

A REVIEW OF SPECIAL LAND TENURE ISSUES IN KENYA

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ABSTRACT

The FIG Expert Group Meeting on secure land tenure, “New Legal Frameworks and Tools” has presented several objectives for discussion. One of the main objectives involves the evolutionary approaches for recording and mapping land tenure forms. For many years, surveyors have used conventional surveying tools to measure and record land and registration has been based on 2D cadastre. In recent byears, it has emerged however that a more comprehensive definition of land tenure requires the 3-D elements of land and the inclusion of spatial and non-spatial attributes of land in integrated GIS databases. This new trend has emerged in many countries such as USA, New Zealand, Jamaica, New Mexico, and the Netherlands etc. These countries are in the process of implementing a comprehensive GIS-Based land tenure system and the Spatial Data Infrastructure (SDI). Other countries such Denmark, Norway, Sweden, Australia, Canada have started on the development of 3D-Cadastre (Stoter, 2004). In this paper, the author presents the developments in Kenya and the innovations taking place in the recording and mapping of land tenure forms in selected areas such as the Arid and Semi Arid Lands (ASALS), the 10-Mile Coastal Strip, and the Communal Group Ranches. In each case, the paper gives the background of each area, the subsisting land tenure situation and the recommended innovations.

THE ARID AND SEMI-ARID LANDS (ASALS)

In Kenya, the Arid and semi-arid lands (ASAL) constitute 80% of the total land surface area (Ominde 1968). While population estimates may not be precise, the available data indicates that this region contains 20% of the Nations population and 50% of its livestock and vast amount of untapped natural resources (Migot-Adhola, 1981). In terms of rainfall, the ASAL receives an annual precipitation between 500mm to 800mm and lies within ecological zone IV with an extension to zone V. The main land use in the area is pastoralism, minimal agriculture and dry season grazing (Campbell and Migot-Adhola, 1981).

Present Models of Land Tenure in the ASAL.

(1) The Case of Group Ranches

The land tenure system, which exists in the group ranch areas of the ASAL of Kenya, could be described as communal in that the land is held in trust by a few selected people under Land (Group Representatives Act), Cap 287 of 1968 on behalf of the members of the group ranch. This model of land tenure was introduced in Kenya as part of the African Land Reform (ALDEV) to improve on the carrying capacity of the land, the productivity of cattle, and to control the ecological imbalance usually associated with such fragile ecosystems (Kidemi, 2001). Today, there are 401 incorporated group ranches covering an area of about 7million hectares with a membership of 54,452 members. The ranches are situated in 13 Districts of Narok, Kajiado, Samburu, Laikipia, Trans-Mara, Baringo, West Pokot, Taita Taveta, Kilifi, Kwale and Lamu. The group ranches were formed and incorporated only after the process of land adjudication and registration had been completed under the Land Adjudication Act (Cap 284, of 1968) and the Registered Lands Act (RLA, Cap, 300 of 1963). A group in this context refers to a tribe, a clan, a family or any other group of persons whose land, recognized under customary law, belongs communally (undivided) to more than five persons who are members of that group. Each group selects about 10 of its members to be registered as trustees of the land by the Government. These trustees can allocate portions of the group

ranch to the members for a specific use and can also mortgage part of the land for monetary benefits on behalf of the group. All land disputes within the group ranches were amicably solved by elders and rarely ended up in the Government High Courts.

For many years, these group ranches provided free dispersal area and migration corridors for wildlife from the various National Parks. These migration corridors act as biological/genetic recharge banks in that the wildlife usually migrate to crossbreed with animals of different genetic species thereby improving their genetic set-up. If the migration routes are closed, the wild life may become extinct from inbreeding.

SHORTCOMINGS OF THE GROUP RANCHES MODEL

In recent past, increasing subsistence demands of a growing population in these areas has led to the sub-division of the group ranches. These sub-divisions have caused some ecological and socio-economic land use conflicts such that prominent wildlife migration routes have been blocked, the dispersal areas have diminished; the human-wildlife conflicts have been intensified. There have also been major changes in land tenure from the communal to individual ownership, with subsequent problems of plot fencing, diminished grazing areas, and change from pastoralism to sedentary agriculture. As a result, the limited land resources in the area are torn between pastoralism, agriculture and wildlife conservation. This situation has precipitated a series of land use/land tenure conflicts, which are threatening the survival of the National Parks and the Tourism industry upon which the Government depends for foreign exchange earnings.

It is important that these land use/land tenure conflicts are properly studied and mapped in order to develop mitigation strategies. Many studies have been conducted to quantify the type and level of land use/land tenure conflicts in the area (Campbell and Migot-Adhola, 1981; Pratt and Gwynne, 1967; ILRI, 2003). The problem is that most of the spatial data derived from these studies are scattered in various organizations and have not been collated into an integrated geospatial database that can be used for holistic planning of the site. As a result, a lot of funds and resources are being wasted in data collection on land use/ land tenure conflicts in the Group Ranch areas and yet the wildlife-human conflicts continue unabated.

Proposed New Land tenure Model

Technically, land documentation in the group ranches has been approximate and generalized. Boundaries of the ranches were adjudicated to follow natural features as far as possible, and plotted on the 1:50,000 topographical-sheets. The rectilinear boundaries were marked with permanent corner beacons and plotted by identification of details appearing on the topographical maps with no coordinates (Njuki, 2001). At present most governments of the world are in a dilemma on how to introduce agricultural and land tenure reforms in the nomadic pastoralist indigenous communities. On the one hand, there are calls for the adaptation of development policies that take cognizance of the cultural, social and economic needs of the indigenous people as declared in the world Rio United Nations Conference of 1992. On the other hand, there are calls for the development of modern cadastral in order to promote the efficient operation of market forces in Agriculture; and to provide individual land tenure prevailing in most parts of the country. Factors such as irreversible climate changes, population increase, encroachment of irrigated agriculture and escalating of wildlife human conflicts due to the proximity of National Parks/Game Reserves to human settled areas, militate against the individualization of land titles in the group ranches.

The new land tenure system for the ASAL should be holistic in approach, taking care of the cultural values of the local community and the ecological effects on the environment. This is seen to be only possible by the Government developing a comprehensive land policy on the group ranches and applying appropriate modern surveying technologies to document and map the land tenure issues. Lack of accurate definition of boundaries in the ASAL (particularly in group ranches) is causing a lot of boundary disputes, which cannot be resolved by Surveyors, as the provisions of the Registered Lands Act do not recognize their role. On the other hand, the Chief Land Registrar, who is vested with the authority to resolve land disputes in these areas, is not a trained Surveyor and lacks the necessary competence to re-establish such boundaries. It is therefore recommended that GPS be used to fix the perimeter boundaries of the group ranches so that boundary disputes can be minimized through mathematical boundary relocation. All communal facilities such as water points, burial sites, and sacred places

should all be registered. Individual land titles should be given only in the agriculturally productive areas of the ASAL such as along river valleys and swampy areas to allow for drop production. Wildlife dispersal areas should also be mapped, and GIS used to locate animal grazing areas, water points and migration routes. The Government should however come up with a policy of compensation for the use the migration routes

(2) THE TRUST LANDS

The trust lands were created out of the need to accommodate the insecurity and restlessness in the African reserves. Three commissions were appointed by the British Government to help resolve these issues. These were the Ormsby-Gore Commission (1924-25), the Hilton Young Commission (1927-29), and the Carter Commission (1930-1934). As a result of these land Commissions, the Native Lands Trust Ordinance was enacted and later changed to the Trust Land Act, Cap 288 of 1939 (Onalo, 1986; Okoth-Ogendo, 1991; Ojienda and Rachier, 2001). The Act made provisions for a system of land consolidation, Adjudication, Registration and Conveyancing but did not cater for the African Land rights in the 10-mile coastal strip nor did it cater for and any Africans for whom no reserve had been defined. According to the details of the Act, all the trust lands are vested in local county council within whose area of jurisdiction it is situated. Additionally, each county council holds the trust land vested in it for the benefit of the persons ordinarily resident on the land, and give effects to rights, interests or other benefits in respect of the land as may be under the African Customary Law for being in force and applicable thereto; and be vested in any tribe or individual, subject to the rights for the Government to set apart and alienate any land required for public purposes, or for such other purposes as the County Council may think is beneficial. The Commissioner of Lands acts as the agent of the County Council in respect of any trust land which is to be set apart. In Kenya trust lands are found in the pastoralist Districts of Turkana, Marsabit, Isiolo, Mandera, Garissa, Ijara, and parts of Lamu District.

The Existing Land tenure in Trust Lands

The existing land tenure in the trust lands can be described as a quasi-customary / communal in that land rights are held in trust by the county councils on behalf of the resident communities. Because there have been no formal surveys or land Adjudication in most of these areas, land is still held communally by various communities under customary tenure. The main difference between this tenure and that of the Group ranches is that all rights to land are exercised through the elected councilors and the local resident communities do not have any registered land rights. The only surveys in the trust lands are in those places where land have been adjudicated under the Land Consolidation Act Cap 283 of 1959 or the Land Adjudication Act Cap 284 of 1968 and titles issued under the Registered Lands Act, Cap 300 of 1963. In such places boundaries were demarcated and plotted on unrectified aerial photo enlargements at a scale of 1:2500. These photos were later traced to produce Preliminary Index Diagrams, which were subsequently converted into Registry Index Maps upon registration of the sections. The main drawback in using this method for land tenure demarcation is ASAL is the there is a deficit of moisture and rainfall, which would sustain the boundary hedges. Furthermore the communities resident in these areas are nomadic pastoralists who move from place to place in search of pasture.

Proposed New Model

The author proposes maintenance of the current land tenure system for the trust lands except that boundary definition is improved by use of modern surveying tools such as the hand held GPS, GIS, and high resolution Satellite Remote imagery. At present ILRAD has embarked on a series of ground measurements aimed at developing GIS databases for mapping poverty and land use/land tenure conflicts. Under this program, a whole range of methods and indicators have been developed to study the spatial distribution of wealth and poverty. This study has utilized GIS facilities to prepare poverty maps based on the five different type of assets upon which individuals draw to build their livelihood. These are natural, social, human, physical and financial capital (ILRAD, 2004). So far the results obtained from the pilot study in Kajiado District, have presented great potential in the use of these methodology in mapping land tenure forms in the ASAL.

THE 10-MILE COASTAL STRIP

Land Tenure issues in the 10-mile coastal strip of East Africa are intertwined with the early Swahili settlement in the region and the Indian Ocean trade. In Kenya, this area covers a strip of land of 1900km stretching from Vanga in the south coast to the Lamu Archipelago in the North. The ownership of land in this area has changed hands severally between the Sultan of Zanzibar, Imperial British East African Company (IBEACO), and later the British and Kenya Governments. The Omani Arabs conquered the East Coast of Africa in 1660 A.D. and declared their sovereignty over the entire coastal region from Mozambique to Somalia.

In 1885, Sir. William Mackinon of the IBEACO signed an agreement with Sultan Sayid Baghash of Zanzibar for leasehold on the 10-mile strip. In 1888 all the land in the area was ceded to the British Government by virtue of a concessionary agreement signed between the British and the Sultan of Zanzibar. Under the agreement, all rights to land in this territory, except for the private property, were vested in the Crown. In 1902, the Registration of Documents Act (RDA, Cap 285) was enacted to facilitate registration of documents relating to private land in the area. In 1908 it became necessary to adjudicate land in the 10-mile strip in order to separate private property from Gov. land and. the Land Titles Act, Cap 282 of 1908 was passed for this purpose. Those individuals who successfully claimed their land rights were issued with a freehold certificate of ownership or certificate of mortgage. Title deeds issued for the RDA lands did not create new rights to land but only confirmed the existing and did not pertain to new grants. Today, most of these titles have been converted to either the Registered Lands Act (Cap 300 of 1963) or into the Registration of Titles Act, (Cap 281, of 1919).

PREVAILING TENURE SITUATION

The prevailing situation in the 10-mile coastal strip is that land occupied by the indigenous Kenyans are still held under communal customary tenure as most of the land have not been adjudicated to determine the individual land rights. Areas, which had been adjudicated under the Land Titles Act, have legal individual tenure except that most of the landowners are absentee landlords. Squatters who believe they have the right of

ownership as they have lived in these localities for time immemorial occupy most of these parcels. The Government has recently acquired a few of the farms and converted them to settlement schemes, such as Magarini, Mtondia Roka, Shimba Hills etc. However, land tenure issues in the Kenyan 10-mile coastal strip remains one of the most sensitive issue as the local communities feel they were cheated at the time of the Adjudication in 1908. As has been indicated elsewhere, the land occupied by the indigenous Kenyans were not adjudicated as private property, but were alienated as crown land.

WAKF COMMISSION LAND

Under the Wakf Commissions Act Cap 109, are established Wakfs, which are religious, charitable, or benevolent endowments or dedications of any property in accordance with the Muslim Law. The Act legislates rules and regulations for the administration of all Wakfs. These Wakfs are often made in respect of land, and for charity, but can be limited to vest in charity after the death of the whole family. They can be made for the benefit of an individual, a family or community for rights and ceremonies for the soul of a deceased founder member. They can also be made for religious, charitable or benevolent purposes including maintenance of cemeteries or any other purpose recognized under Muslim Law. All Wakfs must be registered with the Wakf Commissioners, and one must obtain the consent of the Wakf Commissioners to sell or lease wakf land for more than one year. Wakfs are exceptions to conditional transfers of land and to acquisition under prescription or adverse possession. Trust Lands Act does not prejudice or affect the operation of the Wakf Commissioners Act.

PROPOSED INNOVATIONS ON TENURE

Most of the inhabitants of the 10-mile coastal strip are Swahili people, who have occupied the area since the 7th century AD. The architecture and layout of the towns within the 10-mile coastal strip is Islamic in nature but not Arabic. It is characterized by narrow and winding streets, hidden courtyards and paved stone ways. The houses are annexed back-to-back and occupy the whole plot. Most of the Swahili towns are situated either on islands off the East Coast of Africa or within the 10-mile strip. In practically all the towns, the Swahili buildings consist of thick walls made of coral and several storey

units superimposed one on top of each other; as such there is very little room for horizontal expansion. Additionally, the inheritance of the houses in the Swahili towns is based on the female line rather than the male side as is practiced everywhere else in Kenya. It is the ladies who inherit the houses from the parents and the husbands stay at the pleasure of the wives.

Other unique features of the Swahili towns is the existence of *Wikios*, a kind of fly-over which provide secret passage between members of the same family. Currently there are 19 of these features left in Lamu and two in Zanzibar. Under the present land registration systems, the *Wikios* have not been registered and their locations have not been indicated in the 2-D cadastre available. Similarly, the storey units found in the Swahili towns have not been registered. It is therefore recommended that the sectional property Act be applied in the Swahili towns as a 3D cadastre in order to capture the *Wikios* and to provide secure land tenure to the Swahili women. Because of the complex nature of the housing structure in the Swahili towns, use of Laser Scanners and close-range digital photogrammetry are recommended for the generation of 3-D coordinates and special 3-D surface models.

CONCLUSION

Although many countries are advocating for issuance of titles based on community rights without necessarily carrying out accurate surveys, experiences with general boundary surveys in Kenya indicate that accurate demarcation of the perimeter boundaries is an important prerequisite to any tenure registration. The author therefore supports the use of GPS technology in boundary demarcation. The use of large-scale aerial photography for land Adjudication has served Kenya Government well over the years and it is a simple and fast technology that can be recommended for the emerging land markets in Africa. Although the use satellite imagery has also been recommended in some quarters, the prohibitive cost of acquiring these data and lack of trained personnel and equipment, preclude their efficient use in tenure mapping in Africa. The move towards realization of the International Cadastre Model, aimed at the achievement of the concept of Cadastre 2014 is stimulating and encouraging for countries that are still struggling with the hard copy 2-D cadastre. The efforts and achievements in 3-D cadastre have been well captured

by Stoter (2004) and the experiences from the countries that are already involved in this aspect of tenure definition will be replicated in countries that are still to start the program. Finally the author appreciates the invitation from FIG to participate in this important international conference and believes the deliberations will go along way in improving the land tenure operations of the member states.

Biographical Notes

Mr. Wayumba holds a Bachelor Degree in Surveying from the University of Nairobi (1976), a Masters Degree in Remote Sensing from Cornell University, USA, 1982. He is a full member of the Institution of Surveyors of Kenya, a Licensed Land Surveyor, a Certified Land Surveyor of East Africa and a Lecturer in Remote Sensing and Surveying at the University of Nairobi. His academic interests are in the area of heritage documentation. He is currently involved in the documentation and database design for historical Swahili towns of East Africa and Prof. Heinz Ruther of the University of Cape Town is supervising the research.

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