



## LAND RIGHTS AND REFORM AGENDA IN KENYA: A POLICY BRIEF AND AUDIT<sup>1</sup>

### Executive Summary

This policy brief provides a critical analysis of the land questions in Kenya and the different governance measures initiated to deal address them. Towards this enterprise, the brief is organized around the following framework:

- The Background to and Manifestations of the Land Questions in Kenya;
- The Current Governance Attempts in Addressing the Land Question in Kenya;
- Prognosis which captures the conclusion and way forward.

#### **1. The Background to and Manifestations of the Land Questions in Kenya**

**The history of land relations in Kenya is one characterised by, firstly, foreign subjugation and occupation, and secondly, by wanton abuse of legal trust vested in the Government in relation to land as well as in the failure to redress the colonial legacy of injustice by post-colonial Governments.<sup>2</sup>**

*Land* according to Article 260 of the *Proposed Constitution of Kenya* includes but not limited to the surface of the earth and the subsurface rock; any body of water on or under the surface; marine waters in the territorial sea and exclusive economic zone; natural resources completely contained on or under the surface; and the air space above the surface.

Land is the basis of livelihood for billions of people in the world and because of this critical role; it has been extensively captured in the major international instruments. Availability of adequate food and shelter, in third world countries and other agriculture-based economies especially, depends on the size and tenure of land that is available to an individual. It follows therefore that land is an important essential for the realization of many human rights-civil and political; and economic, social and cultural rights. The rights to own, control, access and use of land are therefore very critical.

Moreover, Vision 2020<sup>3</sup> and the Agenda No. 4<sup>4</sup> identify land reforms as one of the key pillars for development and national reconstruction.

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<sup>2</sup>See Peter Omuodho in "Legal Framework to Deal with Past Misdeeds Related to Land in Kenya. KatibaNews Issue No. 08.08, August '06 Newsletter; Media Development Association.

<sup>3</sup>The Kenya's Economic and Development Blue Print.

<sup>4</sup> This agenda item of the National Accord to the National Dialogue and Reconciliation process which ended the post-election violence in February 2008 under the leadership of H.E Koffi Annan dealt with dealing with the long term

*The Kenya Vision 2030* that the economic, social and political pillars of Kenya Vision 2030 are anchored on macroeconomic stability; continuity in governance reforms; enhanced equity and wealth creation opportunities for the poor; infrastructure; energy; science technology and innovation; land reform; human resources; development; security as well as public sector reforms<sup>5</sup>.

*The Preamble to the Agenda 4 Matrix and the Statement of Principles on Long-term issues and solutions posits:*

**We recognize that the issue of land has been a source of economic, social, political and environmental problems in Kenya for many years. We agree that land reform is a fundamental need in Kenya and that the issue must be addressed comprehensively and with the seriousness it deserves. Towards this end, we agree to fully support efforts to establish the factors responsible for conflicts over land and to formulate and implement actionable short, medium and long-term recommendations on the issue<sup>6</sup>.**

While land and land based resources remains the single most important economic factor in Kenya, its mismanagement and maladministration has led to massive human rights violations as indicated further by the historical and contemporary injustices captured below. In Kenya, 75% of the population is directly dependent on land yet land distribution is skewed in many ways. 17.2% of Kenyan total landmass of 587,900sq.kms carries 80% of the population while the remaining over 80% carries only 20% of the total population, which is mainly made up of pastoralists. About 13% of the population has no land at all. The situation is even grimmer in the case of the Kenyan women of whom only less than 5% have land titles in their names, yet women constitute about 50.5% of the population. These statistics are the recipe for the historical injustices in Kenya. The Sessional Paper on the National Land Policy defines historical land injustices as thus:

**...grievances which stretch back to colonial land administration practices and laws that resulted in mass disinheritance of communities of their land, and which grievances have not been sufficiently resolved to date. Sources of these grievances include land adjudication and registration laws and processes, and treaties and agreements between local communities and the British. The grievances remain unresolved because successive post independence Governments have failed to address them in a holistic manner.<sup>7</sup>**

The historical land injustices are currently manifested in the society by such malfeasances as the systematic breakdown in land administration and land delivery procedures; inadequate participation by communities in the governance and management of land and natural resources; gross disparities in land ownership, gender and transgenerational discrimination in succession, transfer of land and the exclusion of women in land decision making processes; lack of capacity to gain access to clearly defined, enforceable and transferable property rights; lack of progressive and accessible land information system; a general deterioration in land productivity in the large farm sector; and inadequate environmental management and conflicts over land and land based resources.

Most of these injustices are traced to the oppressive and disharmonized land governance systems in Kenya initiated by the colonial rule and retained by the post-independence regimes. The National Land Policy underscores these as the political, economic and legal aspects of “The Origins of the Land Question in Kenya”. Thus:

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underlying issues to the violence. Agendas 1, 2 and 3 focused on ending the violence, providing humanitarian assistance to IDPs and ending the political crisis respectively.

<sup>5</sup> <http://www.kenyaengineer.or.ke/index.php/kenyaengineer/article/viewFile/217/216>

<sup>6</sup> See The Kenya National Dialogue and Reconciliation; “Statement of Principles on Long-term issues and solutions: Preamble”;[http://www.google.co.ke/search?hl=en&source=hp&q=agenda+4+of+the+national+accord&rlz=1W1ADBS\\_en&aq=f&aqi=g10&aql=&oq=&gs\\_rfai=](http://www.google.co.ke/search?hl=en&source=hp&q=agenda+4+of+the+national+accord&rlz=1W1ADBS_en&aq=f&aqi=g10&aql=&oq=&gs_rfai=)

<sup>7</sup> Government of Kenya, *Sessional Paper No. 3 on the National Land Policy, August 2009*, Section 178.

It was expected that the transfer of power from colonial authorities to indigenous elites would lead to fundamental restructuring of the legacy on land. This did not materialize and the result was a general re-entrenchment and continuity of colonial land policies, laws and administrative infrastructure. This was because the decolonization process represented an adaptive, co-optive and pre-emptive process which gave the new power elites access to the European economy.<sup>8</sup>

Since the removal of KANU government from power in December, a number of policy and institutional measures have and are still being initiated to deal with some of these injustices and maladministration as capture below.

## **2. The Current Governance Attempts in Addressing the Land Question in Kenya**

### **a) The Land Policy Formulation Process**

#### **i) General Progress and Gains Realized**

The formulation of the National Land policy (NLP) was initiated in February 2004 as the Bomas Constitutional Conference was about to finalize with its final session in March of the same year. The first draft of the policy was produced in December 2005 and was approved by the Cabinet for public dissemination and debate in September 2006. Following the debates, the emerging concerns and comments were incorporated to produce a revised draft in March 2007. This was presented and considered by over 600 participants during the National Stakeholders Conference at K.I.C.C in April 2007. It was finally adopted by stakeholders during the second forum held at the Safaripark Hotel in May 2007 and presented to Cabinet for deliberation and approval through a cabinet memorandum in October of the same year. However, due to the impending elections and subsequent post elections violence and national reconstruction efforts, the adoption by the Cabinet was delayed up to June 25 2009. Finally, the policy was passed by Parliament as Sessional Paper No. 3 in December 3, 2009 and the stakeholders are currently working on the implementation frameworks.

*The Vision and Mission of Policy* is to guide the country towards efficient, sustainable and equitable use of land for prosperity and posterity; and to promote land reforms for the improvement of the livelihoods of Kenyans through the establishment of accountable and transparent laws, institutions and systems dealing with land.<sup>9</sup> *The overall objective of the National Land Policy* is to secure rights over land and provide for sustainable growth, investment and the reduction of poverty in line with the Government's overall development objectives.

Specifically the policy shall offer a framework of policies and laws designed to ensure the maintenance of a system of land administration and management that will provide: (a) All citizens with the opportunity to access and beneficially occupy and use land; (b) economically viable, socially equitable and environmentally sustainable allocation and use of land; (c) Efficient, effective and economical operation of land markets; (d) Efficient and effective utilization of land and land-based resources; and (e) Efficient and transparent land dispute resolution mechanisms.

According to the policy brief developed by the civil society organizations under the banner of the Land Sector Non State Actors in May 2008, the policy responds to the above questions and injustices within the ten-point scale thus:

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<sup>8</sup> Section 2.2. 1 on the Political Aspects of the Origins of the Land Question.

<sup>9</sup> Section 1.2(Para 3) and Section 1.3 (Para 4) respectively.

- THAT, the national land policy is a product of the formulation process which was very consultative and inclusive.
- THAT, the national land policy comprehensively addresses all historical problems from colonial times to date and responds to all manner of land problems generated by a complex and difficult legacy, which at various times have threatened to destroy the fabric of Kenyan society.
- THAT, provision in the national land policy for the limitation of all land leases to a maximum period of not more than 99 years and the repossession of all illegally and irregularly acquired public land is in the national interest and fully consistent with international norms and practices.
- THAT, the national and policy has unequivocally recognised and protected the land rights of women.
- THAT, the national land policy safeguards the rights of the marginalized, vulnerable and dispossessed groups in the society. These include pastoralists, squatters, IDPs, refugees, children, youth, slum dwellers/hunter-gatherers, forest dwellers, and persons with disabilities, persons affected and infected by HIV/AIDS among others.
- THAT, the land redistribution as provided for in the national land policy will ensure equitable access to land for sustainable livelihoods. Thus, the current situations where a few individuals own large tracts of land while a large number have little or none is unacceptable.
- THAT, the provision of the National Land Commission in the national land policy will ensure the participation of citizens in the administration and management of land. This will enhance clear and appropriate checks and balances to avoid abuse of power in and delivery systems.
- THAT, national land policy recognizes the need for participatory regional and national planning for investment and sustainable development as the key to economic growth and poverty reduction.
- THAT, Community Land Tenure is meant to protect and safeguard the interests of all those ordinarily resident in any given area irrespective of ethnic origin.
- THAT, the National Land Policy provides for a practical framework for addressing the environmental problems and enhancing sustainable and equitable management of other land based resources.

## ii) Progress Realized in Regards to Thorny Issues Raised by UNOCHA

Moreover, the land policy responds to the following thorny issues on resettlement raised by UNOCHA in its brief to me: Mt Elgon Settlement Scheme; Prospects for Resettlement of Mau Forest Evictees; and Inter-Ethnic and Internal Communal Harmony in Resettlement

- Generally, the policy provides directions on governance and rights issues manifested in land injustices and malfeasances experienced in the above cases. In Section 3.2, the policy provides for such constitutional issues as the need to ensure participation by the citizens in decision-making processes on land matters; security of legitimate rights to land; equitable access to land in the interests of social justice; resolution of genuine and current historical land injustices and protection of human rights for all (including the rights for women, children among other vulnerable groups).
- More ever, the Government through the National Land Commission (NLC) shall establish and harmonize the criteria for compulsory acquisition of land. The policy also provides the principles for land dispute resolution (alternative dispute resolution) through negotiation, mediation and arbitration to facilitate speedy and cost effective access to justice.
- The following four *Mechanisms for Resolving Special Land Issues* will be applied in resolving all the injustices above:
  - ✓ *Redistribution* whose purpose is to facilitate equitable access to land for residential, commercial and other productive purposes. There is a need to establish a clear legal and

- planning framework for identifying, verifying and recording genuine land use needs, and to establish clear and equitable criteria for redistribution.
- ✓ *Restitution* whose purpose is to restore land rights to those that have unjustly been deprived of such rights. It underscores the need to address circumstances which give rise to such lack of access, including historical injustices. The Government shall develop a legal and institutional framework for handling land restitution.
  - ✓ *Resettlement* which seeks to procure adequate land for the reorganization of both rural and urban settlements in light of expanding populations, conflicts, historical injustices and disasters.
  - ✓ *Land Banking* which entails setting land aside for redistribution, restitution and resettlement; investment and development. This land will be procured via a government buy-back policy; purchase and donations; repossession of grabbed land and the programme for land reclamation<sup>10</sup>.
- In Section 3.5.3, on *Settlement Land Allocation Principles*, the Government will streamline the land settlement procedures and processes.
    - ✓ Under this, the government will bring in all the provisions relating to settlement under the Agriculture Act (318) to the proposed Land Act.
    - ✓ Moreover, the Government will set out a clear framework for among others identifying, verifying and recording of genuine landless people; acquisition of land for establishment of settlement schemes; planning and survey and demarcation of land in settlement schemes; equitable settlements.
    - ✓ The Government will also review and streamline the documentation process of settlement plots; and repossess and reallocate abandoned settlement schemes.
    - ✓ Finally, it is hoped that the Settlement Land Trust Fund Act which provides for 60% by 40% ratio<sup>11</sup> and policy for resettlement will form part of the harmonization and implementation framework. This together with the Peace and Conflict Policy, ADR measures above, the works of TJRC and National Cohesion and Integration Commission are expected to foster inter-ethnic and communal harmony at all levels in the society.
  - Institutionally, the National Land Commission, the District Land Boards and Community Land Boards will be responsible for these interventions at their respective levels in the society.

### **b) Institutional Reforms in the Land Ministry**

The Government is strengthening institutional reforms in complementation or preparation of NLP implementation. The key initiatives are the establishment of the Land Reform Transformation Unit; awareness creation on land issues; creation of the modern land information system; capacity building of the Land Control Board members and the Land Dispute Tribunal members, harmonization and consolidation of land laws and initiation of mechanisms to implement the Ndung'u report on illegal and irregular allocation of public land<sup>12</sup>

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<sup>10</sup> Sub-Section 3.6.1 Paras 172-177

<sup>11</sup> For non-locals and locals respectively in order to foster inter-communal integration.

<sup>12</sup> For details see the paid up advert by the Land Ministry in *Daily Nation*, Tuesday May 18 2010, "Commissioning of the New Banking Hall: Reforms in the Lands Sector". p. 34.

### **c) The Proposed Constitution of Kenya**

The Proposed Constitution of Kenya (PCK) entrenches most of the key provisions in the NLP. In *Chapter Four of the Bill of Rights*, land and related rights are captured under property rights, environmental rights and economic and social rights (housing, food, water etc). *Chapter Five (Part I)* provides the principles of the land policy, classification of land (public, community and private tenures), roles of the National Land Commission, legislation on land among others. *Part II on Environment and Natural Resources* captures the state's obligations in respect to environmental governance and rights; and the legislation relating to the environment. In *Chapter Seventeen on General Provisions*, the definitions/ interpretations on property and natural resources touch on land and land based resources. *Chapter 17 on Constitutional Commission and Independent Offices (Article 248(b))* captures the NLC as one of the ten constitutional commissions. Article 252 goes ahead to give the NLC, together with the Kenya National Human Rights and Equality Commission; the Judicial Service Commission and the Auditor General special powers to issue summons to a witness to assist for the purpose of its investigations. Finally, the fifth Schedule (Article 262(1)) provides the transitional and consequential timeframes for land ranging from 18<sup>th</sup> months to five years.

### **d) The Truth, Justice and Reconciliation Commission(TJRC)**

The TJRC is mandated under the TJRC Act 2008 to establish truth, foster justice and reconciliation over the past human rights violations and economic crimes committed between December 13, 1963 to February 28 2008. The functions of the TJRC provide the following opportunities for complementarity from the land reform perspective:

- Dealing with historical land injustices as part of the gross human rights; crimes of sexual nature and economic injustices against the victims;
- Dealing with illegal and irregular allocation of public land as part of the economic crimes and abuse of public offices committed during the period under review.
- Dealing with disputes over land based resources part of the basis and manifestations of the causes of ethnic tension and civil strife with the TJRC mandate.
- Considering and providing recommendation on the implementation of the relevant official report such as the Ndung'u report.

The major challenge with this mandate is the possibility of overlap with the NLC especially if the NLP is institutionalized while the TJRC is yet to start or complete its work.

### **e) The National IDPs Policy**

The draft IDPs was adopted by stakeholders at Holiday Inn in March 2010. The policy responds to the provision in Section 203 of the NLP which obligates the government to establish policy and institutional measures for protection of and assistance to IDPs.

The vision of the policy is to find sustainable and durable solutions for all the IDPs and prevent any future displacement from occurring so that Kenya becomes a nation free from internal displacement. The policy therefore proposed these solutions by entrenching overarching human rights principles; clear and modern definition of who IDPs are; institutional framework and obligations for all stakeholders; principles and mechanisms for preventing internal displacement; protecting from arbitrary displacement(including conditions and procedures on evacuation, evictions and relocations); preparedness and mitigation; response measures in all phases of displacement up to durable solutions; and finally, the implementation framework.

To guide the adoption and implementation of the policy, the stakeholders through the Protection Working Group and its Legal Steering Committee are working on the audit of the existing and envisaged policies and legal frameworks; implementation matrix and advocacy strategies. A memo is being prepared for submission to cabinet.

#### **f) The National Human Rights Policy(NHRP)<sup>13</sup>**

The proposed National Human Rights underscores improving access to land as one of the major interventions for citizens. The policy notes that Kenyans seem to have a low awareness about the Draft National Land Policy, and more specifically, how it might interact with the proposed human rights policy. Therefore the NHRP notes follows:

- The need for it to support measures to delink land adjudication from politics.
- The need for it to complement the existing and proposed land policies to protect the rights of young people to inherit land from their parents and families.
- The need to strengthen and streamline the land office functions in order to end mismanagement, corruption and non-responsiveness.
- The need for the policy to complement other policy measures that aim to increase the participation of women in land control boards as well as granting greater authority to officers in land boards.
- The need for the policy to also complement other responsive policy measures that address the use of public land as well as regulate the buying of land by foreign companies.

The policy also captures other land related issues such as women rights; housing and environmental rights; and rights of the minority groups and indigenous communities. Concerning the latter and in the context of land rights and reforms, the policy notes as follows:

**Historical injustices' against these groups and communities relating to land must be addressed if resettlement away from forests and wetlands is to be successful. Similarly, the generalized violence they sometimes experience in the forms of communal wars and cattle rustling attacks should be combated more vigorously. The policy should seek complementarity with other policy initiatives like the recently initiated policy framework on small arms and light weapons<sup>14</sup>.**

#### **g) Other Governance Frameworks**

These are the Draft Mining Policy and Act; The Draft Housing Bill; the Draft Peace and Conflict Policy; Draft Disaster Policy; and Draft Environment Policy which strives to respond to respective and land related issues as management of minerals (part of the land based resources); housing concerns (sometimes caused by landlessness); conflicts(sometimes caused by disputes over land and land based resources); disaster management(where most of the natural ones are land based); and sustainable environmental management.

### **3. Prognosis**

I wish to conclude by noting that although a number of policy, legal and institutional measures have been initiated in the land sector reforms there is a need for through mapping, advocacy, monitoring

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<sup>13</sup> See Sections 3.16 and 3.17 of the National Policy on Human Rights, 2009 Version.

<sup>14</sup> Section 3.19

and evaluation of the governance process. Perhaps the adoption of the rights-based approach to programming will form a progressive framework for surmounting this daunting enterprise.

*A rights-based approach to development (RBA) is a framework that integrates the norms, principles, standards and goals of the international human rights system into the plans and processes of development. It is characterized by methods and activities that link the human rights system and its inherent notion of power and struggle with development. RBA is able to recognize poverty as injustice and include marginalization, discrimination, and exploitation as central causes of poverty. It has four areas of focus i.e.*

- *Most vulnerable groups*-including issues of gender and discrimination.
- *Root causes* such as poverty, deprivation and human rights violations.
- *Rights holders* (those violated) and *duty bearers* (those with obligations to protect and promote human rights).
- *Empowerment*-supporting people's ability take part in governance processes and claims their rights-both as groups and individuals<sup>15</sup>.

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<sup>15</sup> Jakob Kirkemann Boesen & Tomas Martin, *Applying a Rights Based Approach: An Inspirational Guide for Civil Society*; The Danish Institute for Human Rights; Copenhagen, 2007