

# **A Legal and Planning Methodology for African Commons: Reviewing Rangeland Governance in Kenya**

Robert M. Kibugi

## **Abstract**

Rangelands in Kenya lie within the arid and semi-arid lands (ASALs) with low and erratic amounts of rainfall and harsh environmental conditions. Traditionally inhabited by pastoral communities, livestock keeping is the main source of livelihood supported by this environment. These communities have age old ecological and land use practices that have ensured that pastoralism works for them. They practiced common property traditions to share resources, providing options for both dry and wet season grazing and food contingencies.

Following Garrett Hardin's now discredited *Tragedy of the Commons* postulate, the Kenya Colonial Government declared these practices archaic, pushing for individualization of tenure, and agriculture. This policy, adopted in independent Kenya led to "Group Ranches" – an attempt at fusing common property and private ownership of land. The outcome has been disastrous, with most ranches sub-divided, resulting in expropriation of the African commons. Now there is evidence that due to the ecological dictates of ASALs, the pastoral communities are re-establishing an informal system of commons.

We examine whether the management of African rangelands as common property is inimical to sustainable utilization. Our thesis is that expropriation of the African Commons into private property was based upon a wrong premise. Taking a deconstructive theoretical approach, we examine theories, principles, and historical developments that informed these actions. We propose a legal-policy and planning methodology to safeguard the African commons as embodied by the Kenyan Rangelands. These include options for rangeland governance among them corporate legal personality for communities to facilitate common ownership, legal re-classification of the commons for transfer and sub-division, equity, codification of customary law, and dismantling of patriarchy. We further propose a planning methodology that will guide ecological governance and ensure compatible land use, as well as an overall institutional framework. The aim is governing African Commons for sustainable development of rangeland communities.

# **A LEGAL AND PLANNING METHODOLOGY FOR AFRICAN COMMONS: REVIEWING RANGELAND GOVERNANCE IN KENYA**

Robert M. Kibugi\*

## **INTRODUCTION**

Governance over natural resources remains a complex task around the world. As natural resources are finite, there is increasing competition between uses and users resulting in inequity, discrimination, poverty, and unsustainable consumptive patterns. Land stands out as a key resource facing that high stakes competition due to its scarcity, centrality to human life and variations in productivity. Where peoples livelihoods and subsistence thus depends on the land solely, the stakes are even higher. Naturally, governmental authorities employ public law and policy instruments to regulate governance and use of land. Where those instruments are ill-devised and unsuited for a particular ecosystem, a plethora of problems emerge. That is the devils dilemma facing the African Commons otherwise known as rangelands.

The pursuit of private property rights has dismantled systems that have managed the communal interests in these lands for generations. In the case of Kenya, government officials either failed to understand how common property works or just ignored it. Either way, at the present their chosen form of rangeland governance through group ranches is in a mess. Many communities either sub-divided, wanted to sub-divide, are stuck in the sub-division process, or at trying to consolidate individual pieces after sub-division left them worse off. Introduction of group ranches was intended to save rangelands from the tragedy of the commons metaphor, but has interestingly resulted in exactly that. Consequently, legal and policy reform is necessary. Ingenious communities have developed certain responses to deal with the current challenges. This paper seeks to review rangeland governance in Kenya from colonial days, focusing on group ranches, and eventually propose a methodology for sustainability.

Part 1 of the paper is the introduction. Part 2 analyses the key concepts in play here. It looks at property, common property and the African commons. Part 3 is a journey in history of rangeland governance, tracing origins of group ranches, and the rationale for their introduction. Part 4 of the paper represents a legal and factual deconstruction of group ranches to examine where they stand vis-a-vis the tragedy of the commons. Part 5 of the paper seeks to propose reform measures to ensure sustainability in rangeland governance in the context. The last represents a brief conclusion.

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## CONCEPTUALIZING THE AFRICAN COMMONS

There is always reference to the commons using a variety of terms, oftentimes creating more confusion than clarity. Further, the African commons possibly has a unique foundation that has informed its governance in the last century or so. In addition, there are international environmental law instruments and principles offering guidance on appropriate governance systems.

### A. Property and Property Rights

The key concept here, *property*, is conceptualized as a benefit (or income) stream.<sup>1</sup> Property *is not* an object but rather a social relation defining the property holder with respect to something of value (the benefit stream) against all others.<sup>2</sup> This relation is exercised as a property right; rather fundamental to understanding problems in environmental management.<sup>3</sup> This right may be defined as the *de jure* or *de facto* rights of individuals or groups of individuals to a flow of benefits from assets, with at least a partial right to exclude others.<sup>4</sup> Another dimension is the right as a claim to a benefit stream that some higher body, usually the state, agrees to protect through assignment of duty to others who may covet, or somehow interfere with the benefit stream.<sup>5</sup> The essence of property rights is thus a structure of duties that will give any particular benefit stream protection against adverse claims.<sup>6</sup> There are many several types of property rights, but here the focus settles on common property.

### B. Common Property

Common property is a rather 'common' term. Economists have applied the term where no property rights existed (*res nullius*), whereas historians and anthropologists used the same term to refer to a system of collective property rights (*res communes*).<sup>7</sup> It is also confused with public property vested in the state and held in trust for the citizens.<sup>8</sup> Another confusing variant is property, owned by the state as a private land owner to the exclusion of the citizens.<sup>9</sup>

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<sup>1</sup> Daniel W. Bromley, "The Commons, Common Property and Environmental Policy" (1992) *Environmental and Resource Economics* 2, 1 at 2.

<sup>2</sup> *Ibid.*

<sup>3</sup> R. Quentin Grafton, "Governance of the Commons: A Role for the State?" (2000) *Land Economics* 76(4) 504.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Supra* note 1. Economists present parallel arguments, for instance, that a primary function of property rights includes guiding incentives to achieve a greater internalization of externalities. See generally, Harold Demsetz, "Toward a Theory of Property Rights" (1967) *The American Economic Review* 57(2) *Papers and Proceedings of the Seventy-ninth Annual Meeting of the American Economic Association*, pp. 347-359.

<sup>6</sup> *Supra* note 1.

<sup>7</sup> John Quiggin, "Common Property, Equality and Development" (1993) *World Development* 21(7), 1123. Harold Demsetz, an economist (*supra* note 5, 354) for instance talks of communal property as where the community denies to the state or to individual citizens the right to interfere with any person's exercise of communally-owned rights.

<sup>8</sup> Public property can be as vulnerable as unowned resources to overuse because it is afflicted with severe principal-agent disease. Ownership is vested in an abstract identity (the 'public') whose representatives (government officials) are only managers who are often far removed

Common property represents private property for the group (since all others are excluded from use and decision making), and that individuals have rights (*and duties*) in a common property regime.<sup>10</sup> It represents jointly owned private property without unilaterally tradeable shares. Simultaneous sale by all co-owners is only permissible by vote, but sale *inter se* is subject to strict internal rules.<sup>11</sup> Hailed as the best (although the most rare and difficult to acquire) option for protecting community-based property rights including the commons, especially for original long-term occupants of a specific area, it may require granting legal recognition of private-group rights for communities over the property in question.<sup>12</sup>

The essence of any property regime is an authority system and compliance, to assure that the expectations of rights holders are met.<sup>13</sup> The fundamental characteristic of a common property regime is that their primary legitimacy is drawn from the community in which they exist, and not from the nation state in which they are located. Thus, if the authority and legitimacy system breaks down – for whatever reason – then common property (*res communes*) degenerates into open access (*res nullius*).<sup>14</sup>

Research into common property was largely influenced by the controversial and now discredited 'tragedy of the commons' metaphor by Garrett Hardin regarding private property, It has come to symbolize the degradation of the environment to

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from the resource itself and thus unable to police its use, and who in any case have no personal stake in the resource and thus no great motivation to exert themselves to protect it. See, Margaret A. McKean, "Success on the Commons: A Comparative Examination of Institutions for Common Property Resource Management" (1992) *Journal of Theoretical Politics* 4(3) 247, at 252.

Under Kenyan law, an example of public property specifically designed as a public trust are the "Trust Lands" established under Chapter IX of the Constitution vesting in County Councils in trust for residents and administered under the Trust Lands Act, Cap 288, Laws of Kenya. Although the Constitution provides for their setting apart to individuals and groups, County Councils have irregularly allocated most of them to undeserving persons, mostly with political connections.

<sup>9</sup> In such a case, the state would have an exclusive right to dispose such land without regard to the public. Under Kenyan law, the Government Lands Act, Cap 280 Laws of Kenya is such an example. There is currently a major land reform debate aimed at converting most of these lands into public trusts and curtailing the exclusive powers of the state to make dispositions.

<sup>10</sup> *Supra* note 1, at 11.

<sup>11</sup> Margaret A. McKean, "Success on the Commons: A Comparative Examination of Institutions for Common Property Resource Management" (1992) *Journal of Theoretical Politics* 4(3) 247, at 252.

<sup>12</sup> Owen j. Lynch, "Promoting Legal Recognition of Community-Based Property Rights, Including the Commons: Some Theoretical Considerations (Paper presented at a Symposium of the International Association for the Study of Common Property and the Workshop in Political Theory and Policy Analysis, Indiana University, Bloomington, Indiana, June 7,1999) [unpublished], at 2.

<sup>13</sup> *Supra* note 1, at 12.

<sup>14</sup> *Supra* note 12, at 3.

be expected whenever many individuals use a scarce resource in common.<sup>15</sup> The tragedy of the commons thesis by Hardin applied pastures that are open to all, as its illustrative point.<sup>16</sup> In such a case, it would be expected that each herdsman would try to keep as many cattle as possible on the commons. Accordingly, such an agreement may work reasonably satisfactorily for centuries because tribal wars, poaching, and disease keep the numbers of both man and beast well below the carrying capacity of the land. Finally, however, comes the day of reckoning, that is, the day when the long-desired goal of social stability becomes a reality.<sup>17</sup>

At this point, according to Hardin, the inherent logic of the commons remorselessly generates tragedy. As a rational being, each herdsman seeks to maximize his gain. Explicitly or implicitly, more or less consciously, he asks, "What is the Utility *to me* of adding one more animal to my herd?" This utility has one negative and one positive component.<sup>18</sup> The positive component arises out of the increment of one animal. The negative component arises out of the additional overgrazing created by one more animal. Since, however, the effects of overgrazing are shared by all the herdsmen, the negative utility for any particular decision-making herdsman is only a fraction of the overall negative impact.<sup>19</sup>

Hardin presented the rational herdsman to conclude that the only sensible course is to add more animals to his herd, a conclusion reached by other rational herdsmen sharing a commons. Each man is locked into a system compelling him to increase his herd without limit, in a world that is limited.<sup>20</sup> Hardin argued so long as the pasture remains open, it will be tragedy since as a commons it will decay and rot away. He assumed that community managed areas equate to areas free from management control. Since Garrett Hardin presented the tragedy of the commons, private/individual property rights have been fronted as a panacea to the problem of unsustainable resource use.<sup>21</sup>

### C. African Commons

African commons represent the arid and arid lands, otherwise called rangelands. Rangelands are the semi-arid regions that are too dry for reliable crop cultivation

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<sup>15</sup> Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge, Cambridge University Press, 1990), at 2.

<sup>16</sup> Note the contrasting reference to open pasture while our theoretical exposition of common property refers to a line of authority and legitimacy being central to its survival.

<sup>17</sup> Garrett Hardin, "The Tragedy of the Commons" *Science*, 162 (1968) at 1243-1248. Available at [www.dieoff.org](http://www.dieoff.org) .(Accessed on 15 July 2006).

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*

<sup>21</sup> Patricia Kameri-Mbote, "Land Tenure, Land use and Sustainable Environmental Management in Kenya: Towards innovative Approaches to Property Rights in Wildlife Management" in Nathali J. Chalifour, Patricia Kameri-Mbote, Lin Heng Lye & John R. Nolon, eds., *Land Use Law for Sustainable Development* (New York: Cambridge University Press, 2007) at 1.

and hence used for livestock production of one form or another. The rangelands developed over many thousands of years under climates marked by strong seasonality and high interannual variation in rainfall.<sup>22</sup> Africans keep about 14 percent of the world's cattle and 21 percent of the world's sheep and goats on a land base that comprises 25 percent of the world's total area of rangelands. The number of people engaged in extensive livestock production is higher in Africa than in any other region of the world. Of the 30 to 40 million pastoralists in the world, over half reside in Africa.<sup>23</sup>

Kenyan rangelands support six (6) million people and more than fifty (50) percent of the country's livestock population.<sup>24</sup> Historically, a livestock based economy has been dominant supporting a large and diverse pastoral population. While this population has risen rapidly over the last three decades, only slightly below the national average of 3.8 percent, cattle numbers during this time have fluctuated. Disease and drought have checked any long term increase in numbers and the present cattle population is close to the 1969 level of 2.8 million. Per capita livestock holdings have thus decreased, and many groups (the Turkana, Samburu Somali and Pokot pastoralists in particular) are no longer able to maintain a purely livestock-based economy.<sup>25</sup>

Conceptually, the African commons represents a variant of common property representing land and associated resources available exclusively to specific communities, lineages or families operating as corporate entities.<sup>26</sup> Such commons are supposed to be managed and protected by a social hierarchy in the form of an inverted pyramid with the tip representing the family, the middle the clan and lineage and base the community.<sup>27</sup> Access to the resources of the commons is open to individuals and groups who qualify on the basis of socially defined criteria.<sup>28</sup>

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<sup>22</sup> Brian H. Walker; Marco A. Janssen, "Rangelands, Pastoralists and Governments: Interlinked Systems of People and Nature" (2002) *Philosophical Transactions: Biological Sciences* 357 (1421), 719.

<sup>23</sup> Brent M. Swallow & Daniel W. Bromley, "Institutions, Governance and Incentives in Common Property Regimes for African Rangelands" (1995) *Environmental and Resource Economics* 2(6), 118.

<sup>24</sup> Bondi Ogolla & John Mugabe, "Environmental Governance and the Law" in Calestous Juma & J.B. Ojwang (eds), *In Land We Trust: Private Property and Constitutional Change* (ACTS Press, Nairobi, 1996) at 88.

<sup>25</sup> Chris Southgate and David Hulme, *Environmental Management in Kenya's Arid and Semi-Arid Lands: An overview* (Rural Resources Rural Livelihoods Working Paper Series, Phase III Project: 'Dryland Degradation in Africa: Land, Water and Local Governance', Paper No 2) (Institute for Development Policy and Management, University of Manchester, Research funded by the Economic and Social Research Council Global Environmental Change Programme, February 1996) at 6.

<sup>26</sup> H.W.O. Okoth-Ogendo, "The Tragic African Commons: A Century of Expropriation, Suppression and Subversion" (2003) *University of Nairobi Law Journal* 1, at 107.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*

Classical African commons in particular were the primary socio-economic asset for the development of individuals and communities. For this reason, these commons were not susceptible to *inter vivos* transfer outside of each level of social organization. Transmission of access rights to land and associated resources was done in *mortis causa*, by way of intestacy, and to a predetermined class of heirs under commons rules internalized within the community.<sup>29</sup>

The Kenyan rangelands, representing about 82% of the total land mass have been occupied by pastoralist communities for decades. Policy makers sought to protect these arid environments without concomitant attention to the socio-economic attention and capacities of residents to use them.<sup>30</sup> This led to policy measures to 'fix' degradation problems, including population movements, irrigated agriculture, etc. rangelands have been seen as 'waste of space'.<sup>31</sup> No wonder government interventions in Kenya were guided by Hardin's metaphor. Legal measures were adopted to alter the land tenure system, re-order the rangelands and pre-empt a potential tragedy of the commons.

The Hardin postulate assumed rangelands inhabited by pastoralists were open access without any management control.<sup>32</sup> He missed the point that many social groups, including the herders on the commons, have struggled successfully against threats of resource degradation by developing and maintaining self-governing institutions.<sup>33</sup> It has been observed that Hardin's metaphor was really about about the "tragedy of open access" and not any "tragedy of the commons."<sup>34</sup> There is a critical difference between *open access resources* and *common property resources*, and the difference turns on the very concept of *property*. Property is a future benefit stream, and hence there is no *property* in an open access situation, there is only the opportunity to use something.<sup>35</sup>

Government efforts to re-order the Kenyan rangelands led to introduction of the group ranch concept, as the formal land holding and use structure for pastoralist communities. While the group ranch concept will be clearly examined in the next two parts of the paper, we suggest that its governance structure has significantly contributed to environmental and resource mismanagement of the rangelands. It has, paradoxically, led to the tragedy of the commons it was actually intended to prevent.

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<sup>29</sup> *Ibid.*

<sup>30</sup> African Conservation Centre, *Diversifying Rural Livelihoods: Pastoralism and Rangeland Management* (Nairobi, ACC, 2007), at 5.

<sup>31</sup> *Ibid.*

<sup>32</sup> Thompson, D.M., *The Role of Cultivation in Maasai Production systems on Three Group Ranches Adjacent to the Maasai Mara National Reserve in Kenya* (Ph.D. Proposal, Department of Anthropology, University College London, London, August 1998 [Unpublished] at 26.

<sup>33</sup> Thomas Dietz, Elinor Ostrom & Paul C. Stern, "The Struggle to Govern the Commons" (2003) *Science* 302 (12), 1907.

<sup>34</sup> *Supra* note 12.

<sup>35</sup> *Supra* note 1 at 14.

#### *D. International Environmental Law Principles and Instruments*

Generally, management of natural resources is within the competence of individual governments since they exercise sovereignty.<sup>36</sup> However, as the principal actors at international law, states have developed environmental law principles and even binding agreements to observe certain standards to ensure sustainable management of their natural resources. Perhaps if these standards and commitments were taken more seriously, sustainable natural resource governance would be within reach.

The 1992 Rio Declaration urged States to take significant steps to ensure sustainable environmental management. It urged that the right to development must consider inter generational equity;<sup>37</sup> recognized poverty eradication as an indispensable requirement for sustainable development,<sup>38</sup> and urged participation of citizens at local level in environmental decision making.<sup>39</sup> The declaration significantly also recognized that indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices.<sup>40</sup>

Agenda 21 too made a concerted effort to develop guidelines for natural resource management. On management of fragile ecosystems, governments were required to integrate indigenous knowledge related to forests, forest lands, rangeland and natural vegetation into research activities on desertification and drought;<sup>41</sup> and to facilitate allocation of land to the uses that provide the greatest sustainable benefits and to promote the transition to a sustainable and integrated management of land resources.<sup>42</sup> This would involve taking into consideration, *inter alia*, protected areas, private property rights, the rights of indigenous people and their communities and other local communities and the economic role of women in agriculture and rural development.<sup>43</sup> These principles are imperative especially where legal-policy instruments chosen by government to manage fragile ecosystems like rangelands are at odds with its very character, and the traditional property rights regime.

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<sup>36</sup> See for instance Article 3 of the Convention on Biological Diversity which provides that "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies." See also, Principle 2, Rio Declaration, 1992.

<sup>37</sup> Principle 3.

<sup>38</sup> Principle 5.

<sup>39</sup> Principle 10.

<sup>40</sup> Principle 22.

<sup>41</sup> Agenda 21: Chapter 12, "Managing Fragile Ecosystems: Combating Desertification and Drought" (UN, 1992) online: <http://www.un.org/esa/sustdev/documents/agenda21/english/agenda21chapter12.htm>

<sup>42</sup> Agenda 21: Chapter 10, "Integrated Approach to the Planning and Management of Land Resources." Online:

<http://www.un.org/esa/sustdev/documents/agenda21/english/agenda21chapter10.htm>

<sup>43</sup> *Ibid.*

In the realm of binding instruments, the 2003 African Convention for the Conservation of Nature and Natural Resources<sup>44</sup> is pertinent when analyzing African commons. It requires parties to take effective measures to prevent land degradation, and develop long-term integrated strategies for conservation and sustainable management of land resources, including soil, vegetation and related hydrological processes. Parties are required to develop and implement land tenure policies able to facilitate these measures, *inter alia* by taking into account the rights of local communities.<sup>45</sup> This provision is very pertinent to the question of the African commons as it recognizes the need for proper land tenure policies that consider the interests and rights of local communities.

## **HISTORICAL BACKGROUND TO LEGAL RANGELAND GOVERNANCE**

Governmental legal and policy intervention into rangeland governance in Kenya has been continuous. However, it provides clarity to distinguish between actions taken by colonial and post-independence governments.

### *A. Colonial Government Rangeland Governance*

The Colonial government established the African Land Development Organisation (Aldev) in 1945.<sup>46</sup> Aldev identified a number of problems regarding to tenure in different parts of Kenya. It argued that since land occupied by pastoralists was owned by the tribe and grazing was free for all, it was badly over-grazed with stock diseases out of control.<sup>47</sup> In response, the colonial administration commenced a system of private enclosures over the land. In these settlements run by Aldev, the criteria for the holdings were firmly based on family holdings.<sup>48</sup> Aldev laid down two principal policy aims to deal with its identified problem:<sup>49</sup>

- (a). Developing sound ranching techniques to replace nomadic pastoralism
- (b). Encouraging settled agriculture by all wishing to adopt it in suitable areas.

The first included continuing with already existing grazing schemes and establishing large extended family ranches concentrated in blocks of the order of 20,000 acres each. Several of these huge family ranches cum grazing schemes

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<sup>44</sup> This Convention was adopted by the Summit of Heads of States and Governments of the African Union in Maputo, Mozambique in 2003 to replace the earlier Convention adopted in 1968 by the then Organization of African Unity.

<sup>45</sup> Article VI.

<sup>46</sup> The establishment of Aldev is clearly described in Sessional Paper No. 8 of the 1945 which set out the Government's policy on Land Utilization and Settlement.

<sup>47</sup> Report of African Land Development in Kenya 1942-1962 (Ministry of Agriculture, Animal Husbandry and water resources, Nairobi, 1962) at 7.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*, at 69.

were established. Two major ones would be helpful to understand the origins of group ranches, and the rationale for their introduction:

(i). The Konza Grazing Demonstration Scheme<sup>50</sup>

It was introduced in 1946, ranging 22,000 acres in size. Primary objectives included demonstrating the results of grazing management; demonstrate improvement of stock by breeding and selection; and examine ways through which the Maasai could be introduced to stable agriculture. It was fenced and divided into paddocks, with water supplies. Ten families (about 90 persons) were selected by elders from amongst the less wealthy and were required to give verbal assurance they would manage herds according to rules. It however excluded sale of surplus as this was unacceptable to the families. The herds multiplied but project lost government favour due to refusal to sell off surplus. By 1954 families were abandoning the scheme to protest livestock sale. By 1961, all families had abandoned due to insufficient pasture, high stock levels, and a 1960-61 drought that was wiping out all the surpluses. Despite its failings, the project represents an earlier model at reforming rangeland management in Kenya.

(ii). The Il Kisongo Grazing Scheme<sup>51</sup>

The scheme covered about 2,030 square miles. Unlike the Konza scheme, it adopted traditional divisions of water and grazing between clans, proposing to enforce them without recourse to grazing fees. This system entailed grazing as far as Chyulu hills, away from home, during the rains and returning to the perennial springs of the Kilimanjaro during dry season (otherwise called dry season and wet season grazing system). Partial stock limitation was enforced through land usage by-laws. It received support of the chief and community leaders. A drought in 1959-61 led to relaxation of rules, and scheme was abandoned by end of 1961.

Konza was the more radical of the two schemes as it aimed at totally replacing Maasai pastoralism with sedentary ranching systems, or with agriculture. The government did not despair on concept of group ranches, with the Report of the East African Royal Commission of 1953-1955, proposing that individualization of land ownership should be the main aim,<sup>52</sup> extending it from individuals to group such as companies, co-operatives and customary associations for Africans.<sup>53</sup>

*B. Independent Kenya move to Group Ranches*

In 1965, the government commissioned an inquiry into 'Land Consolidation and Registration in Kenya'. The Inquiry report (otherwise the Lawrence Report) concluded that group rather than individual registration of land has greater

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<sup>50</sup> *Ibid*, at 71.

<sup>51</sup> *Ibid*, at 75.

<sup>52</sup> East Africa Royal Commission 1953-1955 Report (London: Her Majesty's Stationery Office, Cmd 9475), at 350.

<sup>53</sup> *Ibid*, at 351.

relevance to range areas.<sup>54</sup> It argued that land rights in the range areas of maasailand are communal, pervaded by overstocking, and consequent land deterioration is a natural feature of the traditional system of land use.<sup>55</sup> The report argued that nomadic existence imposed by the traditional maasai system has many social disadvantages, which the maasai were beginning to realize.<sup>56</sup>

According to the report, development committees consisting of politicians, representative maasai and government officers were set up in 1964 to coordinate political and technical thinking and to evolve a development plan for the maasailand. This resulted in 'A plan for the Development of Kenya maasailand' in which these committees proclaimed a first principle that 'the maasai now wish to progressively give up their nomadic way of life and to settle down to a static existence'.<sup>57</sup>

While the government was pursuing strict and pure tenure individualization in the rest of Kenya, this was not thought proper for the range areas. The total acreage of maasai rangeland divided by the total adult male population would yield an average 200 acres per adult male, this being an unsustainable size.<sup>58</sup> The state argued group ranches would manage this difficulty and ensure best possible use of rangelands.<sup>59</sup> Registration of group ranches would facilitate access to external loans, due to overt security of tenure.<sup>60</sup> The report also proposed appointment of group representatives to deal with the land and to enable direct adjudication of ownership rights to groups.<sup>61</sup>

Government efforts to set up a legislative framework to define and govern the Group Ranch concept followed shortly with introduction of the Land Adjudication and Land (Group Representatives) Bills to Parliament. The objective of the Land Adjudication Bill was to enable ascertainment and recording of rights and interests in trust land to ensure that not only individuals and families but also groups were recorded and registered as the land owners.<sup>62</sup> It would also meet the special needs of some parts of the country for which the Land Consolidation Act<sup>63</sup> was not suitable for.<sup>64</sup>

To assist in the collectivization of land, the Bill defined a group mean "a tribe, clan, family or other persons, whose land under recognized customary law

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<sup>54</sup> Report of the Mission on Land Consolidation and Registration in Kenya 1965-1966: With Appendices (Government Printer, Nairobi, 1966) at 297, Para101.

<sup>55</sup> *Ibid*, Para 102.

<sup>56</sup> *Ibid*.

<sup>57</sup> *Ibid*.

<sup>58</sup> *Ibid* at 298, para 105.

<sup>59</sup> *Ibid*, para 106.

<sup>60</sup> *Ibid*.

<sup>61</sup> *Ibid*, para 109.

<sup>62</sup> Memoranda of Objects and Reasons, Kenya Gazette Supplement No. 24, 1968 (Government Printer, Nairobi, 1968).

<sup>63</sup> Cap 283 Laws of Kenya.

<sup>64</sup> *Supra* note 62.

belongs communally to the persons who are for the time being the members of the group, together with any person of whose land the group is determined to be the owner.<sup>65</sup>

The objectives of the Land (Group Representatives) Bill included enabling recording of individual rights in Trust land, in cases where the consolidation of holdings is not appropriate in order to make provision for persons and groups as owners of land.<sup>66</sup> The law was intended to incorporate a method whereby a few persons can act on behalf of the group as its representatives, to incorporate such representatives and confer perpetual succession to property to avoid the need for express transfer of such property whenever a new group of representatives is elected and registered.

The two statutes were passed by the National Assembly and received Presidential assent which brought them into force.<sup>67</sup> A significant observation is that while the memoranda of objects and reasons for the two statutes captures rather clearly the principal objectives of the new laws, none of the statutes in their substantive forms capture any of these objectives. It is only the preamble to the statutes that bring out what is merely a vague semblance of an objective.<sup>68</sup> It would appear as though the drafters assumed the memoranda of the objects and reasons would always be available to all those people in subsequent years, who would be implementing the legislations. This omission could have undermined their implementation, since the object of law especially beyond incorporation of the group ranches is not clear.

### **DECONSTRUCTING THE NATURE OF GROUP RANCHES: A TRAGEDY OF THE COMMONS?**

Introduction of group ranches was guided by a certain school of thought, aimed at eliminating the decay in the rangelands. The government classified rangeland governance then as open access; and pastoralism as outmoded hence to be phased out and replaced with commercial ranching and sedentary agriculture. This policy and subsequent actions by the state have been questioned and criticized. The prevailing question is whether the group ranch concept has fallen prey to the very tragedy of the commons it was meant to preempt? To answer

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<sup>65</sup> Section 2, Interpretation section.

<sup>66</sup> *Supra* note 62.

<sup>67</sup> See Kenya Gazette Supplement No. 56 capturing Acts No. 35 of 1968 and Act No.36 of 1968 (Government Printer, Nairobi, 1968).

<sup>68</sup> For instance, the preamble to the Land Adjudication Act provides that it is: 'An Act of parliament to provide for the ascertainment of rights and interests in Trust land, and for purposes connected therewith and purposes incidental thereto'. For its part, the Land (Group Representatives) Act provides that it is: 'An Act of Parliament to provide for the incorporation of representatives of groups who have been recorded as the owners of the land under the Land Adjudication Act, and for the purposes connected therewith and purposes incidental thereto'.

this, it is imperative to analyse certain aspects of the governing framework vis-à-vis the factual situation.

#### *A. Basic Nature of a Group Ranch*

The term 'group ranch' is a generic term. The principal law, the Land (Group Representatives) Act refers to 'group representatives' instead. These are persons elected by a group adjudicated to have communal interests over certain land. The land is registered in the name of these representatives as trustees.<sup>69</sup> The members of the group also elect a committee of group officials who transact the daily affairs of the group.

The law establishes a registrar of group representatives chiefly to register and supervise the administration of group ranches.<sup>70</sup> In practice, this officer is represented at every district where there are group ranches.

#### *B. Conflicting Objectives in Legal Form of a Group Ranch*

The registration of group ranches was viewed as a compromise between individual ownership and the need for collective access to wider resources in 'communal dry lands'.<sup>71</sup> It is individual tenure because the land is registered to a distinctive group of people who constitute the membership of the group ranch.<sup>72</sup> The objectives of individual tenure were extolled by a 1955 Colonial Government plan to intensify African agriculture.<sup>73</sup> On the same note, the Lawrence report stated that:<sup>74</sup>

'individualization of tenure strikes at the very root of tribal society. It marks the final passing of the concept so eloquently expressed in the often quoted saying of the Nigerian Chief "Land belongs to a vast family of which many are dead, few are living and countless members are still unborn".'

Thus the land is registered to a group as the private owner, with freedom to deal with the land, and power to sub-divide and sell the land to a willing buyer. The private landowner ideally is free from tribal controls and customs over land use and disposition since the land is theirs alone. But this same land is claimed and recognized under customary law to communally belong to group members.<sup>75</sup> The

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<sup>69</sup> Section 8.

<sup>70</sup> Section 4.

<sup>71</sup> *Supra* note 24 at 99.

<sup>72</sup> Indeed Section 23(2) (b) of the Land Adjudication Act provides that where any group has, under recognized customary law, exercised rights in or over land which should be recognized as ownership, the adjudication officer shall determine that group to be the owner of that land.

<sup>73</sup> Its intention in part was to 'provide the African farmer with such security of tenure through an indefeasible title to encourage him invest labour and profits into development of his farm and enable him offer it as financial collateral for loans. See generally, Colony and Protectorate of Kenya, *A Plan to Intensify the Development of African Agriculture in Kenya* (Nairobi: Government Printer, 1955). This report is otherwise known as the Swynnerton plan.

<sup>74</sup> *Supra* note 52, at 6.

<sup>75</sup> The Land Adjudication Act defines a group to mean a tribe, clan section, family or other group of persons, whose land under recognized customary law belongs communally to the persons

land (and other property) is actually vested in the group representatives who are required to act on behalf of members, and fully and effectively consult them on group matters.<sup>76</sup>

The law failed to reconcile the objectives of private and communal ownership by being silent on the role on the role of customary law in management. It remains difficult to fuse communal interests of present and future generations with the power of disposition held by the group as a private landowner. In addition, the legal ability by the members to dissolve and sub-divide group ranches remains as a major challenge to pastoralism as way of life.

### *C. Leadership Structure at Group Ranch level*

Under the Land (Group Representatives) Act, there are two levels of leadership in a group ranch: the group representatives; and the officers of the group ranch (committee).

#### (i). Group Representatives

Group Representatives are incorporated on application by a group having been advised by the Adjudication Officer to apply pursuant to the Land Adjudication Act.<sup>77</sup> At this point, the registrar must convene a meeting of the members at a specified venue and time to address three principal items of agenda.<sup>78</sup> First is to require the members to adopt a constitution. Secondly, oversee election of between three and ten persons to be the group representatives of the group and third, to supervise election of officers of the group in accordance with the constitution.<sup>79</sup>

Group representatives once elected should apply for incorporation, and get a certificate of incorporation as group representatives,<sup>80</sup> conferring on them perpetual succession, power to sue and be sued, acquire and dispose of property and take loans.<sup>81</sup> In fact, the term 'group ranch' is a generic term while 'group representatives' is the legal term.

The group representatives hear and determine an appeal brought to them by any person who is aggrieved by a decision of the committee. They may also issue instructions to the committee or to any other member in any case where they consider such instructions to be in the interest of the group.<sup>82</sup>

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who are for the time being the members of the group, together with any person of whose land the group is determined to be the owner.

<sup>76</sup> Section 8(2).

<sup>77</sup> Under section 23(5) (a) –(c).

<sup>78</sup> Section 5(1).

<sup>79</sup> Section 5(1) (a)-(c).

<sup>80</sup> Section 7.

<sup>81</sup> Section 8(1). It is imperative to note that perpetual succession to property is particularly important since it eliminates the need for express transfer of such property whenever a new group of representatives of representatives is elected and registered.

<sup>82</sup> The Land (Group Representatives) (Prescribed Provisions) Order, Third Schedule: Provisions which are deemed to be contained in the Constitution of every Group unless specifically excluded or modified.

(ii). Officers of the Group Ranch

Section 5(1) (c) of the Act provides for the election of officers of a group ranch, who constitute the management committee. The law disqualifies persons convicted of a crime involving fraud or dishonesty to the office of treasurer, group representative or any other position of trust.<sup>65A</sup> The committee comprises of chairperson, vice-chairperson, secretary, treasurer and three other members, at least two of whom must be group representatives. Only members of the group ranch may be nominated and elected as officers of the group ranch unless the registrar approves the election of non-members.<sup>83</sup>

The committee conducts group affairs to achieve the greatest practicable social and economic benefits for members. They are required to assist and encourage members to manage land or graze stock in accordance with sound principles of land use, range management, animal husbandry and commercial practice, prepare a plan for the development of the land and its implementation.<sup>84</sup> They may issue instructions to members and make rules for the smooth operations of the group ranch. They may also raise credit and hold and use moneys for the benefit of members.<sup>85</sup>

Even though the management committee and the group representatives are designated powers and functions, the law in a sense creates *two centres* of power. As the group represents may issue instructions to the committee, and sit in appeal of committee decisions, the committee is subordinated to the group representatives. This same committee is directly in charge of group affairs, and is most directly answerable to the members. Even though it may have been intended as a check and balance system, it is a potential conflict area.

For practical reasons, some group ranches have crafted a local solution by incorporating the committee members as Group Representatives.<sup>86</sup>

*D. Decision Making and Legitimacy of Group Ranch Leadership*

Section 15 of the Act provides for meetings of a group ranch. The registrar has power to convene meetings at any time. Groups must hold annual general meetings as prescribed in their constitution. The group representatives, a significant number of members or the District Agricultural Committee may petition the chairman to convene a meeting of the group.<sup>87</sup> All members are entitled to attend a meeting of group ranch and to vote. A quorum of at least sixty per cent

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<sup>65A</sup> Section 6

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*

<sup>86</sup> For instance, common Article 21 (c) of the Constitutions of Tiemamut, Nkiroriti and Kijabe Group Ranches in Laikipia District make such provision. Copies of the Constitutions on file with author.

<sup>87</sup> Section 15(1), (2) & (3). The Chairman is mandated by law to comply and convene the meeting within 21 days of the petition.

of the registered members is mandatory. A resolution must be supported by not less than sixty per cent of the members present and voting, to be valid.<sup>88</sup>

In addition to election of group representatives and committee members, participation at meetings of a group ranch is the only mechanism available to the members to take part in decision making over matters affecting their group. Yet this system is fraught with challenges that undermine its utility.

The law does not entrench incorporation of women in the committee or as group representatives. In many group ranches, women except for widows are not even registered as members, leave alone getting elected to leadership positions due to conservatism and patriarchy traditionally vesting leadership in the men.<sup>89</sup> A few group ranches now include women as of right in leadership.<sup>90</sup> The trend of male dominance continues unabated. A survey at Shompole group ranch in Kajiado District showed that male elders tend to dominate the discussions, while women and the youth contribute only when asked to do so.<sup>91</sup> At Olderkesi group ranch in Narok District, female members mostly refused to answer questions fearing, as they put it, 'answering men's issues'. The survey established minimal female role in decision making and extreme male dominance.<sup>92</sup>

General apathy to meetings is not uncommon. Members of Imbirikani group ranch in Kajiado district argued their attendance really made no difference as the committee was indifferent to their contributions. They accused the committee of patronizing the members, misuse of group ranch funds, lacking solidarity and being divided by political and clan interests, being unresponsive to the needs of the members and being biased in the registration of members.<sup>93</sup> In the same district, Kuri Kuri group members gave reasons for meetings apathy: no confidence in fraudulent chairperson; too many incomplete projects; contempt for committee; unnecessary meetings; no-information flow at all; and exclusion in decision making.<sup>94</sup> At Shompole group ranch, despite constitutional

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<sup>88</sup> Section 15 (5), (6) & (7).

<sup>89</sup> This is the case for instance amongst the Maasai. Information from Mr. John Ole Kamanga, Co-ordinator of the South Rift Landowners Association (SORALO) during an interview at his office housed at the premises of the African Conservation Centre, Karen C, Nairobi on 19 September 2006.

<sup>90</sup> For instance the constitutions of Kijabe, Nkiroriti and Tiemamut group ranches provide as such, while that of Imbirikani group ranch totally ignores the existence of women or any role they play in the group ranch. See commons article 22 of the Constitution of Kijape, Tiemamut and Nkiroriti group ranches. (Copies on file with author).

<sup>91</sup> John Ndung'u & Isaac Warugi, "Report on community communication, networking, decision-making mechanism and asset building tools at Shompole Group ranch, Kajiado District" (African Conservation Centre) (ACC), Field Activities 14 – 16 August 2002) at 6-7.

<sup>92</sup> *Ibid.*

<sup>93</sup> African Conservation Centre, "Proceedings of the Imbirikani Group Ranch Community Workshop held at Kindu Hotel, Emali" (African Conservation Centre (ACC)-Community Conservation Programme & Ford Foundation, 12-15 October 1999) at 8.

<sup>94</sup> PACT – Conservation of Resources through Enterprise (CORE), "Report on Governance and Leadership Training for Kuri Kuri Group Ranch Community" (conducted by Small and Micro-Enterprise Development Limited (SAMED), Nairobi, December 2001) at 7.

requirements for regular meetings, this does not happen, and most leaders fail to pass important information to members after meetings.<sup>95</sup>

Election of officials too presents a legitimacy headache. The law requires group representatives and committee be elected.<sup>96</sup> The elections are carried out at meetings supervised by the registrar of group representatives, which as seen above – have a major quorum problem. Much of the time, years pass before elections are held. At Shompole group ranch, a survey showed that officer bearers at times stay in office beyond their constitutional limit.<sup>97</sup> In the quieter group ranches, like the ones in Laikipia District no elections were held between 1972 and 2004. In Musul group ranch the first committee was elected by elders in 1975. The next elections were held in 2005 while the process of adopting a constitution is still underway.<sup>98</sup> Tiemamut group ranch held no elections for about 33 years between 1972 until 2005. According to Mzee Ole Lamatani, chairman for 33 years, they did not know that they were required to hold elections and it was a very dormant time for the group ranch.<sup>99</sup>

Politics generally affect group ranch governance. Elections are largely influenced by money, clanism or political clout. At Olgulului/Olorashi group ranch, in 1996 there was a protracted tussle between the group ranch secretary and the area Member of Parliament. The secretary had opposed the MP during the nominations by the then ruling party KANU, of its parliamentary candidates. The MP was feeling threatened and paralysed ranch operations.<sup>100</sup> Clanism has been applied officially in Imbirikani group to elect officials by including all the clans.<sup>101</sup>

With this combination of challenges, the leadership structure of group ranches faces a legitimacy crisis. This has a direct impact on the actual operations of the group, and to sustainable management of resources available. It also negates any goodwill members have, and could be blamed for increasing popularity of sub-division.

### *E. Ecological Governance*

Most rangeland communities are pastoralist livestock keepers. For this reason, group ranches are heavily dependent on natural resources whose proper and

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<sup>95</sup> *Supra* note 87 at 7.

<sup>96</sup> Section 5.

<sup>97</sup> *Supra* note 93.

<sup>98</sup> Author survey: Author was the lawyer assisting in negotiating and drafting of the group's ranch constitution for the African Wildlife Foundation (AWF)

<sup>99</sup> Interview with the author at Tiemamut group ranch community nursery on 5 November 2005 during a special General Meeting with the Group ranch members to discuss the contents of the new constitution.

<sup>100</sup> *Ibid* at 36.

<sup>101</sup> Members indicate that they have used this method in the past, by elected the chair, vice chair, treasurer and secretary from different clans. See, Minutes of the reconciliation meeting for Imbirikani group ranch committee members summoned by the District Commissioner, Kajiado and held on 3 December 2003 at the Kajiado District Headquarters. Source: Ministry of Lands and Settlements, Department of Lands Adjudication and Settlement.

sustainable management is thus imperative. An ideal ecological governance system should balance between the individual needs of the members of the group ranch to the collective interests of the group as an entity.

The substantive provisions of the Land (Group Representatives) Act do not make any reference to natural resources governance and management. Section 5 provides for the adoption of a constitution. Section 12 empowers individual groups to make rules regulating matters left out of the model constitution but which are important for the administration of the affairs of the group. These provisions are the only possible means for groups to make rules governing natural resource use and ecological governance.

The third schedule to the Act requires the committee to assist and encourage the members to manage the land or graze their stock in accordance with sound principles of land use, range management, animal husbandry and commercial practice. These provisions are however not binding and can expressly be excluded from the constitution of a group ranch or modified. In any event, the language of the provision is vague and lacks any guiding substance for the group ranch officials or members. Hence developing a natural resources governance system for a group ranch depends on internal rules. This inadequacy has significantly contributed to the collapse of many group ranches. Lack of guidelines for any coercive internal measures to determine stock control poses an even bigger challenge.

Since this matter is dear for basic livelihoods, members have tried a number of measures to address it using group ranch constitutions. One common tool is zoning of the ranch into several sectors e.g. conservation, grazing, and settlement zones.<sup>102</sup> While this maybe lauded as a progressive step to prescribe binding and acceptable natural resource management rules, uncontrolled stock levels undermine the success. This author found it impossible to address this question while developing the constitutions of Tiemamut, Kijabe, Musul and Nkiroriti group ranches in Laikipia district. Members were unwilling to discuss even the remote possibility that rules may be prescribed to limit the members of livestock that they owned.

#### *F. Sub-division*

Subdivision of group ranches all over Kenya is probably the greatest tragedy to afflict them. It basically entails the sharing of the parcel of land owned by the group, among the members, ideally on an equal basis. The governing law<sup>103</sup> is

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<sup>102</sup> For instance, article 17 of the constitution of Tiemamut group ranch in Laikipia District provides for the zoning of the ranch into such three sectors. The constitution requires the committee to consult with the general membership in a general meeting on the nature of the zoning and acceptable land uses. Further, all members are bound to act in accordance with this zoning arrangements without any exception whatsoever. Article 19 of the same constitution prescribes penalties for the violation of the zoning arrangement, the minimum being a warning to a maximum of five thousands shillings. Copy of the constitution on file with author.

<sup>103</sup> Land (Group Representatives) Act

silent on the process of subdivision of group ranches, extending only to dissolution. Section 13(1) requires group representatives to apply to registrar for consent for the dissolution. That application should be made in writing, signed by a majority of the group representatives and supported by a copy of the minutes of the meeting at which the resolution to effect the dissolution was passed. This application must be submitted within fourteen days of passing of the resolution.<sup>104</sup>

The law is generally quiet on the way forward after the dissolution of a group. Thus the process of subdivision has been hit by a lot of controversy due to lack of either clear government policy or legislation. The process has been left to members, with the supervision of the registrar of group representatives.

What led to the quest for subdivision? Many of the issues discussed earlier in this part have been prominent. Others include poor management; lack of accountability (at group and government levels); increasing group ranch populations; discord between age-sets; unregulated livestock quotas; financial misappropriation; and an ambivalent state bureaucracy.<sup>105</sup>

The final whistle beckoning large scale subdivision was blown by the then President Daniel Toroitich Arap Moi who in 1989 directed the civil service to send a team of surveyors to Kajiado district to demarcate land so that group ranches in that area could be subdivided and each member given an individual title deed.<sup>106</sup> In the absence of clear government policy sanctioning subdivision, Moi's statement was viewed as the policy direction that was long overdue. He said that 'the issue of having group ranches will create problems in the future.'<sup>107</sup>

Kajiado district is the one area largely affected by group ranch subdivision. Out of an initial number of 51 incorporated group ranches in the district, 46 of them have already been subdivided.<sup>108</sup> A survey undertaken found that that women, though important and crucial resources users, have no role in the subdivision process indicating that 'land is a man's affair and they need not be consulted on the process.'<sup>109</sup>

Surveyors wield more power controlling the process of subdivision, exploiting the ignorance of community members and subdividing land without considering

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<sup>104</sup> Section 13(2).

<sup>105</sup> Esther Mwangi, E., & BurnSilver, "Beyond Group ranch subdivision: Collective Action for Livestock Mobility, Ecological Viability and Livelihoods", *Op cit.*

<sup>106</sup> Conservation Development Centre (CDC), "Realizing the Economic Development and Poverty Alleviation Potential of Nature in Magadi: A study of OI Donyo Nyoike, OI Keri, Olkiramatian and Shompole Group Ranches, October 2002," (Department for International Development (DFID), East Africa) at 72.

<sup>107</sup> Daily Nation, 15 April 1989.

<sup>108</sup> Interview with Registrar of Group Representatives at her office at Ardhi House, Nairobi 9<sup>th</sup> Floor, Room 903 on 11 August 2006.

<sup>109</sup> *Ibid* at 6.

potential, spatial distribution of resources within the ranches as well as the slope gradient.<sup>110</sup> Imbirikani group ranch members indicated they would be petitioning for a general meeting to reverse the surveyors' absolute powers and give them back to the group ranch committee.<sup>111</sup> A survey carried out in Enkaroni, Meto and Nentanai, three group ranches in Kajiado district revealed that two-thirds or more of the registered members received below average parcels. Nine percent of their registered members ended up owning more than 25% of the land.<sup>112</sup>

The government has a paradoxical role in the subdivision process reduced to giving land control board consent and mitigating conflict arising from the subdivision and leadership struggles in the group ranches. The land adjudication officers, who are the assistant registrars of group representatives, have had their role reduced to attending Annual General Meetings, supervising elections and updating group ranch registers.<sup>113</sup>

The process thus lacks in equity and transparency in many group ranches. Contrary to members' expectation, the subdivision has not resulted in equality of parcels allotted to individual members, it has been quite the opposite. It emerges that splitting of group ranches in individuals parcels of land will not always benefit the potential or intended beneficiaries. It is openly inequitable, benefiting the 'haves' as against the 'haves not'. Well-connected individuals and powerful elites connive with management committees and private surveys to manipulate the process to their advantage at the expense of less powerful and vulnerable people like poorer herders and widows. Cultural constraints that would ordinarily have limited individual self-interest for the common good appear to have been severely undermined.

## **TOWARD A SUSTAINABLE LEGAL AND PLANNING METHODOLOGY FOR THE KENYAN RANGELANDS**

The group ranch system needs an overhaul, or modification. Current land tenure and use is exposing entire communities to poverty. A concerted effort is necessary to devise a methodology to induct sustainable land use and management practices. On the one hand are legal-policy interventions the State may undertake. On the other hand are the adaptive measures within grasp of the rangeland communities to overcome their challenges. In this part, we look at these two approaches.

### *A. Legal and Policy Level Interventions*

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<sup>110</sup> *Ibid* at 6.

<sup>111</sup> *Ibid* at 7.

<sup>112</sup> Esther Mwangi, "Pitfalls for Privatization: Fingers on the Hand are not Equal" Property and Environment Research Centre (PERC) Reports Vol 22 No. 2, June 2004 at 13. Online: [www.perc.org/php?subsection=&id=141](http://www.perc.org/php?subsection=&id=141)

<sup>113</sup> *Ibid*.

To ensure sustainable rangeland management for the benefit of concerned communities and posterity, the state can institute far reaching reforms to restructure the current system. Several interventions are possible.

**(i). Development and implementation of an integrated policy for rangeland administration and policy is one viable option.**

A major problem facing group ranch and general rangeland management is absence of government policy to guide the implementation of the legislation, or a review of legislation over time. Two options are possible. One is incorporating into the Draft National Land Policy<sup>114</sup> (currently being debated) an integrated policy statement setting out mechanisms for effective rangeland, and in particular group ranch, administrative and natural resource governance. Such a policy should also address itself to post-group ranch activities in the rangelands. The policy should inform subsequent far-reaching legislative reform in order to implement its recommendations.

The second option is to develop a separate rangeland policy but anchor it into the main land policy for harmonization. A process to develop an Arid and Semi-arid (ASAL) lands policy is only now beginning, albeit on the wrong footing.<sup>115</sup> It gives land governance a wide berth, and suggests further sub-division of communal lands is acceptable.<sup>116</sup>

Either way, the general thrust should aim at establishing a governance system that is economically efficient enhancing accruals of benefits to members. It should set out mechanisms to implement economic programmes efficiently in order to reap maximum benefits. The policy should aim at social equity to dismantle patriarchy and enhance participation by all members. Thus it should recognize the special and diverse roles that women play in the rangelands and the fetters that lack of access to land rights or participation in decision making places in their way of performing these special roles.<sup>117</sup>

Specifically, any policy and accompanying legal reform could focus on:

- a) Disbanding the group representatives system for an African Commons

When dealing with African communities, the main error that Hardin, most property theorists and in this case Kenyan government policy makers have consistently made is assuming that communities *qua* communities do not have a

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<sup>114</sup> Ministry of Lands, National Land Policy Formulation Process, National Land Policy Formulation Secretariat, Ardhi House, Nairobi. Available at <[www.kenyalaw.org](http://www.kenyalaw.org)>

<sup>115</sup> A first draft was generated in 2004, no further progress appears visible since then.

<sup>116</sup> See, Republic of Kenya, Draft National Policy for the Sustainable Development of Arid and Semi-Arid Lands (December 2004), at 10.

<sup>117</sup> These issues are generally addressed by the Drafted National Land Policy being Prepared by the Ministry of Lands and Settlements. The Draft of December 2005 was generally referred to here.

*juridical persona* and cannot hold property rights in land directly.<sup>118</sup> Hence the mistaken need to create a legislative requirement for 'group representatives'.

Communities have certain commons bond of kinship, from marriage to blood relations through clans etc. In fact, most group ranches members are related by belonging to similar clans. The law should be amended to grant different community groups a legal *persona* for recognition as a corporate entity that can own property directly. This would vest the radical title to such community land in the community as a commons for management with internal rules made by the community.

Decision making will then be made at the base of the group, involving the bulk of the members for their own good, and entail responsibility for all members to protect their land as a group. It will ensure a level of inter and intra generational equity and secure the commons ownership since each member will by their action be responsible for his own destiny as well as the collective destiny of the group.

As an African commons, the land would not be open for *inter vivos* transfer but only for transmission in *mortis causa* exclusively by way of intestacy and only to members of that community group. The overall impact of this would be to legally remove the ability to actually subdivide the land or to sell the land to a person who does not belong to the community in ownership. This would ensure more open rangelands, supportive of pastoralism and other range activities such as wildlife conservation for tourism.

The other impact would be several such 'African Commons' neighbouring each other in the rangelands, thus propagating the concept of open rangelands to ensure ecological sustainability. Several commonly owned community lands neighbouring each other would enhance vibrant pastoralism as well as mobility of people and livestock in search of pasture and water in all seasons.

#### b) Territorial definition of the commons

Since the proposed transformation involves groups that are already physically in existence, the land should be clearly defined. In order to protect the interest of community and secure their tenure in the commons, especially in a Kenya prone to land grabbing, a number of legal steps are essential.

After granting individual community groups personality, legal changes are needed to secure community interests in land through registration, in this case the community as a corporate personality owning land directly. The next legal intervention is registration of the different parcels of land owned by different communities in their recognized clan or other names.

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<sup>118</sup> H.W.O Okoth-Ogendo, "The Tragic African Commons: A Century of Expropriation, Suppression and Subversion" (2003) University of Nairobi Law Journal (UNLJ) 1, at 107.

c) General governance within the commons

A number of measures are proposed in this respect. First is recognition of customary law as being central to rangeland governance. Codification of the different customary laws should follow to overcome their being subordinate to other statutory laws.<sup>119</sup> Those propagating patriarchy and inequity should be excluded. Members would also set up internal rules setting out duties and responsibilities of members.

Elective leadership is now widely preferred. There is evidence of communities using elected committees to manage water dams and nursery schools.<sup>120</sup> Election of leaders should remain the preferred option. Legislative reform should not influence choices, but protect peoples choices of leaders at the ballot. Challenges include dealing with illiteracy, and unconscionable influence in queue voting.

The first step in so doing is to require all elections of group ranch leadership to be by a secret ballot. To deal with the council of elders should elect a number of literate elders to work alongside the Registrar in overseeing the voting process. To ensure a certain level of confidentiality, these voting officials should be sworn to confidentiality using whatever traditional/religious practice in use by that community. They then anonymously take down the preferred choice of leaders made by the illiterate members and pass on the anonymous selection immediately over to the registrar for counting.

Proactive state intervention is necessary to nullify any action, transactions or decisions of officials who have exceeded their terms of office. Otherwise rangeland governance will be condemned to complete disarray and unsustainability.

**(ii). Implementing Physical Planning in the Rangelands**

Physical planning in Kenya is regulated by the Physical Planning Act.<sup>121</sup> A distinction is made between rural and urban planning. Regional physical development plans are specific for rural areas such as rangelands and may provide for 'planning, re-planning, or reconstructing the whole or part of the area comprised in the plan, and for controlling the order, nature and direction of

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<sup>119</sup> Judicature Act, section 3(2), Cap 8 Laws of Kenya.

<sup>120</sup> For instance, both Kijape and Nkitoriti group ranches have elected committees in charge of the local nursery schools. At Morupusi group ranch, there is an elected committee in charge of sand mining on behalf of the members. (Author survey). Also, 50 individuals on Meto and Enkaroni ranches indicated that an elected committee is charged with overseeing maintenance as well as collecting money to finance maintenance activities. See generally, Mwangi, E., & BurnSilver, S., Beyond Group Ranch Subdivision: Collective Action for Livestock Mobility, Ecological Viability and Livelihoods, *Op cit.*

<sup>121</sup> Cap 6, Laws of Kenya.

development.<sup>122</sup> This would be directed by local authorities which have competence in control of development.

This is an important instrument to harmonize overall planning for rangeland management, and coordinate with other land uses. Evidence of physical planning implementation is at best scanty at the moment despite the current revised legal framework being in place since 1996.

### *B. Adaptive Measures*

Rangeland communities have taken certain measures to cope with decay of group ranches. They also have a number of legal options available to them at the moment.

#### (i). Pre-empting Group Ranch Subdivision

Faced with a crippling legal system, economic woes and erratic weather, rangeland communities have had to be innovative. While some which subdivided are struggling to reverse that trend, others are taking or have taken measures to preempt subdivision.

A survey by the author disclosed groups in the much drier parts, like Laikipia district have been reluctant to disclose. All the 13 group ranches in the district have formed a trust, Naibung'a conservancy to assist them swap pasture, or develop projects across ranch boundaries.<sup>123</sup>

Shompole and Ol Kiramatian groups in Kajiado have not been subdivided, and there is no inclination to do so. Their area too is extremely dry, but there are rivers, highland pastures and swamps.<sup>124</sup> The community has set aside irrigation areas, a traditional system of setting aside grazing land for dry seasons, and wildlife areas, for which they charge tourists a viewing fee.<sup>125</sup> Each member has been granted a parcel of land for cultivation, which they either use or lease out to non-maasai for an annual fee.<sup>126</sup>

This approach is now favoured by people dealing with daily difficulties and seeking to fulfil livelihood. Most, if not all, of these initiatives are supported by Non-government organizations, hence operate outside of official channels or policy.<sup>127</sup> Questions of sustainability have also been raised, but with the involvement of private investors in tourism projects, this appears to have been resolved.<sup>128</sup>

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<sup>122</sup> Section 16.

<sup>123</sup> Copy of the Trust Deed on file with author.

<sup>124</sup> *Supra* note 30, at 12.

<sup>125</sup> *Ibid.*

<sup>126</sup> *Supra* note 30, at 31.

<sup>127</sup> Such organizations include the African Wildlife Foundation (AWF) operating in Laikipia, Samburu, Isiolo and Kajiado Districts ([www.awf.org](http://www.awf.org)), and African Conservation Centre operating in Kajiado, Narok and Samburu districts ([www.conservationafrica.org](http://www.conservationafrica.org)).

<sup>128</sup> AWF for instance has involved private investors in construction and management of an eco-lodge on Kijape group ranch in Laikipia district, while ACC has been working with Art of Ventures Inc. in a similar project at Shompole group ranch in Kajiado district.

(ii). Post Group Ranch Subdivision Arrangements

Pastoral producers in Kenya face a critical dilemma caught between new land tenure rules associated with the dissolution of group ranches and sub-division of communal rangelands, and the *unchanged* ecological exigencies of their dryland systems.<sup>129</sup>

A survey carried out in group ranches at different stages in the process of land subdivision offers convincing evidence that even while herders are attempting to diversify and intensify their production strategies, they are also taking steps to aggregate their spatial access to resources through pasture sharing and swapping mechanisms. These emergent strategies are interesting because they represent examples of sustained collective action after the dissolution of group ranches- either a strengthening of traditional norms or the creation of new ones – whereas the obvious predication would be their decline. Collective outcomes are theoretically unexpected under a sub-divided property assignment.<sup>130</sup>

Yet for instance according to the survey, a range of post-subdivision mechanisms have emerged in Nentanai, Meto and Enkaroni group ranches that act to re-aggregate household access to forage outside of private parcels. All these three group ranches are subdivided. Households redistribute portions of their herds for long periods and swap/share pastures. Movement of animals occurs between parcels (*e.g. shambas*) owned by members of extended families (sons, fathers, in-laws) and between the shambas of friends (age-mates, clan-mates and stock associates). Giving out animals, sharing or swapping of pastures occurs with the understanding that movement between parcels is based on need and reciprocal in time and reflects efforts at rotational grazing between their shared price. Some leasing arrangements also occur based on monetary exchange or payment for pasture with animals, but these purely economic arrangements are reportedly more rare.<sup>131</sup>

Thirty nine percent of individuals interviewed from Enkaroni, Meto and Nentanai indicated that some of their livestock were resident on a full-time basis away from their parcels at the time of the survey. Out of the 53 individuals with livestock not resident on their parcels, most of these animals (57%) were distributed with family (i.e. with brother, sister, second wife, in-laws) and members in the same group ranch. Twenty two percent had distributed to friends in the same group ranch, while 18% indicated that their livestock were distributed across multiple shambas that they owned.

A small proportion, about 4%, indicated some of their livestock were resident in other locations (Elangata Wuas Group Ranch and in Tanzania). Pasture leasing

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<sup>129</sup> Mwangi, E., & BurnSilver, S., Beyond Group Ranch Subdivision: Collective Action for Livestock Mobility, Ecological Viability and livelihoods, *Op cit.*

<sup>130</sup> *Ibid.*

<sup>131</sup> *Ibid.*

was also used in order to redistribute animals. Eleven individuals (on Enkaroni and Meto) indicated that they are leasing out and/or buying pasture access at a fee ranges between Kshs 500-1500 per month. Out of these 11 households, three were straight up leases and eight were mix of leasing and pasture sharing, or leasing additional pastures with no sharing arrangements.<sup>132</sup>

Policy and legislative review should aim at introducing a legislative basis for these flexible associations between individual landowners who have come together to use resources collectively and for common good, in order to regulate these arrangements to ensure they use conservation easements, trusts or associations where individuals retain ownership over their respective parcels but have opened them to commons rules and subject to commons rules.

(iii). Flexible Legal Options

Currently, a number of options are available within the legal system to allow communities cope with the aftermath of sub-division, or enhance open rangeland access within the group ranch framework.

The provisions of section 112 of the Environment Management and Co-ordination Act,<sup>133</sup> on the use of environmental easements<sup>134</sup> especially for rangeland rehabilitation to prevent the spread of desertification or to reign in persistent drought and/or floods should be explored. Under this law, a court of law may grant such an easement on the application by any person. The environmental easements should be used to further principles of environmental management through the imposition of obligations on the burdened land. The environmental easement may attach to the burdened land either in perpetuity or for a term of years or for an equivalent interest under customary law as the court may determine. Such an easement may exist in gross, that is, its validity shall not depend on the existence of a beneficial parcel of land in the vicinity.

Further to the above instruments, policy and law should aim at the use of trusts, under the general law of trusts to manage collective interest of lands brought together for common management but under individual ownership. This normally involves the setting up of an irrevocable trust, through the instrumentality of trust deed.

Such trusts setting up loose associations of landowners are common, especially in Kajiado, for instance the South Rift Association of Land Owners (SORALO), which brings together 13 group ranches in Kajiado, a number of which are subdivided. SORALO is set up as a trust, with each group ranch nominating a

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<sup>132</sup> *Ibid.*

<sup>133</sup> Act No. 8 of 1999.

<sup>134</sup> Section 112.

trustee, with the aim of opening up the South Rift as a tourist destination by linking the Maasai Mara National Reserve and Amboseli National Park.<sup>135</sup>

This is to be achieved by maintaining the entire area as an open rangeland (by stemming subdivision or convincing individual landowners to forgo alternative use of their land for wildlife and open range livestock keeping – but with a promise to receive a commensurate benefits), preparing joint land use plans, commons security modalities, infrastructure such as roads and water sources as well as strengthening a livestock based economy as a source of outcome and livelihood. The latter is preferred since it is compatible with the ideal to maintain the area as an open rangeland.<sup>136</sup>

## CONCLUSION

Rangeland management is complex. The climate is harsh, the level of rainfall very low and unsuitable for sedentary lifestyles such as agriculture on a large scale. The subdivision of group ranches has reduced the amount of land available for pastoralism, with communities developing innovative post-group ranch subdivision associations.

The concept of group ranches was founded on the wrong premise; on an assumption that the Kenyan rangelands were devoid of any management control as put forward by Garrett Hardin's metaphor of the 'tragedy of the commons.' Over the years, rather paradoxically, the group ranches have decayed, fallen apart and even been subdivided. In essence, what was set up to avoid the onset of Garrett Hardin's tragedy of the commons ended up falling prey to the tragedy of the commons.

The legislation has failed; it was inadequate and was based on a wrong philosophical base, that is, 'correction of the tragedy of the commons'. The group ranches have over the years failed to either *originate* or *facilitate* any meaningful sustainable development for the members. The frequently asked question has then been whether these group ranches should then be left to their own devices, to collapse, be subdivided and the communities being sorted out by natural selection

The answer arising from this paper is that these group ranches collectively constitute the Kenyan rangeland ecosystem. The only suitable land use is pastoralism and other compatible land use such as eco-tourism and wildlife. These land uses cannot be applied in cases where the land has been subdivided and fenced, hence the evidence of post-subdivision collective arrangements among individual landowners from subdivided group ranches.

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<sup>135</sup> Information obtained from Mr. John Ole Kamanga, Co-ordinator of the South Rift Landowners Association (SORALO) during an interview at his office at the premises of the African Conservation Centre, Karen C, Nairobi on 19 September 2006.

<sup>136</sup> *Ibid.*

The group representatives system is not viable in its state since it allows for subdivision as well as having inherent structural weakness. However, converted into an 'African Commons' communal ownership and management of land and attendant resources by a recognized community is viable. It calls for radical legislative and policy reforms which vest the radical title in the community as a corporate entity. It vests decision making to the lower levels of the community, on the common destiny. The decision making power excludes the appropriation of the radical title which is vested in the entire community in trust for future generations. Any reforms must however intend to introduce intra-generational equity too; equity between men and women as well as equity in leadership, sharing of benefits and in responsibilities.