

RECONCILE

KNOW COMMUNITY LAND LAW PROVISIONS



VITAL DEFINITIONS

Certificate of reservation means a certificate issued in the interim by the Registrar pending the registration of community land and acquisition of the certificate of title. Community means a consciously distinct and organized group of users of community land who are citizens of Kenya and share any of the following attributes- common ancestry, similar culture or unique mode of livelihood, socio-economic or other similar common interest, geographical space, ecological space or ethnicity.

Community assembly means a gathering of registered adult members of a community convened in accordance with this Act.

Communal use of land means holding or using land in undivided shares by a community. Community land includes; land declared as such under article 63(2) of the Constitution, and land converted into community land under any law.

Community of interests means the possession or enjoyment of common rights, privileges or interests in land, living in the same geographical area or having such apparent association. Community reserve land means any land set aside for communal or land allocated by the registered community for individual occupation and use.

Community tenure system means unwritten land ownership practices in certain communities in which land is owned or controlled by a family, clan or a designated community leader.

Customary land rights refer to rights conferred by or derived from African customary law, customs or practices provided that such rights are not inconsistent with the Constitution or any written law.

Organized group includes any or both formal and informal kinds of organization in the community setup.

Registered community means a community that has completed the registration processes and is recognized under this law.

Spouse has the meaning assigned to it under the Marriage Act, 2014.

Vested interests means absolute and indefeasible ownership.

The act appreciates the rules on regulations set under article 66 and 40 of the Constitution as community land ownership is not absolute.

The act has further introduced a new form of tenure system other than leasehold and freehold there will be the customary tenure system.

Customary land rights are to be recognized, adjudicated for and documented for purposes of registration in accordance with the Act or any other written law.

It ought to be noted that customary land rights may also be held in common and will have equal force and effect in law with freehold or leasehold rights acquired through allocation, registration or transfer.

ADMINISTRATION AND MANAGEMENT

A registered community is to have a Community Assembly. The quorum for decision making by the community will not be less than two thirds of the community assembly. Community assembly is to elect between seven and fifteen members of the community assembly to constitute the Community Land Management Committee.

The functions of the Community Land Management Committee is to run of the day to day functions of the community.

Functions include;

- Manage and administer registered community land on behalf of the respective community;
- Coordinate the development of community land use plans in collaboration with the relevant authorities;
- Promote the co-operation and participation among community members in dealing with matters pertaining to the respective registered community land;
- Prescribe rules and regulations, to be ratified by the community assembly, to govern the operations of the community.

Any decision of a registered community to dispose of or otherwise alienate community land is binding if it is supported by at least two thirds of the registered adult members of the community, while all other decisions of the registered community is to be by a simple majority of the members present in a meeting.

County Government is to hold in trust all unregistered community land on behalf of the communities. It is to hold in trust for a community any monies payable as compensation for compulsory acquisition of any unregistered community land. Upon registration of the land, the respective county government is to release to the community all such monies payable for compulsory acquisition.

The monies are to be deposited in a special interest earning account by the county government. The respective county government will transfer the amount and the interests earned to the communities as may be prescribed. Any transaction in relation to unregistered community land within the county is to be in accordance with the provisions of this Act and any other applicable law.

Upon registration of any unregistered community land in accordance with this Act, the respective registered community is to assume the management and administrative functions provided and the trustee role of the respective county government in relation to the land is to cease.

A county government is not to sell, dispose, transfer, and convert for private purposes or in any other way dispose of any unregistered community land that it is holding in trust on behalf of the communities for which it is held.

On environment and natural resources management;

Natural resources are to be used and managed;

- Sustainably and productively;
- For the benefit of the whole community including future generations;

- With transparency and accountability;
- On the basis of equitable sharing of accruing benefits.

Benefit sharing agreements relating to investment in community land will be made after a free, open consultative process and will contain provisions on aspects indicated under the section. The agreement is to be between the investor and community and it has to be approved by two thirds of members at a community assembly meeting called to consider the offer and at which quorum of two thirds of the members of that community is obligatory. Community may request guidance from relevant stakeholders including County government.

A registered community may make rules or by- laws for regulating the management and administration of their land and they are to provide;

- The regulation of investments on the land,
- The determination of terms of any leases granted for purposes of investment,
- The conservation and rehabilitation of the land, land use and physical planning and other relevant matters.

Further into regulating community land, the Act appreciates article 66 of the Constitution that provides that the State may regulate the use of land. Therefore, the management of community land will be subjected to national government laws and policies relating to the resources in Kenya.

On settlement of disputes relating to community land;

The act appreciates the need to use alternative dispute resolution mechanisms including traditional disputes mechanisms and conflict resolution mechanisms. It provides that dispute (between members of registered community and in between registered communities) at first instance is to be resolved using any of the internal dispute resolution mechanisms set out in the respective community by-laws.

Alternative methods of dispute resolution are to be given priority once dispute arises. It appreciates the usage of customary law. A court or dispute resolution body is to apply customary law prevailing in area of jurisdiction of parties to a dispute or binding on the parties to a dispute in settlement of community land disputes. So long as it's not repugnant to justice and morality.

The Act appreciates mediation and arbitration and the fact that a community may decide to refer to arbitration at any given level of dispute resolution. An agreement reached during the mediation process the agreement will be reduced into writing and signed by the parties at the conclusion of the mediation.

In case an arbitration agreement fail to agree on the appointment of an arbitrator or arbitrators the provisions of the Arbitration Act relating to the appointment of arbitrators will apply. Where all efforts of resolving dispute under this Act fail a party may refer the matter to the court as provided in the Act. Court may confirm, set aside, amend or review the decision which may be subjected to an appeal or make any order in connection there with as it may deem fit.

RECOGNITION, PROTECTION AND REGISTRATION OF COMMUNITY LAND RIGHTS

Procedure for registration of communities is that a community claiming an interest/right over community land is to be notified in at least one newspaper of nationwide circulation and radio, invite all members of the community with some communal interest to a public meeting for the purpose of electing the members of the Community Land Management Committee. Notice is to be given to the national county administrators and county government administrators in the area. The community land registrar may use all available means of communication e.g. electronic media to reach the members. The Community Land Management Committee is to come up with a comprehensive register of communal interest holders. They should come up with the name of the community and is to submit the name, register of members, minutes of the meeting and the rules and regulations of the committee to the Registrar for registration.

Procedure for recognition and adjudication of community land is that the Cabinet Secretary is, in consultation with the respective county governments, develop and publish in the Gazette a comprehensive adjudication programme for registration of community land. In consultation with the county government ensure the process of documenting, mapping and developing of the inventory of community land is transparent, cost effective and participatory. The inventory is to be accessible to the county government for by members of the community. The CS is to issue a public notice of intention to survey, demarcate and register community land; contain the name of the community; state which land is to be adjudicated; invite all interested person with overriding interests or any other claim on the land, to lodge their claims; specify an area or areas of land to be a community land registration unit; and be for a period of sixty days. The CS is to cause the land to be adequately surveyed but such survey exclude- all public purposes parcels; and adjudicated private land. A cadastral map produced and presented to the Registrar for registration.

In Community land Registrar the Chief Land Registrar is to designate a qualified registrar to be the community land Registrar responsible for registration of community land (Section 8 of the Land registration Act, 2012). The Registrar will not register any instrument purporting to dispose of rights or interest in community land except in accordance with this Act. A parcel of community land not registered will remain unregistered community land and be held in trust by the county government on behalf of the communities pursuant to article 63(3). The Cabinet Secretary is to appoint an adjudication officer in respect of every community registration unit who will; facilitate in consultation with the respective county government, the adjudication of the community land including the recording of community land claims, demarcation of community land and delineation of boundaries. Upon adjudication, the title to be issued by the Registrar in the prescribed form.

Community land may be held as communal, family or clan and reserve land. A registered community may by a resolution of the majority members of that community in the

general meeting, reserve a portion of the community land for communal purposes. Land which has been used communally, for public purpose, before the commencement of this Act is upon commencement of this Act be deemed to be public land vested in the national or county government, according to the use. A registered community may reserve special purpose areas e.g. farming; settlement; community conservation; cultural and heritage sites; urban development; & any other as may be determined by the community respective County Government or National Government for public interest and be used exclusively.

A customary right of occupancy in community land is in every respect be equal in status and effect to a right of occupancy granted in any other category of land. It is to be; capable of being allocated by the community to an individual person, family, group of persons, clan, an association, partnership or body corporate wholly owned by citizens of Kenya, capable of being of indefinite duration and governed by customary law in respect of any dealings. A person, family or group of persons under customary law who have formed or organized themselves as an association, cooperative society or other law who are members of a community may apply to the registered community for customary right of occupancy. During consideration of the application, the registered community is to consider; proposals made by the adjudication team or any subcommittee of the registered community set up for that purpose as well as equality of all persons. On approval, the registered community is to issue a certificate of customary right of use and occupancy.

Conversion of land, the community land register is to set up a land registry as envisioned under section 8 (1) of the Land Registration Act, 2012 to contain particulars on conversions involving community land. Further before conversion takes place, there is need to seek and obtain approval from two thirds of the assembly in a special meeting convened for that purpose. Community land may be converted to public land by compulsory acquisition, transfer or surrender. Do note that nothing in this Act will limit the application of the Land Act, 2012 in relation to compulsory acquisition of land. Reversionary interest is to lie with community in the first instances upon expiry of such public use interest. Transfer of community land is subject to approval of the community members in a community meeting done in accordance with the Land Act, 2012. Conversion of registered community land to private land can be through transfer and allocation subject to approval of registered community. Public land may be converted to community land by allocation by the Commission and in accordance with the Land Act, 2012 based on a case to case basis. Further the Commission may by an order published in the gazette identify other specific parcels. Private land may be converted to community land by transfer, surrender or operation of the law in relation to illegally acquired community land. A community may set aside registered community land for public purposes and the Commission is to gazette such parcel of land as public land.

NATURE OF COMMUNITY LAND

Nature of community land title is that registration of a community as the proprietor of land vests absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto. This thereafter will vest the following interest to the community such as; leasehold interests; implied and express rights, privileges and agreements, liabilities or incidents of the lease. Rights of a registered community acquired first or subsequently for valuable consideration or by court order cannot be defeated except as provided in the Act. The rights can be subjected to leases, charges and other encumbrances, condition as and restrictions as well as overriding interests as provided under section 28 of the Land Registration Act, 2012. It ought to be noted that nothing is to relieve a registered community from any duty or obligation to which the registered community is subject to as a proprietor. Certificate of title issued by the Registrar upon registration, purchaser upon transfer or transmission is to be prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner. The title may be challenged in cases of fraud or misrepresentation to which the person is proved to be a party; or where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme. A certified copy of the registered instrument, signed by the Registrar and sealed with the seal of the registrar is to be received in evidence in the same manner as the original.

A registered community may on its own motion or at the request of the county government, submit to the county government a plan for the development, management and use of the community land administered by the registered community for approval. Factors the registered community is to consider before submitting a plan. They include; any conservation, environmental or heritage issues relevant to the development, management or use of the land and incorporate them in the plan; consider any environmental impact plan pursuant to existing laws on environment; comply with the values and principles of the Constitution; seek ratification

from the members of the registered community; and be bound by any approved relevant physical development plan. Once approved, the registered community is notified. The registered community is to develop, manage and use the land concerned in accordance with the plan as approved or subsequent varied as the case may be. The county government is to ensure that the plans comply with the relevant law relating to the development plan. The county government is to on the request of the Commission submit records of development plans lodged with the county government. To ensure sustainable conservation of land based natural resources within community land across counties, every respective registered community is to abide by the relevant applicable laws, policies and standard on natural resources but at the same time the community is to establish several guiding principles. The principles are to be in relation to; measures to protect critical ecosystems and habitats; incentives or investments, measures to facilitate access, use and management, procedure for registration and procedure for involvement. The registered community is to put in place several measures necessary to conserve resources in the community land.

On Special rights and entitlement in the community land, a registered community may upon application and approval of members of the registered community, allocate part of its registered community land to a member or group of members of the community exclusive use and occupation or such period as the registered community will determine. This does not mean that a separate title is to be issued for such a parcel and the entitlement is not to be superior to community title in any way. Such exclusive use is guided by several principles which include; pay to the registered community such premium or fees commensurate to the use as may be determined by the community from time to time; may develop the land subject to the provisions of any laws and regulations relating to land use; may develop the land subject to the provisions of any laws and regulations relating to land use; may not

assign or lease the land to a third party who is not a member of the community; put the land into lawful use; surrender the land back to the community if the member no longer requires the land; and be entitled to quiet enjoyment of the land.

The customs and practices of pastoral communities relating to land will be taken into consideration by a registered community as long as they are consistent with the provisions of the act. Community land in a pastoral community is to be available for use by members of the community but is subjected to several conditions include; conditions as the respective registered community may impose such as kind and number of livestock, sections of land & grazing plan and the right of the community to utilize the portions of land. A registered community may upon application by any person who is not a member of the registered community grant grazing rights and upon such grant, that person is to exercise the rights subject to the Act. The members of the registered community are to approve in a meeting the withdrawal of grazing rights either due to drought or reasonable cause consider the cancellation is for the interest of the residents. Grazing rights may be withdrawn if the member; fails to observe in a material respect any condition referred to in the act and contravenes the guiding principles. Except with the written authority of the registered community, a person is not to; erect or occupy any building or other structure on the designated grazing land; plough or cultivate any portion of the land; take up abode on or occupy any portion of the grazing land; and obstruct water access. Do note that contravention of the limitations results to an offence liable to conviction, fine not exceeding one hundred thousand shillings or imprisonment for period not exceeding six months.

Reservation of areas for special purposes are exclusively used for the designated purposes including; farming, settlement, community conservation, access and rights of way, cultural and religious sites, urban development or any other purpose determined by the community, county government or national government for promotion of public interest. The Act ensures equal benefits to all members of the community as it appreciates

the principles of non-discrimination. It provides that every member of the community has the right to equal benefit from community land. Women, men, minority, persons with disabilities and marginalized groups have the right to equal treatment in all dealings in community land and a registered community is not to directly or indirectly discriminate. Every man or woman married to a member of the community is to gain automatic membership of the community and such membership will subsist until the spouses legally divorce and the woman remarries or the woman remarries after death of a spouse. It also ought to be noted that subject to article 159 of the Constitution, the culture of each community is to be recognized in accordance with article 11 (1) of the Constitution in the exercise of community land rights.

Transactions in community land, unless there is an exemption, condition or a lease that provides otherwise, a customary land right is to be dealt with the approval of the registered community in a meeting convened for such purposes. Contracts and transfers over community land is to be carried out as per private land as provided under the Land Act, 2012 and Land Registration Act, 2012. Leases over community land are to be on the basis of an agreement between the community and lessee. Despite section 55(1) of the Land Act, 2012 unless the agreement contemplated provides otherwise as per Part IV. Cancellation of a right of leasehold may be cancelled by a registered community with approval of the members of the registered community. This is in the case of; leaseholder fails to comply with the requirements, adhere to restrictions or under any law pertaining utilization of land. Existing rights whether by virtue of authority under law or lease before commencement of this Act may continue to use and occupy such land under the right. Conversion of community land into public land which commenced before the commencement of this Act will be deemed to have been commenced under this Act and will be completed in accordance with this Act, while any conversion commenced after the promulgation of the Constitution will be null and void.

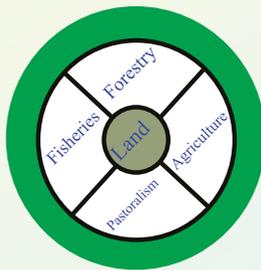
GENERAL PROVISIONS

On offences no person is to occupy or use any registered community land other than under a right acquired in accordance with the act. A person who contravenes this section commits an offence. Penalty for general offences is a fine not exceeding five hundred thousand shilling (Ksh.500, 000), or imprisonment for a term not exceeding three years or both.

The repealed laws which include; the Land (Group Representatives) Act (cap 287) and the Trust Lands Act (Cap 288) thus repealing the exact laws that affect community land. The Act provides for a saving and transitional clause and for group representatives land-buying companies. In relation to land held under the Land (Group Representative) Act, the respective group representative together with the communities they represent will be registered as a community in accordance with the relevant Act. Upon registration the respective group representatives will cease to hold office. Land held by group representative under the Land (Group Representatives) Act are not to be sold, leased or converted to private land before it has been registered under this Act. Title documents issued under Land (Group Representatives) Act will continue to be in force until new titles are issued under this Act. The Cabinet Secretary has been bestowed with the power to make regulations generally for better implementation of this section.

The Cabinet Secretary in ensuring public participation may make regulations generally for the better carrying into effect of this Act. The CS may make regulations prescribing; the procedures of recognition and registration of all parcels of community land rights, procedure for settlement of disputes arising from the community land registration process, the requirements for investor partnerships, the procedures of registering any other entity holding community land, conversion of other categories of land into community land, the fees payable for any application or the issue of any certificate or other document in terms of this Act, the conditions in addition to conditions imposed by or under any other law under which prospecting or mining operations may be carried out on community land, public education and awareness on the rights of communities over community land, the combating and prevention of soil erosion and degradation the protection of the pastoral resources and the limitation and control of the grazing of stock, payment of royalties to communities from income generated from resources within community lands, the timelines within which the adjudication programme must be gazette including guidelines on how to ascertain community or individual claims of interest in or right over community land, the rules and procedure for election of a community land management committee and the procedures for registration of interest in community land as enriched in article 63 of the Constitution.

The transitional provisions schedule provides that the phrase 'appointed day' is the date to which the Act comes into operation. The 'former institution' means the institution by whatever name called registered under the repealed laws. The rights and obligations vested or imposed on a former institution will be deemed to be the rights, obligations and contracts of the registered community. Notwithstanding any provision in this Act to the contrary, all agreements entered into between a community for the use of community land in the interest of defense, public safety, public order, public morality and public health will continue in force. On the appointed day, all funds, assets and other property, moveable and immovable which immediately before the appointed day were vested in a former institution will on the appointed day vest in the registered community. Every public officer having the power or duty to effect or amend any entry in a register relating to property, or to issue or amend any certificate or other document effecting or evidence title to property will without payment of a fee or other charge and upon request made by or on behalf of the registered community do all such things as are by law necessary to give effect to the transfer of property. Actions, suits or legal proceedings whatsoever pending by or against the former institution will be carried on or prosecuted by or against the registered community and no such action suit or legal proceedings will in any manner abate or be prejudicially affected by the enactment of this Act. The Cabinet Secretary has been bestowed with procedures for the determination of all pending appeals to the Minister brought under any of the repealed laws. Directions, orders and permissions given or licenses or permits issued or registrations made by a former institution and subsisting or valid immediately before the appointed day will be deemed to have been given issued or made by the registered community under this Act.



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Support by: THE CHRISTENSEN FUND