

IMPLEMENTATION OF THE COMMUNITY LAND ACT: A GUIDE FOR COUNTY EXECUTIVE COMMITTEE MEMBERS



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Informed by the Constitution of Kenya, the Community Land Act (CLA), and the County Governments Act (CGA), this Guide aims to support the County Governments to effectively play their role in implementing the CLA, while ensuring an inclusive, participatory and people-centered process. The Constitution of Kenya states that the executive authority of the county is vested in and exercised by a County Executive Committee (CEC)¹. The CEC consists of the Governor, the Deputy Governor, and County Executive Committee Members (CECMs) appointed by the governor. The primary responsibility of the CEC is to implement, within the county, national legislation to the extent that the legislation requires. Therefore, CECMs have a critical role in the implementation of the Community Land Act.

This Guide includes specific guidance on how CECMs can ensure that CLA implementation efforts are participatory, community driven, and gender sensitive, as women are often the primary managers and users of community lands. Participation of everyone in the community - including women, youth, men, elders, minority groups, people from various religions, and other marginalized groups is critical in the community land registration process.

THE GUIDE IS FURTHER INSPIRED BY THE OBJECTIVES OF DEVOLUTION, WHICH INCLUDE:

- To promote democratic and accountable exercise of power.
- To give powers of self-governance to the communities and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them.
- To recognize the right of communities to manage their own affairs and to further their development.
- To protect and promote the interests and rights of minorities and marginalized communities.

The effective implementation of the **CLA** requires coordination between the National Government (Ministry of Lands and Physical Planning and the National Land Commission) and the county governments. Besides coordination, the law envisions constant consultation between the two agencies at every stage of the implementation of the law.

WHO SHOULD USE THIS GUIDE?

The Guide is designed for County Executive Committee Members (CECMs), Chief Officers in the department of lands and physical planning within the county, Civil Society Organizations (CSO's) that are carrying out training or capacity building for county governments, and all other relevant stakeholders in the lands sector.

1 Article 179 of the Constitution of Kenya 2010

SECTION ONE: INTRODUCTION TO THE COMMUNITY LAND ACT

BY THE END OF THIS SECTION, READERS WILL:

- Understand the history and context of the Community Land Act.
- Have clarity on the roles and responsibilities of the county and the national government.

HISTORY AND CONTEXT OF THE COMMUNITY LAND ACT

Prior to the enactment of the **Community Land Act** in 2016, the **Trust Lands Act, 1939** and the **Land (Group Representatives) Act, 1968** were the legal frameworks that provided for the governance and management of community land in Kenya, in the form of trust lands and group ranches respectively. These two laws (that have since been repealed by the **Community Land Act**) inadvertently shifted governance of community land away from the people and bestowed it in the hands of a few elite individuals and the now defunct county councils. Subdivision of pastoralist lands, wrongful allocations, loss of community lands, and gender discriminatory registration processes characterized the former legal dispensation.

More recently, the **Constitution of Kenya** and the **National Land Policy (NLP)** both recognized the importance of community land as a distinct tenure system equal to private and public tenure. Both the **Constitution** and the **NLP** outlined legislative steps that would be required to institutionalize the documentation and subsequent registration of community lands. The enactment of the **Community Land Act** in 2016 therefore marked a great milestone in the management and governance of customary and indigenous people's lands in Kenya by communities themselves. Under the act, communities, women, and men have the opportunity to meaningfully lead and engage in decision-making processes that deal with community lands and natural resources.

DEFINITION OF 'COMMUNITY' AND 'COMMUNITY LAND'

The **Community Land Act (CLA)** defines “a community” as a distinct and organized group that shares any of the following attributes:

- Common ancestry
- Similar culture or unique mode of livelihood
- Socioeconomic or other similar common interests
- Geographical space
- Ecological space
- Ethnicity

Other than this guidance, the **CLA** gives communities the right to define themselves, as long as the community's self-definition does not

exclude people that have lived on the land and depended on it for their livelihoods (**Constitution of Kenya, Article 39.3**). This means that communities must define themselves in a way that includes everyone who has been living on and using the land, including men, women, youth, minority tribes, and members of all religions, people with disabilities, and people who have historically used and shared natural resources located within the community. Communities should not be pushed to identify themselves along predefined lines besides those provided in law, but given the opportunity to define themselves, as long as the definition does not violate other laws.

The **CLA** defines “community land” as:

- Land lawfully registered in the name of group representatives under the provisions of the law.
- Land lawfully transferred to a specific community by any process of law.
- Any other land declared to be community land by any process of law.
- Land that is:
 - Lawfully held, managed, or used by specific communities as community forests, grazing areas, or shrines.
 - Ancestral lands or lands traditionally occupied by hunter-gatherer communities.
 - Lawfully held as trust lands by the county governments, but not including any public lands held in trust by the county government.

ROLES OF COUNTY GOVERNMENT AND NATIONAL GOVERNMENT

The Roles of County Governments

County Governments have critical roles to play in the implementation of the **CLA**. These roles are established in the **Constitution of Kenya**, the **Community Land Act** itself, and in the **County Governments Act**. These roles include:

- Holding unregistered community land “in trust.”
- Preparation and submission of inventories of unregistered community land.
- Budgeting resources to support **CLA** implementation at the county level.

In addition, there are a number of functions that are the responsibility of the national government which must be done in consultation with county governments. Finally, there are other functions that the national government will do on its own.

A. HOLDING UNREGISTERED COMMUNITY LAND “IN TRUST”

The **Community Land Act** states that county governments

shall hold in trust all unregistered community land on behalf of the communities. Unregistered lands are lands previously identified as trust lands and land previously registered as group ranches. To hold in trust means:

- You are holding it for the community for a defined period of time as communities complete the legal process of registering their land.
- You are not the rightful owners to the land and therefore cannot transact any unregistered community lands.
- Any money payable as compensation for compulsory acquisition of any unregistered community land should be kept in a special interest earning account for the community and promptly released to the community once they register.
- Once communities register their lands, the role of County Governments as trustee ends as communities assume all management and administrative rights and responsibilities over their land.



B. PREPARATION AND SUBMISSION OF INVENTORIES OF UNREGISTERED COMMUNITY LAND

County governments, as trustees of community lands, take the lead role in the process of identifying all unregistered community lands in their jurisdictions and compiling an inventory. Prior to any adjudication programs at the national-level, county governments must prepare and submit inventories of all unregistered lands to the Ministry of Lands. The inventories should document community land within the county, approximate area in hectares, and current land use of the unregistered lands. Consultation with communities and participation of all is key in developing inventories. The **County Government Act** requires CECMs to consider the objects and principles of devolution (which is bringing services closer to the people) while promoting the following:

- Self-governance for communities in the management of development programs.

- Protection and promotion of the interests and rights of minorities and marginalized communities.
- Gender equity.
- Social and economic development within the county.

In preparing the inventories, county governments must:

- Consult with the unregistered communities living on the unregistered community land. Indigenous and rural communities have in many cases lived on unregistered community land for generations. They are able to describe their boundaries using existing natural resources such as rivers, hills, trees among others. Consulting communities minimizes inaccuracies and ensures ownership of the process by the communities themselves.
- Uphold transparency, participation, inclusion of women and men during the preparation and submission of the inventories.

Roles of the National Government that Should be Carried out in Consultation with County Governments

The law provides clarity on roles of the national government that must be carried out in consultation with the county governments. These roles include:

- The Ministry of Lands (Cabinet Secretary) must consult county governments while developing and publishing a comprehensive adjudication programme for purposes of registration of community land in the Gazette.
- The Ministry of Lands must facilitate, in consultation with the county government, the adjudication of the community land including the recording of community land claims and demarcation.
- The Ministry of Lands (Cabinet Secretary) must consult the county government and other stakeholders in developing and rolling out a national programme for public education and awareness on the **CLA**.
- The Ministry of Lands, in consultation with the county governments, is expected to undertake training and induction for newly elected Community Land Management Committees.
- To resolve disputes, the Ministry of Lands can form an ad hoc committee that must have two nominees from the county government where the community land is situated.

Roles of the National Government in Implementing the CLA

The national government, through the Ministry of Lands, is mandated to lead the implementation of the **CLA**. The specific mandates include:

- Issuing public notices of intention to survey demarcate and register community land and appointing adjudication to every community registration unit.
- Developing adjudication programme which should be concluded within three years of the enactment of the Act. This deadline has passed and an adjudication program has not yet been developed.
- Making regulations to operationalise the **CLA** including procedure for recognition and registration of community lands, settling of disputes during community land registration process, investor partnerships among others. The regulations were passed in November 2017.

- Prescribing procedures for determination of all pending appeals brought under any of the repealed laws.
- Declare Community Land Registration Units in accordance with the **Land Registration Act, 2012.**
- In case county governments do not submit an inventory within 18 months of the commencement of the regulations, the Cabinet Secretary in consultation with the communities will prepare an adjudication programme based on the existing data on adjudication programmes. This deadline has since elapsed even after the extension of the timelines through a court order following a case filed by Taita-Taveta County. For counties yet to submit inventories, it is expected that the Ministry of Lands will move to develop the inventories.
- Overseeing the preparation of an inventory of conversions of all land held under the **Group Representative Act** (Cap. 287) (now repealed) indicating their status and forwarding it to the Community Land Registrar.
- The Cabinet Secretary is to designate a qualified Community Land Registrar through the Chief Community Land Registrar.
- The National Land Commission steps in when any community land is being acquired on behalf of government or in any conversion of land that touched on community land.
- Receiving appeals from communities not satisfied by decision of the registrar and mediating on the cases.
- Convening and presiding over community meetings where Community Land Management Committees (CLMCs) are elected. The Community Land Registrar is responsible for presiding over the elections of the CLMCs.



SECTION TWO: WHAT CAN COUNTY GOVERNMENTS DO TO SUPPORT EFFECTIVE IMPLEMENTATION OF THE COMMUNITY LAND ACT

BY THE END OF THIS SECTION, READERS WILL:

1. Appreciate strategies to use in securing budgets to support implementation of the **CLA** at the county level.
2. Understand strategies to support communities fulfil the requirements of the law.
3. Understand **CLA** implementation principles and the requirements for communities to register their land.

BUDGETING FOR CLA IMPLEMENTATION: WHY ARE BUDGETS NECESSARY?

Implementation of the **CLA** at county level will require resources for supporting communities meet the requirements prescribed in the law. In drafting budget estimates, the respective **CECM** for lands should secure adequate budgets to support communities to draft inclusive by-laws, facilitate harmonisation of boundaries, and strengthen local land governance structures. Each financial year, county governments develop a proposed budget that captures the government's proposed revenues, spending, and priorities. CECMs have the opportunity to lobby for the allocation of resources to support the implementation of the CLA before the proposed budget is submitted to the County Assembly. The budgets can include resources to hire paralegals and other land administrative resource persons to support communities to meet the requirements of the law, public awareness campaigns on the law, among other activities.

LAND USE PLANNING

Besides county budgeting, county governments should facilitate cross-county land and resource use plans and agreements for managing mobility and avoiding conflicts over access to natural resources. Neighboring counties should negotiate and agree on cross-county access to key resources, considering existing practices that enhance harmony, peace, and fair allocation of resources. County planning and development is a key county government function, which directly affects community land. Land surveying, mapping, and boundary demarcation are also county functions critical for land use planning.

IMPLEMENTING NATIONAL POLICIES AND ASSISTING COMMUNITIES TO DEVELOP ADMINISTRATIVE CAPACITY

Another role of the county governments is the implementation of specific national government policies on natural resources and environmental conservation related to soil and water, conservation,

and forestry. County governments should also coordinate and assist communities to develop administrative capacity for participation in governance at the local level. Building the capacity of newly elected and established community land management structures and the community at large is instrumental in strengthening participation in democratic community-level governance.

SUPPORT COMMUNITIES TO MEET THE REQUIREMENTS OF THE LAW: A PARALEGAL MODEL

The spirit of the **CLA** envisions knowledgeable communities fulfilling the requirements of the law and then approaching relevant government institutions to demand for the registration of their lands. As stipulated in the **CLA**, the knowledge gap will be bridged by a national awareness campaign to be rolled out by the Cabinet Secretary (CS) and county governments. Within the context of the communities in Kenya, and especially among the pastoralist communities where most community lands are domiciled, the majority of the population has low literacy levels, making it difficult for them to understand and apply the requirements of the CLA. This makes it necessary to budget and deploy paralegals among the communities in order to support the community land registration process.

County governments can engage paralegals who will be stationed either at the county headquarters or sub-county headquarters, ideally within the county government offices. The paralegals, who are adequately trained on the law, will help guide community members that come to seek support in fulfilling the requirements of the law at the county offices. This will address the fact that although some people may know that the law exists, very few know details about the law, how to use it to legally register community lands, or how to request and ensure that they comply with the requirements of the law. The paralegals will provide basic information of the law, including all requirements needed to facilitate their registration. Additionally, the paralegals will guide community leaders on matters institutions and offices that they need to visit to register their land.

SECTION THREE: OVERVIEW OF LEGAL REQUIREMENTS TO REGISTER COMMUNITY LAND

BY THE END OF THIS SECTION, READERS WILL:

1. Understand the principles of **CLA** implementation.
2. Appreciate the requirements that communities must fulfil to register their land.

Another major role for county governments is to support communities to understand the law and how to begin the process of registering their community land. Communities must carry out a number of activities – including drafting local bylaws for land and natural resource management, electing a Community Land Management Committee, creating a community register, and creating evidence of their land claim. These activities must be completed according to specific provisions and guidance provided in the **Community Land Act** and the **Constitution of Kenya**. The following section describes, in detail, all legal requirements that communities must follow to register their land, along with important principles enshrined in the law and constitution about how these requirements must be met.



OVERVIEW OF LEGAL REQUIREMENTS TO REGISTER COMMUNITY LAND

LEGAL FRAMEWORK

CLA IMPLEMENTATION PRINCIPLES

The **Constitution, National Land Policy, and CLA** include rules that affect how communities must manage their lands and natural resources. The Constitution sets out the following:

- Land in Kenya shall be held, used, and managed in a manner that is equitable, efficient, productive, and sustainable (Article 60, Sub-article 1).
- Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural, and social spheres (Article 27, Sub-article 3).
- The State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender (Article 27, Sub-article 8).

The CLA also includes specific rules about community membership and rights, governance, and natural resources management, which are listed later in this section.

NON-DISCRIMINATION

The CLA includes a number of provisions to ensure that the governance and management of community land is as inclusive as possible.

NONDISCRIMINATION: COMMUNITY LAND ACT, SECTION 30

- Every member of the community has the right to equal benefit (use and access) of community land.
- Women, men, youth (including morans), minority tribes, persons with disabilities, and marginalized groups have the right to equal treatment in all dealings in community land.
- A community/community member shall not directly or indirectly discriminate against any member of the community on any ground, including race, gender, marital status, ethnic or social origin, color, age, disability, religion, or culture.
- Every man or woman married to a member of the community shall gain automatic membership of the community. They remain members of the community until they remarry outside of the community after a divorce or the death of their spouse.
- The culture of each community shall be recognized in the exercise of community land rights (subject to Article 159 of the Constitution, in accordance with Article 11(1) of the Constitution)

GOVERNANCE

FUNCTIONS AND POWERS OF THE COMMUNITY ASSEMBLY AND COMMUNITY LAND MANAGEMENT COMMITTEE, COMMUNITY LAND ACT, SECTION 15

- All community members (18 years and above), including men, women, elders, youth, and ethnic minorities, make up the Community Assembly.
- At least two thirds of all community members must be present in order for a community assembly to make decisions.
- The Community Land Act requires that communities identify and elect a 7-15 persons Community Land Management Committee (CLMC), who will be responsible for:
 - The day-to-day management of the community land on behalf of the community.
 - Promoting cooperation and participation among community members in matters relating to community land.
 - Acting as a representative or voice of the registered community while communicating with outsiders.
 - Working closely with other institutions such as the county and national governments .
 - Proposing rules and regulations to govern the community land and natural resources, which must then be checked and approved by the Community Assembly.
 - Coordinating the development of community land use plans in collaboration with relevant government authorities.

- The Community Land Management Committee cannot make any decisions to sell, lease, or transfer community land unless two-thirds of the entire Community Assembly (all adult community members) have approved it.
- Any decision of a registered community to permanently sell or give community land shall be binding if it is supported by at least two-thirds of the Community Assembly, while all other decisions of the registered community shall be by a simple majority of the members present in a meeting.
- The Community Land Management Committee must be at least one-third women if the majority is male or at least one-third men if the majority is female. Article 27 of the Constitution provides that not more than two-thirds of the members of any elected body can be of the same gender.

NATURAL RESOURCE MANAGEMENT

MANAGEMENT OF NATURAL RESOURCES ON COMMUNITY LAND: COMMUNITY LAND ACT, SECTION 35

- Natural resources should be used in a productive and sustainable way for the benefit of the whole community, including future generations. Benefits from the use of natural resources must be shared equitably among community members.
- Information about any money generated from natural resources on the community land should be presented to the Community Assembly on a regular basis. The Community Assembly has the right to decide how money shall be used to benefit all community members.

COMMUNITY RULES AND BYLAWS: COMMUNITY LAND ACT, SECTION 37

- A registered community may make rules or bylaws for regulating the management and administration of their land, and such rules or bylaws may provide for the conservation and rehabilitation of the land, land use and physical planning, regulation of investments on the land, and determination of terms of any leases granted for purposes of investment.

REGULATION OF COMMUNITY LAND USE PLANNING: COMMUNITY LAND ACT, SECTION 38

- Natural resources, including those listed below, must be managed according to national and county government laws and regulations.
 - Fishing, hunting and gathering, protection of animals and wildlife, water protection, securing sufficient residual water, hydraulic engineering and safety of dams, forestry, environmental, oil and gas, and exploitation of minerals and natural resources.

GRAZING RIGHTS: COMMUNITY LAND ACT, SECTION 38

- While drafting bylaws, the customs and practices of pastoralists communities should be taken into consideration.
- Land in pastoral communities shall be available for use by members of the community for the grazing of their livestock. Agreements over the land may include:
 - The kind and number of livestock that may be grazed.
 - Grazing plans and the zones for other land uses.
 - How the community will use the rest of the land that isn't being used for grazing.
- Non-community members may be granted grazing rights. They must seek approval from the community, and their practices shall not contradict the community's bylaws.
 - These rights can be withdrawn by the community in a community assembly meeting due to drought or any other reasonable cause as long as it is in the interest of the community members.
 - The community can withdraw grazing rights from people who, without the written authority of the community:
 - Fail to observe the terms of the agreement under which the rights were granted.
 - Erect or occupy any building or other structure on the grazing land.
 - Plough or cultivate any portion of the grazing land.
 - Take up as residence or occupy any portion of the grazing land.
 - Block access to any watering place on the land, prevent or attempt to prevent any person from drawing water or watering stock at a watering place, pollute the water at a watering

place, or interfere with the operation of any windmill, water pump, water pipe, dam, storage tank, or other structure installed or constructed within the grazing land.

- A person who commits the above offenses can be fined up to one hundred thousand shillings or imprisoned for up to six months.

DESIGNATION OF OTHER LAND USE RIGHTS IN COMMUNITY LAND: COMMUNITY LAND ACT, SECTION 39

A registered community may reserve “special purpose areas,” which must be used exclusively for the designated purpose, including:

- Farming areas
- Settlement areas
- Community conservation areas
- Access and rights of way
- Cultural and religious sites
- Urban development
- Any other purpose as may be determined by the community, county government, or national government for the promotion of public interest.

LEGAL STEPS TO REGISTER COMMUNITY LAND

1. Complete and submit CLA Form 1 (Application for Recognition of Interest/Claim on Community Land). The form can be completed by any 10 members of the community and notifies the government that the community intends to go through the process of legally claiming its land.
2. Create participatory bylaws for community land governance, membership and rights, and natural resources management. The bylaws must be formally adopted by at least 2/3 of all adult community members.
3. Elect a 7-15-member Community Land Management Committee (CLMC). The committee must include at least 1/3 women. An official from the County Government must oversee the election.
4. Create a Community Register that includes the names, dates of birth, and ID numbers of all community members 18 years and older.
5. Complete and submit CLA Form 3 (Application for Registration of a Community). This form should be completed by the Community Land Management Committee. This form begins the process of registering the community as a legal entity that can sign contracts, sue and be sued, and nearly all the same rights as a legally registered company. After the government approves the application, the community will receive CLA Form 4 from the government that shows that the community has been officially registered. The community must receive CLA Form 4 before it can continue the land registration process.
6. After the community agrees on its boundaries with its neighbors and recognizes shared historic access rights, the CLMC should complete and submit CLA Form 5 (Application for Recognition and Adjudication of Claim on Community Land). The CLMC must include evidence of the community's land claim. This can be a description of the boundaries, a sketch map, or a GPS map.
7. The government will then put an official notice of the community's land claim in local media and will give anyone with a competing land claim time to notify the government.
8. The government and community will then work together to resolve any land conflicts or competing land claims.
9. After all land conflicts have been resolved, the community will work with a government surveyor to create an official map of the community's land.
10. After the map has been processed by the government, the community will receive a title to its land.



ABOUT NAMATI

Namati is a global NGO dedicated to supporting governments and citizens to know, use, and shape law to address pressing challenges in peoples' daily lives. Namati was founded in 2011 and has nearly a decade of learning and experience supporting the recognition of community and customary land rights. Having supported communities fulfil the requirements of the law and file for registration of their lands in Kenya and other parts of the world, Namati believes a legal empowerment approach is critical in implementing the **CLA**.

Using the lessons learned while supporting the implementation of the **CLA** and similar laws in Uganda, Zambia, Liberia, Myanmar, and Sierra Leone, the Guide will support county governments and the respective **CECM** in charge of the lands docket in effective delivery of their mandate. In addition to supporting governments and communities to register community land, Namati's legal empowerment approach also strengthens local land governance, improves natural resource management, and reduces intra- and inter-community conflicts.