



How did we get here? Unpacking the conflict in the application of Section 6(6) the Community Land Act and Section 4(b) of the Wildlife Conservation and Management Act vis a vis the establishment of conservancies in the ASALs

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Declaration

I, Murithi Peace Mukami, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

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This dissertation has been submitted for examination with my approval as university Supervisor.

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Abstract

Community land is recognised under Article 63 of the Constitution of Kenya. In giving meaning to Article 63, the Community Land Act was enacted to govern matters of community land. The act outlines the role of the county government in dealing with unregistered community land under Section 6. The role of the county government includes ensuring that in dealing with transactions of unregistered land due law must be followed from the act and other laws. On the other hand, conservancies have been on the rise in the Arid and Semi-Arid Lands, and the Wildlife Conservation and Management Act provides for principles meant to guide conservation practices such as in section 4(b) on the need of public participation. The county government in exercising their role under Section 6 of the Community Land Act have failed to use this guiding principle under Section 4(b) of the Wildlife Conservation and Management Act on including communities in the establishment of conservancies heightening tensions over land use and occupancy. Therefore, in employing a desk-based research methodology and relying on sources such as journals, and case law this paper studies the possibility of including communities in management of their resources through the implementation of the Community Based Natural Resource Management.

List of Abbreviations

ASALs- Arid and Semi-Arid Lands.

UNDRIP- United Nations Declaration on the Rights of Indigenous People.



List of cases

1. John Ngimor and 554 others vs Northern Rangelands Trust & 3 others (2021) eKLR.
2. Illinois Central Railroad Company vs Illinois (1869), The Supreme Court of the United States.



List of legal instruments

1. The Constitution of Kenya (2010).
2. The Community Land Act (No 27 of 2016).
3. The Wildlife Conservation and Management Act (No 47 of 2013).
4. The United Nations Declaration on the Rights of Indigenous Peoples.
5. The Constitution of Namibia (1990).
6. The Nature Conservation Amendment Act of 1996 (Namibia).



CHAPTER ONE: INTRODUCTION

1.1 Background

The right of communities to hold land in Kenya is established and recognised under the Constitution of Kenya. ¹For purposes of this study, Indigenous people are persons of unique cultures retaining social, cultural, economic, and political characteristics distinct from their dominant societies. ²In Kenya, indigenous communities are recognized under Article 260 of the Constitution defined as persons who maintain livelihoods based on hunter, gatherer, or pastoralism.³ Therefore, the state both at the national and county level has the duty to promote and protect their interests and rights.⁴

The United Nations Declaration on the Rights of Indigenous Peoples recognises the rights of indigenous persons such as the right to self-determination.⁵ In exercising this, Article 10 states that indigenous persons shall not be removed from their lands without free, prior, and informed consent .⁶ Indigenous persons in Kenya who practice pastoralism, defined as the production of livestock in rangeland environments and livestock mobility management mainly occupy the Arid and Semi-Arid Lands of Kenya(ASALs).⁷

The ASALs cover close to 89 % of Kenya's land mass, holding 70% of the national livestock herd, and are home to 38% of the total population.⁸ Additionally, these regions support over 90 % of wildlife found in protected areas. ⁹For any pastoral community the ability to

¹ Article 63, *Constitution of Kenya* (2010).

² https://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf on 25 August 2023.

³ Article 260, *Constitution of Kenya* (2010).

⁴ Article 174(e), *Constitution of Kenya* (2010).

⁵ Article 3, United Nations Declaration on the Rights of Indigenous Peoples, 13 September 2007, UNTS,

⁶ Article 10, United Nations Declaration on the Rights of Indigenous Peoples.

⁷ Odote C, 'The dawn of Uhuru? Implications of constitutional recognition of communal land rights in pastoral areas of Kenya: Securing the land and resource rights of pastoral peoples in East Africa'17, *Nomadic Peoples* 1 ,2013,88.

⁸ Odhiambo O, 'The ASAL policy of Kenya: Releasing the full potential of arid and semi-arid lands an analytical review'17 *Nomadic Peoples* 1, 2013,159.

⁹ Odhiambo O, 'The ASAL policy of Kenya: Releasing the full potential of arid and semi-arid lands an analytical review',159.

be mobile determined by resources such as water is a crucial element of practicing their livelihood.¹⁰ In that, they can move according to the seasonal climate change in ensuring their livestock have access to pasture and water.

The genesis of the disruption of pastoral communities' landholding begins during the colonial period where landholding was fundamentally reshaped to prefer private ownership of land over communal.¹¹ During this period, communal lands in pastoral areas were held under group ranches established by the Land (Group Representatives) Act of 1968, and further governed by the Trust Land Act.¹² The county councils held land in trust for the communities, and had the powers to determine the user and occupancy of the land in ways that benefit the communities but instead dished it out to private individuals for their own benefits.¹³

The governance of group ranches continued in the form of conservancies in the 1980s with the Craig family establishing Protected Areas in the Lewa Downs,¹⁴ and the Northern Rangelands Trust Organisation (NRT) registered under the Trustees Act. The NRT propelled the establishment of conservancies aiming to secure peace, transform people's lives, while conserving natural resources.¹⁵ The setting up of these protected areas was through territorialisation and the erection of fences to the exclusion of communities to protect wildlife and bio-diversities.¹⁶ This is because the conservationists believed that to conserve wildlife, communities need to be excluded to yield better results.¹⁷

¹⁰ Odhiambo O, 'The ASAL policy of Kenya: Releasing the full potential of arid and semi-arid lands an analytical review', 159.

¹¹ Peters P, 'Conflicts over land and threats to customary tenure in Africa' 112 *African Affairs* 449, 2013, 544.

¹² Musembi N, Mbote P, 'Mobility, Marginality and tenure transformation in Kenya: Explorations of community property rights in law and practice' 17 *Nomadic Peoples* 1, 2013, 10-11.

¹³ Musembi N, Mbote P, 'Mobility, Marginality and tenure transformation in Kenya: Explorations of community property rights in law and practice', 12.

¹⁴ Corry S, 'Are Kenya conservancies a trojan horse for land grabs,' *The Elephant*, 3 April 2021 – <https://www.theelephant.info/culture/2021/04/03/are-kenyan-conservancies-a-trojan-horse-for-land-grabs/> on 9 January 2023.

¹⁵ The Oakland Institute 'Community conservancies devastate land and lives in Northern Kenya,' 2021, 13.

¹⁶ Archambault C, 'Re-creating the commons and re-configuring Maasai women's roles on the rangelands in the face of fragmentation' 10 *International Journal of the Commons* 2, 2016, 729-730.

Currently, the number of conservancies established under the NRT covers 11 % of Kenya's total land mass.¹⁸ The Community Land Act herein referred to as CLA formally recognizes customary rights of communities in holding land,¹⁹and outlines the custodian role of the county government in holding unregistered land in trust for communities.²⁰A role that places a duty on the county government not to sell, dispose, or convert for private purposes the land being held in trust, ²¹and to have transactions relating to land being carried out in accordance with other laws.²²

The Wildlife Conservation and Management Act herein referred to the WCMA outlines principles of wildlife management that include effective public participation,²³and the need to prescribe measures that facilitate community-based natural resources management practices in wildlife conservation and management.²⁴For purposes of this study a wildlife conservancy is land set aside by an individual landowner, body corporate, group of owners, or a community for purposes of wildlife conservation.²⁵The establishment of the conservancies under NRT's vision of transforming persons lives while securing has been met by heightened insecurities of armed raids due to land occupancy conflicts. ²⁶

The conflicts backed up by dispossession claims and inability to exercise their livelihood by communities highlight the case of Kuki Gallmann who was shot by armed pastoralist in the wake of 2021 over her occupancy in the Ol Ari Nyiro plains. ²⁷The county governments have continued to play a role in dispossessing communities from their land

¹⁸ Corry S, 'Are Kenya conservancies a trojan horse for land grabs,' *The Elephant*, 3 April 2021 – <https://www.theelephant.info/culture/2021/04/03/are-kenyan-conservancies-a-trojan-horse-for-land-grabs/> >on 9 January 2023.

¹⁹ Section 5(3), Community Land Act (No 27 of 2016).

²⁰ Section 6, Community Land Act (No 27 of 2016).

²¹ Section 6(8), Community Land Act (No 27 of 2016).

²² Section 6(6), Community Land Act (No 27 of 2016).

²³ Section 4(b) The Wildlife Conservation and Management Act (No 47 of 2013).

²⁴ Section 5(c), The Wildlife Conservation and Management Act (No 47 of 2013).

²⁵ Section 3, Wildlife Conservation and Management Act (No 47 of 2013).

²⁶ The Oakland Institute 'Community conservancies devastate land and lives in Northern Kenya,' 2021,6,8.

²⁷ -< <https://www.theguardian.com/global/2017/jun/18/who-shot-kuki-gallmann-the-story-of-a-kenyan-conservationist-heroine>>on 24 November 2023.

by entering agreements of establishments of conservancies on behalf of communities that have led to conflicts among community members and the county governments.²⁸The problem with these agreements is that they do not entail effective community participation on matters concerning the use of their land to their benefit. ²⁹

In further doing so, the county government continues to partner with the NRT by entering into memorandum of agreements allowing communities to be excluded from their land.³⁰ The devastating effects of the actions of the county government communities have been other than dispossession, increased armed conflicts among communities fighting the efforts of conservation of both wildlife and the environment where communities have felt by passed as relevant stakeholders in having interests in the land.³¹

1.2 Statement of the Problem

The CLA recognizes the custodian role of the county government, ³² the equal force of customary land rights, ³³ and the need to consider other laws in transactions relating to unregistered lands.³⁴ However, in applying its custodian power the county government has failed to exercise these powers well in ASALs when establishing a conservancy. Therefore, this study seeks to assess whether there is conflict in the application of Section 6(6) of the CLA and Section 4(b) of the Wildlife Conservation and Management Act in the establishment of a conservancy in the ASALs.

1.3 Research Objectives

1. To examine whether there is a conflict between the application of Section 6(6) of the CLA and Section 4(b) of the WCMA.

²⁸—< <https://www.future-agricultures.org/blog/conservation-in-northern-kenya-conflicts-over-community-land-in-the-pastoral-margins/> >on 9 January 2023.

²⁹ *John Ngimor & 554 others vs Northern Rangelands Trust & 3 others* (2021) eKLR.

³⁰ *John Ngimor & 554 others vs Northern Rangelands Trust & 3 others* (2021) eKLR.

³¹ The Oakland Institute ‘Community conservancies devastate land and lives in Northern Kenya,’2021,25.

³² Section 6, *Community Land Act* (Act No 27 of 2016).

³³ Section 5(3), *Community Land Act* (Act No 27 of 2016).

³⁴ Section 6(6), *Community Land Act* (Act No 27 of 2016).

2. To examine whether the county government takes full cognizance of the Public Trust Doctrine when exercising its custodian role under Section 6(6) of the CLA.
3. To propose the implementation and inclusion of Community Based Natural Resource Management in the fifth Schedule of the WCMA.

1.4 Research Questions

1.
 - a) Whether there is a conflict between the application of Section 4(b) of the WCMA on need of wildlife management to entail public participation where wildlife occurs and Section 6(6) of the CLA on transactions relating to unregistered land that should be done in accordance with the Act and any other applicable law.
 - b) Has this conflict led to the dispossession of indigenous communities from their communal land and if so to what extent?
2. Whether the custodian power given to the county government under Section 6(6) of the CLA takes full cognizance of the application of the Public Trust Doctrine?
3. Whether inclusion of the Community-Based-Natural-Resource Management policy framework under the fifth schedule of the WCMA will allow indigenous communities take part in the management of their resources when establishing conservancies in Kenya?

1.5 Hypothesis

1. There is a need to study whether there is conflict between application of Section 4(b) of the WCMA and Section 6(6) of CLA.

2. A clear understanding will highlight the extent of the custodian role of the county government.
3. This will enable discussion of possible solutions to allow communities to take part in the conservation.

1.6 Justification

In the era of championing for conservation, new conservancies are being established in the Arid and Semi-Arid Lands ³⁵ with the belief that conservancies are more beneficial and enable conservation of the environment and wildlife compared to pastoralism.³⁶ This has resulted in an increase in interpersonal conflicts, and human-wildlife conflicts over land use and occupancy for pastoralism needs.³⁷ My study will be useful for both the county governments, conservationists and communities in helping them deal with the adverse effects of climate change on pastoralism to enable such parties integrate their livelihood with conservation practices in the midst of increasing land use pressure that has made it difficult for communities to practice their livelihood.³⁸ Further, this study will be useful in contributing to the ongoing literature debate on conservancies as green grabs,³⁹ and to the discussions of need to take advent measures for inclusion of pastoral communities as relevant stakeholders to deal with climate change risks.

³⁵Bersaglio B, Cleaver F, 'Green Grab by Bricolage – The Institutional Workings of Community Conservancies in Kenya' 16 Conservation & Society 4 ,2018,467.

³⁶ Corry S, 'Are Kenya conservancies a trojan horse for land grabs,'The Elephant, 3 April 2021 – <https://www.theelephant.info/culture/2021/04/03/are-kenyan-conservancies-a-trojan-horse-for-land-grabs/> on 9 January 2023.

³⁷ The Oakland Institute 'Community conservancies devastate land and lives in Northern Kenya,'2021,27-28.

³⁸ Fleming P, Kenyan pastoralists fight for future adapted to climate change 'Mongabay, 28 November 2023 <https://news.mongabay.com/2023/11/kenyan-pastoralists-fight-for-a-future-adapted-to-climate-change-commentary/#:~:text=But%20pastoralism%20faces%20perilous%20threats,among%20tribes%20across%20the%20region> on 13 February 2024.

³⁹ Bersaglio B, Cleaver F, 'Green Grab by Bricolage – The Institutional Workings of Community Conservancies in Kenya'.

1.7 Conceptual framework

The Indigenous person as a distinct vulnerable person

Vulnerability is a condition or state where one may be under threat requiring support or protection.⁴⁰ Other definitions of vulnerability in Chapman and British Gypsy cases, highlighted that the vulnerability of certain persons requires special consideration of their different lifestyles.

⁴¹In the protection of such persons the duties-imposed limit the exercise of the rights and freedoms of others.⁴²

Therefore, a vulnerable person requires special treatment, that can be accorded to them by the state or other individuals within a state. Being vulnerable has internal and external manifestations, and may range from economical, physical, cultural-economical, and social⁴³. This is commonly referred to as the double structure of vulnerability. Bohle's double structure of double vulnerability is not just exposure and coping rather, it refers to vulnerability features external to an exposed element or unit at risk and those factors that are internal.⁴⁴

They are also characterised as being separate from their dominant society, and this separation is both economic, political, and cultural.⁴⁵ The vulnerable person therefore given these features that are both internal and external to them require a certain degree of

⁴⁰ <https://www.cdema.org/virtuallibrary/index.php/charim-hbook/methodology/5-risk-assessment/5-3-vulnerability#:~:text=The%20different%20types%20of%20vulnerability&text=According%20to%20the%20different%20types,social%20vulnerability%20and%20environmental%20vulnerability> on 25 August.

⁴¹ Morawa H, 'Vulnerability as a Concept of International Human Rights Law' *Journal of International Relations and Development* 2,2003,145.

⁴² Morawa H, 'Vulnerability as a Concept of International Human Rights Law',145.

⁴³ <https://www.cdema.org/virtuallibrary/index.php/charim-hbook/methodology/5-risk-assessment/5-3-vulnerability#:~:text=The%20different%20types%20of%20vulnerability&text=According%20to%20the%20different%20types,social%20vulnerability%20and%20environmental%20vulnerability> on 25 August.

⁴⁴ <https://www.cdema.org/virtuallibrary/index.php/charim-hbook/methodology/5-risk-assessment/5-3-vulnerability#:~:text=The%20different%20types%20of%20vulnerability&text=According%20to%20the%20different%20types,social%20vulnerability%20and%20environmental%20vulnerability> on 25 August

⁴⁵ Kibugi R, 'Local communities and indigenous peoples' land and forestry rights :Assessing the law and practice on tenure security in Kenya' University of Nairobi ,2021,1.

preferential treatment from other persons in the dominant societies to enable their survival.

1.8 Literature review

Much academic work exists regarding the effect of conservation efforts on indigenous communities practicing pastoralism. Odote discusses this paper's study from the perspective of the Trust Land Act, which gave powers to county councils to grant occupancy rights to persons that would benefit the community.⁴⁶ Unfortunately, this did not happen because, the councils dished out communal land to private individuals,⁴⁷ at the communities' expense.⁴⁸ He concludes by stating that while constitutional recognition and legislation provide important operating conditions, these can be tools to disempower changes and the need for the legislation to adapt to the existing arrangements of the communities.⁴⁹

1.8.1 The Public Trust Doctrine

The Public Trust Doctrine traces its origin in ancient Roman law and common law.⁵⁰ The Roman law in *res commune's omnium*, and for the common law the Magna Carta which included the limits of the monarch in the resources. The basis of the doctrine is that it limits the sovereign's power to privatize or destroy resources to guarantee public's access.⁵¹ It maintains that the public owns the trust property in common and the government holds the property in trust for the public benefit.⁵²

⁴⁶ Odote C, 'The dawn of Uhuru? Implications of constitutional recognition of communal land rights in pastoral areas of Kenya: Securing the land and resource rights of pastoral peoples in East Africa', 90.

⁴⁷ Odote C, 'The dawn of Uhuru? Implications of constitutional recognition of communal land rights in pastoral areas of Kenya: Securing the land and resource rights of pastoral peoples in East Africa', 91.

⁴⁸ Odote C, 'The dawn of Uhuru? Implications of constitutional recognition of communal land rights in pastoral areas of Kenya: Securing the land and resource rights of pastoral peoples in East Africa', 91.

⁴⁹ Odote C, 'The dawn of Uhuru? Implications of constitutional recognition of communal land rights in pastoral areas of Kenya: Securing the land and resource rights of pastoral peoples in East Africa', 101.

⁵⁰ Steiner F, Roberts J, 'Prospect: Public Trust Doctrine' 76 *Landscape Architecture Magazine*, 3, 1986, 132.

⁵¹ Manahan K, 'The Constitutional public trust doctrine' 49 *Environmental Law* 1, 2019, 264.

⁵² Manahan K, 'The Constitutional public trust doctrine' 49 *Environmental Law* 1, 2019, 264.

The public trust doctrine encompasses a relationship between a trustee and beneficiaries.⁵³The trustee who is the government has the duty to act in good faith, prudently, and diligently when dealing with trust property, and if the government is to sell the property then the interests of the beneficiaries should be considered paramount.⁵⁴On the other hand, the beneficiaries who are the citizens have the right to enjoy the benefits of the public trust resource and to participate in making decisions that concern the resource.⁵⁵

The duties of the state exist in two ways, the first having been expressly provided for under the law mainly in the constitutions, and the latter being implied from already existing duties.⁵⁶Further classification of the duties is international, national, and sub- national level depending on who the duties are being imposed to.⁵⁷In contemporary society, public trust is viewed as an integral part of a democratic society.⁵⁸Therefore, in order to effectively implement its policies the government needs to build trust through inclusive governance. ⁵⁹

In understanding the public trust doctrine, one must question why certain obligations are to be given to the government and specifically why some certain resources include more care towards their preservation. In answering this question authors and critics have explained that property is owned by the citizens and would therefore require the government to preserve it for its citizens.

⁵³ Rajamani L. 'Doctrine of public trust: A tool to ensure effective state management of natural resources'38: *Journal of the Indian Law Institute* 1,1996,76.

⁵⁴ Rajamani L. 'Doctrine of public trust: A tool to ensure effective state management of natural resources',76.

⁵⁵ Rajamani L. 'Doctrine of public trust: A tool to ensure effective state management of natural resources',80-81.

⁵⁶ Orangias J, 'Towards global public trust doctrines: an analysis of the transnationalisation of state stewardship duties'12 *Transnational Legal Theory* 4,2021,551.

⁵⁷ Orangias J, 'Towards global public trust doctrines: an analysis of the transnationalisation of state stewardship duties',551.

⁵⁸ Demissie B, Kaur R, 'Public trust in local government: Explaining the role of good governance practices'

⁵⁹ Sax J, 'The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention' 68 *Michigan Law Review* 3, 1970,

1.8.2 On Indigenous people

Indigenous people are defined as persons who practice unique cultures and ways of relating with people and their environment. They retain their social, cultural, economic, and political characteristics and live distinctly from the dominant societies.⁶⁰ The indigenous persons share certain characteristics that include increased vulnerability to the effects of climate change due to their locality, having a special connection to the land they occupy either for cultural, legal, or spiritual reasons, and having a history of colonization and oppression that increases their vulnerability.⁶¹

Furthermore, their rights are recognized internationally where basic rights are owed to them by virtues of their indigenous identities.⁶² These rights, include the right to self-determination as expressly recognized under Article 3 of the United Nations Declaration on the Rights of Indigenous People. ⁶³This right encompasses their rights to autonomy or self-government in matters relating to their affairs.⁶⁴ However much this provision provides for their right to determine matters affecting them, states have had a problem with the self-determination right with the belief that it might limit their sovereignty leading to more harm than good.⁶⁵

The examples of indigenous people in Kenya include communities such as the Ogiek and Sengwer, who are hunters and gathers, and communities like Samburu and the Maasai who practice pastoralism. These communities face a wide range of challenges in Kenya ranging

⁶⁰ -<<https://www.un.org/development/desa/indigenouspeoples/about-us.html#:~:text=Indigenous%20Peoples%20are%20inheritors%20and,societies%20in%20which%20they%20live.>> on 18 August 2023.

⁶¹ Abate R, Ann E, 'Commonality among unique indigenous communities: An introduction to climate change and its Impacts on indigenous peoples' 26 *Tulane Environmental Law Journal* 2, 2013, 181.

⁶² Abate R, Ann E, 'Commonality among unique indigenous communities: An introduction to climate change and its Impacts on Indigenous peoples', 181.

⁶³ Article 3, United Nations Declaration on the Rights of Indigenous People, 13 September 2007, 61/295.

⁶⁴ Article 4, United Nations Declaration on the Rights of Indigenous People, 13 September 2007, 61/295.

⁶⁵ Barelli M, 'The interplay between global and regional human rights systems in the construction of the Indigenous rights regime' 32 *Human Rights Quarterly* 4, 2010, 958-959.

from social, cultural, economic, and political, and currently continue to be victims of climate change.⁶⁶

Contribution

Authors have discussed the failure of conservancies but did not give solutions to deal with such problems,⁶⁷ while others have approached it from a perspective of discussing it before the Constitution and the CLA. Some scholars take a more general approach by describing this study through the lens of the advantages and disadvantages of conservancies in Kenya.⁶⁸ However, this study will be unique by studying the role of the county government in dispossessing communities from their land when establishing conservancies and suggest how CBNRM from Namibia may be implemented in Kenya to allow communities work together with the county government so as to achieve conservation goals while exercising their livelihood when establishing conservancies.

1.9 Methodology

The method of research applied in this study shall be qualitative and desk based. There will be reliance on primary sources such as statutes like, the Constitution of Kenya, the CLA and case law.⁶⁹ However, the main source of information shall be secondary sources such as articles, journals, reports, and working papers. In general, a deductive approach shall be taken where the chapters shall set the ground from where the premise can be derived from. Lastly, a comparative analysis will be done for chapter four where lessons will be drawn from Namibia on practices of conservation that can be implemented in Kenya and the discussion shall highlight how this will take place.

⁶⁶ Hansungule M, Oluborode J, 'The Impact of Climate Change on Indigenous Peoples' Land Tenure and Use: The Case for a Regional Policy in Africa 21, International Journal on Minority and Group Rights 2,2014, 257.

⁶⁷ Mwaura F, 'Wildlife heritage ownership and utilization in Kenya – the past, present and future,' in Deisser A, Njuguna M(eds) Conservation of Natural and Cultural Heritage in Kenya,1, University College London Press, London,2016, 126.

⁶⁸ Mwaura, 'Wildlife heritage ownership and utilization in Kenya – the past, present and future'.

⁶⁹ *John Ngimor and 554 others vs Northern Rangelands Trust & 3 others* (2021) eKLR.

1.10 Chapter Breakdown

Chapter one introduces the scope of this study by discussing the historical background of establishment of conservancies and the right of communities to hold land in Kenya. This discussion highlights the various laws applicable to the study, the role of the county government and how they have played a role in dispossessing communities from their land has led to conflicts such as the Kuki Gallman case.

Chapter two will examine whether there is a conflict between the application of Section 4(b) of the WCMA and Section 6(6) of the CLA. In identifying any possible conflict this chapter will highlight the applicable laws, and if the conflict is present to what extent it has caused the dispossession of indigenous communities from their land.

Chapter three will study whether the custodian power of the county government under Section 6(6) of the CLA takes the full cognizance of the Public Trust Doctrine. This Chapter will discuss what the public trust doctrine entails and why it would be great to extend its application to the indigenous communities' land.

Chapter four shall discuss the inclusion of the Community-Based-Natural-Resource Management policy framework under the fifth schedule of the Wildlife Conservation and Management Act to allow participation of indigenous communities in management of their while allowing conservation practices during establishment of conservancies.

Chapter five shall entail a brief overview of the research that will involve a summary of the findings, recommendations, and a conclusion to the study.

CHAPTER TWO: WHETHER THERE IS A CONFLICT IN APPLICATION OF SECTION 6(6) OF THE CLA AND SECTION 4(B) OF THE WCMA

2.1 Introduction

This Chapter will answer the first research question. This will be done by discussing the relevant statute touching on the aspects of communal land-holding systems, environmental conservation, and establishment of conservancies. Thereafter, the chapter shall discuss Section 6 of the CLA narrowing the discussion to Section 6(6) and Section 4(b) of the WCMA. This discussion is meant to highlight whether there has been a conflict in the application of the two sections. The chapter shall conclude by discussing the conflict arising, its effects to both conservationists and communal landowners and to what extent it has led to the dispossession of indigenous communities from their land.

2.2 The law governing the establishment of conservancies and communal land holding

2.2.1 The Constitution of Kenya

The Constitution of Kenya defines community land as land vested in communities identified on the bases of their ethnicity, culture, or similar community interest.⁷⁰The Constitution provides that it shall consist of land lawfully registered by communities or that which is unregistered but held in trust by the county government.⁷¹ In a move towards protecting communities land interest, it states that their land shall not be disposed of or used in ways that have not been provided under legislation.⁷²If one is to be

⁷⁰ Article 63(1), *Constitution of Kenya* (2010).

⁷¹ Article 63(3), *Constitution of Kenya* (2010).

⁷² Article 63(4), *Constitution of Kenya* (2010).

deprived of the ability to own property it should be done in good faith and compensation to the occupants of the land.⁷³

Under Article 174 communities are given the ability to manage their own affairs and further their development.⁷⁴For communities that have maintained their pastoral livelihoods, commonly referred to as the marginalised communities under Article 260 the state is under the duty to put in place affirmative action programs to ensure that they participate and are represented in governance.⁷⁵ Therefore, the Constitution being the supreme law of the land is meant to offer guidance as the main reference point for securing and protecting community land rights and that of marginalised and indigenous communities in participating in governance relevant to section 4(b) of the WCMA on the need to have public participation in areas where wildlife occurs.

2.2.2 The Community Land Act and Wildlife Conservation and Management Act

a) The CLA

In a bid to give effect to Section 63 of the Constitution of Kenya, the CLA was enacted to protect, recognise and allow the registration of community land. By doing so, the act provides for the equal effect of customary land rights with freehold or leasehold rights.⁷⁶Further it allows communities to claim interest over their land and be registered according to this interest following the procedure under Section 7.

The CLA outlines the role of the county government in relation to unregistered land which is to hold unregistered land in trust for communities, and any monies that are payable to the communities during compulsory acquisition of the land.⁷⁷The county is under an

⁷³ Article 40, *Constitution of Kenya* (2010).

⁷⁴ Article 174(d), *Constitution of Kenya* (2010).

⁷⁵ Article 56, *Constitution of Kenya* (2010).

⁷⁶ Section 4(4), *The Community Land Act* (Act No 27 of 2016).

⁷⁷ Section 6, *The Community Land Act* (Act No 27 of 2016).

obligation not to sell, dispose, transfer or convert rather than for the intended purpose any unregistered land that it is holding for communities,⁷⁸and ensure that any transaction relating to the unregistered land follows due law.⁷⁹Once the community registers their land the trustee role of the county government ceases to exist, and communities take up the management role of their land.⁸⁰

For leases over community land, the act provides that it shall be handled on basis of agreements between the community and the lessee being subject to other laws.⁸¹Finally, in relation to investments made in community land agreements relating they shall be done in a free, open ,and consultative process containing stakeholder consultations and involvement of the community⁸²The importance of the CLA to the discussion is that it recognises communities' rights over land that has equal effect with other rights. Additionally, it outlines the role of the county government in holding the land in trust for communities and its obligations that include not disposing of the land until due law and procedures are followed to involve the communities.

b) The WCMA

Persons including communities who own land where wildlife inhabits are allowed individually or collectively to establish a wildlife conservancy.⁸³A wildlife conservancy means land that has been set aside by communities, individual owners for purposes of wildlife conservation. ⁸⁴In application of the WCMA they are certain principles that should be considered where it states that the management and conservation of wildlife shall be devolved to owners where such conservation occurs, and this shall entail effective public participation, that includes the relevant stakeholders such as communities in the participation of making the decisions concerning where the wildlife occurs. ⁸⁵

⁷⁸ Section 6(8), *The Community Land Act* (Act No 27 of 2016).

⁷⁹Section 6(6), *The Community Land Act* (Act No 27 of 2016).

⁸⁰ Section 6(7), *The Community Land Act* (Act No 27 of 2016).

⁸¹ Section 32, *The Community Land Act* (Act No 27 of 2016).

⁸² Section 36, *The Community Land Act* (Act No 27 of 2016).

⁸³ Section 39, *Wildlife Conservation and Management Act* (Act No 47 of 2013).

⁸⁴ Section 3, *Wildlife Conservation and Management Act* (Act No 47 of 2013).

⁸⁵ Section 4, *Wildlife Conservation and Management Act* (Act No 47 of 2013).

Additionally, in ensuring that communities interests are protected and within the spirit of mutual co-existence, decision-making on the management of the conservancies is not to be exercised prejudicial to the rights and privileges of communities living adjacent to conservation areas.⁸⁶ The WCMA outlines relevant procedures and guidelines to be followed when an individual or the government wishes to establish a conservancy, in that in land when they are to be set the communities being relevant stakeholders should participate in making decisions causing the use, occupancy and expectations of it.

2.2.3 The United Nations Declaration on Rights of Indigenous Peoples

The United Nations Declaration on the Rights of Indigenous Peoples provides for various rights of indigenous persons such as the right to full enjoyment as individuals or collective of all their human rights and fundamental rights,⁸⁷ and the right to self-determination.⁸⁸ In recognizing their right to self-determination the Declaration states that indigenous peoples have the right to autonomy or self-government in their internal affairs ⁸⁹ and prohibits the forceful removal of indigenous people from their land without prior, free, and informed consent.⁹⁰ As an international law instrument it sets an international standard of dealing with indigenous communities' land where their consent is paramount in determining their own affairs especially on matters to do with their land.

2.3 Custodianship under the CLA

As discussed previously, Section 6 of the CLA outlines the role of the county government in relation to unregistered land for communities, a role that ceases to exist when the land is registered.⁹¹ Therefore, the county government can be prescribed as a custodian of

⁸⁶ Section 75, *Wildlife Conservation and Management Act* (Act No 47 of 2013).

⁸⁷ Article 1, United Nations Declaration on the Rights of Indigenous Peoples, 13 September 2007, 61 UNTS 295.

⁸⁸ Article 3, United Nations Declaration on the Rights of Indigenous Peoples.

⁸⁹ Article 4, United Nations Declaration on the Rights of Indigenous Peoples.

⁹⁰ Article 10, United Nations Declaration on the Rights of Indigenous Peoples.

⁹¹ Section 6(7), *Community Land Act* (Act No 27 of 2016).

unregistered communal land. A custodian is defined as an agent that performs duties on behalf of someone,⁹² or an individual entrusted with guarding and keeping property before any transfer is made.⁹³

A trustee is usually under the responsibility of managing the trust and holds a higher fiduciary duty to the beneficiaries to act in their best interests compared to a custodian.⁹⁴ A custodian may also be a trustee commonly referred to as a custodian trustee who has custody of the investments but does not have the administration or management powers in relation to the trust established.⁹⁵

Having established the discussion then, the county government exercising its custodian power under Section 6(6) of the CLA is under the duty to ensure that in dealing with transactions relating to the unregistered land reference is made to the act itself or other laws.⁹⁶ These transactions include the transfer of land to other parties such as in establishment of conservancies. The laws that should be referenced when dealing with the transactions include the Constitution that is the supreme law of the land,⁹⁷ subsidiary legislation, common law and customary law given it is not inconsistent with the Constitution.⁹⁸

In dealing with the context, the subsidiary legislation in taking account conservation is the WCMA. The WCMA states the need to entail public participation in communities where wildlife consideration and mutual co-existence is of relevance to the discussion in the context of dealing with establishment of conservancies under Section 4(b). Therefore, being a custodian of the unregistered land, the county governments are under the obligation to ensure that in granting freehold or leasehold rights to organisations such as the NRT and in

⁹² Black's Law Dictionary, 2 ed.

⁹³ Black's Law Dictionary, 2 ed.

⁹⁴ Ho L, 'Trust: the essentials' https://assets.cambridge.org/97811070/32439/excerpt/9781107032439_excerpt.pdf on 10 November 2023

⁹⁵ <https://www.lexisnexis.co.uk/legal/glossary/custodian-trustee> on 28 December 2023.

⁹⁶ Section 6(6), Community Land Act (Act No 27 of 2016).

⁹⁷ Article 2(1), *Constitution of Kenya* (2010).

⁹⁸ Section 3, Judicature Act (Act No 18 of 2018).

implementation of Section 6(6) then other provisions of the law should be taken into consideration and applied that include section 4(b) of the WCMA that is to be discussed in the next section.

2.4 Deconstruction of the concept of public participation

The Constitution of Kenya and the WCMA provides for effective public participation when deciding on matters to do with communal land.⁹⁹ The public in this context refers to persons residing in a particular county.¹⁰⁰ Hence public participation is a continuous process of having such persons involved in issues of governance and influence making of decisions in policy.¹⁰¹ Its main objective is to ensure that citizens can actively participate in making decisions that impact their life by giving them powers of self-governance.¹⁰² This participation is open to all members of the public and no one may be discriminated against by virtue of having sovereign power granted by the Constitution.¹⁰³

2.4.1 Principles of public participation

The general principles that should govern public participation include the timely access to relevant information that can be understood, and the protection and promotion of the interests and rights of minorities, and marginalised persons.¹⁰⁴ Additionally, it should be a continuous process and involve multiple occasions and avenues where the public may appeal decisions made. The last principal entails balancing of roles and obligations between the public and government that should aim at promoting the Public and Private Partnerships (PPPs).¹⁰⁵

⁹⁹ Section 4(b), Wildlife Conservation and Management Act (Act No 47 of 2013)

¹⁰⁰ Ministry of Devolution and Planning and council of governors, County public participation guidelines,2016.

¹⁰¹ Ministry of Devolution and Planning and council of governors, County public participation guidelines,2016.

¹⁰² Article 174 (c), Constitution of Kenya (2010).

¹⁰³ Article 1, Constitution of Kenya (2010).

¹⁰⁴ Ministry of Devolution and Planning and council of governors, County public participation guidelines,2016.

¹⁰⁵ Ministry of Devolution and Planning and council of governors, County public participation guidelines,2016.

2.4.2 The International Association for Public Participation (IAP2) spectrum of public participation

This is an internationally recognised and used spectrum outlining the five hierarchies of public participation.¹⁰⁶The first level is informing the public of any decisions that is to be undertaken and assist them in understanding it. ¹⁰⁷The second level involves consultation where the government obtains feedback from the public on alternatives.¹⁰⁸The third and fourth level entails collaboration with the public in identifying preferred solutions, and the last level of empowerment is done by placing final decision-making authority in their hands.¹⁰⁹

The relevance of this spectrum to the discussion is that it outlines the ways in which public participation may be implemented effectively by outlining the five basic steps that a government may emulate. The relevance of this discussion to the study of this chapter is that it discusses section 4(b) and what public participation entails and ways it may be implemented to allow communities to participate in making decisions concerning the use of their land and transfer of the rights to other persons.

2.5 The Application of Section 6(6) of the CLA and 4(b) of the WCMA

This paper does not ignore the fact that persons have benefited from the establishment of conservancies such as having stable income from employment, access to health facilities, schools and increase of the country's revenue from tourism.¹¹⁰ However, this chapter highlights and discusses the other side of the coin where conservancies have heightened

¹⁰⁶ <https://organizingengagement.org/models/spectrum-of-public-participation/> on 4 January 2023.

¹⁰⁷ <https://organizingengagement.org/models/spectrum-of-public-participation/on> 4 January 2023.

¹⁰⁸

<https://www.iap2.org/page/pillars#:~:text=IAP2%20Spectrum%20of%20Public%20Participation,in%20many%20public%20participation%20plans.on> 4 January 2023.

¹⁰⁹

<https://www.iap2.org/page/pillars#:~:text=IAP2%20Spectrum%20of%20Public%20Participation,in%20many%20public%20participation%20plans.on> 4 January 2023.

¹¹⁰ <https://kwakenya.com/conservancies/roles-of-conservancies-in-kenya/#:~:text=Land%20and%20Natural%20Resources%20Management,for%20wildlife%2C%20people%20and%20Olivestock.on> 4 January 2023.

tensions among community members over land use and occupancy.¹¹¹ The tensions stem from feelings of exclusion of communities both politically, spatially and economically from matters to do with the conservation on their lands. ¹¹²

Spatial exclusion herein refers to territorial exclusion of communities from conservancies that affects pastoralist mobility, political exclusion occurs where the needs of a number of elites are favored at the expense of the communities and economic exclusion entitles specific persons to benefit from the conservation.¹¹³ Section 4(b) of the WCMA states the importance of effective public participation in places where wildlife occurs and the relevance to the discussion is that in failing to involve communities to participate in matters concerning the use of their land it goes against Section 6(6) of the CLA fueling the exclusions.

An example that highlights this is the case of West Pokot county where the county government and NRT entered into an agreement to form a conservancy without the communities participation such that the community members had to seek a conservatory order to prevent the establishment of the conservancy in their land.¹¹⁴ This highlights the case of political exclusion that would affect the establishment of conservancies and in turn increase cases of conflicts over land use and occupancy between conservationists and communities such as the case of Kuki Gallman who escaped death by a whisker after being attacked by community members. ¹¹⁵

¹¹¹ https://www.theeastafrican.co.ke/tea/science-health/community-wildlife-conservation-not-always-a-win-win-4053292#google_vignette on 4 January 2023.

¹¹² Mkutu K, 'Security dynamics in conservancies in Kenya :The case of Isiolo county' United States International University-Africa, Nairobi, BICC Working Paper Number 3,2020,1, 8 [BICC Working Paper 3 2020 01.pdf~dr1134](#) on 20 November 2023.

¹¹³ Mkutu K, 'Security dynamics in conservancies in Kenya :The case of Isiolo county' United States International University-Africa, Nairobi, BICC Working Paper Number 3,2020,1, 8 [BICC Working Paper 3 2020 01.pdf~dr1134](#) on 20 November 2023.

¹¹⁴ John Ngimor & 554 others vs Northern Rangelands Trust & 3 others (2021) eKLR.

¹¹⁵ <https://www.theguardian.com/global/2017/jun/18/who-shot-kuki-gallmann-the-story-of-a-kenyan-conservationist-heroine> on 24 November 2023.

There is no exact account of how much land dispossession has occurred among communities. However, in places like Laikipia County over 40 % of the land is occupied by conservancies and thousands have been disposed from their lands to pave way for establishment of more conservancies in the county.¹¹⁶In as much as the conservancies are seen to be beneficial to the communities their establishment should not be done at the expense of dispossession of indigenous communities who continue to maintain their pastoral livelihoods from their lands.

Hence, the county government has failed to effectively implement their role under section 6(6) of the CLA in dealing with the transactions in establishment of conservancies using West Pokot as the case example and this has escalated conflicts between community members, conservationists and caused the dispossession of thousands of community members from their indigenous lands.

2.6 Conclusion

This chapter has discussed the relevant laws dealing with communal land and conservation beginning with the Constitution, the CLA, the WCMA and the UNDRIP. Their relevance has been to form the basis of the discussion before narrowing it down to section 6(6) of the CLA on referring to other laws when dealing with unregistered land transactions and Section 4(b) of WCMA on public participation. The discussion established the custodian role of the county government and the obligations given to them under Section 6(6) and 4(b). The chapter concluded by discussing the failure of the county government to effectively implement this role that has led to conflicts between community members, conservationists, and frustrated efforts of establishment of conservancies.

¹¹⁶“Stealth game: “community” conservancies and dispossession in Northern Kenya’The Elephant,14 January 2022, <https://www.theelephant.info/analysis/2022/01/14/stealth-game-community-conservancies-and-dispossession-in-northernkenya/#:~:text=Series,Stealth%20Game%3A%20%E2%80%9CCommunity%E2%80%9D%20Conservancies%20and%20Dispossession%20in%20Northern%20Kenya>, on 5 January 2023.

CHAPTER THREE: WHETHER THE COUNTY GOVERNMENT TAKES FULL COGNISANCE OF THE PUBLIC TRUST DOCTRINE IN APPLICATION OF SECTION 6(6) OF THE CLA

a. Introduction

Following the discussion in chapter two, this chapter shall deal with the second research question. The discussion will begin by studying the Public Trust Doctrine, its characteristics, the restrictions it imposes on states, and the ways it has evolved to its current day application and interpretation by the court. The evolution of its application shall be discussed within the existing Kenyan legal framework on the Public Trust Doctrine and how it has been applied to prevent expropriation of public lands. The chapter shall conclude by discussing the realities of the application of the PTD in Kenya with regards to public land, and argue the case on why it should extend its application to community land with regard to the application of Section 6(6) of the CLA and 4(b) of the WCMA.

3.1 The Public Trust Doctrine

The Public Trust Doctrine herein referred to as PTD traces its origin in Roman and English Law.¹¹⁷ The common denominator between both systems of law is that the PTD aimed to protect interests such as fishing, and navigation for the public's benefit by ensuring that these rights cannot be transferred to private individuals.¹¹⁸ Under Roman law the *jus publicum* principle stated that by the law of nature things such as air, running water, and sea are common property to mankind,¹¹⁹ and under the English law the Magna Carta and Charter of the Forest limited the exclusive rights of the sovereign over common resources such as water and sea shores.¹²⁰

¹¹⁷ Blumm M, Wood M, The public trust doctrine in environmental and natural resources law,3, Carolina Academic Press, North Carolina,2021, 4.

¹¹⁸ Sax J, 'The public trust doctrine in natural resource law: Effective judicial intervention',68 Michigan Law Review, 1970,475.

¹¹⁹ Ryan E, 'The public trust doctrine, property, and society' Scholarship Repository,2022,3.

¹²⁰ Ryan E, 'The public trust doctrine, property, and society' Scholarship Repository,2022,3.

The rationale behind the development of the PTD is that certain resources belong to the public and therefore should be enjoyed by all in equal measure, and if individuals are to have private rights over such resources, then the public purposes they are meant to serve may be defeated.¹²¹This doctrine informs the establishment of public utilities such as public beaches, parks, and water ways.¹²²However, departing from the historical view of the inability of such resources to be transferred to private individuals the Illinois case stated that these rights can be transferable for the benefit of the public ,which has to be examined thoroughly by the courts and state.¹²³

3.1.1 Characteristics of the PTD

It establishes a trusteeship relationship where the state as a trustee has a fiduciary duty to protect and manage the public resources for the good of the public .¹²⁴Similarly, to the duties under a trust relationship, the government has the duty to act in good faith, diligently, and with prudence when dealing with such resources.¹²⁵If then they have the power to sell such trust property they have to consider both the effects of the sale on the trust's beneficiaries and whether it is in the beneficiaries' best interests to sell the trust property and thereafter take the most beneficial action. ¹²⁶

Additionally, fundamental to this doctrine is that such trust cannot be alienated or surrendered developing a perpetual trusteeship over the public trust lands.¹²⁷Perpetual trusteeship is that which can be passed down through generations, and in this context even through transfer of rights to private entities. That even if the trustee transfers the public

¹²¹ Kariuki F, Ouma S, Ng'etich R, Property law, Strathmore University Press, Nairobi,142 in Sax J,'The public trust doctrine in natural resource law,471.

¹²² Kariuki et al, Property law, 142.

¹²³ Illinois Central Railroad Company vs Illinois (1869), The Supreme Court of the United States.

¹²⁴ Rajamani L. 'Doctrine of public trust: A tool to ensure effective state management of natural resources'38: *Journal of the Indian Law Institute* 1,1996,76.

¹²⁵ Rajamani L, 'Doctrine of public trust: A tool to ensure effective state management of natural resources', 75-76.

¹²⁶ Rajamani L, 'Doctrine of public trust: A tool to ensure effective state management of natural resources,' 75-76.

¹²⁷ Rajamani L, 'Doctrine of public trust: A tool to ensure effective state management of natural resources,' 76.

resource to a private entity for the public's alleged benefit it continues to exercise its trusteeship role over the resource.¹²⁸

In addition to that, another characteristic of this doctrine is that the beneficiaries are usually citizens.¹²⁹The beneficiaries are both present day and future generation of citizens whose interests need to be protected by the actions taken by the trustee.¹³⁰ Further, as a beneficiary the citizens are supposed to partake in making decisions that concern the use of the public resources which promotes credibility and allows openness in the decision- making process.¹³¹Lastly, the PTD places obligations on other arms of the government in ensuring that the resource is maintained and used for its public purpose.

3.1.2 Restrictions imposed by the PTD

The PTD imposes restrictions on both the exercise of the trustee's powers and the citizens use of the resource. The first restriction imposed on the state is that the property being held in trust should be made available and only used for public purposes, thus restricting the need to use it for private purposes.¹³²Secondly, the state is under an obligation not to sell the public resource for any cash equivalent and lastly the state is to maintain the public resource for its intended uses which are either traditional such as fishing or natural uses for navigation.¹³³

For the citizens use and access is restricted for the general public's benefit given that some natural resources are common pool resources whose overuse would affect the use of others.¹³⁴For example for fishermen the fishing waters are usually restricted to certain areas to avoid over-fishing or interference with the eco-systems under the water. Hence even if the resource is open to public access, it is not done at the expense of interfering with the enjoyment of the next generation.

¹²⁸ Illinois Central Railroad Company vs Illinois (1869), The Supreme Court of the United States.

¹²⁹ Rajamani L, 'Doctrine of public trust: A tool to ensure effective state management of natural resources,'81.

¹³⁰ Blumm M, Wood M, The public trust doctrine in environmental and natural resources law, 7.

¹³¹ Rajamani L, 'Doctrine of public trust: A tool to ensure effective state management of natural resources,81.

¹³² Sax J, 'The public trust doctrine in natural resource law',477.

¹³³ Sax J, 'The public trust doctrine in natural resource law',477.

¹³⁴ Kariuki et al,144.

3.1.3 Evolution of the PTD

Tracing its origin from Roman and English law, the PTD was mainly used to deal with rights associated with the public's access to the navigable waters.¹³⁵ However, over the years it has evolved to cover more than navigable waters such as infrastructure and public streets the rationale being that the resources intended public and common use purpose.¹³⁶ Additionally, it has evolved to increase a broad array of rights to citizens as beneficiaries that increases their ability to institute claims in court against the state where one need not prove personal harm or injury to institute the claims as before.¹³⁷

However, this evolution and liberation has been met with its fair share of opposition where scholars and courts interpretation have categorically stated that it is bad for the PTD to be liberated.¹³⁸ In the courts preview the problem with liberation is that it causes them to exceed their powers in coming up with laws that tread on the vested rights of the people.¹³⁹ Where they are two sides of the coin, the public being receptive towards the decisions made by the court, or not being pleased by what they would include as a public resource.¹⁴⁰

Further, in liberating the PTD who would define the resources that fall within such protection, or would the lines be more blurred if we are to allow everyone define what it

¹³⁵ Turnipseed M, Sagarin R, 'The public trust doctrine: Where ecology meets natural resources management,' Annual Review of Environment and Resources, 475-476 2012, <https://www.bing.com/search?q=Turnipseed+M%2C%E2%80%99+The+public+trust+doctrine%3A+Where+ecology+meets+natural+resources+management%2C+%E2%80%98+Institute+of+Environment+University+of+Arizona%2C+2012.&form=ANNH01&refig=6a71e3e24eed4988a3bbbe84d431ab2b&pc=LCTS#> on 15 January 2024.

¹³⁶ Turnipseed M, Sagarin R, 'The public trust doctrine: Where ecology meets natural resources management,' Annual Review of Environment and Resources, 2012, 479 <https://www.bing.com/search?q=Turnipseed+M%2C%E2%80%99+The+public+trust+doctrine%3A+Where+ecology+meets+natural+resources+management%2C+%E2%80%98+Institute+of+Environment+University+of+Arizona%2C+2012.&form=ANNH01&refig=6a71e3e24eed4988a3bbbe84d431ab2b&pc=LCTS#> on 15 January 2024.

¹³⁷ Turnipseed M, Sagarin R, 'The public trust doctrine: Where ecology meets natural resources management,' Annual Review of Environment and Resources, 2012, 480 <https://www.bing.com/search?q=Turnipseed+M%2C%E2%80%99+The+public+trust+doctrine%3A+Where+ecology+meets+natural+resources+management%2C+%E2%80%98+Institute+of+Environment+University+of+Arizona%2C+2012.&form=ANNH01&refig=6a71e3e24eed4988a3bbbe84d431ab2b&pc=LCTS#> on 15 January 2024.

¹³⁸ Huffman J, 'Why liberating the public trust doctrine is bad for the public' 45 Environmental Law 2, 2015, 340.

¹³⁹ Huffman J, 'Why liberating the public trust doctrine is bad for the public', 340-341.

¹⁴⁰ Huffman J, 'Why liberating the public trust doctrine is bad for the public', 340.

entails.¹⁴¹Some scholars have argued that the traditional aspect of navigable waters should be maintained while those calling for a more liberal approach state that all natural resources should fall within the application of the PTD and apply this in their constitutions such as the Hawaii constitution.¹⁴²

The relevance of this discussion to the second research question first begins with discussing the characteristics, and meaning of the PTD that establishes the state as the trustee for public resources and citizens as beneficiaries. As a trustee the state is under the obligation to exercise their powers in good faith and involve the citizens in making decisions concerning the use of public resources. This highlights the expectations for both parties in the application of PTD. The discussion on the evolution of the PTD going beyond navigable waters to natural resources is meant to begin the discussion on whether the PTD should extend to common purpose resources like the community land even if it does not fall under the realm of public land in Kenya.

3.2 The existing legal framework on the PTD

Land in the constitution of Kenya is classified into private, public, and private.¹⁴³ Public land constitutes of land such as forests, and land where there is no individual or community owner claiming ownership.¹⁴⁴In these classifications, there exist trust relationships in public land where it is held in trust for the residents of the county by the county government and is administered by the National Land Commission.¹⁴⁵ The obligation placed on them is that it is not meant to be disposed of unless the use and disposal is specified under any act of Parliament.¹⁴⁶ Therefore, the county government is meant to apply the PTD when dealing with the classifications under public land as it falls within public resources.

¹⁴¹ Huffman J, 'Why liberating the public trust doctrine is bad for the public',340.

¹⁴² Blumm M, Wood M,'The public trust doctrine in environmental and natural resources law' 7-8.

¹⁴³ Article 61, *Constitution of Kenya* (2010).

¹⁴⁴ Article 62, *Constitution of Kenya* (2010).

¹⁴⁵ Article 62(2), *Constitution of Kenya* (2010).

¹⁴⁶ Article 62(4), *Constitution of Kenya* (2010).

3.3 Application of the PTD in Kenya

In the realm of application of the PTD there have been numerous incidences of misappropriation of public property and the abuse of the trust by the state such as attempts to grab public school land such as the Langata road primary school and Uhuru Park. ¹⁴⁷However, in dealing with this misappropriation the PTD has been applied to safeguard the interests of the citizens as beneficiaries where the court has ruled in favor of the beneficiaries such as in the case of Uhuru Park, and other developments that would prevent the public access to the resource which has also been influenced by pressure from non-governmental organisations. ¹⁴⁸

The benefits of the application of the PTD have been to safeguard the interests of the citizens over the use of public resources that should not be meant for only a few. This then becomes relevant to the discussion in that if it has been used to safeguard the interests of citizens why shouldn't the county government in application to the community land take full cognisance of especially when applying Section 6(6) of the CLA? Over the years even with the cases of misappropriation of the public resources, the PTD has been applied to the benefit and safeguard the interest in use of the resources of the citizens. Therefore, with this mind the county government should take full cognisance of it in application of Section 6(6) of the CLA to protect the communities' interests in use of land vis a vis establishment of conservancies, where they are to retain the resources for the best interests for the community members.

3.4 Realities of dispossession of communal land held in trust by county government

Land as in any other African country is central for most communities in Kenya embodying both economic and social meaning.¹⁴⁹The importance of land has been attributed to the

¹⁴⁷ Kariuki et al, Property law,143.

¹⁴⁸ Kaguru M, 'Taking Stock of the Constitutionalizing of Environmental Rights on Environmental Justice through Judicial Redress in Kenya and South Africa: The Undelivered Promise.'

¹⁴⁹ Mbote P, Odote C, Kamande M, 'Ours by right: Law politics and realities of community property in Kenya' Strathmore University Press, Nairobi,2013, 10.

numerous conflicts on land that have surfaced in the country and continue to do so to date and Kenya's Vision 2030 embodies a blueprint dependent on land both in agriculture and tourism placing a high premium on the use of the land in both instances.¹⁵⁰

In Kenya, community land is estimated to consist of more than 65% of the total land mass mostly occupied by the pastoralist communities.¹⁵¹ As the emphasis is placed on agriculture and tourism as better ways of increasing the Gross-Domestic Product, pastoralism is often termed as a waste of land and resources. The county government as already discussed is the custodian trustee of all unregistered community land in Kenya and as such has responsibilities and obligations under Section 6 of the CLA.¹⁵² These obligations include that the transactions dealing with the unregistered land follow the law prescribed and any other subsidiary legislation which in this context is section 4(b) of the WCMA.

As discussed in Chapter two, there has been a conflict in the application of both sections that has caused thousands to be displaced by the establishment of conservancies and more people continue to be dispossessed to pave way for more infrastructural development and development of conservancies.¹⁵³ Coupled up with political factors, such as the lack of political will of the involving communities in making decisions concerning the use of their resource, the conflict regarding the use of land continue to escalate.

Then in safeguarding these interests and preventing the further escalation of conflicts between conservationists, communities, and wildlife application of PTD should be

¹⁵⁰ Kameri Mbote et al, Ours by right, 10.

¹⁵¹ Mokku J, 'The unjust valuation of pastoralists land in Kenya,' The Elephant 2 October 2021, <<https://www.theelephant.info/features/2021/10/02/the-unjust-valuation-of-pastoralists-land-in-kenya/>> on 10 November 2023.

¹⁵² Huka F, Pastoralist Communities Still Anxious About the Status of Their Land', The Elephant 15 October 2021, <<https://www.theelephant.info/features/2021/10/15/pastoralist-communities-still-anxious-about-the-status-of-their-land/>> on 10 November 2023.

¹⁵³Stealth game: "community" conservancies and dispossession in Northern Kenya 'The Elephant, 14 January 2022, <https://www.theelephant.info/analysis/2022/01/14/stealth-game-community-conservancies-and-dispossession-in-northernkenya/#:~:text=Series,Stealth%20Game%3A%20%E2%80%9CCommunity%E2%80%9D%20Conservancies%20and%20Dispossession%20in%20Northern%20Kenya>, on 5 January 2023

extended to community land for the county government in relation to section 6(6) of the CLA. In doing so, it ensures that the interests of the community members are considered paramount and not easy to misappropriate for private interests unless they have been duly consulted, and a consensus that benefits the community has been arrived at. This is regarding application of Article 10 of the UNDRIP that states that for specifically indigenous communities they have the right to self-determination which include the right not to be removed from their land unless duly consulted and a just compensation given to them.¹⁵⁴

3.5 Conclusion

This chapter has discussed the PTD, its characteristics, restrictions, and the evolution it has undergone to include other natural resources. This discussion further highlighted the obligations of the state to ensure that the resource is put into good public use in applying the PTD. In discussing its evolution, the question of whether it should extend to resources not considered public was examined and the justification was that it should give the resource is used for a common purpose and its benefit that ensures the interests of citizens are safeguarded. Therefore, then the doctrine would be useful in safeguarding rights of communities and hence the need for the county government to take full cognisance of it in applying Section 6(6) on dealing with transactions related to unregistered land in this context conservancies.

¹⁵⁴ Article 10, United Nations Declaration on the Rights of Indigenous Peoples.

CHAPTER FOUR: THE INCLUSION OF THE CBNRM IN THE FIFTH SCHEDULE OF WCMA IN APPLICATION OF SECTION 6(6) OF THE CLA AND SECTION 4(B) OF THE WCMA

4.1 Introduction

This chapter shall answer the third research question. This will be done by discussing the integration and implementation of the Community Based Natural Resource Management (CBNRM) in the fifth schedule of the WCMA. Its implementation is in the context of the application of Section 4(b) of the WCMA and Section 6(6) of the CLA on strengthening the participation ability of indigenous communities in conservation practices. The chapter shall use Namibia as the case study drawing best practices of how CBNRM has been implemented by giving a historical recount of Namibia's conservation practices, and its legislative and policy framework. The discussion shall conclude by highlighting the best practices that Kenya can implement from Namibia to increase the participatory ability of indigenous communities in management of their resources such as land.

4.2 History of conservation practices in Namibia

Namibia's economy is based on mining, fishing, and limited agricultural practices given that much of its terrain is arid or semi-arid experiencing low rainfall.¹⁵⁵ Over the years, it has tapped into the tourism industry to diversify its sources of revenue in the form of wildlife conservancies,¹⁵⁶ and this has led to the increase of the wildlife population lost during the 1980s.¹⁵⁷ Today, about 40 % of Namibia's land mass is under wildlife conservancies.¹⁵⁸ The conservation practices date back to the precolonial period in the form of social practices such as the use of cultural taboos to prevent excessive hunting and killing of wild animals

¹⁵⁵ Jacobsohn M, Owen G, 'Integrating conservation and development: A Namibian case study' *Nomadic People* 1, 2003, 94.

¹⁵⁶ Jacobsohn M, Owen G, 'Integrating conservation and development: A Namibian case study', 94.

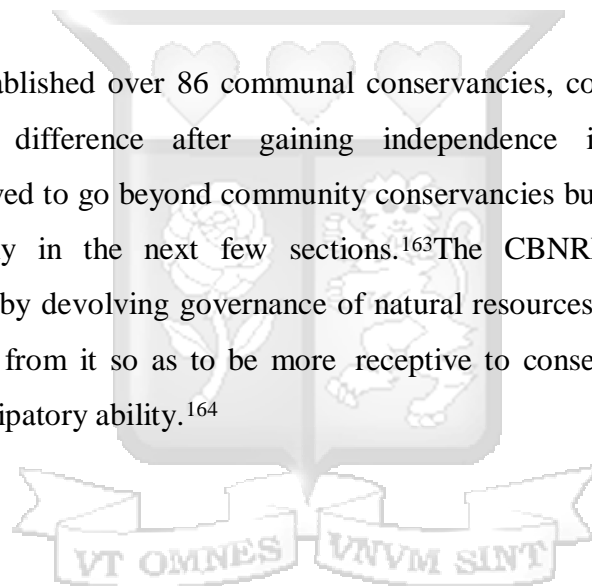
¹⁵⁷ Overseas Development Institute, Sustainable natural resource management in Namibia: Successful community-based wildlife conservation, 2009, 2.

¹⁵⁸ <https://www.fairplanet.org/story/namibia-the-conservation-capital-of-africa/on> on 26 January 2023.

and the belief in the patrilineal and matrilineal system that desired the preservation of wildlife for future generations .¹⁵⁹

During the colonial period, there were no formal practices tied to conservation but during this time there was a rapid increase in trophy hunting and the wild animals were heavily used for commercial purposes that led to a rapid decline in their numbers.¹⁶⁰In the 1980's, to deal with the decline there was the introduction of community-based conservation through a system of community wildlife rangers known as game guards.¹⁶¹This was an initiative by the Namibian Wildlife Trust meant to address and protect the desert white rhinos whose numbers had declined over the years.

Today, Namibia has established over 86 communal conservancies, covering 9 % of Namibia's total population.¹⁶²The difference after gaining independence is that the community conservancies have evolved to go beyond community conservancies but the CBNRM which will be discussed extensively in the next few sections.¹⁶³The CBNRM was implemented to incentivise communities by devolving governance of natural resources to them and giving them rights to derive benefits from it so as to be more receptive to conservation practices through strengthening their participatory ability.¹⁶⁴



¹⁵⁹ Jones BT, 'Community conservation in Africa successes for the current poaching crisis' <https://centrestudisaficans.org/wp-content/uploads/2015/11/Barcelona-paper-BJ-final.pdf> on 27 November 2023.

¹⁶⁰ Overseas Development Institute, Sustainable natural resource management in Namibia: Successful community-based wildlife conservation, 2009, 4-5.

¹⁶¹ Wenborn M, Svensson M, Collinson R, Nijman V, 'Lessons on the community conservancy model for wildlife protection in Namibia', 377.

¹⁶² <https://www.worldwildlife.org/projects/conserving-wildlife-and-enabling-communities-in-namibia> on 27 November 2023.

¹⁶³ https://wwf.panda.org/wwf_news/?200002/Namibia-how-communities-led-a-conservation-success-story on 26 January 2024.

¹⁶⁴ Mosimane A, Silva J, 'Local governance institutions, CBNRM, and benefit sharing systems in Namibian conservancies' 8 Journal of Sustainable Development 2, 2015, 99.

4.3 Justifications of Namibia for comparative analysis

The Namibian legal system is made up of various sources of law such as the constitution, statute law, customary law, Roman-Dutch common law, and international law.¹⁶⁵ The property regime in Namibia is similarly as in Kenya where all persons have a right to own property under the constitution. ¹⁶⁶This right can be limited by the government in public interest matters but just compensation shall be given to those affected and it shall be done in accordance with other laws.¹⁶⁷The property tenure is divided to private, public, and communal land where the latter is recognised under the Communal Land Reform Act, therefore bearing these similarities the jurisdiction will be used for the comparative analysis.

The first reason for the use of Namibia goes to it being hailed as one of the countries in Africa that has successfully implemented the CBNRM model.¹⁶⁸Such that through its implementation it has enabled the increase of wildlife numbers and the increase in revenue while doing so.¹⁶⁹Given this success its implementation has been extended to management of other resources such as water, fishery and forests.¹⁷⁰ In this way then, Kenya can be able to learn why its implementation has been a success and extend the same to conservation of wildlife and other resources such as forests just as in Namibia.

The second reason for the use of Namibia and connected to its success is the implementation of the CBNRM in Namibia that has been different from other South African

¹⁶⁵ Mwanza G, Skeffers I, Researching Namibian law and the Namibian legal system ,Global Lex,2007 [Researching Namibian Law and the Namibian Legal System - GlobalLex \(nyulawglobal.org\)](https://nyulawglobal.org)on 26 January 2024

¹⁶⁶ Article 16, Constitution of Namibia (1990).

¹⁶⁷ Article 16, Constitution of Namibia (1990).

¹⁶⁸ Mosimane A, Silva J, 'Local governance institutions, CBNRM, and benefit sharing systems in Namibian conservancies',99.

¹⁶⁹ Taylor S, Nuulimba K, '25 years of CBNRM in Namibia: A retrospective on accomplishments, contestations, and contemporary challenges 'Journal of Namibian Studies,2015,94-95, [25 years of CBNRM in Namibia: A retrospective on accomplishments, contestation and contemporary challenges | Journal of Namibian Studies : History Politics Culture \(namibian-studies.com\)](https://namibian-studies.com)on 29 January 2024.

¹⁷⁰ Taylor S, Nuulimba K, '25 years of CBNRM in Namibia: A retrospective on accomplishments, contestations, and contemporary challenges 'Journal of Namibian studies,2015,95, [25 years of CBNRM in Namibia: A retrospective on accomplishments, contestation and contemporary challenges | Journal of Namibian Studies : History Politics Culture \(namibian-studies.com\)](https://namibian-studies.com)on 29 January 2024.

countries such as Zimbabwe.¹⁷¹ In that, in empowering the local communities to make decisions the local government in Namibia does not take a central lead in the management of resources like in the CAMPFIRE in Zimbabwe. Their role leans more towards overseeing and monitoring the decisions made by communities so as to increase their participatory ability of communities in management of their resources unlike in Kenya. ¹⁷²

Lastly, the CBNRM is grounded on the belief that the benefits from implementation should outweigh the losses endured by the community members. ¹⁷³However much this has been a complex structure to implement, this belief is grounded in the integration of management of natural resources with the practice of livelihoods such as pastoralism. Therefore, because the paper is dealing with indigenous communities who practice such livelihoods it would provide a good background as to how they have been able to implement it to allow communities conserve wildlife and practice their livelihood in balancing the benefits and losses of conservation.

4.4 Community-Based Natural Resource Management

The idea of CBNRM in Namibia was introduced in the form of game guards in the 1980s to replace the community conservancies. ¹⁷⁴CBNRM was fueled by the need to make better inclusive policies and the belief that if communities are key decision in the use of their land, they are likely to support the goals of conservation. ¹⁷⁵Simply defined, CBNRM is a process

¹⁷¹ Child B, Barnes G, 'The conceptual evolution and practice of community-based natural resource management in Southern Africa :past, present and future', 288.

¹⁷² Mkutu K, 'Security dynamics in conservancies in Kenya :The case of Isiolo county 'United States International University-Africa, Nairobi, BICC Working Paper Number 3,2020,1, 8

[BICC Working Paper 3 2020 01.pdf~dr1134](#) ¹⁷³ Mosimane A, Silva J, 'Local governance institutions, CBNRM, and benefit sharing systems in Namibian conservancies',99.

¹⁷⁴ Carpenter S, '(Re)Empowering the community: A case study of Namibia's legal evolution of wildlife governance'325-327.

¹⁷⁵ Mosimane A, Silva J, 'Local governance institutions, CBNRM, and benefit sharing systems in Namibian conservancies,99.

that combines the devolution of property rights with collective action for rural communities to improve the value and sustainability of natural resources.¹⁷⁶

It envisions the empowerment of communities to enable them to share the rights and responsibilities of management and utilization of natural resources with the government.¹⁷⁷It aims at meeting the development objectives of governments, allows communities practice their livelihood whilst promoting the conservation of the environment. ¹⁷⁸In implementing CBNRM in Namibia, lessons were drawn from Zimbabwe that had implemented the Communal Areas Management Program for Indigenous Resources (CAMPFIRE).¹⁷⁹

The difference in implementation in Namibia was that the conservancies were independent structures, and the local governments did not take a central lead in making decisions concerning the use of the land, the sharing of the benefits nor in the management.¹⁸⁰In that they only oversee the decisions that the communities make regarding the use of their land even in conservation. However, in Kenya, the difference stems from the fact that the county governments in performing their custodian role make these decisions on behalf of the community members.

4.5 The legal framework governing CBNRM

The constitution of Namibia provides for the involvement of communities in the management of ecosystems, ¹⁸², similarly as in Kenya.¹⁸³The law governing CBNRM began informally through surveys where in 1992 the Namibian government drafted a policy

¹⁷⁶ Child B, Barnes G, 'The conceptual evolution and practice of community-based natural resource management in Southern Africa: past, present and future' 37 *Environmental Conservation* 3, 2010, 284.

¹⁷⁷ Child B, Barnes G, 'The conceptual evolution and practice of community- based natural resource management in Southern Africa: past, present and future', 288.

¹⁷⁸ <https://www.worldwildlife.org/projects/conserving-wildlife-and-enabling-communities-in-namibia> on 27 January 2023.

¹⁷⁹ Child B, Barnes G, 'The conceptual evolution and practice of community-based natural resource management in Southern Africa: past, present and future', 288.

¹⁸⁰ Child B, Barnes G, 'The conceptual evolution and practice of community based natural resource management in Southern Africa: past, present and future', 288.

¹⁸² Article 95, Constitution of Namibia (1990).

¹⁸³ Article 10, Constitution of Kenya (2010)

known as the Policy on the Establishment of Conservancies to provide for community-level management institutions known as conservancies. ¹⁸⁴In 1995, the Policy on Wildlife Management, Utilisation and Tourism in Communal Areas was approved to enable the rural communities gain similar rights of use and benefit from wildlife.¹⁸⁵

In 1996, the Nature Conservation Amendment Act of 1996 gave the minister the ability to register a conservancy after meeting requirements such as having a representative committee, a legally compliant constitution, and the ability to manage funds. ¹⁸⁶This Act aimed at promoting and integrating tourism into the rural livelihoods of communal area people such as hunter-gatherers or pastoralists. Lastly, customary law implemented by traditional authorities such as chiefs is relevant to implementation of the CBNRM by providing for the allocation and use of communal land.¹⁸⁷

The workings of the CBNRM begin from the rural communities taking a central lead in its implementation ,¹⁸⁸ where they apply to be registered as a conservancy after meeting conditions such as legal constitution, having well-defined boundaries accepted by their neighboring communities, a defined membership, and a representative decision-making body making plans on how the benefits will be distributed equitably.¹⁸⁹ On registration the conservancy acquires user rights over wildlife that include the ability to enter any sort of contractual agreement regarding the wildlife.

¹⁸⁴ Wanjiru P, 'An evolution of the policy framework for community based natural resource management in Kenya' Unpublished LLM Thesis, University of Nairobi, Nairobi,2010,22.

¹⁸⁵ Wanjiru P, 'An evolution of the policy framework for community based natural resource management in Kenya' Unpublished LLM Thesis, University of Nairobi, Nairobi,2010,22.

¹⁸⁶ Wanjiru P, 'An evolution of the policy framework for community based natural resource management in Kenya' Unpublished LLM Thesis, University of Nairobi, Nairobi,2010,22.

¹⁸⁷ TB Jones, Corbett A, 'The legal aspects of governance in CBNRM in Namibia' https://www.cbnrm.net/pdf/corbett_001.pdf on 29 November 2023.

¹⁸⁸ Jones BT, 'Community conservation in Africa successes for the current poaching crisis' <https://centrestudisafricans.org/wp-content/uploads/2015/11/Barcelona-paper-BJ-final.pdf> on 27 November 2023.

¹⁸⁹ Jones BT, 'Community conservation in Africa successes for the current poaching crisis' <https://centrestudisafricans.org/wp-content/uploads/2015/11/Barcelona-paper-BJ-final.pdf> on 27 November 2023.

Since its formal implementation, CBNRM has witnessed a couple of successes that include the doubling of wildlife like black rhinos, elephants, and lions.¹⁹⁰ Not only have the numbers of the wildlife increased but the population of the animals has become stable over time given while the revenue acquired from the conservancies has increased.¹⁹¹ Further for the rural communities it has contributed to poverty alleviation in the integration of their livelihood and conservation.¹⁹²

4.6 Kenya's implementation of CBNRM

In Kenya, the Constitution, and other statutes provide for how resources can be managed with the public. Article 10 of the Constitution of Kenya provides for the participation of the people and the devolution of power as one of the national values and principles of governance.¹⁹³ In environmental conservation the state is usually obliged to encourage public participation while conserving the environment and ¹⁹⁴communities are given the ability to manage their land and activities on it. ¹⁹⁵

The WCMA in this context further lays out general principles that should govern the implementation of the Act including devolution of decision-making to owners and managers of land where the wildlife occurs in ensuring effective public participation.¹⁹⁶ There is the establishment of a community wildlife conservation committee whose duties include bringing any relevant stakeholders to harness in the participation of conservation and management of wildlife.¹⁹⁷

¹⁹⁰ Jones BT, 'Community conservation in Africa successes for the current poaching crisis' <https://centrestudisaficans.org/wp-content/uploads/2015/11/Barcelona-paper-BJ-final.pdf> on 27 November 2023.

¹⁹¹ <https://www.worldwildlife.org/places/namibia> on 26 January 2023.

¹⁹² Ministry of environment and tourism, National policy on community based natural resource management, 2013, 2-4.

¹⁹³ Article 10, Constitution of Kenya (2010).

¹⁹⁴ Article 69(1)(d), Constitution of Kenya (2010).

¹⁹⁵ Article 63, Constitution of Kenya (2010).

¹⁹⁶ Section 4, Wildlife Conservation and Management Act (Act No 47 of 2013).

¹⁹⁷ Section 19, Wildlife Conservation and Management Act (Act No 47 of 2013).

4.7 Practices that can be adopted in the Kenyan context.

In answering the third research question, the CBNRM can be adopted and fitted to the Kenyan context to allow the application of section 4(b) of the WCMA on allowing persons where wildlife occurs to participate in decision making and section 6(6) of the CLA on the county government's custodian role of ensuring that the transactions are done in accordance with the Act and other provisions of the law which in this case is section 4(b) of the WCMA. However, as the discussion begins it recognises that CBNRM has been meet with its conflicts where certain aspects such as benefit sharing have been a problem in Namibia which can be adopted but better defined in Kenya according to different household needs to yield better results.¹⁹⁸

Kenya, as discussed previously, has several provisions for the co-management of resources with communities but the problem begins with the implementation. The first step in implementation in Kenya is empowering and allowing community members as in Namibia to take a central role in the management of their resources and formation of conservancies. In that they decide how to form the conservancies, period of the leases and how the benefits can be shared. Rather than the county government and bureau-technical elites taking this role, communities should be left to take the central lead in management of their resources. Therefore, transforming the role of the local government and bureau-technical elites to facilitation and monitoring rather than key decision makers. This integrates the first aspect of public participation but in the aspect of conservancies.

As discussed under chapter two this participation should be a continuous process, and the way this can best be reworked is by allowing them to make decisions on how they would like to establish the conservancies. The county government can then come in just as how the local government in Namibia does to over-see the decisions made and empowering communities by educating them on the best possible ways to get better results from the conservation practices.

This being the gist of the paper allowing communities to govern their own affairs such as the registration of the conservancies, decide on the boundaries, and have their own legal constitution, psychologically gives them the belief of consideration as relevant stake holders and persons with ability to govern their own matters with oversight from the governments and are likely to be more receptive to it.²⁰⁰ In turn, reducing the already escalating conflicts on land use and occupancy and giving communities the ability to integrate their livelihood with conservation and still being able to deal with the realities of climate change.

Having registered the conservancy, the communities should acquire certain rights over the land being occupied that should be integrated with the practice of their livelihoods such as pastoralism. These rights should be defined just as in Namibia on how the land is to be used and shared among the community members, wildlife, and conservationists to reduce the escalating conflicts. In the Kenyan context, the rights are defined by the local government and conservationists that take little consideration of its integration with their livelihood, therefore in allowing them to define these rights it will allow them to give more consideration to their livelihoods that further gives effect to Section 5 of the CLA.²⁰¹

Lastly, in implementing a point of friction for the Namibian jurisdiction was certain households complained that the benefits only favored few community members that influenced their perceptions on whether the benefits had meaning. Therefore, to deal with this in the Kenya context the benefits should be defined from the beginning of the formation of the conservancy and vary according to the household needs of the different

¹⁹⁹ Child B, Barnes G, 'The conceptual evolution and practice of community-based natural resource management in southern Africa: past, present and future' 288.

²⁰⁰ Mosimane A, Silva J, 'Local governance institutions, CBNRM, and benefit sharing systems in Namibian conservancies', 99.

²⁰¹ Section 5, The Community Land Act (No 27 of 2016).

communities. The county government can allow communities to decide what benefits they would like to get from the conservancies and oversee their implementation. Further, they can help in suggesting benefits that would suit more families in the communities such as introduction of animal insurance, which are meant to help persons deal with cases of floods, or severe drought that might cause the death of their livestock.²⁰³

Therefore, as in Namibia where communities have been more receptive to the conservation practices because they have been made key decision makers with the discussion above then the same can be implemented with a change in how benefits are defined to allow both the indigenous communities practice pastoralism and integrate it with conserving wildlife and the environment.

4.8 Conclusion

This chapter has studied Namibia's conservation practices over the years and the implementation of the CBNRM that has led to an increase in wildlife numbers and revenue. The CBNRM in Namibia allows communities take the central lead in management of their resources, and to benefit directly from it. The chapter discussed Kenya's situation where they are provisions for the need to involve communities in management of their resources, but their implementation has been the problem. In dealing with this, the chapter concluded with practices that can be adopted in the Kenyan context and how it can be done such as empowering and allowing communities to take a central lead in making management decisions on use of their resources, having well defined benefit sharing schemes and integration of their livelihood through rights definition that will allow the application of Section 4(b) of the WCMA and Section 6(6) of the CLA.

²⁰³ <https://www.hubinternational.com/insurance-glossary/l/livestock-insurance/#:~:text=Livestock%20insurance%20is%20protection%20against,a%20mixture%2C%20you%20are%20covered.> On 2 February 2024.

CHAPTER FIVE: CONCLUSION

5.1 Introduction

This chapter concludes the study by outlining the summary of the findings in the previous chapters. Further, it discusses three recommendations that will enable the county governments to have a more inclusive approach that allows the effective participation of indigenous communities towards county developments which in this context is conservancies allowing a win-win situation for both parties.

5.2 Summary of findings

This paper has studied the custodian role given to the county governments in holding unregistered land for communities. In doing so, chapter one formed the basis of the discussion introducing the different legislative framework that recognises the rights of communities to use and own land. It gave a historical overview of the formation of the first conservancy and the rise of the NRT and went ahead to highlight the lack of participation of communities in the establishment of conservancies on their land. Further, the chapter outlined the research questions and objectives the first being whether there has been conflict in the application of both Section 6 of the CLA and Section 4(b) of the WCMA and the extent the conflict has caused the dispossession of communities from their land. The second research question sought to study the custodian role of the county government and if it takes full cognisance of the Public Trust Doctrine and the third question sought to provide a solution for the inclusion of the CBNRM in the legislative framework.

Chapter two analysed Section 6 of the CLA and Section 4(b) of the WMCA. In doing so it discussed the meaning of a custodian and the role of a custodian in the context of the county government. Additionally, it sought to understand the concept of effective public

participation and why it is beneficial for county governments to include communities when making decisions that concern them. The chapter concluded by highlighting the conflict that has arisen from the non-application of Section 4(b) of the WMCA when dealing with Section 6(6) which is conflicts among community members and conservationists on the use of land and the occupancy of it.

Chapter three discussed the Public Trust doctrine and whether in the application of Section 6(6), the county government does take full cognisance of this doctrine. This discussion began by defining the meaning of the doctrine and the duties arising from the application of this doctrine when dealing with resources such as land. The discussion concluded by highlighting the need to extend the application of this doctrine in the application of Section 6(6) given its benefits to application in public land to avoid misappropriation.

Chapter four discussed the inclusion of the CBNRM in the fifth schedule of the WCMA Kenyan context drawing lessons from its application in Namibia and Zimbabwe .In integrating the discussion to chapter two this chapter deals with how communities can be able to participate in management of their resources by taking a central lead in making management decisions just as in Namibia and the benefits of having similar implementation model as in Namibia that will allow the extension of the same mode of conservation to other areas of natural resources.

The present chapter concludes the discussion by giving a summary of the findings and the recommendations that might be used by county governments to implement the participation of the indigenous communities in managing their resources.

5.3 Recommendations

a) The county governments

Having discussed their custodian role under chapter two, and the discussion of the implementation of the CBNRM in the management of the resources, the county governments should allow the communities to take a central role in this management. In that the communities themselves decide to set up the conservancies and acquire certain rights for the use of it and describe these rights and the benefits to be derived from it. The county government role does not cease but becomes more of a supervisory one to ensure that the community's performance is still well. At their interpretive levels, the provision of the custodian role of the government needs to be interpreted and applied together with the provision of allowing communities to participate in making decisions that concern them that is both sections 4(b) of the WCMA and 6(6) of the CLA to reduce the conflict escalation discussed in chapter two.

Lastly, at the regulation level, there is a need to regulate the NRT operations. In that as much as it champions conservation practices that allow the preservation of wildlife and biodiversity its activities should be able to be monitored and the conservancies being formed be regulated. This can be done by having guidelines that specify how far their operations can go, prescribing legal implications for the failure and applying the implications for such failures.

b) The legislative level

At the legislative level, there is a need to revisit the fifth schedule of the WCMA to include a CBNRM section and guidelines that follow how it should be implemented. The guidelines can operate as separate legislation that would allow the county governments to be guided on how they can effectively allow communities to take part in making decisions that affect the use of their land and must be made in a way that failure to comply would lead to consequences punishable by the law.

c) Administrative level

The conservationists

For the conservationists, such as NRT as described under CBNRM programs, they should facilitate the conservation programs by allowing communities to be the key decision makers in the use of their land rather than the organisation itself. This is to reduce the resistance towards the conservation programs and allow them to work together with communities in integrating their livelihood and conservation practices

5.4 Conclusion

In summary, this study has found that the lack of participation and involvement of communities in management of their resources when forming conservancies has caused conflicts and dispossession of indigenous communities from their land. From this then, it has been hard for communities to practice their livelihood, and support conservation programs. Therefore with the evident climate change needs and the pressure being caused on pastoral communities' land the adoption of the three recommendations will result in a better and more inclusive approach that can enable all parties from communities to the county governments and conservationists be able to benefit from the conservation efforts while allowing communities to practice their livelihood that is beneficial to the country in terms of meat provision discussed in subsequent chapters.

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