

USAID COUNTRY PROFILE

PROPERTY RIGHTS AND RESOURCE GOVERNANCE

KENYA

OVERVIEW

In December 2009, the Kenyan Parliament approved the National Land Policy (NLP), the result of a long and intensive process to develop an equitable land policy. The NLP mandates land restitution or resettlement for those who have been dispossessed and calls for reconsideration of constitutional protection for the property rights of those who obtained their land irregularly. The policy reasserts customary land tenure rights and repudiates the focus on converting customary tenure into individual ownership. According to the Kenya National Dialogue and Reconciliation mediation team, the approval of the NLP is a critical step toward addressing land issues in Kenya. The NLP is supported by the new Constitution of Kenya, adopted in August 2010, which calls for a National Land Policy to ensure that land is held in an equitable, efficient, productive and sustainable manner.

Land and politics have long been entwined in Kenya. The use of land as an object of patronage to engender support and consolidate power has been exacerbated by corruption, forced eviction, government backtracking, and lack of redress for those who have lost land through violence. Insecure land tenure and inequitable access to land and natural resources contribute to conflict, which occurred most recently leading up to and following the disputed December 2007 elections.

Tension also surrounds the management and use of Kenya's water and forest resources. Chronic water scarcity is leading to violent conflict in drought-stricken areas. Conservation programs and pastoralists compete for land and water resources near parks and protected areas. And demand for forest resources threatens Kenya's forests.

Legislation has failed to rectify women's marginal role in the management of land and natural resources. In both the statutory system and customary practice, women's rights of use and ownership over resources are not equal to those of men.

KEY ISSUES AND INTERVENTION CONSTRAINTS

- **National Land Policy.** Developing a strategy for effective implementation of the National Land Policy (NLP) should be a priority. The NLP sets out an ambitious agenda for reforming the legal and institutional framework governing land. The reform process needs to be undertaken in an equitable and transparent manner. The Ministry of Lands has proposed a broad public information and awareness campaign but needs help to implement the initiative. The Ministry and civil society groups also need support to maintain dialogue on land policy issues and the policy implementation process.
- **Internally Displaced Persons (IDPs).** Finding solutions related to the resettlement and/or restitution of IDPs should be a priority. Additionally, Kenya's international refugee population would benefit from additional attention and resources. The donor community should consider supporting the restitution and/or resettlement of IDPs through established civil society organizations to ensure transparency and equity. Resettlement criteria should be revised to ensure that female-headed households are prioritized in resettlement schemes, including those that are currently being implemented.
- **Natural Resources Management.** Continuing to support the decentralization of natural resource management could advance democratization and the rule of law in the natural resource sectors. This should include the implementation of more transparent and integrated management practices for threatened land, water and wildlife resources. In particular, these practices should provide resource managers with adequate compensation for conservation and sustainable management of these commonly-held or state-owned resources.
- **Gender.** Changes to the Married Women's Property Act, the Inheritance Law, and other legislation could improve food security and reduce the incidence and spread of HIV/AIDS (landless women are more likely to engage in transactional sex). All land regularization and formalization efforts must consider joint titling/registration and co-ownership of marital property for both husband and wife.
- **Conflict Resolution** Historical land inequities, the push to individualize communal land and competition over natural resources is leading to civil unrest and conflict. There is an urgent need to strengthen local and traditional conflict resolution bodies through education and legal assistance. The NLP calls for Land Boards to use alternative dispute

resolution to facilitate justice. The NLP also emphasizes a participatory approach for natural resource management. Working with local communities and building their capacity to manage their land resources, potentially applying lesson learned from community forestry practices, could also be useful.

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SUMMARY

In December 2009, the Kenyan Parliament approved the National Land Policy (NLP). The policy calls for extensive overhauls to current policies and institutions in an attempt to address chronic land tenure insecurity and inequity. Land inequality is increasing in urban areas, where over 50% of the population lives in informal settlements lacking basic services. The NLP does little to address urban land rights and rapid urbanization.

In recent years, conflict has arisen over land and scarce natural resources. Insecure land tenure and inequitable access to land and natural resources contributed to the violence following the disputed December 2007 elections, while chronic water scarcity has led to violent conflict in drought-susceptible regions.

The degradation of critical natural resources poses a threat to Kenya's social and economic life. Water scarcity is compounded by extensive degradation of water resources, including water catchment areas. The few existing water resources are intensively exploited, resulting in often irreversible environmental damage. Kenya's forests are threatened by encroachment and logging for charcoal and fuelwood. The degradation of critical resource areas, such as the Mau Forest Complex, negatively affects Kenya's parks and wildlife reserves, which are the foundation for the country's tourism industry.

Women's role in the management of land and natural resources has been too often ignored in the legislation. In both the statutory system and customary practice, women's rights of use and ownership over resources are not equal to men's rights even though women are very active in agricultural production and in the gathering of wood, water and medicinal plants for the household.

I. LAND

LAND USE

Kenya has a total land area of 580,000 square kilometers and a 2008 population of 38.5 million people. Seventy-eight percent of the population is rural. Agricultural land makes up 48% of the land area, of which 1.8% is irrigated. The main irrigated crops are vegetables, rice, and coffee (World Bank 2009a; FAO 2005).

Forests account for 6.2% of Kenya's land. The annual rate of deforestation is 0.3%. Twelve percent of Kenya's land is classified as nationally-protected (World Bank 2009a).

In 2008, Kenya's GDP was US \$34.5 billion, of which agriculture represented 21%, industry 14%, and services 65%. A large portion (12%) of Kenya's economy is based on tourism. Approximately 44,600 square kilometers (7.5%) of Kenya's total land area is protected, in the form of National Parks and Reserves and community-based privately-owned parks (World Bank 2009a; Tolvanen 2004).

BOX 1. MACRO INDICATORS

	Year	Score
Population, total	2008	38,534,087
Population ages 0-14: 15-64: 65+ (% of total)	2008	42.8: 54.6: 2.7
Population growth (annual %)	2008	2.6
Rural population (% of total population)	2008	78.4
Population density (people per sq. km)	2008	6.7
Literacy rate, adult total (% of people ages 15 and above)
Land area: Surface area (sq. km)	2008	569,140: 580,370
Arable land (% of land area)	2005	9.2
Agricultural land (% of land area)	2005	47.5
Permanent cropland (% of land area)	2005	0.8
Irrigated land (% of cropland)	2003	1.8
Forest area (% of land area)	2005	6.2
Nationally protected areas (% of total land area)	2006	12.1
Renewable internal freshwater resources per capita (cubic meters)	2007	551.5
Annual freshwater withdrawals, agriculture: domestic: industry (% of total freshwater withdrawal)	2007	79.2: 17.2: 3.7
Crop production index (1999-2001 = 100)	2005	101.8
Livestock production index (1999-2001 = 100)	2005	110.8
GDP (current US\$)	2008	34,507,015,778
GDP growth (annual %)	2008	3.6
Agriculture: industry: manufacturing: services, value added (% of GDP)	2008	21.3: 13.5: 9.1: 65.3
Ores and metals exports: imports (% of merchandise exports: imports)	2007	2.8: 2.2
Aid (% of GNI)	2007	4.7

Source: World Bank, 2009

In 1999/2000, approximately 54% of Kenya's population lived below the national poverty line, with slightly more of the poor living in rural areas. Fifty-five percent of the rural population and 51% of the urban population were below the national poverty line (Thurlow et al. 2007).

Kenya has a diverse complex of ethnic groups, each practicing its own land-management customs. From this point forward in the report, these very different systems will be referred to in the aggregate as customary law and practice, for the purpose of differentiating them from formal legal systems.

LAND DISTRIBUTION

According to a UN report, 80% of residential land in Nairobi is occupied by only 20% of the population (Malhotra 2002).

Twenty percent of Kenya's agricultural land is classified as medium- to high-potential and attracts the majority of the population; three out of four Kenyans inhabit this area. The two arid northern provinces of Kenya comprise half the land area of the country yet are home to less than 3% of the population, mainly nomadic pastoralists, including Kalenjin (mixed tribes), Maasai, Somalis, and Borana. Competition among nomadic groups over cattle and grazing combined with periods of drought has perpetuated a subsistence way of life (World Bank 2008; MRGI 2008).

Land distribution is a high profile issue, in part because of the well-documented illegal appropriations of public land by the elite during the late 1980s through the 1990s. Land inequality as measured by the Gini was 0.612, based on reported size of ownership in 1997. Nationally, there was a 36% increase in the Gini over the period 1997–2005/6, to about 0.83 for landholding in the entire population. The increase in the Gini is linked to worsening inequality, which was marked in the Coast and Nyanza provinces and in rapidly-growing urban areas (World Bank 2008; Oxfam Great Britain 2009).

Urban poverty in Kenya is increasing. Over 50% of the total urban population lives in extremely dense informal settlements. The percentage is higher in Nairobi, where an estimated 60% of the population lives in informal settlements. Population density in these settlements can be as high as 1000 people per hectare. The majority of slum-dwellers (92%) are rent-paying tenants with no tenure security, either legal or perceived. The buildings are owned by absentee landowners who provide extremely poor housing units without basic services. In Nairobi's Kibera, landowners are often descended from the inhabitants to whom the land was originally granted, or they have paid a fee to a government official to erect a building (Oxfam Great Britain 2009; Malhotra 2002; World Bank 2008; *Economist* 2007).

BOX 2. LAND TENURE INDICATORS

	Score
<u>Millennium Challenge Corporation Scorebook, 2009</u>	
– Land Rights and Access (Range 0–1; 1=best)	0.712
<u>International Property Rights Index, 2009</u>	
– Physical Property Rights Score (Range: 0–10; 0=worst)	5.5
<u>World Economic Forum's Global Competitiveness Index, 2008-2009</u>	
– Property Rights (Range: 1–7; 1=poorly defined/not protected by law)	4.2
<u>World Economic Forum's Global Competitiveness Index</u>	
– Ease of Access to Loans (Range: 1–7; 1=impossible)	4.1
<u>International Fund for Agricultural Development, Rural Poverty Report, 2001</u>	
– Gini Concentration of Holdings, 1981-1990 (Range: 0–1; 0=equal distribution)	0.77
<u>International Fund for Agricultural Development, Rural Sector Performance Assessment, 2007</u>	
– Access to Land, 2007 (Range: 1-6; 1=unsatisfactory access)	3.8
<u>Food and Agricultural Organization: Holdings by Tenure of Holdings</u>	
– Total Number of all Agricultural Holdings, Year	..
– Total Area (hectares) of all Agricultural Holdings, Year	..
– Total Number of Holdings Owned by Holder; Year	..
– Total Area (hectares) of Holdings Owned by Holder; Year	..
– Total Number of Holdings Rented from Another; Year	..
– Total Area (hectares) of Holdings Rented from Another; Year	..
<u>World Bank Group, Doing Business Survey, 2009</u>	
– Registering Property-Overall World Ranking (Range: 1–181; 1=Best)	82
<u>World Bank Group, World Development Indicators, 2009</u>	
– Registering Property-Number of Procedures	8
– Registering Property-Days Required	64
<u>World Bank Group, World Development Indicators, 1998</u>	
– Percentage of Population with Secure Tenure	97.3
• Kisumu	
<u>Heritage Foundation and Wall Street Journal, 2009</u>	
– Index of Economic Freedom-Property Rights (Range 0-100; 0=no private property)	30
<u>Economic Freedom of the World Index, 2008 (2006 data)</u>	
– Legal Structure and Security of Property Rights (Range 0-10;0=lowest degree of economic freedom)	5.07
– Protection of Property Rights (Range 0-10; 0=lowest degree of protection)	5.15
– Regulatory Restrictions of Sale of Real Property (Range 0-10;0=highest amount of restrictions)	7.41

LEGAL FRAMEWORK

The Constitution of Kenya (2010) declares that “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 recognized local community initiatives consistent with this Constitution” (GOK 2010, Article 60).

The National Land Policy (NLP), adopted in December 2009, is intended to guide Kenya toward sustainable and equitable land use and replace the existing patchwork of often incompatible laws. The NLP outlines broad and substantial reforms to the land management and administration system. The policy: 1) recognizes and protects customary rights to land; 2) outlines principles of sustainable land use and provides productivity and conservation targets and guidelines; 3) calls for reform of land management institutions to ensure devolution of power, increased participation and representation, justice, equity, and sustainability; 4) establishes the National Land Commission, District Land Boards, and Community Land Boards; 5) calls for the development of a legal and institutional framework to handle land restitution and resettlement for those who have been dispossessed; and 6) calls for reconsideration of constitutional protection for the property rights of those who obtained their land irregularly (GOK 2009b).

The NLP focuses heavily on agrarian land issues at the expense of urban and peri-urban areas. As urbanization increases, there will be critical need for a policy governing urban land. A comprehensive strategy for effectively implementing the National Land Policy has yet to be adopted. The breadth of the NLP may limit implementation of its proposed changes (GOK 2009b; Bruce 2008; Aggarwal and Roth 2008; Ayieko 2009; USAID/Kenya 2009a).

The existing legal framework governing land is a collection of colonial and post-colonial statutes. The 1968 Land (Group Representatives) Act governs group ownership of land. The Act states that land may be held communally and in accordance with applicable customary laws and practices (KLA 2005).

The 1963 Registered Land Act governs individual ownership of land. The Registered Land Act applies to registered land formerly held under customary law, trust land, and land known as “native reserves.” The Act does not apply to land held by the government or local authorities and does not recognize customary rights of use (GOK 1963).

The 1962 Land Control Act (LCA) governs transactions in agricultural land. Under the LCA, local Land Control Boards (LCBs) must approve all transactions in agricultural land including sale, lease, mortgage, and division (GOK 1962).

The 1948 Transfer of Property Act also governs individual ownership of land (see the 1963 Registered Land Act above). The Transfer of Property Act governs land in settler and formerly settler-occupied areas, which were designated during the colonial period as the white highlands (GOK 1948b).

The 1948 Government Lands Act gives the President power to make grants or dispositions of any estates, interests or rights in or over unalienated government lands to individuals (GOK 1948a).

The 1939 Trust Land Act also governs group ownership of land (see the 1968 Land [Group Representatives] Act above). The Trust Land Act states that land in areas that were occupied by indigenous Kenyans during the colonial period and that has not been consolidated, adjudicated, and registered in individual or group names, and indigenous land that has not been taken over by the government, is governed by the Trust Lands Act. These lands are vested in local authorities designated as community councils (GOK1939).

Although not part of the formal land system, customary land holding systems continue to exist, and vary among ethnic groups. They can include lending/borrowing of land for residential or cultivation purposes, ownership of buildings and trees separately from the land, land subleasing, squatting in its many forms, and traditional easements. The elders and other local leaders monitor these informal arrangements, often in tandem with local authorities (the District Commissioner and the municipal council) (Swazuri and Yahya 2007).

TENURE TYPES

The National Land Policy designates all land in Kenya as public, private (freehold or leasehold tenure), or community/trust land, which is held, managed and used by a specific community. Currently, however, the main classifications of land ownership in Kenya are private (freehold), government, and trust land held by councils for the benefit of a community.

Freehold. Private freehold land makes up about 20% of the country's land and is held either individually or collectively. Most of the high-value agricultural land has been adjudicated and registered as freehold. Collective freeholds include group ranches established under the Land (Group Representatives) Act in 1968. The Act recognizes customary tenure of pastoralist groups and grants every member of a group an equal, undivided interest in the group ranch. Elected group representatives act as legal trustees of the ranch (GOK 2009b; Mwenda 2006; Aggarwal and Roth 2008).

Government-owned land. Approximately 10% of Kenya's land is under government ownership and includes all unalienated land, including gazetted forests, protected areas and reserves, rivers, and land occupied by government or quasi-government institutions (Mwenda 2006; Aggarwal and Roth 2008).

Trust land. The balance of land holdings (70%) are trust land. Trust lands derive from the 1915 amendment to the Crown Lands Ordinance of 1902, which converted all native reserve lands to trust lands and (at Independence) vested county councils with the power to hold and alienate land for the benefit of resident communities (Mwenda 2006; Aggarwal and Roth).

SECURING LAND RIGHTS

The most common method of obtaining land rights in Kenya is through inheritance, followed by purchase. Land leasing is common in some rural areas. The vast majority of leases are fixed rent; sharecropping is rare (Yamano et al. 2009).

Under current law, any person (citizen or foreigner) can apply for and be allocated land in urban areas. Under the National Land Policy, foreign individuals and companies may acquire land as renewable leasehold from the government or landowners for investment purposes (GOK 2009b).

Land registration is accomplished under The Registration of Titles Act or The Registered Land Act. A substantial portion of the urban population has no access to land (Ellis 2007).

Titling and registration programs have frequently dispossessed the holders of secondary land rights, such as tenants and those with rights to natural resources on the land, by limiting registration to the primary user and failing to register secondary rights. Titling and registration processes also opened land to elite capture, especially the recipients of former settler land, and those influential enough to manipulate the registration process in the interests of themselves, their lineage, or clan (Wakhungu et al. 2008; Quan 2000).

Throughout Kenya, security of tenure under both customary and statutory systems has been undermined by arbitrary decision-making, corruption, government backtracking, and lack of redress for those who have lost land through violence. County councils charged with protection of the customary rights of landholders in the rural areas have in many cases abused the trust bestowed on them and presided over the expropriation of these lands without regard to their constitutional mandate, the provisions of the Trust Land Act, or the communities they represent (Odhiambo 2006; Wakhungu et al. 2008).

Membership in a community through kinship ties and common descent is the primary basis for acquiring customary rights to land. Within the community, allocation of land is based on need. Loss of such membership means loss of access, which is particularly difficult for women whose membership depends on their relationship to male members (Odhiambo 2006).

INTRA-HOUSEHOLD RIGHTS TO LAND AND GENDER DIFFERENCES

According to the Constitution of Kenya (2010), discrimination on the basis of sex is prohibited. Further, women are granted the right to equal treatment and equal opportunities in the political, economic, cultural and social spheres (GOK 2010).

The Transfer of Property Act (TPA) of 1948 limits the rights of married women to own property individually. The country’s courts can disregard the provision, but the law continues to be valid (GOK 1948b).

The Married Women's Property Act of England of 1882 (MWPA), which governs the division of property in Kenya, is ambiguous and has been subject to inconsistent interpretations. Judicial cases initially held that women are entitled to half of the family property in cases of death or divorce if they can prove that they contributed to the household through direct or indirect contribution (labor). However, the 2001 case of *Echaria v. Echaria* concluded that only direct financial contribution to the purchase of the property would be considered when deciding what share of the marital property belongs to each spouse (FIDA-Kenya 2008).

The Law of Succession (1981) applies to all Kenyans, with an exception for Muslims. Under that law, men and women, married or unmarried, have the capacity to make a will. All wives and children of a deceased man, whether or not he had been maintaining them at the time of his death, are considered dependents and are able to inherit under the intestate rules. In certain gazetted areas (Wajir, West Pokot, Turkana, Tana River, Kajiado, Garissa, Marsabit, Isiolo, Mandera, and Lamu), customary law governs the distribution of agricultural land and livestock if a person dies intestate. In these areas, women’s rights to agricultural land or livestock are greatly reduced as they cannot benefit from or seek protection under the provisions on intestacy laid out in the Law of Succession (GOK 1981; Kameri-Mbote 1995).

BOX 3. LAND AND GENDER INDICATORS		Score
<u>OECD: Measuring Gender In(Equality)—Ownership Rights, 2006</u>		
– Women’s Access to Land (to acquire and own land) (Range: 0-1; 0=no discrimination)		0.7
– Women’s Access to Property other than Land (Range: 0-1; 0=no discrimination)		0.7
– Women’s Access to Bank Loans (Range: 0-1; 0=no discrimination)		0.7
<u>FAO: Holders of Land Classified by Sex, 1993</u>		
– Percentage of Female Holders of Agricultural Land		..

In practice, Kenya remains a patriarchal society; women continue to be marginalized and discriminated against in almost all aspects of their lives. For example, although the Law of Successions Act grants widows a life interest in the matrimonial home, the government has failed to enforce this protection adequately, especially in rural areas. Widows and their children are often evicted from their homes. Lack of alternative housing and livelihood options often results in widows and their children migrating to urban slums where they eke out a sub-standard living and often must resort to sex for necessities for themselves and their children (FIDA-Kenya 2008).

LAND ADMINISTRATION AND INSTITUTIONS

The key institutions, housed within the Ministry of Lands, include: Administration & Planning, responsible for overall administration of the Ministry; the Department of Lands, responsible for land administration, valuation, and registration; the Department of Land Adjudication and Settlement, responsible for land adjudication, consolidation, group ranches, and settlement of landless citizens; the Department of Survey, the official agency of the Government of Kenya on all matters affecting land surveys and mapping; and the Department of Physical Planning, responsible for the production of physical development plans for both urban and rural areas (GOK 2008).

Under the Land Control Act, local Land Control Boards (LCBs) must approve all transactions in agricultural land, including sale, lease, mortgage, and division. LCBs are established by the Minister of Lands for every land-control area and division. LCBs have wide discretion to decide whether or not to approve a transaction. Their processes are often cumbersome and time-consuming (GOK 1962; Ellis 2007).

County Councils are trustees of trust/community land under the Trust Land Act. The Trust Land system has been abused by County Councils, which have managed the lands in favor of individuals and institutions rather than in the interest of local residents (Ellis 2007; KLA 2005; GOK 2009b).

The National Land Policy proposes a complete overhaul of the institutional framework governing land administration and management. It proposes a National Land Commission and democratically elected District and Community Land Boards. District Land Boards (DLBs) will assume district-level responsibilities of the Ministry of Lands. The majority of DLB members will be democratically elected by eligible voters in that Land Board’s jurisdiction. Under the NLP, communities will assume management of community lands through representative Community Land Boards (CLBs). CLBs will have the power to approve all transactions related to community land. The NLP does not specify what will happen to the County Councils (Bruce 2008; KLA 2005; GOK 2009b).

LAND MARKETS AND INVESTMENTS

The Land Control Act controls transactions in agricultural land. Under the LCA, Land Control Boards have broad discretion to exercise their authority. Appeals can go to the Provincial Land Control Body, and then to the Central Land Control Body. Banks are hesitant to take agricultural land as collateral because the Land Control Boards are time-consuming and outcomes are uncertain (Ellis 2007).

Registering the transfer of land in Kenya requires eight procedures, takes approximately 64 days, and costs 4.2% of the property value. Many cases of land sale and succession have not been reported to the Land Control Boards, largely due to the high financial and time costs associated with the formal process (World Bank 2009b; Konyimbih 2001).

Regions with productive agricultural land have active land-sales and rental markets. High transaction costs, the high price of land, and lack of a credit market prevent the markets from achieving a socially optimal distribution of land. The land market in Kenya, in which numerous players participate—including the provincial administration, politicians, land owners, and professionals such as valuers and lawyers—also suffers from a lack of adequate information. The formal procedure is lengthy and cumbersome. New land markets are emerging, including the rental market in the informal settlements (Yamano et al. 2009; GOK 2009b).

COMPULSORY ACQUISITION OF PRIVATE PROPERTY RIGHTS BY GOVERNMENT

The State has the right of compulsory acquisition of land for public purposes after Constitutional due process procedures are followed. The Kenyan courts have interpreted public purpose narrowly (GOK 2000; Veit 2009).

The Compulsory Acquisition Procedure is as follows: (1) the Minister of Lands directs the Commissioner of Lands to identify land to be acquired (no public participation); (2) the Commissioner publishes a notice of intention in the Kenya Gazette; (3) the Commissioner publishes a notice of inquiry to hear claims for compensation; (4) the Commissioner convenes public inquiry on compensation (land, houses, trees, crops, structures and fixed improvements are eligible, and property owners are compensated with land or paid at market price); (5) the Commissioner awards compensation; and (6) the Government takes possession of the land. Aggrieved persons can petition the court prior to the award of compensation (Veit 2009).

Despite these procedures, the Kenyan government has carried out large-scale forced evictions of informal urban settlements for decades, without heeding the legal framework. Government bulldozers have been used to evict residents and demolish their homes with little or no notice, and no efforts are made to resettle or compensate residents. Forced evictions also have occurred (and continue to occur) in forest areas purportedly in the interest of conservation and preservation of existing forests (AI n.d.; AI 2007; Mutai 2010).

LAND DISPUTES AND CONFLICTS

Population pressures, commercialization of agriculture, and urbanization have contributed to increasing numbers of land conflicts in Kenya. Outdated land registrations are also a cause of landholder concern about future conflicts. Land disputes were a source of conflict in the aftermath of the post-election violence experienced in Kenya in early 2008. The Kenya National Dialogue and Reconciliation process identified land reform as key to long-term peace and reconciliation, and the Truth, Justice and Reconciliation Commission was mandated to examine historical land injustices and the illegal or irregular acquisition of land, especially as these relate to conflict or violence (Yamano and Deininger 2005 ; Huggins 2008).

Tensions exist between pastoralists living on land that traverses or abuts parks, ranches and protected areas, and the official owners and administrators of these areas. Up to 90% of wildlife is not contained within protected areas. As a result, wild animals attack community members, damage crops and property and threaten herds. Government compensation schemes require communities to be compensated for sharing their land with wildlife through infrastructure development. In practice, however, actual investment in these communities is nominal (Nyamwaro 2006)

Both informal and formal institutions resolve conflicts, though the majority of land conflicts involve an informal institution, even if a formal institution is subsequently called upon. In a study done by Yamano and Deininger, over 91% of the land conflicts that started between 1990 and 1999 were brought to informal institutions, including committees or bodies composed of community elders. Forty-four percent of the cases were brought to both informal and formal institutions (Yamano and Deininger 2005).

KEY LAND ISSUES AND GOVERNMENT INTERVENTIONS

On December 3, 2009, the Kenyan Parliament approved the National Land Policy (NLP). The NLP is the result of a long and intensive process to develop a fair and equitable land policy that seeks to re-balance customary and statutory land tenure. The policy identifies the unequal distribution of land as the critical problem facing Kenya's land tenure system (Bruce 2008; Aggarwal and Roth 2008; Ayieko 2009).

Pending implementation of the NLP, the government will focus its efforts on the institutional transformation of the Ministry of Lands, and the setting up of a National Land Commission – a constitutional body created to implement land management and administration in a manner that is sustainable, equitable, efficient, and cost-effective. Other focus areas include land-policy finalization and preparation for implementation; local mechanisms for sustainable land rights administration and management; improvements to the land information management system; and the implementation of the recommendations of the Ndungu Commission (on illegal and irregular allocation of Public Land) (Adams and Palmer 2007; GOK 2009b; Bruce 2008).

DONOR INTERVENTIONS

Civil society has been very engaged in the development of the NLP, which grew out of a broad-based coalition of non-governmental organizations, civil society organizations, and donors. The process has been mostly funded by grants from the Department for International Development (DFID), Irish Aid, the Swedish International Development and Cooperation Agency (SIDA), and USAID through a basket funding mechanism chaired by UN-Habitat. The funding period was extended through September 2009 (Adams and Palmer 2007).

USAID programs have helped the GOK advance the policy and legal frameworks for increased agricultural productivity, environmental management, and sustainable, productive land use. USAID conducted a review of the draft NLP in 2008. USAID's most recent land-related investment in Kenya is the 18-month project, Securing Rights to Land and Natural Resources for Biodiversity and Livelihood in Kiunga-Boni-Dodori Reserves and Surrounding Areas in North Coastal Kenya (SECURE). The objectives of SECURE are to secure land and resource rights of indigenous coastal communities, to improve livelihoods, and to support biodiversity conservation and sustainable natural resource management (USAID/Kenya 2009b).

The World Bank has supported the GOK's development of infrastructure, social services, public sector reforms, and private sector development. The European Commission (EC), while also investing in infrastructure and public finance management, has emphasized decentralization, governance and rural development. The African Development Bank Group concentrates on roads and transport, energy, agriculture, and social sectors. Bilateral partners extend their support mainly to social sectors and governance reforms (ADB 2008).

UN Habitat chairs the Development Partners Group on Land (DPGL). In conjunction with the Ministry of Lands and Housing (MoL), the DPGL assisted in formulating the National Land Policy. In 2006, the DPGL and the MoL signed a Memorandum of Understanding, which explained that development partners will support the Kenyan land policy formulation process through a joint financing account for 18 months (ending in April 2007). Currently, the DPGL is reviewing the land support program and assessing how a sector-wide approach may be implemented for development partners (UN Habitat n.d.).

International agencies and NGOs have focused on women's rights to land. From 2000 to 2002, USAID funded the NGO Small Grants Program, which provided grants of \$25,000 or less to local NGOs to support women's property and inheritance rights. The Federation of Women Lawyers (FIDA-Kenya) provides legal aid to women in cases of succession, inheritance, and the division of marital property (USAID/Kenya 2009b; FIDA-Kenya 2009).

2. FRESHWATER (LAKES, RIVERS, GROUNDWATER)

RESOURCE QUANTITY, QUALITY, USE AND DISTRIBUTION

Eighty percent of Kenya has an arid or semi-arid climate. The water supply is insufficient to satisfy demand, meaning that water is scarce. Kenya has annual renewable water resources of 30.7 cubic kilometers. The agriculture sector uses about 79% of available water, followed by domestic use and industry. In 2003, approximately 110,000 hectares were irrigated. Of this, 56% is irrigated by sprinklers, 36% by surface irrigation, and the remaining 6% comprise cultivated wetlands and inland valley bottoms (FAO 2005).

Water scarcity is compounded by extensive degradation of existing water resources, increasing volatility of rainfall amounts, and periodic droughts and floods. The shortage is chronic and leads to conflict (sometimes violent) among users. The few existing water sources are exploited intensively, and the resulting environmental damage is already irreversible. Watersheds have been damaged by logging, encroachment of settlements, and changing borders, in addition to government policy changes that de-gazetted National Forests in the early 1990s (FAO 2005; GTZ 2008; Miller et al 2003).

The water sector has historically suffered from low levels of investment. Most infrastructure is now old and dilapidated. Roughly 12% of rural Kenyans have household water connections and approximately two-thirds of poor rural households depend on unprotected sources of water (wells, rivers, lakes, ponds, and rainwater) in all seasons (Were et al. 2006).

As of 2006, 70% of electricity supply was derived from hydropower. However, hydropower is negatively affected by weather changes and the amount of hydro-electricity in production is decreasing. There is increasing interest in geothermal energy production, particularly in the Rift Valley. Geothermal energy is not affected by weather changes and could relieve increasing demand for electricity (UNESCO 2006; Karekezi 2007).

LEGAL FRAMEWORK

The Water Act of 2002 provides the framework for Kenya's water use and management. The Water Act separates the management of water resources from the provision of water services, separates policy making from day-to-day administration and regulation, decentralizes functions to lower level state organs, and involves non-governmental entities in the management of water resources and in the provision of water services (Mumma 2005).

The Water Act of 2002 also stipulates that the National Water Conservation and Pipeline Corporation (NWPC) shall receive government funding to develop large-scale infrastructure for harnessing water resources. These projects – which include the building of dams and other infrastructure for water management – are funded with state resources (Mumma 2005).

TENURE ISSUES

The Water Act of 2002 does not recognize the existence of a pluralistic legal framework and does not recognize customary rights. All rights to water are vested in the State. Water users must acquire a water permit except for: (1) minor uses of water resources for domestic purposes; (2) use of underground water in places where there is no stress on the resource; and (3) use of water drawn from artificial dams or channels (Mumma 2005).

Water is allocated by the Water Resource Management Authority. The Authority establishes a regional office and appoints an advisory committee in each catchment area to advise the Authority on water resource management issues, including the allocation of permits. Irrigation water permits extend for 5 years. The rate is based on the amount of surface area to be irrigated (Mumma 2005; FAO 2005).

Community self-help water systems are registered under an informal registration system operated by the Ministry in charge of community development. These systems are not legal entities and operate outside of the formal legal framework of the Water Act of 2002. Women and children are generally responsible for domestic water collection and management, but women are often not part of community water associations (Were et al. 2006; Mumma 2005).

There are a total of 1800 domestic water supply schemes, of which 700 are managed by the Ministry of Water Resource Management and Development, while the communities manage the rest. There are 9000 boreholes, most of which require rehabilitation. Boreholes are primarily developed with support from the central government, international donors, and churches. Some wealthy individuals and have organized communities to drill their own boreholes. However, the expense of drilling a borehole (over \$40,000) is prohibitive for most individuals and communities (FAO 2005; Rutten 2005).

GOVERNMENT ADMINISTRATION AND INSTITUTIONS

Under the Water Act of 2002 the revamped Ministry of Water and Irrigation has primarily become a policy-making and coordinating agency. Responsibility for management of water resources is now vested in the semi-autonomous Water Resources Management Authority, and responsibility for regulating water services is vested in

the Water Service Regulatory Board. A new fund, the Water Services Trust Fund, has been established to channel external resources for water supply to disadvantaged communities (Were et al. 2006).

The supply of water is considered the role of private enterprises and non-governmental organizations. The Water Act of 2002 does not carve out a role for community-based organizations (Were et al. 2006).

The National Irrigation Board is responsible for the development of national irrigation schemes and the promotion of smallholder irrigation. The River Basin Development Authorities are responsible for the planning and use of water and land resources within their jurisdictions (FAO 2005).

GOVERNMENT REFORMS, INTERVENTIONS AND INVESTMENTS

The government is focused on decentralizing water management. This effort is strengthened by the development of national Integrated Water Resources Management and Water Efficiency strategies. Under the revised system, the Ministry for Water and Irrigation is responsible for formulating the National Water Policy and for implementing reforms. The Water Resources Management Authority has been delegated authority for water management at the national level, while Catchment Areas Advisory Committees are responsible at the regional level and Water Resource User Associations are responsible at the local level. Since 2004, the provision of water and sanitation services has been transferred to private companies (Ngigi and Macharia 2006; Olum 2003).

The Government of Kenya is a member of the Nile Basin Initiative (NBI). Through NBI, nine Nile Basin countries work toward to: equitably and sustainably develop the Nile River water resources; guarantee effective water management and optimal resource use; promote cooperation and combined action between member countries; and combat poverty and promote economic integration (NBI 2010).

DONOR INTERVENTIONS AND INVESTMENTS

For FY 2010, the United States Department of State (USDOS) allocated USAID programs \$1 million for water projects in Kenya. For FY 2011, USDOS allocated USAID and other development assistance \$1.5 million and \$7.5 million, respectively, for water improvement programs. USAID projects in Kenya are focused on providing clean water and improved sanitation, particularly in drought-affected areas, and improving water resource management in international river basins (USDOS 2009; USDOS 2010; USAID/Kenya 2010).

The World Bank has a 6-year Water and Sanitation Service Improvement Project (2007–2012) with objectives to help the government increase access to reliable, affordable, and sustainable water supply and sanitation services; and improve water and wastewater services. The project is supported by the Netherlands, the United Nations Children's Fund (UNICEF), the Kenya Joint Assistance Strategy (KJAS), the German Agency for Technical Cooperation (GTZ), the German Development Services (DED), and the French Development Agency (World Bank 2007a; IRC 2008).

The International Fund for Agricultural Development (IFAD) has funded agricultural development projects that include the development of smallholder irrigation schemes and establishment of a framework for the development of farmers' organizations. World Vision Kenya is focusing on rehabilitating irrigation schemes to improve food security (FAO 2005).

3. TREES AND FORESTS

RESOURCE QUANTITY, QUALITY, USE AND DISTRIBUTION

Kenya's forests are crucial to the country's social and economic life. Kenya has 3,522,000 hectares of forest land (6.2% of all land area), which ranges from lowland rainforests, montane forests, and equatorial forests to mangroves and coastal mosaic forests. Primary forest cover is only 704,000 hectares, which is 1.2% of land area – far below the internationally recommended 10%, and only 20% of the country's total forest area. Approximately 1.7 million hectares of forest are gazetted (FAO 2007; Ludeki et al. 2006; Vajpeyi 2001).

There is increasing concern about the deteriorating state of forests in Kenya and the pressure on forest land and demand for forest products. The main threats to forests include settlements and encroachments, charcoal-production and logging. Consumption of charcoal and fuelwood constitutes 75% of total energy consumption. In some areas, landowners have profited by having charcoal burners clear all of their trees, then sell or lease the land for crop production (Ludeki et al. 2006; Vajpeyi 2001; WRI 2007).

There are over thirty parks and wildlife reserves throughout Kenya. The rich biodiversity found in these areas forms the foundation for the country's tourism industry. However, policy deficiencies, market failures, poor regulation, population growth and migration, rural poverty, and corruption among the political elite have contributed to habitat and species loss. This has been particularly prevalent in the Mau Forest Complex, a critical water catchment and forest area (Ludeki et al. 2006; GRID-Nairobi n.d.; GOK 2009a).

LEGAL FRAMEWORK

The 2005 Forests Act provides for the establishment and development of sustainable management of forests, including conservation, and rational utilization of forest resources. The Forests Act provides for the inclusion of local forest communities in the management of the forests (FAN n.d.).

The key elements of the Forests Act are: 1) inclusion of management of all types of forests; 2) involvement of adjacent forest communities and other stakeholders in forest conservation and management; 3) ecosystem approach to forest management planning; 4) provision of appropriate incentives to promote sustainable use and management of forest resources; 5) development of a framework for a forest legislation; and 6) establishment of Kenya Forest Service (Ludeki et al. 2006).

A 1986 Presidential directive banned the production and transportation of charcoal, but not the sale, purchase, or use charcoal. As a result, the charcoal market was forced underground (WRI 2007).

TENURE ISSUES

The Forests Act 2005 categorizes Kenya's forests into six categories. These are: indigenous forests; farm forests and trees; plantations; dryland forests; local authority forests (forests found on trust lands and other lands under the jurisdiction of local authorities including urban forests such as arboreta); and private forests (Ludeki et al. 2006).

All forests, other than private forests and local authority forests, are vested in the State, unless otherwise provided for by law or contract (Ludeki et al. 2006).

Customary rights to forest products are allowed, as long as such produce is not for purposes of sale (Ludeki et al. 2006).

The Act provides several avenues through which Kenyans in general and forest communities in particular can directly or indirectly participate in the implementation and monitoring of the Forests Act and the management of their forests. These include: as members of Community Forest Associations (CFAs); as representatives appointed to the Forest Conservation Committees; as representatives appointed to the Board of the Kenya Forest Service; and as individuals (FAN n.d.).

Members of forest communities are encouraged to form associations registered under the Societies Act and apply to participate in forest conservation and management. Under the law, communities make up close to 50% of representation in the Forest Conservation Committee. The law also provides for community representation on the Board of the Kenya Forest Service (FAN n.d.).

The fact that women lack legal and cultural ownership of land has a negative effect on forestation projects since insecurity of ownership dominates tenants' decision to cut wood for domestic fuel; those with insecure tenure neglect to plant trees on land over which they have no decision-making power (ADB and ADF 2007).

GOVERNMENT ADMINISTRATION AND INSTITUTIONS

The Forests Act 2005 establishes a forest service (the Kenya Forest Service [KFS]) as the government agency responsible for forest management in Kenya (GOK 2005).

The Kenya Wildlife Service (KWS) is charged with conserving and managing Kenya's wildlife, and enforcing related laws and regulations. The agency manages National Parks, National Reserves, and National Sanctuaries, in addition to field stations outside protected areas. KWS is a state corporation established by Act of Parliament Cap 376 (KWS 2010).

GOVERNMENT REFORMS, INTERVENTIONS AND INVESTMENTS

The Forests Act specifies many reforms that the Government of Kenya will undertake, including the following: managing forests sustainably for climate amelioration, soil, water and biodiversity conservation; carrying out inventories and valuation of forest resources and their utilization to generate accurate information for decision-making; empowering local communities to manage forests through community forest associations; ensuring that forest plantations are sustainably managed to realize their maximum potential; supporting forest management, which will embrace preservation of religious and cultural sites, traditional medicinal sources and water catchments and habitats for endemic and threatened species of flora and fauna; supporting the formulation of criteria and indicators for sustainable forest management; and promoting good governance in the forest sector (Ludeki et al. 2006).

In response to deforestation and degradation of the Mau Forest Complex, the Office of the Prime Minister appointed the Task Force on the Conservation of the Mau Forests Complex. After commissioning studies of the Mau, the Task Force issued recommendations for stopping and reversing the deforestation and unsustainable land-use practices occurring there. The Task Force also made recommendations applicable to all of Kenya's forest reserves, including: 1) making funds available for implementation of the Forests Act; 2) strengthening the technical and financial capacity of the Kenya Forest Service; 3) identifying, demarcating, and securing forest reserve boundaries; 4) relocating landowners of former forest reserves; and 5) restoring degraded forests and critical water-catchment areas. The Prime Minister established the Interim Coordinating Secretariat (ICS) to implement the recommendations, which began its work in October 2009. The Office of the Prime Minister is soliciting funding from international donors to partially fund the initiative (GOK 2009a).

DONOR INTERVENTIONS AND INVESTMENTS

The prominent NGO working on the environment in Kenya is the Green Belt Movement (GBM), initiated by Professor Wangari Maathai and the National Council of Women of Kenya (NCWK) in 1977. The GBM, which began as a grassroots tree-planting program to address the challenges of deforestation, soil erosion, and lack of water, is now a movement with thousands of members. The GBM is also a vehicle for empowering women by both reducing the effects of deforestation and providing a forum for women to be creative and effective leaders (ADB and ADF 2007).

USAID programming aims at enhancing integrated forest-management and conservation. Forestry Range Rehabilitation & Environmental Management Strengthening (FORREMS) was a 5-year (2003–2008) program that focused on strengthening GOK institutions by providing capacity-building, technical assistance, and material support to improve forest management, rangeland conservation, and environmental management. FORREMS worked with community natural resource user groups to build organizational capacity so they could actively participate in conservation and in development of Nature Based Enterprises (NBE) (USAID/Kenya 2006).

The World Bank's Natural Resource Management Project has four components: Water Resource Management and Irrigation; Management of Forest Resources; Livelihood Investments in the Upper Tana Catchment; and Management and Monitoring and Evaluation. The Management of Forest Resources component supports the legal and institutional reforms contained in recent legislation (World Bank 2007b).

Many other donors are actively involved in forestry in Kenya. The Forest Donor Coordination Group includes the Food and Agriculture Organization (FAO), the United Nations Environment Programme, (UNEP), the United Nations Development Programme (UNDP), USAID, World Bank, the Embassy of Finland, and others (GOK 2007b).

4. MINERALS

RESOURCE QUANTITY, QUALITY, USE AND DISTRIBUTION

In 2006, Kenya played a significant role in the world's production of fluorspar and natural soda ash. The country's share of the world's mine production of soda ash amounted to 3% and that of fluorspar nearly 2%. Other significant mineral processing operations included cement and petroleum refining (Yager 2008).

In 2006, the manufacturing sector accounted for 9.9% of the gross domestic product, and mining and quarrying accounted for 0.5%. The mining and quarrying sector grew by 4.1% in 2006. Mineral exports accounted for

between 2% and 3% of Kenya's total exports. Mining and quarrying was estimated to employ more than 50,000 Kenyans (Yager 2008).

LEGAL FRAMEWORK

With a few exceptions, mining and mineral exploitation is governed by the Mining and Minerals Act of 1999, Mining Regulations of 1969 (Amended), and the Environment Management and Co-ordination Act. The Petroleum Act (Chapter 116), Petroleum Act 14 of 1984, and certain regulations govern exploitation of hydrocarbon resources. Exploitation of diamonds is governed by the Diamond Industry Protection Act (GOK 1999; Reynolds and Flores 2009).

Through the Department of Mines and Geology in the Ministry of Environment, Natural Resources and Wildlife, the Government of Kenya has prepared a draft mining policy and is in the process of enacting a new mining law. The new law aims to develop a comprehensive policy framework for regulating the mining sector and an appropriate legal and fiscal framework, which are in line with the current global mining trends. Under the envisaged mining law, a simplified mining licensing system will be introduced; the authority of the Minister in charge of mining will be curtailed; and tenure security for mining investors will increase. The new law also seeks to harmonize mining with the Environment Management and Co-ordination Act of 1999 and requires the restoration and rehabilitation of mined areas (KenInvest 2005).

TENURE ISSUES

Ownership of minerals is vested in the Government of Kenya and includes minerals found within Kenya's continental shelf, territorial waters and the exclusive economic zone (Kariuki 2002).

Most of Kenya's mining and mineral processing operations are privately-owned, including the diatomite, fluorspar, gemstone, salt, and soda ash mines, the lime plants, and the steel mills. In 2006, the Government held a 52% share in East Africa Portland Cement Co. Ltd. (EAPC) and a 50% share in Kenya Petroleum Refineries Ltd. (Yager 2008).

Kenya's small-scale and artisan miners conduct between 70% and 80% of the mining. The primary small-scale mining operations include gemstone mining in the coastal region, gypsum mining at Kajiado, and alluvial gold mining in western and northern Kenya (Amutabi and Lutta-Mukhebi 2001).

Although there is little research on female miners in Kenya, one study indicated that in Mukibira women were very involved in gold panning, often at great risk. It is estimated that gold panning produces about 5 tons of gold a year from rivers in Kenya; Mukibira is one of the leading sites. Mukibira has an estimated 2000 panners, and the majority of them are women and children. About 10,000 people subsist on the proceeds of these mines (Amutabi and Lutta-Mukhebi 2001).

GOVERNMENT ADMINISTRATION AND INSTITUTIONS

The Government of Kenya reviews policies, develops mineral legislation, and promotes measures and publicizes the mineral investments in Kenya through the Mines & Geology Department in the Ministry of Environment and Natural Resources (Kariuki 2002).

The Mines and Geology Department also undertakes regional mapping and exploration, encouragement of industrial mineral prospecting and exploitation by local miners, evaluation and investigation of mineral deposits using drilling rigs, and the rehabilitation of disused mines and quarries. Over 90% of the country has been geologically surveyed (Kariuki 2002).

Local authorities license quarrying activities. These authorities lack the human resources, financial capacity and training needed to effectively assess the quantity and production capacity of local mines. Additionally, they are unable to assess the environmental degradation caused by local mines or implement required rehabilitation programs after the quarrying/or mining has been completed (Kariuki 2002).

GOVERNMENT REFORMS, INTERVENTIONS AND INVESTMENTS

Government policy in mineral resources development ensures that the private sector leads mineral development while the Government assumes a regulatory role by providing basic geological data and financial incentives. The Government has prepared a mining policy and is in the process of enacting a new mining law that will provide a comprehensive policy framework for regulating the mining sector and a legal and fiscal framework that is in line with current global mining trends (Kariuki 2002; KenInvest 2005).

The Government of Kenya has a well-intended policy of mineral development as stipulated by Agenda 21 (product of the Earth Summit). The participation of private investors as the vehicle for mineral development is one of the provisions in Agenda 21. However, the enactment of the legislation has been very slow (Kariuki 2002).

DONOR INTERVENTIONS AND INVESTMENTS

USAID currently is not investing in mining in Kenya.

It does not appear that the World Bank is actively supporting Kenya's mining sector.

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