

# 10 Kenya's New Water Law: an Analysis of the Implications of Kenya's Water Act, 2002, for the Rural Poor

**Albert Mumma**

*Faculty of Law, University of Nairobi, Nairobi, Kenya; e-mail: cepla@nbnet.co.ke*

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## **Abstract**

This chapter analyses the implications of Kenya's Water Act, 2002 for the rural poor in the management of water resources and delivery of water services. It is premised on the belief that recognizing pluralistic legal frameworks is necessary for the effective management of water resources and delivery of water services to the rural poor. The chapter argues that, to the extent 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 the Kenyan state is facing. Consequently, it is necessary that a conscious policy of pursuing the 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, 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, the primary aim of which was to ensure availability of potable water, at reasonable distances, to all households by the year 2000 (Sessional Paper No. 1 of 1999). The Plan aimed to achieve this objective by actively developing water supply systems, which required the government to 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, which had been enacted as law in the colonial era.

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. The DWD, which continued to exist as a department in the newly created Ministry, embarked on an ambitious water supply development programme. By the year 2000 it had developed, and was managing, 73 piped urban water supply systems serving a population of about 1.4 million and 555 piped rural water supply systems serving a population of 4.7 million. Typically, in rural areas, the consumers used the water supplied for both domestic and small-scale irrigation, a practice that continues to date. Indeed, the rules used in implementing the Water Act,

Chapter 372 allowed irrigation of up to 2 acres as part of domestic use of water.

As a consequence of this practice and the rules applied, the use of water for small-scale irrigation (informally referred to as 'kitchen gardening') is hardly ever separately accounted for. Consequently, no distinction is drawn in documents relating to the permits granted for water abstraction between the water to be used for drinking, cooking and washing and the water to be used for kitchen gardening, and no clear records for such use are maintained by the Registrar of Water Rights.

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 and 14 large water supply systems in rural areas serving a population of 1.5 million.

Alongside the DWD and the NWPC the large municipalities were appointed as 'water undertakers'. A water undertakership was the term given to the licence issued under the Water Act, Chapter 372 to supply water within an area. By the year 2000, ten municipalities supplied 3.9 million urban dwellers under an undertakership granted to them by the Minister.

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

Persons not served under any of the above arrangements did not have a systematic water service, and had to rely on such supply as they were able to provide for themselves, typically by directly collecting water from a watercourse or from 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.

Supplying water by commercial and other large-scale irrigation schemes was carried out under the Irrigation Act, Chapter 347, first enacted in 1967. The Irrigation Act established the National Irrigation Board as being responsible for the development, control and improvement of national irrigation schemes in Kenya. Further, the Act gave the Minister powers to designate any area of land as a national irrigation scheme. Once an area was designated as such a scheme, the National Irrigation Board would be responsible for settling people on it and for administering it, including making arrangements for the supply of irrigation water to the scheme.

Apart from irrigation carried out through designated irrigation schemes, private individuals engaged in irrigated agriculture were required to apply for, and obtain, a permit for water abstraction, following the permit application procedures that applied to abstraction for any other use. The Water Act, Chapter 372 stipulated, however, that the use of water for domestic purposes took priority over the use of water for any other purposes, including irrigation purposes.

In the 1980s, the government began 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.' However, 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: (i) the capacity of the community to take over; (ii) the ability to pay; (iii) the capacity to operate and maintain the system; (iv) the involvement of women in management; and (v) the 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 to community groups under these guidelines, focusing on management and revenue collection, but not on full asset transfer.

Building on this experience, the government developed a fully fledged policy, The National Water Policy, which was adopted by Parliament as Sessional Paper No. 1 of 1999. The development of the National Water Policy was largely funded by donor organizations whose predominant interest was with regard to domestic water supply, and not with irrigated agriculture or even with water resources management. Key among these donor organizations were GTZ – interested primarily in urban water supply, SIDA – interested largely in rural domestic water supply and the World Bank.

The National Water 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 both water services and mechanisms for regulation.

The Policy justified the 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 15 March 2002 and passed by Parliament on 18 July 2002. It was gazetted in

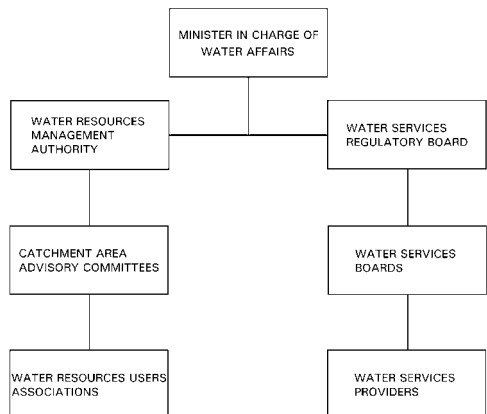
October 2002 as the Water Act, 2002 and came into effect in 2003, when effective implementation of its provisions commenced.

## 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: (i) the separation of the management of water resources from the provision of water services, which is explained further below; (ii) the separation of policy making from day-to-day administration and regulation; (iii) decentralization of functions to lower-level state organs; and (iv) the involvement of non-government entities in both the management of water resources and the provision of water services. The institutional framework resulting from these reforms is represented diagrammatically in Fig. 10.1.

### Separation of functions

Under the Water Act, Chapter 372, the DWD carried out all the functions in the water sector. It developed and supplied water for consumption and for productive use in irrigated agriculture, among other uses; it regulated the sector by issuing permits and carrying out policing; it



**Fig. 10.1.** Diagrammatic representation of the new institutional structure for the management of water affairs in Kenya.

was responsible for conserving and managing water resources and for determining funding allocations between water resources management and water supplies. Over the years, it became clear that priority was being given by the DWD to its role as a water supplier. The financial resources and the attention that the DWD gave to water resources management declined markedly in the 1970s and 1980s. This led to a dramatic deterioration in the effectiveness of the systems and arrangements that were in place for managing water resources. Given the water scarcity in Kenya generally, inattention to water resources management did not augur well for the sustainability of the resource.

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: 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 of 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 for, among other things, 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 resources and 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 of 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 license all providers of water and sewerage services that supply water services to more than 20 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 as areas from which rainwater flows into a water-course, as they are so defined. 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 15 persons in respect of each catchment area to advise its officials 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, supposedly, under the new legal framework, to be transferred to the catchment area offices of the Authority.

The development of large-scale infrastructure for harnessing water resources, including the building of dams and other infrastructure for flood control and water conservation, has been made the responsibility of the NWCP. In order to facilitate infrastructural projects, the Water Act, 2002 stipulates that the NWCP shall receive funding from Parliament. These projects are therefore seen as 'state schemes', because they will comprise assets and facilities developed under public funding. It is for this reason that this role has been vested in a state corporation. The NWCP shall therefore supply water 'in bulk' for downstream use by others.

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

### **The role of non-governmental entities**

The Water Act, 2002 has continued – and even enhanced – a long-standing tradition in Kenya of involving non-governmental 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 WSBs may include private persons.

Most significantly however, the Act provides a role for community groups, organized as water resources user associations (WRUAs), in the management of water resources. WRUAs

constitute a concept that builds on associations (previously known as ‘water user associations’) under which local community members who wished to develop water projects for domestic use (including small kitchen gardening) tended to organize themselves. The Water Act, 2002 opted to rely on voluntary membership associations rather than on other institutional mechanisms such as local authorities. The reason for this is the belief that, being voluntary in nature, these associations can draw on the commitment of the members as social capital, as opposed to attempting to rely on more formal statutory structures, which might not necessarily be able to call on that social capital.

Section 15(5) of the Act thus states that these associations will act as forums for conflict resolution and cooperative management of water resources. Consequently, water user associations, where they exist, will have to reconstitute themselves to take on board water resources management issues. Where such associations do not exist, which is the case in most parts of the country, new associations will need to be formed to carry out the role, which the new law has given to WRUAs. Inevitably, there will be financial cost and time involved in setting up new institutions. However, being institutions that depend for their success on the initiative of the members and the belief by the members in the usefulness of the association in meeting their water resources management needs, the investment of time and resources in setting up an association is likely to strengthen the commitment of the members to sustain the association.

With regard to water services, Section 53(2) stipulates that water services shall be provided only by a water services 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 WSB]’. Community self-help groups providing water services may therefore qualify as water services providers. In the rural areas where private-sector water services 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-governmental entities in both the management of water resources and

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

### The Water Act, 2002 and State Centrism

In my view, the Water Act, 2002 is based on a notion of law that 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 it replaces of not recognizing the existence in Kenya of a pluralistic legal framework. It assumes that the legal framework in Kenya comprises 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 my 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 coexistence 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 ownership of 'every water resource' in the state. The term

'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. Previously, the Water Act, Chapter 372 vested ownership of water 'in the government'. The replacement of the word 'government' with the word 'state' does not, in reality, represent a significant departure in the legal status of water resources.

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

[N]o 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 – and its predecessor, the Water Act, Chapter 372 – is self-evident. Like its predecessor, the Water Act, Chapter 372, it has vested all water resources throughout the country in the state, centralized 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 households 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: (i) minor uses of water resources for domestic purposes (representing uses of water for domestic purposes abstracted without the assistance of equipment. Equipment is defined to mean any device for the abstraction of water, including a hand-held mobile pump); (ii) uses of underground water in areas not considered to face groundwater stress and therefore not declared to be ground-water-conservation areas; and (iii) 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.

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. As noted below, under the Registered Land Act, Chapter 300, discussed further below, customary rights of access to water are recognized as ‘overriding interests’, which remain valid and lawful even if they are not registered against the land.
- Efficient and beneficial use of the water in the public interest.
- The likely effect of the proposed water use on the water resources 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.
- The quality of water in the water resources that may be required for the reserve.

These considerations are designed not only to enable the Authority to 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 resources as follows:

- That the use of water for domestic purposes shall take precedence over the use of water for any other purpose 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. It is to be recalled that, in rural settings, the use of water for domestic purposes typically includes the use for minor irrigation (‘kitchen gardening’) purposes.
- 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, unlike under the previous Act, 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 and 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 is vested in the state, which is entitled to grant and administer the right to use water resources. Details of the charges to be imposed, including the amounts to be charged, and the uses for which a charge may be imposed will be spelt out in subsidiary rules that have not yet been made.

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, poor rural communities that are unable to meet the requirements for obtaining a permit – principally landownership – are marginalized from the formal statutory framework by the permit system.

Permits run with the land so that, where the land is transferred or otherwise disposed of, the permit also passes to the new owner of the land. Section 34 requires a permit to specify the particular portion of any land to which it is to be an appurtenant. 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. that is not linked to a particular land).

This provision reinforces the predominance of landowners – or those with a property interest in land – 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, and which does not require documented title, such as extant 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 could potentially undermine the ability of poor rural communities in Kenya to effectively 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 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 the 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 were redefined 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 1930s and 1940s, 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 of 1962, trust lands are held by county councils for the benefit of the ordinary residents of the county council. Currently, trust



lands comprise what remains of lands that were designated as native reserves. These lands, which are predominantly in the arid and semi-arid areas of Kenya, are 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 of 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 implementation of the Water Act, 2002 is dependent on 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 or the Registration of Land Act (RLA), Chapter 300. The RLA provides for the issuance to landowners 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, which grants 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. Despite the registration of land in the names of private individuals, empirical evidence suggests that, even in areas of high agricultural potential, among rural communities land use and access rights continue to be based largely on customary and traditional systems, notwithstanding statutory law. Indeed, studies have revealed what has

been described as 'a surprising recalcitrance of indigenous institutions and land use practices' (Migot-Adhola *et al.*, 1990, unpublished).

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 landowner 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 and to much litigation. To date, local beliefs and practices have not changed significantly.

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

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

Consequently, collective 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 this Act 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 title documents 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 practising communal land tenure systems are unlikely to be able to operate within the straitjacket of the Water Act, 2002. It is likely that these communities comprise predominantly the rural poor. Consequently, in considering revision of the

Water Act, 2002, it will be important to examine and provide mechanisms for granting water rights to community members who do not have land titles.

### **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 20 households or supply more than 25,000 l of water/day for domestic purposes – or more than 100,000 l of water/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 that is a precondition to obtaining a licence. Many such groups will probably 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 having access to technical and financial resources, to the detriment of the self-help initiatives of the local community.

Section 57 provides that an application for a licence may be made only by a WSB, which therefore has a monopoly over the provision of water services within its area of supply. As earlier indicated however, the WSB 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 that is in the business of providing water services.

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

- 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.
  - Where the water services authorized by the licence are to be provided by a water services provider that 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 that with respect to a permit for the use of water resources, there is no property involved 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 WSB, which is a state corporation. Section 113 provides for the transfer of assets and facilities for providing water services to the WSBs. Where the assets and facilities belong to the government they are required to be transferred outright to the WSBs. Where, on the other hand, they belong to others, including local authorities and community groups, only use rights may be acquired by the WSBs. A WSB may require the use of assets and facilities presently used by community groups in order to integrate them into a bigger and more cost-effective water service. In arranging to use the assets and facilities belonging to communities for its purposes, the WSB would be required to pay compensation to the community group.
- The likely effect of this provision is that WSBs will be inclined to reach agreements with those community groups having 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 infrastructural development is channelled increasingly to WSBs directly, rather than to communities. Furthermore, in order to be able to enter into contracts for the provision of water services as an agent of the WSB, the entity concerned needs to be a 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 the Kenyan people. This chapter 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 a population of no less than 2.3 million get water services from systems operated by self-help (community) groups – traditionally known as ‘water user associations’ (WUAs). 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 long. Most 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 such systems 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 groups of individuals would have approached some donor organization, church group or even community members living abroad and successfully negotiated funding support.

Also typically, it was a 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 to the belief by the community members and the landowner that the transfer is as good as complete with the oral donation of the land by its owner.

Typically, technical input into the design and supervision of the project will have 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 officials, 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 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 administrative 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 community development 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 provide the group with any legal personality; 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, most of the 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 registration of organizations that 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 12 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 official 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 on 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, but not by 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 the provision of water services 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 that 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.

Non-governmental organizations 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 favoured 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 [WSB]'. Under the Interpretation and General Provisions Act, Chapter 2 of the Laws of Kenya, the word 'person' refers to a 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 upon a formal statutory legal system, it is likely to prove inappropriate to the needs and circumstance of the Kenyan rural poor.

The reasons, which have already been explained, 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 that 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 Kenya's achievement of the Millennium Development Goals with respect to

the provision of water and sanitation by 2015, particularly for the poor rural communities. This chapter 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.

This chapter 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, formalization of 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 legitimacy calls for the recognition of existing pluralistic legal frameworks. In this respect, the implementation of the provisions of Section 113, which deals with mechanisms for giving use rights over community assets to the WSBs, 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 WUAs as an institutional mechanism for allocating water resources to a community-based entity as opposed to an individual landowner. This recommendation is to the effect that, in appropriate circumstances, a water resources use permit could be allocated to a WUA on behalf of all the members of the association. The association would then, in turn, allocate the water resources 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 WUA. It would also utilize 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 WUAs. It is recommended that the government support the nurturing of WUAs as institutional mechanisms for community management of water resources.

The WUAs can build on the local associations that have already been formed in areas with significant water scarcity, such as in the Nanyuki district in which the necessity for water users to cooperate in sharing the resource, brought on by water scarcity, has fostered the growth of community groups. These associations have proved that they can provide a viable community-based mechanism for conflict resolution and cooperative management of a scarce resource. Additionally, being voluntary entities, their formation does not require funding from the government, but they are funded by contributions from the members. Ordinarily, the costs are met from the membership subscriptions.

With respect to the provision of water services, the government should reinforce the capacity and role of district community development officials as a means of providing support to community self-help organizations. Furthermore, 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 from financially hard-pressed public systems.

Looking further ahead, the Water Act, 2002 will need to be amended to take on board legal pluralism as the basis for the design and operation of a water law. This would require that rights of access to land – which arise from customary rights of use – be recognized as a legitimate basis for the provision of a water permit.

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