



# **Kenya NGO Earth Summit 2002 Forum**

## **AGRICULTURE, LAND AND DESERTIFICATION**

### ***A REPORT ON CIVIL SOCIETY REVIEW OF THE IMPLEMENTATION OF AGENDA 21 IN KENYA***

**By**

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## PREFACE

In June 1992, World leaders met in Rio de Janeiro, Brazil to chart the way for the world in a new re-birth of a development process that did not jeopardize future generations. In the now eminent Rio Conference, World leaders achieved consensus and according to the then Secretary General Boutros Boutros-Ghali the Rio Conference:

“ First, secured a set of agreements between governments which marks a significant advance in international cooperation on development and environmental issues. Second, it marshaled political commitment to these arrangements at the highest level and placed the issue of sustainable development on the global agenda. Third, it opened new paths for communication and cooperation between the official and non-official organizations working towards developmental and environmental goals. Fourth, it led to an enormous increase in public awareness of the issues that were tackled in the process – an awareness that ought to facilitate the adoption of policies and the allocation of additional resources to fulfill the task”.<sup>1</sup>

Agenda 21, a comprehensive and far-reaching programme for sustainable development was agreed upon. It constituted the centerpiece of international cooperation and coordinating of activities within the United Nations system for Post Rio years in the form of a blue print for global actions to affect the transition to sustainable development.

Besides Agenda 21, the Rio Conference bore the twin Conventions on climate change and the protection of Biologically Diverse species<sup>2</sup>, which were signed by the representatives of 150 countries. A framework convention containing a set of principles on the management of forests worldwide was also agreed upon.

This research shall however restrict itself to the Agenda 21 being the most comprehensive and far-reaching programme of action ever approved by the world community. Agenda 21 received the approval at the highest political levels lending it special authority and importance. It offered an action plan based on international consensus and charted a framework of financing its ambitious objectives. To African states, it represented a brave and laudable attempt to reduce the brunt of the challenge of poverty and ecological disasters experienced in the continent and offered a glimmer of hope for financing of the programs of the Agenda 21.

Kenya was represented at the highest level in the Rio Summit and is a signatory of the Conventions stemming there from. As an African state, she too shared in the anticipation of containing the twin challenges of poverty and ecological disasters.

This research is therefore aimed at taking stock of what Kenya has achieved since Rio in the implementation of Agenda 21. In particular we shall restrict ourselves to discussing the implementation of the said Agenda 21 in the field of Agriculture, Land (usage and

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<sup>1</sup> In his opening address to the United General Assembly September 1992

<sup>2</sup> The United Nations Convention on Climate Change (UNCCC) and The United Nations Convention on Biological Diversity (UNCBD)

tenure), Desertification and Drought. In so doing we shall venture to incorporate grassroots experiences (if at all) and also take stock of policies and public input in policy formulation in that regard. The impact of major groups i.e. women, children and youth will be addressed along the stated thematic line.

## I. INTRODUCTION

Land is generally defined as a physical entity embodying its topography and spatial nature. A much broader perspective includes natural resources viz. the soils, minerals, water and biota that the land comprises. In Kenya the definition of land varies from one statute to another depending on the purpose and spirit. However the definition encompasses land to include land of any tenure, and mines and minerals, whether or not held apart from the surface, buildings (whether the division is horizontal, vertical, or made in any other way) and includes any interests held over the land<sup>3</sup>. This definition seems to be stemming from the Latin maxim of '*cujus est solum ejus est usque ad coelum et ad inferos*'; that is to say that *his whose is the soil his too belongs that which is below the geo-sphere and up above in the atmosphere*. This definition is subject to criticism and a clear critique of Kenyan legislation elsewhere in this report demonstrates its shortcomings.

It is however generally agreed that land is a finite resource and the resources that it supports may vary over time depending on management and use. Conflicts are therefore inevitable.

In Kenya land is generally viewed from the point of usufruct informed and influenced by the societal attachment to land. The usufruct is generally defined along two dominant categories being farmers and pastoralists.

Over two thirds of the country's land mass is covered by arid and semi-arid land with the dominant culture being pastoralism. The rest of the land mass is home to over 80 per cent of the country's mainly agricultural population.

To effectively address land issues we shall endeavor to distinguish the pastoralist adaptation and their agricultural counterparts in addressing the implementation of Agenda 21. We shall look at the effect of litigation on land use and tenure in addressing the realization of food security and combating poverty. The ramifications of land use in the face of the challenge of sustainable development shall also be addressed. We shall also endeavor to address the tenure of land in Kenya and the impact of such tenure on usage. To this end, policies on land and public input (if at all) in that regard shall be analyzed as to their suitability in meeting or addressing sustainable development.

In the end we shall attempt to offer an opinion as to the way forward in the face of the challenge of sustainable development. We shall seek to ask ourselves the question of whether implementation of Agenda 21 on the chosen thematic line is sustainable and addresses the posterity of intergenerational equities.

Further, we shall attempt to present a way forward towards the World Summit on Sustainable Development slated for Johannesburg in 2002.

Throughout this research we shall adopt the base year as 1992 being the year of the Rio Conference.

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<sup>3</sup> Sec. 3 The Trusts of Land Act, Chapter 290 of the Laws of Kenya

## LAND USE

### AGRICULTURE

In 1992 it was estimated that by the year 2025, 83 per cent of the global population of 8.5 billion people would be living in developing countries<sup>4</sup>. Yet the capacity of available resources and technologies to satisfy the demands of this growing population for food and other agricultural commodities remains uncertain. Agriculture presents the major solution to this crisis mainly by increasing production on land already in use and by further avoiding encroachment on land that is only marginally suitable for cultivation. Agenda 21 proposed the creation of conditions conducive to sustainable agriculture and rural development (SARD) and aimed at increasing food production in a sustainable way thereby enhancing food security.

In Kenya, 56 per cent of the country's population lives below poverty line with more than one half of the population unable to sustain basic needs. Those who venture into agriculture have to contend with the uncertainties of the climate and even when yields are high the marketing of the surplus still present a problem to the farmers.

The Kenyan farmer is well acquainted as to the potential of his own farm, the needs of his family and the production techniques that he ought to employ when cultivating crops. In the past, this was a perfectly satisfactory scenario, but today, the farmer has to shoulder the burden of a rapidly increasing population and meet export needs. He is called upon to meet the cost of urbanization in Kenya. Traditional farming methods that restricted themselves to subsistence needs are not capable of arresting the ever-increasing needs for more food and widespread scientific methods are required. Sadly, knowledge of these methods is compiled and stored out of reach of the farmer. It is estimated that less than ten per cent of the relevant knowledge now available reaches the Technical assistant at the grassroots, which in turn trickles down to the farmer.

A sound knowledge of the natural conditions of a country is the basis for agriculture and a precondition for successful farming. A tremendous amount of agricultural and other research findings have been collected in this country by various institutions. Majority of the research findings are irrelevant to the rural socio-economics and end up swallowing scarce resources needed to address more urgent problems. The transfer of the know-how to those who need most is a major inhibition to the agriculture sector in this country.

The country is generally defined along Agro-ecological zones<sup>5</sup> suited to make decisions on long-term agricultural policy. These zones are defined as being zones of potential land-use on the basis of the natural local factors so that they can be employed as a fundamental element of agricultural advice at the grassroots level, advice, which may further be differentiated into small areas. These zones are:

1. Temperature Belts: Defined according to the maximum temperature limits within which the main crops in Kenya can flourish.

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<sup>4</sup> Agenda 21

<sup>5</sup> As per FAO guidelines; Report on the Agro-ecological Zones Project. Methodology and Results for Africa (World Soils Resources Rep. 48/1) Rome 1978

2. The main zones: based on their probability of meeting temperature and water requirements of the main leading crops i.e. climatic yield potential. These main zones are further divided into sub-zones according to the yearly distribution and the length of the growing periods.

Agriculture is practiced along the high potential zones and it is usually large-scale single crop cultivation. Large-scale farmers employ state of the art methods in crop production to continuously ensure high yields. They use fertilizers at all levels of crop production and employ the use of heavy machinery. Majority of the large-scale farmers are the past generations of colonial settlers and they occupy large tracts of land in the high potential zones. The bulk of the large-scale farming concentrates on the cash crops as opposed to food crops. Small-scale farmers who grow cash crops mainly focus on tea and coffee, and in the near past pyrethrum. These produce is then sold to buyers who include government institutions and cooperative societies set up by the government to oversee standards and ensure constant supply of high yields.

Agriculture remains the main stay of Kenya's economy. With the advent of liberalization under the World Bank sponsored Structural Adjustments Programmes, farmers were confronted with a policy that was antagonistic with their basic quest for necessities of life. Whereas trade liberalization and globalization of agriculture are meant to increase food production and as a consequence improve the economic situation of farmers, the same has remained largely a far-flung ambition. Food consumption patterns have changed in the advent of genetically modified food (GMO). The understanding of food security previously construed as constituting safe, adequate, nutritious and culturally prescribed food has shifted to incorporate GMOs. Indeed the current draft of the World Food Summit has removed this meaning inscribed in earlier draft plans of action.<sup>6</sup> The resultant effect of this shift is that our agriculture sector continues to suffer from loss of markets locally and in the international arena, a dislocation of traditional methods of farming, influx of genetically engineered food and the importation of food and food products for domestic consumption<sup>7</sup>. Going by the world uproar over GMOs introduced by profit-driven multinationals, it would appear that scientific approach to food security does not hold the answer- large-scale mechanized and monocrop farming has already caused untold damage.

Far from arbitrarily imposing their so-called altruism upon consumers at large (there are already reports of violent allergic reactions by some people to GMOs), and with no information whatsoever about long-term implications of GM crops, the corporations concerned (Rhône Poulenc' AgrEvo, Novartis, Monsanto, AstraZeneca...) have been shaken rigid by the public backlash and – even better, by plummeting share prices, the one thing guaranteed to hit where it really hurts. Indeed there could be some hope if the public can mobilize so effectively against the commercial juggernaut of profit-driven greed.<sup>8</sup>

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<sup>6</sup> TWN, Globalization of Agriculture and Rising Food Insecurity, May 2000 (Rome, Italy)

<sup>7</sup> The Agreement on Agriculture (AoA) of the WTO favours an industrial approach to agriculture that jeopardizes the food security in Developing countries owing to their lack of resource capacity.

<sup>8</sup> Raymer, Dee in "Millennium Resolutions" Eco-Forum Vol. 24 No.1 2000, ELCI

Reduction and at times absolute removal of tariffs on imported goods<sup>9</sup> and the removal of price controls that subject commodity price to market forces have created pressure on local goods ensuring that domestic producers are dislodged from the market. In the end the poverty levels have continued to rise at alarming rates. The idea posted is to lend everything to market control.<sup>10</sup> We must be prepared to take care of matricidal excesses by widespread adoption of organic and bio-intensive farming methods that work with nature's own processes. In the absence of any real government commitment to educating food producers in such methods<sup>11</sup>, farmers are left to the hands of a few individual role models who have dissociated themselves from mainstream systems and dependence on an all-cash economy. These people admit deriving enormous satisfaction at seeing their plans come to fruition, and in setting an example that others are eager to follow. Add to this a well-earned sense of security in having food on the table, surplus for sale, water during drought, and power during failures.<sup>12</sup>

Kenya is manifestly potential to sustain itself as far as food is concerned. Agriculture and by extension pastoralists' activities present the vehicle to achieving this goal. With the policy preferring large scale farming to subsistence farming, land use has shifted with peasants engaging prime land in cash crop farming. The demand from the farmer of his land and constant cultivation has wasted the land making it absolutely dependent on induced nutrients in the form of fertilizers. The end result is that fertilizers have routed the normal composition of the soil thereby interfering with the natural and ordinary ecological adaptation of the soil to support its own ecosystem.

In the extreme, devious dealers who sell farmers fake and uncertified fertilizers that end up destroying the soil richness leaving them swindled and the end result is that low yields are recorded.

Unscrupulous dealers repeat this scenario with the sale of uncertified seeds to farmers especially maize farmers in the Rift Valley. The Kenya Seed Company, a parastatal incorporated to ensure that only good and reliable seeds are sold to farmers has failed to arrest this menace and seeds bearing their labels have found their way to the market.<sup>13</sup> The gravity of these shortfalls cannot be over-emphasized in the wake of recurrent food shortages in the country.

Kenya is capable of being self-reliant as far as food security is concerned. However, and in the wake of rampant and uncontrolled corruption at high level of Government, artificial food shortages are created and unscrupulous and usually powerful and well-connected personalities 'import' cereal and other grains to meet the 'deficit'. In this scenario, subsidized imports find their way into the Kenyan economy to compete with hard-toiled farmers' produce. Coupled with the high costs of farm inputs, uncertain

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<sup>9</sup> Always subsidized in their country of origin

<sup>10</sup> Even when the majority of Kenyans live outside that market.

<sup>11</sup> Possibly being more preoccupied with constitutional and political reforms to see the bigger picture?

<sup>12</sup> Id.

<sup>13</sup> As recently as October 2001, arrests were reported in the local dailies of tones of packaged seeds in Kisii town of Nyanza Province that were designated to various destinations within East Africa. Fortunately, Police intercepted the lorries and confiscated the seeds. A few persons including influential businessmen were arraigned in Court and the trial is yet to be concluded.

markets and economic slump the country is undergoing, farmers are being driven slowly out of the essence of their livelihoods.

In the past and immediately after Kenya attained her independence, there were strong cooperative movements formed and managed by farmers. They were so strong that a whole Ministry took care of their interests. Coffee farmers had their own cooperatives. So too did the tea farmers. Maize farmers had a parastatal to look into their issues, and the dairy industry was ostentatious under the Kenya Cooperative Creameries Limited. Farmers and their produce were a major concern for the state because of the impact they had on the economy. Such choice phrases like “Agriculture is the bedrock of the Kenyan economy” found place in those days. However with the shift in political paradigms, such phrases only found place in political rallies and never at key policy levels. We engineered the collapse of the most crucial sector of our economy. Government’s role in this included the appointments uncreditworthy individuals to key positions in the sector and condoning the mass wreckage of these persons. Appointments in Kenya been based primarily on patronage, political affinity was the prime qualification requisite for public office. Attitudes towards civil service have been that of “*let us eat while we can*” with very little or no concern at all for the responsibilities attached to the position. The once famed coffee sector is now but dead, tea prices are not promising<sup>14</sup> and the maize farmers despite high yields have nowhere to sell their produce. The farmer is basically an unhappy citizen who is frustrated by the very system that ought, ideally, to protect it. Perhaps this explains why GM foods have found safe haven in Kenya without much official concern over their safety and potential risk. For whatever reason post colonial Kenyan Governments have consistently supported, both literally and metaphorically bottle imported industrial effluent locally in a character of self-hatred. This character is further reflected by the elitist, upper class distaste for local products and reinforced by the widely accepted and dismissive attitude that local products are essentially inferior. This serves the interests of multinationals, who, having bound and gagged the third world governments in debt and multi-lateral trades and agreements have unfettered access to the steady and cheap raw materials, a steady and even cheaper supply of labour, and a pristine environment in obvious need for polluting<sup>15</sup>. By legitimizing foreign exploitation, we criminalize and indigenouse ideas. Through elitist and concealed laws and institutions, we drive them underground and behave like they are an aberration of the chosen path, the accepted system.

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<sup>14</sup> Especially now that our key market, Afghanistan was bombed flat

<sup>15</sup> Kantai, Parsilelo in *Fast Food Culture* Eco-Forum Vol.24 No.1 2000

## PASTORALISM

Pastoralism derives its origin from the use of pasture as fodder for animals. In the Northern districts of Kenya over 800,000 nomads live on 108,000 square miles of inhospitable desert or near desert. The region straddles over two thirds of Kenya's landmass and is home to 60 per cent of the country's cattle, 80 per cent of the country's goat population and almost the entire camel population.

These pastoralists own and keep these domesticated animals enjoying vested interests over them and like their kin the world over, emphasize on the principle of accumulation seeking to always keep their stock high enough to remain as viable herds. Being thus independent, the ownership is vested on the individual pastoralists rather than the community with the result that the basic unit of productive labor and consumption is the family. The pastoralists' landscape of pastures and waterholes in these regions has no formal boundaries. The land is held in common by each pastoralist grouping and divided only loosely according to habit and usufruct. In this social and ecological set-up, the pastoralists move as they deem fit, each as Marx once observed 'an economy unto itself'<sup>16</sup> The principal pastoralists groupings are the Turkana, Boran or Borana, Sakuye, Gabbra, Orma, Wardei, Malakote, Rendille, Ariaal, Samburu, Ilchamus, Pokot, Maasai and the Kenyan Somali groups including Ogaden, Ajuran, Degodia, Garre and Murrule. The pastoral tribes of the Horn of Africa (the area comprising the North Eastern Province of Kenya, Ethiopia and Djibouti) are not rigidly separate and are often in interconnected, divided primarily by language.

The pastoralist economy is deeply entrenched in the culture and devolves around the web of claims and obligations between the pastoralist and his animals. The search for pasture grounds leads the pastoralist to cross over territorial jurisdiction of other pastoralist groupings and conflicts become inevitable. Whether it is genuine desire to assist, these conflicts have provided an opportunity for the government to impose draconian measures in the name of containing conflicts and any official heavy handedness is easily justified as containing peace and security. These conflicts are motivated by a number of factors: age-old inter-communal hostilities, competition for scarce resources, interaction with refugees, the culture of cattle rustling (which is taking a new commercial trend where rustlers receive ready market for their loot), misplaced political interventions and ordinary highway banditry. As drought and other natural calamities take their toll on these pastoralists, the tensions are heightened as the resources diminish.

Most pastoralists in the Northern region of Kenya move homesteads between 6 to 12 times a year in their search for fresh grazing grounds and adequate water supply, although many are now tempted to base themselves near more populated areas where there is constant water and the chance for employment in leaner times exist. The state views this pragmatic search for pasture and sustenance as peripatetic wandering, contributing nothing to nation building and causing awkward conflicts amongst its citizenry and at the borders. The official desire to see nomads settle is borne out of the perceived but misplaced economic theory that pastoralists own more than half of the country's cattle population but contribute less than half of the beef production. Government policy is one of protectionism towards the large-scale ranchers, and

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<sup>16</sup> Marx, Karl (1973) *Grundrisse* (Translated by M. Nicolaus) Hands worth, Penguin at 433

discrimination against the traditional pastoralists. Much of the official hype about the archaic, outdated nature of nomadic pastoralism and the anti-pastoralist bias of politicians can be understood in the light of the interests of the ranchers and meat producers. This is understandable in the sense that most policies of the government have for a very long time ignored the potency of pastoralism as an important economy. Pastoralists were the last people to send their children to attend 'formal education' in schools. This meant that the current crop of policy writers are not informed by the pastoral thinking and way of life and therefore fail to understand the nomadic nature of pastoralists. Official policy is to try and introduce agriculture in pastoral areas through irrigation. It is believed that if pastoralists stop moving, they will become more productive members of the society. In fact the pastoralists' lifestyle has carefully evolved to withstand extremely harsh conditions. It is the hardy nature of the pastoralists that is considered the best and probably the only method of survival in the region. This is the lesson that has to some extent been learnt by the independent aid agencies through trial and error but has yet to receive official recognition. Presently irrigation is practiced in the Garrisa District of North Eastern Province along the banks of River Tana. It is also practiced at Wei- Wei<sup>17</sup> in the West Pokot District of Rift-Valley Province. It is instructive to note however that these pastoralists engage in the agricultural activities without the intention of remaining farmers. With the proceeds from the sale of their produce they purchase animals, the ultimate currency of their economy.<sup>18</sup>

'Development' itself is one factor in the destruction of the pastoral way of life. Recent years have seen a series of aid projects, set up by foreign agencies, both governmental and non-governmental, which are related to the practical needs of pastoralists. Prior to this, however, considerable environmental and social damage was done by attempts to provide fixed water supplies and grazing areas, when in fact the only sustainable method among these pastoralists is constant movement. These agencies have always operated on the hypothesis that the pastoralist way of life does not take into account the issues of bio-diversity and want to see the pastoralist lifestyle replaced. In fact, research has shown that pastoralists know what bio-diversity is and understand the necessity of maintaining it in terms of risk spreading and resilience in their production systems.

Varied views have been expressed on this issue. Some maintain that pastoral nomadism is caught in the cycle of livestock accumulation that leads to overgrazing, environmental degradation and famine. Others hold that pastoral nomadism is environmentally sound and that the disruption of the normal system has caused the environmental problems currently experienced; that it is this lack of understanding of the traditional pastoral adaptation that that has led to the failure of development programmes in the pastoral regions<sup>19</sup>.

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<sup>17</sup> Under Cooperation of the Kerio Valley Development Authority (KVDA) and the Italian Government.

<sup>18</sup> See generally Lorot, AbdulQadir in "Unquiet Pastures" Survival International 2000

<sup>19</sup> Dr. Abdirashid Ali Sharmakey is quoted in Drysdale, J's The Somali Frontier Problems Shenvall Press, London, Hartford & Horton as saying,

*"Our misfortunes do not stem from unproductiveness of the soil, nor from lack of any mineral wealth. These limitations on our material well-being are accepted and compensated for by our forefathers from whom we inherited among other things cultural prosperity of inestimable value."*

I contend that the good Doctor had the pastoralist adaptation in mind.

Agencies have concentrated on wells, water, schools, churches and hospitals, all of which have had the effect of inactivating the nomadic practices, leading to grazing deteriorating from over saturation. By the drilling of boreholes and building of irrigation schemes, areas are suddenly flooded with families and their herds, and if these new sedentary communities are near already-existing townships, such as those established by the Gabbra, Rendille and Orma, the result is high unemployment and a drop in nutritional and medical standards, as well as a general scarcity of resources. Small administration stations such as Marsabit and Moyale had swollen to the size of 8,000 by 1979 as a result of development projects, which figures have more than doubled to-date.

Similarly, misguided practice has been the distribution of food aid, instead of providing funds for more long term development projects based on making existing pastoral systems more efficient. During the great drought of the early 1970's and that of 1979-80, thousands of destitute nomads who had lost their livestock became dependent on food handouts. This scenario was repeated after the 1992 famine and the 1994 prolonged drought. During 1979-80, the Turkana lost 90% of their cattle, 80% of their small stock and 40% of their camels, forcing them into towns and relief camps. By 1982 almost half of them were receiving food aid from the Turkana Rehabilitation Project, although new attitudes have now prevailed which are responsible in part for the fall of that figure to less than 10% by 1985. A local media house<sup>20</sup> alerted the Government and the relief agencies of the devastating famine that had hit Turkana District in late 1999. The Turkana lost most of their livestock and faced imminent starvation. They are now reduced to dependency on food aid. The effect of the famine is still being felt.

The failure of aid agencies in the past to take into account the real needs of their supposed beneficiaries led to the collapse of projects like the one funded by Norway in the late 1970's. \$2 million was spent on an ice-making/cold-storage plant at Lake Turkana, and a further \$20 million on a connecting road, bringing 20,000 Turkana into taking up fishing as an alternative to camel herding. The plant shut down after a few days due to prohibitive costs, and the disappearance of the area of the lake's richest in fish (comprising 80% of stocks through a foreseeable drought led to widespread destitution and a huge reliance on food aid). In 1980, Norway spent \$25,000 per Turkana farmer to earn a maximum of \$100 (the average Kenyan income being four times higher). However, the fish business around Lake Turkana is picking up with the entry of other communities who have more attachment to fish. The locals have also attempted to try out this new trade although those who come from as far as Nairobi to purchase the fish overly exploit them. Amana Lokwaliwa concedes that a tilapia that would have a market value of Ksh.100 in Nairobi goes for less than Ksh.5 in Kalokol, the fishing centre for the Turkana. At the end of the day however, these pastoralists use whatever earnings they make from their fishing escapades to purchase and rebuild their stock herds, the trade they know best.

The lack of emphasis on rebuilding herds-stock has caused a serious breakdown in social structures, since without stock to pay bride price and to fulfil other non-financial commitments traditional nomadic customs have been all but destroyed. However, not all

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<sup>20</sup> The Nation Media Group, publishers of the *Daily* and *Sunday Nation inter alia* 1999

nomads are necessarily averse to adopting agricultural alternatives when herding does not provide for their nutritional needs (normally a combination of the milk and blood of their livestock) as long as they can preserve existing social structures.

One of the largest projects that received immense criticisms was the Integrated Project in Arid Lands (IPAL). IPAL was a UNESCO/UNEP project that was based on the presumption that desertification in Northern Kenya was due to overgrazing by pastoral herds. IPAL's main objective therefore was to encourage pastoralists to sell their stock and to take up wage labour. IPAL folded in 1986 having achieved almost none of its objectives. It had not even proved its underlying presumption that the pastoralists were responsible for desertification; neither had they reduced their herd sizes.

The series of more practical projects that had been established included a scheme funded by OXFAM and the UN World Food Programme, working with destitute Turkana to restock their herds. Another restocking was organized by CAFOD at Garbatulla near Isiolo.

CAFOD also attempted to secure land for the Waso Borana who were being forced onto marginal lands by the take-over of their grazing grounds. They did this by providing them with plots on which to settle. This project was unsuccessful, as it did not take into account the characteristic nature of these nomadic pastoralists. Though it enabled them to subsist, it did not allow for their own pastoral way of life of forming households.

Governmental development projects to date, apart from the official antipathy to pastoralism, low population densities and poor communications make it hard to establish anything more than pilot projects. As detailed here before, the region presents the poorest infrastructure in the country and the administration has preferred to concentrate on other regions. Initially, the administration favored sedentary group ranches (as the one in Maasai-land) that attempted to integrate the pastoral economy into the national one, without regard for very different cultures and ideologies that underlie them. However, the Turkana District Development Plan 1984-88 recognized the need to mobilize local resources for food production, income, employment and poverty alleviation, and to support livestock development, local staff training and more local participation in development. The Maasai group ranches, thought before to be a way forward in dealing with pastoral lands, have been experiencing problems with many of the disputes arising finding their way to courts for determination. Majority of members of these group ranches have ended up selling the portions adjudicated to them to farmers from Central and neighbouring provinces at throw away prices. On realising that they have less land in which to practice free-range grazing as is true to their pastoralist adaptation, these members have resorted to forcefully graze their animals on land bought by these so-called outsiders and conflict has been reported.<sup>21</sup>

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<sup>21</sup> In 1992, numerous Kikuyu families living in Narok District were evicted from their land by Masai *morans* (warriors) on claim that they had encroached on their land. These families when interviewed by the press, produced titles for the said land, which they claimed, were sold to them by the same people who were evicting them. The Masai on the other hand claim that even those who sold their land did so at prices way below the market rates and those buyers

The Northern Kenya pastoralists do not want a similar fate as the one that befell their Maasai counterparts even though their land is not *per se* a potential agricultural zone, save for Marsabit and the region around Mount Marsabit and Horr.

Large-scale development schemes in communications and irrigation that had initially bypassed the locals were put in place in the region. The tarmac to Lodwar and Lokichogio was put in place with the help of International agencies. However, since its construction ten years ago the stretch between Eldoret and Lodwar has never been repaired and gives the Pokot and Turkana highway bandits an easy opportunity to harass motorists.<sup>22</sup> The NEP is known for these bandits.

Since its enactment, the Kerio Valley Development Authority has been engaged in the development of the ASALs found within the Kerio Valley region. This region covers eight administrative districts including Turkana district and Samburu. However, most of the projects are concentrated within West Pokot and Baringo districts<sup>23</sup>. Through the Authority, the government secured the construction of a multi-million dollar electricity-generating dam at the Turkwell Gorge. The Kerio River sustains the dam, which is the pastoralists' lifeline in the region. The dam has caused the drying up of vegetation on which the Turkana are dependent for their grazing. Despite that, most of the employees including the manual labourers are not drawn from the local communities (the Turkana and the Pokot). In essence, these communities have not benefited in any way from the presence of the dam in their ancestral land and can only count their losses in terms of lost pasture grounds. Furthermore, they have never been compensated from the loss of their land to the construction of the dam and the plant.

In Marsabit and Moyale, there is a heavy presence of non-governmental organizations with the notable presence being that of GTZ-Germany and the Food for the Hungry International. The locals complain that these NGO's operate in the region as if the locals do not exist. They claim that they were neither consulted on any of the projects nor are they allowed to effectively participate in them. GTZ (Germany Development Agency) has set up numerous projects ranging from establishment of cattle-dips, bee-keeping, restocking of livestock and settlement schemes. They also offer scholarships to the needy but bright students. They are however criticized for not involving the locals in their projects and they feel as if these projects are imposed on them.

The Food for the Hungry International is essentially a Christian relief agency whose presence in the region is to ensure that there is no danger of starvation by provision of relief food to these pastoralists. The FHI also sponsors needy but bright students in their education. However, FHI does not support non-Christian students. In fact, they do not have in their employment any Muslims or traditionalists yet these residents whom they serve profess diverse faith other than Christianity. Further, those who work for these

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capitalized on their ignorance to take away their pasture grounds. The land is now used for the cultivation of wheat and barley though even maize does well in this highly potential region.

<sup>22</sup> Security personnel have blacklisted the area between Marich in West Pokot District and Kainuk as a banditry zone. A stretch of 36 km of potholes, anyone driving in the route has to obtain security escorts or endure a journey that is living nightmare. Just after Kainuk, a similar stretch is manned by Turkana bandits up to Lokichar.

<sup>23</sup> The sitting President is from Baringo District and the Pokots are considered as Kalenjins.

organizations are not locals. Overall, these organizations do not enjoy much popularity in the region.

During the pendency of the EL NINO rains in the region in 1997, the area was flooded, the already poor roads rendered impassable by the floods and diseases were common. The wretched state of medical potential saw many people die of an ailment similar to 'Ebola'. The refugee camps were flooded and it became increasingly difficult for relief to reach the residents trapped by the rains.

The National Poverty Eradication Plan-1999-2015 (Office Of The President - Department Of Development Co-Ordination) concedes<sup>24</sup> that at times of drought, ASAL residents have to migrate to the urban centres; unless large-scale relief is available and may never return to pastoralism as a way of life. Special programmes are needed to increase their economic integration with the rest of the country. In this way, they would be able to increase their human capital and have employment safety nets to access in times of disaster.

Approximately 1 million people live in the ASALS, poverty is widespread because of uncertainties arising from resource degradation and climatic variations. Competition for the scarce resources is rife and brings about conflicts between the ethnic grouping in the region. This in turn results in the hindrance of concentration on development issues. The state is enjoined by International Law to create a conducive atmosphere within which every citizen can enjoy development economically, socially or culturally. The government concedes<sup>25</sup> that the physical isolation of the ASAL from the rest of the population, added to the poor infrastructure means "that normal programmes to support economic growth and human capital do not reach them *in situ* or do so at extremely high costs".

The socio-economic infrastructures within the region are far from desirable.

With the introduction of agriculture, these pastoralists are forced to settle in one area as they await the yields. Apart from creating a confused culture amongst the pastoralists, the same is also an economic hazard. Nomadic pastoralism has long been understood to be environmentally sound and environmentally friendly. These pastoralists sanctified pastures and venerated pasture grounds. A literature review reveals two differing positions. Some maintain that pastoral nomadism is caught in the cycle of livestock accumulation, which leads to overgrazing, environmental degradation and famine<sup>26</sup>. Others hold that pastoral nomadism is environmentally sound and that the disruption of the normal system has caused the environmental problems<sup>27</sup>. This lack of understanding of traditional nomadic pastoral systems has been cited as a major reason for failure of development programmes in pastoral areas<sup>28</sup>. The movement allowed used pasture grounds to reinvigorate and rejuvenate as they move to others that were left to remain bare. Settlement exhausts the resource base of the area so settled being as it were a fragile ecosystem. Population explosion in the settled areas brings about the social ills associated with urbanization. In the advent of serious drought as the one experienced in 1992, 1997

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<sup>24</sup> At page 66

<sup>25</sup> Id.

<sup>26</sup> Picardi and Siefert, 1976; Ingold, 1980; Brown, 1971; Lamprey, 1983.

<sup>27</sup> Hogg, 1987; Sinclair and Fryxell, 1985; Swift, 1977.

<sup>28</sup> Sanford, 1983; McCabe, 1985; Fry and McCabe, 1986.

and 2000, the settled areas experience the most intensity as herd losses are much higher and overgrazing exhausts the pasture grounds.

This is illustrated by the case study of the North Eastern Province and pastoralist sections of the Eastern Province. Four ethnic communities, the Boran, Gabbra, Rendille and the Burji, mainly inhabit Marsabit district. The first three are spread around the District but considerable concentrations of Boran are found around Mt. Marsabit at Dirib Gombo, Gabbra at Bubisa, Rendille at Korr while the Burji who are mainly sedentarised agriculturalists are found within the humid environment around Mt. Marsabit and also constitute a greater proportion of the merchants within Marsabit town. The Boran still practice some extent of agro-pastoralism around the mountain and nomadic pastoralism further away. Gabbra and Rendille tribesmen fully concentrate on livestock husbandry.

On the other hand, the Kenyan Somali trace their present predicament to the colonial era and more particularly in mid-1940s. During this period, the time-tested pastoralist practices were rendered irrelevant. What follows and continues to happen to date because of new conditions has put the Kenyan Somali in jeopardy. Most of these interventions included settled agriculture, settlement centres, bore holes and most critical in Wajir and Mandera Districts, the appointment of chiefs and creation of locations<sup>29</sup>. Most of these interventions are however found or established in more arable parts, which are dry season pastures. The net effect of these interventions has been a disruption in the Somali Pastoralists migration system. In other areas, their access has been totally blocked. Therefore, poverty, misery, hunger, pauperism and other forms of human indignity now witnessed among the Somali find explanation in these disruptions. Following the collapse of the system and outside interference, there is frequent drought, decline in livestock productivity and increasing sedentarisation as in Banissa, Takaba, Daua River, Habaswein, and Buna and along the Ewaso Nyiro River. Mobility, the cornerstone of nomadic pastoralism has reduced, the resource user cycle has shortened and individual and at times community territorial claims are becoming more specific. It is reported that before the 1940s there were only four major dry season water points at Buna, Elnur, Wajir Town and Ewaso Nyiro River.

The Wajir wells were most important and served the greatest number of livestock. From the 1940s, the water points increased remarkably in terms of bore holes, wells and water pans. Under the colonial government's Dixey Scheme ten, pans were dug in the NFD from Tarbaj, ElBen, Wargadud, Mansa and Griftu. Kenyan government at independence developed more water points under the Livestock Development Programme 1969-1978 mainly in Wajir West and South. To date, there is increased proliferation of water points and the figure stands at slightly over 30 dry season water points.<sup>30</sup> The net effect of this proliferation is that there has been a total disappearance of distinct dry and wet season grazing areas. This is because water is available all through the year and people are now settled around the water points. Banissa and Takaba areas of Mandera district have their population concentrated around the twenty earth dams<sup>31</sup>. Another effect has been a

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<sup>29</sup> These pastoralists have a saying that 'every tree has its own chief'

<sup>30</sup> These include Wagalla, Ganyure, Kutulo, Hungai, Khorof Harar, Habaswein, Sarman, Gutar, Dambas, Ajawa, El Ben, Griftu and Dadajabula.

<sup>31</sup> Mandera District Development Plan 1994-96 p.63

change in the species composition of herds, where traditionally camel keeping clans have diversified into cattle following the increase in water points.<sup>32</sup> Moreover, the water points are too close to one another making them environmentally unsustainable.

It is a truism that nomadic pastoralism survives on mobility. Settlements tend to follow patterns of water sources and to an extent this has led to establishment of settlement areas especially around Elnur, Wagalla and Leheley. The Dambas borehole was dug in 1973 and following the subsequent drought in early 1970s, 1980, 1984 and 1992 many pastoralists who lost livestock settled at Dambas. As a result of the growth in water points and settlement, the rotational wet season grazing patterns that traditionally existed among the Somali has been distorted or has collapsed.

Before, the Mandera Somali pastoralists moved their livestock to the dry season pastures along the Daua River to the north, Banissa in the north, and Takaba to the west and El Wak to the southeast and further into Southern Ethiopia. On the onset of the rainy season, the livestock would be moved away to the east and center of the district such as Wargadud, Fino, and parts of El Wak and to the southern parts of Rhamu division<sup>33</sup>.

On the other hand the Turkana, the creation of the Buffalo Springs Game Reserve in 1958 and the Shaba Game Reserve in 1979 deprived them of their traditional pastures and water. Presently their livestock cannot access the park, as it is a restricted area. The Somali and Samburu claim the creation of the two game reserves onto their land disrupted their traditional migratory trends. Similarly, the creation of the Meru National Park has affected the Boran people by depriving them of dry season pasture grounds.

Most of the NGOs in the region, as stated earlier, operate on the premise that the pastoralists experience suffering owing to their conservative traditional emigrational patterns. One example of this is OXFAM, an NGO that has attempted to make farmers out of pastoralists in Garrisa District. In conjunction with the Government, OXFAM has introduced farming along the banks of Tana River in the region around Raya and Sankori of the District. Here, members of the Abdwak and Auliyan clans grow subsistence crops and fruits. Most of these products find their market in neighbouring Wajir and Garrisa towns. On average, a farmer earns Ksh. 10,000/= per month. It is however important to note that the farmers buy cattle and other livestock from these proceeds. The farming is usually interrupted by feuds among these clans as here before mentioned.

We note from the foregoing that the region still lags behind in Development projects on the basis of lack of proper prioritization of projects and the general attitude that the inhabitants cannot help much in assigning themselves a proper course for development. This is evident in the very nature of concerned agencies in the region ignoring the input of the inhabitants and only treating them as spectators in matters that directly affect them.

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<sup>32</sup> Camels are more resistant animals compared to cattle.

<sup>33</sup> The logic behind this rotational grazing system is that areas recently grazed would be allowed to rejuvenate. This customary practice was recognized and enforced by the colonial authorities through customary chiefs, as reported by Hardin (1968). This system collapsed in the 1970s owing to the increase in water points and settlement.

Findings of existence of mineral oil in the region have elicited no favorable response and to date the potential for oil in the region has never been tapped. The government has seemingly let this potential lie untapped without good cause.

The right to development is an inherent right in the preservation of the human dignity and worth. Development is construed to include the acropetal rise or advancement by a society to meet the current needs and wants. This cannot be achieved in an environment of threat to the security of both person and property. The pastoralist adaptation of old which was their way of life for the continuity of society has been compromised by emigrational trends<sup>34</sup> that portray movement to urban centres leaving behind only the most hardened and tempered to continue with the pastoralist practice. Good examples of this is found in the Turkana Diaspora of Baragoi<sup>35</sup>, Marsabit and Mogotio<sup>36</sup>; and the Somali Diaspora of East Leigh Nairobi, Mogotio, Namanga, Isiolo, Meru and the neighboring Towns.

These migrations explain the poor state of the security present in the region as the Pastoralist abandon their homes in search of safer abodes. With the NFD straddling over two thirds of the country's landmass both human and livestock continue to rise at slightly higher than the average Kenyan rates. This fragile resource base is under pressure despite the modest increase. This fragility is increased because the rangelands (as pasture grounds) in the key areas are degraded and insecurity leads to under-utilization of 40% of the range.

These pastoralist groups therefore require special programmes to ensure that they are in synchrony with the rest of the population in matters touching on social, cultural and economic spheres. Development is one such sphere. The pre-requisite for this right is to guarantee the safety of both person and property so that a conducive environment for viable exploitation of resources can be realized. Whether by neglect or simply indifference, this guarantee has never been an agenda of Kenyan government's plan for the NFD since independence. Time is now ripe to consider the necessity of this right in its totality.

Settlement breeds a large population of persons dependent on food aid. Food aid is a vicious cycle of dependency and these communities may never recover their lost grandeur. This is the sad story that has repeated itself in Turkana District, West Pokot, Samburu, North Eastern Province, Pastoral areas of Eastern Province and some parts of Coast Province. The system has failed to turn the pastoralists to farmers but has successfully made them more indigent and deeply entrenched in poverty.

Even food aid is still presenting problems to the pastoralist culture. Granted it is a humanitarian act, but the way it is conducted lends its otherwise noble intentions parched. The relief workers<sup>37</sup> establish relief distribution centers in this areas where they routinely assemble the pastoralists and distribute food and other staff (usually with a camera or two – for the records!). Because they are receiving food aid, these citizens establish settlement areas around the distribution centers and the vicious cycle of food aid

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<sup>34</sup> Influenced by insecurity

<sup>35</sup> Samburu District

<sup>36</sup> Koibatek District

<sup>37</sup> Notable among them is The World Vision International in Turkana District

dependency is repeated, perhaps even worse than before. Pastoralism as a culture that has withstood the test of time in the region is decimated and rendered redundant, but at what price?

The hinterland pastoralists namely the Maa speakers<sup>38</sup> and the pastoralists bordering the farming communities have their own problems to contend with. For the Maasai, the establishment of Group Ranches at the onset of independence may have been aimed at incorporating the pastoralist nature of the Maasai in the tenure system. The Group Ranches allowed the Maasai people to own land in common accommodating their grazing patterns that did not and is not expected to recognize unfamiliar concepts like title and ownership of land. However this has grossly been abused by the system and corrupt officials so that most group ranches are now either defunct or have cases pending in Courts. Those who were successful to have themselves allocated parcels of land have either sold them or have leased them to innovative ‘Bantus’. In the end, the Maasai whose land is potential for agriculture and especially the production of cereals have found themselves without any land to graze freely and it is a common sight to see large herds of cattle grazing along the main roads as you traverse Maasailand. This has caused severe differences between the Maasai herdsmen and the entrepreneurs who bought or leased Maasai land.<sup>39</sup>

The Pastoralist land is vast with diverse flora and fauna. In particular tropical and Savannah animals of rare find abound in the plains that is the Pastoralist landscape. The tendency is for the government to set a huge chunk of the Pastoralist land as Game Reserves and parks to attract Tourists and generally to preserve the ecosystem. However this is always done arbitrarily and without regard to the pastoralist interaction with the ecosystem around them. As a result, huge chunks of pasture grounds are removed from the reach of these pastoralists and they are forced to compete for the limited resources left. Pastoralists the world over have since time immemorial lived in the harshest environments and yet have always managed to co-exist with that environment so that the same remained useful for future generations. They have all along maintained large herds to mitigate the effects of drought and as a pedestal to societal esteem, more or less like the regard accorded to ‘hefty bank accounts’ by the non-pastoralists.” To ask them to maintain small and so-called ‘manageable’ herds is like reducing your bank account”.<sup>40</sup>

According to Mr. Achoka Awori, a member of the National Steering Committee on the Poverty Reduction Strategy Paper<sup>41</sup>, the Kenyan beef industry was at some point in the 70s a major industry with a respectable position at the National GDP grid. Corruption and patronage with policy favoring the Large Scale ranchers led to the collapse of the Kenya Meat Commission. *Inter alia*, its function was to slaughter the animals from the ranches and other livestock keepers, package the same and market. It was also charged with the task of enlightening the meat producers on how to improve stock to increase output.

In a way the collapse of the KMC as it is widely referred to, signified a blessing in disguise. First and foremost the KMC had its factory situated in Athi River, some 700

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<sup>38</sup> These includes the Maasai, the Samburu and the Ilchamus (Njemps in other books)

<sup>39</sup> This is discussed further in this report under the heading on Conflict.

<sup>40</sup> Per Tolit Olwor-Atiya, a Karamojong’ elite from Uganda

<sup>41</sup> In a paper of the same title presented at a workshop on the East African Rio+10 NGO and Civil Society process at Mombasa Beach Hotel, Kenya.

kilometers from Lodwar and a similar distance from Wajir. Pastoralists were expected to transport their live animals to the factory this distance notwithstanding. This created an opportunity for a class of middlemen who bought the pastoralists' animals for dismal sums. Only the big time Ranchers<sup>42</sup> could afford the cost of transporting the animals to KMC depots. Secondly, KMC by virtue of its location could only engage the services of the inhabitants around Athi River. The distance and the remoteness of their land prohibited the pastoralists who contributed the bulk of the meat from being engaged. Thirdly, the pastoralists' poor infrastructure and inaccessibility meant that a lot of animals were lost along the way, and this coupled with the threat posed by bandits. What was so hard in setting up the same facility in the pastoralists' areas so that what they transport is merely carcasses?<sup>43</sup>

What the pastoralist communities require is a system that understands the customary laws, rules and regulations governing the usage of land. Without such a system, the result will be the erosion of local customary responsibility and loss of bio-diversity, continued insecurity and prolonged droughts. Poverty will remain part and parcel of the community unless every effort, however bona fide assessed as to its viability and sustenance. Tragedy of the Commons, a now well too familiar term, under the guise of free for all, will be real. These issues have to be related to rights over land and control rights. Otherwise the conflicts between the pastoralists *qua* pastoralists like the Wardei and their neighbours the Pokomos would have long been averted.<sup>44</sup> There is need to recognize and enforce customary rights that have served these people over the years.

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<sup>42</sup> Including the Lord Delamere and the remnants of the colonialists still in Kenya in the Rift Valley

<sup>43</sup> A question posed by the long serving MP for Turkana North Constituency Mr. Japheth Ekidor

<sup>44</sup> The Wardei, a predominant nomadic pastoralist community has been in conflict recently with the Pokomos (predominantly farmers) over Pasture grounds, now cultivated, and water holes in Tana River District. A number of houses were burnt, several people killed and social functions interrupted. The situation is further heightened by the political dimensions the conflict is drawing; understandably since politics thrives under chaos.

## **CONFLICTS ARISING FROM LAND USE**

From the forgoing it is clear that conflicts relating to land use abound in the entire country as is expected of a fragile resource base that takes more than it can handle. Among the farming population of the country conflict takes the form of competition for arable land. This means that as populations soars, so too is the threat for expansion of land to accommodate the increasing population. Forests have been invaded and important bio-diversity rendered endangered. The Forest ecosystem is interrupted and finally caving in to the clearing activities of farmers. The oft-spoken unscrupulous dealers leaning on loose legislation find the boon by corrupting their ways to owning forestland and selling to these farmers in need. As a result conflict over this resource inevitable. The infamous 1992 Land Clashes in parts of the Rift Valley Province are still alive in the memories of many a Kenyan.

## **REFUGEES AND INTERNALLY DISPLACED PERSONS**

Among the pastoralists, age-long practices of cattle rustling continue unabated. While it was a show and display of manhood in the past, it has now adopted a new commercial dimension with stocks finding their way in interior markets. Whether by design or utter indifference, cattle's rustling has continued to claim lives in its wake and condoned by the state as amounting to bad cultural practice without any measures being taken to stop the bane.

A host of internally displaced persons abound stemming from the cattle rustling menace predominantly the Turkana and Marakwet communities. Reception Centres have emerged in Kitale, Mogotio, Marigat, Nakuru, Cherangani and Eldoret. With no animals and fleeing from constant threats to dear life, these pastoralists serve as a reservoir for cheap labour in these reception centers mainly serving as watchmen, ayahs and houseboys, which is also difficult to come by. The crime rate in these reception centers has always been attributed to these internally displaced persons because they are poor. They depict the ideal Lambrosian criminal in tatters and poverty reading all over their faces.<sup>45</sup>

Unfortunately, they too have been left to the force of liberalization to sort its own. They are hopeful of liberation.

Refugees residing in pastoral areas compete with the pastoralists for the already fragile resource.<sup>46</sup> Instructively, though hosting refugees is a perfectly humanitarian act, the government never consulted with these pastoralists before allowing in the refugees to be settled in their areas. Noteworthy, these refugee camps are located in lean time pasture grounds for these pastoralists.

Virtually all the states bordering Kenya in the Northern Frontiers have their share of internal feuds and dissidents. To quell this apparent opposition, all these states engage in armed conflict with the rebels. The breakdown of the Somali state has rendered inter-clan feuds the order of the day as each try to harness power. This has reduced Somalia to a

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<sup>45</sup> From my own experience with them in Court

<sup>46</sup> Kakuma in Turkana District and Dadaab in the North Eastern Province are large refugee camps carved out of huge chunks of pastoral land areas and hosting primarily Somalis and Southern Sudanese

state of fiefdoms. In all these cases, civilians and other non-combatants caught up in the muddle of conflict have abandoned their homes to begin the long journey that is a refugee's life. From Sudan to Somalia to the Oromo Liberation Front rebels from Ethiopia and more recently the Civic United Front (C.U.F) members from Zanzibar in Tanzania, these refugees find Kenya a safe abode for shelter away from the business of conflict.

The United Nations High Commission for Refugees (UNHCR) has encircled vast pieces of arid land in Dadaab in Garrisa District and Kakuma in Turkana District to accommodate the refugees from Somalia and Southern Sudan respectively.

A refugee is defined as "a person who owing to a well-founded fear of being persecuted...is outside the country his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country".<sup>47</sup> A refugee shall cease to be so considered if, *inter alia* he has re-availed himself of the country of his nationality or he has acquired a new nationality, and enjoys the protection of the country of his new nationality.<sup>48</sup> He will also cease to be a refugee when the circumstances that rendered him a refugee cease to exist (*rebus sic stantibus*)<sup>49</sup> and he can no longer continue to refuse to avail himself the protection of the country of his nationality or habitual residence.<sup>50</sup>

Refugees are generally enjoined to conform to the laws and regulations as well as measures taken for the maintenance of public order of the host state.<sup>51</sup>

Kenya being a contracting state to the Conventions on refugees is therefore under an International duty to admit refugees into her territory. As earlier noted there is an influx of refugees from the states bordering Kenya at the Northern frontiers as a result of the incessant conflicts. Somali Republic is now reduced to fiefdoms, Ethiopia has its share of dissidents, the Southern Sudanese crisis is still on-going and Uganda still has problems with its Northern citizens.

Understandably, Kenya having a duty under international law has hosted these burgeoning number of refugees within her territory. Through the UNHCR<sup>52</sup> camps as earlier noted, were established in various regions of the country. Unfortunately the largest of these camps were set up at Dadaab and Kakuma, which are situated in the country's most arid regions of North Eastern Province and Turkana District respectively.

The major threats posed by Refugees or their presence can be said to include the following:

- a. Influx of small arms used to fuel age old enmities
- b. Rising banditry or *shifitism* especially in the North Eastern Province

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<sup>47</sup> Art. 1A(2) of the *United Nations Convention Relating to the Status of Refugees* adopted by the U.N Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened pursuant to Gen. Assembly Resolution 429(V) of 14 December 1950 (28 July 1951)

<sup>48</sup> *ibid* Art 1c (1) and (3)

<sup>49</sup> fundamental change of circumstances

<sup>50</sup> *ibid* Art 1c (5)

<sup>51</sup> *ibid* Art.2

<sup>52</sup> United Nations High Commission for Refugees which has its regional office for Africa in Nairobi.

- c. Dumping of plastic waste emanating from the refugee camps causing environmental hazard
- d. Uncertain futures as Refugees get more attached to their new place of abode. The Turkana are asking whether the Southern Sudanese will respect the borders if they ever get independence, and since they are the majority population in the Kakuma area, what will their relationship with Kakuma be?
- e. Increased lawlessness owing to intermixing of cultures. The Refugees are hardened by years of conflict and their attitudes towards authority is as expected off the mark. This coupled with the easy access to small arms rubs onto the natives and the result is a time bomb of a society.
- f. The general notion that the Northern Frontier Districts are unsafe has led to the shying of would be investors from the region. Fear of highway bandits especially in the NEP means that armed escort lead public service vehicles that dare ply the region. Notably, these bandits are mainly Refugees who have crossed the porous borders or natives supplied with arms by refugees.

All said and done, there is urgent need to address these problems by borrowing leaves from systems that have worked elsewhere. We would wish to make particular mention of Mauritania which through its *Code Pastorale*<sup>53</sup> has attempted to address the issue of competing interests between the minority farming communities and the predominant pastoralists. It has yet to be enacted but by far the greatest representation of Governmental concern for its citizenry.

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<sup>53</sup> Prepared by consultations with the communities facilitated by GTZ- Mauritania and the Mauritania Government

## IMPLICATIONS OF LEGISLATION AND POLICY ON LAND USE AND TENURE

As stated earlier, if the legal process does not attempt to fully understand the underlying customary laws, rules and regulations that govern the usage of land in both agricultural and pastoral areas, the result will be the erosion of local customary responsibility and loss of bio-diversity. Poverty will set in as these are resource-dependent economies and the degradation will result in the real tragedy of the commons.

Legislation for the farming communities is the more concise types set out clearly with both substantive and procedural faces to pre-empt and regulate actions arising therefrom. In Kenya, legislation on land is embodied in the Registered Land Act Cap 300 of the Laws of Kenya as the ultimate goal for legislation of land. In fact, land legislation is spread over depending on the location of the land, duration of the lease, grant or freehold, and the nature of the tenure. Grants fall under the Government Lands Act (Cap 281) while trust land is governed by the Trusts Land Act (Cap 290). Land tenure must therefore be construed in the specific regime of the legal instrument governing the parcel of land. Any system of land tenure is dependent on the historical and cultural circumstances within which the given community has evolved the legal and philosophical content of that communities' conception of land.

In Kenya the RLA governs land previously held under customary and replaces what was essentially communal continuous law with that of individual ownership. The trust lands on the other hand fall under the jurisdiction of the county council *in trust* for the people and emphasizes on the system of traditional communal land ownership. At present, maybe due to sociological, ecological and management reasons, it is very difficult to replace customary law with individual land tenure. And this is good for the pastoral areas. The Land Act (Group Representatives) Act tries to preserve some element traditional and modern law in giving a group title deed to a communal area of land on a cooperative basis. But as noted earlier in this report, there have emerged numerous misunderstandings with a lot of litigation pending or before courts.

Since all land ultimately belongs to the state, the question is whether it is possible to balance the interests of the rural population and the government in terms of tenure. At present, customary law is largely unwritten and exists *de facto* as opposed to *de jure* and is probably out of step with wider development process as observed by Wanjala (1990). "Development" does attempt to understand such customary law regulations whether they be of an individual or communal nature. As communal tenure in Kenya derives from customary law, how then can it be better understood, articulated and used as a basis for land management even alongside individual land tenure? It is important that where the law recognizes group, family or cooperative rights to land, the rules governing these rights under customary law in the various ethnic groups should be identified, understood and codified in statutes.

Conflict may arise between statutory operation and customary emphasis on land usage. While statute operates on the principle of *exclusion*, customary law emphasizes on the inclusion through communal access and usage. This issue of inclusion is germane and of integral importance in understanding customary law, especially in the expansive pastoral systems. In Pastoral communal law, the principle of inclusion is linked to the pastoralists'

ability to retain relationships with those around him to continue having access rights for instance to trees, water etc.

Land tenure cannot be separated from land use. Land tenure rules emphasize issues between humans and the regulation of competing interests in the use of land. Land use rules emphasizes human-versus-environment on the other hand, issues and the regulation of land use so as to conform to acceptable methods of husbandry and conservation. Thus, the holder of tenurial rights has to assume that the objectives of land use are realized; land use decision –making therefore becomes a tenure issue. It then becomes a question of whether the farmer or the national planner defines the objectives objective of land use.

Unfortunately, many people are ignorant of these rules and regulations, be they customary or statutory. The two are not necessarily mutually exclusive but more often than not, the state judiciary is used as an instrument to erode customary rights and regulations. This especially if it is seen to result in change that is “improvement” like turning rich patch pastoral land into an irrigation scheme or settlement. In general, research and development programmes as seen earlier condone such “improvements”. Research by its very nature favours work on technologies, and not the attitudinal process<sup>54</sup> of change that requires a solid understanding of existing land use systems. Development efforts only add to the pressures on local and indigenous approaches neglecting them altogether and undermining them with incompatible interventions, which often lead to project failure.

It is not lost to us that no development or research can take place in a political vacuum. Nor can they blithely ignore issues of tenure and access. Yet all too often this happens. Research looks at issues from a technological, anthropological or sociological perspective, not from the legal perspective. Therefore research findings, important as they may be, lack a policy and legal framework through which they could gain more definitive acceptability. Development programmes, on the other hand, concentrate on the sectoral disciplines they are working with and often do not see the work in terms of policy intervention and legal redress. Therefore the benefit of the work may be lost, or not accepted.

This combination erodes customary law, indigenous property rights, genetic resources and bio-diversity in such areas in favour of other land use systems that have, in many cases, already been shown to be unstable in such high risk areas where management of risk and maintenance of resilience, and not economic production, are the primary objectives. It has been noted we must seek localized solutions. In this regard, customary law on tenure is not rigid as has been touted, but flexible and innovative. Local people should be helped to find ways of accommodating traditional tenure patterns to new and more productive systems of land use that are ecologically sustainable, maintain bio-diversity and respect indigenous property rights. In this regard there is need to tap the high invaluable knowledge potential of these locals.

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<sup>54</sup> I hope I have adopted a different approach