

# Aspects Of Customary Land Tenure Rights In Kenya

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**Abstract:** *This paper argues that the imposition of Western-style land tenure system into Kenya has not killed the spirit of the customary tenure. Instead, the customary system only went underground where it continued to grow despite the overlay of statutory law that was designed to replace it. That resilience and persistence is evident in several ways; for example, available literature indicates that many communities in Kenya continue to implement customary law in a way that indicates that customary tenure provides better solution to societal problems than the western statute laws. Consequently, many communities in Kenya continue to rely on customary tenure methods to solve land disputes as they claim that western-based courts are expensive, cumbersome and the judiciary system can be compromised.*

*This paper therefore examines the current status of customary tenure among the Kenyan communities and how it performs vis a vis the western-based tenure systems. The paper concludes that customary tenure still provides the only meaningful framework for the organization of social and economic livelihoods in Africa; and should therefore not be extinguished but instead be restructured to fit into modern economic regimes of the 21<sup>st</sup> Century.*

**Keywords:** *Customary Tenure, Colonialism, Community Examples*

## I. INTRODUCTION

Land tenure is defined as a collection of relationships that exist between members of a society by virtue of their occupation and use of land. It embraces institutional arrangements pertaining to property rights and duties. It also refers to the division of decision making among tenure groups, as owners and users of land combined with other means of production. These institutional arrangements may be legally established, customary, or enforced by a combination of both. They define the rights of property owners and users [Ezigbalike and Benwell, 1994].

Customary tenure is defined as the system of land holding and land use which derives from the operations of the traditions and customs of the people affected. Customary laws

derive from the accepted practices of the people and the principles underlying such practices. Other sources of law include laws made by elders in response to special circumstances such as drought, war or famine, which once accepted by the people become custom, even when the situation which prompted the law has passed.

In Kenya, prior to the introduction of colonialism, the predominant land tenure system was the customary tenure, where village elders and chiefs had the sole say on the allocation and use of land. At the structural level, the customary tenure was managed and protected by a social hierarchy organized in the form of an inverted pyramid with the tip representing the family unit, the middle the clan and lineage, and the base, the community at large [Okoth-Ogendo, 2000]. These were decision-making levels designed to respond to issues regarding allocation, use and management of resources comprised within the on the basis of scale, need, function and process. This customary system ensured that there was enough land for everybody, and built in conservation measures ensured maximum environmental protection. One other positive aspect of the customary tenure is that the location of the radical title to land always was, and still remains in all members of the community past, present and the future, constituted as corporate entities.

This tenure system refers to unsurveyed land owned by different Kenyan communities under customary laws. Being a diverse country in terms of its ethnic composition, Kenya has multiple customary tenure systems, which vary mainly due to different agricultural practices, climatic conditions and cultural practices.

At present, land under customary tenure occupies approximately 70% of the total area of the country and most of these lands are gradually being converted to private tenure through the process of land adjudication. Customary tenure systems are generally mixed with other tenure systems in the Group Ranches, the Trust Lands and the Ten-Mile Coastal Strip. With the promulgation of the new Constitution in Kenya, all the customary land will be administered under the Community Land Commission but the inhabitants will still enjoy all the customary rights they have had in their areas. The main objective of the Community Land Commission is to determine and register such rights. Previously, such rights

have not been recognized in the laws of Kenya neither have they been registered.

## II. THE STATUS OF CUSTOMARY TENURE SYSTEM IN KENYA

This section reviews the status of customary tenure among various communities in Kenya. Majority of this information have been adopted from student research at the Technical University of Kenya, University of Nairobi and various sources in Kenya.

### A. PASTORALISTS TENURE SYSTEM

Nomadic pastoralism is a major land use in the arid and semi-arid rangelands all over the world. Pastoralists typically rely on animal husbandry for their economic survival. The arid environment in which the pastoralists find themselves is characterized by erratic rainfall distribution and varying climatic conditions under which plant growth is seasonal. The strategy of the pastoralists to provide year-round supply of food to their animals involves moving the livestock to pasture rather than bring fodder to the animals [Lengoiboboni, 2011].

In the dry seasons therefore, pastoralists move their livestock to the highlands or well-watered pastures and when the rains fall on the rangelands, they move back to take advantage of the new and more succulent pastures. This movement between rangelands and dry-season grazing areas allows the farmers to exploit ASAL resources in the different agro-ecological conditions at different times to make for the fluctuations in production. The movement also ensures a balanced maintenance of the ecosystems so that the pastures have time to rejuvenate and support the pastoralist's life-style for a long time. Pastoralists land tenure system is based on customary conditions where pastoralists hold their land in communal nature.

This communal property regime is important because it creates pastoralists right of access. It also provides a reliable framework for the pastoralists to exploit the available resources across various agro-climatic conditions and thereby reducing their level of vulnerability. Lengoiboni [2011] has referred to this tenure system as spatiotemporal in the sense that pastoralists own land across the ecosystem of movement and at different times in the year. The formalization of tenure in Kenya (through the implementation of the land adjudication programs) from the 1950s had the impact on the extensive seasonal migrations of the pastoralists because it endangered the traditional methods of access to local resources.

As pastoralists ignored the boundaries of private landholders in order to maintain their seasonal migration, and as land was continuously being surveyed, demarcated and allocated for private purpose under the formal land tenure systems, renegotiating temporary and flexible access right to resources became problematic and as a consequence, regional recurrent conflicts intensified.

The formalization of tenure in Kenya from the 1950s, through land adjudication and consolidation, had the impact on the extensive seasonal migrations of the pastoralists because it

endangered the traditional methods of access to local resources. Surges in large-scale foreign investment in land, increased nature conservation activities, growth in tourism, forest depletion, oil and mineral extraction programmes all increase tensions between the different stakeholders; and it is the pastoralism who often lose out in these climate change inspired conflicts. While pastoralists are intrinsic climate change adaptors, they are weaker economically and legally. Unlike other land uses, pastoralism activities are not always assured by national land policy and administration frameworks. Private ownership is often given precedence over customary land tenures.

Despite policy and legislative movements, approaches for practical recording remain unclear: knowledge on how to record pastoralism tenures in a manner that ensures sustainable ecosystem conservation is almost non-existent. Whilst pastoralism has been widely studied and some routes recorded, many remain undocumented: only vague ideas exist of how pastoralists move. Moreover, the climate change induced shifts in migratory routes are also unknown. Conventional land administration tools are not equipped to capture of manage pastoralist tenures. The climate change adaptation offers an opportunity to develop methodologies for recording pastoralism. Currently, there is a general agreement that pastoralism has a major role in supporting sustainable ecological and economic systems. Moreover, the limitations of conventional private property approaches are clear as the National Land Policies already reflect the changing ideology [MoL, 2007].

The challenge is to operationalize the new ideology. Many studies focus on understanding the status quo: pastoralism actors, related resources, and various interactions are studied. Others seek solutions. Clear acceptance of pastoralist tenures at all levels is an important ingredient in operationalisation: all successfully secured formal land tenures rely on clear descriptive and spatial identification. Fit-for-purpose adjudication, mapping, and recording processes deliver this point of authority to communities, governments, and NGOs. Understanding the spatial and temporal aspects of migratory routes will assist in developing this authority. Conventional land administration tools are not well equipped to capture the pastoralist tenures. This paper therefore observes that documentation of pastoralism is one of the projects that should be undertaken to support the operationalisation of the tenure system in a more satisfactory manner.

### B. THE WAKF COMMISSION LAND

Under the Wakf Commission Act Cap 109, are established Wakfs, which are religious charitable or benevolent endowments or dedication of any property in accordance with the Muslim Law. The Act legislates rules and regulations for the administration of all Wakfs which are often made in respect of land (for charity), and can be limited to vest in charity after the death of the whole family. The Wakfs can be made for the benefit of an individual, a family or community for rights and ceremonies for the soul of deceased founder member.

These tenures can also be made for religious, charitable or benevolent purposes including maintenance of cemeteries, or

any other purposes recognized under the Muslim Law. All Wakfs must be registered with the Wakf Commission, and one must obtain the consent of the Wakf Commission for sale or lease of Wakf land for a period beyond one year. Wakfs are exceptions to conditions of transfer of land and to acquisition under prescription or adverse possession. Trust Lands Act does not prejudice or affect the operations of the Wakf Commission Act [Wayumba, 2004]. The Wakf Commissions are found mainly along the Ten-Mile Coastal strip where Muslim culture and religion is dominant.

### C. THE HISTORICAL SWAHILI TOWNS TENURE SYSTEM

Historical Swahili towns are ancient urban settlements found on the East Coast of Africa between Somalia and Mozambique. These towns contain some of the most valuable architectural and archaeological heritage, which deserve to be documented for posterity and scientific research. These towns are rich in customary tenure systems which are unique to the coastal towns of Eastern Africa.

The historical Swahili towns were constructed with narrow winding lanes, tall closely clustered buildings and on sloppy ground. The narrow streets were constructed with orientation in the East West direction to allow for free flow of cool ocean breeze and sunlight into the whole town. The streets also provided security from any invaders as different portions of the streets could be blocked to disorient the enemy. The tall, closely clustered buildings provided shadows along the streets for the comfort of the citizens as they walked along the paved stone-ways, while the sloppy landscape allowed for free-flow of water into the oceans, thus draining the towns of rain and domestic water.

The thick coral walls (generally 60cm thick) are porous and act as heat filters between the outside environment and the inside rooms of the Swahili houses; and this arrangement ensures that the rooms are kept cool even when the outside temperatures are high. Water supply to the houses was strategically located in the inner court-yard for ease of access during day and night and even during emergency when it was not possible to venture outside the houses.

The thick walls also provided strong foundation for future extensions to the Swahili houses during the marriage of the oldest daughter. According to the Swahili culture, the first-born daughter inherited the family house from the father and these necessitated extensions to the houses to accommodate the new couple [Yassim, 2003]. The oldest daughter is usually married to one of the sons of the father's brothers in order to maintain the family's ownership of the family house and the palm trees. This arranged marriage of relatives contrasts significantly with the other local communities where it is strictly forbidden. The inheritance of the houses ensured that the women had a permanent shelter for her and the children in a society where divorce was rampant.

In cases of divorce, it was the man who was expected to move out leaving the children and the wife behind. In the Swahili towns, there was no room for horizontal development as land is scarce and this necessitated the construction of high-rise buildings and continuous addition of extra vertical floors

where never the situation demanded. This was common land tenure in the historical towns which resulted in the proliferation of tall closely clustered buildings.

In the old days, Swahili houses were constructed at the same height to provide uninterrupted view of town at night for security purposes and it is only recently that uncontrolled extensions have sprung up in the towns. The Swahili people believed that the construction of houses and tombs in the North-South direction and with their main axis oriented towards Mecca was pure and religiously fulfilling [Yassim, 2003]. In recent past the craze for dish television and radio has hit the towns and the skyline-view is badly affected by these new contraptions. The traditional Taarab music is also being replaced by Western music and the traditional Swahili culture is disappearing fast.

The foot bridges (*wikios*) found in Lamu old Town and Zanzibar, are unique and innovative Swahili architectural features which allowed members of the family (particularly women) the opportunity to move from house to house without coming down onto the streets. The interior courtyards (*viwanda*) were the only source of light for the houses as the buildings were annexed-back-back and side-to-side and occupied the whole part. There were no windows opening onto the main streets, except in the facades facing the courtyard, as this was felt that it would compromise privacy in a society where were kept in seclusion (*Purda*). These *Wikios* were particularly useful during the war situation when the inhabitants could not come down onto the streets due to enemy occupation. At such times, they depended on communication through the *Wikios* and food reserves kept in the houses and water supply in the inner court-yards.

### CONSTRUCTION MATERIALS

One of the most unique innovations in the historical Swahili towns was the use of local materials for construction. As stated before, walls were made of coral stone laid in lime mortar and finished with coral lime plaster. The use of coral ensured efficient heat control in the houses as discussed above and provided a good protection to the towns against coastal erosion as coral continues to grow when exposed to sea water. This is due to the fact that coral stone is made of the living coral organisms in the ocean and when the two come into contact, the coastal-bank-protection interacts with the living coral from the sea water and continues to grow and reidentify the coast line. This is one of the innovative indigenous knowledge developed by the Swahili people in environmental protection. This technology has been maintained in Lamu to the present day as the use of any alternative material such as cement would result in coastal accretion with possible environmental disasters.

Mangrove poles were used as construction timber, either in round section (*Boriti*) or square section (*Banaa*) for floor joints and roof rafters. This restricted the width of Swahili house to a width of 2.4m [Abungu, 1998] and it is only recently that modern development in building technology increased the width of these houses to 10m. These mangrove poles could last for 100 years and have been exported for construction in the entire Indian Ocean region.

Because Swahili people never used Iron or metal for construction, most of the towns have been preserved for hundreds of years, however recent introduction of cement and iron in the constructions in the historical Swahili towns is a major source of concern as increased rusting is already quite evident on most roofs in the towns. Apart from being used as roof construction, mangroves protected the ocean beach-line from sea erosion, acted as a wind-break during such disasters such as the Tsunami and cyclones and provided a safe breeding ground for various ocean flora and fauna. It is commendable that most Governments in the region have banned the excessive harvesting of mangroves in order to maintain the coastline protection and the breeding habitat of various ocean flora and fauna.

Roofs were predominantly covered with palm leaves (*Makuti*) and the kitchen was the topmost room in the house. There was always an appreciable gap between the pitched Makuti roofs and the kitchen which additionally doubled up as a sleeping room during the hot season. This arrangement ensured efficient circulation of the cool ocean breeze throughout the building and protection from the direct sun by the Makuti. At present, iron sheets are increasingly being used in roof construction in the Swahili towns without due consideration for the potential danger of environmental degradation through rusting and acid rain pollution. This indigenous innovation is being destroyed by demand for modernity and industrial development.

The narrow winding streets commonly found in the historical Swahili towns acted as funnels for free flow of ocean breeze and light. In Lamu the lanes are so narrow that it has not been possible to introduce motorized traffic in the town. This, together with its location on an Island has greatly contributed towards the preservation of the town and its buildings. Similar historical towns in other parts of the world have been destroyed by acid pollution from the vehicle fumes. Except for Lamu, streets in other historical Swahili towns such as Mombasa, Malindi, Kilifi etc, have been expanded to accommodate motorized vehicular traffic, and the state of their environment have changed.

#### DISPOSAL OF WASTE MATERIALS

The provision of efficient waste disposal facilities such as cesspits and soak-pits was a creative design by the ancient Swahili Architects. Cesspits are large constructions extending downwards (20 – 30m) in depth, along the outside walls of the Swahili houses, and running the full length of the house from top-to-bottom. Cesspits were constructed with coral stones and bricks laid in plasters with mixed lime, which provided water proofing and flexibility against cracks. These structures acted as dry pit latrines, where the solid waste was deposited progressively from the bottom of the pit and the sewage water was channeled into another chambers dug at the base of the cesspits. When filled up, the solid waste would be dug out and transported away for safe disposal. Domestic water from the Swahili houses was channeled into the soak-pits and allowed to drain off into the ocean through open drainage systems commonly found in historical Swahili towns. Water for domestic use was provided through deep wells dug

strategically at the corners of the houses or within the open courtyard.

The use of these traditional cesspits and drainage channels ensured that the Swahili towns were constantly drained of domestic and rainwater, hence maintaining a clean public health of the towns. These facilities are the main sources for waste disposal of most historical Swahili towns up to the present. In Lamu, there are no modern sewage system and cesspits are the only means of waste disposal for the entire population. In the more developed historical Swahili towns such as Mombasa, Kilifi and Malindi, modern sewage systems have been constructed.

However this requires expansion and destruction of the narrow lanes in order to accommodate the sewer lines and manholes. This unfortunately ends up destroying the very old towns for which there is a lot of international interest in preserving. In Lamu, the water pipes and power lines have been connected to the outside walls as it is not possible to expand and/or dig the streets for underground cabling. While this has provided clean water from the sand dunes and electricity to the community, the facilities have interfered with the beauty of the walls. Additionally, the coral walls are yielding to the weight of the pipes and power lines. The skyline in these towns is now badly affected by new television discs, TV masts and high Radio antennas.

#### LOCATION OF THE TOWNS

The strategic location of the towns on the trade-routes to the interior of Africa ensured their survival as they became an important contact point between the local inland communities and the sea merchants. For example, the position of Lamu, Kipini and the Archipelago ensured a continuous flow of goods from the Tana rivers basin. Mombasa became an important contact for ivory from inside Kenya, while Zanzibar and Bagamoyo, and were the main markets of slaves from Central Africa through Tanzania. Further down in Mozambique, Kilwa and Sofala were the main coasted markets for gold, slaves, diamond and other goods from Southern Africa region. The fertile soils and abundant East Africa Rainfall sustained the large population in these towns. According to Abungu (1998), the 300 city-states flourished which flourished during this period depended on agricultural produce and the Indian Ocean trade for their survival. By the 16<sup>th</sup> century A.D, Swahili towns grew and prospered steadily, becoming a powerful mercantile area as the Mediterranean region. From Mogadishu to Mozambique, a line of Swahili principalities studded the East Africa Coast like a row of pearls.

#### THE MATERIAL CULTURE

Apart from the characteristics of historical Swahili towns discussed above, some of the unique features of the Swahili towns include, carved doors and windows, Muslim religion, and Taarab Music. This material culture has greatly contributed towards the preservation of these towns and their buildings and as a source of income from tourism.

#### D. THE MAASAI CUSTOMARY SYSTEMS

Traditionally, the Maasai community consists of special sociological clans (the *ol osho*), which can be grouped as follows; the Kaputiei, Matapato, Purko, Kisonko, Ildamat, Dalalekutuk, Keekonyokie, Loodokilani, Loita, Siria, Uasinkishu, and Moitanik. Together, these sections comprise the Maasai pastoral group in East Africa [Rutten, 1992: 20]

Every clan had its own specific geographical location in Maasailand and formed the basis, as well as the ultimate unit of land ownership and resource utilization. The senior members in every clan formed the governing body and land at the clan level was communally owned. Members of each clan enjoyed equal rights of access to all resources including land. The only restrictions on land-use were those due to seasonal grazing (wet season and dry season grazing). No outsider was allowed to claim any land within the clan areas except with the permission of the elders and only for a temporary use. Land was also regarded as a community resource and that only small portions of land parcel could be owned by families. The Maasai people, being nomads, had two types of lifestyles. The permanent homes where children, women and the elderly people stayed; and the semi-permanent home where the young men (*the ilmurran*) would migrate with cattle, sheep, goats and donkeys in search of fresh green pastures [Nyamweru, 1998].

The concept of family land ownership among the Maasai is known as *ormarei*. Families were often allocated portions of land for settlement. The choice for settlement area had to meet certain conditions such as; security and ease of access to main resources such as firewood and water amongst others. After a family has chosen an area, it was further subdivided into individual land units. During subdivision, a special consultative meeting was convened to determine those who had a right to own land and these included; 'proper' families (father and mother present), widows with children (*enkoliai*) and unmarried ladies who were passed marriage age.

The boundaries to these parcels of land were defined by physical features such as; rivers, trees, foot paths and gullies (*enong'oto*). The use right on these pieces of land rested solely on the owner. An important parcel of land was curved by every individual for special use called '*olokerri*'. This was an area where calves, sick animals or any other animal deemed by the land owner to graze.

This area was out of bounds to any other external user and if any other family member infringed on this piece of land, the owner would have no option but to report the person to a disciplinary board. This comprised of the neighbors and family elders. If the culprit disregarded the family warnings, the area chief was brought into the matter with others in the Maasai leadership structure (*nkasisin*). This was in rare cases. Another important aspect was that if another family wanted to settle in that area, they first had to seek the permission of the already existing family. This helped in reducing land conflicts among the Maasai people.

Apart from the individual land unit, the Maasai operated on community land (*oloshu*). Community land ownership was in areas widely inhabited by humans mostly because of security, wildlife inhabitation, thieves and thickly forested

areas. These were areas of communal rights where everyone had a right to graze their animals. The main common points were the watering areas (*osilanka*) and the salt licks (*emboliei*). These areas sometimes caused conflicts because of the ever increasing number of livestock but they were always resolved through community leadership and participatory mediation.

It is worth noting that the Maasai as a community have lost a lot of land to both the white settlers and the post independence governments in Kenya. For example, at the end of the 19<sup>th</sup> Century and before the arrival of the British and the Germans in East Africa, the Maasai occupied an area located between latitude One degree North and six degrees South and at some places, over 200km wide and the total area of land occupied ranged between 116,000km sq and 207,000km sq. After the arrival of the British, the Maasai were moved from their best grazing areas and restricted into two reserves totaling some 23,620km sq. by the treaty of 1904 [Rutten, 1992: 6].

In 1911 and 1912, majority of the northern Maasai were regrouped in an enlarged southern reserve comprising an area of approximately 37,800 km sq. According to Rutten [1992] of the 31,000 km sq of European settled land, 18,000 km sq was derived from the Maasai grazing grounds. Further losses of grazing pastures due to creation of the National Parks in Maasailand, resulted in the formation of group ranches as a means of protecting the land rights of the community. This situation was ameliorated after Second World War reforms in which the government initiated group ranches in the ASAL.

The first group ranches were established at Konza in 1949 as experimental grazing schemes under the African Land Development Programme (ALDEV) [Rutten, 1992: 206]. The main reasons for establishing the ranches were: (i) to demonstrate to the Africans the results of good grazing management in improving the carrying capacity of land and cattle production; (ii) to demonstrate improvement in stock through selective breeding; and (iii) to conduct experiments in pasture improvement

These grazing schemes were discontinued in 1961 due to severe drought and heavy stock losses. Apart from the grazing schemes, there were also established individual ranches by various Maasai elites, and by 1963, 24 individual ranches located in all parts of Kajiado District. Lawrance Mission [GOK, 1966] recommended the discontinuation of individual ranches and instead pushed for the re-establishment of the group ranches under the Land (Group Representatives) Act, Cap 287 of 1968. Consequently, 52 group ranches were incorporated in Kenya covering an area of 7 million hectares [Kidemi, 2000]. The ranches are distributed in 13 districts covering; Narok, Kajiado, Samburu, Laikipia, Transmara, Baringo, West-Pokot, Kilifi and Kwale just to mention a few.

Despite being in operation for the last four decades, the group ranches concept has been considered as a failure because the initial objectives were not achieved and their operation jeopardized the ecology and the socio-economic welfare of the local communities [Mwangi, 2007]. Various group ranch committees therefore opted to subdivide the ranches so that each share holder may acquire an individual title deed. The first subdivision programmes started in earnest

in Kajiado District in the mid 1970s and by 1985, 22 group ranches in the district had resolved to subdivide their land.

Available records at the Ministry of Lands [Mwenda, 2001] and Njuki [2001] indicate that by the end of 2006, out of the original 52 ranches that had been incorporated, 32 have been complexly subdivided, 15 are in the process (seven of which are under litigation in court due to disputes) while five have not been subdivided. Nyamweru [1998] has provided a comprehensive summary of the main reasons for the subdivision of group ranches.

#### E. THE POKOT CUSTOMARY TENURE

The Pokot are Nilo-Hamitic community who live in North Western Kenya and occupy two Districts, West and East Pokot. Among the Pokot community in Kenya, land is generally held communally under the Trust Land System, where the local County Council is responsible for land on behalf of the community. In the medium to high potential areas, there are individual tenure. Boundaries of individual land are clearly demarcated and ownership recorded in a location land book. The location land-book contains the names of the land owner, description of the boundary marks, the names of the existing land committee including the village chief and the list of all witnesses who were present during the boundary demarcation [Rionokal, 2011]. The record of the land Book is held by the location land committee at the administrative location. The ownership of any land holding is defined by the village elders with regard to the length of use or purchase transactions.

The boundaries of the land-holdings are defined with natural features like rivers, gullies or ridges, and where natural features do not exist, boundaries are marked by stones, planted hedges or cutting in trees. According to the customary laws of the Pokot, it is an offence to interfere with the boundary marks and any disputes concerning boundaries or ownership are arbitrated by a council of elders. If the council do not reach an agreement in the dispute resolution, the matter is referred to the divisional tribunal or further to the District tribunal until the matter is resolved. The problem with this informal adjudication system is that the records are not deposited in the government land registries. Consequently, it is difficult to resolve disputes without going back to the land. However, this is an important entry point for the Land Adjudication officers as the process of adjudication and demarcation are already finalized, and they only need to bring it up to the register. The unfortunate thing however, is that the Adjudication officers usually carry fresh adjudication with out-dated aerial photographs, and in many cases, end up creating disputes where there should be none [Rionokal, 2011].

The Pokot ethnic community is subdivided into two main group; the people of grain or the agricultural group, commonly referred to as the *pi-pa-pagh*; who live in the hills and along the rivers where they practice sedentary agriculture. The other group is the Livestock people the *pi-pa-tich* who live in the lowlands (the grass plains) where they practice a nomadic lifestyle [Rionokal, 2011]. The agricultural Pokot hold communal agricultural fields both in the valley and on the hills as a means of spreading the risks associated with crop losses.

The agricultural Pokot also keep a few livestock for milk, meat and hides.

The Pi-pa-tich group mainly keeps livestock and practice pastoralism on the plains. The pastoralist Pokot usually travel between Kenya and Uganda in search of pasture; and many of them have established two families on either side of the border, i.e. a typical Pokot pastoralist has a family in Kenya and one in Uganda. This way, the community is able to take advantage of facilities available in the two countries without necessarily registering as citizens. It is also observed that most pastoralist communities in East Africa move across the international boundaries between the different countries without migration papers since as they do not recognize such boundaries.

#### F. CUSTOMARY TENURE AMONG THE TIGANIA OF MERU

In Tigania (a clan of Meru tribe in Kenya) land belong to the community in the past and not a sole individual, the community owned land for the members use, in either pastoral or cultivation. Protection of the land was a collective responsibility which was guided by the constitution drawn by legendary KAURA WABA ICHUA. The community had a council of elders (Njuri Ncheke) which acted as Supreme Court. This court upheld the community rights and individual rights judging any case with fairness and transparency. Within the community there were smaller clan units (the Mweriga) and family units (the Muchii) and from this to the individual member with his wife and children. Therefore land belonged to the clan, the family, and lastly the individual.

Individuals inherited land from the ancestors land (mburao) and on this, one could refer to the ancestors who settled there before. In case of a dispute, the kinsmen support would be sought to resolve the dispute. In case the disputing parties were not satisfied by the laid down guidance of the community, then the Njuri Ncheke would authorize the administration of the Nthenge Oath or Kithiri Oath. These final decisions were given by the Njuri Ncheke which was regarded as local Supreme Court by everybody. At times, a minor oath such as the Gichioro which does not involve the Njuri Ncheke elders was administered for minor offences. This is because everybody in the community feared the repercussion of the Nthenge Oath and Kithiri Oath, as the entire clan, related to the disputant by blood, would suffer the consequences of the effects of the oath such as curses.

Such consequences ranged from; barrenness in women, impotence among men, many misfortunes for the clan of the disputant. Additionally, girls from such clans would not be married would not be married due to the fear of curses that may befall all other clan members. Therefore, traditional land dispute mechanism among the Tigania were treated with a lot of fear because one might put the entire clan (Mwirega) into problem if the process of administering oath was not carried out in transparent and consultative manner among the council of elder.

#### a. THE NJURI-NCHEKE - JUDGMENT AND PUNISHMENT

The elders forming the Njuri-Ncheke were carefully selected; one could say segregated from the rest of the tribe. In order to be elected Njuri, a candidate had to pay a heavy fee, consisting usually of a number of animals, which had to be sacrificed and eaten during a great feast. Each Njuri and this practice persists even nowadays in the Igembe region and Tigania [this was in 1974] was to have a particular mask painted on his face while performing rites or gathering for solemn solemn circumstances. The distinctive ornaments of the Njuri were the *morai* or *knotty* stick cut out of a branch of black wood (usually African blackwood or ebony); the *ncea* or *ring* of pearls on the head; the *meu* or fly whisk made from the tail of an animal (usually cow or giraffe) and the three-leg stool cut out of a single piece of wood.

Some Njuri had a special headgear made from the skin of a monkey (*guereza*). These special decorations were worn Njuri who were head of the villages, or the *agwe*, the witch doctor. They also had a large mantle made from the skin of a ram or of a monkey. The *Tiania* (indigenous tribunal) had authority over all the Njuri and the tribe; and consisted of the most renowned Njuri members such as the *Mogwe* (the religious leader/prophet), the witch doctor, and the headman. The *Mogwe* would assemble in a particular large hut (the *nyumba ya Tiania*), the feared hut in Meru. Only very serious crimes against community were judged in the *nyumba ya Tiania*; and usually the accused person, once sentenced by *Tiania*, had to pay with his life.

Justice was administered as follows: members of the *Tiania* together with the accused person would enter by the main entrance of the hut. Wearing all paraphernalia and sitting on the three-leg stools, snuffing abundantly, everybody had to speak and repeat and make comments on the trial. In the middle of the centre of the elders, near the accused person, a large gourd stood, filled with sugar cane wine. But not all was not wine; a good quantity of poison was mixed with the beverage; and since the poison is heavier than wine, it would sink and settle at the bottom of the gourd.

The sentence against the supposed criminal once entered the *Tiania* hut was always a capital one, but had to be proved with the poison test. The first members of the Njuri elders, using a little gourd as a spoon, would take some of the wine, being careful not to touch the bottom of the container, and saying: "I drink this wine so that it may bring joy to my belly, because I am innocent". The second judge would follow and then the third, the fourth and so on up to the last. Only then would the condemned come up: to him the last judge would offer wine taking it deeply from the bottom of the gourd: "Drink of this wine, and let us see whether you also are innocent!"

The poison would act in less than a quarter of an hour. Then the poor fellow, already rigid in the spasm of the last minutes of his life, had to be pushed away from the hut by means of sticks, and thrown out through a small hole cut out in the wall of the hut, opposite to the main entrance. The hole had to be closed immediately so that the spirit would miss the way and never find the "traitor" of the tribe.

#### G. THE SACRED MIJIKENDA KAYA FORESTS

The *Kayas* are forested sacred sites that dot the coastal strip of Kenya covering a total area of 5056 Ha and spanning a distance of approximately 200 Km along the Eastern Coast of Kenya. They are a representation of the formation and identity of the Mijikenda peoples of Kenya Coast. The *Kayas* are shrines with a powerful link to the past. They are the burial places of the elders, the symbol of the well being of a nation, the nation of the Mijikenda. The *Kayas* are the ceremonial ground for occasioning rain, good harvest and healing with the community; the heart and soul of a people [National Museums of Kenya, 2014]

Today the *kayas* appear as small forested hills in the midst of densely populated rural farmlands dominated by coconut and cashew stands and clusters of thatched huts. The contrast between the surrounding farm monoculture and the luxuriant indigenous forest grove's is vivid and the *kayas* stand out conspicuously, alluring and mysterious. Yet all true *Kaya* forests bear the clear imprint of humankind. On true *kayas* there are visible clearings in their centers and a system of deeply engraved well worn paths leading to and from these spaces. In some of the clearings there will be stands of coconut trees. From the air this repeated pattern of paths and clearings in all the *kayas* is particularly striking. In drier and less populated areas it is found on some of the few existing forested patches. The effect is that of land sculpture at its most powerful. The collective 'sculptors' are the local rural Mijikenda people and the inspiration has been their changing environment through history [Mutoro, 1987]

The Mijikenda myths of origin relate how many generations ago they came from the north, from a place known as 'Singwaya' or 'Shungwaya' which would be in present day Somalia between the Tana and Juba Rivers. Persecuted by the nomadic Galla they undertook to migrate and departed Singwaya traveling southwards into present-day Kenya in waves. In Shungwaya the Mijikenda were one people living alongside other tribes, but on their migrations south various factions broke off and settled at differing locations and also at different times. These small groups formed the ancestral cores of the nine separate entities.

On their arrival in the region, it is narrated that they chose secure sites in the continuous thick forest of that time, on hilltops and other strategic locations shown to them by forest dwellers, the *Wa Sanya*. They made clearings which they fortified with a strong stockade of poles and thorns and built their settlements or *Kaya* (homestead or village). These villages were a historical fact which was recorded by the early European travelers from the mid 1800s. In addition to natural defenses the settlements were protected by powerful magic.

The *fungo* or talisman of each group, its invincible charm procured from distant Singwaya, was and is still buried at a secret location in the *Kaya*. Well defined paths and gates *virya* into and out of the *Kaya* were also the only legitimate routes and were guarded by warriors and strong magic. Enemies or people of ill will attempting entry would mysteriously lose their way and die. It was said that the *Kaya* people would literally disappear in the forest when pursued. They were perfectly safe. Villagers went out during the day and returned

at night. Meetings were held in a large booth or hut in the center of the village known as the *Moro*. All the nine Mijikenda groups recognize a 'primary' or original Kaya but a multiplicity of secondary or satellite sites exist especially for the southern Mijikenda, the Wa Digo and Wa-Nduruma [Nyamweru, 1998].

Conditions outside the *Kayas* became more secure as time went by especially in the early twentieth century and people cleared land outside the forests not just to farm but to build homes. However the *Kayas* and surrounding vegetation were preserved by the local communities and became isolated forest patches in the cultivated countryside. The *Kayas* became shrines due to their powerful link with the past, and were the homes of the ancestors, increasingly a ritual place where prayers were said in the event of serious threats or calamity, and places of refuge.

The inhabitants of the *kayas* were taken into the Kaya to be buried and their graves marked by *vigango* or carved grave posts and *koma*. A system of taboos and rituals related to the sites developed through time which is still expounded by the Kaya Elders today. It was forbidden to cut trees, saplings or any other vegetation there as they took on a spiritual value. The same protection went for unique animals and singular landforms such as caves and limestone cliffs. In each Kaya there were highly sacred sites accessible to only a select group 'the forest within a forest'. The area where the fingo is believed to be hidden is still the most holy place. Criminal and anti-social acts or behaviour; such as murder and sorcery, adultery and incest were also forbidden inside the *kayas*.

The *Kayas* are still used for traditional ceremonies led by Elders to this day, typically for rain and a good harvest as well as for healing within the community. The most important rituals of the *Kayas* are accompanied by cleaning of the paths (*mwara*) and central clearing (*Kaya*), a symbolic 'sweeping of the home'. Thus the practical day-to-day activities carried out earlier in the historic villages have thus become ritualized and symbolic. As the village was the home for all, all members of society, men, women and the youth may visit the Kaya and participate in most ceremonies. Each clan (*mbari*) is represented at major ceremonies and builds its own ritual hut representing the dwellings of the original clan members. A common feature at all major ceremonies is the building of a miniature thatched hut (*Kadzumba ka mulungu*) in which are placed food items whose purpose is to engage and thus distract evil spirits (*Mapeho*) from interfering with proceedings [Morton, 1973].

Physical safety provided by the historic Kaya has over time taken on a more psychic significance and the *Kayas* today are still identified with security for the Mijikenda. They are an unspoken refuge in times of stress both for the society as well as the individual. Naturally the *Kayas* being such a potent symbol feature in present-day politics as well and politicians vie for the blessings of the Kaya Elders. The forests' physical survival can be said to represent the resilience and survival of the Mijikenda themselves in the modern day struggles for well being and survival. They symbolize the people's soul with all its secrets their primal identity. *Makaya* have remained relevant and continue to be 'home'. Magic played a key role in the protection of the

historical Kaya village and is still a reality for many rural Mijikenda today despite non-traditional religious trappings. Many a homestead will have its fingo buried in a secret place. The *chiraho* or oath (spell) represented by a coloured ribbon or other recognized symbol still protects many fields of crops and coconut trees from thieves and vandals.

The historical and the mythical dimensions of Kaya are inextricable from each other and complete knowledge about them remains elusive. The Kaya Elders will describe detailed lineages of the founding figures of the *Kayas* which point to a definite time of origin after the sixteenth century. On the other hand, archaeological work however suggests there has been continued or intermittent occupation between the early first and late second millennium. In other words there may have been an extended and complex process of localized development rather than the epic migrations and settlement expounded by Mijikenda mythology. The Mijikenda identity itself has been described as a political construct whose purpose was to counteract the effects of colonialism. These puzzles and controversies only serve to increase the mystery and attraction of these sites to students of history but do not diminish their value to the Mijikenda in any way.

Often the only remaining forested areas in their localities the *Kayas* importance for conservation of nature has been increasingly recognized. The coastal forests of Kenya are the most diverse in the country with over 50% of Kenya's rare plants. Seven out of the 20 sites with the highest conservation importance in the region in terms of plant species diversity and rarity are Kaya forests. Rare species of birds, butterflies and other life forms have been identified. The disproportionately large number of species rarity and endemism indicate that the surviving Kaya forests cover a broad range of habitat and micro-climatic conditions. Thus traditional values and beliefs of the Mijikenda have served to preserve important natural areas for posterity.

The *Kayas* are an outstanding and unique African example of how the collective attitudes and beliefs of a rural society have shaped or sculpted a landscape over time in response to prevailing needs. In effect they can be said to be the product of a collective conscious and unconscious act of creation of a people. They are also a highly aesthetic symbol of the interrelation of man and nature, a rich blend of natural and cultural values. Prominent on hills and other strategic sites, they reflect evolving human priorities. They remain relevant to the Mijikenda and in changing ways will continue to do so in the future. Their origins and development are totally original and authentic. Without the attendant associations and values the Kaya is just a forest like any other but with them it is transformed. In the African context the spiritual or psychic dimensions are as important as the material, physical and natural. All the elements are essential and mutually reinforcing.

The *kayas* have survived the onslaught of the twentieth century. Increased populations and corresponding needs for farmland and wood products as well as the development of urban centers and tourist resorts have posed many challenges to many Kaya forests. Adoptions of new religions have posed threats in terms of loosening the hold of traditional rules and conventions surrounding the *Kayas*. However the resistant

vestiges of forest endured these ravages for an extended period until gazettement under national laws took place. Kaya ceremonies also were fewer but did not cease altogether. This indicates that even before the state became actively involved in their protection, traditional rules and values had held sway and conserved them. This is a signal achievement of the Mijikenda peoples, and humanity in terms of appreciation and utilization of the environment our lives depend on. The Kayas are central to the vision of the Mijikenda past and future

Today, the Kayas greatly influence the leadership of the Mijikenda peoples and by extension the country of Kenya in general. One of the most recent powerful Ministers of the Kenya Government's actions after joining the cabinet was to be made a Kaya elder. It is only through this that he could claim his role as a true Mijikenda leader. In death, the Kaya and the elders have played a role in his burial as now a respected departed elder. Currently, there are only 40 kayas remaining at the Coast of Kenya. The kayas have recently been gazetted as National Monuments by the National Museums of Kenya on behalf of the Government of Kenya.

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