SECURITY OF TENURE UNDER THE COMMUNITY LAND BILL 2015

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Declaration

This is to certify that this research is my original work and has not been presented for a degree award in any university or institution of higher learning. Information from other sources has been duly acknowledged.

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ABSTRACT

The onset of Colonialism in Kenya dealt a blow to the customary land tenure by failing to give it legal recognition in preference for the common law private ownership tenure system. This lack of recognition deprives communities of security of tenure over community land. The Constitution of Kenya 2010 requires parliament to enact legislation on Community Land (Community Land Bill 2015) to provide for this recognition and hence security of tenure. This research evaluates the nature of community land rights in Kenya and sets out to answer the question whether the Community Land Bill 2015 will achieve this goal using respondents in Narok County as a case study. The study focuses on answering three research questions; howa community is defined by the respondents, and how this compare to the provisions in the Community Land Bill 2015. What is the bundle of rights contained in the community land according to the respondents and how this compare to what is contained in the Community Land Bill 2015. Lastly, how these first two questions are answered will determine the security of tenure under the Community Land Bill 2015.

The respondents of the Case Study highlighted that the bundle of rights in the community land included rights of occupancy, use among others. However, these rights are restricted and others seemingly absent. The respondentsfurther also defined the community mostly along ethical lines. These findings are compared to the corresponding provisions of the Community Land Bill 2015 which are more encompassing than the views of the respondents. This comparison attempts order to yield holistic results in the area of group ownership of land in Kenya.

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1.0. CHAPTER ONE: INTRODUCTION

1.1.Background

The promulgation of the Constitution of Kenya 2010 was one of the most important events in the history of Kenya. Its effects on laws are profound and the ripple effects will continue to be felt in the next decades or longer. The magnitude of the reformative nature of this Constitution can be said to have been informed by the many shortcomings of the 1963 Kenya Constitution (Independence Constitution). Many constitutional scholars have cited such problems to include bad governance, weak institutions within which wanton corruption and impunity thrives.[1]There is consensus that land governance has been one of the biggest of such issues.

Land has always been an emotive issue in Kenya.[2] Land has been identified as one of the main causes of ethnic violence among neighbouring communities[3] for example the 1997 Land Clashes and the 2007-2008 Post Election violence. The former United Nations Secretary-GeneralKofi Annan acknowledged in the aftermath of Kenya's electoral violence in 2007-2008 that violations of land rights, including the rights of the generations of Kenyans displaced through historic and recent evictions, are one of the key unresolved issues in Kenya. The African Commission found that the Kenyan government has continued to rely on a colonial law that prevented certain communities from holding land outright, and allowed others, such as local authorities, effectively to own their traditional land on trust for these Communities.[4]Of importance to this study is the place of community land.

Article 63 of the Constitution introduces a land tenure regime called "community land", which shall vest in and be held by communities. Article 63(5) directs Parliament to enact legislation to give effect to this Article. In 2013, the Senate drafted the Community Land Bill 2013 which is still subject to discussions in the August House.

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[1]See Lumumba and Franceschi, *The Constitution of Kenya 2010: An Introductory Commentary*. Strathmore University Press, Nairobi, 2014.
[2]*National Land Policy* Sessional Paper No. 3 of 2009, at vii.
[3]http://www.internal-displacement.org/8025708FOO4BE3B1/%28httpInfoFiles%29/A7C2D6322766F7B1802570BA00529A80$file/Kenya%20-November%202004.pdf on 3 March 2015.
[4]https://www.hrw.org, Human Rights Watch; Kenya: Landmark Ruling on Indigenous Land Rights
African Human Rights Commission Condemns Expulsion of Endorois People for Tourism Development
On 17th January 2016.

The Community Land Bill was drafted to address historical injustices within the community land tenure regime[5] and fill gaps in the law. The legislators drafted land laws that applied largely to public and private land, but little regard was given to community land rights.

From the colonial period, there have been deliberate efforts to expropriate the commons.[6] Commons is defined as land or resources belonging to or affecting the whole of a community. This expropriation was effected primarily through legal and administrative contempt of customary law.[7] The colonial government passed laws that saw to it that land that was unoccupied by individuals was declared Crown Lands - dispossessing communities of their land. In the case of*Isaka Wainaina & Another v. Murito wa Indagara*& Others,[8] for instance, Chief Justice Barth interpreted the provisions of the 1915 Crown Lands Ordinance in Kenya to the effect that Africans were mere tenants at will of the Crown with no more than temporary occupancy rights to land- ignoring any rights existing under customary law.[9]

Further, the management of land according to customary law was replaced by the British common law systems that had no regard for communally owned land. Moreover, the Swynnerton Plan of 1954 recommended land adjudication, registration and privatization of land. This was based on the assumption that by legislating change from common to private property, fundamental revolution in land would occur.[10] However, community land tenure regime survived its multiple pronged attacks.

According to Okoth-Ogendo, indigenous property systems have, for the longest time, operated informally- to mean absent legal recognition.[11] There have been attempts to formalize the indigenous property systems. This led to the concept of group ownership that was dealt with under trust land and group ranches.[12]

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[5]Paragraph 64.*National Land Policy*, (2009)
[6] Okoth-Ogendo HWO, 'The Tragic African Commons- A century of expropriation, suppression and subversion,' *Land reform agrarian change in southern Africa,* 2003, 5.
[7] Okoth-Ogendo, 'The Tragic African Commons,' 7.
[8](1922-23) Kenya Law Reports Vol. IX 102.
[9] Kameri-Mbote P, Righting wrongs: Confronting dispossession in post-colonial contexts, A keynote speech at the Conference on land, memory, reconstruction and justice: perspectives on land restitution in South Africa, 1.
[10] Okoth-Ogendo, 'The Tragic African Commons,' 12.
[11] Okoth-Ogendo HWO, *Formalising "informal" property systems* - The problem of land right reform in Africa, 2007, 12.
[12] Kameri-Mbote P, Odote C, Musembi C, Kamande M, *Ours by right: Law, politics and realities of community leasehold property disputes in Kenya,* Strathmore University Press, Nairobi, 2013, 43.

Trust lands were originally occupied by native Kenyans under the colonial regime and have not yet been adjudicated, consolidated or registered to either an individual or a group. The governing law with this regard is the Trust Land Acts[13] and the repealed Constitution of Kenya contained provisions relating to trust lands.[14] County councils managed Trust Land.[15] However, tenure to trust land increasingly changed from trust land to individual ownership, or legally constituted groups. The application of customary law was then ousted and the concept of communal ownership faded.[16]

Group ranches were demarcated tracts of land where pastoralists grazed their individually owned herd and had official land rights. The governing statute was the Land (Group Representative Act).[17] Under which, a group was defined as a "tribe, clan, family or other groups of persons whose land under recognized customary law belongs communally to the persons who are for the time being members of the group".[18] Group ranches however did not work well for long. Eventually, most of them were subdivided and given to individuals.[19]

It is with this in mind that the first national land policy - Sessional Paper No. 3 of 2009 provided for the recognition of community rights to land.[20] The Constitution of Kenya 2010 captures this in Article 63. Further in sub-article 5, it provides that "Parliament shall enact legislation to give effect to this Article" and therefore the Community Land Bill 2015.

The Community Land Bill provides a good opportunity for rationalising the governance of community land in Kenya. The Land governance regimes prior to the 2010 constitution included land alienation, consolidation and adjudication of land into individual ownership, affected customary land tenure significantly. This regime undermined traditional resource management institutions and ignored customary land rights not deemed to amount to ownership such as family

[13] Chapter 288 of the Laws of Kenya.
[14] See sections 114-120.*Constitution of Kenya*(1983) (Repealed)
[15] Kameri-Mbote *et.al Ours by right,* 43.
[16] Okoth-Ogendo, *Formalising "informal" property systems* - The Problem of Land Right Reform in Africa, 12.
[17] Chapter 287 of the Laws of Kenya.
[18] Section 23(2) (a) *Land (Group Representatives Act*), (1968).
[19] Kameri-Mbote *et.al Ours by right,* 45.
[20] Kameri-Mbote *et.al Ours by right,* 45.

interests.[21] Further, past legislation has not rendered a definition of community in relation to land nor has it delimited the bundle of rights therein. For example the Sessional Paper on National Land Policy of 2009 defines community land as referring "to land lawfully held, managed and used by a given community as shall be defined in the 'Land Act'". Neither does it define the term 'community'. As a result, governance of community land and adjudication of disputes in community land have often used definitions of community based on ethnicity and culture while overlooking other key factors communal use of land-based resources.[22]

Inevitably, there has been a mismatch in the community's notion of community, community land rights and the definitions adopted from statutes.

The Community Land Bill must address key legal issues bearing in mind that community land rights are inclusive rather than exclusive; they derive from accepted membership to a social unit and must provide a means of applying the constitutional criteria of ethnicity, culture and community of interest.

1.2. Statement of the Problem

The previous laws concerned with protecting community land tenure eventually did not ensure the security of tenure for communities. The community land was subdivided and privatized. It is therefore paramount that the proposed law ensures security of tenure for communities in Kenya. Community land tenure regime has existed for a long time despite its lack of legal recognition, or the undermining of such laws. Communities relied on customary law for the administration and management of this land and for the allocation of rights. Using the Maasai Community in Narok County as a case study,this research endeavours to establish to what extent the practice and perspectives of communities with regard to community land have been codified into the Community Land Bill 2015 to ensure the security of tenure for communities.

1.3. Research Questions

i. What constitutes the definition of community as provided in the Community Land Bill 2015 as compared to the definition given by the respondents of the case study?

[21] See *National Land Policy*, (2009)
[22] Collins Odote, FES Paper

ii. To what extent does the definition of community ensure the security of tenure of current and future generations anticipated in the Community Land Bill 2015?

iii. What is the bundle of rights included in the respondents of the case study's notion of land rights and how does this compare with the rights allocated under the Bill?

1.4. Statement of Objectives

i. To establish the definition of a community under the Community Land Bill 2015 as compared to the definition of community by the respondents of the case study?

ii. To establish the extent to which the definition of community ensures the security of tenure of current and future generations anticipated in the Community Land Bill 2015.

iii. To establish the bundle of rights in community land according to the notion of the respondents of the case study found in Narok County and how this compares to the bundle of rights in the Community Land Bill 2015.

1.5. Justification for the Study

This study acknowledges how in the past, despite some form of recognition in law of community land, the security of tenure for communities with regard to community land has been questionable. Either the Community land has been subdivided and individual titles given to members of the community, or the land has been the subject of illegal and irregular allocation. It is important for the future because any law that is to be passed for the protection of community rights in land ought to avoid pitfalls of the previous laws, and a study of the Bill will reveal if communities are exposed to this danger once more.

1.6.Arrangement of Chapters

Chapter Two will discuss the literature already written on the topic of community land in relation to the research questions and will point out the gaps in this general topic of law. It will discuss the theories of property related to community land law, and the bundle or rights in the land. Lastly, it will also provide a conceptual framework, a lens through which this study is looked at.

Chapter Three will be a detailed description of the case study. Where it was conducted, who was interviewed, and how they were selected.

Chapter Four will give the findings of the field study while Chapter 5 will analyse the findings and discuss it in view of the contents of the Community Land Bill 2015. The final chapter will discuss the limitations of the study, give recommendations for the Community Land Bill 2015, and then conclude.

2.0. CHAPTER TWO: LITERATURE REVIEW AND THEORETICAL FRAMEWORK

2.1. Introduction

The aim of this research is to establish the extent to which the Community Land Bill, 2015 ensures security of tenure for communities using respondents belonging to the Maasai Community in Narok County as a case study.

Before this is done, it is important to examine the literature surrounding the general area of community land law, and consequently address the gaps in this literature. This will lead the chapter in the direction of property theories surrounding communal land ownership and the bundle of rights in the same. The definition and allocation of property rights in the context of the community land and jurisprudential basis for recognition of community land are important to this research. The common law conception of property in land as defined within the scope of positivism and conceptualism are relevant to this research.Lastly, to conclude this chapter, a conceptual framework will be provided in order to show the lens through which the study examines the problem.

2.2 The downward spiralling of Community Land Rights

The notion of community land is one that began before the onset of colonialism in Kenya. According to Lenaola and Wichert, land in pre-colonial Kenya was more often than not owned communally especially by the pastoral communities. Lynch classified land tenure systems into customary tenure, "modern" tenure and public land tenure.[23] This system of tenure consisted of rights and social structures that implied a legal notion of common property. This essentially suggests private ownership, but for a group of individuals who are members of a particular community. Within this group, members had the right to exclude non-members.[24] Members within the group regarded land as a collection of separate and distinct rights that make up the land, commonly referred to as "bundle of rights." These rights vary from one community to another but may include agricultural rights and rights to land-based resources.

[23]Lynch O J, Alcorn JB, 'Tenurial rights and community-based conservation.' In Western D, Wright RM, Strum SC(ed) *Natural connections; perspectives in community-based conservation*, Washington DC Island Press, 1994 375-376.

[24] Lenaola , Jenner , Wichert , 'Land tenure in pastoral lands' *In land we trust* 237..

Customary Land Tenure was riddled with several characteristics. First, an individual or a family by virtue of their membership to either a social unit of production or a political community derived and were guaranteed their rights of access to land.[25] Individuals claim these rights by virtue of affiliation to the group. Further, the content of the rights are decided upon by status in the group and the performance of certain obligations by an individual, family or clan within the group. [26]

Secondly, there were rights of control, which vested in the political authority of the group or community. It is the political authority that determines who has access to the land, its redistribution both spatially and inter-generationally. Further, it had administrative functions that included the power to allocate land, regulate its use and exclude others.[27]

Lastly, customary land tenure had rights analogous to private property. This was because of individuals investing their labour in developing, maintaining and otherwise utilizing a portion of the land. There, therefore, were no persons within the community that had greater rights to parcels of land than their then cultivator. Their rights transcend mere usufruct and encompass transmission and in certain communities, transfer. [28]

From the foregoing, it is clear that there was a distinct way of identifying members of a community. This was mainly based on belonging to the particular ethnic group especially by blood relations. Equally worth noting is that there is a clear distinction between access to land and control over community land. Such distinction is rare in private ownership of land because ownership (legal title) gives exclusive rights over the land as embodied in the doctrine of *cujus est solus.*

However, as per Okoth Ogendo, despite this elaborate, well developed and sophisticated customary tenure, the colonial government took advantage of the sparsely populated customary commons to introduce Western concepts of ownership of property. Communal land was viewed as nobody's land. The colonialists argued that "since Africans owned land only in terms of

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[25] See Okoth-Ogendo HWO, *Land tenure and its implications for the development of Kenya's semi-arid areas*, Institute of Development Studies, Nairobi, 1979.
[26] See Okoth-Ogendo, *Land tenure and its implications for the development of Kenya's semi-arid areas*, 1979.
[27] Ogolla BD, Mugabe J, 'Land tenure systems' in Juma C, Ojwang JB (ed) *In land we trust*, Initiatives Publishers, Nairobi, 1996, 97.
[28] See Elias TO, *The nature of African customary law,* Manchester University Press, Manchester, 1956 and Gluckman M, *Ideas in Barotse jurisprudence*, Manchester University Press, Manchester, 1965.

occupational rights, it followed that unoccupied land reverted to the territorial sovereign".[29] Denial of the proprietary character of the commons was fundamental to the operation of colonial occupation and subsequent exploitation of the African commons.[30] This was primarily done through the statuteslike the Foreign Jurisdiction Act 1890, which vested all 'waste and unoccupied land in protectorates where there was no settled form of government and where land had not been appropriated to the locals, sovereign, or individuals' to the Crown. Okoth-Ogendo goes ahead to describe from one legislation to the next throughout colonialism how all the laws that were passed progressively stifled customary tenure and imposed the common law property systems that did not acknowledge existence of group ownership of land.

The common law viewed property as a creation of the law.

According to Jeremy Bentham,

> Property and law are born together. Before laws were made, there was no property; take away laws and property ceases... property is nothing but a basis of expectation; the expectation of deriving certain advantages from a thing that we are said to possess; in consequence of the relation in which we stand towards it.[31]

Bentham posits that laws are responsible for the existence and allocation of rights and interests.Further, Kameri-Mbote *et al*explain how the common law viewed ownership of property as a creation of law in that the law sanctions a bundle of rights against all other persons. Therefore, property rights are rights *in rem* – a"bundle of rights and expectations in a tangible or intangible thing that are enforceable against third parties including the government."[32]

However, if property is examined as an economic concept, it presents a challenge for community land. Individual private property is seen as the standard to aim for in order to curb the so-called tragedy of the commons.[33] Common-pool resources are susceptible to overuse and are thus prone to ``tragedies of the commons," This according to Garett Hardin denotes a situation

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[29] Okoth-Ogendo HWO, *Tenants of the crown; Evolution of agrarian law and institutions in Kenya*, African Centre forTechnology Studies Press, Nairobi, 1991, 11.
[30] Okoth-Ogendo, HWO, 'Property theory and land use analysis: An essay in the political economy of ideas.' *Journal of Eastern African Research and Development*, 1975, 1.
[31] Bentham J, *The theory of legislation* (C.K Ogden ed, 1931) 113.
[32] Kameri-Mbote *et al*, *Ours by right*, 30.
[33]Kameri-Mbote et al, Ours by right, 31.

whereindividuals acting independently and rationally according to each other's self-interest behave contrary to the best interests of the whole by depleting some common resource.[34]

Even more interestingly, Heller discusses that which he describes as the: Tragedy of the Anti-commons."[35] This describes a situation where a single resource has numerous rights holders who prevent others from using it, frustrating what would be a socially desirable outcome.In these two situations, both describe cases where the communal ownership of a resource has a negative impact. In one case it results in over use while in the other it results in under developmentand under use. In both instances, if land is the resource init is not economically developed to a satisfactory standard, as it will either be overused, depleted and polluted or it will be underdeveloped. However, Ostrom on the other hand demonstrated that, within communities, rules and institutions of non-market and not resulting from public planning can emerge from the bottom up to ensure a sustainable, shared management of resources, as well as one that is efficient from an economical point of view.[36]

In addition to the view that group ownership of resources (land in this case) does not make economic sense as explained above, the jurisprudential basis for the existence of community land has not been recognized especially under the Western property regimes. This is because according to their regime of private property exclusion, use, and management and exclusion are key elements. In terms of exclusion, other people may not enter or use the resource, while in terms of use, the owner is free to use and consume the resource and finally, the owner is free to manage, sell, gift, bequeath or abandon the property. However, the Western property regimes did not envisage a situation where the group ownership can amount to private property to the exclusion of others who are not part of this group.

This resulted in the denial of the proprietary character of the commons and hence of the alienation of community land rights. Thus began a process of introducing a previously unknown notion of land rights. This is what Okoth-Ogendo described as "legal-structural authoritarianism".[37] It attempted to undermine any notion of rights based on customary law. The colonialists introduced and promoted a land tenure system based on individualism. The

[34]Hardin G, Tragedy of the commons, *Science*, Vol. 162, 1244.
[35] Heller MA, The tragedy of the ant commons: property in the transition from Marx to markets, *Harvard Law Review,* Vol. 111, No. 3. (Jan., 1998), pp. 621-688.
[36] See Ostrom E, *Governing the commons,The evolution of institutions for collective action,* Cambridge University Press, 1990.
[37] Okoth-Ogendo, '*Tenants of the crown; Evolution of agrarian law and institutions in Kenya'* 170.

introduction of a Western property doctrine ensured the establishment of a political system, a constitution and laws that would serve to guarantee the distinct rights of the individual. [38]

In addition to the colonial laws' refusal to acknowledge the legitimacy of customary tenure, the colonial government employed another important tool to ensure the death of community land rights in colonial Kenya: the courts. According to most reception clauses:

"The High Court and all subordinate courts [were to be guided] by African customary law [only in civil cases], and so far [only] as it is applicable and is not repugnant to justice and morality."

That rubric gave the courts the power to strike out whatever rules of customary law they did not like, or to declare as custom what was unknown to African culture.[39] Colonial law reports are full of incidences in which common property concepts were declared repugnant to colonial notions of property, or where doctrines unknown to common property systems were declared to be part of that system.[40] Further, the Swynnerton Plan of 1954 recommended land adjudication, consolidation and registration of land. This was based on the assumption that by legislating change from common to private property, fundamental revolution in land would occur.[41]

However, to counter the Western regimes of property that recognized private tenure and public tenure as the only possible tenure regimes, Okoth-Ogendo proposes the recognition of communal land as a *sui generis* property system, as unique and of its own kind.[42]Henry Smith has also captured this concept as what he refers to as the semi-commons which exists where property rights are a mix of common and private rights.[43] This would result in group ownership of land where the members are known and certain in such a way that any other individual who is not a member can be excluded. The group members have ownership rights but not transfer rights and the land use is restricted to what has been agreed upon by the group members. Though the two writers did not get into the intricacies of how this would be made possible, the post-colonial political regime in Kenya came up with a system where this was possible as the previous laws had done away with this. Communal ownership of land in post-colonial Kenya was primarily effected through the use of trust lands and the group ranches.

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[38] Lenaola *et al* 'Land tenure in pastoral lands' in Juma C, Ojwang JB (ed) *In land we trust*, 238.
[39] Okoth-Ogendo HWO, 'The tragic African commons: A century of expropriation, suppression and subversion', *Land reform and agrarian change in southern Africa,* 2002, 8.
[40] Mann K, Roberts R, *Law in colonial Africa*, Portsmouth, Heinemann, 1991.
[41] Okoth-Ogendo , 'The Tragic African commons, 12.
[42] See Okoth-Ogendo, The Tragic African Commons.
[43]Smith, 'Semi common property rights and scattering in the open fields,' 131-169

Trust lands were governed by the Trust Lands Act[44] and the repealed Constitution of Kenya (1983).[45] Trust lands constituted areas occupied by native Kenyans during the colonial period and which have not been consolidated, adjudicated and registered to either an individual or a group.[46] They were managed by local authorities and every tribe, group or family enjoyed the rights in the land depending on existing African customary law or any subsequent modifications of the same.[47]

In 1968, the Land (Group Representatives) Act was passed.[48]This led to the registration of group ranches which were seen as a compromise between individual ownership and the need for access to wider resources in dry lands. This system had communal lands divided into ranches that were then registered in the names of the group representative, elected by the members of the group. Each member of the group had rights in the ownership of the land in undivided shares. Members were to make exclusive use of the group ranch resources.[49]

However, the group ranches have not worked as well as was thought they would. Government policy strongly tended to emphasize individual rights with a view that the group rights will eventually evolve to individual rights. This has led to subdivision of group ranches and individual titling.[50]

It is with this in mind that Kenya's first National Land Policy called for the recognition of community rights to land.[51] This was adopted in the Constitution of Kenya 2010 in article 63 which provided;

"(1) Community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest.

(2) Community land consists of—

(a) land lawfully registered in the name of group representatives under the provisions of any law;

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[44] Chapter 288 of the Laws of Kenya.
[45] See Sections 114-120.
[46] Kameri-Mbote *et al*, *Ours by right*, 43.
[47] Section 69, *Trust Lands Act*, Chapter 288 of the Laws of Kenya.
[48] Chapter 287 of the Laws of Kenya. Introduced as an Act of Parliament to provide for the incorporation of representatives of groups who have been recorded as owners of land under the Land Adjudication Act Chapter 284 of the Laws of Kenya.
[49] Ogolla BD, Mugabe J, 'Land tenure systems' in Juma C, Ojwang JB (ed), *In land we trust*, 100.
[50] Kameri-Mbote *et al*, *Ours by right*, 45.
[51]Paragraph 64, *National Land Policy*,, (2009)

(b) land lawfully transferred to a specific community by any process of law;

(c) any other land declared to be community land by an Act of Parliament; and

(d) land that is—

(i) lawfully held, managed or used by specific communities as community forests, grazing areas or shrines;

(ii) ancestral lands and lands traditionally occupied by hunter-gatherer communities; or

(iii) lawfully held as trust land by the county governments, but not including any public land held in trust by the county government under Article 62 (2).

(3) Any unregistered community land shall be held in trust by county governments on behalf of the communities for which it is held.

(4) Community land shall not be disposed of or otherwise used except in terms of legislation specifying the nature and extent of the rights of members of each community individually and collectively.

(5) Parliament shall enact legislation to give effect to this Article."

Kameri-Mbote and Odote discussed what an ideal legal framework governing the ownership of communal land would look like and the issues it would tackle. Odote highlighted the critical legislative issues as;how to define communities, howto apply the constitutional criteria of ethnicity, culture and community of interest, the place of customary law in Community Land Rights Law, dispute resolution under the law, the place of individual rights and the rights to resources.[52]

TheCommunity Land Bill 2015 was then drafted and continues to be discussed in Parliament. This research fills the gap that other literature did not get an opportunity to address. It examines an actual proposed legislation and attempts to examine whether it would help address the issue of community land rights in Kenya. The case study also gives a different perspective from previously done studies by examining the actual situation on the ground of a community practising group ownership of land.

2.3. Conceptual Framework

For the purpose of this research, the jurisprudential basis of group ownership of land is where it is recognized as *suigeneris*, of its own kind. This will be a mixture of private and group

[52]Odote C, 'The legal and policy framework regulating community land in Kenya An appraisal', Friedrich Ebert Stiftung, Nairobi, Kenya, 2013, 42

ownership rights like with the semi-commons described by Henry Smith as discussed above. Land in this case is owned by a group of specific individuals collectively, and they have the right to exclude any other individual who is not a part of the group from use of the land. These members enjoy certain rights over the land as owners in a theory propounded by Wesley Hohfeld as discussed below as what is referred to as a "bundle of rights or sticks"

2.3.1. Bundle of Rights and Incidents of Ownership

. According to Hohfeld, the idea of property is that it is a 'bundle of rights' that are inherent with the property.[53] This is commonly referred to as the Bundle Theory. This theory states that there is no pre-existing, well-defined and integrated concept of property that guides our understanding of property entitlements, or the creation or interpretation of property entitlements in law. Instead, the law grants specific entitlements of people to things. The property that a person holds in any given instance is simply the sum total of the particular entitlements the law grants to her in that situation. These particular entitlements are metaphorically termed 'sticks', and the property that a person holds is thus the particular bundle of sticks the law grants to them in the given instance. This is line with Bentham's theory discussed that states that property exists only as a result of law. Hohfeld argued that entitlements in law could be broken down into their constituent parts – the basic building blocks of which more complex legal entitlements are constructed. He termed these basic entitlements 'jural relations' namely, liberty, privilege, claim and immunity. [54]

To answer the question as to what rights an owner of land has and a community ought to have over the community land, this study shall refer to A.M Honore's incidents of full liberal ownership of land. He avers that these are the necessary ingredients in the notion of ownership such that if a system did not have them then the system did not know the liberal concept of ownership either of a primitive or of a sophisticated sort. This research adopts a similar view.

"Ownership comprises the right to possess, the right to use, the right to manage, the right to the income of the thing, the right to capital, the right to security, the rights or incidents of

[53] Wesley Newcomb Hohfeld was an American jurist. He was the author of the seminal *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays.* The work remains a powerful contribution to modern understanding of the nature of rights and the implications of liberty.

[54] Hohfeld, W,"Fundamental legal conceptions as applied in judicial reasoning,' *Yale Law Journal*23 (1913): 1659; (Continued in YLJ 26, 1917: 71069.)

transmissibility and absence of term. the prohibition of harmful use, liability to execution, and the incident of residuarity. This makes eleven leading incidents".[55]

For the purpose of this research, some of the elements of the 11 incidents of ownership have to be present for an individual or a group to be considered an owner, as opposed to all 11 incidents to be present in whole. This is precisely because this research has adopted the view that group ownership of land is a *sui generis* property ownership system. Therefore the restriction of one of the incidents does not in itself constitute lack of title because group ownership of land is unique in its own way and does not necessarily conform to the standards of either publicly owned or privately owned land.This is important to the study because land use in community land is generally restricted- the most common uses being grazing, residential and agriculture. The transfer of land is restricted as well. Nonetheless, it is possible to find elements of these incidences within the communal land ownership having in mind that the key elements in communal land ownership are access and control.

2.4 Conclusion

While the western concept of property fails to recognise the commons as a way of owning property, it is evident from the foregoing that property in Kenya has nonetheless been held in common by communities. It is possible for most of the rights ascribed to private ownership to be applied to community ownership. This has indeed been the case although not legally recognised by the common law system.

Odote[56] argues that the neglect of the commons as a way of holding property has been due to the perception that common property is synonymous with open access. Open access goes against the idea of property as rights *in rem*. The colonialists also viewed the African customary law as inferior. Further, private property was seen as economically efficient and a stable way of management of land and thus superior to communal ownership.

[55]7. Honore AM, 'Ownership, Nature of property and value of justice,' 370.
[56]Odote C, 'The Dawn of Uhuru? 'Implications of constitutional recognition of communal land rights in pastoral areas of Kenya',*Nomadic peoples Journal* (2013), Volume 17, ISSUE 1,: 87–105

3.0. CHAPTER THREE: THE CASE STUDY

3.1 Introduction

The respondents in Narok County were used as a case study to help address the main objective of the research; whether the Community Land Bill 2015 ensures security of tenure for communities. This is based on the hypothesis that the problem with previous laws regulating community land rights was the mismatch in the community's notion of community, community land rights, and what was provided for in statute. Subsequently, although there was a system (ranch system) of ownership and management of community land, it allowed for gradual encroachment of community land and ultimately, the forced evictions by private developers.

3.2 Research design

The research design used was a law reform research and looked at the community land law in context. The design type was a case study which was conducted in Narok County. It involved the use of in-depth interviews.This research is largely qualitative and involved both field work and black letter law analysis. The field work consisted of visits to areas where land is owned and used communally. The study attempted to get the perspective of the community with regard to the concept of community land. This crossed paths with black letter law analysis where clauses of the Community Land Bill 2015 were compared to the perspectives of the respondents interviewed on behalf of theircommunity. There is an analysis to establish to what extent the community wishes with regard to how the community land is used, managed and rights protected is captured in the Community Land Bill.

3.3 Site Selection

The fieldwork was conducted in two of the five constituencies in Narok County; Narok North constituency and Narok West. The pilot study was conducted on 1st May 2016. The actual field study was conducted from 30th May to 1st June 2015.

Narok North was selected because it is the most metropolitan of all constituencies there. It is the home of Narok town. Its metropolitan nature plays a big role in understanding the concept of a "community" within the context of community land. Further, most of the group ranches here are virtually non-existent. The land was largely sub-divided and given to individuals who were

members of these communities. The group ranches whose members were interviewed were: Olopito, Oleleshwa, Nkairamiran, and Melili.

Narok West constituency was selected because it is particularly rural. The concept of community ownership of land is still largely practiced and fresh in their minds. This is important to the research because it brings out the traditional ways in which community land was managed and used. Further, it is a good contrast to Narok North constituency which is fairly modern and metropolitan in order to help bring out the differences, if any, on the concept of a "community "in the context of community land. The group ranches whose members were interviewed were: Siana, Naikarra and Leshuta.

However, this bias in site selection did not have any implications on the study. The answers given by the respondents were not different on account of the difference of the location of the group ranches to which they belong.

3.4. Population and Sampling

Purposive sampling was applied to identify the study sites as discussed above. The interviewees were drawn from: community leaders, community members and well educated members within the community. However, demographic variables such as age, gender, marital status and education were not emphasized.

A total of 30 respondents were interviewed for the study.The respondents were aged between 22 years and 60 years. A total of 10 females were interviewed who were aged between 22 and 56 years old. Of the 10, 1 was unmarried while the rest were married and had children. A total of 20 males were interviewed whose ages ranged between 31 and 60 years old. Of the men interviewed, all were married but one; who was a widower.

3.5Data collection

Data was collected using individual in-depth interviews as well as secondary data sources like journal articles, books on community land and reports. The answers of the respondents were recorded by hand. A pilot study was first conducted to evaluate feasibility, time needed for the research, cost and statistical variability in an attempt to predict an appropriate sample size and improve upon the research design. The pilot helped in amending the interview structure, and increasing the sample size from 13 during the pilot study, to 30 during the actual field study.

3.6 Data Analysis

With regard to the individual interviews, discourse analysis was used. The use of language, syntax, grammar, pauses, hesitations and repetitions were closely monitored. The researcher not only focused on the answers given by the respondents, but also the body language, and a view oflanguage as constructive and how it was constructed. Deductions were drawn from the language as was used and the conduct of the respondents to arrive at certain conclusions. Follow up interviews with the key informants to cross-check and to corroborate data collected from interviews and secondary sources were carried out.

With regard to the analysis of the Community Land Bill 2015, classical content analysis was used to analyse the clauses of the Bill. The content analysis was merely descriptive.

4 CHAPTER FOUR: FINDINGS

4.1. Introduction

This section outlines the findings of the field research undertaken in the area of the case study. The findings are outlined based on the key features of community land discussed earlier in the study. The research outlines what the Maasai community in Narok views or defines a community. It outlines the key elements used by the Maasai to determine what or who belongs to a community. Secondly, the chapter outlines that the Maasai uses to determine what land forms part of the community land as well as how rights and interests in this land are allocated and managed.

4.2. Definition of Community: Who belongs to the Community?

Ninety-seven percent of respondents interviewed when asked exactly who owns a particular piece of communally owned land answered that only a specific section of the Maasai community owns the land in the context of group ownership of land. This is as opposed to every member of the Maasai tribe, or members of a village, or that the land is not owned by any individual. The other three percent however responded that every individual who belongs to the Maasai tribe is an owner of the 'Maasai' land. A respondent of this view stated that "Any Maasai who needs to graze his cows on any land in this county can do so. That is why we are everywhere including inside the Mara. Any Maasai can use it. As long as you mean no harm."

Thirty-six per cent of the respondents when asked what criteria is used to identify this specific group of the Maasai discussed above answered that the said section of the Maasai community is arrived at through membership of an individual or a family to a certain clan. These respondents rejected the possibility that the owners of the community land are individuals who live near the land, and insisted that it is only by virtue of belonging to a certain clan that one enjoys being an owner of the community land. However, three percent of interviewees answered that the section of the Maasai community who owned the land were those who had a certain geographical proximity to the land. The majority, sixty-one percent of the respondents answered that members agree who is or is not a part of the community.

One hundred percent of the respondents interviewed when asked if an individual belonging to a different tribe can be a part of the community that holds land communally answered that an

individual of a different tribe cannot be part of a community that holds land communally among the Maasai.

When the respondents were asked if they knew the boundaries of the community land, one hundred per cent of the interviewees answered that they knew the boundaries of the community land. When the respondents were asked how the boundaries are made or known, most respondents cited that the boundaries normally used are natural features such as valleys, rivers, mountains, tree trunks, forests, hills, streams. Six-percent of the interviewees explained that sometimes these boundaries are man-made such as fences. Fifty-percent cited boundaries as a major source of conflict between different communities where some of the natural features used as boundaries are destroyed.

These findings show that key to the definition of 'community' in this area is ethnic relations, family ties and geographical proximity. As such, the Maasai people have an established way of determining who is a member of their community. The Maasai tribe is divided into villages or clans, which then individually lay claim to certain sections of land within a certain geographical limit.

This finding is important to this study given that the Constitution of Kenya outlines how a community is to be identified. It is also worth noting that the fluid geographical boundaries have been a constant source of conflict and instability in this region and should therefore be addressed by the proposed law on Community Land.

4.3. Bundle of Rights: Who Owns the Land and to What Extent?

When the respondents were asked if they felt that they own the community land, ninety-seven per cent of the respondents interviewed answered that they felt they own the community land. They cited several reasons for this. Most stated that they felt so because they were free to use the land as agreed by all members for grazing, farming and building homes whether temporary or permanent, while others stated that they are free to use the natural resources in the land. However, three percent of the interviewees stated that they did not feel like they owned the community land especially because their land use is limited and they are not allowed to sell a portion of their land when they want to sell. One respondent of this view stated, "I cannot use this land however I want. I cannot use it without having to consult with the members of the community and the elders. I would want to be able to wake up one morning and build a school.

Then and only then will I consider myself an owner. At the moment, I am at the graces of the other members of the community."

4.4. Management and Control

When asked if the communal land has specific uses, one hundred per cent of the interviewees stated that the community land has specific uses. Out of a list of land uses, one hundred percent respondents stated that grazing is permissible. Fifty percent of the respondents listed agriculture as permissible. One respondent however commented that only minimal crop farming is permissible and is limited to around two to four acres per member. Ninety percent of the respondents highlighted residential land use as a permissible use of the community land. None of the respondents listed railway land use, industrial land use, use or utilities land use as permissible activities on the community land. Three percent of the respondents highlighted commercial land use and transportation land use as permissible whereas seventy percent of the respondents highlighted that the community land could be used to build institutions like schools. Half of the respondents interviewed named recreational land use as a permissible land use on the community land. Sixty percent of the respondents highlighted that the community land is often vacant. Other uses of the community land that were repeatedly mentioned by a majority of the respondents included planting trees, construction of dams, drilling boreholes and preservation of rain water.

When asked if there are allocations of parcels of land within the communal land to individuals, of all the respondents interviewed, one hundred percent of them said that individuals are given allocations within the community land for their use and the same number highlighted that an individual is not allowed to sell his portion of the land to an individual outside the community. When asked what happens if an individual no longer wants to be a member of the group that communally owns the land, the common response was that the individual would leave the land for the other members to use communally. One of the respondents answered "You leave it for everyone else."

When asked if the children and grandchildren of the community members are entitled to use the land, all the respondents answered that they are given access to the land and have the right to use it. When asked how disputes regarding the community land are settled, a similar number cited that the council of elders settles the disputes regarding the community land.

4.5. Security of Tenure: Do the Group Ranches Work?

When the respondents were asked if they feel like the current system of communal land ownership works for them, sixty per cent of the respondents answered that they feel the group ranch system of ownership works well but it can be improved. Some respondents said that this could be done through government intervention in setting up infrastructure such as electricity and water. Another respondent answered that individuals should be assigned specific portions but still restrict transferability of this land. However, selling should not be completely out of the question and that the council of elders should be given the discretion to decide on such matters. Forty percent however answered that the group ranch system of ownership of land does not work well for them. The main reason that kept coming up was that it is difficult to develop land with that kind of ownership system. These respondents answered that the solution to this is to subdivide the land and give it to individuals who have the autonomy to decide exactly how they would like to use the land.

Of all the respondents interviewed, only three percent of them were aware of the Community Land Bill 2015.

4.6. Conclusion

The findings outlined in this chapter clearly elucidate that the Maasai community has a well-established customary system of managing community land. Key features of the property in land are available within this system.

The community refers to specific section of the Maasai tribe determined first by the family or clan ties, geographical proximity and the common interests of the people living within this geographical limit.

These findingsare further analysed in Chapter Five below.

5. CHAPTER FIVE: DISCUSSION

5.1. Introduction

This chapter discusses the definition of 'community' vis-a-vis land ownership as well as the concept of bundle of rights from findings of the case study discussed in the previous chapter.

The understanding of the concept of community land and the bundle of rights therein by the Maasai community in Narok County versus the definitions and meaning given to the same in the Community Land Bill 2015 is also discussed.

Community land consists of land lawfully registered in the name of group representatives under the provisions of any law, land lawfully transferred to a specific community by any process of law, any other land declared to be community land by an Act of Parliament; and land that is (i) lawfully held, managed or used by specific communities as community forests, grazing areas or shrines; (ii) ancestral lands and lands traditionally occupied by hunter-gatherer communities; or (iii) lawfully held as trust land by the county governments, but not including any public land held in trust by the county government.[57]

5.2. Definition of Community

According to the respondents, the definition of 'community' derives from a conglomerate of several features, including, ethnicity, family or clan ties and geographical proximity.

For the Maasai community interviewed, being a member of the Maasai ethnic community is essential to being part of the community. The only exception would be if is allowed into the community by marriage into the Maasai community. This is however, not common and such finding were only in the more metropolitan part of Narok.

In addition to being a member of the Maasai ethnic community, belonging to a specific clan of family is also crucial. As discussed in the previous chapter, the respondents identified themselves as belonging to a certain community by virtue of being a member of a certain family or clan. The families or clans therefore together form the community.

[57] Article 63(2), *Constitution of Kenya*(2010.)

Further, the families or clans have been seen to live within certain geographical proximities to each other. In this case, such proximity has been delimited by the ranch boundaries in Narok County.

In Kameri-Mbote study of Samburu, a community similar to the Maasai, there are various avenues to membership such as birth, marriage to a man belonging to the community (vice versa is rare) and through residence and assimilation.[58]

While the Constitution does not give a definition of community land, it sets out ethnicity, culture or similar community of interest as criteria for identification of the same.[59]

The Sessional Paper No. 3 on the National Land Policy requires the Land Act to be enacted to define the term community and vest ownership of community land in the community.[60] The Policy Paper outlines specific steps to be undertaken by the government to secure community land having in the past injustices. These injustices had been occasioned by the fragmented approach to legislation on community land. This approach resulted in the abuse of trust lands, alienation and eventual privatisation of community lands.[61]

The policy paper further requires the government to document and map existing forms of communal tenure, whether customary or contemporary, rural or urban, in consultation with the affected groups, and incorporate them into broad principles that will facilitate the orderly evolution of community land law. Specifically, this 'Land Act' shall have a clear framework and procedures for:

i. The recognition, protection and registration of community rights to land and land based resources taking into account multiple interests of all land users, including women;
ii. Resolving the problem of illegally acquired trust land;
iii. Governing the grant to, and regulation of, rights of use to members;
iv. Reversion of former Government land along the Coastal region to community land after planning and alienation of land for public usage;
v. Governing community land transactions using participatory processes;

[58] See Kameri-Mbote et al, *Ours by right*, 54.
[59] See Article 63, *The Constitution of Kenya*(2010.)
[60] See Paragraph 66 of the *National Land Policy, (*2009.)
[61] Section Paragraph, above.

vi. Accountability of groups, individuals and bodies entrusted with the management of community land, and community participation in the allocation, development and disposal of community land;

vii. Incorporating mechanisms for community land management and dispute resolution;

viii. Members opting out of the communal arrangements and buying out of non-members;

The Land Act 2012 does not define the term 'community land' but rather refers to the meaning in Article 63 of the Constitution. Further, the only other section of this Act that addresses itself to Community Land, Section 37 provides that Community land shall be managed in accordance with the law relating to community land enacted pursuant to Article 63 of the Constitution.

However, Section 2 of the Land Registration Act 2012 defines 'community' as a clearly defined group of users of land identified based on ethnicity, culture or similar community of interest as provided under Article 63(1) of the Constitution, which holds a set of clearly defined rights and obligations over land and land-based resources.

The above provisions indicate that substantive legislation on community land is left to be provided for under the Community Land Bill. The Bill to be enacted into an Act of Parliament to give effect to Article 63 (5) of the Constitution; to provide for the recognition, protection and registration of community land rights; management and administration of community land; to provide for the role of county governments in relation to unregistered community land and for connected purposes.

Section 2 of the Bill defines 'community' to mean a homogenous and consciously distinct group of users of community land who share any of the following attributes –

- common ancestry;
- similar culture or unique mode of livelihood;
- ethnic language;
- socio-economic interest;
- geographical space;
- ecological space; or
- community of interests.

The Bill further defines 'community of interests' to mean the possession or enjoyment of common rights, privileges or interests and living in the same place or having some apparent

association. The Bill also defines 'communal use of land' as holding or using land in undivided shares.

This definition seems to in line with the Maasai community's understanding of community as outlined in the previous chapter. Common ancestry, ethnic language and similar culture are elements used to identify a tribe such as the Maasai. However, as indicated earlier in the chapter, the Maasai community in Narok county does not believe that they land they occupy is owned by the entire Maasai tribe but rather, by specific members of the community. Therefore, the Bill needs to underscore this in its definition of community. This will ensure there is no mismatch between the community's notion of who owns the community land and what the Act to be enacted envisions.

However, the inclusion of "community of interest" by the Bill envisages a unique situation where individuals who may even belong to different ethnic communitiescould own community land based on any othercommon factor other than tribe. This, as discussed above is not possible in the Maasai community. There is only one basic criteria used if any group of individuals is to own land communally: belonging to Maasai community above all else.

5.2.1 Grazing Rights to Non-Members

The Community Land Bill 2015 however has been drafted interestingly to allow non-members of the community to be allocated grazing rights. A registered community may upon application by any person who is not a member of the registered community, grant grazing rights to a non-member of the community.[62] However, this right may be withdrawn after agreement by the members of the community. The withdrawal may be as a result of drought or any other reasonable cause, or if the community considers such cancellation to be in the interest of the residents of the community concerned.

This is a new concept that was not encountered during the field work. At no instance did the respondents envisage a situation where non-members would be allowed to use communal land for their own use.

[62]Clause 29(3), *Community Land Bill* (2015.)

5.3. Bundle of Rights in Community Land

5.3.1 Under the Community's notion

According to the respondents responses during the interviews, individuals or a family are allocated their portion of the land within the community land to use in line with the permissible uses according to the community's members. Further, the members have occupancy rights. However, an individual may not transfer his land to an outsider and may only vacate the land for it to revert back to the community.

5.3.2 Under the Community Land Bill 2015

There are several rights granted to a community owning land under the Bill, or rights granted to individuals who are members of a community registered under the Bill. These rights are registrable.[63]

The Bill provides for occupancy rights.These rights are 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. The occupancy rights are also capable of being of indefinite duration and are governed by customary law in respect of any dealings. The rights are inheritable and transmissible by will to subsequent generations and are liable to prompt payment, in full, of just compensation upon acquisition by the State for public purposes[64].

The Community Land is convertible. It can either be converted to public land or private land.[65] Community land may be converted to public land by compulsory acquisition, transfer, or surrender.[66] The reversionary interest of the community land shall lie with the community in the first instance upon expiry of such public use interest. Thetransfer of community land shall be subject to the approval of the members of the registered community in a community meeting, and should be done in accordance with the Land Act, 2012.[67]

According to the Bill, part of the community land may be allocated to a member or a group of members of the community for exclusive use and occupation for such period as the registered

[63]Clause 16(1) (c), *Community Land Bill* (2015).
[64]Clause 14(1), *Community Land Bill*(2015).
[65]Clause 22(2),*Community Land Bill*(2015).
[66]Clause 23(1),*Community Land Bill*(2015).
[67]Clause 23(4),*Community Land Bill*(2015).

community shall determine. However, a separate title shall not be issued for this parcel.[68]This individual entitlement shall not be superior to community title in any way. A member granted exclusive use of a parcel of land is to pay to the registered community such premium or fees commensurate to the use as may be determined by the community from time to time. The member may develop the land subject to the provisions of any laws and regulations relating to land use. Importantly, the community member may not assign or lease the land to a third party who is not a member of the community. The group member is expected to put the land into lawful use. In the event where the member no longer requires the land, he shall surrender the land back to the community. A parcel of land granted to a member for exclusive use shall revert to the community either if the member dies without an heir; or if the member fails to put it into any use for such period as may be prescribed by the registered community; or if the period of use determined by the registered community expires.[69]

However, land use under the Bill is restricted. It is restricted in the sense that it is subject to the approval of members of the community. Further, at the request of the county government, the community shall submit to the county government a plan for the development, management and use of the community land administered by the registered community for approval.[70]However, before handing in the plan, the community must seek ratification from the members of the registered community; and the plan ought to be bound by any approved relevant physical development plan.[71]

Under the Bill, the community may reserve special designation of other land use rights in purpose areas including: farming areas, settlement areas, community conservation areas, access and rights of way, cultural and religious sites, urban development; or any other purpose as may be determined by the community, county government or national government for the promotion of public interest.[72]

These rights are similar to the rights granted under the Maasai's notion of bundle of rights in communal ownership of land. As earlier discussed, land use under this system was restricted to what members had agreed upon. There was allocation of land to individuals within the

[68] Clause 28(1) and 28(2), *Community Land Bill*(2015).
[69] Clause 28(3), (4) and (5),*Community Land Bill*(2015).
[70]Clause 20, *Community Land Bill* (2015).
[71]Clause 20(2) (e) and (f), *Community Land Bill* (2015).
[72]Clause 30(1), *Community Land Bill* (2015).

community to use in line with the uses generally agreed upon by the community. The Community Land Bill does not allow individual members within the community to transfer their individual entitlements, and neither does the Maasai community. When an individual no longer has use for such land, he is to vacate it and leave it to the rest of the community for use. Such decisions, however, present a challenge to community leadership.

5.4. Security of tenure under the Community Land Bill 2015

The Bill goes a long way to ensure security of tenure for communitiesfor communal land.

It makes key provisions that recognize customary land rights and gives them equal footing with other land rights such as leasehold or freehold rights. "... Customary land rights shall be recognized, adjudicated for and documented for purposes of registration in accordance with this Act and any other written law...Customary land rights, including those held in common shall have equal force and effect in law with freehold or leasehold rights acquired through allocation, registration or transfer..."[73]

This provision works to ensure that the legislation adopts and gives recognition to what communities already use in their traditional tenures. This cures the mismatch between communities' notion of community land and what laws have previously provided. This provision will go a long way in ensuring stability and in management and use of community land.

Further, registration of a community as the proprietor of land shall vest in that community the absolute ownership of that land together with all rights and privileges that attach to that land. However, if the registration of a community or a person is as the proprietor of a lease, that community or person shall have the leasehold interest described in the lease, together with all implied and express rights and privileges therein.[74] The rights as proprietor, either as a first registration or after registration upon valuable consideration are indefeasible. However, these are subject to charges and encumbrances and overriding interests under the Land Registration Act of 2012.[75] A certificate of title issued after registration is prima facie proof of ownership of communal land unless it was obtained through fraud or misrepresentation or if the certificate of title was acquired illegally, unprocedurally or through a corrupt scheme.[76] Lastly, no interest inor

[73]Clause 4 & 5, *Community Land Bill*, (2015).
[74]Clause 17, *Community Land Bill* (2015.)
[75]Clause 18, *Community Land Bill* (2015).
[76]Clause 19, *Community Land Bill* (2015).

right over community land may be compulsorily acquired by the State except in accordance with the law, for a public purpose, and upon prompt payment of just compensation to the person or persons, in full.[77] This clause was specifically introduced to prevent the illegal and irregular allocation of community land as seen in earlier presidential eras.

In this sense it is clear why a communal land ought to be registered. It receives recognition from the law and therefore cannot be subjected to abuses as they have been in the past as discussed in Chapter Two.

However, this does not mean that unregistered community land is not offered protection under the Bill. County governments shall hold in trust all unregistered community land on behalf of the communities for which it is held.[78]

5.5. Conclusion

Future research under this broad topic of community land rights would be to analyse the bundle of rights under the community land and how this ties in withtraditional resolution dispute resolution mechanisms. This indeed has a bearing on the security of tenure. It would also be interesting to establish the role of the formal judicial systems in ensuring the security of tenure for communities.

From the above discussions, it is clear that there are many similarities between the notion of community land according to the Maasai community, and the provision of the Community Land Bill 2015. This will go a long way in securing title for communities. However, there are a few recommendations that could even improve the Bill further which shall be discussed in the next chapter.

[77]Clause 5(4), *Community Land Bill* (2015).
[78]Clause 6, *Community Land Bill* (2015).

6. CHAPTER SIX: RECOMMENDATIONS AND CONCLUSIONS

6.1 Introduction

In many aspects the Community Land Bill 2015 has addressed previous inadequacies in the laws governing the group ownership of land. With regard to trust lands, many of them have changed status either to individual ownership under the Registered land Act[79], or to public land based on the powers of the county councils under the Local Governments Act. This means that customary tenure and collective rights ceases to apply in those areas. However, the Bill 2015 cures this by stating that customary rights are recognizable and so is customary tenure.[80]

Further, it deliberately left the definition of communities broad enough to allow for flexibilityso as to be non-exclusionary and to allow for evolution, and did not limit the definition to an ethnic criteria.Definition based on culture or ethnicity alone has been avoided in order to prevent inter-ethnic tensions, conflict or violence.[81]

The Bill also ensures security of tenure through providing for registration of community land, and the indefeasibility of a certificate of title except in the cause of fraud, corruption or misrepresentation.[82]

However, the Bill is still lacking in some aspects. It failed to mention who can transact on behalf of a community. Further, the Bill failed to give enforcement mechanisms of some of the rights it allocated.Lastly, the Bill does not clearly highlight the difference in roles of between the National Government and the County Governments in relation to community land.

6.2. Limitations of the study

The field research for this study focused on the Maasai community only, a pastoralist community that has had the concept of community land applied for a significantly long time. However, such focus on one community out of many others in Kenya means that the results and conclusions drawn from such fieldwork may not be an accurate representation of other communities, given the different cultural practices. Having conducted the research, it was clear that each ranch had

[79]Now repealed and replaced by the Land Registration Act.
[80]Clause 4(3) (a) and 5(2) & (3), *Community Land Bill* (2015).
[81]Odote C,'The legal and policy framework regulating community land in Kenya An appraisal', Friedrich Ebert Stiftung, Nairobi, Kenya, 2013, 42.
[82]Clause 19, *Community Land Bill*(2015).

its own way of doing things that was different from doing the other ranches. These results therefore cannot be accurate of any other community's way of doing things and how this should reflect on the Community Land Bill 2015.

6.3. Recommendations

Although the Bill states the nature of permissible transactions (conversion of community land to either private or public land)[83] the Bill omits to mention exactly who transacts on behalf of the community. This leaves room for ambiguities and therefore is open to abuse. The Bill should specify which individualstransact on behalf the community. This would avoid cases of misappropriation of community land by group representatives as was the case in the past.Once community land is properly vested, transactions on such land should be made legal and enforceable or voidable under contract law.[84]One way of doing this would be by introducing a clause that would give a community a legal status as a corporate. The members of this corporate body would be like shareholders with equal voting rights similar to those of a company and therefore able to have resolutions. The council of elders would be the directors of the company. This is in turn results in obligations by law on them to act in the interest, and under the direction of the community members as shareholders. If they act otherwise, legal action can be instituted against them. This would prevent misappropriation of community land.

However, this may present several challenges. By introducing corporate affairs into the community land may complicate the life of the community members further. First, these are complex matters in law and not all the community members may be in a position to understand the legal implication of giving a community corporate status. It may lead to the elite members of the group taking advantage of those who may not understand such implications.Secondly, focus on its corporate nature may cause the customary rights in the community land to be overlooked and eventually extinguished in the process and take us back to the age of the problems of group ranches.

Secondly, the Bill should provide on how rights are to be enforced including rights and entitlements of individual members within communities. The Bill only gives entitlements and

[83]Clause 22-27, *Community Land Bill* (2015).
[84]Odote, 'The legal and policy framework regulating community land in Kenya An appraisal', 42.

rights but lacks enforcement mechanisms. For instance, the individuals with entitlements lack a legal status in the face of the community. The Bill should address this question.This would be cured by the suggestion of having the community registered as a body corporate. An individual as a shareholder would have legal standing according to the exceptions under the rule in the famous company law case of *Foss v Harbottle*[85] as minority with say, suing on behalf of the community (corporate.)

Thirdly, the transfer of individual entitlements to non-members is not permissible by the Bill.[86]This was deliberate in order to avoid the problems of the current group ownership of land which were subdivision and individualization. However, this transaction should not be completely disallowed. The decision should lie with the community members.This however, ought to be done in ways enumerated in the Bill, through a majority vote where at least two-thirds of the members are present in the meeting. If the community members are of the opinion that an individual can transfer his entitlement to a non-member without watering down the essence of the community then they should be in a position to decide for themselves.Having the community registered as a body corporate with the council of elders as the directors would smoothen this process.

Lastly, the Bill should redefine the state and/or public by taking into account the devolved system of government, and by clearly providing for the relationships between the County governments and the National Government through the National Land Commission (NLC) in relation to management of community land.[87] The Bill only seems to have highlighted the role of the county government but omitted the role of the National Government and National Land Commission in the protection of community land rights with regard to compulsory acquisition of land as a result of the police powers of the State.

6.4. Conclusion

The Community Land Bill 2015 has addressed the injustices of the Group Representatives Act and Trust Lands Act in many aspects. The bundle of rights include customary rights of occupancy, rights of use although restricted, the right to manage, the right to the income of the thing, the right to capital, the right to security, the rights or incidents of transmissibility and

[85](1843) 67 ER 189
[86] Clause 28(4) (e), *Community Land Bill* (2015).
[87]Odote, 'The legal and policy framework regulating community land in Kenya An appraisal', 43.

absence of term, the prohibition of harmful use, liability to execution, and the incident of residuarity. However, the right of security is conspicuously missing. The incident of transmissibility is also heavily restricted. In line with the conceptual framework of this research of viewing group ownership as a *sui generis* property ownership regime, this is well in order. Because of group ownership of land being unique, it is not expected to conform to the standards of the two traditional property ownership regimes. It is with this in mind that despite the absence of one and the restriction of some of Honore's incidents of ownership,the community in this case is still seen as an actual owner of the communal land.

Further, the Community Land Bill 2015 broadly defined "community" in order to allow for growth and flexibility so that it is not exclusionary. It included many criteria in order to broaden the scope of the people who can come together to form a community and hold land together. It also highlighted the role of the individual within the community in order to enable economic development of land within the limits that the members prescribed.

The law-makers should take into consideration the recommendations given in this research then the Bill should be made into law without any further delay.A delay in putting in place the requisite legislation to govern community land essentially leaves community land under the old and inadequate framework.

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APPENDICES

Security of Tenure for Community Land under the Proposed Community Land Bill, 2015:

The Case for Narok County

INTERVIEW QUESTIONS

Basic Information:

Interview No: _____

Name of Interviewee _____

Interview Date _____

Location of Interview _____

Gender _____

Age _____

Ethnicity _____

Occupation _____

1. Who exactly owns this land?
    A. Every member of the Maasai Community
    B. Members of our village
    C. Nobody
    D. A specific section of the Maasai community
    E. None of the above.

2. If D above, what is the criteria involved in selecting this section of the Maasai community?
    A. A particular clan or family
    B. Individuals within a certain geographical proximity to the land.
    C. Members agree who is part of or not part of the community (members with a similar interest get together and own, use, administer land)
    D. None of the above.
3. Can a member of a different tribe be part of a community that holds land communally?
    A. Yes
    B. No

4. Do you know the boundaries of the community land?
    a. If yes, how are they delimited?

    _____

    _____

    _____

    _____

5. Do you feel you own the land that you use?
    A. Yes
    B. No
        i. If, 'Yes', why?

_____

_____

ii. If 'No', why?

_____

_____

6. Does this land have specific uses?

A. Yes

B. No

If 'Yes', what are they?

(tick the land use that is permissible)

i. Grazing
ii. Agriculture(Crop Farming)
iii. Residential Land Use - where people live (residential houses)
iv. Institutional Land Use - government related (schools, town hall, police station)
v. Recreational Land Use - for fun, entertainment purposes (such as sports fields)
vi. Open/ Vacant Space Land Use
vii. Commercial Land Use - places to do with [making] money (stores, banks)
viii. Industrial Land Use - working places that help industry (factories)
ix. Railway Land Use
x. Transportation Land Use -to do with transport (bus stops, roads)
xi. Utilities Land Use - like hydroelectricity towers
xii. Any other land use
xiii.

7. Are there allocations within the community land to individuals?
   A. Yes
   B. No

8. Can an individual within the community sell his portion of the land to an individual who is or is not a member of the community?
   A. Yes
   B. No

9. What happens when a member of the community no longer wants to be an owner of the land?

   _____

   _____

   _____

10. Are the children of the community members entitled to use the land?
    A. Yes
    B. No

11. How about their grandchildren?
    A. Yes
    B. No

12. How are disputes regarding the community land settled ?
    A. Council of elders
    B. Community leader
    C. Court
    D. None of the above.

If D above, how?

_____

_____

_____

13. Do you feel like the current system of land ownership work well for you?
    A. Yes
    B. No
14. Can it be made any better?
    A. Yes
    B. No, it is okay

If 'Yes', how?

_____

_____

_____

_____

15. Are you aware of the Community Land Bill 2015?
    A. Yes
    B. No