

# FOOD SECURITY AND LAND GOVERNANCE FACTSHEET

## Kenya



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### ABSTRACT

In Kenya, insecure land tenure and inequitable access to land, forest and water resources have contributed to conflict and violence, which has in turn exacerbated food insecurity. To address these interlinked problems, a new set of laws and policies on food security and land governance are currently being introduced or designed by the Government of Kenya. The new Food Security Bill explicitly recognizes the link between food security and land access, and the 2012 land laws target the corrupt system of land administration that made much of Kenya's land grabbing possible. A Community Land Bill seeks to protect the customary rights of local residents and prevent people from losing their land without compensation.

Kenya's reforms are being made in the spirit of the new 2010 Constitution of Kenya, which establishes a devolved system of government called 'County Government'. With respect to land governance, the new Constitution is being hailed as promising and progressive, as it seeks to devolve control over land and to address the historical and political roots of the country's land problems. However, since the Constitution came into effect in 2013, the implementation process of these reforms has been fraught with problems and delays, and so, many of the land governance issues on the ground appear to remain unchanged.

This country factsheet was prepared under auspices of LANDac – the Netherlands Academy on Land Governance – and was originally compiled by the Royal Tropical Institute (KIT – Thea Hilhorst and Nicolas Porchet) at the request of the Netherlands Ministry of Foreign Affairs. In 2015, the factsheet was updated by Angela Kronenburg García (African Studies Centre Leiden) in collaboration with LANDac (Gerard Baltissen, KIT; Gemma Betsema, LANDac; Jur Schuurman, Utrecht University-IDS) with support from the Food and Business Knowledge Platform (F&BKP) as part of the LANDac/F&BKP knowledge agenda on land governance and food security.

### **About LANDac**

LANDac, the Netherlands Academy on Land Governance for Equitable and Sustainable Development, is a partnership between Dutch organizations working on land governance. The partners are the International Development Studies (IDS) group at Utrecht University (leading partner), African Studies Centre, Agriterra, the Sociology of Development and Change (SDC) group at Wageningen University, HIVOS, the Royal Tropical Institute (KIT), and the Netherlands Ministry of Foreign Affairs. The LANDac network conducts research, disseminates information, and organizes courses and training, focusing on new pressures and competing claims on land and natural resources. Guiding question is how to optimize the link between land governance, sustainable development and poverty alleviation.

[www.landgovernance.org](http://www.landgovernance.org)

### **About F&BKP**

The Food and Business Knowledge Platform (F&BKP) is one of the five Knowledge Platforms initiated by the Dutch Ministry of Foreign Affairs. It is an open and independent initiative where representatives from international networks and organizations of business, science, civil society and policy come together. The Platform shares, critically reflects on, generates, deepens and improves (interdisciplinary) knowledge and feeds practices and policies on food and nutrition security. Land governance is one of the prioritized themes in its mission to develop a more focused knowledge agenda.

[www.knowledge4food.net](http://www.knowledge4food.net)

**Regulatory land governance framework**

In December 2009, the Kenyan Parliament approved a new National Land Policy, which was seen as a critical step towards addressing the current patchwork of often incompatible laws and ensuring efficient, sustainable and equitable land use.

This policy was a response to the Ndung’u report, prepared by the Ndung’u Commission as it became known after its chairman, which was made public in December 2004. Then President Mwai Kibaki instigated this Commission of Inquiry into the Illegal/Irregular Allocation of Public Land. The report exposed widespread land corruption in Kenya’s system of land management and administration, particularly through land grabs by public officials, well-connected individuals and businesses (Southall 2005; Manji 2015: 7-9).

The National Land Policy was embedded in the new 2010 Constitution of Kenya in Chapter 5 on Land and Environment. The Constitution came into effect in March 2013 when Uhuru Kenyatta became Kenya’s new President. It declares that land should be held in an equitable, efficient, productive and sustainable manner. It also addresses the practice of land grabbing by proposing a new National Land Commission that would, amongst other functions, investigate and redress ‘present and historical land injustices’<sup>1</sup>

Both the National Land Policy and the new Constitution of Kenya are widely regarded as being radical and constitute significant achievements of a long struggle for land reform. They promise a complete overhaul of Kenya’s land governance framework that would improve tenure security and ensure equitable access to land. However, the subsequent process of drafting and enacting new legislation is largely seen as a failure, as the resulting land laws do not reflect the guiding principles of these documents (Manji 2014, 2015).

The new legislation on land was enacted in April 2012 and includes the Land Act, the Land Registration Act and the National Land Commission Act. With the enactment of the Land Act and the Land Registration Act a number of old laws were repealed such as the 1915 Government Lands Act. It was this Government Lands Act that had enabled widespread land grabbing by government officials (Klopp & Lumumba 2014: 62).

The Environment and Land Court Act was passed in 2011 and accords the Environment and Land Court jurisdiction to hear and determine disputes related to land.

As of this writing (August 2015), there are three land bills under consideration: the 2014 Community Land Bill, the 2014 Evictions and Resettlement Bill and the 2015 Minimum and Maximum Land Holding Acreages Bill.

**Policy and legislative framework**

2009 NATIONAL LAND POLICY	This policy was formulated ‘to provide an overall framework and define the key measures required to address the critical issues of land administration, access to land, land use planning, restitution of historical injustices, environmental degradation, conflicts, unplanned proliferation of informal urban settlements, outdated legal framework, institutional framework and information management’ <sup>2</sup>
2010 CONSTITUTION OF KENYA	‘Land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with the following principles: (a) equitable access to land; (b) security of land rights; (c) sustainable and productive management of land resources; (d) transparent and cost effective administration of land; (e) sound conservation and protection of ecologically sensitive areas; (f) elimination of gender discrimination in law, customs and practice related to land and property in land; and (g) encouragement of communities to settle land disputes through recognised local community initiatives consistent with this Constitution’ <sup>3</sup>
2011 ENVIRONMENT AND LAND COURT ACT	An Act to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land, and to make provision for its jurisdiction, functions and powers, and for connected purposes.

1 Constitution of Kenya 2010, Article 67(1)(e).

2 Government of Kenya, ‘Sessional Paper No. 3 of 2009 on National Land Policy’: p. ix.

3 Constitution of Kenya 2010, Article 60(1).

## Policy and legislative framework

2012 LAND ACT	An Act to revise, consolidate and rationalize land laws, to provide for the sustainable administration and management of land and land-based resources, and for connected purposes. The Land Act only covers two of the three land categories recognized in the Constitution, namely Public and Private Land. The third category, Community Land, is to be governed by a separate Act that still needs to be enacted (see below).
2012 LAND REGISTRATION ACT	An Act to revise, consolidate and rationalize the registration of titles to land, to give effect to the principles and objects of devolved government in land registration, and for connected purposes.
2012 NATIONAL LAND COMMISSION ACT	An Act to make further provision as to the functions and powers of the National Land Commission, qualifications and procedures for appointments to the Commission, to give effect to the objects and principles of devolved government in land management and administration, and for connected purposes.
2014 EVICTIONS AND RESETTLEMENT BILL	An Act to provide for procedures for the evictions of unauthorized occupants from Private or Public Land and the resettlement of displaced persons coerced or involuntary displacement and for matters incidental and related thereto. Bill status: Forwarded to the Attorney General for publication.
2014 COMMUNITY LAND BILL	Provides for the recognition, protection and registration of Community Land rights, management and administration of Community Land, for the establishment of and the powers of Community Land management committees, provides for the role of county governments in relation to unregistered Community Land and for connected purposes. Bill status: Forwarded to the Attorney General for publication. The constitutionally stipulated deadline for the enactment of the Community Land Act is 27 August 2015. Until then, Community Land continues to be governed by existing law on the colonial land category of Trust Land.
2015 MINIMUM AND MAXIMUM LAND HOLDING ACREAGES BILL	Provides for minimum and maximum land holding acreage in respect to Private Land and for connected purposes. Bill status: Undergoing internal review & stakeholder consultations.

Kenya is still in the process of land law reform and therefore the existing legal framework governing land remains a collection of colonial and post-colonial statutes, as well as the more recently enacted land laws.

## Legislative framework: colonial laws and post-colonial statutes

THE 1939 TRUST LAND ACT (revised 2012)	This Act applies to all land, which for the time being is Trust Land. The category of Trust Land will be replaced by Community Land as soon as the Community Land Bill is passed and the Trust Land Act is repealed.
THE 1959 LAND CONSOLIDATION ACT (revised 2012)	An Act to provide for the ascertainment of rights and interests in, and for the consolidation of, land in the special areas, for the registration of title to, and of transactions and devolutions affecting, such land and other land in the special areas, and for purposes connected therewith and incidental thereto. It governs Trust Land.
THE 1967 LAND CONTROL ACT (revised 2010)	An Act to provide for controlling transactions in agricultural land.
THE 1968 LAND (GROUP REPRESENTATIVES) ACT (revised 2012)	An Act to provide for the incorporation of representatives of groups who have been recorded as owners of land under the Land Adjudication Act, and for purposes connected therewith and purposes incidental thereto. This Act will be repealed with the passing of the Community Land Bill. Land that used to be governed under this Act, such as group ranches in Kenya's pastoral areas, becomes classified as Community Land.
THE 1968 LAND ADJUDICATION ACT (revised 2012)	An Act to provide for the ascertainment and recording of rights and interests in Trust Land, and for purposes connected therewith and purposes incidental thereto. It governs Trust Land.

Customary law as it applies to land rights, tenure and land disputes was recognized in Trust Land legislation and is also recognized in the Community Land Bill. This means that customary law will govern at least 73.8% of land in Kenya (Community Land is estimated at this percentage, see below). Customary law is understood to vary from community to community, is usually unwritten and not encoded in formal law. There are efforts on the part of the Judiciary to document customary laws for individual communities, although these efforts are still in the early stages (Gaafar 2014). Customary law is only valid to the extent that it is consistent with the Constitution. This is important with respect to the gender equality principle in relation to land governance (see later).

## Land categories and tenure forms

Chapter 5 of the Constitution of Kenya states that 'all land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals'.<sup>4</sup> Thus, land in Kenya is classified as Public, Community or Private Land.

Forms of tenure include freehold, leasehold, customary and some forms of partial interest such as easements.

Land categories and tenure forms	
Private Land	The tenure options for Private Land include freehold tenure (only possible for Kenyan citizens) and leasehold tenure (for both Kenyan citizens and foreigners). In 2001, Private Land was estimated at 12.9% of Kenya's land, but this percentage must have decreased now as group ranches, which were formerly classified under Private (collective freehold) Land, now fall under Community Land.
Public Land	The National Land Commission is mandated to administer Public Land and therefore this institution will decide whether it shall be freehold or leasehold. Based on the Government Land estimates of 2001, Public Land comprises 13.3% of Kenya's land.
Community Land	According to the 2014 Community Land Bill, Community Land may be held under customary, freehold, leasehold and any other tenure form recognized in written law. Unregistered Community Land (which is, technically, still 'Trust Land') shall be managed and administered by the National Land Commission on behalf of the County Government. Community Land includes land that falls under the category of Trust Land (estimated at 73.8% of Kenya's land in 2001), but also collective freeholds such as group ranches that were formerly classified under Private Land.

(Wily & Mbaya 2001: 79; Doshi et al. 2014: 7)

'Land registration' is the term used in Kenya for land titling. The general procedures for land registration are laid out in the 2012 Land Registration Act. Private Land and registered Community Land (i.e. the group ranches) is titled, but the largest part of Kenya (the unregistered Community Land, formerly Trust Land) is not. The National Land Commission Act stipulates that the commission will "advise the national government on a comprehensive programme for the registration of title in land throughout Kenya" and that it "shall ensure that all unregistered land is registered within ten years from the commencement of this Act".<sup>5</sup> The Community Land Bill provides for the recognition, protection and registration of community land in particular.

## Institutional land governance framework

Kenya's institutional land governance framework, like its regulatory framework, is undergoing a process of transition and implementation. The most important change is the establishment of a National Land Commission, made possible by the 2012 National Land Commission Act. The National Land Commission is mandated to manage Public Land (which used to be managed by the Ministry of Lands) and unregistered Community Land. It is composed of one chairperson and 8 members, who may not hold a political position or have stood for elections within the preceding five years. After a controversial delay of months, President Kibaki finally appointed the commissioners in February 2013.<sup>6</sup>

The setting up of an independent National Land Commission was a response to the problem of grabbing of public land made possible by a corrupt system of land administration housed in the Ministry of Lands. In the spirit of devolution and democratic accountability enshrined both in the 2009 National Land Policy and the 2010 Constitution, powers from the Ministry of Lands, Housing and Urban Development (as the Ministry is now called) were to be transferred to the new National Land Commission (as well as to District Land Boards and Community Land Boards, see below). The Ministry of Lands was envisaged to continue performing 'residual roles' such as policy formulation and enforcement, resource mobilization, and monitoring and evaluation.<sup>7</sup>

4 Constitution of Kenya 2010, Article 61(1).

5 National Land Commission Act 2012, Article 5(1)(c) and Article 5(3).

6 <http://ibrahimmwathane.com/index.php/frontpage/entry/president-finally-gazettes-national-land-commission>, accessed 16 October 2015; <http://www.nation.co.ke/News/Appoint-land-commission-Kibaki-and-Raila-told/-/1056/1626684/-/d9ye4l/-/index.html>, accessed 16 October 2015.

7 Government of Kenya, 'Sessional Paper No. 3 of 2009 on National Land Policy': p. x.

As could be expected, the Ministry of Lands responded to this reduction of its powers by undermining and underfunding the National Land Commission. Poor drafting of the Act, allegedly deliberate, has not only compromised the independence of the National Land Commission but has further stimulated ongoing wrangles between the National Land Commission and the Ministry of Lands over their respective mandates, staffing and funding (Manji 2015: 12; Klopp & Lumumba 2014: 67). In April 2015, the Ministry of Lands even proposed reviewing the 2009 National Land Policy and amending all three 2012 land laws, a move that would significantly reduce the powers of the National Land Commission – and increase those of the Ministry again.<sup>8</sup>

Apart from the National Land Commission, the 2009 National Land Policy also proposed setting up District Land Boards and Community Land Boards to manage land locally. County Land Management Boards (in place of District Land Boards)<sup>9</sup> have so far been established with the 2012 National Land Commission Act and in 2014 they were given powers to allocate land at county level.<sup>10</sup> The establishment of Community Land Boards, however, remains uncertain as some drafts of the 2014 Community Land Bill include provisions for it and others do not.<sup>11</sup>

Other important institutions in the land sector include: County Governments and the Environment and Land Court.

### **Gender**

The 2010 Constitution of Kenya prohibits discrimination, and women and men are granted the right to equal treatment and equal opportunities in the political, economic, cultural and social spheres. With respect to land, one of the principles of land policy includes the 'elimination of gender discrimination in law, customs and practices related to land and property in land'.<sup>12</sup> But although this principle has been translated into new legislation, women's ability to exercise and enforce their rights to land continues to be limited. One problem is that Kenya's land law reform has so far failed to acknowledge and address the interconnectedness of law. To address women's land rights and promote their access to land, reforms must also transpire in other areas of law such as inheritance law, family law and mortgage law (Manji 2015: 10). Another problem is that customary law and Kenyan society's general patriarchal nature often discriminate against women and limit their rights to land (Gaafar 2014). As a result, women hold only about 1 per cent of registered land titles, while 5 to 6 per cent of registered titles are held jointly by men and women (Gaafar 2014).

At present, women constitute about 70 per cent of Kenya's small-scale farmers, who produce 75 per cent of Kenya's food (USAID 2014). It is believed that improving African women's access to and ownership of land will also improve food security at household level (Espinosa 2014).

### **Indigenous people**

Kenya counts numerous indigenous groups living all over the country. Many of them have been evicted from their lands in the past decades without prior consent or fair compensation.

As an example, in 2010, a landmark ruling by the African Commission on Human and Peoples' Rights stated that the Government of Kenya had violated the charter by evicting the Endorois people, a traditional pastoralist community, from their homes at Lake Bogoria in central Kenya in the 1970s, to make way for a national reserve and tourist facilities (Human Rights Watch 2010). It ordered the Government to restore the Endorois to their historical land and to compensate them (Human Rights Watch 2010), but so far it has failed to comply (Marlin 2015).

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8 <http://www.kenya-today.com/news/ruto-set-stage-for-cutting-powers-of-national-land-commission-grabbing-to-be-simplified>, accessed 18 August 2015; [http://www.standardmedia.co.ke/article/2000158285/cs-matiang-i-wants-land-laws-amended-to-cut-nlc-powers?articleID=2000158285&story\\_title=cs-matiang-i-wants-land-laws-amended-to-cut-nlc-powers&pageNo=1](http://www.standardmedia.co.ke/article/2000158285/cs-matiang-i-wants-land-laws-amended-to-cut-nlc-powers?articleID=2000158285&story_title=cs-matiang-i-wants-land-laws-amended-to-cut-nlc-powers&pageNo=1), accessed 18 August 2015.

9 With the introduction of County Government, the category of 'district' was abolished and the category 'county' introduced.

10 <http://mobile.nation.co.ke/news/County-Land-Management-Boards-Kenya-Gazette-Notice/-/1950946/2498478/-/format/xhtml/item/0/-/x513o1/-/index.html>, accessed 19 August 2015.

11 The draft on the Kenya Law website includes provisions for Community Land Boards (see <http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2014/KenyaGazetteSupplementNo147.pdf>, accessed 18 August 2015), and the draft on the website of the Commission for the Implementation of the Constitution does not (see <http://www.cickenya.org/index.php/legislation/item/480-the-community-land-bill-2014#.VdNKohz41fw>, accessed 18 August 2015).

12 Constitution of Kenya 2010, Article 60(1)(f).

The Endorois case has encouraged other indigenous groups in Kenya to sue the Government for denying their rights to land. The Ogiek, one of the few forest-dwelling communities and one of the most marginalized indigenous peoples in Kenya, are one of them. They have experienced forced evictions from their lands in Mau Forest without consultation and compensation. The case against the Government of Kenya was originally lodged with the African Commission and Human and Peoples' Rights, but was referred to the African Court on Human and Peoples' Rights on the basis that it evinces serious and mass human rights violations. This is the first time the African Court, in operation since 2006, will hear an indigenous peoples' rights case and indeed is one of the first ever court cases. (Minority Rights Group International 2014)

### **Land acquisitions**

Inheritance is the most widespread method of obtaining land rights in Kenya, followed by purchase; while land leasing is common in some rural areas (USAID 2010: 6).

The 2010 Constitution states that foreign individuals and companies may only hold land on the basis of leasehold tenure and that such a lease may not exceed 99 years.

According to Klopp & Lumumba (2014) and the Land Matrix<sup>13</sup>, Kenya has experienced 17 large-scale investments in land-based enterprises over more than 735,000 ha (approx. 13.2 per cent of Kenya's arable land) since the 2007/2008 food crisis, although some of these investments preceded the crisis. Most investors are foreign but some are government bodies. Plantations are growing sugar cane, jatropha, maize, oil seed, rice, and flowers. Land is also acquired for mining titanium, harvesting fish and producing wind energy. Of the investments producing food crops, most seem to target the domestic market but the Qatar project in Tana River Delta controversially intended to cultivate fruits and vegetables to be exported back to Qatar (Klopp & Lumumba 2014; FIAN 2010; Nunow 2011; Makutsa 2010). Many proposed investments have either been cancelled (like the Qatar land deal) or stalled due to legal battles, local resistance or delays in getting a license from the National Environmental Management Authority. It is hoped that Kenya's land reforms will enable 'local citizens and experts to have more say in how their land is managed and used and by whom', particularly through new institutions of devolved government such as the Environment and Land Court, County Government and the County Land Management Boards (Klopp & Lumumba 2014: 67).

## **FOOD SECURITY**

### **Current food security situation**

According to a report on the effects of the 2013-2014 short rains season on Kenya's food security situation (Rembold et al. 2014), the country was affected as follows. The poor rains had a negative impact on maize production in the southeastern and coastal zones and on the vegetation of the northern pastoral drylands, which experienced drought. As a result, the food security situation was 'stressed' (IPC Phase 2) in the southeastern and coastal areas and in the northern areas it ranged from 'stressed' to 'crisis' (IPC Phase 3). The same areas were affected again with unfavourable rains during the 2014-2015 rainy season. More people are expected to become food insecure and in the northern areas more households are likely to go from a 'stressed' food security situation to a 'crisis' one (FEWS NET 2015). The capital city of Nairobi also experienced increased food insecurity (USAID 2014).

The latest estimate of the number of food insecure people counts 1.5 million, and it is expected that this number will further increase (USAID 2014, FEWS NET 2015).

The food security problems in Kenya's northern drylands are chronic and not only due to erratic rainfall but also due to socio-economic factors such as poor infrastructural facilities and unfavourable market systems (Wambua et al. 2014). Displacements resulting from interethnic conflicts or terrorism-related insecurity also exacerbate food insecurity in this area (USAID 2014). Refugees from Somalia and South Sudan staying in northern Kenya's refugee camps depend on food assistance for survival.<sup>14</sup>

### **Regulatory & institutional framework around food security**

The Constitution states that 'every person has the right to be free from hunger, and to have adequate food of acceptable

13 <http://www.landmatrix.org/en/get-the-detail/by-target-country/kenya/>, accessed 22 October 2015.

14 <https://www.usaid.gov/kenya/food-assistance>, accessed 27 August 2015.

quality'.<sup>15</sup> It is in this constitutional context that the 2011 National Food & Nutrition Security Policy was framed. Its objectives are: a) to achieve good nutrition for optimum health of all Kenyans; b) to increase the quantity and quality of food available, accessible and affordable to all Kenyans at all times, and; c) to protect vulnerable populations using innovative and cost-effective safety nets linked to long-term development.

In July 2015 a new Food Security Bill was passed by the Senate.<sup>16</sup> The Bill addresses issues of access to food through production, purchase and food distribution/subsidy programmes implemented by the State.<sup>17</sup>

The Food Security Bill establishes a Food Security Authority whose principle functions include the formulation of strategies, plans and programmes on food security and nutrition, as well as monitoring and evaluating their implementation by county food security committees. The Food Security Authority will operate under the Ministry of Devolution and Planning.

### **Food security and land governance**

Both the Food Security Bill and the National Food & Nutrition Security Policy explicitly recognize the link between food security and land access for those citizens that feed themselves through agricultural production. The Food Security Bill directs the Food Security Authority to participate in the land reform process to ensure that food security is taken into account. How this directive will be implemented and what its effects will be on food security remains to be seen.

Muraoka et al. (2014) found that land rental markets are the most important means available to smallholder farmers to access additional land for cultivation and increase their food security. They also found that these markets are underperforming. Their policy implication is therefore that food security and nutrition strategies should target improving the functioning of land rental markets.

The National Food & Nutrition Security Policy blames the food security problems of Kenya's drylands (or, Arid and Semi-Arid Lands, ASALs) on natural (droughts, floods) and man-made (conflict, unsustainable land management) disasters. It therefore tends to focus on improving disaster emergency relief, eradicating conflicts and banditry, institutionalizing drought management, sinking boreholes to support irrigation schemes, and promoting proper range and livestock management practices.

The National Food & Nutrition Security Policy recognizes that bio-fuel production and the leasing out of agricultural land for export production affect local food production but insists that 'interventions to ensure ... food and nutrition security for all Kenyans remain the priority of the Government.'<sup>18</sup> This stands awkwardly with the proven record of large-scale land acquisitions approved by the Government for export crops, jatropha, mining, etc.

As mentioned earlier, one of the targets of the National Land Commission is to ensure that all unregistered land (i.e. Trust Land/Community Land) is registered before 2022. A vast area of Kenya's northern drylands falls under this land status. Although the purpose of registration is to secure community land and customary land rights, similar experiences with collective land registration, particularly among the pastoral Maasai in south Kenya, have eventually led to individualization of tenure and, in the process, many lost access to land (Rutten 1992). The food security effects of individualization in Maasailand were inconclusive at first (Rutten 1998), the long-term effects are said to be 'deleterious' (Thornton et al. 2006).

## **INTEGRATED WATER RESOURCE MANAGEMENT (IWRM)**

In Kenya, water supply is insufficient to satisfy demand as 80 per cent of the country has an arid or semi-arid climate (USAID 2010: 9). Water scarcity is aggravated by degradation of existing water resources and increasing volatility of rainfall amounts, resulting in periodic droughts or floods (USAID 2010: 10).

<sup>15</sup> Constitution of Kenya 2010, Article 43(1)(c).

<sup>16</sup> <http://kenyalaw.org/kl/index.php?id=4248>, accessed 26 August 2015.

<sup>17</sup> [http://www.standardmedia.co.ke/article/2000135968/bill-to-cushion-citizens-at-risk-of-food-shortage?articleID=2000135968&story\\_title=bill-to-cushion-citizens-at-risk-of-food-shortage&pageNo=1](http://www.standardmedia.co.ke/article/2000135968/bill-to-cushion-citizens-at-risk-of-food-shortage?articleID=2000135968&story_title=bill-to-cushion-citizens-at-risk-of-food-shortage&pageNo=1), accessed 26 August 2015.

<sup>18</sup> Government of Kenya, 'National Food and Nutrition Security Policy' 2011: p. 5.



Forests in Kenya are important in regulating water supplies. The country relies on high forest 'water towers' notably five main water catchment areas (Mt. Kenya, Mt. Elgon, Aberdares, Cherangany and the Mau Forest). The water towers are sources of water for irrigation and for hydro-electric power stations. Irrigation development has been integrated in the National Food and Nutrition Security Policy as a way of boosting food security in the country.

### Regulatory framework around IWRM

The new 2010 Constitution states that 'every person has the right to clean and safe water in adequate quantities.'<sup>19 20 21</sup> It further charges National Government with water management and protection, securing sufficient residual water, hydraulic engineering and the safety of dams; and County Government with water conservation, storm water management systems in built-up areas and water and sanitation services. A number of draft policies and bills have been formulated to align the water sector to these constitutional requirements. The most important ones include the 2014 Water Bill, the 2012 Draft National Water Policy and the 2015 Draft National Irrigation Policy.

Existing laws and policies that bear on water management include: the 1966 Irrigation Act, the 2000 Environmental Management and Co-ordination Act, the 2005 Forests Act and the 2014 Forest Policy.

A new Forest Conservation and Management Bill will, if passed, repeal the 2005 Forests Act, but does not alter its provisions regarding the management of forests on water catchment areas.

Law	Content Key elements
1966 IRRIGATION ACT (revised 2012)	An Act to provide for the development, control and improvement of irrigation schemes, and for purposes incidental thereto and connected therewith. Establishes the National Irrigation Board.
2000 ENVIRONMENTAL MANAGEMENT AND CO-ORDINATION ACT (revised 2012)	An Act to provide for the establishment of an appropriate legal and institutional framework for the management of the environment and for matters connected therewith and incidental thereto. Establishes the National Environmental Management Authority (NEMA), whose function includes the protection of water catchment areas, control of water quality and prevention of water pollution. An amendment bill for this Act is currently awaiting parliamentary debate.
2005 FORESTS ACT (revised 2012)	An Act to provide for the establishment, development and sustainable management, including conservation and rational utilization, of forest resources for the socio-economic development of the country. This Act establishes the Kenya Forest Service, whose function includes to 'manage forests on water catchment areas primarily for purposes of water and soil conservation, carbon sequestration and other environmental services'. <sup>3</sup>
2014 WATER BILL	To provide for the regulation, management and development of water resources, water and sewerage services, and for other connected purposes. Bill status: Published. Awaiting parliamentary debate. Every water resource is vested in and held by the National Government in trust for the people of Kenya. The Bill separates the management of water resources (to come under the Water Resources Regulatory Authority, an agent of the National Government) from the provision of water services (to come under County Government). The most important change entails the transfer of functions from the Ministry responsible for water to the county governments. <sup>4</sup>
2014 FOREST CONSERVATION & MANAGEMENT BILL	An Act to provide for the establishment, development and sustainable management, including conservation and rational utilisation of all forest resources for the socio-economic development of the country. Bill status: Undergoing internal review & stakeholder consultations. The Kenya Forest Service continues to manage water catchment areas for soil and water conservation, carbon sequestration and other environmental services.

### Institutional framework around IWRM

Responsibility over water and irrigation used to fall under one ministry (the Ministry of Water and Irrigation), but since September 2013, the function of irrigation has been transferred to the Ministry of Agriculture, Livestock and Fisheries

19 Constitution of Kenya 2010, Article 43(1)(d).

20 Forest Act 2005, Article 5(n).

21 <http://allafrica.com/stories/201507131426.html>, accessed 24 August 2015.

under the Irrigation, Technology, Infrastructure Development & Mechanization Directorate.<sup>22</sup> Water remains in the new Ministry of Environment, Water & Natural Resources, itself a combination of the old Ministry of Water & Irrigation, the Ministry of Wildlife & Forestry and the Ministry of Environment & Mineral Resources.<sup>23</sup> Before the devolution process, river and lake basin development authorities used to fall under the Ministry of Regional Development. This ministry is earmarked to being scrapped by the government and therefore it remains unclear whether the river and lake basin development authorities will remain under National Government or will fall under the authority of County Government.<sup>24</sup>

### **Water**

Despite that the 2014 Water Bill proposes to establish many new institutions, this does not seem to be a drastic overhaul of the institutional framework of the water sector, as most of the existing institutions continue to exist under a new name. Thus, the Water Resources Management Authority will become the Water Resources Regulatory Authority, the Water Services Regulatory Board becomes the Water Services Regulatory Authority, the Water Services Trust Fund becomes the Water Sector Trust Fund, the water services boards are renamed as the water works development boards, and the Water Appeals Board becomes the Water Tribunal.

The Water Resources Regulatory Authority is responsible for the overall regulation of water management and use of water. It may establish basin water resources committees responsible for the management of water resources within a respective basin area. At the sub-basin level, water users may establish water resource users associations, which shall be community-based associations for collaborative management of water resources and resolution of conflicts concerning the use of water.

The National Water Conservation and Pipeline Corporation becomes the National Water Harvesting and Storage Authority, except for its property, assets, rights, liabilities, obligations, agreements and other arrangements linked to its water services provision. In line with the devolution requirements of the new Constitution, these are transferred to existing county water services providers or cross county water services providers.

### **Irrigation**

The National Irrigation Board is 'responsible for the development, control and improvement of national irrigation schemes in Kenya'.<sup>25</sup> It manages 7 national irrigation schemes and is currently involved in the one million acre irrigation project in the Galana- Kulalu Food Security Project in Tana River and Kilifi Counties.<sup>26</sup> Overtime, the Boards' activities have expanded to include development of smallholder owner-managed irrigation schemes too.<sup>27</sup>

### **Forest & Environment**

The Kenya Forest Service is the government agency responsible for forest management and the National Environmental Management Authority supervises and co-ordinates all matters relating to the environment and implements environmental policy.

## **REALITIES ON THE GROUND**

Land law reform in Kenya is not translating in substantive land reform (Manji 2015: 4). The new land laws address the long-standing problems of land grabbing and land corruption by wresting control over land from the Ministry of Lands (that, as we saw, is not so easy to do and might even fail), but they do not challenge the unequal structure of land holding by redistributing land from the wealthy to the poor and landless (Manji 2014: 124-127). It is therefore expected that Kenya's long-running land problems such as unequal land distribution, tenure insecurity and related conflict will continue to exist.

22 <http://www.nib.or.ke/media-centre/news-events/136-new-ministry.html>, accessed 24 August 2015.

23 <http://presidency.go.ke/index.php/environment-water-natural-resources>, accessed 24 August 2015. Mining has been granted a ministry of itself.

24 <http://m.news24.com/kenya/Business/News/Fate-of-regional-authorities-unknown-20130418>, accessed 24 August 2015.

25 Irrigation Act 1986, Article 15(1).

26 <http://www.nib.or.ke/about-nib/historical-background.html>, accessed 24 August 2015.

27 Government of Kenya, 'Draft National Irrigation Policy 2015': p. 27.

Land grabbing by politicians continues to occur,<sup>28</sup> and there are concerns over the delay of the passing of the Community Land Bill in the context of ongoing land allocations to companies without legal protection and compensation to local residents.<sup>29</sup> The same institutional framework and network of brokers who facilitate land grabbing by Kenya's elite also mediate foreign investments in agricultural land (Klopp & Lumumba 2014: 55, 63). Domestic and foreign land grabbing impacts smallholder farmers' and pastoralists' access to land and thus also their food security (Klopp & Lumumba 2014: 54, 66).

In many rural areas of Kenya, customary law is the main legal framework governing social life, including use of and access to land, even if it is inconsistent with the Constitution (as we saw in relation to the principle of gender equality). Legal and institutional pluralism is a reality on the ground as customary laws have their own rules, land categories and tenure forms, and their own institutions for conflict resolution. Pluralism gives rise to 'forum shopping' strategies during land-related disputes,<sup>30</sup> but also to power struggles between local elders implementing customary law and state actors enforcing state law (Kronenburg García 2015: 289-310).

The individualization of customary land tenure through or in anticipation of ongoing titling and registration efforts typically benefit the male family heads, dispossessing women and youth as well as other secondary users (like tenants) from rights to land and other natural resources (USAID 2010: 6). In those areas where titling and registration have already occurred, changes in ownership through sale or succession are often not reported due to the high financial and time costs (USAID 2010: 8).

Policies and legislations around food security, water and forests are fairly new, about to be enacted or still in 'draft' version, so how they will be implemented and what their effects will be on the ground remains to be seen.

In the meantime, water scarcity remains an issue in Kenya. It leads to conflict in Kenya's drylands during periods of drought affecting the food security situation in those areas. It is further aggravated by intensive exploitation and extensive degradation of water resources, including water catchment areas. Forests in water catchment areas face deforestation for settlement, cultivation, charcoal and fuel. (USAID 2010)

## RESOURCES AND OTHER INFORMATION

### Related country profiles

USAID: <http://usaidlandtenure.net/kenya>

FAO: <http://www.fao.org/countryprofiles/index.asp?lang=en&ISO3=KEN>

FAO/Gender: [http://www.fao.org/gender-landrights-database/country-profiles/countries-list/general-introduction/en/?country\\_iso3=KEN](http://www.fao.org/gender-landrights-database/country-profiles/countries-list/general-introduction/en/?country_iso3=KEN)

IMF: <http://www.imf.org/external/country/KEN/index.htm>

World Bank: <http://www.worldbank.org/en/country/kenya>

### Laws, policy and regulations search engines

FAOLEX (Kenya country profile): <http://faolex.fao.org/faolex/>

### Maps and databases

Land and soils database/information system: <http://www.fao.org/nr/land/databasesinformation-systems/en/>

Water database/information system: [http://www.fao.org/nr/water/infores\\_databases.html](http://www.fao.org/nr/water/infores_databases.html)

Land and water maps and graphs: [http://www.fao.org/nr/solaw/maps-and-graphs/en/http://www.fao.org/nr/water/infores\\_maps.html](http://www.fao.org/nr/solaw/maps-and-graphs/en/http://www.fao.org/nr/water/infores_maps.html)

<sup>28</sup> See for instance, <http://www.dailymail.co.uk/news/article-2916433/Kenya-Police-tear-gas-school-kids-demo-playground.html>, accessed 28 August 2015.

<sup>29</sup> <http://www.businessdailyafrica.com/Experts-warn-mining-leases-could-fuel-conflict/-/539546/2408350/-/h1kdsa/-/index.html>, accessed 28 August 2015.

<sup>30</sup> When "disputants have a choice between different institutions and they base their choice on what they hope the outcome of the dispute will be, however vague or ill-founded their expectations may be" (K. von Benda-Beckmann 1981: 117).

## Portals and other resources

Landportal: [http://landportal.info/search/apachesolr\\_search/kenya](http://landportal.info/search/apachesolr_search/kenya)

Landesa: <http://www.landesa.org/what-we-do/sub-saharan-africa/kenya/>

Food security portal IFPRI: <http://www.foodsecurityportal.org/kenya>

World Food Programme: <https://www.wfp.org/countries/kenya>

## Donor support programs

The Global Donor Working Group on Land (GDWGL) quotes 30 donor programmes and projects in Kenya (finalized and active ones): <https://landgov.donorplatform.org>

UN Habitat chairs the Development Partners Group on Land in Kenya (DPGL): <http://mirror.unhabitat.org/content.asp?typeid=24&catid=283&id=1603>

DFID, Irish Aid, SIDA, and USAID via UN-Habitat support the implementation of the National Land Policy

The World Bank and USAID have programs for improving water resource management, also linked to Irrigation and the Management of Forest Resources

There is also a Forest Donor Coordination Group (FAO, UNEP, UNDP, USAID, World Bank, the Embassy of Finland, and others).

## Civil Society Organizations working on land governance

### Members of International Land Coalition in Kenya:

Environment Liaison Centre International – Nairobi: <http://www.elci.org/>

Kenya National Farmers' Federation – Nairobi: <http://www.kenaff.org/>

Global Land Tool Network – Nairobi: <http://www.gltln.net/>

International Livestock Research Institute – Nairobi: <http://www.ilri.org/>

Ogiek Peoples' Development Program – Nakuru: <http://www.ogiekpeoples.org/>

Land Development and Governance Institute – Nairobi: <http://www.ldgi.org/>

UNEP – Nairobi: <http://www.unep.org/>

World Agroforestry Centre (ICRAF) – Nairobi: <http://www.worldagroforestry.org/>

Kenya Land Alliance – Nakuru: <http://www.kenyalandalliance.or.ke>

Resource Conflict Institute (RECONCILE) – Nakuru: <http://www.reconcile-ea.org/>

Eastern Africa Farmers' Federation (EAFF) – Nairobi: <http://www.eaffu.org/go/downloads/EAFF%20Position%20on%20Land%20Grab.pdf>

EAFF participates actively in national and international discussions on land governance. Its member countries include: Burundi, DRC, Djibouti, Eritrea, Ethiopia, Kenya, Rwanda, Uganda and Tanzania. EAFF published the 2010 Entebbe Declaration on Large Foreign Land Acquisitions: [http://www.landcoalition.org/sites/default/files/documents/resources/EAFFPositionLargeLandAcquisitions\\_3.pdf](http://www.landcoalition.org/sites/default/files/documents/resources/EAFFPositionLargeLandAcquisitions_3.pdf)

### Other CSOs and private actors

Co-operative Alliance of Kenya Limited (CAK) – Nairobi: <http://www.cak.coop/>

Groots International Kenya – Nairobi: <http://www.groots.org/members/kenya.htm>

LNSA (Land Sector Non-State Actor Group)

The Private sector is also influential in the development of the new land bills, notably through KEPISA (Kenya Private Sector Alliance) – Nairobi: <http://www.kepsa.or.ke/>

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