



RIGHTS AND RESOURCES INITIATIVE | SEPTEMBER 2021

*Community Land Rights in Kenya:
A Summary of 2020 Analyses*

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Background

Land is a highly complex issue in Kenya. It not only serves as a means of production for supporting community livelihoods, but also embodies the social, cultural, and spiritual identities of more than 40 Indigenous and local communities who call Kenya home.

Land tenure in pre-colonial times Kenya was governed through the application of customary laws that varied between communities. After colonization, the British forced local communities in the newly created protectorate of Kenya to relinquish some of their most fertile lands for use by white settlers. These lands were subsequently named the “white highlands.” The British also introduced new land governance regimes that undermined existing customary tenure frameworks. Native reserves and trust lands were established along ethnic lines, severing past trade agreements and other inter-communal relationships.

The colonial period marked the beginning of the systematic dispossession and disenfranchisement of Indigenous and local communities, and instigated land-related conflicts that plague the country to this day. The post-independence period saw the state preserve colonial land-management regimes, including retaining state control over community lands and the undermining of communities’ customary tenure rights. Land became inextricably tied with politics and ethnic mobilization, especially during elections, which resulted in land grabs of both community and public land.

It is in this historical context that Kenyans continue to advocate for reforms in land governance. The 2010 constitution, which recognized the legitimacy of customary land tenure, was a critical step forward in instituting reforms in land governance, land use, land ownership, and customary land tenure in Kenya. The Forest Management and Conservation Act of 2014 built on the constitution’s recognition of customary tenure rights, including provisions for local communities to co-manage forest lands alongside the Kenya Forest Service, withdraw forest products, and establish plantation forests. Previously, these activities were considered illegal. The Community Land Act (CLA) of 2016 also helped further secure community land rights and resolve historical injustices related to land.

Summary of findings

This summary highlights Kenya-specific findings of three RRI studies conducted in 2020 on:

- 1. The estimated area of land and territories where the rights of Indigenous Peoples, local communities and Afro-descendants (referred hereon as “communities”) have not been recognized.ⁱ*
- 2. The identification of opportunities for investments in securing collective tenure rights in the forest areas of low - and middle- income countries.ⁱⁱ*
- 3. The exploration of rights-based interventions in conserving biological and cultural diversity.ⁱⁱⁱ*

This document will explain what the findings of these three studies mean for Kenya, and aims to equip local communities and civil society organizations (CSOs) with data to advance their advocacy work to

influence future reforms, and help the government, donors, private sector actors, and conservationists make informed decisions.

Report 1: Estimated area of land and territories of communities where their rights are not recognized

1.1. Study rationale

Research shows that legally recognized community lands store more carbon, have lower emissions, and have significantly lower deforestation rates than lands owned by other actors. They also cost less to establish and maintain than conventional protected areas. Insecure, contested, and unjust land and forest tenure undermines efforts to protect, sustainably manage, and restore ecosystems essential to the realization of climate, conservation, and sustainable development goals. Further, community-owned and -managed lands have emerged as a conservation strategy that is often lower risk, lower cost, and more effective than the conventional, publicly protected area approach. This report aims at developing a global baseline of the total area of land where Indigenous and local communities' rights are unrecognized. It draws on data from 42 countries covering almost 50 percent of global land area, excluding Antarctica.

1.2. Findings and interpretation

Globally, recognized and unrecognized community lands constitute 49.2 percent of the total area in the study. This supports previous research that found that communities have historic or customary rights to half of the world's lands. In comparison to Asia and Latin America, Africa has the largest portion of unrecognized community lands: 505 million hectares (Mha), or the equivalent of 49.9 percent of the land area in the 14 African countries studied. **In other words, the greatest opportunity for the global advancement of customary and collective tenure rights is in Africa.**

Out of Kenya's total land area of 56.91 Mha, an estimated 39.3 Mha (69.1 percent) is community land: 38.5 Mha (67.6 percent of Kenya's land area) is recognized and 0.8 Mha (1.4 percent of Kenya's land area) is unrecognized.

Importantly, the 38.5 Mha with recognized tenure consists of both registered and unregistered community lands. While the 2010 constitution and the 2016 CLA legally recognize communities' customary land rights regardless of whether they are registered or unregistered, county governments hold unregistered community lands in trust for communities until they are formally registered. It is only in the registration of community lands that ownership of that land, together with all rights and privileges, are transferred to the community. For example, registration is required to form Community Land Management Committees (CLMCs) to oversee the management and administration of community lands and communities with unregistered lands cannot access compensation that they may be entitled to under the CLA. The study reinforces the critical need to accelerate national actions and international investments to secure collective land and resource rights in Kenya specifically, and Africa more broadly.

Report 2: The Opportunity Framework 2020: Identifying Opportunities to Invest in Securing Collective Tenure Rights in the Forest Areas of Low - and Middle-Income Countries.

2.1. Study rationale

Globally, Indigenous Peoples and local communities comprising roughly 2.5 billion people customarily manage over 50 percent of the Earth's land mass, but governments currently recognize their legal ownership to just 10 percent.^{iv} There has been some progress in addressing this historic injustice in recent years as governments have begun to pass legislation and implement court decisions to recognize the historic and customary use and ownership of these lands. However, legal frameworks for the recognition of collective tenure rights are often not implemented. Governments and CSOs sometimes lack the financial resources, organizational capacities, or political will to fully execute these laws and court decisions on the ground, as demonstrated by the cases of the Endrois and the Ogiek. Both Indigenous communities have taken their grievances about rights violations to the African Commission on Human and Peoples' Rights and have obtained positive judgements. The Kenyan government, however, has largely ignored these rulings. For the Ogiek, the task force's report that was to study the ruling and advise the Kenyan government is yet to be made public.

The Opportunity Framework 2020 examines the status of country readiness for investments in community land rights, prioritizing countries that are members of the Forest Carbon Partnership Facility (FCPF), an international initiative to help governments reduce deforestation and thereby mitigate climate change. The Opportunity Framework is designed to facilitate awareness and identify potential opportunities for investment by governments, supporters of the FCPF, and other potential donors, and to provide a simple framework for monitoring the status of readiness for investments over time. The study evaluates and scores 29 countries, including Kenya, on 1) the adequacy of existing legal frameworks; 2) the willingness of national and 3) subnational governments to support collective rights; 4) government capacity to institute reforms; and 5) the capacity of communities and affiliated CSOs to implement projects. A score ranging from 0-15 was assigned to each country based on the assessment of these five parameters.

2.2. Findings and interpretation

Kenya scored an 11 out of a possible 15, meaning the country is ready for medium-scale projects to implement forest tenure reforms.^v These are projects estimated at around 1 million USD per year with community-based organizations as their leaders often at the sub-national level. While the 2010 constitution and the 2016 CLA were positive steps towards securing community land rights, implementation has lagged. As of early 2021, fewer than 10 communities were able to register their community lands with the Kenyan government since 2016.

The slow pace of implementation can be partially attributed to a lack of interest from relevant government agencies, as evidenced by the Ministry of Housing and Lands having missed all legally

specified deadlines for the recognition of land rights in the last three years. For example, they have not yet taken inventory of group ranches, a sub-category of community lands, nor have they documented any of the country's unregistered community lands. The Kenyan Forest Service has been particularly obstructive: Despite new legislation recognizing communities' customary rights, it continues to establish new public forests carved out of community lands without consent. CSOs working in Kenya have flagged these actions as a major setback in the implementation of community land rights.

Other challenges include inadequate funding for CSOs, strained relationships between CSOs and the government, inadequate knowledge or understanding of legal frameworks at the community level, and weaknesses in gender and youth mainstreaming in land-related issues. In addition, the provisions for gender and youth inclusion exist in legal frameworks but lack implementation on the ground.

Report 3: Rights-Based Conservation: The path to preserving Earth's biological and cultural diversity?^{vi}

"Throughout conservation's checkered history, we have seen exclusionary conservation as a gateway to human rights abuses and militarized forms of violence. We now have evidence that this approach is also economically devastating. Paying Indigenous Peoples to abandon lands they have historically protected better than governments and private entities is wasteful and furthers past wrongs."-José Francisco Cali Tzay - United Nations Special Rapporteur on the Rights of Indigenous Peoples

3.1. Study rationale

Urgent action is needed to prevent the collapse of biodiversity across the planet. In an effort to propose solutions, certain governments, organizations, and conservation scientists have put forward proposals for bringing at least 30 percent, and up to 50 percent, of the planet's terrestrial area under formal "protection and conservation" regimes to address the dual biodiversity and climate change crises. However, given that important biodiversity conservation areas often overlap with territories inhabited and claimed by communities, expanding biodiversity conservation significantly impacts these communities. Indeed, conservation's colonial history has contributed to a growing list of human rights abuses, displacements, and increasingly militarized forms of violence in the pursuit of protecting biodiversity. It has been estimated that up to 136 million people were displaced when formally protecting half of the global area currently protected (8.5 million km²). This report reinforces peer-reviewed findings that already show how communities are far more effective than governments at protecting ecosystems and forests, especially when given formal rights that allow them to continue protecting their territories, and that supporting their agency and self-determination is the most cost-effective path to achieving global biodiversity goals.

3.2. Conservation in Kenya

Kenya is among the world's 50 countries who have committed to placing 30 percent of Earth's terrestrial and marine environments under formal conservation by 2030.

The area under forest cover in Kenya is now estimated at about 7 percent. The Kenyan government has been working to increase this to 10 percent, which has resulted in human rights issues in major forested ecosystems such as the Mau complex and Embobut forest. Currently, terrestrial conservation areas under government control are about 12.8 percent. Thus, expansion to 30 percent will mean dramatic changes in land uses across the country.

However, Kenya's ambitious conservation targets are set against a background of intense competition for land, an increase in land and natural resource-related conflicts, the expansion of large-scale government-funded infrastructure projects, and unresolved land-related historical injustices. Many of Kenya's largest conservation areas are contested spaces, having been established through the outright dispossession of land from communities, with some of these grievances dating back to the colonial period. In addition, wildlife exists and traverses beyond government protected areas onto community lands. Human-wildlife conflict is rife, and in many instances, communities feel that they do not receive adequate compensation for their loss of livelihood as a result. Despite all this, Kenya is cast as a leader in conservation in the East African region with its network of world-renowned national parks and charismatic megafauna. Maintaining this image and the country's network of national parks in a setting where land disputes are widespread requires substantial militarization. Surveillance is heavily funded by international conservation agencies who also wield considerable power and influence in policy formulation processes.

3.3. Findings

3.3.1. The global population of communities living in important biodiversity conservation areas ranges between 1.65 billion to 1.87 billion people.

In Africa, Asia, the Caribbean, Oceania, and the Americas, it is estimated that over 25 percent of each region's population currently lives within important biodiversity conservation areas. In Kenya, this is the reality for 3.5 million people. And, if the commitment to place 30 percent of the country's terrestrial and marine environments under formal conservation by 2030 is successful, more than one third of the population (18 million people) will live in important biodiverse areas by the end of the decade.

3.3.2. A greater proportion of people living in important biodiversity conservation areas are in low- and middle-income countries and may be at risk if exclusionary practices are used to expand conservation areas.

High-income countries account for only 9 percent of the people living in important biodiversity conservation areas, whereas low- and lower-middle income countries account for 56 percent. In addition, the population densities in important biodiversity conservation areas are much higher in low- and lower-middle income countries than in high- or upper-middle income countries. A significant portion of communities in low- and middle-income countries are more likely to depend on the natural resources held within their socio-ecological systems. Any exclusion from these areas could therefore have profound impacts on food and livelihood security. In countries with poor protection of tenure rights, there is considerable overlap between important biodiversity conservation areas and

populations whose rights to land have yet to be recognized. Excluding or restricting communities from lands prioritized for strict biodiversity conservation could have serious socio-economic impacts, and particularly disproportionate effects on rural women.

3.3.3. Expanding conservation areas by using historically dominant models of exclusionary conservation would be highly contentious, prohibitively expensive, and come with human rights costs that will fuel land conflicts.

Globally, relocation cost estimates for 1.2 to 1.5 billion people currently living in unprotected biodiversity conservation areas range between 4 and 5 trillion USD. While considerable, this notional cost remains underestimated as it only represents the costs directly tied to physically resettling people. Absent from the cost estimate are the indirect costs of social, political, and cultural disruption; lost access to local, ecological, and cultural resources; non-monetizable assets (i.e. traditional ecological knowledge, historical roots, sacred sites, spiritual connections); and the multigenerational trauma of evicting communities whose identities are inextricably linked to their traditional territories. Thus, the limited scope of applying resettlement-linked compensation for conservation is strongly critiqued by many social scientists and civil society, regardless of whether resettlement is voluntary or involuntary, particularly in countries where democratic and governance processes are weaker.

These notional costs were calculated using development-induced displacement as a framework and averaging the per person compensation within relocation plans for projects funded by the World Bank, African Development Bank, and Asian Development Bank. The intention behind this calculation was to expose a hidden cost in conservation initiatives, particularly as people are often rendered invisible in global conservation strategies. With conservation predicted to become a leading industry, more so than it already is, the promise of financial gains will likely lead to elite capture. Projections for the cost of conserving biodiversity are expected to be over 100 million USD. The calculation therefore shows that, if “good practices” are followed in resettlement, these optimistic cost predictions are unrealistic.

More importantly, the thought experiment highlights how Indigenous Peoples and local communities invest their own time and money into their territories with the intention of conserving resources. Globally, Indigenous Peoples and local communities invest an average of US\$3.57 per hectare on conservation practices in their territories. In Kenya, the average cost spent per hectare of conserved lands by government and conservation organizations is estimated to be US\$10.78 per hectare. Not only will displacement be costly, but it will also lead to conservation practices that are far more expensive, controlled by fewer people, and primarily benefit those running the industry.

3.3.4. Communities conserve forests, ecosystems, and biodiversity effectively.

Indigenous and local communities with secure land tenure achieve similar if not better conservation outcomes than private or state-managed protected areas and do so at a lower cost. However, they seldom, if ever, receive the financial, political, and technical support granted to public and private conservation initiatives or the security of state-sanctioned enforcement measures. Deforestation

rates are significantly lower in Indigenous and Tribal territories where governments have formally recognized collective land rights, according to a UN review of over 300 studies.^{vii} In addition, as recognized by a growing body of research, communities' sustainable management of their resources contributes to societal needs in rural and urban areas alike through the provision of food, fiber, material, and medicine for local use and exports, the preservation of agrobiodiversity, and the conservation of essential watersheds. This is in large part due to the reciprocal relationship communities have with their territories of life, integrating livelihood, energy, and health, with identity, culture, autonomy, and freedom for the entire "territory of life" which connects the actions of today, the ancestors of the past, and the future generations yet to come. Rights-based conservation can preserve these relationships and play a role in protecting both the environment and the rights of communities who collectively steward them.

3.3.5. Recognizing the traditional and customary lands of communities will substantially contribute to, or even exceed, area-based conservation targets.

Communities' role is integral to achieving the UN's ambitious 2030 global biodiversity agenda. With their Indigenous knowledge and proven track record in conservation, they hold the key to preventing a global biodiversity collapse. Recognizing their tenure rights is also a far more feasible and cost-effective approach to conservation compared to traditional, protected area approaches. For example, the estimated cost of recognizing community tenure rights in currently unprotected, high biodiversity areas is less than 1 percent of the cost of resettling these communities out of protected areas.^{viii}

Recommendations

These recommendations are taken from the RRI report, *Rights-Based Conservation: The path to preserving Earth's biological and cultural diversity?* They should not be taken as an exhaustive list, but rather a brainstorm of important ways that various stakeholders can support rights-based conservation in Kenya and beyond.

For Governments

- Implement culturally appropriate legal, institutional, and regulatory reforms to recognize and protect the customary land and resource rights of communities and particularly the women within them;
- Recognize the rights of communities to existing protected areas and important biodiversity conservation areas. Establish links with local organizations representing these groups to develop culturally appropriate frameworks for rights-based conservation regimes;
- Uphold the distinct and differentiated rights of communities, including their right to self-determination, locally adapted governance institutions, and culturally appropriate land use priorities;
- Commit national and official development assistance (ODA) funds for nature protection towards supporting effective conservation efforts by communities;

- Ensure that community conservation efforts are counted in post-2020 global area-based targets;
- Establish and finance national accountability and reparation mechanisms to address past and present human rights violations in state-sanctioned protected areas as well as privately managed conservation areas;
- Make deliberate efforts to obey court rulings at both the national and international levels;
- Work proactively with communities to ensure formalization of community land rights as enshrined in the constitution and the 2016 CLA.

For Conservation Organizations and Philanthropists

- Support efforts by communities, and particularly the women within them, to advance their land and livelihood rights in important biodiversity conservation areas;
- Prioritize actions and investments that advance the legal recognition and protection of tenure rights, the right to self-determination, and protection and valuation of traditional ecological knowledge held by communities;
- Endorse the “Land Rights Standard”^{ix} principles for best practices in recognizing and respecting community rights, and ensure its effective implementation through appropriate accountability mechanisms (i.e. organization specific criteria, indicators, trainings, transparent monitoring, and reporting;)
- Support local governance institutions and decision-making platforms to support joint learning, resolve conflicts, redress grievances, and develop life plans as well as equitable benefit-sharing approaches;
- Support the flow of funding and capacity building resources to organizations representing communities to facilitate the recognition and securing of rights and governance of their lands and territories.

For CSOs and Communities

- Intensify advocacy efforts targeting governments for the implementation of reforms in the conservation and environmental sectors;
- Enhance capacity building in the identification and registration of community lands;
- Articulate and apply Indigenous knowledge and practices in conservation;
- Pursue proactive dialogues with government and conservation agencies as partners in land use interventions;
- Enhance and strengthen community-based institutions in land and natural resource governance;
- Proactively seek out and engage in dialogue with state and private sector actors on natural resource governance on community land;
- Actively work towards securing community land rights and redressing historical injustices, including those that exist within individual communities.

For Donors and Private Sector Actors

- Ensure the application of communities' right to free, prior and informed consent (FPIC) and other international best practices in all community-related transactions;
- Open avenues for dialogue with communities and state actors on resources held in community lands, including forest carbon.

Conclusion

These three studies underscore the need for securing community land rights to advance local communities' livelihoods and conservation efforts. Their long-term struggle for land rights in Kenya spans from the early 1900s to present-day efforts to address historical land injustices enshrined in the Kenyan constitution, the 2016 CLA, the recommendations of [the Ndungu Land Report](#) on illegal and irregular allocation of public land, and the [Truth, Justice and Reconciliation Commission](#), which addressed land-related injustices and a wide range of human rights abuse issues from 1963-2008.

Yet, despite decades of mobilization, lack of political will remains a major obstacle to moving the rights agenda forward in the country. Concerted efforts from all spheres – government, civil society, donors, conservation and private sector – are needed to advance rights-based land governance practices in the country. The government should seek to work with CSOs, CBOs, the private sector, and bilateral agencies in centering community land rights in all their engagements. Otherwise, it will not be able to meet its ambitious conservation and climate commitments. The private sector must engage in ethical business practices and clean up its value chains as is consistent with international best practices. Conservation enterprises need to reckon with historically oppressive practices and seek to reconcile with communities who share landscapes with wildlife. And last but not least, across all these levels, gender policies should be incorporated into land-related discourse and programmes to secure the rights and livelihoods of women, who make invaluable yet unrecognized contributions to their communities and toward global development and conservation goals.

About the Rights and Resources Initiative

The Rights and Resources Initiative is a global Coalition of 21 Partners and more than 150 rightsholders organizations and their allies dedicated to advancing the forestland and resource rights of Indigenous Peoples, Afro-descendant Peoples, local communities, and the women within these communities. Members capitalize on each other's strengths, expertise, and geographic reach to achieve solutions more effectively and efficiently. RRI leverages the power of its global Coalition to amplify the voices of local peoples and proactively engage governments, multilateral institutions, and private sector actors to adopt institutional and market reforms that support the realization of their rights and self-determined development. By advancing a strategic understanding of the global threats and opportunities resulting from insecure land and resource rights, RRI develops and promotes rights-based approaches to business and development and catalyzes effective solutions to scale rural tenure reform and enhance sustainable resource governance.

RRI is coordinated by the Rights and Resources Group, a non-profit organization based in Washington, D.C. For more information, please visit www.rightsandresources.org.

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ⁱ Rights and Resources Initiative (RRI). 2020a. Estimated area of land and territories of Indigenous Peoples, local communities and Afro-descendants where their rights are not recognized. Rights and Resources Initiative, Washington, DC. Available at: <https://rightsandresources.org/publication/estimate-of-the-area-of-land-and-territories-of-indigenous-peoples-local-communities-and-afro-descendants-where-their-rights-have-not-been-recognized/>.

ⁱⁱ RRI. 2020b. The Opportunity Framework 2020: Identifying Opportunities to Invest in Securing Collective Tenure Rights in the Forest Areas of Low- and Middle-Income Countries. Rights and Resources Initiative, Washington, DC. Available at: <https://rightsandresources.org/publication/the-opportunity-framework-2020/>.

ⁱⁱⁱ RRI. 2020c. Rights-Based Conservation: The path to preserving Earth's biological and cultural diversity? Rights and Resources Initiative, Washington, DC. Available at: <https://rightsandresources.org/publication/rights-based-conservation/>.

^{iv} RRI. 2015. Who Owns the World's Land? A global baseline of formally recognized indigenous and community land rights. Rights and Resources Initiative, Washington, DC. Available at: <https://rightsandresources.org/publication/whoownstheland/>.

^v The analysis does not claim to be a comprehensive assessment of the country's potential for reforms, but rather a snapshot of the existing conditions and available data. The score is also not given in comparison with any other country.

^{vi} The "Rights-Based Conservation" report did not analyze marine protected areas as population distribution data is currently incapable of addressing issues related to the use, access, and management of water bodies and their resources. While water rights, and issues of access to water-related resources, are relevant to the conservation debate, analyzing and addressing these issues was beyond the scope of this report and will require further research.

^{vii} Food and Agriculture Organization of the United Nations (FAO). 2021. Forest governance by indigenous and tribal peoples: An opportunity for climate action in Latin America and the Caribbean. Food and Agriculture Organization of the United Nations, Rome. Available at: <http://www.fao.org/news/story/en/item/1391139/icode/>.

^{viii} RRI 2020c.

^{ix} RRI. 2021. The Land Rights Standard. Rights and Resources Initiative. Accessed September 20, 2021. Available at: <https://rightsandresources.org/land-rights-standard/>.