

Who Owns Namibia's Communal Land?

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NAMIBIA HAS a land mass measuring 824 268 square kilometres with three major categories of land tenure.

These are commercial farmland with freehold tenure (approximately 44% of the country situated predominantly in the south and centre of Namibia), communal areas which are situated mainly in northern Namibia (approximately 41% of the country), and the state land including conservation areas (approximately 15% of the country).

In addition, Namibia has a coastline of 1 572 km along the Atlantic Ocean to its west.

Although communal land only constitutes about 38% – 41% of the total land mass, about 70% of the population (in one way or another) depends on it. While land reform efforts have concentrated extensively on the distribution of freehold land, land-based developments (e.g. irrigation projects, livestock and crop farms, lodges, expansion and establishment of local authority areas such as towns, village councils and settlements) have continued to increase pressure on communal land, threatening the tenure security of people living in these areas.

Hence proper management and administration of communal land for the benefit of all the inhabitants is essential. The major role players as defined in the Communal Land Reform Act 5 of 2002 include communal land boards, traditional authorities and communal lands appeal tribunals.

The functions and powers of these role players follow a system of checks and balances. The land rights which are allocated in communal areas are: Customary land rights, leasehold rights and occupational land rights. The question, however, is whether these rights guarantee tenure security in the real sense.

Section 17 of the Communal Land Reform Act makes it very clear that all communal land areas vest in (belong to) the state.

The act also makes it clear that communal land cannot be sold as freehold land to any person. This means that communal land cannot be sold like a commercial farm or freehold land. Thus individuals or entities cannot own communal land, but may obtain land rights with regard to certain areas of the land.

The state keeps the land in trust for the benefit of the traditional communities living in those areas. This is loosely illustrated by the relationship between the banker and depositor (of which the former is the state and the latter are resident community members).

Because communal land belongs to the state, the state must put systems in place to make sure that communal lands are administered and managed in the interests of people living in those areas. State ownership of natural resources is further emphasised in the supreme law of the land.

Article 100 of the Namibian Constitution provides that "Land, water and natural resources below and above the surface of the land and in the continental shelf and within the territorial waters and the exclusive economic zone of Namibia shall belong to the state if they are not otherwise lawfully owned". This article vests all natural resources in the state, unless otherwise legally owned.

It is therefore important to understand that although a customary land right guarantees a lifetime tenure security, it does not translate into ownership, but only a user right. This further explains why a customary land right cannot be used as collateral to obtain bank finance because it is situated in (or is) state land.

Furthermore, communal land can thus not form part of the estate of a married couple regardless of the marriage regime, but certainly the investment on the land does. Local authority areas within the boundaries of a communal land area do not form part of communal lands or a settlement area declared in terms of the Regional Councils Act 22 of 1992.

Namibia is known to have a progressive legislative framework with regards to land governance. However, there is clear contradiction between policy and practice when it comes to the protection of a communal inhabitant's land rights. The Communal Land Reform Act aims to improve communal tenure, but the effectiveness of the act in this regard is questionable.

The act does not provide adequate protection for commonage resources in communal land. Having realised this the Ministry of Land Reform commissioned two separate studies in 2015/16 titled: "An enquiry into land markets in Namibia's communal areas" and "Group rights to land under different traditional authorities and communities", respectively.

The two studies came up with policy-altering findings. The land market study confirmed that indeed an informal market for land in communal areas exists, favouring individuals with adequate financial resources. The group rights study provided concrete recommendations with regards to the protection of commonage resources in communal land.

Furthermore, land grabbing through illegal fences perpetrated by the elite remains a legal challenge primarily due to lack of political will from the government. Commercialisation of communal land by private and foreign investors remains a growing concern.

Research shows that a few years ago, the government through various ministries received proposals from multinational agribusinesses to develop large-scale agricultural irrigation projects. In some cases, proper procedures were not followed (e.g. in Kavango East and western Zambezi regions) and most of these were delayed and some did not succeed due to resistance from vigilant community members.

The third pillar of the Harambee Prosperity Plan (HPP), is 'social progress' and under this pillar, the first sub-pillar is 'hunger poverty'. Many people in Namibia practise subsistence agriculture as livelihood strategy; 1,3 million Namibians reside on communal lands and approximately 1,1 million people derive their livelihood from communal areas.

Hence, matters of land ownership and use in communal areas are crucial to social progress. Commonage resources in rural areas must therefore receive adequate protection for the benefit of the masses who depend on these resources for their livelihood.

Therefore, the land conference which has been scheduled for October this year has to deliberate on communal land reform.

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