

Conserving Wildlife on Private Land: The Legal Framework for Landownership and New Tools for Land Conservation in Kenya

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ABSTRACT. The threat to wildlife conservation in Kenya continues to escalate, largely because of an increase in habitat fragmentation, land use change, and human population pressure. To maintain viable populations of native wildlife, lands outside protected areas must be conserved through innovative measures. This paper describes the legal framework for landownership in Kenya and existing legal mechanisms used to conserve wildlife habitat and recommends new tools for land conservation on private land. We stress that none of the existing land tenure systems provide an absolute right of use and that most existing legal mechanisms for conservation cannot be relied upon to effectively conserve wildlife habitat outside protected areas. Although environmental statutes such as the Forests Act (Laws of Kenya, 2005) prescribe conservation guidelines, most environmental legislation in Kenya relies upon enforcement and compliance. This approach is not effective because of the lack of institutional capacity to enforce. Because existing measures are not sufficient, other mechanisms such as environmental easements, land purchase, and conservation leases are urgently needed. Even if Kenya's environmental legislation was fully enforced and implemented, environmental easements, land leases, and land purchase would still be vital tools for conservation. Although these tools have great promise, they have not been widely used in Kenya because of legal limitations and lack of precedence. Legislative change and the testing of these tools through existing statutes are required to enable their broader application in Kenya. The Kenya Land Conservation Trust is introduced as an institution providing the framework and structure to utilize conservation mechanisms, such as environmental easements.

INTRODUCTION

The majority of Kenya's large mammals inhabit land outside the network of formally protected national parks, reserves, and forest reserves, which comprise approximately 7.5% of Kenya's land area (Western and Wright, 1994). It is also agreed that the survival of wide-ranging wildlife species found within protected areas depends on seasonal access to surrounding non-protected lands. Large mammals and their access to dispersal areas outside protected areas have been declining in Kenya for decades, creating a severe threat to their viability. Existing

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conservation mechanisms are not adequate to address the threat to wildlife and habitat. New mechanisms are needed. This paper outlines existing and proposed legal provisions and mechanisms for conserving wildlife habitat outside protected areas. In particular, we outline the potential for landholders to conserve wildlife habitat through new legal mechanisms, based on property rights.

LAND RIGHTS IN KENYA

The Constitution of Kenya¹ recognizes and protects the right of individuals to hold and enjoy private property, either individually or in association with others, as one of the Rights and Fundamental Freedoms of the individual. It protects the individual from being arbitrarily deprived of their property without compensation (Laws of Kenya, 2010: section 40). The right to property as used in the Constitution includes property rights in land and is further set out in various statutes that provide for the manner in which property rights in land may be held and transferred. The statutes include Government Lands Act (Laws of Kenya, 1915), Registration of Titles Act (Laws of Kenya, 1920), Land Titles Act (Laws of Kenya, 1908), Land (Group Representatives) Act (Laws of Kenya, 1968c), Trust Land Act (Laws of Kenya, 1970), Registered Land Act (Laws of Kenya, 1963b), Land Acquisition Act (Laws of Kenya, 1968a), and the Land Control Act (Laws of Kenya, 1967). The statutes relating to land will be revised to ensure that they are consistent with the new Constitution of Kenya of 2010 adopted and enacted in a national referendum on 4 August 2010.

The Constitution classifies landownership into three categories: public land; private land, in which individuals or corporate entities hold lease or freehold interests; and community land, in which freehold interests are vested in communities, including registered groups whose lands are referred to as “group ranches,” lands registered to a specific community, and lands vested in county governments to hold in trust on behalf of the communities residing within them (Laws of Kenya, 2010: sections 62–64).

Public lands comprise what were formerly Crown Lands under the Crown Land Ordinance of 1915 (Laws of Kenya, 1915) and consist now of unalienated land; that is, land that had not been leased to any other person as of the effective date of the Constitution of Kenya of 2010 (by which date the Commissioner of Lands had not issued any letter of allotment). Public land also includes government forests, game reserves, water catchment areas, national parks, and government animal sanctuaries as well as all minerals and mineral oils, and all rivers and

lakes. Ownership of public land is divided between county government and national government as trustees for the people of Kenya. Government forests, government game reserves, national parks, and animal sanctuaries are vested in the national government. A national land commission established in the Constitution administers all public lands on behalf of the national and county governments.

Private land is held by individuals or corporations in the form of freehold or leasehold interests. These interests are established through a process of adjudication, consolidation, and titling of land. The only limitations to absolute proprietorship over land are when there are restrictions registered against the title, such as a right of way, caveats, or use agreements or land use regulations created by law (Laws of Kenya, 1963b, 2010). Absolute proprietorship over land is unlimited in time and can be transferred over generations. Private ownership of land is also achieved through leasehold tenure provided under the Registered Land Act (Laws of Kenya, 1963b). Leaseholds are generally issued for 99 years and are renewable. Foreigners are not permitted to hold freehold title in Kenya and they can only hold leases for up to 99 years (Laws of Kenya, 2010: Section 65(1)).

Most of the land outside protected areas that is used by wildlife is classified as “agricultural.” Ownership of agricultural land in Kenya is controlled by the Land Control Act (Laws of Kenya, 1967). Agricultural land transactions that are subject to the Land Control Act include sale, transfer, lease, mortgage, exchange, partition, or other disposal of or dealing with agricultural land, including shares in a private company or cooperative society that owns agricultural land (Laws of Kenya, 1967: section 6). The Act establishes Land Control Boards whose responsibility is to consider and grant or deny consent to any controlled transaction following application as set out in the Act. The Land Control Act limits dealings with agricultural land to citizens of Kenya, private companies, or cooperative societies whose membership is entirely comprised of Kenyan citizens, group representatives incorporated under the Land Group Representatives Act, or a state corporation established under the State Corporation Act (Laws of Kenya, 1986). Any other individuals or entities that wish to deal in agricultural land are required to seek exemption from the provisions of the Land Control Act, and this exemption can only be granted by the President of the Republic of Kenya following an application for exemption (Laws of Kenya, 1967: section 24). In the absence of an exemption, the Land Control Board is required to refuse consent to persons who do not meet the above criteria, and refusal of consent makes a controlled transaction for which the consent is sought void for all purposes (Laws of Kenya, 1967: section 9(2)). For example, if

the African Wildlife Foundation (AWF) wishes to purchase agricultural land in Kenya, because it does not qualify as any of the above, AWF must seek exemption from the Land Control Board to own land. These controls on dealing with agricultural land are expected to change to reflect the provisions of the new Constitution on the rights to own property and the establishment of a national land commission.

Lands held under group ranches and lands vested in county governments in trust for local communities living on the land are categorized as community lands. Group ranches are established under the Land (Group Representatives) Act (Laws of Kenya, 1968c) and apply mainly in the rangeland districts. Most of these rangelands are occupied by Maaspeaking communities that were largely nomadic pastoralists.

In 1968 the Land Adjudication Act (Laws of Kenya, 1968b) and the Land (Group Representatives) Act (Laws of Kenya, 1968c) formalized the conversion of rangelands into group lands to communities with title vested in small groups. No individual group member can dispose of the land. The group members continue to access and use the land communally on the basis of customary laws (Laws of Kenya, 1968c). Group representatives are elected and, upon registration, become a body corporate. Members of the group have a right to vote and participate in decision making through meetings of the group. Over the past decade, many group ranches in southern Kenya have subdivided their land, changing the dynamics of group ranches by vesting ownership within parts of the ranch to individuals. For example, east of Amboseli National Park in southern Kenya, the Kimana Group Ranch has subdivided their land into 60 acre lots that are leased by individuals, who are now free to sell or lease their land for any use permitted by law.

Land vested in county governments to hold in trust for the communities residing within them are referred to as trust lands. These were previously native reserves in the colonial period that were, at independence, vested in local government authorities as trustees for communities ordinarily resident in them (Laws of Kenya, 2010). These lands are now vested in county governments as per the new Constitution (Laws of Kenya, 2010: section 63). The communities residing in trust lands apply African customary law for purposes of land occupation, use, control, disposal, and succession. (Laws of Kenya, 1939: section 69).

COMPULSORY ACQUISITION AND LIMITATION OF LAND RIGHTS

None of Kenya's land tenure systems as previously described grants an absolute right of land use without

any limitations on use, nor does any land tenure preclude the government from acquiring such land. The Constitution provides the government two ways to limit property rights: through compulsory acquisition or through land use regulations. The Constitution states that the government may acquire property compulsorily for purposes of public interest and that this may be exercised for the following purposes: defence, public safety, public order, public morality, public health, or land use planning (Laws of Kenya, 2010).

In the case of compulsory acquisition, the landowner is entitled to full and prompt compensation under certain circumstances (Laws of Kenya, 2010: section 40(3)). When determining compensation, the government considers inter alia the market value of the land (Laws of Kenya, 1968a: section 9). The Land Acquisition Act states that land may be acquired for purposes of the government or public body (Laws of Kenya, 1968a: section 6). Once the Minister for Lands makes a decision to acquire land for public purposes, a notice is published in the *Kenya Gazette* and served to the landowner and interested parties.

The power of government to acquire land for purposes of wildlife conservation outside protected areas is also provided for within the Wildlife (Conservation and Management) Act, which empowers the government, through the minister responsible for wildlife, to declare an area a national park (Laws of Kenya, 1976: section 6). In the case of private land the process requires parliamentary approval before the requirements of the Land Acquisition Act (Laws of Kenya, 1968a) can apply. The end result of compulsory acquisition of land is that title is vested in the government free from all encumbrances (Laws of Kenya, 1968a). When all the land has been acquired, documents of prior title are cancelled. When only part of the property has been acquired, the documents of title are amended to reflect the change against the title in the Register of Titles (Laws of Kenya, 1968a: section 20).

Although the potential to protect wildlife habitat through application of eminent domain is theoretically unlimited, any attempt to apply compulsory acquisition today would be met with resistance of a scale highly likely to defeat the objective. Kenya's protected areas were established through a process of compulsory land acquisition largely belonging to communities, resulting in a great deal of bitterness and resentment that persists today. Any attempt to secure conservation land through eminent domain would be fought vigorously by community members and leaders.

Apart from compulsorily acquiring land, the government has power to regulate and limit the rights of landowners to use land for the purpose of conserving wildlife

habitat (Laws of Kenya, 2010: section 66). This is done mainly through land use planning and zoning and the use of regulations and sanctions to enhance compliance. The government has no obligation to compensate the landowner for land rights limited as a result of land use regulations.² Like eminent domain, forcefully limiting personal rights on land for wildlife conservation will be challenged because of the history of compulsory land acquisition for the creation and management of protected areas in Kenya. Thus, conservation via land use regulations alone is not a viable option for securing land for conservation.

HABITAT CONSERVATION USING EXISTING STATUTES

Kenya has numerous statutes that are designed to conserve natural resources. This section highlights some of these statutes and how they may be used to protect land outside of protected areas. Currently, Kenya is reviewing and redrafting a number of its policies that pertain to natural resource conservation. Any new laws will need to be made fully compatible with the new Constitution.

Provisions of the Water Act (Laws of Kenya, 2002) relating to the protection of water bodies could, if implemented effectively, benefit wildlife habitat. The Act's provisions can be used to ensure availability of clean water for wildlife and protect catchment habitat around water bodies. The Act prohibits various harmful activities relating to water bodies and requires permits for certain activities. For example, the Act criminalizes pollution of water bodies as well as obstruction or diversion of water from any water resource without authority under the Act, with stiff penalties for violations (Laws of Kenya, 2002: section 94).

The Agriculture Act (Laws of Kenya, 1963a) is aimed at promoting and maintaining agricultural production, stimulating the development of good land management and husbandry, developing agricultural land, conserving soil and soil fertility, and preventing soil erosion. "Agricultural land" refers here to all land that is used for purposes of agriculture and excludes any land that is by provision of any law relating to planning, such as the Physical Planning Act, and proposed for use other than agriculture (Laws of Kenya, 1963a: section 2). The term "agriculture" is used broadly under the Agricultural Act and includes cultivation, horticulture, dairy farming, beekeeping, and raising livestock. Much of the land used by wildlife outside of protected areas is arid, agricultural land primarily used by pastoralists. Agricultural land also includes land used for the keeping of game animals and

birds as well as breeding and game ranching within the provisions of Kenya's Wildlife (Conservation and Management) Act (Laws of Kenya, 1976: section 2).

The Agriculture Act gives the minister in charge of agriculture authority to issue sanctions to enforce the provisions of the Act. For example, the Minister may require a private landowner to carry out an activity that preserves soil (Laws of Kenya, 1963a: section 51). The Act makes it an offense for any landowner to fail to comply with an order, and if found guilty, the offender is liable to a fine, imprisonment, or the disposal of his land (Laws of Kenya, 1963a: section 60). The Agriculture Act would benefit rangelands by preventing soil degradation; however, like most laws that require enforcement, these sanctions have not been effective because of lack of enforcement capacity.

The Minister of Agriculture has wide powers for ensuring preservation of agricultural land, and these include powers to make regulations and rules for preservation and development of agricultural land (Laws of Kenya, 1963a: sections 51, 64). The Minister has wide powers for enforcing the provisions of the Agriculture Act as well as any regulations made under the Act, including the power to dispossess owners and occupiers of agricultural land and to purchase or compulsorily acquire the land from landowners who fail to comply with any regulations or orders made under the Agricultural Act. The Minister also has power to intervene in issues of land management on any agricultural land if, in the Minister's opinion, the land is inadequately managed or has ceased to be managed; and the Minister can take measures to prevent or delay deterioration of such land, including issuing management orders against the landowner, which allows the Minister to manage the land to the exclusion of the landowner (Laws of Kenya, 1963a: section 187).

The Forests Act (Laws of Kenya, 2005) was intended to provide for conservation and management of Kenya's forest resources. This is another statute that could have potential benefits to wildlife habitat outside protected areas; however, like the Water and Agricultural acts, this Act relies on enforcement and sanctions for compliance (Laws of Kenya, 2005).

The 1999 Environmental Management and Coordination Act (EMCA) provides a legal framework for management of the environment, which is defined to include the physical factors of the surroundings of human beings, including land, water, atmosphere, climate, sound, odor, taste, the biological factors of animals and plants, and the social factor of aesthetics, and includes both the natural and built environments (Laws of Kenya, 1999: section 2). The Environmental Management and Coordination Act contains several provisions that could be

used to protect wildlife habitat outside protected areas. These provisions include environmental easements, environmental restoration orders, environmental impact assessment, and environmental impact licenses.

The foregoing examples illustrate that Kenya has several strong statutes intended to protect natural resources and the environment. However, much of Kenya's environmental legislation relies heavily on compliance, implementation, and enforcement. Because of low capacity of enforcing agencies, there is poor enforcement of Kenya's environmental laws. Monitoring for compliance and prosecuting offences are challenging functions, especially where there is widespread default, and most government institutions have insufficient staff for these purposes. With few exceptions, the overall result is a general failure of existing legal measures for conserving wildlife habitat outside of protected areas, thus leaving the wildlife vulnerable to various threats and resulting in a continued decline in wildlife.

MECHANISMS FOR HABITAT CONSERVATION BASED ON PROPERTY RIGHTS

If Kenya's environmental laws were fully enforced and implemented, tools such as environmental easements, land acquisition, and conservation leases would still be necessary to adequately secure Kenya's wildlife and landscapes. Conservation of natural resources is best served by a diversity of tools. Regulation may be appropriate in certain places, whereas different tools may be more appropriate in other areas. In addition, legislation is subject to change, so although Kenya may enjoy strong environmental legislation one year, that may change the following year, which jeopardizes the conservation of natural resources.

Tools such as leases, described below, can provide direct benefit to landowners; otherwise, they may choose alternative land uses that are permitted by law yet are incompatible with wildlife and conservation. For example, Kitengela is a wildlife dispersal area south of Nairobi National Park. Development pressure is significant because of proximity to Nairobi. Much of the land in Kitengela has been subdivided and is held by title; thus, landowners can legally sell their land for development or agriculture. One conservation entity is leasing the land on an annual basis to keep the area open for wildlife movement. This land would have been fragmented by a number of legally permissible uses if not for the lease program. The challenge, however, is how to sustain the lease program as well as compete with escalating market prices. If someone can make four times

as much by selling their land than they can from the lease program, they will be very tempted to sell.

The failure of coercive legal measures and existing statutes for conserving wildlife habitat outside protected areas and the diversity of conservation needs and challenges call for additional approaches. There is an urgent need for incentive-based mechanisms that provide landowners with opportunities to conserve their land through the voluntary restriction of their property rights. These mechanisms include land purchase, environmental easements, and conservation leases. The successful use of conservation mechanisms based on property rights depends on clearly defined and articulated land rights. A landowner must have secure legal rights over the land and the power to convey rights and interests for the benefit of wildlife conservation in order to take advantage of these tools. Several such mechanisms are described below.

LAND PURCHASE

Typically, when parcels of land come up for sale in Kenya, they are purchased, developed for agriculture, habitation, or other uses that are incompatible with wildlife conservation. These lands can be purchased by entities intending to manage them for conservation. For example, in 2004 a large-scale ranch in Laikipia District that was located in an area strategically important for conservation was purchased by a private company registered in Kenya and funded through an international conservation organization. Today, the land is managed successfully for conservation and wildlife, and it also benefits the surrounding communities. In this case, the provisions and requirements under the Land Control Act as to who can own land in Kenya were met because the purchaser of the above land is a company comprised of Kenyan shareholders. Buying land for conservation purposes, assuming compliance with the Land Control Act and other Kenyan statutes, is an effective tool that can be used by conservation entities to secure critical wildlife habitat. By owning the land, the conservation entity is in control of the land use and can manage specifically for wildlife purposes. The challenges to purchasing land are ensuring clear land rights of the seller, raising the funds to purchase land, and managing the land in the long term.

ENVIRONMENTAL EASEMENTS

An environmental easement is an agreement between a landowner and the holder of the easement, which restricts certain uses of a property to achieve conservation

purposes. Easements in Kenya have their origin in English law (Gaunt and Morgan, 1997). They have also been used for non-conservation purposes, such as to create a right of way or grant water rights (Gaunt and Morgan, 1997).

In Kenya, the 1999 EMCA makes provisions for use of easements to conserve wildlife habitat. The aspect of the environment that benefits from the restrictions placed on the land by an easement is called the “benefited environment,” and the land subject to the easement is called the “burdened land.” The essence of an environmental easement is to conserve target resources such as wildlife, watersheds, and habitat.

Use of environmental easements to conserve wildlife habitat requires landowners to forego certain land use options on their land. Under EMCA, the process operates through the court and is not necessarily voluntary. If the court imposes an environmental easement, the landowner is entitled to compensation commensurate with the lost value of the use of the land (EMCA). The person awarded the easement pays the compensation, unless the court determines a national importance; then the government may be instructed to compensate the landowner. Under EMCA, section 112 (Laws of Kenya, 1999), anyone can hold a conservation easement. This is in contrast to the Land Control Act (Laws of Kenya, 1967), which controls dealings in agricultural land and limits the rights of noncitizens to own agricultural land without the consent of the President of the Republic of Kenya, which may be obtained following an application for exemption from the provisions of the Land Control Act. In a situation where an environmental easement is negotiated, the landowner and the easement holder would agree on the value of compensation due to the landowner. For example, if Mr. M. believes his neighbor’s property is important wildlife habitat, under EMCA he can file for an environmental easement. If the court approves the environmental easement, Mr. M. will hold the easement, and as per the recommendation of the court, he will compensate the neighbor. The neighbor has no choice in this matter.

To encourage landowners to place environmental easements on their land, EMCA and/or other legislation in Kenya should be amended to allow for the use of *voluntary* environmental easements without being imposed through judicial process. Imposing an environmental easement through the court presumes an adversarial approach and could be viewed as punitive. Instead, landowners and appropriate organizations should be able to negotiate and agree to voluntary environmental easements. To ensure the long-term sustainability of easements, institutions that can monitor and uphold easements should be the easement holders. Moreover, EMCA makes no provision for determining the

value of an environmental easement, leaving it to the courts to perhaps set the precedence. Less adversarial systems and a standardized appraisal process should be developed to determine the value of environmental easements (Farrier, 1995). To date, an environmental easement has not been implemented through EMCA. In addition to proposing legislative change to provide for voluntary environmental easements, the African Wildlife Foundation is working with partners to bring a consensual environmental easement to the court to process through EMCA with the aim of setting a positive precedent for voluntary easements.

Community land presents a challenge to the use of environmental easements because rights of use over land among the communities that live on the land are governed by customary law, which is unregistered. This is expected to change as the Constitution provides that the national land commission would advise the national government on a comprehensive program for the registration of title in land throughout Kenya. The laws relating to governance of community land are also to be reviewed and rationalized, and an important outcome of this process would be provision for a process to define and quantify the nature of customary rights of use over land to enhance the security of tenure and enable the use of property-rights-based conservation mechanisms, especially easements and leases.

LEASES

A lease provides an opportunity to obtain possession of a parcel of land for a given duration for specific uses. This mechanism is very common in land transactions and can be used for purposes of conserving land. For example, an appropriate entity may purchase a 99 year lease on a property and manage it for conservation purposes. Another variation is leasing specified rights on a property. Many safari and tourism companies lease land for tourism use, tented camps, and wildlife watching. The African Wildlife Foundation is using leases, for example, to conserve wildlife dispersal areas outside Amboseli National Park in southern Kenya, leasing land from landowners for habitat conservation. Through a lease, AWF is paying approximately 210 landowners to manage their land sustainably and not block wildlife movement with development, fencing, and farming. This program has protected approximately 12,500 acres of strategic wildlife habitat and is expanding by incorporating more adjacent landowners. This is another example that documents the need for tools such as leases because fragmentation by development, fencing, and agriculture is legally permissible in this area under Kenya law and landowners would choose

alternative income-generating land uses that may not be compatible with wildlife. The challenge is finding a long-term funding source to sustain lease programs.

LACK OF INCENTIVES FOR WILDLIFE CONSERVATION ON PRIVATE LAND

Kenya landowners generally use land for purposes that are profitable, and land use that does not provide favorable returns is likely to be shunned. Landowners are required to absorb costs of keeping wildlife outside protected areas, and those not directly investing in ecotourism see little or no return from wildlife. In fact, many landowners face direct economic challenges from wildlife, for example, elephants raiding crops or predators killing livestock. Yet much of the wildlife in protected areas would not survive without seasonal access to adjoining private and community lands. A key challenge for wildlife conservation is therefore to find ways of making wildlife a profitable land use. One way to ensure that landowners benefit from wildlife is by compensating them for conservation of their land through conservation leases or environmental easements, such as the examples provided in the Amboseli region and in Kitengela.

One of the greatest challenges facing wildlife in Kenya today is the shift in land use from grazing to cultivation. The government's policy has promoted agricultural production through, for example, support for irrigation, financing for land subdivision and titling to establish farms, and subsidized loans to support cultivation of specific crops. Cultivation then becomes more profitable than keeping wildlife or cattle. In addition, there is significant international investment and focus on food security and large-scale agricultural development in Africa. This investment puts added pressure on land in Africa and further encourages governments to promote agricultural development without proper land use planning.

At the same time, many group ranches are going through a process of subdivision into small, fenced units, which severely fragments the landscape and impedes wildlife movement. As a result, livestock production has become limited, with less room to roam. Many pastoralists have turned to cultivation, which further fragments the landscape, increases human-wildlife conflict, makes traditional pastoralism unsustainable, and leads to habitat degradation.

Measures should be taken to encourage the government to prevent subdivision of rangelands below economically viable size to ensure that the rangelands continue to

support livestock and wildlife and to provide tax incentives for landowners to establish wildlife-based tourism. Private land tools, such as conservation leases, can provide an added benefit to landowners and prevent conversion of open land to cultivated units. The greatest challenge herein is finding the funds to support conservation leases as donor funds cannot be relied upon in the long term. In some areas, tourism may directly support leases; however, this is not a viable option everywhere. Creative benefit-sharing mechanisms from existing protected areas and tourism facilities must be explored. Payment for ecosystem services is another potential source of revenue to support conservation leases.

KENYA LAND CONSERVATION TRUST

Many state institutions in Kenya have a mandate to conserve aspects of the environment; however, existing institutional frameworks for these agencies do not permit them to effectively conserve wildlife resources outside protected areas, especially through the use of property-rights-based mechanisms. This is because they have a limited mandate to conserve wildlife outside protected areas, especially on private land. Therefore, effective use of mechanisms based on property rights for conservation of wildlife habitat in Kenya requires an enabling institutional framework that until recently has been lacking. Recognizing the need for a national organization that can pilot environmental easements, leases, and land acquisition and serve as a countrywide organization, the African Wildlife Foundation helped cofound the Kenya Land Conservation Trust (KLCT) in 2005 (Box 1).

The KLCT provides an institutional framework to support the development and use of property-rights-based mechanisms such as environmental easements and land purchase for habitat conservation. It aims to work in collaboration with landowners and partners to conserve wildlife habitat in areas such as the Ewaso ecosystem and to test and advance the use of legal and economic mechanisms for habitat conservation. The KLCT can serve as the institutional holder of environmental easements and promote the advancement of private land tools.

AFRICAN WILDLIFE FOUNDATION

The African Wildlife Foundation (AWF) was founded in 1961 and works together with the people of Africa to ensure the wildlife and wildlands of Africa will endure

BOX 1.**The Kenya Land Conservation Trust.****Objectives**

The Kenya Land Conservation Trust was established in 2005 as a private charitable trust, incorporated under the Trustees (Perpetual Succession) Act (Laws of Kenya, 2009). The main objective of the trust is to ensure the viable function and integrity of natural habitat on land outside protected areas and the wildlife populations that they support while taking into account the social and economic interests of landowners and communities. The trust, in partnership with landowners and other stakeholders, will do this by (1) providing landowners with an opportunity to use land conservation options, including land acquisition, environmental easements, and leases for land conservation, and (2) supporting the formulation of policies relevant to biodiversity conservation in Kenya.

The Board of Trustees

The management of the trust is currently vested in the Board of Trustees. The founding trustees are representatives of African Wildlife Foundation, Kenya Wildlife Service, and the Ministry of Lands and Housing. One of the board seats is allocated to a member of the National Land Owner Forum. This is a fully Kenyan board.

Scope of the trust

The trust is focused on biodiversity conservation outside protected areas in Kenya. It will address aspects of conservation including wildlife migratory routes, dispersal areas, forest areas, and wetlands. With the support of the African Wildlife Foundation, the trust has undertaken a process of site selection and prioritization to determine the landscapes it will target for conservation intervention in Kenya. Overall, it is important that the trust will seek to engage with and respond to the landowners and stakeholders in designing and implementing habitat conservation mechanisms.

forever. AWF's land protection program had primarily focused on supporting protected areas and helping communities protect their land through management and land use plans and zoning. To successfully achieve its conservation goals, AWF recognized that in addition to its existing conservation tools and land conservation programs, it must put more emphasis on direct conservation measures on lands outside protected areas and to do so, it must utilize new conservation approaches.

The African Wildlife Foundation is working to identify strategic conservation priorities in the Ewaso ecosystem and throughout Kenya. AWF uses a scientific approach to identify its conservation targets, considering a suite of indicator species, access to water and other natural resources, wildlife movement patterns, connectivity, threat, and natural communities. Once a property is identified, AWF carefully evaluates the appropriate tool needed to conserve the parcel. AWF firmly believes that the advancement of conservation tools, as discussed in this paper, will help itself and other conservation organizations to achieve conservation success throughout Kenya. AWF has used a variety of these tools; it has purchased land, leased land, and is currently working with partners to secure land with an environmental easement through EMCA.

To advance the development of private land conservation tools, AWF convened a team of attorneys and conservation practitioners to explore environmental easements in Kenya, review existing statutes to determine how and if voluntary easements can be implemented under existing legislation or propose new legislation and amendments, and develop valuation methodologies for environmental easements and conservation leases. The results of this working committee were published by AWF (Watson et al., 2010).

CONCLUSION

Kenya's wildlife is severely threatened by habitat fragmentation, loss of habitat, land use change, barriers to movement, and human population pressure. The current institutional frameworks for wildlife conservation have failed to effectively conserve wildlife resources outside protected areas in Kenya and provide landowners with an incentive to manage their land for wildlife. Most of Kenya's wildlife is dependent upon habitat outside of protected areas. This is especially true for the Ewaso ecosystem, where wildlife thrives largely on privately and communally owned land. To adequately address the conservation challenge in Kenya, a wide diversity of tools must be developed, enhanced, and utilized. Kenya's environmental statutes alone will not safeguard the country's wildlife and landscapes. Tools such as leases, acquisition, and environmental easements play a vital role in conserving Kenya's wildlife habitat.

Kenya's property rights regime provides substantial opportunities to use various mechanisms such as environmental leases to conserve wildlife habitat outside protected areas by restricting land use to activities that are

compatible to conservation of wildlife habitat as well as providing an opportunity to purchase critical parcels of land. These mechanisms not only protect important habitats but also provide landowners with the compensation they need to effectively manage their land for wildlife and ecological integrity. Environmental leases are already being used successfully, and this model can be replicated throughout Kenya. However, creative and collaborative funding mechanisms must be developed to support the large-scale conservation that is necessary to sustain Kenya's wildlife and habitat.

The Environmental Management and Co-ordination Act provides an opportunity to use environmental easements, and this instrument has the potential to be used to conserve wildlife habitat on private land without the burden or cost of purchase. An amendment to EMCA and/or other environmental legislation in Kenya to provide for voluntary easements would help catalyze the use of this tool and significantly enhance conservation in the Ewaso ecosystem and throughout Kenya.

Kenya boasts unique landscapes and wildlife; however, with only approximately 7.5% of the country formally protected, additional tools and strategies must be adopted to conserve additional lands. The use of environmental easements, leases, and land acquisition will complement Kenya's existing conservation framework and tools to ensure the long-term sustainability of its wildlife and wildlands.

NOTES

1. Reference to the Constitution of Kenya refers to the 2010 constitution adopted and enacted through a national referendum on August 4, 2010. This replaced the 1963 Constitution of Kenya.

2. Land use control measures must be applied with caution as excessive land use regulations may be seen to amount to compulsory ac-

quisition of the land and may be challenged on a constitutional basis as taking. In the United States, for example, land use regulations may be challenged on the grounds that they are so restrictive that the state has as good as acquired the land and may be declared unconstitutional, as was the case in *Morris City Land Improv. Co. v. Parsippany-Troy*, 40 N.L. 539, 193 A.2d 233,242 (1963) and *Lucas v. South Carolina Coastal Council*, 112 S. Ct., 22 ELR (1992).

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