



# Are forest tenure rights secure for local communities and indigenous peoples in Kenya?

## ASSESSMENT OF LAND TENURE RIGHTS UNDER KENYA'S NEW LEGAL FRAMEWORK

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This brochure reflects the opinion of the lead author, who is a lawyer and currently serving as the Chairperson of the Task Force appointed by the Government of Kenya to advise on implementation of the Judgment of the African Court concerning the Ogiek community of the Mau Forest. During the year 2019, the Task Force has received varied submissions from multiple actors, regarding its Terms of Reference. This brochure does not reflect those multiple perspectives, nor those of the Task Force, the Government of the Republic of Kenya, or CIFOR.

### Key messages

- The Center for International Forestry Research (CIFOR) undertook a review of Kenya's legal framework to understand whether, and to what extent, Kenyan legal provisions were sufficient to secure community land and forest rights. The primary objective was to assess how adequate Kenya's legal framework was in protecting and promoting tenure rights of forest communities, including in protected areas.
- The law appears to offer adequate security for the tenure rights of forest communities. Kenya's *Community Land Act*, enacted in 2016, defines community tenure rights comprehensively and has legal provisions to enhance and guarantee tenure security. Forests on communal land are secure, at least on paper.
- Areas of public gazetted forests that are claimed by indigenous groups as their customary territory are not well secured by law, even though the Constitution recognizes indigenous groups. However, a task force is now addressing this gap.
- Most challenges lie in determining community identity and customary land rights, and registration of the community and land rights. This affects areas claimed as ancestral lands by indigenous and marginalized communities. Resolution requires investigations into historical land injustices to provide remedies.
- Key actions to strengthen protection and promotion of forest communities' tenure rights are: participatory mapping and inventory of community land requiring determination of customary rights and registration; implementation of legal mechanisms for community participation in public forest management; and a system to map out community forests which fall under a) land lawfully held, managed or used by as community forests, grazing areas or shrines or ancestral lands; and b) lands traditionally occupied by hunter-gatherer communities.

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## Background

Kenya has had a complicated history with the administration and protection of its community land rights. However, its recently adopted progressive constitutional framework points to change – with a strong human rights structure underpinning land rights, and land now reclassified to include a distinct category of community land.

Since 2010, various land laws and institutions have been established to govern land rights in Kenya. Yet these legal provisions and structures have not been fully tested, and historical challenges relating to the guaranteeing of community land rights remain.

Against this backdrop, a recent CIFOR study (Kibugi 2018) assessed the land and forest rights tenure security of local communities and indigenous peoples under the new Kenyan Legal Framework. The aim was to understand whether, and to what extent, Kenya's new legal provisions were sufficient to promote and protect community land rights, including those of indigenous and local communities, inside and outside of protected areas. This assessment came with five specific objectives:

1. Identify and analyze existing laws, regulations and policies that establish tenure regimes recognizing rights of indigenous and other forest communities.
2. Analyze the extent to which rights recognized in regulations account for the different bundle of rights connected to land and forests.
3. Analyze to what extent these legal provisions provide the basis for ensuring tenure security.
4. Identify incongruences, gaps and inconsistencies in regulations relevant for collective forest tenure reform across different sectors and levels of governance.
5. Identify changes of regulations and their impact on the recognition of bundle of rights and tenure security.

The desk review assessment analyzed relevant regulations, policy provisions and institutional mandates. The final report outlines the legal framework for land tenure in Kenya, assessing constitutional provisions and its human rights approach. It sets out three indicators against which it evaluates the protection of community tenure rights:

1. The scope of land tenure and security of tenure under the Community Land Act
2. The legal status and protection of indigenous people's tenure rights
3. Securing community participation in management of public forests

To evaluate these qualitative indicators, legal provisions – and how they are applied – were reviewed, using practical examples such as decided cases by courts and illustrations from the literature. The report makes conclusions as to whether, and to what degree, legal provisions provide a basis for ensuring tenure security, and makes some recommendations. This flyer provides a summary of the key points within the report.

## Kenya's legal framework

### A rights-based Constitution

The 2010 Constitution of Kenya makes extensive provisions regarding property and land tenure rights. It provides a legal definition of the term “community,” and addresses the question of community tenure rights over forests, including the rights of indigenous peoples, forest communities and local communities. Property rights in Kenya are classified as a human right. The Constitution's Bill of Rights contains extensive provisions for property rights, and other human rights that impact access to and security of land tenure. These include: the right to own property of any description, anywhere in Kenya (Article 40); the equality of all persons before law and freedom from discrimination (Article 27); and the right to a clean and healthy environment (Article 42).

### Land classification

The Constitution has an all-encompassing definition of land, which includes the surface and subsurface of the earth, water, natural resources and air space. It unambiguously sets out that all land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals; land is thus classified as either public, community or private. Under Kenyan law such a “community” can arise from a socio-economic or other community of interest, or common ethnicity, common ancestry, similar culture, or unique mode of livelihood. Three types of forest land are therefore relevant to community tenure rights over forest land in Kenya:

1. Public land: government forests (other than forests falling under 2(i) below), government game reserves, water catchment areas, national parks, government animal sanctuaries, and protected areas.
2. Community land:
  - i. lawfully held, managed or used by specific communities as community forests, grazing areas or shrines.
  - ii. ancestral lands and lands traditionally occupied by hunter-gatherer communities.

The *Community Land Act* has provided a modified definition of community land. Section 2, as enacted in 2016, states that:

Community land *means includes:*

- a. land declared as such under article 63(2) of the 2010 Constitution of Kenya and;
- b. land converted into community land under any law.

The use of the words “means” and “includes” adjacent to each other to define community land was challenged at the Environment and Land Court in *Kelly Malenya v Attorney General and another; Council of Governors (Interested Party)* [2019] eKLR. It was argued that the Constitution (article 63-2), in defining community land, had used the words “community land consists of ...” It

was argued that section 2 of the *Community Land Act*, in defining community land, departed from the intent of article 63(2), and was therefore unconstitutional. This is because, according to the Court, the word “includes” means “includes but not limited to,” while the text of the Constitution applied the word “consists of.” The Court ruled that juxtaposing the words “means” and “includes” gave the definition of community land multiple meanings, more than intended by the Constitution, and therefore made that definition unconstitutional.

## Evaluating Indicator 1 - scope and security of land tenure under the *Community Land Act*

To assess this indicator, we examine tenure rights and security conceptually, before reviewing legal provisions to analyze the extent to which they form a basis for tenure security and identify incongruences that undermine secure tenure.

### Scope of tenure rights and parameters of tenure security

The scope of land tenure rights includes the establishment and implementation of statutory and/or customary rules to define how property rights to land are to be allocated; and to define how access is granted to the rights to use, control and transfer land (FAO 2002). Security of land tenure rights exists when an individual perceives he/she has rights to land on a continuous basis, free from imposition or interference, and can reap the benefits of investment (Place et al. 1993). Land tenure security exists when an individual

or community has confidence regarding the certainty of their bundle of rights (Hanstad et al. 2009) and enjoys protection from external interference. To characterize land tenure security, the report considers breadth, duration and assurance of tenure, as per Place, Roth and Hazell's indicators (Place et al. 1993).

### Breadth of rights

Breadth of rights refers to the legal quantity or bundle of rights held. These may include the entire spectrum of use, control and transfer rights, or certain rights out of this bundle. These could be held either as preferential, or limited tenure rights. The breadth of rights therefore refers to the legal quality of rights held, otherwise referred to as the robustness of the tenure rights. Thus, depending on the scope, extent or limitation of the breadth of rights, tenure security could be expanded or limited. Under the *Community Land Act*: 1) a registered community is granted complete or full breadth of tenure rights to their community land, and protection from external interference; 2) a registered community is granted the power to transfer and sell land; 3) a legal process is in place for recognition, adjudication and registration of community land; and 4) internal community land governance mechanisms exist (community assembly and community land management committee).

In order to fully recognize the breadth of rights, the *Community Land Act* requires a comprehensive program for registration of community land, and an inventory of community land, developed in a participatory, transparent and cost-effective manner. This inventory should be accessible to affected communities, and the government must issue public notice of their intention to start

## LEGISLATION UNDER THE 2010 CONSTITUTION

A number of Acts provide the framework for forest and land management under the Constitution:

1. *The Land Act* (2012) grants the National Land Commission (NLC) authority to govern and allocate rights in public land, establishes rules for transactions over private land, and provides guidance for compulsory acquisition of private and community land, including prompt payment of just compensation.
2. *The Land Registration Act* (2012) establishes the process for land registration and the legal effect of tenure security granted by registration of ownership interests in land.
3. *The National Land Commission Act* (2012) establishes the NLC to administer all public land for national and county governments, and supervise public entities that manage public land, including public forests, national parks and catchment areas.
4. *The Forests Conservation and Management Act* (2016) retains the Kenya Forest Service (KFS) as administrator of all public forests but gives county governments a role in forest management. It classifies forests as public, private or community forests, and allows for community participation in public forest management through community forests associations (CFAs). It also declares that every gazetted forest at the time of enactment is a public forest; contradictory to the Constitution, which excludes certain community forests from classification as public forests owing to their status of community land.
5. *The Community Land Act* (2016) enhances human rights undermined by weak or absent community tenure rights. It establishes the community as a collective legal entity, which can be registered and issued with a title document over land, and make decisions regarding the use, control and transfer of the land. It eliminates customary discriminatory practices against women and provides for the election of a community land management committee. It also reclassifies previous trust lands as community land, where customary rights have been established.

## COMMUNITY LAND TENURE SECURITY: THE CASE OF THE *NGARE MARA*

The *Ngare Mara* community in Isiolo County, a county in the former Eastern Province of Kenya, refer to their land as a group ranch, although it hasn't yet been formally adjudicated as such. Prior to enactment of the 2016 *Community Land Act*, a freehold title deed could be issued once land was registered to the community through a land adjudication process, under the old *Land (Group Representatives) Act* (enacted in 1970 and revised in 2012).

In the absence of formal adjudication and registration, *Ngare Mara* community members have informally implemented a land administration system, and elected a community land committee that determines how families and individuals are allocated parcels. Common areas have been set aside for community use.

However, lack of formal land registration has caused problems. During construction of the Isiolo-Moyale road, land was taken by government for a stone quarry, with no subsequent rehabilitation. This resulted in waterlogging and injuries to livestock and people. The community previously enjoyed relatively secure tenure; no attempts had been made to forcefully evict them or deny their rights. However, this experience left them apprehensive over their tenure security, particularly in the face of expected land acquisition for the Lamu Port South Sudan Ethiopia Transport (LAPSSET) corridor. Under the *Community Land Act*, the *Ngare Mara* community can have their tenure security enhanced by the government if it initiates a program of adjudication and registration over the parcel of land the community possesses and occupies, and over which they lay an ancestral claim. In this way, they would enjoy a complete breadth of rights because of the bundle given to communities by the law, as described above.

surveying, adjudication and registration of community land. This process of recognition, adjudication and registration of community land is important in addressing existing legal gaps, where communities that have been occupying ancestral land for a long time have the robustness of the breadth of rights that have been regularly infringed upon, due to lack of adjudication and registration. The case of the *Ngare Mara* community is illustrative.

### Duration of rights

According to Place et al. (1993), duration of rights refers to the length of time a right is legally valid. Where land tenure rights are fully vested, ownership is likely ongoing (Hanstad et al. 2009), or for a clearly defined duration, e.g. the length of a leasehold. In the case of freeholds, as with most community land, the duration is perpetual with no time limitation. Thus, the *Community Land Act* states that community rights of land proprietors are ongoing until the community decides to sell and transfer the land to another owner. If a community is registered as leaseholder, this is for the lease duration. Duration is a crucial element, but how much it secures tenure depends on the extent of the assurances given to both the breadth and duration of the rights. Thus, for a Community Forest Association in a public forest (*Forest Conservation and Management Act*, s47), the duration given must be proportionate to the breadth of rights sought. For instance, where the breadth of rights are for non-residential cultivation (which may take longer periods), the duration of the land right should be commensurate – and both the breadth and duration must be assured – through something like a community forest management agreement.

### Assurance of the breadth of rights and duration

The certainty of breadth and duration of the land rights is necessary if an individual or community is to be legally

able to exert or enforce those rights (Hanstad et al. 2009). In this case, assurance is a function of the rule of law where respect for the granted breadth of rights, and their duration, is upheld. Weaknesses in legal enforcement, for instance, can result in dispossession through external interference, and the subsequent loss of rights through evictions and land grabbing (Place et al. 1993). Legal assurance may be confirmed by the community assembly and the community land management committee, or through determination of tenure rights through legal processes, such as rights being registered or title documents being issued. A community's access to court to defend and confirm these rights is an important mechanism for enforcing the assurance. A community's awareness of the provisions of the *Community Land Act*, and the procedures in it, is a key step to that assurance.

The extent of tenure security thus depends on the balance between how the breadth and duration of rights are assured.

### Assurance of community tenure rights through legal provisions and registration of ownership

The Constitution addresses tenure assurance with the provision that "community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest." This means communities are granted an immediate, present and future right to that land, and legal procedures such as adjudication and registration will confirm this vesting of tenure rights. The *Community Land Act* states that registering a community as a land proprietor shall result in absolute ownership. After adjudication, the community is issued with the title for the community land. In ownership disputes, the person named as proprietor is seen to be the absolute and indefeasible

owner; this title can only be challenged on the grounds of misrepresentation or fraud.

Community forests, which form part of community land governed by the *Community Land Act*, must also be registered. The *Forests Conservation and Management Act* requires the Kenya Forest Service to register each community forest. This action is not to issue a title document, confer or confirm ownership. Rather, it is to allow the community to apply to the county government for technical advice regarding appropriate forestry practices and conservation, or to the Forest Conservation and Management Trust Fund, for loans to support the development of the forest.

### **Challenges arising from de facto assurance of community tenure rights, in absence of registration**

The assurance of tenure rights may also be de facto, informed by the practical situation in which people find themselves (e.g. a community having actual possession and use of land over several generations, without any formal adjudication and registration of such rights). Such de facto assurance may continue until landholders feel the need to pursue de jure (legal) assurance by seeking adjudication and registration. Where communities occupy land on the basis of de facto assurance, they can face challenges from land grabbing and evictions, which undermine security of tenure and disrupt uninterrupted and unchallenged possession. The conversion of de facto tenure assurance to de jure assurance, through registration, may also be a requirement of the law.

### **Conclusions (Indicator 1)**

Overall, evaluation of this indicator concluded that the law in Kenya provides secure tenure for community land. This is drawn from the Constitution, and the *Community Land Act*. However, implementation of the *Community Land Act* is a long-term process. The ascertainment, adjudication and registration of the community, and its ownership interests over any land, remain a complex exercise. This is because the breadth of rights – although assured by provisions of the law – requires completion of the adjudication process and actual registration of a community, with all the governance mechanisms in place. Internal harmony within a community will play a major role in assurance of this breadth of rights. Where the community has continuously occupied land outside protected areas, the process will be less complex. However, the process of determining customary interests, adjudicating and registering community rights for land in protected areas will remain complicated; even if they are classified by the Constitution as community lands (Article 63-2(d)), they are classified by forestry law as public forests. These are the lands claimed by indigenous peoples across Kenya but they currently remain managed as public forests.

## **Evaluating Indicator 2 – legal status and protection of indigenous peoples’ tenure rights**

This indicator assesses the legal status and community land rights of indigenous peoples. The 2007 United Nations Declaration on the Rights of indigenous Peoples (UNDRIP) states the need for indigenous peoples to enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination. Although Kenya abstained during the UNDRIP vote, the Constitution now addresses rights of indigenous communities, including their identification. Consistent with the African Court of Human Rights, the Kenyan Constitution uses marginalization as a legal basis for indigenous identity. It defines a marginalized group as people who, because of laws or practices, were or are disadvantaged by discrimination due to ethnic or social origin, or culture. Indeed, most communities that claim indigenous peoples’ identity in Kenya (such as Ogiek, Sengwer, Endorois, Aweer, Yaaku,) have been subject to socio-economic and political exclusion.

The 2010 Constitution, along with a 2017 case at the African Court of Human Rights that focused on the Ogiek community, have strengthened legal protections for indigenous peoples in Kenya. In 2018, the government established a Task Force to: study the African Court decision and advise the government on the manner of its implementation; study and recommend models for management of community forests and the relationships between communities and public agencies; and recommend policy modifications for future management of community forests. This clearly demonstrates that the legal recognition of indigenous people, as per the Court and the Constitution, is now accepted, which is pertinent in tenure rights and ancestral claims to community land.

### **Evaluating the legal protection of the land tenure rights of indigenous peoples**

The socio-economic vulnerability of indigenous peoples is a challenge made worse by discriminatory treatment regarding access to land rights and weakened security of tenure. The UN Special Rapporteur on Human Rights and the Environment argued that States have heightened obligations when they are dealing with indigenous peoples’ legal rights. The internationally endorsed 2012 Voluntary Guidelines on the Responsible Governance of Tenure (VGGT) call on States to provide appropriate recognition and protection of the legitimate tenure rights of indigenous peoples and other communities with customary tenure systems, consistent with national and international law. In the context of Kenyan law, this affects ancestral claims made by indigenous peoples over land often now classified as national park, reserve or public forest. These arguments have given rise to the question of whether indigenous peoples are entitled to special legal protection measures. Indigenous peoples’ land rights have been a contentious issue under Kenya law; court decisions

show an evolution in attitudes and in the current status of the law and practice.

## Historical evolution of indigenous community tenure rights

In the 2007 case of *Saramaka People v. Suriname*, the Inter-American Court of Human Rights considered the Saramaka as a tribal community whose social, cultural and economic characteristics are different from the national community's, particularly because of their special relationship with their ancestral territories, and because they regulate themselves by their own norms, customs, and/or traditions. The Court held that members of indigenous and tribal communities require special measures to guarantee the full exercise of their rights, particularly regarding property rights, to safeguard their physical and cultural survival. In the 2014 case of *Joseph Letuya & 21 Others vs. Attorney General of Kenya, and 5 Others* concerning a community land claim by the Ogiek community living in the East Mau Forest in Kenya's Rift Valley, the High Court highlighted the need for special consideration of minority and indigenous groups due to indirect discrimination resulting from actions or policies that have a differential effect on these groups.

Special measures, already in place, to enhance the fulfillment of land and other human rights of indigenous peoples, and to heighten the obligation on governments, include prioritizing the needs of indigenous communities in addressing land claims, either directly or through investigations into historical land claims (to be brought within five years from September 2016, under section 15(3) of the *National Land Commission Act*).

However, more remains to be done. Where a community has an ancestral land claim over land currently classified as public land, and managed as a public forest, they can file a historical land injustice claim with the National Land Commission, as indicated above, for determination and the issuance of remedies. A community can also approach the High Court of Kenya, under articles 22 and 70 of the Constitution, seek a determination, as in the above case of *Joseph Letuya*, or that of *John K. Keny & 7 others v Principal Secretary Ministry of Lands, Housing and Urban Development & 4 others (2018) eKLR*, whose findings were similar to *Letuya*. The route followed by the Ogiek, of approaching the African Commission, which the filed the petition against the Republic of Kenya at the African Court, is the second judicial alternative, subject to the rules of jurisdiction.

The legal framework concerning the land rights of indigenous peoples remains convoluted. The courts of law in Kenya, and indeed in much of Africa, have stated their positions but these need to be reconciled with statutory provisions. On this question, therefore, the outcomes of any future Task Force or any legal process may provide clarity in terms of tenure, and its implementation. When the land claims by indigenous peoples concern lands that are protected forests, the

respect for tenure rights will include upholding the human rights of indigenous people in a balance with the needs for conservation and the human right to a clean and healthy environment. Thus, if a court makes a positive determination in favour of an indigenous community, there may be need for an appropriate governance framework for community land once it has been allocated and registered to an indigenous community. For example, if community land is forest-covered and must maintain statutory protections, what customary practices and land uses are consistent with biodiversity conservation, the Constitution, and the fulfilment of human rights?

## Evaluating Indicator 3 - legal provisions securing community participation in public forest management

### Community Forest Associations

Community Forest Associations (CFAs) play an important role in the security and participation of forest management by communities adjacent to forests. Introduced in the *Forests Act of 2005*, CFAs were further recognized by the *2016 Forests Conservation and Management Act*. A registered CFA may apply to Kenya Forest Service (KFS) for permission to participate in the conservation and management of a public forest. The law is clear that community participation doesn't amount to ownership rights, but it does grant "permission to participate in the conservation and management of a public forest" through a management agreement. Communities that participate do so under a CFA license (or permit) and have clearly defined user rights. Security of these rights is for a defined duration, and assurance is provided through legal provisions governing termination of the CFA permit, and access to the National Environmental Tribunal for conflict resolution. Implementation remains guided by the *2009 Forest (Participation in Sustainable Forest Management) Rules* until new regulations are in place. These rules classify community participation as: 1) community forest management agreements whereby a local community is authorized to participate in forest conservation and management based on user rights assigned by the Forest Service; and 2) issuance of permits to CFAs that allow members to engage in non-residential cultivation of degraded industrial forest plantations, as they tend and grow tree seedlings.

The *2016 Forests Conservation and Management Act* and the *2009 Forest Rules* are contradictory on how a CFA should commence their participation in sustainable forestry. The former states that registered forest associations "may apply to the KFS for permission" to participate. However, the *Forest Rules* give KFS the right "to invite forest associations to participate in the sustainable management of state forests," which removes the opportunity for communities to initiate an application to participate.

## Rights and duties of Community Forest Associations

The Forest Conservation and Management Act lays out how a community forest association can participate in the conservation and management of public forests through a management agreement with KFS. CFAs must: 1) protect, conserve and manage the forest according to an approved management agreement and management plan; 2) formulate and implement forest programs, consistent with the traditional forest user rights of the community concerned, in accordance with sustainable use criteria; 3) protect sacred groves and protected trees; 4) keep KFS informed of any developments, changes and occurrences within the forest that are critical for the conservation of biodiversity; and 5) help in fire-fighting. In return, the CFA receives various benefits defined in the community forest management agreement. These include access to non-timber forest products such as grass, and in some instances, firewood collected from dead trees. Where permissible, non-residential cultivation is allowed, but this has been facing severe governance challenges, resulting in some forests having higher deforestation rates. There appears to be an assumption that each CFA will provide internally for the sharing of financial benefits. When developing new regulations for the Forest Conservation and Management Act, it may be necessary to include a clause requiring CFAs to submit benefit-sharing criteria. KFS can then prepare technical guidelines for CFAs to adopt the benefit-sharing criteria. What is clear though is that the present and past forestry legislation has not provided a clear definition or approach to benefit-sharing in the context of community forest associations.

New regulations should also identify and implement benefit-sharing arrangements for specific situations, such as managing water catchment areas, soil and water conservation, carbon sequestration and other environmental services. This would include any opportunities for CFAs to take part in environmental service schemes, including Reducing Emissions from Deforestation and Forest Degradation (REDD)+.

## Legal provisions on issuance of non-residential cultivation permits to CFAs

The 2009 Forest Rules state that KFS must earmark forest areas qualifying for non-residential cultivation, such as state forests intended for industrial plantations. After demarcating these areas into individual plots, KFS must prepare a map of plots for public display. Plots are allocated through a CFA-organized balloting system, and permits that are issued give limited user rights and tenancy for up to three years. Plot allocation prioritizes poor and vulnerable community members. Permit holders cannot lease out or sublet the plots, and must pay annual rental fees to KFS; permits can be terminated if conditions are violated. Permits authorize the use of hand tools only and crops such as maize, non-climbing beans or potatoes; structures

are prohibited except when there is considerable crop damage from wildlife.

## Conclusions and recommendations

Kenya has adopted a progressive constitutional framework, with a strong human rights structure that underpins land rights, and a distinct category of community land. The 2016 Community Land Act has comprehensively defined community tenure rights and put in place legal provisions to enhance and guarantee tenure security. However, there are still challenges in ascertaining community identity and customary land rights, adjudicating them, and in the registration of the community and its land rights. This is particularly challenging when a specific community claims land as ancestral, yet this land is deemed to be public land, and managed as public forests. This presents an enduring challenge to the realization of community land rights, and the balance with conservation, and still needs to be resolved. For this to happen, there is also a need for investigation into historical land injustices for the National Land Commission to provide remedies, which could include alternative lands where restitution is impossible.

Based on this analysis, we propose several recommendations to ensure and improve protection of community land rights in Kenya:

1. Undertake participatory mapping and an inventory of community land for which community rights need to be ascertained, adjudicated and registered. Participatory development of by-laws should be a priority. Areas of community land with ancestral claims should also be prioritized, especially where there is no dispute around the identity of the community with those claims.
2. Develop a system to map out which community forests fall under: a) land lawfully held and managed by or used as community forests, grazing areas or shrines or ancestral lands; or b) lands traditionally occupied by hunter-gatherer communities, as well as a proper legal process for recognizing indigenous rights to these. To avoid legal bottlenecks, community lands should be identified promptly so communities can realize their rights sooner rather than later. Recording of compatible traditional and indigenous knowledge for management of these lands can also enhance sustainable management outcomes.
3. Implement legal mechanisms for community participation in public forest management and revisit the 2009 regulations to ensure incongruences are corrected. Promote on-farm forestry, which is key to relieving pressure on protected forests. This should include Kenya Forest Service promptly registering private and community forests to allow for the provision of technical support and incentives.
4. Kenya has been developing a new legal framework, and institutions with revised or new mandates. Whether this enhances protection of community tenure rights will depend on the effectiveness and powers accorded to the institutions, and government

attitude to establishing and building the capacity of community land governance structures; and whether KFS supports community participation in public forest management and the establishment of a benefits-sharing system. Institutions and government should focus on all of the above to enhance community tenure rights.

5. The internationally endorsed 2012 Voluntary Guidelines on the Responsible Governance of Tenure should be used, given the strength that these provide to all legitimate tenure systems. The VGGT suggests that all longstanding customary rights be recognized without payment/fee, and that if any rights are restricted they be compensated appropriately. All termination or reduction of rights should be in consultation with the communities, and alternatives provided or compensated. There should be access to justice for communities in case of infringement of their rights by government or others. These systems should be accessible and affordable. Where courts do not provide accessibility, strong alternative dispute resolution systems should be provided for.

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