The Implications of Property Rights for Wetlands Management in Kenya

C.Odote with B. Ochieng; and O. Makoloo[•]

Abstract

Wetlands are an important ecosystem in Kenya. They are sites of exceptional biodiversity, have enormous social and economic value. However despite their utility, they continue to be impacted and degraded and lost due to pressure from agricultural and development activities. They end up being converted to these uses. The conversion is due to the fact that wetlands are viewed as wastelands.

Kenya is party to the Ramsar Convention and as such is under an obligation to take legal and policy measures to protect its wetlands. These include the actions stipulated in the Ramsar Convention. In addition the country has laws and policies that seek to address the conservation and wise use of wetlands. These include the environmental management and coordination Act, the Water Act and the Wildlife (Conservation and Management) Act.

Despite the existence of these laws, wetlands continue to be degraded. This paper takes the position that the success of efforts to conserve and wisely use wetlands needs to appreciate the implications of property rights regimes. Using case study experiences from Yala Swamp, where a US company Dominion got authority to convert wetlands into Rice farming, this paper shall demonstrate how efforts to conserve wetlands are being frustrated in Kenya due to lack of adequate protection of property rights.

The paper shows how property rights can be regulated and reconceptualised so as to guarantee the conservation and wise use of wetlands. The paper argues that wetlands are best managed as a public good and that tool like the Public trust Doctrine can be properly applied to ensure that wetlands are conserved and wisely used**.**

Key Words

Wetlands, Property Rights, Conservation, Wise use, Public Trust Doctrine, Eminent domain, Police Powers

I. Introduction

Wetlands are an important ecosystem in Kenya. They are sites of exceptional biodiversity and have enormous social and economic value. However despite their utility, they continue to be impacted and degraded and lost due to pressure from agricultural and development activities. They end up being converted to these uses. The conversion is due to the fact that wetlands are viewed as wastelands.

In efforts to stem the degradation and conversion of wetlands, Kenya acceded to the global convention governing the management of wetlands, Convention on Wetlands of

[•] Institute for Law and Environmental Governance, Nairobi

International Importance especially as Waterfowl Habitat[1](hereinafter The Ramsar Convention) on 5th June 1990. The objectives of the Ramsar Convention are to "stem the progressive encroachment on and loss of wetlands."[2] By acceding to the Convention, Kenya became duty bound to meet the obligations stipulated therein so as to prevent the degradation and loss of wetlands and ensure their conservation. The primary obligations, which Kenya, just like any other contracting party assumed include, designation of at least one wetland to the List of Wetlands of international importance and promoting the conservation of such listed wetlands[3]; include wetland conservation considerations within its natural resources planning processes and promote the wise use of wetlands within its territory;[4] create nature reserves on wetlands within its boundaries;[5] cooperate with other countries and the international community in the management of transboundary wetlands, shared water systems, shared species and development projects affecting wetlands.[6]

In addition to its international obligations Kenya, has passed several policies and legislations including the Environmental Management and Coordination Act, the Water Act and the Wildlife (Conservation and Management) Act to ensure sustainable management of wetlands and its component resources in Kenya. Despite these laws and international commitments, Kenya's wetlands continue to be under tremendous pressure and threats from degradation and conversion.

This paper surveys the legal framework for sustainable management of wetlands and argues that the threats to wetlands management are as a result of the implications of poor regulations of property rights and property rights regimes in Kenya. The paper argues that the success of efforts to conserve and wisely use wetlands needs to appreciate the implications of property rights regimes. Using case study experiences from Yala Swamp, where a US company Dominion got authority to convert wetlands into Rice farming, this paper demonstrates how efforts to conserve wetlands are being frustrated in Kenya due to lack of adequate protection of property rights.

The paper shall show how property rights can be regulated and reconceptualised so as to guarantee the conservation and wise use of wetlands. Such regulation involve reliance on tools like public trust doctrine and treating wetlands as a public good so as to ensure conservation and wise use of wetlands.

To make the above argument the paper is structured as follows: Following this introduction, section two discusses wetland ecosystems In Kenya, their locations, values and the threats they are facing. Section three outlines the legal framework for the management of wetlands in Kenya and assesses its utility in sustainable management of wetlands. Section four discuses briefly the different property rights regimes under

[1] 996 U.N.T.S 245(1976) *reprinted in* 11 ILM. 97(entered into force Dec. 21 1975)
[2] *Ibid*, preamble.
[3] Ibid, article 2
[4] Ibid., article 3(1)
[5] Ibid. article 4(1)
[6] Ibid. article 5

which wetlands occur in Kenya, while section five provides assessments of the implications of property rights and its regulation on sustainable management of wetlands. Section six gives a brief case study of Yala Swamp, a wetland in kenya while Section seven concludes the paper.

II. Wetlands of Kenya

The Republic of Kenya lies on the eastern side of the African continent with the equator running approximately in the middle of the country. It covers an area of about 587 900 km^2 of which 576 000 km^2 is land surface. 88% of the land surface is classified as arid and semi-arid lands (ASALs) and the remaining 12% forms the medium and high agricultural potential land.[7] The country has wide differences in the amount, reliability and seasonal distribution of rain. There is also great elevation variation, which has produced regions with sharply contrasting environments. [8]

Kenya has five major drainage basins namely; Lake Victoria, Rift Valley, Athi River, Tana River and Ewaso Ngiro. The pattern of drainage is influenced by topography. Although, the country has numerous rivers, only a small number is permanent. Major lakes include parts of Lake Victoria, the lakes of the Rift Valley-most of which are small and slightly saline**.**

Wetlands are amongst the most precious natural resources on Earth.[9] In Kenya wetlands occupy about 3% to 4%, which is approximately 14,000 km^2 of the land surface. This fluctuates up to 6% during the rainy seasons.[10].In Kenya Wetlands cover between 2% and 3% of the country's surface area and harbour a substantial proportion of the country's water resources. Some of the country's major wetlands are; the shallow lakes of the Rift Valley, the edges of Lake Victoria and mangrove forests of the Coast. There are also hundreds of small wetlands distributed throughout the country.

Wetlands are rich ecosystems, which perform critical ecological functions and provide essential livelihood products and services. Critical wetlands functions include groundwater recharge and discharge, flood control, erosion control, sediment/toxicant retention (purification), nutrient retention, microclimate stabilisation, water transport and recreation. Products derived from wetlands include forest products, wildlife resource, and fisheries. Wetlands are habitats for biological resources and serve as feeding, spawning and refuge sites for a number of migratory birds. In some places they serve

---

[7] Kiai, S.P.m and Mailu, G.M. "Wetland Classification for Agricultural Development in Eastern and Southern Africa". available at iodeweb1. vliz.be.iodion/bitstream/1834/387/1/kiai-1999.pdf

[8] See D. C. Edwards, "The Ecological Regions of Kenya: Their Classification in Relation to Agricultural Development", (1956) XXIV *Empire J. Experimental Agriculture* p.20.

[9] Ramsar Convention Bureau, "Wetlands and Biological Diversity: Cooperation Between the Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar, Iran, 1971) and the Convention on Biological Diversity." (1996, UNEP/CBD/Cop/3?Inf. 21 (available at http://www.ramsar.org/about/about_biodiversity.htm)

[10] Kenya Land Alliance**,** *Wise or Unwise Use? :A Survey of Some Wetlands in Kenya*, Unpublished report, 2006 at p.3

unique cultural functions. Kenyan wetlands are diverse in type and distribution, but no national inventory on the type, status and location currently exists.

Wetlands therefore significantly affect the national economy, in terms of support both for direct livelihoods and for necessary ecological functions, such as provision of water, waste water treatment, maintenance of hydrological cycle, and prevention of storm damage and erosion.

However, their importance and attributes that are not directly related to human uses are not often appreciated until they are destroyed, modified or restoration of the wetlands to provide the above services proves too expensive. Part of the reason why the importance of wetlands has not been appreciated and efforts spent only in their conversion is as a result of the failure to accurately assess and value their economic importance. Decision-makers, developers and land-use planners have long perceived little economic benefit to conserving wetlands and few economic costs attached to their degradation.[11] Efforts at valuation did not consider the use, non-use and option values of wetlands. This justified the continued modification, conversion, over-exploitation and degradation in the interests of other seemingly more beneficial and productive land and resource management options like agriculture and settlement.

In efforts to stem the degradation and loss of wetlands[12] Kenya has undertaken several measures. Firstly, as required by the Ramsar Convention Kenya has designated five of its wetlands onto the Ramsar List of Wetlands of international importance. These include Lake Nakuru, Lake Naivasha, Lake Bogoria, Lake Baringo and Lake Elmentaita.

In addition Kenya has taken other measures including the adoption of national legislation so as to promote wise and sustainable utilization of wetlands within its borders**.**

III: Laws Governing the Management of Wetlands

The discussion of the legal framework governing the management of wetlands starts from the constitution. The Kenyan constitution has no provisions governing environmental management and consequently wetland resources. The relevant provisions in the Constitution are sections 75 and sections 114-118 of the constitution.

Section 75 protects private property from being compulsory acquired by government. The section deals with the power of eminent domain and requires that private property can only be acquired for public purposes and that the public purpose must justify the hardship that the private individual whose property is compulsorily acquired will incur

[11] Emerton, L. "The Economic Value of Africa's Wetlands" In *Thieme*, M.L. (Ed) *Freshwater Ecoregions of Africa and Madagascar*: *A Conservation Assessment* (Washington, D.C., World Wildlife Fund, 2005) 11-18 at 11.

[12] For a discussion of the efforts to restore wetlands and literature on wetlands degradation and loss See Gardner, R. Gardner, R.C. "Rehabilitating Nature: A Comparative Review of Legal mechanisms That encourage Wetland Restoration Efforts" Vol. 52(3) The Catholic University Law review 573 (2003)

and critically fair and adequate compensation must be paid. A similar provision exists in section 117 regarding trust land, where the concept of compulsory acquisition is referred to as setting apart. One of the grounds on which land can be compulsory acquired is if it is required for environmental conservation

The management of the environment and all its component resources is governed by a framework environmental law in Kenya, the Environmental Management and Coordination Act.[13] In addition there are sectoral legislations for almost each and every sector. Thus for the Forestry sector in addition to EMCA, there is the Forestry Act,[14] for Fisheries there is the Fisheries Act[15] and the Wildlife (Conservation and Management) Act[16] for the wildlife sector. There is, however, no sectoral legislation exclusively governing the wetlands ecosystem. Instead in addition to EMCA, provisions have to be gleaned from various sectoral statutes on the environment to appreciate the full corpus of legislative provisions governing sustainable management of wetlands in Kenya.

The Environmental Management and Coordination Act, is the framework environmental law, governing the management of the environment. Its purpose is stated as being "to provide for the establishment of an appropriate legal and institutional framework for the management of the environment in Kenya…"[17] The Act establishes the National Environmental management Authority as the overall body with the duty of ensuring coordination in the implementation of government policy for the sound management of the environment.[18]

The Act contains general principles to govern the management of the environment. These include principles to ensure rational management of the environment and thus promote sustainable development of the country. In determining cases regarding the protection of the right and a duty to a clean and healthy environment as guaranteed by EMCA[19] the High court is required to be guided by these principles which include:

(a) the principle of public participation in the development of policies, plans and processes for the management of the environment;

(b) the cultural and social principles traditionally applied by any community in Kenya for the management of the environment or natural resources in so far as the same are relevant and are not repugnant to justice and morality or inconsistent with any written law;

(c) the principle of international co-operation in the management of environmental resources shared by two or more states;

(d) the principles of inter-generational and intra-generational equity;

---

[13] Act No 8 of 1999. For a discussion of the History and implementation of the Act see Anne Angwenyi, "An Overview of the Environmental Management and Coordination Act, " in C.O. Okidi, P.K. Mbote and J.A. Migai (eds) *Environmental Governance in Kenya: Implementing the Framework Law* (EAEP, 2008).

[14] Act No. 7 of 2005

[15] Chapter 378, Laws of Kenya.

[16] Chapter 376, Laws of Kenya

[17] EMCA, Supra note,14, preamble.

[18] Supra note, 14 section 7.

[19] Section 3 EMCA

(e) the polluter-pays principle; and
(f) the pre-cautionary principle.

These principles are useful for the management of all sectors of the environment. They apply to the management of wetlands resources to. The High court of Kenya, in a case concerning public health and construction of houses in a settlement withour adequate attention to sanitation, the case of *Peter Waweru v The Republic*, it was held that 'In the case of land resources, forests, wetlands and waterways … the Government and its agencies are under a public trust to manage them in a way that maintains a proper balance between the economic benefits of development with the needs of a clean environment'.[20]

Part V of EMCA deals with legal tools for the sustainable management of the environment and covers the protection of various components of the environment including wetlands. Section 42 specifically contains provisions governing protection of wetlands. The section prohibits the carrying out of several listed activities on a wetland without prior approval of the Director General of NEMA. These activities include:

(i) erecting, reconstructing, placing, altering, extending, removing or demolishing any structure or part of any structure in or under a wetland;
(ii) excavating, drilling, tunneling or disturbing a wetland;
(iii) introducing any animal whether alien or indigenous in a wetland;
(iv) introducing any plant or part of a plant specimen, whether alien or indigenous, dead or alive, in any wetland;
(v) Depositing any substance in a wetland if that substance would or is likely to have adverse environmental effects on the wetland;
(vi) Directing or blocking any wetland from its natural and normal course; and
(vii) Draining of a wetland.[21]

The above activities cannot be carried out in a wetland unless the approval of the Director General of NEMA has been sought and obtained, such approval only being given after an environmental impact assessment has been carried out.

EMCA requires EIA to be carried out[22] in situations where an activity being undertaken is out of character with its surrounding, any structure of a scale not in keeping with its surrounding and major changes in land use.[23] The principal objective of EIA is to ensure that environmental considerations are incorporated into the planning, decisions and implementation of development activities. It assists in preventing, or where that is not possible, minimizing an activity's adverse impacts while maximizing its positive effects. EIA attempts to weigh the environmental effects on a common basis with economic costs and benefits in the overall project evaluation. By requiring EIA to be carried out, the Act seeks

[20] High Court of Kenya at Nairobi, Miscellaneous Civil Application No. 118 of 2004.
[21] EMCA, Section 42(1)
[22] Ibid, Section 58
[23] Ibid, Second Schedule.

to ensure that wetlands are protected and activities of the nature described only carried out once a determination is made that they will not have adverse effects on the wetland of after sufficient corrective measures have been undertaken.

The Act then gives the Minister the power to, by a notice in the Gazette, declare a wetland to be a protected area and impose such restrictions as he considers necessary to protect the wetland from environmental degradation.[24] In the process of making the declaration, he should consider the geographical size of the wetland and the interests of the communities resident around the lakeshore.[25]

Lastly, the Act gives the Minister the power to issue, through a Gazette notice general and specific orders, regulations or standards for the management of wetlands.[26] These may include issues to do with the management, protection or conservation measures in respect of wetland areas in risk of environmental degradation. To date no such orders, regulations or standards have been issued. There, however, exist in draft form regulations for the management of wetlands.[27]

The implementation of this section of EMCA has been subject to litigation in the High Court in the case of *Park View Shopping Arcade v. Kangethe & 2 Others*.[28] The plaintiff in this case filed a suit and contemporaneously filed an application for an injunction seeking to restrain the defendants from trespassing upon the suit land and order for their eviction. The plaintiff contended that it was the registered proprietor of the suit land, with an indefeasible title to the land thus having exclusive right of enjoyment, occupation and use which right was being interfered with by the defendants as trespassers. The defendants on the other hand argued that the land in question was a wetland along one of the tributaries of Nairobi River and that they had a permit from the City Council of Nairobi to conduct their business, which was bound to enhance the environmental quality of the area. The defendants were engaged in the business of growing and selling flowers in the suit premises.

The court in deciding the case dealt with the provisions of Section 42 and the duty to declare land to be a wetlands, holding that such powers could only be exercised, in accordance with the Act, by the Minister for the time being responsible for environmental matters. Justice Ojwang, in his ruling made this point by holding as follows

> " The defendants have, in effect, taken it upon themselves to declare the environmental status of the suit land, but this can only be done by the Minister. …

[24] Ibid., S. 42(2)
[25] Ibid.
[26] Ibid., S. 42(3)
[27] The Environmental Management and Coordination(Wetlands, Riverbank, Lakeshore and Seashore Management) Regulations, 2008 (Draft, on file with author)
[28] HCC 438 of 2004 published in KLR, Environment and Land(2006), 591-610

> The Act also empowers the Minister to determine the modes of environmental protection and the standards thereof. At the environmentally-sensitive areas. Section 42(3) provides thus: …
> From this provision it is clear that the defendants/respondents cannot arrogate the authority to determine the standards and modes of environmental protection at the suit land. They have sought to usurp the functions of the Minister, and this must be held to be unlawful."[29]

Other laws impacting on Wetlands in Kenya

Physical Planning Act[30]

The Physical Planning Act is an act of parliament whose principal purpose is to provide for the preparation and implementation of physical development plans. The Act regulates physical planning and development in all parts of the country. It requires that before a development is undertaken, the proponent should apply to the relevant authority so as to obtain approvals. The process involves local authorities whose duty include considering and approving all development applications and grant development permissions.[31] One of the important functions of every local authority is the power to "reserve and maintain all land planned for open spaces, parks, urban forest and green belts in accordance with the approved physical development plans."[32] Although the section does not mention wetlands, it can be used by local authorities as a basis of reserving and maintaining wetlands as fragile ecosystems in cases where it is considered necessary. The Act also discusses the powers of the Director of Physical Planning,[33]the Commissioner of Lands and the Minister in the process of approval and implementation of development plans.

The Act requires the balancing of various interests in the process of designing and approving physical plans. It specifically calls for EIA to be carried out in cases where the local authority is of the view that proposals for industrial development activities will have injurious impact on the environment.[34] In reliance on this provision and due to the unique nature of wetlands ecosystems, EIA should be undertaken in all cases of proposed developments in a wetland. This way the development needs will be weighed against the environmental imperatives of the ecosystem.

The Water Act, 2002[35]

The water Act 2002 repealed the earlier water Act[36] and is stated to be a an act to " provide for the management, conservation, use and control of water resources and for

[29] Ibid., pages 609-610
[30] Chapter 286, Laws of Kenya
[31] Ibid. Section 29.
[32] Ibid, Section 29(f)
[33] Ibid, Section 5
[34] Ibid, Section 36.
[35] Act No. 8 of 2002
[36] Chapter 372, laws of Kenya

acquisition and regulation of rights to use to use water; and to provide for the regulation and management of water supply and sewerage services."[37] This Act has relevance for the management of wetlands in Kenya. As defined a wetland is an area whose characteristics include the presence of water and hence the relevance of the Water Act. The definition section of the Act clearly identifies the relevance of the Act to Wetlands by including in its definition the term "swamp"[38] which is the equivalent term for wetlands. It defines a swamp as "… any shallow depression on which water collects either intermittently or permanently and where there is a small depth of surface water or a shallow depth of ground water and a slight range of fluctuation either in the surface level of the water or of the ground water level so as permit the growth of aquatic vegetation."[39]

The Act deals with the ownership, control, and use of water resources and also has provisions for the protection of water catchments areas. The institutional structure that it creates is also useful for purposes of wetlands management. Two points of caution, however as regards the Water Act. Firstly, the Act empowers the minister to make rules for the better implementation of the Act.[40] In reliance of these powers, there have been drafted draft regulations that amongst other things seek to regulate the management of wetlands. One should look at this in relation to the provisions of Section 42 of EMCA that also empowers the Minister in charge of environment to make regulations for the management of EMCA. This possibility of conflict is further amplified due to the institutional conflict between NEMA through the EMCA and the institutions and legal stipulations under the Water Act, with arguments being made that the Water Act being later in time should prevail over EMCA notwithstanding the provisions of section 148 of EMCA.[41]

The Wildlife (Conservation and Management) Act[42]

This law governs the protection, conservation and management of wildlife in Kenya. It is relevant to wetlands management in Kenya due to the fact that after Kenya ratified the Ramsar Convention it designated the Kenya Wildlife Service as the institutional focal point for the implementation of the Ramsar Convention. Since the establishment and operations of KWS are governed by the Wildlife Act[43]. The Act further empowers the minister to declare an area to be a protected area[44] and according to the Ramsar Convention, wetlands sites of international importance can and should be declared protected areas[45] to enhance their status and thus improve their conservation.

---

[37] Ibid, note 23, preamble.
[38] Ibid., S. 2(1)
[39] Ibid.
[40] Ibid, section 110
[41] For a detailed discussion of this see Migai, J. A. *Governing Water and Sanitation*, in C.O. Okidi, P.K. Mbote and J.A. Migai (eds) *Environmental Governance in Kenya: Implementing the Framework Law* (EAEP, 2008)..
[42] Chapter 376, Laws of Kenya
[43] See Section 3 of the Act introduced by legal notice number of 1989 which established KWS as an independent body.
[44] Supra, note 43 at section 15.
[45] Article 4 of the Ramsar Convention

There are efforts to revise both the Wildlife Policy and Wildlife Act and the draft Wildlife Act gives exclusive rights to KWS to be overall in charge of the management of all wetlands in Kenya. This does not resolve the institutional and structural overlaps between NEMA, KWS and the institutions under the Water Act as far as management of wetlands goes.

Laws and Policies on Land Tenure and Use

The laws that govern ownership, control and use of land have relevance for the management of wetlands in Kenya. tenurial arrangements impact on the conservation and wise use of wetlands.

Secondly, Kenya has had no land policy. Over the last several years, the country has engaged in an extensive and intensive consultations process to develop a national land policy. This culminated in the production of a national land policy in March 2006. The draft polices identifies the problems that wetlands have faced including conversion for industrialization and development purposes. It underscores the main problem facing wetlands ecosystems as being their unsustainable exploitation due to conflicting land uses and inadequate enforcement of natural resource management guidelines. It then offers proposals for the better management of wetlands resources and when adopted they will offer a good policy foundation for the management of wetland ecosystems.

The Policy Framework for Wetlands Management in Kenya

As regards Policy, the country has never had a policy framework. Many attempts have been made in the past to develop one. These have culminated in a draft policy,[46] which as at the time of writing was yet to be adopted as a framework to govern the management of wetlands and wetlands resources in Kenya.

The rationale for a policy framework to govern wetlands is not difficult to fathom. A policy as the government's overall strategic commitment and action plan would clearly coordinate efforts to manage wetlands and elevate their status in planning processes. The draft Policy captures the importance thus:"

"Despite certain specific actions (projects and programmes) which have been "undertaken by various stakeholders, it has become conclusively evident that individual actions or approaches are insufficient to reverse the current trends. … hence the felt need to develop a national policy on wetlands conservation and management. A national policy will lay the framework for planning, co-ordination and management of wetlands. It will also advance the understanding and appreciation of wetlands as valuable ecosystems for sustainable development. The policy will also ensure that specific guidelines, such as environmental impact assessment (EIA) guidelines, are developed and implemented to ensure minimal negative impacts."[47]

[46] Republic of Kenya, *Draft Framework for the Development of a national Wetlands Conservation and Management Policy*, 2007

[47] Ibid.

The draft Policy defines Wetlands in the Kenyan context, identifies the uses to which wetlands have been put and summarizes the main threats to their conservation and management. The key policy issues that the draft addresses include tenure and accessibility; improved institutional and legal framework; improved public awareness; promotion of wise use; recognition of the need for integrated planning and multiple use of wetlands; conservation of wetlands and their biodiversity; restoration and recovery of wetlands; Environmental Impact Assessment requirements for development and monitoring of wetlands; implementation of international responsibilities; and research and establishment of a wetlands database. The discussions on and for a wetlands Policy have taken place for long. It is critical that these discussions be concluded in a consultative manner so that the country can have an adopted policy framework to govern the management of wetlands in Kenya.

IV. Property and property regimes in Kenya

The management of wetlands is an incidence of and is intricately linked to the property rights and property rights regimes. Sustainable management of wetlands requires regulation of property rights. However, the manner of that regulation is determined by the legal rules put in place. How property rights are defined and regulated in law is therefore at the heart of sustainability of wetlands resources.

The institution of property is one of the most enduring characteristics of human societal existence. However, its expression is community-dependent and varies spatially and temporally. Each phase of human society – from the primitive societies, through the feudal systems to the modern industrial and commercial societies – has given its own content to the notion of property.[48] Indeed, property relations and other elements of social order such as political groups and economic policies largely constitute the substructure on which social order of any community rests.

Historically property was seen as the right to a thing. Property has evolved from the early conceptions as a "thing" to being seen as a social relation between people. The term property is normally traced to the description in the 18th Century by William Blackstone as a right over a thing. Blackstone conceived of property as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."[49]

By the beginning of the 20th century, Blackstone's postulation was challenged. Subsequently property came to be viewed as a bundle of rights. Indeed, the traditional conception of property as thing-ownership has been replaced with the new conception of property as an abstract bundle of legal relations."[50] In a series of writings, Hohfeld

[48] Bhalla, R. S. . "Property Rights, Public Interest and Environment." In Calestous Juma and J. B. Ojwang (eds) *In Land We Trust : Environment, Private Property and Constitutional Change* (Nairobi and London, Initiative Publishers and Zed Books, 1996) 61-81 at p. 61.
[49] Blackstone, W., *II Commentaries of the law of England*, (Wayne Morrison ed., 2001) Chap 1.3.
[50] See Heller, M.A., "Three Faces of Private Property," 79 Oregon Law Review. 417 (2000) at 429-431.

saw the crux of property not as a relationship between a person and an object as suggested by Blackstone but rather a nexus of relationships among people regarding an object.[51]

Hohfeld is credited with creating the postulation of property as a "bundle of rights", which conception is popular to date. The bundle of rights metaphor deemphasizes the importance of the thing with regard to which the rights are claimed. Instead each right, power, privilege or duty is but one stick in the aggregate bundle that constitutes the property relationship.

Proceeding from this standpoint, A.M. Honore catalogued a generally accepted list of the incidents of property or ownership.[52] He stated that:

> "ownership comprises the right to possess, right to use, the right to manage, the right to income of the thing, the right to the capital, the right to security, the right or incidents of transmissibility and absence of term, the prohibition of harmful use, liability to execution, and the incident of residuarity."[53]

However, it must be added to list the right to exclude, which although considered core, was missing from Honore's list above.

Despite the above developments, the term property still eludes precise definition. There is a lot of resort to descriptive as opposed to definitive approaches to discussing the term property. In Kenya, the constitution at Section 75 states that , "No property of any description shall be compulsorily taken possession of, and no interest or right over property of any description shall be compulsorily acquired." This provision refers to all the different representations of property – movable or immovable, corporeal or incorporeal – that can be enjoyed, and represents the well-accepted notion of property as a bundle of rights.

The range of interests represented in this constitutional order stood out in the case of *Haridas Chagan Lal v. Kericho Urban District council.*[54] The case concerned sanctity of interests conferred by a lease granted to the plaintiff in 1928, subject only to the conditions that the land was to be used solely for residential and business purposes. In 1960, the plaintiff sought to erect a petrol pump on the land. But the relevant land board refused to grant permission on ground that to operate a petrol pump would be contrary to recently-enacted by-laws passed under the Local Government ordinance of 1960. The court held that the provision of the by-laws that takes away the property interest without compensation is in conflict with section 75 of the Constitution. The court further opined that a person could not be deprived of his or her property without compensation even if there is a clearly expressed intention in an enactment.

---

[51] Hohfeld, N.W., "Fundamental Legal Conceptions as Applied in Judicial Reasoning" 26 Yale L.J. 710 (1917); Hohfeld, N.W., "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning," 23 Yale L. J. 16 (1913)

[52] Honore, A.M., *Ownership,* in *Oxford Essays in Jurisprudence* 107 (A.G. Guest, ed., 1961)

[53] Ibid, at p 113

[54] 1965 E.A. 370.

The property rights regime in Kenya is a product of both pre-colonial and colonial legacies. While the pre-colonial period was dominated by customary law of native communities for purposes of land ownership, access and use of natural resources, the colonial era imposed the English law of property by asserting radical title to all land in the protectorate and granting Her Majesty's commissioner the power to grant private title to land. Settlers were granted either freehold or lease hold interests in land for 99 years to pave way for the economic exploitation of the colony through agriculture.[55] Customary tenure of native communities was considered inferior to English property law and could not provide ownership and disposal rights over the land as the settlers wanted.[56]

The systems of land tenure existing in the colonial period were carried over into the independent Kenya resulting in three general systems of land ownership in the country. The land tenure systems operative in Kenya has been characterized as private/individual/modern, communal/customary and public/state/trust/government.[57] Wetlands occur in each of these types of land. It is therefore important to understand how property rights are regulated under each tenure regime as it is has implications on the management of wetlands in that tenure system.

Community/Customary Tenure

Under this regime of tenure holding, rights over land and land-based resources is held by a clearly defined group of users. They hold a clearly defined set of rights and obligations. Rights to use the resources are distributed equitably amongst members of the group and regulated through use of guidelines which traditionally were handed over from generation to generation.

This regime embodies the concept of common property that was wrongly referred to as the tragedy of the commons by Hardin.[58] In Hardin's postulation, common property regime is inimical to sustainable management of resources as it leads to overuse of the resource.

In Kenya customary tenure continues to govern the management and use of land and land-based resources even despite spirited attempts to convert it to other tenure regimes.

Public/Government Land Tenure

This refers to the situation in which land is owned by the public as a collective entity. In Kenya, however, this tenure regime is equated to the situation where the government

---

[55] Okoth-Ogendo, H.W.O. 1991, *Tenants of the Crown Evolution of Agrarian Law and Institutions in Kenya* Nairobi, Kenya: Acts Press citing the East African (Lands) Order- in –Council of 1901 and 1902

[56] *Id*.

[57] See, for example, Peter Ondiege, "Land Tenure and Soil Conservation," in Calestous Juma and J. B. Ojwang (eds) *In Land We Trust : Environment, Private Property and Constitutional Change* (Nairobi and London, Initiative Publishers and Zed Books, 1996) 117-142 at p. 122.

[58]

owns property in land as a private entity. The land referred to as government lands originates from the Crown Lands ordinance of 1902 which declared all "waste and unoccupied land" in the protectorate "Crown Land". By an amendment to the Crown Lands Ordinance in 1915, Crown Land was expanded to include land in actual occupation of "natives."[59] In 1938, a further amendment removed native reserves from Crown Land. Land in Native reserves became trust lands at independence governed by the Constitutions and the Trust Lands Act.

The Crown Lands Ordinance as amended became the Government Lands Act and consequently all land that had been defined as Crowns Lands became government land. These lands became vested in the President, who had powers to make grants and dispositions over unalienated government lands either by himself or in certain circumstances through the Commissioner of Lands acting on his behalf.

The regime of government land has constituted an important framework for the conservation of the country's biodiversity. They have specifically been relied on to protect forest and Wildlife within the framework of the Forests Act[60] and the Wildlife(Conservation and Management) Act.[61] Both rely largely on the traditional model of creating protected areas as the mechanism for biodiversity conservation.

This tenure regime can be relied on for purposes of conserving wetlands by declaring a wetland as a protected area.

Private Land Tenure

This refers to a tenure regime under which land and land-based resources are owned by individuals. Individual ownership of land and land-based resources is justified on the basis of the incentives said to be engendered by such ownership. It is argued that the possibility of personal gain fosters sound management of resources. That is, individual ownership is said to be the most rational, efficient, and productive way of managing resources.[62]

In Kenya, the process of land reform and conversion has focussed on converting all forms of tenure to individual tenure. Despite the perceived benefits of private tenure the reality has been huge shortcomings in environmental and natural resource conservation within individual tenure regimes. This is because individual tenure ignores wider societal interests.

V: Implications of Property regimes on wetlands management

Wetlands occur in all the different types of property. Thus the manner in which the wetlands are managed is closely related to the property regime in question. For wetlands that occur in private property, its conservation and utilization will be governed

[59] For an exhaustive discussion of the evolution of land law tenure regimes in Kenya see, Okoth-Ogendo, H.W.O. 1991, *Tenants of the Crown Evolution of Agrarian Law and Institutions in Kenya* Nairobi, Kenya: Acts Press

[60] Supra, note 15.

[61] Supra, note 43.

[62] Kenya Law Reports, (*Environment and Land, 2006)* page Xvii.

by the rights that a private land owner in which the property exists ahs and the manner those rights are regulated.

The state has residual powers for regulating property rights in land. The two most common tools for such regulation are the tools of police powers and eminent domain. Their exec rice has, however, to be balanced against those of property holders in the specific property regime.

Compulsory Acquisition In Reliance of The Power of Eminent Domain

Eminent domain comes from the Latin word *dominium eminens* which basically means dominion over territory. It refers to the power of the sovereign to compulsory acquire land for public purposes. This power derives from the notion that the State holds radical title to all land within its territory. This power is embodied in Section 75 of the Kenyan Constitution. The power to compulsorily acquire land is also regulated by the Land Acquisition Act.[63] The Act details the conditions under which land may be compulsorily acquired and this include the "interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of any property in such manner as to promote the public benefit."[64]

Section 75 of the Constitution is, the anchor for the power of eminent domain. It provides that:

> (1) "No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied-
>
> (a) The taking of possession or acquisition is necessary in the interests of defense, public safety, public order, public morality, public health, town and country planning or the development or utilisation of property so as to promote the public benefit; and
>
> (b) The necessary therefor is such as to afford reasonable justification for the causing of hardship that may result to any person having an interest in or right over the property; and
>
> (c) Provision is made by law applicable to that taking of possession or acquisition for the prompt payment of full compensation."[65]

From the provisions of Section 75 of the Constitution, it is clear that for the power of eminent domain to be exercised, the property must be required for a public purpose. The purpose must be such as to justify hardship to be caused on the owner of the private property and thirdly that that owner must be paid prompt and adequate compensation. This power of compulsory acquisition "provides the State with a useful instrument for the conservation of environmental resources, this being a public interest."[66]

---

[63] Chapter 295, Laws of Kenya.
[64] *Ibid*, s 6 (1) (a)
[65] Constitution of Kenya, s 75.
[66] Kenya Law Reports, *Environment and Land*, 2006, page xxi.

The State, in reliance of this power, can acquire land in a wetland and have the same protected and conserved. For the State to do this, the three constitutional requirements must be met. This has been the subject of litigation in Kenyan case *Commissioner of Lands & Another* v *Coastal Aquaculture Ltd.*[67]

This case arose out of the decision of the Commissioner of lands to give notice on 5 November 1993 of an intention to acquire a parcel of land in Tana River belonging to Coastal Aquaculture Ltd. The land acquisition was done in reliance of the powers under section 75 of the Constitution and the Land Acquisition Act.[68] The purpose for which the acquisition was done was stated as being "for Tana River Delta wetlands". The respondents were dissatisfied with the decision of the Commissioner of Lands to compulsory acquire their land and brought a case in the High Court challenging that decision. The High Court, through Ringera J., ruled in their favour by holding that the public purpose and body for whom the land was being acquired was not stated. He stated as follows:

> As regards the adequacy and validity of the notice published under section 6(2), I have come to the judgment that that notice should reflect the Minister's certification to the Commissioner under section 6(1), and must accordingly include the identity of the public for whom the land is acquired and the public interest in respect of which it is required. It is only when a notice contains such information that a person affected thereby can fairly be expected to seize his right to challenge the legality of the acquisition. That is because the test of legality of the acquisition is whether the land is required for a public body for a public benefit and such purpose is so necessary that it justifies the hardship to the owner. Those details must be contained in the notice itself for the prima facie validity of the acquisition must be judged on the content of the notice. The test must be satisfied at the outset and not with the aid of subsequent evidence…In the result, I find and hold Gazette Notice Number 5689 of 4th November, 1993 is defective and invalid for the reason that it did not identify the public body for whom the land was being acquired and the public purpose to be served by such acquisition. The words "Tana River Delta Wetlands" cannot but be a geographical-cum-ecological description. They are not the name of any public body or descriptive of the public purpose of the acquisition. They are accordingly incompetent to satisfy the requirements of the law. That being the position, it follows that Gazette Notice Number 5690 of 4th November 1993 notifying interested parties of the holding of an inquiry into claims for compensation was invalid. As the jurisdiction of the Commissioner of Lands to hold the inquiry was conditional on publication of valid notices of the acquisition and of the inquiry. I must and do conclude, that the Commissioner lacked jurisdiction to commence or continue the inquiry under Section 9(3) of the Land Acquisition Act. I am accordingly inclined to order that the prohibition do issue as prayed.

On appeal to the Court of Appeal this position was upheld. Although argument was made both in the High Court and in the Court of Appeal that "Tana River Delta Wetlands" was not a geographical cum ecological description, but a public body for

[67] Civil Appeal No. 252 of 1996 reported in KLR (E&L) Vol. 1 264-295.
[68] Chapter 295, Laws of Kenya.

purposes of compulsory acquisition, and further that the term wetlands was an international term of art indicative of a water catchment area, the court still held that the purported acquisition did not comply with the strict requirement of the law on compulsory acquisition. The decision was not made because wetlands management was not a public purpose but because this was not expressly stated in the notice. Justice Tunoi, in his concurring judgment at the Court of Appeal, pointed out that:

> … Moreover, he has not shown that the taking of possession or acquisition of these plots was necessary in the interest of public purposes as enumerated in Section 75(1) (a) of the Constitution. I say so because nothing would have been simpler for him than to state in the Notices that the compulsory acquisition was for the Tana and Athi Rivers Development Authority for the development of wetlands or any other public purpose."[69]

In effect the judge was saying that conservation of a wetland is a public purpose and in appropriate cases one in which the power of compulsory acquisition can be exercised.

The next issue that the court discussed is who had the power to conserve and manage wetlands. On this issue Justice Tunoi held as follows:

> "Certainly Tana and Athi Rivers Development Authority is not the only public body or authority charged with the management of wetlands in Kenya. In 1971, in the Iranian City of Ramsar, a handful of countries signed an international treaty, the Convention on Wetlands, with the purpose of promoting the conservation and sustainable use of the habitat. Kenya became a signatory of the Convention in 1990. By a press release issued on 2 February, 1997 during World Wetlands Day, Kenya Wildlife Service claimed that it was appointed the implementing agency. Nothing was heard of the Tana and Athi Rivers Authority."[70]

Police Powers of the State

This refers to the power of the State to regulate land use in the public interest, such as to secure proper resource utilization and management. It is also an incidence of state sovereignty. It is exercised to protect social interests including health, safety and public morality.[71] Police power may be invoked to secure proper environmental management. In Kenya it is provided for in a number of statutes, such as the Public Health Act, the Agriculture Act, the Local Government Act, the Physical Planning Act and the Water Act. While police power has been used in Kenya in different contexts, it has not been very widely used to secure sustainable environmental management.

One advantage of police power over eminent domain is that the state has no obligation to pay compensation to landowners for regulating land use. However land use control measures must be applied with caution as excessive lands-use regulations may be

[69] *Supra*, note 73 at page 276.
[70] *Ibid.*
[71] *Id.*

seen to amount to compulsory acquisition of the land and may be challenged on a constitutional basis as a taking as has happened invariably in the United States.

Reliance of the above tools can help regulate property rights for sustainable management of wetlands. In Kenya, however, neither has been effectively utilized. Eminent domain has been relied on largely when land is required for public construction and in several instances to take land and give it to private individuals and very rarely for environmental sustainability. Neither has police powers been effectively used for wetlands management. This is due to lack of a comprehensive wetlands legislation and a land use policy which would prescribe that wetlands needs to be regulated to ensure sustainability even if they occur in private or community land

The case of Yala Swamp is an apt demonstration of the paucity of legal frameworks and regulation of property rights for sustainable management of wetlands

VI: The Case Study of Yala Swamp Wetlands

The Yala Swamp is Kenya's largest freshwater habitat.[72] It is a large area of swampland located in Western Kenya and is bordered by Lake Victoria to the West and Yala river in the South. It has three lakes namely, Kanyaboli, Sare and Nyamboyo. It covers around 17,500 hectares.

The wetland has high biodiversity and is home to several endemic species. It is part of the most densely populated parts of Kenya. it supports a large part of this population that relies on it for income as a result of fishing, hunting, construction, material and agricultural production.

Unlike other swamps in Kenya, it does not however have a protected status. It has been subject to reclamation since 1960s principally to give way to agricultural activities. The most recent reclamation took place at the instance and of the benefit of a US company, Dominion Farms Limited for purposes of carrying out rice cultivation.

The Company started operations in Yala Swamp through an agreement with the Lake basin Development Authority (LBDA), a regional development authority operating within the area. LBDA was to carry out its activities on a 2,300 hectares of land which had been reclaimed in 1970 and had subsequently been used by LBDA for agricultural activities. In 2004, following an Environmental Impact Assessment conducted as per the requirements of the Environmental Management and Coordination Act, Dominion Farms Limited received an EIA licence to carry out rice cultivation in the Swamp.

Controversy has, however surrounded the activities of the company. There was raised objections by some members of the local communities and NGOs on the basis that Dominion farms was undertaking activities on wider land than they had been allowed initially and further that the scale of activities were larger than the rice production which

[72] Otieno, M., *Mapping Landscape Characteristics of Yala Swamp*, MSC Thesis, Moi University, 2004.

was the basis for the grant of an EIA. These objections have threatened the successful implementation of the activities of the company.

Of greater interests are the issues that arise from the operations of the company at Yala Swamp. Firstly, the tenure regime in Yala swamp is multiple. There are portions of the land that are owned by Lake Victoria Basin Authority, others by the country council(local authority) and others by members of the local communities. The challenges of this multiple tenure regime has been evident in the manner the project has proceeded. First, when the EIA was granted, sufficient attention was not paid to the tenure rights of those holding property rights in the wetlands. With the consequence that there has been run-ins between local communities and Dominion over their relocation and compensation. The government in giving approval to Dominion to carry our development activities did not utilise any of its powers to compulsorily acquire the land and pay adequate compensation to the land owners. Instead it left issues of tenure to be addressed through private arrangements by the company.

The greatest challenge in the *Yala* swamp complex remains balancing community based resource management, agro-industrial exploitation, and biodiversity conservation. The predominant thinking is that most of the wetland is still in its natural state and is not been harnessed for economic gains. One of the major challenges to this wetland is the Government policy that dates back to the 1950s and aimed at draining land for agricultural purposes and the trade off on environmental conservation giving it a political undertone of development agenda versus environmental conservation. Reclamation of the swamp was proposed in 1954 and eventually commenced in the 70s (LBDA was established in 1979), when there were no laws nor policies on wetland conservation. These efforts were carried on by LBDA that was involved in rice farming. Another challenge to the wetland is increased pressure in its resources arising from a high demand for settlement, food production and grazing.

Moreover, the costs of reclamation of the wetland are borne by the local people yet the goods and services they depend on are diminishing as a result of competition for land around the periphery compared to the interior parts of the swamp which is not accessible. As a result of the reclamation, large scale agriculture is promoted and construction of dykes, canals, dams, weirs, and barrages in the past by the Netherlands Government and currently by Dominion Group of Companies to divert water from the river for irrigation is bound to have adverse effects on the hydrology and other ecosystems.

With respect to the *Yala* swamp complex, the community's role in decision making regarding natural resource use and management is very weak. In comparison to the past when they had unlimited access to the resources, their benefits from the wetlands have been curtailed by the current arrangement. This has glaring implications on human rights as it impacts negatively on community rights to the resources they require for their

livelihood. Further, their local institutions are far too weak to deal with long term strategies for managing the swamp and to ensure the benefits accrued from the reclaimed area is shared equitably. There is no clear mechanism of transparency by the local authorities in benefit sharing especially in supporting their priority concerns.

The impact of the agricultural activities on the environment and sustainability of the wetland has not been adequately addressed in the context of the EIA carried out by Dominion. Due to lack of a land use policy in the country, the decision on what types of activities can be carried out within wetlands ecosystem without undermining the sustainability of the resource cannot be decided within na proper context. Instead, the process has proceeded on the basis that Yala Swamp is a wasteland, whose utility requires that it be reclaimed and put to productive agricultural activities.

VII: Towards Sustainable Management of Wetlands in Kenya: in lieu Of a Conclusion

The experience of Yala swamp demonstrates the implications of Property rights for sustainable management of wetlands. Wetlands currently occur in private property, government lands and customary lands. However the laws and process for their management do not recognize this fact. In the first place there are less than adequate legal provisions for the management of wetlands. The closest is the provisions of EMCA, which in any case do not address tenure implications

Secondly, the law assumes that wetlands occur in public lands only. It therefore fails to address how to regulate wetlands as a public good. This failure has its origins in history and policy outlook which sees wetlands as good only when converted to more productive uses.

In our view, it is essential that wetlands be seen as a public good and on reliance of the doctrine of public trust,[73] they should be dealt with as those resources which should always be maintained for public benefit and not transferred to private individuals for private use. This will mean that even wetlands that exist in private or customary land will have their use regulated to ensure sustainability. The implications of such an effort on property right holders is one that the state needs to take into account to ensure that there is healthy balance between property rights interests and Kenya's interest to sustainable development and in maintaining the threshold of sustainability of wetlands resources.

73