities, lawfully held for¹⁴⁴.

In summation, national and county governments have both exclusive and interlinking rights and responsibilities in the way the environment and natural resources should be taken care of. This research finds that the imposition of these rights over resources cannot escape the discussion of land rights generally and land tenure systems that have evolved¹⁴⁵. Suffice to say, the tempering done by the Constitution on who among the national, county and communities should assert what rights and therefore, control over natural resources, has been done by the use of general guiding principles which has ensured that the narrative is one of gain for the citizens, no matter their position in society, rather than a supremacy contest on capacity and ability.

3.1.3 Administrative responsibilities over land and associated natural resources.

The Constitution has sought in addition to the seeking trusteeship responsibilities, bequeathed the responsibility of administering public and community land on the National Land Commission (NLC). Previously, these powers were held by the President and were implementing through a delegated approach to the Commissioner of lands.

Through the NLC, public land and therefore land based natural resources, will be managed for the benefit of communities, through it.

¹⁴⁰ Article 62 (f), (g), (j) and (k).

¹⁴¹ Article 62 (1) (a).

¹⁴² Article 62 (1) (d).

¹⁴³ Article 62 (1) (c).

¹⁴⁴ Article 63 (3).

¹⁴⁵ Kameri *et al* supra note 116 at 39.

3.2 County governments and traditional community based regimes of natural resource management

The expectation of devolution upon the passage of the Constitution brought with it joy and also certain innate challenges. The spotlight has turned on how ‘alien’ structures should be integrated with community based structures of local use and benefits over local resources. The make-up of the county government begins with the way county governments are created¹⁴⁶. The research has identified some four key issues that are flashpoints in articulating the tensions between the counties and the communities when it comes to CBNRM.

The first issue lies in the way counties go about appointing persons to serve in senior positions within the county. The County Government Act provides that appointments made to the county executive posts, which consists some of the senior most positions in the counties, must reflect the cultural diversity of communities¹⁴⁷, marginalized groups and minorities¹⁴⁸ of the people living in the county.

The argument is that by having these persons, the reflection of the county objectives on diversity and inclusivity is blurred. But this criterion is somewhat misapplied in that the procedure of mapping out the county geopolitical zones and identification of skills was not based on empirical data collected. Further, the formalistic structure of seeking applications through the County Public Service Boards¹⁴⁹ meant that, emphasis was placed more on academic grounds rather than the key knowledge value addition of leadership and consensus building that is unique from county to county.¹⁵⁰ Therefore critical indigenous knowledge in CBNRM issues and other county-specific natural resource agenda was ignored.

Secondly, the continued recognition of decentralized units¹⁵¹ that resemble the national government administration, is likely to breed resentment in the obsessive ‘*by the people, for the people*’ mantra of county elected leadership and the perceived undermining of devolution

¹⁴⁶ One objective of the devolution of Government under the Constitution is to ensure that there is recognition of the rights of communities to manage their own affairs and to further their own development.

¹⁴⁷ Section 35 (2) (c).

¹⁴⁸ Section 35 (2) (b).

¹⁴⁹ It constitutes their key functions. There was no settled criterion apart from the general principles laid out in the Constitution and the Act. See Section 59.

¹⁵⁰ Supra note 124s.

¹⁵¹ See Section 48 of the County Governments Act.

principles especially where the institutions have different ideologies of what devolution entails. The assumed issue of further demarcating counties into village units would presumably arise from conflicts of entrenched power that would occur between sub-county administrators pledging allegiance to the national government and county assembly members and their village unit representatives appointed through the county bureaucracy.

The confusion that arises here is in the understanding of the functions that the national government has over decentralized units and sometimes the title that these decentralized units have assumed in entrenching themselves. National government representatives within the decentralized units of the counties still call themselves “chiefs”, “assistant chiefs” and ‘village headmen’ with the former positions of district commissioner and district officer being replaced by county commissioner and sub-county commissioner respectively¹⁵². In addition, the set-up of the decentralized units is such that the leadership is exclusively organized to be headed by sub-county administrators or ward administrators appointed by the County Service Board¹⁵³.

Infact, the composition of an entity called the village council is such that the head of the said council is a village administrator, also appointed by the County Public Service Board and deputized by a maximum of five village elders recognized as such within such a decentralized unit. The village administrator is designated to deputize the ward administrator. The key issue when setting up these administrative units is whether the community considerations on the type of leadership structure that reflects such communities have been considered¹⁵⁴. One would assume that in areas where there are established communal systems of governance of land and the resultant resources, the presence of county bureaucracy would most likely be an unwelcome distraction to already flourishing and working community mechanisms.

In their book, Prof Kameri-Mbote *et al*¹⁵⁵ examined the community of the Samburu in the experiences and practices of managing their land communally¹⁵⁶. The Samburu’s are one of the

¹⁵² See Article 17 of the Sixth Schedule to the Constitution. It would seem that the phased restructuring of the provincial administration has moved with speed to beat the Constitutional deadline of five years. Key positions that have been phased out is the office of provincial commissioner.

¹⁵³ Section 50 (2); Section 51 (2).

¹⁵⁴ See the CIC Assessment Report on the Implementation of the Devolved System of Governance 2014 at 82. It said that by June 2014, there were established 1002 villages in 13 counties with 800 of those being declared as ‘functional’.

¹⁵⁵ Supra note 131 at 53.

communities living around the expansive Northern Rangelands Trust Community Conservancies (NRT). They found that the governance of community lands has always been held by the council of elders which had managed effectively the resolution of disputes¹⁵⁷. In addition, the elders also had the acumen to deal with entrenched entitlements and rivalries on access to natural resources¹⁵⁸.

They observed that the devolved government must endear itself to these communities in among other things, appreciating the rights of these communities to govern, assisting in their understanding of the decentralized role within the counties, in order that there is a mutual understanding of each institution's functions¹⁵⁹. One of the key areas of co- management that the Samburu felt there is need, is county protection through discouragement of subdivision and sale of communal lands. The overwhelming feeling was that it is essential to retain the communal lands because the Samburu live as pastoralists and the need for 'open access' to pasture would be severely curtailed if communal land was demarcated and constrained by private ownership regimes¹⁶⁰.

Thirdly, the differing understanding of community ownership and the roles may likely occur in the discussion on and within the citizenship participation forums that apply for counties.

The Constitution set out one of the objectives of the Constitution to mean information asymmetry shall be horizontally balanced whereby national and county governments are required to reach out to all persons.¹⁶¹ This principle has been further underlined under the County Government Act whereby the criterion of participation is set out in guidelines which county governments must make every effort to adhere to.¹⁶² Local participation is centered around the need to seek sufficient and accurate local knowledge about certain issues before decisions are

¹⁵⁶ Supra note 116 at 54

¹⁵⁷ Supra note 105 at 82.

¹⁵⁸ Supra note 116 at 60.

¹⁵⁹ Supra note 105 at 83.

¹⁶⁰ Supra note 116 at 54..

¹⁶¹ Supra note 151.

¹⁶² Section 87 (e) provides that ' reasonable balance in the roles and obligations of the county governments and non state actors in decision making processes to promote shared responsibility and partnership and to provide complimentary authority and oversight'.

made.¹⁶³ If indeed the county authorities need to be seen in promoting the goals of CBNRM, the particular involvement of the citizen must be concerted, sustained and capacity enhanced to enable all persons appreciate the conversation at hand.

In Samburu, the county has identified community involvement and the sensitization in natural resource management in the county as a key area to entrench citizen participation¹⁶⁴. One way of entrenching participation is the enhancement of the abilities of the pastoralist communities. The county identifies illiteracy as a major hindrance to citizen participation¹⁶⁵. But other than the presence of this Plan, the county is yet to enact legislation on how the process of citizen participation will be coordinated and managed effectively for the citizen's benefit¹⁶⁶.

Whereas the Plan set out seem cohesive to handle environmental and natural resources management, the issue of participation must go hand in hand with the standards of authority and engagement that should apply. The key issue that could affect effective participation in natural resource management at the local level is the dynamics that emerge in the interaction between various groups of people based on their economic ability, religious persuasion, ethnic identity and gender¹⁶⁷.

These dynamics, if not managed effectively could trigger disaffection within these participating for a and lead to apathy¹⁶⁸. Traditional structures of authority within some communities could inhibit people from seeking accountability, thus negating the central theme of the said participatory initiatives.

¹⁶³ See Devas N & Grant U, 'Local Government Decision-making : Citizenship Participation and Local Accountability: Some evidence from Kenya and Uganda' (2003) 23 Public Administration and Development 4 , 2. ; Article 10 (2) (a).

¹⁶⁴ See the Samburu County Integration Development Plan 2013-2017 at 116 whereby the county is keen to ensure the communities living in the county are constantly consulted on matters affecting them.

¹⁶⁵ See supra note 154 at 115.

¹⁶⁶ The Plan stipulates that they will establish up to six ward environmental committees in every ward made up of locals who will be able to organize various activities such as the construction of gabions, tree planting exercises and rehabilitation of grazing areas. See supra note 48 at 118.

¹⁶⁷ See supra note 154 at 3. The inhibited attitudes amongst the ranks whereby majority of people who feel frustrated by the lack of attention would occur yet it will be stated that they have participated in organized discussion.

¹⁶⁸ It is feared that local elites and political leaders could hijack the process and seek to infuse their will to suit certain interests, eroding the role of traditional structures of consult within those participatory forums. See supra note 154 at 3.

Lastly, traditional systems of civic education must be seen to work with new county systems of information dissemination. The role of local actors, NGOs and other members of the civil society is very important as they have been recognized to offer an alternative to government disinterest in areas that are dear to local communities and especially marginalized groups¹⁶⁹.

The setting up of the national civic education curriculum should ensure that it encompasses environmental management as a topic that requires sustained education of the public at the local level. Perceived notions of who is better placed between the traditional NGOs that have for years been involved in educating the locals and county officials keen to assert their influence on civic education initiatives, should be nipped in the bud if meaningful CBNRM is to be seen. The principle of co-management must be managed to apply within the constitutional principles of co-operation and non-state actors should be allowed to continue to work without any hindrance to the issues that affect the public¹⁷⁰.

3.3 Redefining natural resource management with the concepts of use and ownership

The presence of devolved governments in our country legal system and specifically the Constitution provides a great promise on redefining certain ageless concepts. In examining land use and ownership, historically, there was emphasis for a long time in the English feudal system that obliterated traditional communal ownership systems.

The expansion of the definition of what land is meant that a wide array of considerations must be looked beyond the traditional definition. The generalization of that definition¹⁷¹ meant that the various interests in land use could use the uncertainties of the said description to expand their influence and use untoward means to acquire property in land. Now, the emergence of the county and the rights guaranteed by the Constitution in that institution¹⁷² means the right to use and own, which often are applied together, must not now be ameliorated from the 'Crown' as we had

¹⁶⁹ Section 98 of the County Government Act sets out the requirement of civic education within the counties which should be conducted with non-state actors.

¹⁷⁰ Supra note 163.

¹⁷¹ The English feudal system looked at it in the maxim "*quique solo solocedit*" to mean not only what is on the soil but it should what is above and below it.

¹⁷² See generally the County Government Act.

received from our colonial masters, but by the realities of the definitive components of what land is¹⁷³.

In Kenya, the point of departure for community ownership of land and therefore environmental resource management was provided under the Trust Land Act¹⁷⁴. It basically set out to say that land that is not adjudicated, consolidated or registered in any individual or group names, was vested in local authorities which were the latter day county councils.¹⁷⁵

In terms of use, the county councils managed environmental resources within the trust land and advocated conservation measures such as management of wildlife, water and forest resources¹⁷⁶. However, the emergence of a power grab and weak control structures within these county councils meant that, the tenure of trust land suddenly shifted towards individual ownership. This had a negative implication to environmental resource management and traditional conservation measures whereby, the controls that the councils could utilize were all but extinguished¹⁷⁷. In situations where the State or individuals take over, the rights to access these lands by communities is significantly curtailed.

Redefining the concept of use and ownership then has become a vital conceptual need that would set the tone for a balance in the advancement of natural resource management ideology. It would entail the following steps that would capture the need to recognize changing environmental management considerations. Firstly, rights of ownership should be redefined in a way that the rights to use and occupy are not dictated by the existence of the land itself, but what possession of the said land can benefit the people. In other words, the right to ownership should be emphasized on the basis of common societal needs and from that, the entity conferred with that ownership, can allocate the rights to use to its members.¹⁷⁸

Secondly, the right to occupy should be defined by law, in order that land be classified according to its economic and ecological capabilities, and regulations be made in law with provisions specifying the obligations of the occupier. In addition, these regulations would dictate the

¹⁷³ Supra note 37.

¹⁷⁴ Chapter 288 Laws of Kenya (repealed).

¹⁷⁵ Section 114 of the Repealed Constitution.

¹⁷⁶ Kameri Mbote supra note 116 at 268.

¹⁷⁷ Kameri Mbote supra note 116 at 269.

¹⁷⁸ Supra note 11 at 770.

acquisition of additional rights¹⁷⁹. When one wants to assert their "rights", it would naturally encompass those activities in relation to the land in which the occupant or user might freely engage. In addition, there would be aspects of privacy and of security from external damage or annoyance which society through the existence of government and which it would undertake to defend and protect.¹⁸⁰

Thirdly, the issue of land use planning has now taken prominence and therefore a constitutive element in redefining use. Historically, the concepts of natural resource management were quite different from those of indigenous communities¹⁸¹. Where environmental policy and politics are vital for national concerns, the fundamental differences between indigenous concepts of land and resource ownership and the legal system now applicable in the country has continued to generate ongoing conceptual tensions between states and indigenous communities¹⁸². The Constitution imposes on the National Land Commission the obligation of monitoring the oversight responsibilities over land use planning¹⁸³.

Land use planning especially in the current constitutional dispensation is of vital importance as it sets standards for both national and county Governments which dictate the use of natural resources placed on them. In terms of reconfiguring the concepts of use and ownership, the issue of ownership seems to have been settled in the Constitution¹⁸⁴. The use of resources should naturally be seen to be much tighter than before since there seems to be checks and balances with the Commission acting as the defacto 'regulatory' authority in ensuring the ethos of inclusivity of the people of Kenya are secured through various participatory for a discussing land use.

Closer still, some counties have adopted the sustainable land use planning methods in their plans as a way to ensure that the use of land based resources is optimally done. In Nyandarua the County has sought to strictly adhere to the conditions of national government policies on environment, whereby it has set out to facilitate NEMA, WRMA, the African Wildlife Fund

¹⁷⁹ Supra note 13 at 771.

¹⁸⁰ Supra note 13 at 772.

¹⁸¹ Hibbard *et al* , "The Split Personality of Planning : Indigenous Peoples and Planning for Land Resource Management,' (2008) at 138 found in <https://pl.sagepub.com/content/23/2/136.full.pdf+html> and accessed on 3rd September 2014.

¹⁸² Ibid note 181 at 139.

¹⁸³ Article 67 (2) (h).

¹⁸⁴ Supra note 151.

(AWF) in their functions as well as assist where it can in order that continued sustainable and ecological sound use of land¹⁸⁵. Counties are also supposed to heavily rely on the National Land Commission to develop land management information systems as well as ensure the registration of all unregistered trust land and unregistered community land¹⁸⁶.

This imposition of registration of land in the counties is meant to help in the land use planning and where complemented with indigenous systems of planning, it will deliver enormous success in the counties in terms of sustainable use of land based natural resources contained therein¹⁸⁷. Whereas it is a plan that would consolidate both national and county policies on land use, the question as previously provided is whether the communities who have continued to benefit from the existing indigenous natural resource systems will be receptive enough to take in the National Land Commission or any other body's plans to implement its agenda.

In Nyandarua, the Integrated Plan has recognized the important role played by the Water Resource Users Associations in areas such as Turasha and Wanjohi and has sought to use their success to expand their reach in other areas of the county where they are not present¹⁸⁸. These associations mainly set up with the help of the Water Resources Management Authority (WRMA) and run by the local communities have ensured that they have access to clean and reliable water supply from the many permanent rivers running in the county.

It is clear that devolved governments have sought to set a mark on the way the articulation of the land use and land based resources will be undertaken. Since the question of ownership seems to have a constitutional answer, the issue of use of these resources must then be focused largely on the powers that have now been bestowed on the county governments to hold and administer and land based resources on behalf of local communities in a sustainable way.

3.4 The Community as a unit in the natural resource management discourse

It has been argued that communities as entities are devoid of the 'corporate-ness' that is symbolized in formal legal regimes whereby it sometimes characterizes how rights can be

¹⁸⁵ See the Nyandarua County Development Integrated Plan 2013-2017 at 114.

¹⁸⁶ Section 5 (2) (d) and Section 5 (2) (e) of the National Land Commission Act 2012.

¹⁸⁷ In New Zealand, when there was a failed attempt to reach a comprehensive agreement with the Maori, an indigenous tribe, an integrated resource management approach has been used to ensure the Maori participation in the development of regional resource management plans. See supra note 196 at 138.

¹⁸⁸ See Ibid note 185 at 113-114.

derived¹⁸⁹. The community character loses its lustre when it is confronted by the differing characteristics involving collective rights and community rights come into play and the latter is said to lack the locus to be recognized by inchoate legal systems that monopolize this kind of systems.¹⁹⁰ .

One question that challenges whether communities can derive rights capable of enforcing their claims to land based natural resource management is the question of recognized legal capacity of communities in our current legal regime. In *Kipsiwo Community Self- help Group –vs The Attorney general & 6 Others*¹⁹¹, the Court was asked to consider whether the Plaintiffs had the legal capacity to institute the suit before it. The Court considered constitutional provisions that allow a ‘person¹⁹²’ as defined, to institute a suit. The Court was of the view that the Plaintiff lacked the legal capacity to institute the suit because the very fact that the Constitution provides that unincorporated entities can bring actions under it does not mean that the Plaintiff could. They had to prove that they are an entity recognized as such in law and in the absence of it being a representative suit¹⁹³, the court is powerless to issue orders on behalf of persons it ‘does not know’.

The presence of these procedural obstacles also seems to curtail the ability of the community as an entity to seek reliefs in law if their environment is damaged or destroyed. The Community Land Bill¹⁹⁴ has sought to cure this *malafides* by defining conclusively who the community is and bestowing on it the ability to be a body corporate strictly speaking, capable of instituting action on behalf of the people living within it. On a positive note, the insistence by the Constitution to have the county government manage and administer in trust, resources that belong to local communities is a validation that the community as a unit in Kenya, now fully exists. This validation does not mean its fool proof, for the reason that the responsibility to be a

¹⁸⁹ Mumma supra note 11 at 628.

¹⁹⁰ Supra note 11 at 628.

¹⁹¹ E & L Petition No. 9 of 2013 at the High Court in Eldoret Kenya.

¹⁹² Article 260 defined a person as ‘a company, association or other body of persons whether incorporated or unincorporated’.

¹⁹³ Order 1 rule 8 of the Civil Procedure Rules provides that the where there are many persons having the same interest, one or more persons may sue or be sued on behalf of or for the benefit of all persons in a representative suit. See *Mureithi and Others v. The Attorney general & Others, The High Court of Kenya at Nairobi Misc Civil Application No. 158 of 2005* in Mumma Supra note 11 at 628.

¹⁹⁴ Supra note 11 at 629.

trustee of the community must take into consideration, the indigenous structures of identity that are unique to the way of life of such communities.

The Constitution's footprints are markedly vital because by relaying the message that the informality of the communities who share similar interests and have similar identities when it applies to land, does not mean that there is no recognition. The emphasis now seem to move away from amorphous disintegrated homogenous units to entities that have conclaves of similar motives, whether rural or urban that can be organized in such forms as are found under different legal regimes. In Kenya, it is known that most communities especially in the rural areas have been registered as self help groups¹⁹⁵. These self help groups are created through administrative processes created by the former District(now county) Community Development Officer. However, as it has been determined, this registration does not afford the group any legal personality or corporate identity¹⁹⁶.

However, as Mumma puts it, inspite of the absence of the corporate personality, the community projects operated by such self-help groups function very well.¹⁹⁷ The success of their existence seems to stem from the strong affiliation of a normative framework that is construed nonetheless by a different set of rules from formalistic rules. On the flip side, presently in Kenya, there a number of statutory organizations that have the corporate identity recognizable in law that communities can formalize themselves under. They include:-

3.4.1 Cooperative societies

These are formed under the Cooperative Societies Act¹⁹⁸. This legislation provides for cooperative societies which are bodies whose objective is to promote the economic interests of its members where the focus is a common objective. They have had much success in the rural areas ease the populations are not threated by flight.

3.4.2 Non-Governmental Organizations (NGOs)

These are created mostly with the hindsight of a foreigner donor with the aim of alleviating certain needs or propagating economic and social advancement¹⁹⁹.

¹⁹⁵ Supra note 11 at 633.

¹⁹⁶ Supra note 11 at 633.

¹⁹⁷ Supra note 11 at 633.

¹⁹⁸ Chapter 490 Laws of Kenya.

¹⁹⁹ Formed under the Non- Governmental Organizations Act of 1990.

3.4.3 Trusts

These are formed under the Trustees (Perpetual Succession) Act²⁰⁰ and they are meant also to alleviate a certain need in the community. They are mostly funded by donor agencies but are run by a trustees chosen carefully to fully undertake the task of bringing charity to the community.

3.4.4 Company Limited by Guarantee

It is formed under the Companies Act²⁰¹ and it is meant to be a group of persons sharing certain interests or in need of promoting certain concerns in their areas of influence such as business. It is also not for profit.

Mumma states that the problem that afflicts the lack of a corporate personality in the local communities in Kenya is basically one, the voluntary membership of these organizations makes it quite different from communities because the benchmarks for identifying a community are far more complex and difficult to decipher as compared to an organization brought together by shared common objectives²⁰².

Second, the structure of control of the organizations is different from that of communities. For instance, societies and companies go for elections to appoint their leadership. This is quite different from traditional communities which are reliant on a trusted group of elders succeeded by a carefully selected group of persons known to be influential in the community. Third, the perception of non or poor accountability structures in some of these organizations means that they are always in cross purposes of the community interests and it becomes even pronounced when one sees the slow but changing character of present day communities.²⁰³

3.5 Non- Cooperative obligation of the national government *vis a vis* the county government in promoting natural resource management.

The Constitution has in the promotion of devolution, created avenues of how the national government and the county government should engage in ensuring that the objectives of devolution are achieved²⁰⁴. The County Government Act²⁰⁵ as the implementing legislation

²⁰⁰Chapter 164 Laws of Kenya.

²⁰¹Chapter 486 Laws of Kenya.

²⁰² Supra note 11 at 634.

²⁰³ Supra note 11 at 630.

²⁰⁴ See Article 189.

require that county officials direct national government policies envisaged in the Constitution towards practical solutions. In addition, counties are required to consult with the national government from time to time on the way to implement those policies through the inter-governmental forums²⁰⁶. These consultations have been anchored in law under the Inter-governmental joint committees held between members of the county and the national government from time to time.

However, even though the country has embarked on participatory involvement of the so called ‘grassroots’ inclusive government, there are key strategic features that are not *ipso facto* subject to devolution principles. They are so symbolic to the nation in themselves that the only way to guarantee their protection and sustainable use is through the national government. The Constitution has provided the demarcation of duties²⁰⁷, but in addition, the national government is empowered to solely pursue these strategic interests, for the benefit of the country.

In implementing the devolved government objectives, Parliament enacted the Intergovernmental Relations Act²⁰⁸ which provides for mechanisms of engagement in actualizing the spirit of cooperation between the national government and county governments. One key objective crucial to the natural resource management discourse is the provision of a forum to coordinate governments’ policies, functions and legislation²⁰⁹. It should be noted that many of the functions of the national government under the Fourth Schedule of the Constitution are primarily concerned with the creation of appropriate policies for implementing different issues²¹⁰. Prior to the enactment of the new Constitution and as it is currently, the framework law for environmental management is the EMCA. The Act in the spirit of public participation decentralized environmental management whereby the mechanisms under the District and Provincial environment committees²¹¹ were utilized to facilitate citizen participation with the help of local actors.

²⁰⁵Section 106.

²⁰⁶ See *Ibid* note 93.

²⁰⁷ *Supra* note 198.

²⁰⁸ Act No. 2 of 2012.

²⁰⁹ Section 5 (c).

²¹⁰ See the Fourth Schedule.; *Supra* note 151.

²¹¹ See Ochieng B.O, “Institutional Arrangements for Environmental Management in Kenya” (2008) in Kameri Mbote et al *supra* note 70 at 191.

Now, the rigidity of the Act has been exposed because while it proposes sound principles of managing the environment, the Constitution has quashed decentralization which the Act advocated in favour of devolution. Further, there is impetus given under the Constitution for the national government to not only formalize the policy, but also to supervise its implementation under the Intergovernmental Relations Act. Whereas EMCA was effusive without any particular direction on key ecological and conservation issues, the Constitution has strictly sought to have policies that are ecologically driven, whereby the national government must ensure uniform application in all counties. For instance, the requirement of ensuring a ten (10%) percent tree cover in the country is an important ecologically consideration that the national government must be committed to implement through the counties without necessarily seeking extraneous consultative forums to achieve the goal.

This research has identified three issues that lend credence to the argument that the national government has key role to play directly, quite apart from the need for cooperation in the implementation of the community based natural resource management. First, there is an intrinsic supervisory role that the national government must play in managing natural resources. As the custodian of the environment and natural resources²¹², the national government is bound to ensure that the country's resources that are of significant importance are developed and used in the most sustainable way possible. For instance, the national government has created as a policy the use of renewable energy resources and has placed it at the fulcrum of increasing energy availability that is adequate and sustainable²¹³. Further to this argument, the national government's ability in resource mobilization is of great importance to communities as it can help avert certain calamities which counties may not have the inclination and ability to deal with. A key issue in Kenya is the human wildlife conflict. The presence of the Kenya Wildlife Service (KWS) ensures that communities living near wild animal habitats are protected and sensitized on the dangers of community.

Further to this intrinsic role, the importance of certain natural resources to the Republic is of key significance to the country that the benefits accrued from it should not only go to benefit the

²¹² See Article 22 of Part 1 of the Fourth Schedule of the Constitution.

²¹³ Under the Public Partnership Act, a number of energy projects that are going to exploit coal, gas and geothermal resources have been mapped out and have been advertised for heavily capitalized institutions to bid and implement them. See the National Priority Projects in https://www.google.com/?gws_rd=ssl#q=ppp+unit+in+kenya accessed on 9th September 2014.

local communities within the county that the natural resource is based, but must also reach the rest of the counties through the national government equitable allocation functions. For instance, the discovery of oil deposits in Turkana county has led the national government to reexamine the benefit sharing formula in key legislations²¹⁴ as one way of securing the enormous benefits for the whole country once commercial exploitation begins.

The gripe in Turkana has been that even at this early stage of exploration, there seems to be a general feeling that the local community is ignored in the provision of job opportunities and especially top positions²¹⁵. This has required the national government to engage the community and seek Tullow oil intervention in the allocation of the available job opportunities in order that the community can feel that it has fully participated in benefiting from the mineral.

Second, the national government is a long term stakeholder in the reintegration of communities in the natural resource management base, because it has become a major objective of ensuring that natural resources are sustainably used and conserved. The national government cannot use a vertical approach to the issue, but must first consider the incentive that would apply to communities if allowed to manage the resources in its behalf²¹⁶. Under the Constitution, the protection of animals and wildlife and the sustainable use of water can be handled in a far better way if communities are provided the incentives to do so.

The Wildlife Policy provided a stark assessment of the alienation of the community in wildlife management in the following words:

Most of wildlife protected areas were established without due regard to the surrounding landscapes. Consequently, boundaries between protected areas and the wider landscapes and communities are becoming distinct through the erection of fences and other barriers. In terms of wildlife management, the rigid boundaries between protected areas and the surrounding landscapes have compromised integrated and effective management of wildlife. Conservation and management of wildlife outside protected areas has not been integrated into the broader protected

²¹⁴ See the amendments to the Petroleum (Exploration and Production) Act Chapter 308 Laws of Kenya.

²¹⁵ Daily Nation, 'Tullow Oil firm to resume Turkana drilling on Friday' (Thursday November 7, 2013) in <http://www.nation.co.ke/news/Tullow-oil-firm-to-resume-Turkana-drilling-on-Friday/-/1056/2063826/-/r3renk/-/> accessed on 9th September 2014.

²¹⁶ Mumma supra note 13 at 631.

area management and there are limited partnerships between communities living adjacent to protected areas with park management authorities²¹⁷

It is one of the reasons that the Wildlife Management and Conservation Act²¹⁸, was passed into law and it provides how communities can create wildlife associations that are formal organizations, to help the national government through KWS, manage wildlife in their areas²¹⁹. The said Act further provides that the communities having ownership to land may exchange part or the whole of their land with the national government as will be recommended by the NLC if it's in the best interests of the national government to manage protected areas where wildlife are found. An example of a community driven wildlife association is the Olerai Conservancy in Kajiado County.

The Conservancy is managed by approximately 450 indigenous Maasai in an area measuring 9.32 square kilometers. This area acts as dispersal zone and a wildlife corridor for wild animals seeking pasture between the Nairobi National Park and the Amboseli National Park.²²⁰

It is important to note that with the increasing dynamics of community existence, their needs have also evolved. Therefore national government policies focusing on sustainable management of natural resources must provide direct and monetized incentives to ensure that collaborative effort with local communities are maintained and harnessed.

Another argument in support of the national government and local communities' collaboration is the need to protect the symbolic country's features that have cultural and heritage topographies. In Kenya, wildlife is in the category of natural resources known as the commons. The national importance attached means that the government must utilize coordination approaches to bring various actors on board and enhance capacity in managing wildlife resources²²¹. Therefore, the

²¹⁷ Wildlife Policy, 2011 at 11.

²¹⁸ Act No. 47 of 2013.

²¹⁹ Section 40. This is done through the creation of management plans that were prepared with the hindsight of KWS whereby, KWS supervises the implementation of these plans in accordance with the overall objective of wildlife protection and conservation. A successful wildlife conservancy in Kenya is the Ishaqbin Conservancy in Garissa County. See http://www.kws.org/parks/community_wildlife_program/Conservancies/Ishaqbin.html accessed on 10th September 2014.

²²⁰ See http://www.kws.org/parks/community_wildlife_program/Conservancies/olerai.html accessed on 10th September 2014.

²²¹ See supra note 232 at 14.

‘commons’ argument is an important feature in this discourse because the application that embodies protection here means it must be done for the national good.

The third argument is that of ecological considerations that require a holistic, national outlook and which must be examined in the context of sustainable conservation. Whereas the focus on natural resource is to utilize the natural resources available within the current generational needs, there is a global focus on conserving the environmental resources in the context of intra generational needs, whereby ecological requirements should be attained as a general requirement as well as the need to specifically secure the ecologically needs that are unique to different communities.

Under the Constitution, the State, which includes both national and county governments, must cooperate with persons in ensuring that they protect and conserve the environment and also ensure ecologically sustainable development of natural resources²²². The Constitution seems to imposing an innate obligation on everyone who interacts with the environment to consider integrating their plans in order to have a united front.

It has been argued that integration of policy making, in the issue of ecologically sustainable development in the environmental management, must have a balance struck between this issue and the social economic considerations of the community so that the decision making process is efficient.²²³ The narrative is sustained in practical terms whereby the needs of the population should as of right be met by what their immediate environment provides, but also the way the said environment will be exploited with due considerations of how the ecological demands of it must be sustained. Normative explanation is provided in the *Ogoniland case* where the African Commission when making a determination of a right to satisfactory environment, favourable to humane existence and development under the African Charter ruled that, this right require the state to take reasonable measures to prevent pollution and ecological degradation, promote conservation and secure ecological sustainable development and use of natural resources²²⁴.

²²²Article 69 (2).

²²³ See Kibugi R, “*Governing Land Use in Kenya : From Sectoral Fragmentation to Sustainable Integration of Law and Policy*”, (2011) Doctoral Thesis, University of Ottawa at 99.

²²⁴ Social and Economic Rights Action Centre (SERAC) & Another –vs- Nigeria (2001) AHRLR 60 [*the Ogoniland case*] quoted in Kibugi R. *ibid* note 223 at 90.

In trying to relate the legislative measures that should promote this constitutional objective, the EMCA (Amendment) Bill 2014²²⁵ has sought to promote the constitutional objective of sound ecological sustainable development in the context of social economic and therefore community needs. It has amended the general principles of EMCA and sought to introduce an identical clause to Article 69(2) of the Constitution which provides for cooperation between persons with state organs in conserving the environment and ensuring the ecological sustainability of it²²⁶.

The Amendment Act has sought to bridge the gap for the national governments, by providing for County Environment Committees²²⁷. These Committees shall essentially be concerned with the proper management of the environment in the counties²²⁸. Still, it is argued that for this ecological sustainable development principle to gain traction, the legislation to be enacted must progressively seek to realize these commitments as a way of ensuring that it incorporates general principles that shouldn't be restricted by legislation interpretation²²⁹.

3.6 Conclusion

The central theme of this chapter was to analyze how the Constitution has attempted to solve the dichotomous interests of the two levels of government and how the rights and responsibilities bestowed to them by law, help in the demystifying the natural resource management discourse. It has emerged that the often lukewarm relationship between communities and the central government prior to 2010, now has been stirred up and probably there is cause to worry about the county government and its so called 'trusteeship' responsibilities over local communities environmental interests.

This is not to say that the normative underpinnings of the CBNRM mechanism are not soundly acclimatized. But, the collective purpose of the concept must be recharged in light of the expanded role that counties must play in community environmental management. The concepts of use and ownership should be redefined in light of this tenure problems and the nomenclature of the law as it is applied. Applied environmental law must now see that once we are able to see

²²⁵ Kenya Gazette Supplement No. 114 of 25th July 2014.

²²⁶ New Section 3A which provides for the inclusion of ecological sustainable development in light of economic realities.

²²⁷ Section 18.

²²⁸ Section 30.

²²⁹ Supra note 238 at 92.

clearly what issues of use and ownership in the counties are like, we can say that a mutually beneficial relationship that would serve the community will be accrued in the end.

CHAPTER FOUR

INSTITUTIONALIZING JOINT MANAGEMENT IN ENHANCING CBNRM

4.0 Introduction

In the previous chapter, we have examined the reach in terms of community capacity development and the role the Constitution plays in protecting and promoting community resource interests even in the face of the devolved system of governance. It is emerging that the rosy feel that the devolved government structure was to bring, has neither been felt nor has it been fully developed in line with aspirations that were set in the Constitution²³⁰

The key issues of user rights of natural resources and who owns these resources may not in reality be settled with formalized law. The presence of county bureaucracy is already unnerving the local communities' indigenous ingenuity to manage their ecological resource base²³¹. Perhaps even, the question of whether we can rightly say that there still exists 'ancestral' land is now up for debate. Increased predatory machinations on land use based solely on the econocentric outcomes of what the land can produce have often bred resentment by local communities who view these resources as much more than that. The following paragraph aptly captures this sense of isolation when communities are unable to have the control of natural resources in their locality:-

Insights from various studies indicate that the environment bears meaning that provides identity, continuity and fulfillment to individuals and groups and alienation to these spaces can disorient and make inhabitants vulnerable²³².

The significance and importance of community interests on an econocentric and ethnoecological perspective cannot be overstated. The counter to the argument that counties are the true

²³⁰ See the CIC Assessment Report on the Implementation of the Devolved Government Structure 2014 Supra note 169 at 102. The Report states that implementation of devolution has been threatened by high drama from politicians both at the county and national level who have used the people's mandate to argue on who holds sway in county affairs. This is a typical situation that can drown the voice of the community in articulating their issues.

²³¹ See the displacement of local communities surrounding the Tiomin mining in Kwale County. The inability of the county and national government's in asserting the ecological question on the compensatory awards for land to be used in the mining activities has left the local community in Matuga with a sense of betrayal. See Abuya W, 'What is in a Coconut? An Ethnoecological Analysis of Mining, Social Displacement, Vulnerability and Development in Rural Kenya' (2013) 14 African Studies Quarterly 2 at 3,

²³² See supra note 247 at 3.

custodians of community based interests to natural resource management is that while devolution adds a significant boost in people-centric management, the progressive outcome that befuddles that expectation is bound to be lost by the adoption of centralist-like themes of management.

It is therefore imperative for this thesis to state that the approach that should be used is institutionalizing joint management. Joint management refers to the policy where management of natural resources by decision making, the sharing of benefits and responsibilities among policy makers in the county and national government and community elders²³³. If the country is not ready to recognized community land tenure rights, the best solution would be allowing rights of access to the benefits of utilization of these natural resources. On the hand, the right to ownership of the land and associated resources remains with the government.

This research will argue therefore that extensive citizen participation rather than focus on trusteeship by county leadership on local community interests in natural resources should be the point of departure in entrenching joint management. This thesis asserts that there is a great risk in not fully achieving the intentions of devolution and CBNRM in particular, if the focus is only on bureaucratic impositions that counties seem to be transplanting from previous central government systems. The concept as it is, even though originally from Southern Africa²³⁴, is cab be enhanced in its application in Kenya if the assistance and collaboration that is necessary between county authorities and local community leadership, is visible and genuine.

It is for that reasons and reasons to be provided elsewhere in this chapter that the need to institutionalize joint management will be important in the realization of ecological and sustainable use of natural resources where the benefits are visible for the community. In the next section, the thesis shall set out the case for attempted improvements.

²³³ Supra note 13 at 630.

²³⁴ Schafer J & Bell R, " *The State of Community based Natural Resource Management: The Case of Moribane Forest Reserve, Mozambique* ' (2002) *Journal of Southern African Studies*. Vol 28 in http://www.tandfonline.com/doi/abs/10.1080/03057070220140775#.VBmaKBZqL_c accessed on 17th September 2014 at 2.

4.1 Harmonization of laws and policies regarding citizen participation in national and county governments.

It is the argument of this research that one of the main problems affecting persons who are marginalized or communities that have resources but are unable to utilize them, is the fragmentation and consistent loss of direction of policy implementation. Prior to the enactment of the Constitution, natural resource management was predominantly approached from a sectoral position whereby policies laws and enforcement mechanisms were sectoral oriented²³⁵. With the Constitution in place, the focus now has been on aligning these sectoral laws with the devolved systems of government and especially the demarcated functions of the national government and the county government.

The thrust of the policy should be to establish a working relationship between the national government and county government on one hand and between the county government and local communities on the other, with a view to ensuring the full public participation is achieved.

The National Environment Policy 2013²³⁶ recognizes the inherent weaknesses of sector policy formulation where it observes the undermining of proper governance that discusses co-management in environment matters and whose consequence is weakened enforcement²³⁷. A properly harmonized policy in this case should promote access and full economic benefits to natural resource use by the local community, while the mechanisms of implementing these programmes should also be available whereby the counties capacities will have to be enhanced. The Constitution's need to promote integration and principles that primarily promote the participation of the people have meant that the structure of the implementation should be all inclusive and participatory. Harmonization will entail merging of legal principles that permeate the reasoning behind the community involvement as espoused in the Constitution.²³⁸

²³⁵ See Kameri-Mbote supra note 140 at 279.

²³⁶ See the National Environment Policy as aligned with Constitutional principles. Supra note 34.

²³⁷ See supra note 247 at 5.

²³⁸ Article 14 of Part 2 of the Fourth Schedule to the Constitution provides that the counties must make every effort to incorporate communities in governance and to the extent that the said governance is at the local level, they are to ensure that the administrative capacity is guaranteed to promise this participation. See also Article 6 (2) which develops the ideals of devolution.

To understand what harmonization would be in the interests of natural resource management, the bane of why we have devolved units of government is revisited. First, the envisaged mechanisms of engagement under the Intergovernmental Relations Act²³⁹, brings into focus the constitutional need for the national government and the county government to cooperate in ensuring the governance system works. In the Report of the Implementation of the Devolved Governments²⁴⁰, the Task Force identified the need for integration in development planning in the counties. It states:-

The Integrated Development Plans are comprehensive, strategic planning frameworks to help the counties cost effectively and progressively achieve their developmental mandate. They will assist the devolved governments to amongst other things:

- align national and devolved government development and spending priorities;*
- align their financial and institutional resources behind agreed policy objectives and programmes; and*
- serve as a basis for engagement between local government and the citizenry at the local level, and with various stakeholders and interest groups²⁴¹.*

It is envisaged that in the realm of joint management, the harmonizing factor in ensuring that sound land use is implemented is the National Land Commission. As the custodian of county and national public land interests, the National Land Commission (NLC) stands at a critical point because the issues surrounding environmental and natural resource management are also compounded by historical and perceived econocentric interests that have shaped the debate over the loss of the *commons* approach to land²⁴².

The NLC mandate should be one that ensures that the county and national authorities do not take community involvement in natural resource management as passive participation while they retain the methodology and approach in decision-making²⁴³. In addition, there is a rush to reinstate the lost argument of the *commons* approach in bringing a harmonized approach in the natural resources management agenda, in order to fully exploit the space that the Constitution has brought on board. The issue of cooperation can be pursued on this note with purpose

²³⁹ See supra note 223.

²⁴⁰ The Final Report of the Task Force on the Implementation of the Constitution (2013).

²⁴¹ See Ibid note 254 at 148.

²⁴² See Okoth-Ogendo's supra note 8 at 112.

²⁴³ Fabricius C, *et al*, "Rights Resources and Rural Development in Southern Africa: Community Based Natural Resources Management" (2004) Earthscan at 21.

whereby counties mobilize their authority to institute the national government directional statements on the way different sectoral issues of environmental management can be realized.

Secondly, harmonization of policies, in the way the devolved functions have been set up, must be pursued with vigour with the key issue of citizen participation being visible from the upper echelons of county leadership to the very grassroots. Whilst the provisions of the County Government Act on citizen participation²⁴⁴ have seemingly created the necessary legislative offices in the counties, this research has identified that quite apart from what is viewed as grassroots participatory mechanisms, there is a new bureaucratic culture that is slowly growing that seems to be in the rush to oust proven community based natural resource mechanisms frameworks that although primitive on the face, are quite adaptive in terms of actual environmental management.

In Nyeri County, this research has found that the county executive in charge of environmental matters has ameliorated itself with functions that involve among others, ‘community sensitization on the importance of security of infrastructure’ and ‘ploughing back user fees to maintain and manage resources²⁴⁵’.

These functions that this county has taken in trying to manage forests seems to be ignoring the critical role played by communities. By segmenting these functions, the county has created an avenue of conjecture in that, the national policy which advocates for empowerment of communities in forestry management is lost in translation *vis a vis* the county’s explanation of what articulating the national policy on forest management is²⁴⁶. The issue is compounded further by a lack of legislation and therefore enforcement action at the said county that would anchor the actions of the county executive with regard to these issues.

It is the contention of this thesis that whereas the counties have been bestowed with the fiduciary duties of holding land and associate natural resources on behalf of communities, proper oversight of the manner of implementation can only be fully achieved by local community participation in the management and decision making process. This must be done by all persons concerned in the

²⁴⁴ Supra note 177.

²⁴⁵ See the ‘Strategies of dealing with National Government Forests under the Water Sanitation Environment and Natural Resources in Nyeri County in <http://www.nyeri.go.ke/water> accessed on 22nd September 2014.

²⁴⁶ See the National Environment Policy 2013 at 12.

county. This will bring the point of the critical role played by local non-state actors in, to be discussed hereunder, in assisting the communities protect what is rightfully theirs.

4.2. Enhancing the capacity of non-state actors in safeguarding the CBNRM narrative.

Joint management seeks the participation of non-state actors if CBNRM initiatives are to work. The Constitution for example provides that cooperation is expected from the people in charge of state organs and ‘other persons’ in the protection and conservation of the environment and also the ecological sustainability of the said environment²⁴⁷. In the counties, the County Government Act²⁴⁸ has established principles that promote the role of non-state actors. It provides for the recognition of and promotion of the reciprocal role of non-state actors participation and governmental facilitation and oversight.

This is crucial since the idea of accountability that is a national governance principle²⁴⁹ must be properly elucidated at this localized level of governance principally because, the scrutiny of how the functions delegated to it are examined, may not wholesomely explain every decision made and especially so if the decisions seem to be in direct conflict with national government sectoral agencies.

In forest management for example, the role of non-state actors has often been viewed as one way to ensure decentralization does not cause deviation to the ultimate goal. The Eburu Forest Conservation Network which is an umbrella body for community based organizations (CBOs), NGOs, KFS and local communities CFAs has been in operation since 2000 on the western side of the Mau and the mandate has been to enhance forest protection and re-forestation drives²⁵⁰. Its donor funded and its existence is not based on government collaboration only but a coalition of different stakeholders.

²⁴⁷ Article 69 (2); See also Kibugi supra note 247 at 100.

²⁴⁸ Supra note 176.

²⁴⁹ Article 10 (c).

²⁵⁰ See ‘Eburu Forest Conservation Network’ in <http://thereddesk.org/countries/actors/eburu-forest-conservation-management-network-kenya> accessed on 23rd September 2014. It has been said that the change of administration in 2002 in Kenya brought a sudden increase in the number of societies and NGOs that were registered to engage in forest conservation measures. See Gibbon H et al, ‘Forest and Woodland Management in East and Central Africa : Emerging Models for Improvement of Livelihoods and Natural Resource Management in Kenya and Zambia’ (2005) International Forest Review vol 7 at 196.

Certain CFAs are able to function largely because they receive capacity aid from NGOs. The influence of these non-state actors cannot be overstated as they ensure that the local communities involved in forest management receive regular education on how to conserve forests, plant and nurture tree seedlings, exploit the forest undergrowth through extraction of biomass and reduce incidences of illegal logging and charcoal making²⁵¹. Additionally, bee-keeping and eco-tourism are ways of generating income for CFAs and the same is provided with the necessary incentives by the CBOs and NGOs in order that the sustainable conservation of the ecological forest resources is maintained²⁵².

It has been argued that since it's inevitable, even for devolved governments to avoid these non-state actors²⁵³, the focus should shift towards providing more capacity through collaboration and allow for entrepreneurial adaptation. Market commoditization is one way of retaining focus and drive in the CBNRM mechanism in Kenya whereby, non-state actors such as CFAs, CBOs and local NGOs working together with county authorities can be drive the mechanism further towards success.

This research proposes that one way that this entrepreneurial approach can be utilized in enhancing CBNRM pillars is by the use of devolved government funding in environmental management matters by the local organizations themselves. This is whereby having institutionalized themselves in formalized groups, they can take advantage of the government procurement process. The State's policy in procurement matters²⁵⁴ where marginalized groups are provided their special category in state tendered projects and which at least one such group is assured of work, can help a great deal in the involvement of local CBOs that are run on fringe budgets and intermittent financial assistance from transnational NGOs to reignite their interests in matters involving environmental management and specifically water and forest management.

If the devolved functions of environmental management that benefit the counties can be matched with non- state actors involvement in environmental management and conservation,

²⁵¹ See the World Bank, *Strategic Environmental Assessment of the Kenya's Forest Act 2005* at 26.

²⁵² Ibid note 275.

²⁵³ Ibid note 275.

²⁵⁴ See the Public Procurement and Disposal (Preference and Reservations) Amendment Regulations 2013 which require the procuring entities to allocate 30% of all their tendering to disadvantaged groups such as youth, women and persons with disabilities in <http://www.agpo.go.ke/pages/about-agpo> accessed on 23rd September 2014.

environmental goods can be utilized in the mode that would achieve the sustainable resource use and motivate adaptation methods that are jointly managed and monitored by county authorities and representatives of local communities. In the end, local communities will feel that they are actively involved in implementing State policies on natural resource management effectively.

4.3 Full Implementation of the Community Land Bill and promotion of capacity within local communities

This research has introduced the Community Land Bill which has been published in line with the requirement of implementing and securing community tenure rights²⁵⁵. The Fifth Schedule to the Constitution provides that the passage and commencement of this Bill shall be done within five years of enactment of the Constitution. Time has come to finally reinstate the *commons approach* concept in a formal structure that is sustainable. The Bill brings that old adage of cultural and ethnic entitlements to informal claims. It sets out to develop a normative process of recognition of community property rights to land. In supporting the implementation of this Bill and especially where the importance of CBNRM is concerned, this research identifies four key areas that support the argument that joint management between local communities and state authorities will be crucial in implementing it.

First, the Bill seeks to provide formal legal recognition of tenure.²⁵⁶ This recognition has hitherto been lacking and even now that this is only a Bill, the only legally recognizable forms of tenure that affect communal land rights are provided under the group ranches and trust land²⁵⁷. It is important to note that community tenure is basically hinged on customary land tenure where the corporate membership of a people who have ‘similar identity’ traits in this corporate structure are able to assert their property rights.

In environmental management, it is important that this corporate ownership of land be recognized as one way of incentivizing community involvement especially on ecological conservation pursuits. Definitive allocation through adjudication and registration of community

²⁵⁵ See Article 63.

²⁵⁶ Section 6 (2) describes community land tenure to be (i) customary (ii) leasehold (iii) freehold (iv) and any other acceptable form of tenure.

²⁵⁷ See Kameri-Mbote *et al* supra note 140 at 154.

land is far more effective than informal recognition of ownership. Ownership of community land would generally improve the assertion of natural resources in the sense that:-

- The community is bound to look beyond temporal and cosmetic approaches to community ownership whereby they will see county presence as an enemy and rather focus on looking at itself as a joint participant with these state institutions in the sustainable economic and ecological exploitation as a means to benefit from the natural resources.
- Reduction of conflicts over boundaries and access to resources as the corporate culture continues to expand will ensure the consultative forums among neighbouring communities are meaningful and sustainable.
- Meaningful land use is bound to be exercised thus enhancing value and ecosystem protection.

Secondly, the Bill establishes management structures which are meant to create order and sound leadership that accentuates traditional patriarchal systems. The Bill envisages membership of these communities in cross generational lines²⁵⁸, perhaps as recognition of the social hierarchy that characterized community membership²⁵⁹. It is further interesting to note, that by having these management committees, the State through the NLC, wants to stay out of the internal governance, but provide advise that is strategic in nature. This is crucial as it further propagates the entrenchment of community land tenure with community centered approaches to natural resource management, rather than bureaucratic decentralization by counties or the national government, which is overbearing in every sense.

Third, the Bill devolves ecological functions of the environment to communities²⁶⁰. There cannot be meaningful natural resource management and therefore conservation, if State organs do not involve communities in joint management set-ups in the work itself. The Bill's approach is to use the NLC to create measures that have to do with protection of critical ecosystems and habitats

²⁵⁸ Section 17 provides that the membership shall have elders, the youth and women as part of the committees.

²⁵⁹ See Okoth Ogenido supra note 8 at 108.

²⁶⁰ See Section 52.

especially those involving endangered species and the incentivizing of communities involved in income generating activities that conserve the environment²⁶¹.

Further and more importantly, it establishes measures on how communities living close to forests, water and other resource areas can access, use and co-manage these resources, where they assert customary rights to them²⁶². This is a landmark provision since historically, it has been used to alienate communities living next to or inside forests, from utilizing forest resources. For instance, the Endorois community in the Rift Valley had long for a long time been denied their customary right to utilize resources in the larger Mau forest. They took their grievance all the way to the African Court of Human and People's Rights where the Court upheld their argument that as a community, they are entitled to assert their rights²⁶³.

Fourth, the Bill provides for the community to use their natural resources where possible for investment purposes²⁶⁴. The Bill states that the community can enter into contracts with potential investors to develop and use their community land where natural resources lie, and the proceeds therewith will be shared within a formula that first benefits them and the rest is allocated for the county. The Bill presupposes that the committees will have *juridical persona* to enter into those contracts and the NLC will be at hand to make sure the community is not exploited. This particular measure is important as it ensures that conservation efforts are tempered by carefully chosen sustainable commercial exploitation of these natural resource goods. In Kwale County, the Mwalugaje Elephant Conservancy was formed with the help of CBOs and KWS to sensitize the local community on the need to provide a safe corridor for elephants between the Shimba Hills National Reserve and Mwalugaje Forest, as well as offer tourism generated income.

The local community has been able to benefit from the fenced off section and the proceeds therein, have been provided to the Golini Mwalugaje Community Conservation KWS to be

²⁶¹ Section 36 (2)(b) .

²⁶² Section 36 (2)(c) .

²⁶³ See Mumma supra note 10 at 623.

²⁶⁴ Section 52

shared with the local community. It should be noted that the local community had to relinquish land that they owned to allow for the creation of this corridor.²⁶⁵

4.4 Co-Management Adaptive Measures in light of county supervisory role

The ability of community management of natural resources has for a long time been seen as effective for the reasons that communities must first have a preference to sustainably manage the environment around them as opposed to liquidating the resources and taking the proceeds therein elsewhere. In addition, communities believe they possess the capability to use social and material resources to solve collective problems that are environmental in nature. Further, they understand what actions are necessary to engage to be able to guarantee sustainable use of these resources and information, mostly indigenous, is available to them to effectively create necessary managerial responsibility²⁶⁶.

In light of this, one would be forgiven to ask, what then will the state want to focus on in the pursuit of environmental management, in light of community capability? Co Management has been referred to as the management that embodies sharing of benefits, responsibilities, control, and decision making authority as between the localized groups of natural resource users and government agencies.²⁶⁷ . It does not go into the rubrics of relinquishing authority over natural resources. It retains the ownership of these resources, but allows communities access to the benefits of utilizing these resources²⁶⁸. Sectoral laws in Kenya have already made a mark in this delegation. For example the Forest Act provides for the formation of CFAs within local communities to assist in the conservation of government declared forests²⁶⁹. It is for these reasons that if the co-management are adapted to suit the levels of government that we have and community associations, the outcomes of the what they can achieve is significant.

²⁶⁵ See 'Mwalungaje Conservancy' in http://www.kws.org/parks/community_wildlife_program/Conservancies/mwaluganje.html accessed on 25th September 2014.

²⁶⁶ Singleton S, 'Co-operation or Capture? The Paradox of Co-Management and Community Participation in Natural Resource Management and Environmental Policy Making' (2000), Environmental Politics in <http://www.tandfonline.com/doi/pdf/10.1080/09644010008414522> accessed on 25th September 2014 at 4.

²⁶⁷ Mumma supra note 11 at 630.

²⁶⁸ Ibid note 290.

²⁶⁹ Supra note 264 at 110.

This research identifies certain threats to the adaption of co-management as a policy direction. One major concern is the breakdown of the traditional community as it was known²⁷⁰, caused mainly by factors such as population growth, rural urban migration and even technological innovation which seemingly is elbowing traditional systems of sustainable exploitation²⁷¹.

On the flipside, it is the view of this research that co-management is possible as a policy direction position even in the counties. One reason is that the Constitution provides for inclusivity in executing the policy frameworks set forth on environmental management²⁷². For instance, in the County Integrated Development Plans of most counties, there is an attempt to recognize the need for co-management in organizing for management of natural resources. Nyandarua county for instance has identified the Water Resource Users Association in certain sections to be a viable option through joint management to scale up the water supply distribution throughout the county²⁷³. It is in this context that where the state and local communities fail in their own right, then the capacities and incentives of both parties can be utilized to effectively enable co-management to succeed.

4.5 Reintegrating customary law as an attempt of reinstating the *juridical persona* of communities

This research has established that the commons approach is one that forms an important connection point between historical assertions and injustices regarding ownership and the heavily formalistic and dismissive transplanted law that removed the radical title to land from the community. Now, it has been recognized that communities are brought together by shared customs and culture²⁷⁴. The loss of this perch for communities when it came to stewardship of land resources during the colonial period, was only temporal. It is argued that the novel nature of the system of the community means that the customs will remain to dictate certain core qualities unalienable to communities.

We have seen in this thesis that historically, communities lacked the capacity by law to own property. Use of resources was also restricted simply for lacking the legalistic reference of

²⁷⁰ Supra note 11 at 632.

²⁷¹ Supra note 179 at 5.

²⁷² See generally the Fourth Schedule.

²⁷³ Supra note 200 at 113.

²⁷⁴ Okoth Ogendo supra note 8 at 114.

defining what community is. In essence, the common shared characteristics of kinship, blood and marriage have been there but were deemed not normatively inclined to provide definitive components of the legal personality of communities. The thesis argues that its time to reinstate what communities lost during the colonial period. It has been argued that restoring customary law in national legal systems would also help place customary land law at its rightful place²⁷⁵. This is so because policy making at the national level will help restart the management of natural resources as a common resource to be sustainably exploited.

Its suffice to say then, that the framework set by the Constitution not only enhances this argument of reintegrating customary law, but also rebuilds long lost ideals of why customary law cannot but simply thrive in African legal systems. The Constitution sets the pace for recreating that juridical persona of common property ownership. It rebuilds the customary ethos of culture, ethnic and similar interest theories to be the basis of setting out the *legal persona*²⁷⁶. In this context, the nature of what communities would want to assert is basically their customary rules and practices whereby the indigenous property rights are elevated to take into account access rights and control and management.²⁷⁷ Access in this case would guarantee that the sum total of the rights that can be asserted herein will result in the benefit of whole communities based on the social and political connectors that are at the center of their implementation.

It is the argument of this research therefore that while CBNRM seeks to focus more on access of resources, the result is true that that tenure rights on communities that the Constitution has sought to elevate at the same level as individual and public, should be championed in order that where it is clearly defined that there are communal rights to land, over and above accurate definitions of traditional ownership, then it is better that communal interests be recognized since these interests assert the pace for modern thinking of property ownership that have been defined further by socio-economic changes, the world over.²⁷⁸

In addition and building on this argument, if the essence of community land rights and therefore control of resources, must be tempered with lack of ownership, the best path to drive those assertions would be through the use of community interests that are now discernible in law. This

²⁷⁵ Supra note 247 at 115.

²⁷⁶ Article 63.

²⁷⁷ Kameri-Mbote *et al* supra note 140 at 37.

²⁷⁸ Supra note 46 at 40.

brings forth the place of county governments in advancing the legal personality argument. The Constitution identifies the following areas that counties should be seen to advance the community rights to land resources. These include:-

- (i) The holding of trusteeship responsibilities over public land²⁷⁹ and unregistered community land²⁸⁰
- (ii) Driving the national government agenda on policies relating to soil and water conservation and forestry.²⁸¹
- (iii) Ensuring and coordinating the participation of local communities in governance (of environmental matters) at the local level²⁸².

The impact of having these 'powers' in place is that it revitalizes communities to embrace cooperation and joint management with the county as the emblem of social reengineering of property rights whereby the essence of communal ownership will be placed on counties as the custodians. It has been argued elsewhere that communities may not necessarily be interested in the latest bureaucracy that has appeared in their midst²⁸³. What is important in the argument of reinstatement is whether, even though they may not be able to fully assert ownership rights because of myriad of factors such as privatization of land, illegal allocations and fragmentation of land holdings caused by rapid population growth, is access guaranteed to enable the sustainable exploitation of these resources?.

The county, as this thesis would call, an additional conveyor of community access rights must then ensure that self-governance as enshrined by the Constitution²⁸⁴ is placed at the doorstep of communities in order that they, and not the counties, dictate how CBNRM should be done.

In order to achieve this threshold of fully reintegrating customary law as an integral part of the national legal systems, the fragmented legal regimes applying in the identified Constitutional components of natural resources such as fossil fuels, water, minerals, forests, biodiversity,

²⁷⁹ Article 62 (2)(a).

²⁸⁰ Article 63 (3).

²⁸¹ Article 10 of Part b of the Fourth Schedule.

²⁸² Article 14 of Part b of the Fourth Schedule.

²⁸³ Supra note 131 at 37.

²⁸⁴ Article 174 (c).

genetic resources, sunlight and other sources of energy, must be harmonized in order that this argument can hold sway²⁸⁵.

This research identifies that the upstream oil operations as one area that should be harmonized in recognition of community customary interests. The discovery of petroleum deposits in Turkana county has ignited debate of the preparedness of the country in dealing with various interests in this mineral. The application of this Act is permit driven and it negates the role of the local communities in providing access to adjunct resources such as water and on the other hand reduction of tension among subsets of the local communities where perception of favoritism is bound to rise.

With the wholesome incapability of this law in mind, Government commissioned a fresh Energy policy which is already at its draft stage, encompassing the entire energy sector. The Government proposes under the new policy to restructure the model Production Sharing Contracts (PSC) to cover the inherent weaknesses occasioned by the Act especially with regard to community access such as:-

- Compensation rules applicable to communities losing land for extraction purposes.
- Community awareness and participation.
- Environmental protection.
- Conservation and management and
- Sharing of benefits mechanisms between the national government, county government and the local community²⁸⁶.

It is to be summarized here therefore that the course that the reinstatement argument should take should be one that exemplifies the need to have legislations that are designed properly enough to capture that direction. Kenya stands at a critical juncture whereby the discoveries of various minerals must be met by concordant and progressive legislations that promote community uniqueness as well as shepherding the national and county governments to realize the profoundness of their responsibilities in order that the *persona* of the community is protected.

²⁸⁵ Article 260 which interprets what 'natural resources' are.

²⁸⁶ Draft National Energy Policy 2014.

4.6. Conclusion

The devolution of the government of Kenya is now with us and the Constitution has set it out to make environmental management a far more appealing and juridical sound proposition that seems to resonate with international commitments that Kenya has. The concept of community based natural resource management, though criticized as lacking the juridical underpinnings that can persuade scholars of its essence²⁸⁷, is as submitted in this thesis, an offshoot of community rights to land and it extrapolates the real danger that communities in Africa and especially those relying on rural livelihoods, face when of comes to access.

By and large, the dynamics associated with community dispersal tendencies and socio economic changes has led to a critical question that one is unable to ignore anymore. Are there definable communities?. One can argue that the concept of CBNRM may not stand on solid ground if there is no community that by any stretch of imagination is capable of being discerned. Be that as it may, the face of the society hasn't changed much since the colonial period. Communities continue to be defined on the basis of ethnic, cultural and common heritage. The Constitution has sought not to leave any gray area on what is the legal meaning. In the end, the concept of CBNRM begs to have a place in the robust environmental management spectrum and with the undertaking on Millennium development goals, climate change and Agenda 21, Kenya must proceed to jointly manage its environment sustainably.

This thesis has grounded the argument that devolution may not singularly be a panacea of community natural resource use emancipation. What needs to be pursued is a collaborative and cohesive framework that allows all the competing domains of governance to thrive either by themselves or in cooperation with themselves, to make natural resource use achievable.

It has been discovered that the rosiness of devolution and the allure of possible self-governance is not assured especially to entities that are unrecognizable in law. The tragedy of the commons debate is back. Yet its back, not because there is desperation to evolve, but there is a danger of capture. This capture is principally based on ethos that are not driven by what is African about the governance that we still uphold. The environment is what makes society sane. The lack of it can signify anything but peace. The shift in the power base from the central government and

²⁸⁷Kameri-Mbote et al supra note 140 at 26.

moving it to the people²⁸⁸ can be said to be a master stroke since, as this thesis has stated, natural resource management is only safely secured if the people are involved intimately in its management.

In that connection, what matters now is not so much as to invent new processes simply because the Constitution has implored on creation of structures of governance. It is by using structures in the community that have had success to enhance participation among community stakeholders, integrating traditional knowledge and science and devolving decision making and management roles to communities.²⁸⁹

This thesis is of the view that a possible realization of community involvement as a case of equal partner in the management process, is possibly s Realization of Article 63 of the Constitution through the passage of the Community Land Bill is one area that can be said to be a giant step in the reinstatement of the African commons.

In the end, the mechanisms of devolution should be as a matter of course be easily achievable but with a goal of sustainable environmental management so that the resources in Kenya and in the counties can benefit all now and be available for future generations

²⁸⁸Article 1 (2).

²⁸⁹Armitrage Supra note 75 at 710.

CHAPTER FIVE

5.0 RECOMMENDATIONS AND CONCLUSION

5.1 Recommendations

The bane of this thesis has been to examine the place of CBNRM in the discourse of managing land and associate natural resources. We have a progressive Constitution that captures the need to protect our environment in its preamble, sustainably for the benefit of future generations²⁹⁰. In that spirit, this thesis highlights the recommendations that will guide researchers, policy makers and other interested persons on how the concept of CBNRM can be secured in light of the devolved government system in Kenya.

The thesis has identified the institutionalizing joint management as the archetypal argument that will seek to protect the local community interest. Since communities are not assured of ownership and therefore user rights to natural resources, the state would do good to avoid conflict, by allowing these local authorities the access they need to sustainably utilize natural resources. In developing this model, the research has identified the following points in advancing the argument of joint management

First, there is need to harmonize the county and national government policies on citizen participation. A properly harmonized policy in this case would ensure access to economic benefits to natural resource use by the local community. In addition, the mechanisms of implementing these programmes would be available in order to enhance county and national government capacities of taking in citizen participation. The Constitution's need to promote principles that primarily uphold the participation of the people have meant that the structure of the implementation should be all inclusive and participatory.

Secondly, the enhancement of non-state actors in their ability to promote joint management in CBNRM is a must. The local community has had a long time champion to assist it in advocating for involvement in managing its resource base. By use of devolved funds, local non state actors can enhance their abilities to continue playing that important role that communities have often expected them to play in order that their environmental systems are protected.

²⁹⁰ See the Preamble of the Constitution.

Thirdly, the full implementation of the Community Land Bill will see further gains in the CBNRM narrative. One important addition in the argument of joint management in this Bill is the recognition of community land tenure and therefore, the old problem of legal personality of communities seem to be settled.

Fourthly, co-management as a strategy needs adaptive measures in order to take advantage of the policies that counties are required to implement as the trustee of land and associated natural resources in the counties. This argument presupposes that if rights of ownership of natural resources by communities are totally incapable of being achieved, the need to promote access to these resources becomes an inevitable conclusion.

Lastly, the reintegration of the community sense of *juridical persona* can act as a catalyst towards accelerating the position of the local community in the natural resource management table. Further to the argument that the Community Land Bill seeks to secure the community tenure, customary law is an ingredient of the CBNRM narrative albeit in the subtle sense because, community structures, even of other issues apart from ecological sustainable management, were hinged on cultural norms that laid the basis of the existence of these communities and what they held dear to themselves.

5.2 Conclusion

It is clear that while laying the foundation on how the opposing interests of the counties and the communities must be handled on CBNRM, it is accepted that the general obligation of providing leadership in county natural resource use is vested in the county governments. Therefore, the values that define communities must be upheld by the counties in the management of natural resources.

The concept must be revitalized in light of the expanded role that counties must play in community environmental management. The concepts of use and ownership should be redefined in light of this tenure problems and the language of the law as it is applied. Environmental law must now see that once we are able to see clearly what issues of use and ownership in the counties are like, we can say that a mutually beneficial relationship that would serve the community will be accrue in the end.

The Constitution has implored on adhering to the devolved system of governance. In that connection, the community will have the success to enhance participation among community stakeholders, integrate traditional knowledge and science and devolve decision making and management roles are expected to play a significant role in cementing the CBNRM narrative and specifically the place of the community in ensuring that there is success.

In the end, the collaborative action is expected to have the desired results in the actualization of the CBNRM concept between the county governments, national governments and local communities which should be pursued through sustainable development initiatives.

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