

Kenya’s new water law: an analysis of the implications for the rural poor

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This paper analyses the implications of Kenya’s Water Act 2002 for the rural poor in the management of water resources and delivery of water services. The paper is premised on the belief that pluralistic legal frameworks are necessary for the effective management of water resources and delivery of water services to this group. The paper argues that, to the extent that the Water Act 2002 depends on state based legal frameworks, its effectiveness in meeting the needs of the rural poor will be limited, particularly given the limitations of technical and financial resources facing the Kenyan state. Consequently, it is necessary that a conscious policy of pursuing use of the limited opportunities the law presents be adopted in order to maximize the law’s potential in meeting the needs of the rural poor.

Keywords: Kenya’s water law, rural water supply, water services, water resources management, rural poor, legal pluralism

Background

The present institutional arrangements for the management of the water sector in Kenya can be traced to the launch in 1974 of the National Water Master Plan whose primary aim was to ensure availability of potable water, at reasonable distance, to all households by the year 2000. The Plan aimed to achieve this objective by actively developing water supply systems. To do so required that the Government directly provide water services to consumers, in addition to its other roles of making policy, regulating the use of water resources and financing activities in the water sector. The legal framework for carrying out these functions was found in the law then prevailing, the Water Act, Chapter 372 of the Laws of Kenya.

In line with the Master Plan, the Government upgraded the Department of Water Development (DWD) of the Ministry of Agriculture into a full Ministry of Water. DWD embarked on an ambitious water supply development programme. By the year 2000, it had developed, and was managing, 73 piped urban water systems serving about 1.4 million people and 555 piped rural water supply systems serving 4.7 million people.

In 1988 the Government established the National Water Conservation and Pipeline Corporation (NWPC), as a state corporation under the State Corporations Act, Chapter 446 of the Laws of Kenya, to take over the management of Government operated water supply systems that could be run on a commercial basis. By 2000 the NWPC was operating piped water supply systems in 21 urban centres serving a population of 2.3 million people and 14 large water supply systems in rural areas serving a population of 1.5 million people.

Alongside the DWD and the NWPC the large municipalities were licensed to supply water within their areas and by the year 2000, ten municipalities supplied 3.9 million urban dwellers.

Additionally, about 2.3 million people were receiving some level of service from systems operated by self-help (community) groups who had built the systems, often with funding from donor organizations and technical support from the district officers of the Department of Water Development (Government of Kenya, 1999).

Persons not served under any of the above arrangements did not have a systematic water service, and had to make do with such supply as they were able to provide for themselves, typically by directly collecting water from a watercourse or some other water source on a daily basis. Indeed, despite the Government’s ambitious

water supply development programme, by 2000, less than half the rural population had access to potable water and, in urban areas, only two thirds of the population had access to potable and reliable water supplies.

In the 1980s the Government begun experiencing budgetary constraints, and it became clear that, on its own, it could not deliver water to all Kenyans by the year 2000. Attention therefore turned to finding ways of involving others in the provision of water services in place of the Government, a process that came to be known popularly as “handing over.”

There was general agreement over the need to hand over Government water supply systems but much less agreement over what it meant for the Government to hand over public water supply systems to others. In 1997 the Government published a manual giving guidelines on handing over of rural water supply systems to communities (Ministry of Land Reclamation, Regional and Water Development, 1997).

The Manual indicated that “... at the moment the Ministry is only transferring the *management* of the water supply schemes. The communities will act as custodians of the water supply schemes, including the assets, when they take over the responsibility for operating and maintaining them.” But, the goal of community management should be *ownership* of the water supplies, including the associated assets.

The Manual stated the criteria for handing over to be the capacity of the community to take over; ability to pay; capacity to operate and maintain the system; involvement of women in management; and ability and willingness to form a community based group with legal status. By 2002 ten schemes serving about 85, 000 people had been handed over under these Guidelines, focusing on management and revenue collection, not full asset transfer.

Building on this experience, the Government developed a full fledged policy, The National Water Policy, which was adopted by Parliament as Sessional Paper No 1 of 1999.

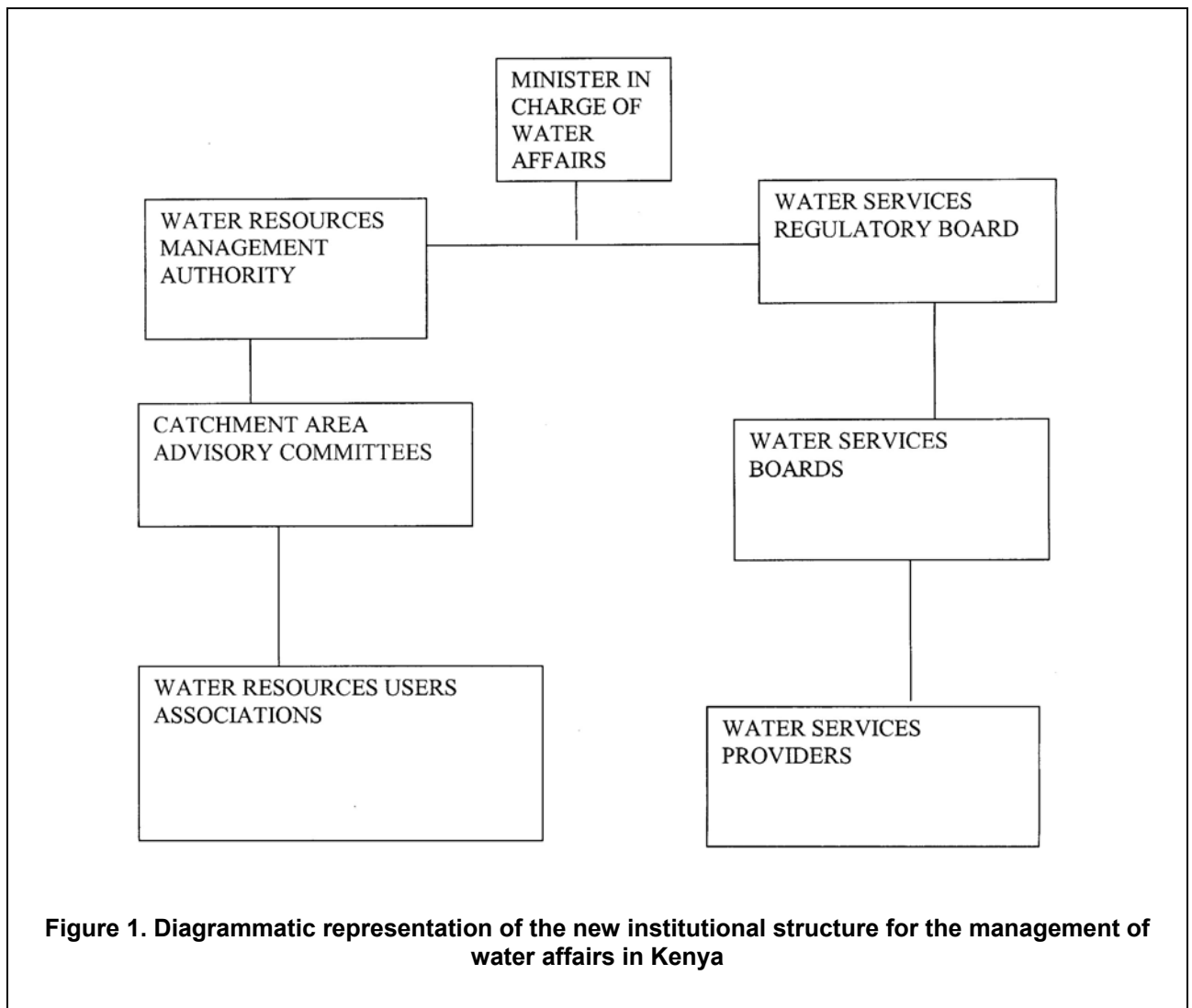
The Policy stated that the Government’s role would be redefined away from direct service provision to regulatory functions: service provision would be left to municipalities, the private sector and communities. The Policy also stated that the Water Act, Chapter 372 would be reviewed and updated, attention being paid to the transfer of water facilities. Regulations would be introduced to give other institutions the legal mandate to provide water services and to provide mechanisms for regulation.

The Policy justified handing over, arguing that ownership of a water facility encourages proper operation and maintenance: facilities should therefore be handed over to those responsible for their operation and maintenance. The Policy stated that the Government would hand over urban water systems to autonomous departments within local authorities and rural water supplies to communities.

While developing the National Water Policy, the Government also established a National Task Force to review the Water Act, Chapter 372 and draft a Bill to replace the Water Act, Chapter 372. The Water Bill 2002 was published on 15th March 2002 and passed by Parliament on 18th July 2002. It was gazetted in October 2002 as the Water Act, 2002 and went into effect in 2003 when effective implementation of its provisions commenced.

The reforms of the water act 2002

The Water Act 2002 has introduced comprehensive and, in many instances, radical, changes to the legal framework for the management of the water sector in Kenya. These reforms revolve around the following four themes: the separation of the management of water resources from the provision of water services; the separation of policy making from day to day administration and regulation; decentralization of functions to lower level state organs; and the involvement of non-government entities in the management of water resources and in the provision of water services. The institutional framework resulting from these reforms is represented diagrammatically in Figure 1.



Separation of functions

The Water Act 2002 separates water resources management from the delivery of water services. Part III of the Act is devoted to water resources management while Part IV is devoted to the provision of water and sewerage services. It establishes two autonomous public agencies: the one to regulate the management of water resources and the other to regulate the provision of water and sewerage services.

The Act divests the Minister in charge water affairs of regulatory functions over the management of water resources. This becomes the mandate of a new institution, the Water Resources Management Authority (the Authority), established in section 7 of the Act. The Authority is responsible, among other things, for the allocation of water resources through a permit system. The framework for the exercise of the water resources allocation function comprises the development of national and regional water resource management strategies which are intended to outline the principles, objectives and procedures for the management of water resources.

Similarly, the Act divests the Minister in charge water affairs of regulatory functions over the provision of water and sewerage services and vests this function in another public body, the Water Services Regulatory Board (the Regulatory Board), which is created in section 46. The Regulatory Board is mandated to licence all providers of water and sewerage services who supply water services to more than twenty households. Community managed water systems therefore need to obtain a licence from the Regulatory Board to continue providing water to their members. This is a departure from the practice previously prevailing under which community water systems, unlike the other systems, operated without a licence.

Decentralization of functions

The Water Act 2002 decentralizes functions to lower level public institutions. It does not, however, go as far as to devolve these functions to the lower level entities: ultimate decision making remains centralized.

With regard to water resources management, section 14 of the Act provides that the Authority may designate catchment areas, defined as areas from which rainwater flows into a watercourse. The Authority shall formulate for each catchment area “a catchment area management strategy,” which shall be consistent with the national water resources management strategy. Section 10 states that the Authority shall establish regional offices in or near each catchment area. Section 16 provides that the Authority shall appoint a committee of up to fifteen persons in respect of each catchment area to advise its officers at the appropriate regional office on matters concerning water resources management, including the grant and revocation of permits. The regulatory functions over water resources management currently performed by the district offices of the Ministry in charge of water affairs are supposed, under the new legal framework, to be transferred to the catchment area offices of the Authority.

With regard to the provision of water and sewerage services, section 51 of the Act establishes water services boards whose area of service may encompass the area of jurisdiction of one or more local authorities. A water services board is responsible for the provision of water and sewerage services within its area of coverage, and, for this purpose, it must obtain a licence from the Regulatory Board. The water services board is prohibited by the Act from engaging in direct service provision. The board must identify another entity, a water service provider, to provide water services as its agent. The law allows water services boards, however, to provide water services directly in situations where it has not been able to identify a water services provider who is able and willing to provide the water services. Water services boards are regional institutions. Their service areas have been demarcated to coincide largely with the boundaries of catchment areas.

The role of non-government entities

The Water Act 2002 has continued – and even enhanced - a long standing tradition in Kenya of involving non-government entities and individuals in the management of water resources as well as in the provision of water services.

The Act envisages the appointment of private individuals to the boards of both the Authority and the Regulatory Board. Rule 2 of the First Schedule to the Act, which deals with the qualification of members for appointment to the boards of the two public bodies states that, in making appointments, regard shall be had to, among other factors, the degree to which water users are represented on the board. More specifically, subsection 3 of section 16 states that the members of the catchment advisory committee shall be chosen from among, *inter alia*, representatives of farmers, pastoralists, the business community, non-governmental organizations as well as other competent persons. Similarly, membership on the board of the water services boards may include private persons.

Most significantly however, the Act provides a role for community groups, organized as water resources users associations, in the management of water resources. Section 15(5) states that these associations will act as fora for conflict resolution and cooperative management of water resources. With regard to water services, section 53(2) stipulates that water services shall only be provided by a water service provider, which is defined as “a company, non-governmental organization or other person providing water services under and in accordance with an agreement with a licensee [the water services board].” Community self-help groups providing water services may therefore qualify as water services providers. In the rural areas where private sector water service providers are likely to be few, the role of community self-help groups in the provision of water services is likely to remain significant, despite the new legal framework.

The role of non-government entities in the management of water resources and in provision of water services is thus clearly recognized. However, given the state centric premise of the Water Act 2002, the role assigned to non-government entities, particularly self-help community groups, is rather marginal.

The Water Act 2002 and state centrism

In our view the Water Act 2002 is based on a notion of law which is unitary and state-centred. Its design and operation are premised on the centrality (indeed monopoly) of central state organs and state systems in the management of water resources as well as in the provision of water and sewerage services. It makes only limited provision for reliance on non-state based systems, institutions and mechanisms. More fundamentally, the new law continues the tradition of the law which it replaces of not recognizing the existence in Kenya of a pluralistic legal framework. It assumes that the legal framework in Kenya is comprised of a monolithic and uniform legal system which is essentially state centric in nature.

The continued denial of the existence in Kenya of a pluralistic legal framework is, in our view, inimical to the success of the new law in meeting the needs of the rural poor, who, more than urban based Kenyans, live within a legally pluralistic environment. For this purpose legal pluralism is understood as referring to a situation characterized by the co-existence of multiple normative systems all experiencing validity (see for instance (von Benda-Beckman, et al, 1997). Kenya's rural poor, typically, live within normative frameworks in which state based law is no more applicable and effective than customary and traditional norms. The new water law, however, ignores this reality.

The long title of the Water Act 2002 states that it is:

“An Act of Parliament to provide for the management, conservation, use and control of water resources and for the acquisition and regulation of rights to use water; to provide for the regulation and management of water supply and sewerage services ...and for related purposes.”

Part II of the Act deals with ownership and control of water. Section 3 vests “every water resource” in the State. “Water resource” is defined to mean “any lake, pond, swamp, marsh, stream, watercourse, estuary, aquifer, artesian basin or other body of flowing or standing water, whether above or below ground.” The effect of this provision, therefore, is to vest ownership of all water resources in Kenya in the State.

The right to use water from any water resource is also vested in the Minister. Accordingly, section 6 states that

“no conveyance, lease or other instrument shall be effectual to convey, assure, demise, transfer, or vest in any person any property or right or any interest or privilege in respect of any water resource, and no such property, right, interest or privilege shall be acquired otherwise than under this Act.”

The right to use water is acquired through a permit, provision for which is made later in the Act. Indeed the Act states that it is an offence to use water from a water resource without a permit.

Section 4 of the Act deals with control of water resources. It states that the Minister shall have, and may exercise, control over every water resource. In that respect, the Minister has the duty to promote the investigation, conservation and proper use of water resources throughout Kenya. It is also the Minister's duty to ensure the effective exercise and performance by authorities or persons under the control of the Minister of their powers and duties in relation to water.

The state centrism of the Water Act 2002 is self-evident. It has vested all water resources in the country in the State, centralised control of water resources in the Minister and subjected the right to use water to a permit requirement. This has far reaching implications for the management of water resources and provision of water services to the rural poor who have only limited access to state based systems. Matters are compounded by the administrative, financial and technical constraints inhibiting the ability of the Kenyan state to implement the Water Act 2002 and to enable rural household to derive full benefits from its provisions.

The acquisition and exercise of water rights

As indicated the Act imposes a permit requirement on any person wishing to acquire a right to use water from a water resource. Section 27 makes it an offence to construct or use works to abstract water without a permit. There are however three exceptions to the permit requirement. These relate to minor uses of water

resources for domestic purposes; to uses of underground water in areas not considered to face groundwater stress and therefore not declared to be groundwater conservation areas; and to uses of water drawn from artificial dams or channels, which – being artificial rather than natural - are not considered to be water resources of the country.

The application for the permit is made to the Authority. Section 32 stipulates the factors to be taken into account in considering an application for a permit. These include:

- The existing lawful uses of the water;
- Efficient and beneficial use of the water in the public interest;
- The likely effect of the proposed water use on the water resource and on other water users;
- The strategic importance of the proposed water use;
- The probable duration of the activity for which the water use is required;
- Any applicable catchment management strategy; and
- The quality of water in the water resource which may be required for the reserve.

These considerations are designed to enable the Authority balance the demands of competing users, but also to take into account the need to protect the general public interest in the use of water resources as well as the imperative to conserve water resources.

Further guidance is given to the Authority in deciding on allocation of the water resource as follows:

- That the use of water for domestic purposes shall take precedence over the use of water for any other purpose – including agricultural purposes - and, in granting a permit, the Authority may reserve such part of the quantity of water in a water resource as is required for domestic purposes; and
- That the nature and degree of water use authorized by a permit shall be reasonable and beneficial in relation to others who use the same sources of supply.

Permits are given for a specified period of time. Additionally, the Authority is given power to impose a charge for the use of water. The charge may comprise both an element of the cost of processing the permit application as well as a premium for the economic value of the water resources being used. Charging a premium for the use of water resources represents the use of charging as a mechanism for regulating the use of water. It is made possible by the fact that ownership of water has been vested in the State, which is entitled to grant and administer the right to use water resources.

As stated earlier the permit system is state centric in orientation. In operation, it privatizes water rights to a small section of the community, essentially property owners who are able to acquire and use water resource permits. By the same token, it marginalizes from the formal statutory framework poor rural communities who are unable to meet the requirements for obtaining a permit, principally land ownership.

Permits run with the land. Section 34 requires that a permit specify the particular portion of any land to which the permit is to be appurtenant. The permit passes with the land on transfer or other disposition. Where the land on which the water is to be used does not abut on the watercourse the permit holder must acquire an easement over the lands on which the works are to be situated. It is thus not possible, under the law, to obtain a permit in gross (i.e., which is not linked to particular land).

This provision reinforces the predominance of landowners with regard to the use of water resources. It is premised on a land tenure system which prioritizes documented individual or corporate ownership of land over communal systems of access to land and land use which do not require documented title, such as exist in most parts of rural Kenya. The Act therefore marginalizes collectivities, such as poor rural community groups in the acquisition and exercise of the right to use water resources. This potentially could undermine the ability of poor rural communities in Kenya effectively to utilize water resources in economically productive activities such as irrigation and commercial livestock rearing. Given the pluralistic land tenure system prevailing in Kenya, this issue will influence the in the effectiveness of the implementation of the new water law.

Kenya's land tenure systems

In Kenya three land tenure systems apply: government lands, trust lands and private lands. These land tenure systems are provided for in a series of statutes dating back to early colonial days.

In traditional Kenyan society, before the advent of colonial rule, land was owned on a communal basis by small community groups. Individuals and families acquired use rights and rights of access to land by virtue of membership to a social unit, such as a clan. Rights of access and use operated for all practical purposes as title to land, even though there was no documented title.

Following the declaration of a protectorate status over Kenya in 1895, the British colonial government passed the Crown Lands Ordinance to provide a legal basis for alienation of land to white settlers. The Ordinance declared "all waste and unoccupied land" to be "Crown Land." By a 1915 amendment of the Crown Lands Ordinance, Crown lands was re-defined to include land that had hitherto been occupied and owned by the natives. Further, in 1938, the Crown Lands (Amendment) Ordinance excised native reserves which became vested in the Native Lands Trust Board. A Native Lands Trust Ordinance was passed to provide for this and for the control and management of "trust lands." After independence these lands became vested in county councils.

In the 1930's and 1940's the colonial Government adopted the policy of enabling Africans to obtain documented title to land as a way of promoting better agricultural productivity. The Swynnerton Plan of 1955 recommended the consolidation and registration of fragmented pieces of land held by Africans into single holdings that could be economically farmed.

The Native Lands Registration Ordinance was passed in 1959, under which Native Land Tenure Rules were made. These authorized the alienation of trust lands to individual members of the native communities. This required the ascertainment of the entitlements of the individuals to the portions of land to which they laid a claim, the registration of the entitlements in the names of the individuals and the issuance of title documents. To facilitate this the Land Adjudication Act was enacted. Lands within the native areas (trust lands) that were not alienated remained trust lands, while lands outside of trust lands that had not been alienated to private individuals and entities remained "crown land" and later became known as government lands. Three land tenure systems thus arose: government land, trust land and private land.

The Government as a landowner can obtain a water resources permit with respect to its land, but the Water Act, 2002 exempts state schemes from the requirement for a permit.

Under the Constitution and Trust Lands Act, Chapter 288, trust lands are held by county councils for the benefits of the ordinary residents of the county council. Currently, trust lands comprise what remains of lands that were designated as native reserves. Currently, these lands are predominantly in the arid and semi-arid areas of Kenya, occupied by semi-nomadic pastoralist communities. The Constitution stipulates that County Councils "shall give effect to the rights, interests, and other benefits in respect of trust land as may, under the African customary law for the time being in force and applicable thereto be vested in any tribe, group, family, or individual."

In effect therefore, the trust land tenure system contemplates the continued operation of customs and traditions granting land use rights and access systems without the necessity for formal documents of title. This means that occupiers of trust land – who comprise largely the rural poor – would not be able to demonstrate ownership of land for purposes of an application for a water permit as required by the Water Act 2002. Consequently, the effective operation of the Water Act, 2002 is dependent of the implicit recognition in practice of a legally pluralistic land tenure regime, which the Water Act 2002 has not expressly done.

Private land is registered under either the Land Titles Act, Chapter 281 of the Registration of Land Act (RLA), Chapter 300. The RLA provides for the issuance to land owners of a title deed, and in cases of leasehold interests, a certificate of lease, which shall be the only prima facie evidence of ownership of the land. The RLA provides that the registration of a person as the proprietor of land vests in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto and free from all other interests and claims whatsoever.

Land registration, granting private ownership, has been completed in those regions of the country with high agricultural potential whereas in the areas in which pastoralism is predominant communal tenure is recognized by the law. But despite the registration of land in the names of private individuals empirical evidence suggests that, even in high agricultural potential areas, among rural communities, land use and access rights continue to be based largely on customary and traditional systems, statutory law, notwithstanding. Indeed studies have revealed what one author has described as “a surprising recalcitrance of indigenous institutions and land use practices.” (Migot-Adhola et al, 1990).

The widespread application of traditional and customary rights over even registered land can therefore be explained on the basis of the existence of a pluralistic legal framework with respect to land tenure. Indeed, rural communities tend to assume that the individuals registered as owning the land hold it in trust for other family or clan members, in line with customary practices. The discovery that, following registration, the registered land owner holds the land absolutely, and free from the claims of other family members, has led to a great deal of social upheaval, insecurity of title and access rights access and to much court litigation. To date local beliefs and practices have not changed significantly.

The absolute nature of the private ownership is qualified under section 30 of the RLA which states that that all registered land shall be subject to such of the overriding interests as may for the time being subsist and affect it, even if not recorded on the register, including-

- a. Rights of way, rights of water and profits subsisting at the time of first registration under the Act; and
- b. Natural rights of light, air, water and support.

Consequently, rights of access to water under traditional and customary laws subsist despite the registration of a private individual as an absolute owner of land. Such rights need therefore to be taken cognizance of in allocating water rights under the permit system established by the Water Act, 2002, even if the Water Act 2002 makes no reference to them.

The implication of the existence of a pluralistic land tenure regime for the administration and the Water Act 2002 and the management of water resources is that the sections of rural communities who have documents title to their land will be able to meet the requirements of the Water Act, 2002 for purposes of acquiring a water rights through a permit. Rural communities practicing communal land tenure systems are unlikely to be able to operate within the straight jacket of the Water Act 2002. It is likely that the latter comprise predominantly the rural poor.

The acquisition and operation of a water supply licence

The right to provide water services is also subject to licensing requirements. Section 56 states that no person shall provide water services to more than twenty households or supply more than twenty five thousand litres of water a day for domestic purposes - or more than one hundred thousand litres of water a day for any purpose - except under the authority of a licence. Indeed subsection (2) stipulates that it is an offence to provide water services in contravention of the licence requirement.

Consequently, community groups must obtain a licence in order to be able to continue or commence supplying water to their members. This is likely to have far reaching implications for member based rural water supplies, given the requirement for technical and financial competence, which are a precondition to obtaining a licence. Many such groups will likely have great difficulty demonstrating such competence, and this may result in water service agreements being granted only to well established community groups and other organizations which have access to technical and financial resources to the detriment of local community – self –help - initiatives.

Section 57 provides that an application for a licence may be made only by a water services board, which therefore has a monopoly over the provision of water services within its area of supply. As earlier indicated however the water services board can only provide the licensed services through an agent known as a water services provider, which can be a community group, a private company or a state corporation which is in the business of providing water services.

In order to qualify for the licence the applicant must satisfy the Board that:

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- Either the applicant or the water services provider by whom the services are to be provided has the requisite technical and financial competence to provide the services;
 - The applicant has presented a sound plan for the provision of an efficient, affordable and sustainable service;
 - The applicant has proposed satisfactory performance targets and planned improvements and an acceptable tariff structure;
 - The applicant or any water services provider by whom the functions authorized by the licence are to be performed will provide the water services on a commercial basis and in accordance with sound business principles; and
 - Where the water services authorized by the licence are to be provided by a water service provider which conducts some other business or performs other functions not authorized by the licence, the supply of those services will be undertaken, managed and accounted for as a separate business enterprise.

Unlike with respect to a permit for the use of water resources, there is no property in a water services provision licence, and, as stipulated in section 58(2), the licence shall not be capable of being sold, leased mortgaged, transferred, attached, or otherwise assigned, demised or encumbered.

Ownership of the assets for the provision of water services is vested in the water services board, which is a state corporation. Under section 113 provision is made for the transfer of assets and facilities for providing water services to the water services boards. Where the assets and facilities belong to the Government they are required to be transferred outright to the water services boards. Where, on the other hand, the assets and facilities belong to others, including local authorities and community groups, only use rights may be acquired by the water services boards.

The likely effect of this provision is that water services boards will be inclined to reach agreements with those community groups which have their own assets. Those community groups without assets – mostly, the most marginalized rural communities - are likely to find that their ability to develop water services facilities will diminish over time as funding for infrastructure development is channeled increasingly to water services boards directly, rather than to communities. Further, in order to be able to enter into contracts for the provision of water services as an agent of the water services board, the entity concerned needs to be legal person, which – as we shall show below - many poor community self help groups are not.

Local Community Water Systems

As already indicated, by the year 2000, less than half the rural population had access to potable water and, even in urban areas, only two thirds of the population had access to potable and reliable water supplies. Typically the people without access to reliable water services often represent the poorest and most marginalized of Kenyan people. This paper is premised on the belief that these are the people least likely to take advantage of, and benefit from, the legal framework in the Water Act 2002 for the provision of water services, and the ones likely to suffer most from inadequate management of water resources.

The ability of rural communities to provide water services through community groups is demonstrated by the fact that presently no less than 2.3 million people get water services from systems operated by self-help (community) groups – traditionally known as “water users associations.” These systems are diverse in nature and capacity, ranging from fairly sophisticated systems with well structured tariffs to simple gravity schemes operated without any formal processes (Njonjo, 1997).

The history of community provision of water services in Kenya is a long one. The majority of the systems are small in scale, serving perhaps one constituency and serving between 500 and 1000 families. Even in the areas served the systems rarely serve everyone, tending to be restricted to those who qualify as members according to criteria stipulated for the system by its initiators.

The phrase “self-help” – which is often used to describe these systems – is an apt one. Many arose out of the initiative of a small group of visionary and energetic community members who sought to redress the lack of water services in their local community whether for domestic water consumption strictly speaking or for irrigation or both. Typically, these individuals or group of individuals would have approached some or other

donor organization, church group or even community members living abroad, and successfully negotiated funding support.

Typically, it was condition of donor support that the community make a contribution of up to 15% of the cost of the project in labour and cash. The organizers of the project would then have had to raise funds from community members and other well wishers through a system commonly described in Kenya as a “*harambee*” in which people get together once, or more commonly, repeatedly to raise funds from members of the public for a community development – or other - project. Additionally, members of the community in which the project was to be constructed would have contributed to the cost of the project “in kind,” that is, by providing direct manual labour at the site in digging trenches, carrying and laying pipes, backfilling and doing other non-skilled tasks.

Another important element of the community’s contribution to the project has often taken the form of a donation of land for the physical facilities, such as the storage tanks and reservoirs, the treatment facilities and even the standpipes. Donations of land are often a contribution by one of the initiators of the project, as a gesture of support for the project. It is not unusual to find that the title to the land – if one exists - remains in the name of the person donating the land, even though for all practical purposes the person ceases to be the owner of the land in question, and the land is perceived as being communal in ownership. The common reason for the failure to transfer the land formally to the community often relates to the lack of a corporate entity into whose name to transfer the land, the cumbersome nature of the paperwork and the expense involved in effecting the transfer, as well as the belief by the community members and the land owner that the transfer is as good as complete with the verbal donation of the land by its owner.

Typically technical input into the design and supervision of the project has been provided by the water engineers stationed at the local district office of the ministry in charge of water affairs. Indeed, the Ministry’s policy over the years has been to encourage its officers, as part of their official duties, to provide technical and backstopping support to community projects, at no cost to the communities. The actual construction of the water system however is often carried out by private constructors paid for by the donor organization and the community group.

Given these origins, the formal ownership of these community systems under formal statutory frameworks is far from clear. They are truly “community systems” in the sense that many have contributed to their development in one way or another, but no one contributor can lawfully claim formal ownership of the system. Legal disputes over ownership are rarely, if ever, heard of, and, in the experience of the writer, those involved in the development and management of these systems do not perceive this as being of significance. That the question of ownership is not perceived as being an issue in Kenya can only be explained on the basis of the existence and active operation of a parallel concept of ownership of these community developed and managed water systems.

The registration of community water systems

Many organizations operating community self-help water systems are registered under an informal registration system operated by the Ministry in charge of community development. The registration is carried out at the district office of the Ministry, where there is a Community Development Officer. To be registered the community members must choose a name for the project, form a committee of officials - including a Chairman, a Secretary and a Treasurer - and draft a constitution setting out their objectives and the rules that will govern the affairs of the group. Following approval the Community Development Officer will issue a certificate of registration.

The registration of a self-help group by the District Community Officer is relatively easy and inexpensive. It is however a purely administrative exercise as the statutory laws do not provide for it. Registration under this administrative system does not give to the group any legal personality and neither does the group acquire corporate identity under the statutory laws. The group cannot, for instance, own land in its own name under the prevailing land laws of Kenya.

Lack of legal and corporate personality notwithstanding, the majority of community projects operated by such self help groups work quite well. This is so particularly among rural communities in which concepts such as legal personality and corporate identity in terms of statutory law have relatively little relevance. It is

an example of the existence of a parallel normative framework governing the existence and operation of community self-help groups in Kenya, based, in this instance, on a normative framework established purely on the basis of administrative arrangements.

Statutory law, on the other hand provides for various systems for registering organizations, which could be adopted by communities. These can be categorized broadly into membership based organizations and non-membership based organizations.

Membership based organizations are typified by the *society*, also known as the *association*. The Societies Act, Chapter 108 of the Laws of Kenya provides for the registration and control of societies. It defines a society as an association of twelve or more persons. Registration of the association as a society grants the association legal personality under the laws of Kenya.

Unlike self-help groups, societies are registered by the Registrar of Societies who is an officer based in Nairobi. This makes it difficult – and expensive - for the marginalized rural communities to register a society as they would have to travel to Nairobi or engage an agent – often a lawyer - in Nairobi to carry out the registration of their behalf. Strictly speaking a society is unincorporated in law, but this fact is rarely appreciated and rarely does it give rise to any legal issues in the administration of the affairs of the society.

The Cooperative Societies Act, Chapter 490 of the Laws of Kenya, provides for a form of association known as the “cooperative society” which is regulated by the Commissioner of Cooperatives, not the Registrar of Societies. The key difference between this and societies registered under the Societies Act is that the objective of a cooperative society is the promotion of the economic interest of its members. Cooperative societies have therefore not been commonly used for rural community based water projects, but have been used often by farmers organizations in rural areas.

Rural communities have rarely perceived rural community water projects as existing to advance the economic interests of the members. Typically they have perceived such projects as existing largely to advance the social welfare of the members of the community. This is despite the very real link between the availability of water supplies and the economic benefit to the consumers arising from the use of the available water for productive economic activities such as irrigation and livestock rearing. This factor partly explains the difficulty many self help groups experience in enforcing tariff payments for water consumption as there is rarely the will to cut off supplies to community members who fail to make payments.

The failure to make the link between water services provision and economic benefit to particular community members together with the assumption that water services are a social service is further evidence of the existence of pluralistic normative frameworks among poor rural communities. Such communities will face real difficulty in making the transition to the new legal framework which is premised on the belief that water services must be operated “*on a commercial basis and in accordance with sound business principles.*”

Non-member based organizations are the second type of organization which could be adopted by communities. The existing types of non-member based organizations used for community water projects are non-governmental organizations (NGOs), trusts and companies limited by shares. It is rare to find a community project registered as either a trust or a company limited by shares, particularly in rural areas. The main form of non-member based organization found implementing community rural water projects tends therefore to be the NGO.

NGOs are set up under the Non-Governmental Organization Registration Act of 1990. This provides for the registration of an organization whose objective is the advancement of economic development. It requires three directors, an identified project and a source of funding. NGOs have been favored mostly by persons external to the community who have received funding for a community project and wish to implement the project themselves, rather than through the community members. It is also commonly the case that the NGO will be an urban based organization.

The Water Act 2002 has provided for the provision of water services by water services providers, described as “a company, a non-governmental organization or other person or body providing water services under and in accordance with an agreement with a [water services board].” Under the Interpretation and General

Provisions Act, Chapter 2 of the Laws of Kenya, the word “person” refers to legal or natural person. As the self-help group is not a legal person, it would not qualify to be a water services provider. Consequently, it will be necessary for these community organizations to acquire legal personality by registering themselves as societies if they are to continue providing water services. The considerable advantages of the system provided by the present system for registering self-help groups at district level will therefore be lost under the new regime.

Conclusions and recommendations

This review of the Water Act, 2002 has highlighted significant implications for poor rural communities arising out of the provisions of the Water Act 2002. These must be seen in the context of the existence in Kenya of a pluralistic legal framework which has not been recognized or provided for in the new law. To the extent that the new law is premised exclusively of a formal statutory legal system, it is likely to prove inappropriate to the needs and circumstance of Kenyan rural poor.

The reasons, which have already been adverted to, are that Kenya’s rural poor have not been integrated into the private land tenure and other formal regimes upon which the Water Act 2002 is premised. They depend largely on land rights arising from customary practices which however have been systematically undermined over the years by the statutory provisions governing land rights and which are not recognized by the Water Act 2002.

It is unlikely therefore that the new law will be able to facilitate Kenyan’s achievement of the Millenium Development Goals with respect to the provision of water and sanitation by 2015 particularly for poor rural communities. This paper argues that, in order to address the circumstances of the rural poor, there is a compelling case for continued reliance, in the management of water resources and in the provision of water services, on alternative and complementary frameworks drawn from community practices.

The paper argues further that there is little benefit to be gained, in the foreseeable future, by attempting to incorporate community self help water systems into formal legal frameworks, through for instance, formalizing ownership arrangements. There is even a risk that disputes will be engendered in the process, as community mechanisms are undermined, as was experienced in the land registration process. Giving community systems due recognition and legitimation calls for the adoption of a pluralistic legal framework. In this respect, the implementation of the transfer provisions of section 113 requires considerable legal innovation.

But it is precisely through such innovative interpretation of the provisions of the new law that the potential of the new law to address the needs and circumstances of the rural poor can be enhanced.

With respect to the management of water resources, one possibility for enhancing the role of local communities in water resources management is to utilize water resources users associations as an institutional mechanism for allocating water resources to a community based entity as opposed to an individual land owner. This recommendation is to the effect that, in appropriate circumstances, a water resources use permit could be allocated to a water resources users association on behalf of all the members of the association. The association would then in turn allocate the water resource to its members according to internally agreed rules. The association would also enforce its rules with respect to the use of the water resource in question.

The above proposal would enhance the role and authority of the water resources users association. It would also utilise community compliance mechanisms as a supplement to the enforcement efforts of the Authority. Its success however would depend on the cultivation of strong and effective water resources users associations. It is recommended that Government support the nurturing of water resources users associations as institutional mechanisms for community management of water resources.

With respect to the provision of water services, the Government should reinforce the capacity and role of district community development officers as a means of providing support to community self-help organizations. Further the rules governing water services providers should take account of the need to foster

and promote community self help schemes, as systems for meeting the water supply needs of the rural poor who are unlikely to receive attention from private operators, or financially hard pressed public systems.

Further down the horizon, the Water Act 2002 will need to be amended to take on board legal pluralism as the basis for the design and operation of water law.

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