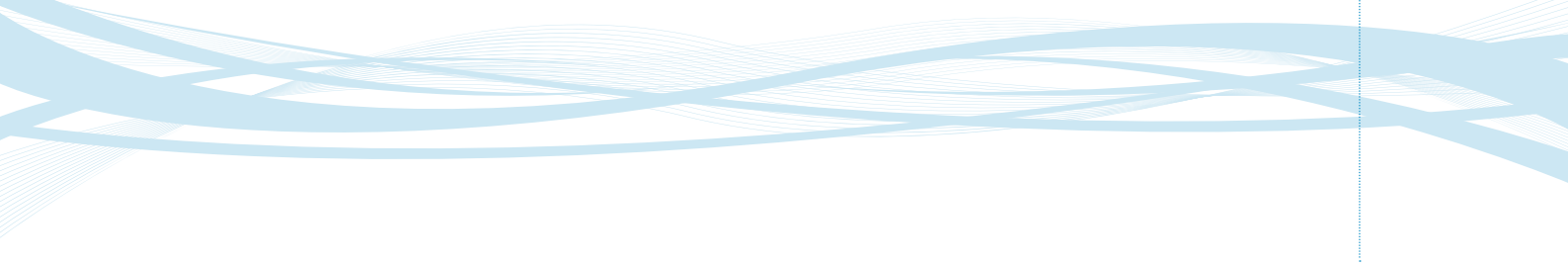


Public land, historical land injustices and the new Constitution



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Society for International Development



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Paul Syagga



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Constitution Working Paper No. 9

Published by:

Society for International Development (SID)
Regional Office for East & Southern Africa
Britak Centre, First Floor
Ragati/Mara Road
P.O. Box 2404-00100
Nairobi, Kenya
Tel. +254 20 273 7991
Fax + 254 20 273 7992
www.sidint.net

© Society for International Development (SID)

ISBN No: 978-9966-029-08-9

Printed by:

The Regal Press Kenya Ltd.
P.O. Box 46166
Nairobi, Kenya

Design & Layout:

Sunburst Communications Ltd.
P.O. Box 43193-00100
Nairobi, Kenya
Email: info@sun.co.ke



Abstract

Underpinned by the concept of entitlement as its theoretical paradigm, this study examines the genesis of public land ownership and its disposition in the post-colonial era, how this has disadvantaged some sections of society and given rise to claims of historical land injustices. From this analysis, the study makes proposals on how best to redress historical land injustices and disputed land allocations, as well as the institution of an effective National Land Commission as envisaged by the Constitution. Literature from various local and international sources related to land reforms and land use in post-colonial states formed the research base.

The study makes four significant recommendations: First, the study contends that the public must be sensitized through civic education on the benefits of land reform that aims to achieve three objectives: equity in terms of opportunities for land access and ownership; efficiency in terms of improved land use; and development of the national economy. Second, the National Land Commission should be sufficiently funded, be accessible to the public, and be empowered to impose significant penalties on non-compliance with the law on land management and administration. In this regard there must be mechanisms in place for monitoring the activities of the professionals, ensuring that errant professionals are penalized and providing opportunities for the public to report any errant professionals. Third, the study recommends the establishment of a Land Claims Tribunal to handle land restitution claims, including land repossession, in a clearly defined process. And finally, the study recommends that redistribution and resettlement programmes must be guided by a legal framework to ensure fairness and transparency.

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The SID Constitution Working Paper Series

In 2010, on the cusp of Kenya's new constitutional dispensation, the Society for International Development (SID) embarked on a project called *'Thinking, Talking and Informing Kenya's Democratic Change Framework'*. Broadly stated, the objective of the project was both historical and contemporary: that is, to reflect on Kenyans struggles for a democratic order through a book project, and to examine the significance of a new constitutional order and its legal and policy imperatives, through a Working Paper Series.

Consequently, SID commissioned research on some of the chapters or aspects of the new constitution that require further policy and legislative intervention, culminating in ten Working Papers. These papers, mostly by Kenyan academics, are intended to help shape public discussions on the constitution and to build a stock of scholarly work on this subject.

These papers seek to contextualize some of the key changes brought about by the new constitutional order, if only to underscore the significance of the promulgation of the new constitution on August 27, 2010. The papers also seek to explore some policy, legislative and institutional reforms that may be necessary for Kenya's transition to a democratic order.

The Working Papers explore the extent to which the new constitution deconstructs the Kenyan post-colonial state: how it re-calibrates the balance of power amongst branches of government and reforms government's bureaucracy; redraws the nature of state-individual relations, state-economy relations, and state-society relations; and deconstructs the use of coercive arms of the government. Lastly, the papers examine some of the limitations of the new constitution and the challenges of constitutionalism.

In the first set of papers, **Dr Joshua Kivuva**, **Prof. Ben Sihanya** and **Dr. Obuya Bagaka**, separately examines how the new constitution has re-ordered nature of Kenya's post-colonial state, especially how it has deconstructed the logic of state power and rule, deconstructed the 'Imperial Presidency', and how it may re-constitute the notorious arm of post-independent Kenya's authoritarian rule: the provincial administration.

The next set of papers in this series, by **Dr. Othieno Nyanjom** and **Mr. Njeru Kirira**, separately looks at the administrative and fiscal consequences of Kenya's shift from a unitary-state to a quasi-federal state system. Whereas Dr. Nyanjom examines the anticipated administrative and development planning imperatives of devolving power; Mr. Kirira examines the anticipated revenue and expenditure concerns, which may arise in a state with two-tier levels of government. Both discussions take place within the context of a presidential system of government that the new constitution embraces.

The paper by **Dr. Musambayi Katumanga** examines the logic of security service provision in post-colonial Kenya. Dr. Katumanga argues that Kenya needs to shift the logic of security from regime-centred to citizen-centred security service provision. However, despite several attempts in the recent past, there are still several challenges and limitations which Kenya must redress. The new constitution offers some room for instituting a citizen-centric security reforms.

The paper by **Prof. Paul Syagga** examines the vexed question of public land and historical land injustices. It explores what public land is, its significance and how to redress the contention around its ownership or use. Similarly, the paper examines what constitutes historical land injustices and how to redress these injustices, drawing lessons from the experiences of

other states in Africa that have attempted to redress similar historical land and justice questions.

The papers by **Dr. Adams Oloo**, **Mr. Kipkemai arap Kirui** and **Mr. Kipchumba Murkomen**, separately examines how the new constitution has reconfigured representation and legislative processes. Whereas Dr. Oloo examines the nature of the Kenya's electoral systems, new provisions on representations and its limitations; arap Kirui and Murkomen look at the re-emergence of a bicameral house system and the challenges of legislation and superintending the executive.

If the other nine papers examine the structural changes wrought by the new constitution; the tenth paper, by **Mr. Steve Ouma**, examines the challenges and limitations of liberal constitutional order, especially the tensions between civic citizenship and cultural citizenship from an individual stand point. Perhaps Mr Ouma's paper underscores the possibility of a self-defined identity, the dangers of re-creating ethno-political identities based on old colonial border of the Native Reserves - the current 47 counties and the challenges of redressing social exclusion and the contemporary legacies of Kenya's ethno-centric politics.

The interpretation of the constitution is contested; so will be its implementation. We hope that this Working Paper Series will illuminate and inform

the public and academic discussions on Kenya's new social contract in a manner that secures the aspiration of the Kenyan people.

SID would like to sincerely thank all those who have made the publication of these papers possible, especially those who participated in the research conceptualization meeting and peer-reviewed the papers such as: **Dr. Godwin Murunga**, **Prof. Korwa Adar**, **Ms. Wanjiru Gikonyo**, **Dr. Joshua Kivuva**, **Dr. Richard Bosire**, **Dr. Tom Odhiambo**, **Ms. Miriam Omolo** and **Dr. Mutuma Ruteere**, for their invaluable input.

Lastly, we would like to acknowledge the invaluable support of the SID staff: Hulda Ouma, Irene Omari, Gladys Kirungi, Jackson Kitololo, Aidan Eyakuze, Edgar Masatu, Stefano Prato, and Arthur Muliro; as well as Board members Sam Mwale and Rasna Warah. Similarly, we would like to thank the Swedish International Development Cooperation Agency (Sida) for their financial support. Our gratitude also goes to the Swedish Ambassador to Kenya H. E. Ms. Ann Dismorr; and Ms. Annika Jayawardena and Ms. Josephine Mwangi of Sida for supporting this project.

Working Papers Series Coordinators

Jacob Akech
Duncan Okello

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Acronyms

ADR	Alternative Dispute Resolution
AfDB	African Development Bank
Africog	Africa Centre for Open Governance
AU	African Union
CIPEV	Commission of Inquiry on Investigation of Post-Election Violence
GOK	Government of Kenya
IDPs	Internally Displaced Persons
KLA	Kenya Land Alliance
KNCHR	Kenya National Commission on Human Rights
KNDR	Kenya National Dialogue and Reconciliation
LDSB	Land Development and Settlement Board
LIMS	Land information management system
NLC	National Land Commission
RDF	Rwanda Defence Force
RLRA	Restitution of Land Rights Act
RLRC	Restitution of Land Rights Commission
ROK	Republic of Kenya
SID	Society for International Development
Sida	Swedish International Development Cooperation Agency
TOL	Temporary occupation licence
UNECA	United Nations Economic Commission for Africa

1.0 Introduction

Since the period when Kenya was under colonial rule, land issues have remained emotive, contentious and an obstacle to social cohesion and economic growth. The development blueprint, Kenya Vision 2030 (GOK, 2008), notes that the country has not had a national land policy and this has given rise to weak land administration and management framework. An ineffective regulatory framework has been at the roots of many problems, including claims of historical land injustices among some communities, proliferation of unplanned urban settlements, bad land use practices and human-wildlife land use conflicts. Additional serious aspects of the land issue have been environmental degradation, uneconomic land subdivisions, unjust land distribution and other land related problems. One result of all this has been increased poverty among some communities. Kenya Vision 2030 therefore recommended the development of a national land policy that would provide an overarching framework for land administration in the country. Fortunately enough, in December 2009 the ninth Parliament approved Sessional Paper No. 3 of 2009 on National Land Policy (GOK, 2009), but it is yet to be implemented.

The National Land Policy made a number of far-reaching recommendations aimed at solving the current and future land problems in Kenya, some of which were incorporated into the chapter on Land and Environment in Kenya's new Constitution (ROK, 2010). Without such a constitutional anchor, some of the recommendations in the National Land Policy would lack a framework for implementation. Key among issues on land in the 2010 Constitution is the establishment a National Land Commission (NLC) to manage land on behalf of central and county governments. The NLC is constitutionally mandated to undertake investigations on claims of historical and present land injustices so as to recommend appropriate redress. The section also directs Parliament to rationalize existing land and sectoral land use laws, and to enact legislation to facilitate review of all grants or dispositions of public

land to establish their legality (ROK, 2010: Articles 67–68). Many efforts in the past to, for instance, repossess illegally/irregularly acquired public land such as the recommendations of the Ndung'u Commission (GOK, 2004) as well as attempts by the Kenya Anti-Corruption Commission (KACC) to repossess such lands, have been met with legal hurdles on grounds of sanctity of first registration of title, irrespective of how the title is obtained. It has also not escaped the attention of Kenyans that the efforts to save the Mau Forest water towers by reclaiming titles and evicting those who irregularly settled on the land was turned into a political battle against the Constitution by those who resist eviction (Okwembah, 2009).

The new Constitution as well as the National Land Policy take cognisance of these failures of the land management system and call for new legislation to be put in place that will question the legality of titles granted through allocation of public land, and take corrective measures as appropriate. This paper reviews the genesis of public land ownership and disposition in Kenya, as well as historical land injustices arising from irregular allocation of public land or otherwise. From that foundation, the paper makes recommendations on how best redress could be achieved in the light of the Constitution, in an effective manner and without impeding growth.

The paper has three main objectives:

- To critically examine the statutory basis of the existence of public land, the size and economic significance of the contested public land under post-colonial Kenya;
- To examine historical land injustices in the Kenyan context and the claims underpinning the demands for its redress; and
- To make recommendations for policy and legislation on how to redress historical land injustices and disputed public land allocations, and constitute an effective Land Commission as envisaged by the Constitution.

The methodology adopted is content analysis of literature from various sources both locally and internationally that relates to land reforms and land use in post-colonial states. Thus the paper relies on secondary sources of data and available information. It examines the genesis of public land ownership and disposition in the post-colonial era, how this has disadvantaged some sections of society and given rise to claims of historical land injustices. Also, to the extent that such information is available, the paper provides comparative perspectives on land reforms in other post-colonial states, and makes proposals on how best to redress historical land injustices and disputed land allocations, as well as the institution of an effective NLC as envisaged by Kenya's new Constitution.

2.0 Entitlement versus Efficiency in Land Reform

Equitable land reform requires a fine balance between entitlement and efficiency. That is, the just repossession and redistribution of land must be weighed against economically efficient modes of land use, particularly when the land is already altered by development investments.

2.1 The concept of entitlement in land ownership and use

This study uses the concept of entitlement as the paradigm against which to evaluate land management and administration practices in Kenya. Land in Kenya, as elsewhere, is a resource that sustains many livelihoods by providing means for earning incomes, improving the wellbeing of people and enhancing food security. Land is required for settlement (shelter), subsistence and commercial productivity, with proportions allocated to each use being dependent on a country's stage of development. According to Nozick (1974), just distribution is attained when everyone is entitled to the holdings they own under the distribution.

The entitlement concept is relevant in the context of land administration and management, but such an ideal situation does not always exist. This is because the mechanisms of owning land have often been abused and as a result people's entitlements to land have been infringed. For example, corruption or misuse of political powers and manipulation of markets may result in the exclusion of some individuals or groups from competing in property acquisition and exchanges. Some people may also steal from others or seize property from others.

In his book, *Anarchy, State and Utopia*, Nozick (1974) outlines the entitlement theory of private property and argues that it comprises three overriding principles:

- The principle of just acquisition of property;
- The principle of just transfer of property; and
- The principle of rectification of justice where property is unjustly acquired or transferred.

Justice in property ownership revolves around three mechanisms of conferring and safeguarding title to property. The first is the initial acquisition of property. This involves the process or processes of ownership of property by first-time owners and the rights that are conferred through such processes. The second relates to the transfer of property from one person to another. These two means of accessing land are sometimes abused, however, leading to undesirable consequences devoid of distributive justice. For example, theft, fraud, corruption and forceful evictions sometimes characterize land transactions with resultant landlessness and the squatter phenomenon. In Kenya, numerous cases have been documented of families that have been dispossessed of their land through fraud and corruption. The Ndung'u Commission (GOK, 2004) reported cases of illegally and irregularly acquired public land. There are also well documented cases of disinheritance of people from their ancestral lands during the colonial period, and the post-independence removals of minority groups like the Ogiek from the traditional forest lands. The third mechanism deals with rectification of distributive justice through processes

such as restitution, redistribution and resettlement. This is usually necessitated by the failure of the first two mechanisms of initial acquisition and transfer of property.

The new Constitution aims to prevent future abuses of the processes of acquisition and transfer of land in order to eliminate infringements on people's entitlement to land. The provisions for rectifying historical land injustices will require further enabling legislation so as to avoid exposing the land reform implementation process to governance and political economy risks. As a priority, there is need to identify possible political and governance risks that might hinder the protection of these entitlements, including measures that could help to mitigate those risks and thus increase the chances of successful implementation by the NLC.

2.2 The concept of efficiency in land ownership and use

Entitlement theory does not always deliver efficient outcomes, however. For example, where land acquired illegally and irregularly from individuals or the public has been transferred to third parties who acquired it in good faith, entitlement theory would require that such land be reposessed and reallocated to the rightful owners, regardless of the cost implications. In acquiring the land the third parties may have been misled unknowingly and therefore become purchasers in good faith. It would therefore not be fair for the state to compulsorily take back the land without compensating such owners, who may have invested heavily in the land to generate significant levels of income and tax revenue besides employing many people.

As a case in point, it would not make good economic sense to destroy the city of Nairobi in order to give the land back to the Maasai, even if indeed there is proof of wrongful annexation of such land. Such a takeover is not likely to yield efficient outcomes. An attempt to destroy a gourd because there is a snake curled inside it is pointless, as much as trying to kill

a snake that has curled around a baby may not save the baby.

Moreover, evidence shows that the security of property rights has a significant impact on overall economic performance and that initial land distribution affects the nature and rate of long-term economic growth (Acemoglu et al., 2001). This suggests that redistributive land reform targeting historical injustices is not simply a means of ensuring social and economic justice; it can also be a good instrument for broad-based and sustainable economic growth.

Therefore, in assessing the redress for historical injustices and contested allocated public land, this paper does not rely on the entitlement concept alone. The analysis also seeks to establish whether the policy proposals will deliver efficient outcomes. Efficiency is attained when proposed policy reform leads to best outcomes that will maximize the welfare of the society as a whole, rather than impede national growth and development.

3.0 Statutory Basis for the Designation of Public Land

The land problems that the new Constitution seeks to reverse can be traced to colonial times and successive post-colonial governments. As the Njonjo Commission (GOK, 2002) and the National Land Policy (GOK, 2009) observed, the policies of the colonial government helped to entrench a dominant settler economy while subjugating the African economy through administrative and

The provisions for rectifying historical land injustices will require further enabling legislation so as to avoid exposing the land reform implementation process to governance and political economy risks.

legal mechanisms. The successive post-colonial governments, under the leadership of Kenyatta and Moi, in fact sustained the colonial policies and therefore further contributed to the infringement of citizens' rights to land.

Land in Kenya today is classified in terms inherited from colonial times when there was crown land, private land and native reserves. Following independence, land designated crown land became 'government land' as defined in the Government Lands Act, Cap 280, and native reserves became 'trust land' under

the Trust Land Act, Cap 281. The 2009 National Land Policy and the 2010 Constitution specify that land in Kenya be designated as public land, private land and community land. In both documents there are stipulations that 'public land' will be defined by an Act of Parliament on the effective date, but will include land lawfully held, used or occupied by a state organ, unalienated government land, natural resources (all minerals and mineral oils, forests, game reserves, national parks, rivers, lakes, etc.), and all roads and thoroughfares.

There is currently no system for the registration of land used by government institutions, such as ministries and departments. To safeguard such land, a practice emerged through which public land was registered under the Permanent Secretary in the Ministry of Finance, but without effective legislation to that effect. It is such land that is proposed to be vested in the national government in trust for the people of Kenya and administered on their behalf by the NLC. Such land may not be disposed of or otherwise used except in terms of an Act of Parliament specifying the nature and terms of that disposal or use (ROK, 2010: Article 62(4)). Some public land will be vested in county governments in trust for the people resident in the counties and will be administered on their behalf by the NLC.

There is currently no system for the registration of land used by government institutions, such as ministries and departments. To safeguard such land, a practice emerged through which public land was registered under the Permanent Secretary in the Ministry of Finance, but without effective legislation to that effect.

'Community land' includes land registered in the name of a group, land communally used by a given community for cultural/religious practices, grazing or hunting, and trust land held by county governments. Community land will be vested in the community, and may not be disposed of or otherwise changed except in terms of legislation specifying the nature and extent of the rights of each member of the community individually or collectively.

'Private land' refers to any land held by a person or body corporate under any tenure (freehold through upgrading of trust land, leasehold alienation of public land or private land, and temporary occupation licence (TOL)).

The process of land tenure reform in Kenya, argues Okoth-Ogendo (1991), introduced a novel and alien concept of property relations in Kenya. This concept involved the redefinition of the state-land relationship, which asserted the British protectorate as a political entity owning land and granting subsidiary rights to property users and owners. One result was the creation of different registration systems supported by administrative institutions, effectively entrenching the objectives of the colonial regime. As observed by the Njonjo Commission (GOK, 2002), there were, on the one hand, systems of tenure based on the principles of English property law and, on the other hand, a largely neglected regime of customary property law. There was also a structure of land distribution characterized by large holdings of high potential land, on the one hand, and highly degraded and fragmented small holdings, on the other. The net effect of the colonial land policy was to create an agricultural export enclave controlled by a small number of European settlers while ignoring and violating the African communities' claims to land.

The declaration of a protectorate over much of what is now Kenya on 15 June 1895 – which marked the official beginning of British rule in Kenya – laid the foundations for the land problem that has been experienced in many parts of Kenya over the years.

Extracts of British annexation of land in the colonies

1. From 1869 until nearly the start of World War I, the British practised imperialism in Africa out of fear of losing their empire. They took South Africa and Egypt to keep India from being stolen, and they annexed other parts of Africa (such as areas around the Niger) to compete economically with France and Germany, and to keep the land they already had from being taken by France and Germany. They also annexed land in order to have allies in case a war should start. The British claimed they did not want to practise imperialism; that Germany and France forced them to do it to keep their empire. Maybe so, but fear of losing the British economic status and the British empire to Germany and France, not Germany and France forcing imperialism down the English people's throat, seems to be the better answer to why the British practised imperialism in Africa from 1869 to 1913.

Source: <http://www.pvhs.chico.k12.ca.us/> (Accessed on 4 April 2011).

2. In 1897, the Commissioner for the Protectorate, using the Land Acquisition Act of India (1894), which was extended to Kenya, appropriated all lands situated within one-mile on either side of the Kenya-Uganda railway for the construction of the railway. The Act was also used to compulsorily acquire land for other public purposes such as government buildings. In 1915, the 1902 Ordinance was repealed and replaced by a new Crown Land Ordinance that now declared *all land within the protectorate as crown land*, whether or not such land was occupied by the natives or reserved for native occupation. The effect was that Africans became tenants of the Crown, with no more than temporary occupation rights to land.

Source: Okoth-Ogendo (1991).

3a. The kingdom of Great Britain acquired the French colony of Acadia in 1713 and then Canada and the Spanish colony of Florida in 1763. After being renamed the Province of Quebec, the former French Canada was divided in two Provinces, the Canadas, consisting of the old settled country of Lower Canada (today Quebec) and the newly settled Upper Canada (today Ontario).

In 1763 the British Crown began to issue grants of land in what is now the province of Ontario. These grants were awarded primarily to attract British settlers to Canada. In order to obtain a grant of land, a settler had to make a formal written application known as a petition.

Source: http://en.wikipedia.org/wiki/Kingdom_of_Great_Britain (Accessed on 4 April 2011).

3b. On 22 May 1784, Governor Haldimand purchased the land along the Grand River in what is now southwestern Ontario from the Mississauga Indians. At that point, the land became British Crown land.

Source: blogs.mtroyal.ca/fwiddowson/2011/04/04/.

In Australia, in 1788 European settlement commenced when Governor Phillip claimed possession of the land on behalf of the British government. All lands were vested in the name of the Crown (thus the terms *Crown colony* and *Crown land*). On 6 February 1840, Maori leaders of different Iwis (tribes) signed a treaty with the British Crown about the distribution of the land and to whom it belonged.

After British colonization, the colonial Australian government parcelled out land to white colonists, primarily under either freehold title or pastoral lease. Freehold titles granted absolute ownership of the land, while pastoral leases ensured that the government retains control over such land by providing that certain rights to develop the land or extract subsurface resources are retained by the government and that title to these lands reverts back to the government eventually. Both types of land grants often constituted large parcels of land, which were necessary to maintain herds of sheep and cattle and meet agricultural requirements in the inhospitable Australian outback. Because Aborigines' rights to own land were not recognized, the land conveyed by these land grants often included traditional aboriginal land. The new landholders were in no way obliged to respect Aborigines' customs or their traditional land uses.

Source: www.wcl.american.edu/hrbrief/v613/aboriginal.htm (Accessed on 4 April 2011).

This was also the beginning of massive dispossession of indigenous Kenyans as the demand for land for the railway construction and European settlement took precedence.

In 1897, the Commissioner for the Protectorate, using the 1894 Land Acquisition Act of India, which was extended to Kenya, appropriated all lands situated within one mile on either side of the Kenya-Uganda Railway for the construction of the railway. The Act was also used to compulsorily acquire land for other public purposes such as government buildings (Okoth-Ogendo, 1991). In the meantime, using the Foreign Jurisdiction Act of 1890, the protectorate administration promulgated the East African Land Regulations of 1897, which it used to alienate land from the natives to allocate to white settlers. This was intended to encourage the European settlement that would pay for the railway. The Commissioner could initially give certificates of occupancy for only 21 years, a period that was extended to 99 years. Any land alienated, whether for construction of the railway or occupation by the administrators or settlers, became crown land (now government land to become public land). Crown land was defined as all public lands within the East African Protectorate that for the time being were subject to the control of His Majesty by virtue of any agreements or treaties, and all lands that had been or may have been acquired by His Majesty under the Land Acquisition Act of 1894, or otherwise (Okoth-Ogendo, 1991).

This system of alienation was not peculiar to Kenya, as it had been the case in Canada, Australia, New Zealand, India and other colonies. It is the methods used to acquire the land that were different, as in some instances the land was paid for, while in others like Kenya the natives were not compensated.

The Crown Lands Ordinance No. 21 of 1902 vested power in the Commissioner to sell freeholds in crown land within the protectorate to any purchaser in lots not exceeding 1,000 acres (400 hectares). Any empty land or any land vacated by a native

could be sold or rented to Europeans, and land had to be developed or else forfeited. The protectorate administration gave no cognisance to customary tenure systems, and by 1914 nearly 5 million acres (2 million hectares) of land had been taken away from Kenyan Africans, mostly from the Kikuyu, Maasai and Nandi communities (Mortensen, 2004: 4). The 1902 ordinance was repealed and replaced by a new Crown Land Ordinance in 1915 that declared all land within the protectorate as crown land, whether or not such land was occupied by the natives or reserved for native occupation. The effect was that Africans became tenants of the Crown, with no more than temporary occupation rights to land. The land reserved for use by the Africans could also at any time be expropriated and alienated to the settlers. The 1915 Lands Ordinance therefore signified the commencement of the disinheritance of Africans from their lands. The ordinance empowered the Commissioner of the Protectorate to grant land to the settlers for leases of up to 999 years. These 999 years notwithstanding, the settlers clamoured for perpetual leases (freeholds).

Kenya was declared a colony in 1920 and remained so until the time of independence in 1963. Throughout, land problems remained unresolved. As in South Africa under the apartheid regime, the colonial land segregation was implemented through the Native Trust Bill passed in 1926 to reserve certain areas for exclusive use by Africans, but with the Governor retaining the power to take away such land from the natives for use and benefit of non-natives. While the natives had no rights of possession other than rights of use, non-natives could be given 33-year leases in these reserves. A definite move towards legal segregation came in 1932 with the Report of the Kenya Land Commission (1934), which recommended fixing the boundaries of the native reserves and the areas reserved for European settlement (called the White Highlands). The Africans were effectively removed from the White Highlands to give assurance to the Europeans that their areas would remain inviolable (Kenya Land Commission, 1934: para 1979). The

annexation of land therefore accelerated to 7.2 million acres (2.88 million hectares) by 1924, and by the time of independence in 1962 a total of 7.5 million acres (3 million hectares) or half the agricultural land in Kenya had been taken away. In the process, some individual farmers such as Lord Delamere are reported to have acquired as much as 1 million acres (400,000 hectares) (Van Swanenberg, 1972).

Ultimately, the effect of the colonial land policy was acute land shortages, landlessness and discontent among the rural peasantry (Sorrenson, 1967; Van Swanenberg, 1972). By the 1940s there was severe shortage of land within the reserves in central Kenya. The division between the de facto owners of land and those made landless by de facto privatization of land holding prompted demands for restoration of 'stolen lands' by the Mau Mau revolts, which eventually compelled the colonial administration to initiate land reforms in the 1950s and 1960s.

4.0 Historical Land Injustices and Claims for Redress

Clearly, the land problems Kenya's new Constitution seeks to reverse can be traced to the earliest colonial times. Moreover, the post-colonial governments under the leadership of Kenyatta and Moi sustained the colonial policies and further contributed to the infringement of citizens' rights to land. The twin impacts are briefly discussed in the sections below.

4.1 Impact of colonial land administration and management

As the Njonjo Commission (GOK, 2002) and the National Land Policy (GOK, 2009) observed, the

policies of the colonial government helped to entrench a dominant settler economy while subjugating the African economy through administrative and legal mechanisms.

4.1.1 Displacement of Africans from their lands

Following the enactment of the Crown Lands Ordinance in 1902, any land that was not developed or occupied could be forfeited. Accordingly, in 1904 there was surveying and alienation of unoccupied land in the southern parts of Kikuyu land (Kiambu, Murang'a), and at the same time an agreement was made with the Maasai, represented by their leader Lenana, and the British government that forced the Maasai to vacate their lands in Suswa, Ol-Joro-Orok and Ol-Kalau areas to the southern Ngong and Laikipia reserves to be used by the government for purposes of European settlement (Syagga, 2006). In 1911 the Maasai were made to sign a second agreement, which led to their eviction from Laikipia to the southern Ngong reserves, with resultant loss of livestock and human life during the trekking.

Subsequently, in 1913, the Maasai unsuccessfully challenged through the courts the validity of the 1904 agreement and the authority of the leaders who were signatories to the agreement. Their prayers were to return to the northern highlands and to be compensated for the loss of stock (Hughes, 2006). Since then, the Maasai have consistently aired their grievances notably before the Kenya Land Commission in 1932, at the second Kenya Constitutional Conference at Lancaster House, London, in 1962, at the constitutional review discussions in 2003–2004, and most recently in threats by Maasai activists to sue Britain again, on the hundredth anniversary of the 1904 agreement. The Maasai demonstrated across the Rift Valley and in Nairobi on 4 August

The Maasai have consistently aired their grievances notably before the Kenya Land Commission in 1932, at the second Kenya Constitutional Conference at Lancaster House, London, in 1962, at the constitutional review discussions in 2003–2004, and most recently in threats by Maasai activists to sue Britain again, on the hundredth anniversary of the 1904 agreement.

2004, claiming that the agreement had expired and so their land should be given back. They also invaded privately owned ranches in Laikipia.

The Nandi had resisted the British since 1895, but in 1905 they were subdued and their land (currently forming part of the large tea estates) annexed by the colonial government. In the case of Coast region, the Land Titles Ordinance passed in 1908 required all persons with claims to land to present them to the Land Registration Court, failing which all unclaimed land was deemed to be crown land. Given the dearth of information and lack of verifiable evidence of ownership, the Africans at the Coast, particularly within the 10-mile strip, were dispossessed and have continued to live as “tenants at will” at the mercy of those who made claims without their knowledge.

4.1.2 Individualization of tenure in African reserves

With the political climate deteriorating and the Africans agitating for their land, the colonial authorities set up a commission in 1954 under R.J.M. Swynnerton to investigate how to improve and make African tenure systems contribute to the economic development of the colony. Following the investigation, the Swynnerton Commission published a report on land management reform for the African reserves, particularly the “Mau Mau districts” of central Kenya (Swynnerton Plan, 1954). The report observed that the traditional system of tenure in the African reserves encouraged fragmentation of the holdings into smaller units for production, as well as incessant disputes that were a disincentive to long-term capital investment

The report recommended the consolidation of separated land holdings of each family into one, followed by the adjudication of property rights in that land and the registration of individuals as absolute owners of land adjudicated as theirs. This marked the beginning of the colonial government’s attempt to establish a single market for land. The intention of the system was to end the perceived uncertainty of customary tenure and create a stable landed gentry

among the Africans. The administrative process of consolidation, adjudication and registration was formalized by the Native Land Tenure Rules of 1956. To ensure that the rights granted through the process were not disturbed, the African Courts (Suspension of Land Suits) Ordinance was passed in 1957 to bar all litigation regarding land to which the 1956 rules applied. This in effect rendered the stipulated three-month objection period redundant.

Given that remarkably large parts of Central Province were consolidated in 1956 during the state of emergency arising from the Mau Mau revolt, the effect of these laws was to prevent claims by aggrieved landholders – who included leaders of the nationalist movement – and dispossessed peasants. These rules were incorporated into the Native Lands Registration Ordinance of 1959, which among other things declared that the first registration was not to be challenged even if it had been obtained through fraud, and that only five persons could be registered as owners of any parcel of land and holding trust for the other members of the family. In the majority of cases only the male head of household was registered as owner of the land. Women and younger men were unlikely to be registered and therefore were effectively excluded from controlling land and other resources that go with it. The elder male owners were given immense power through this system, to the extent that they could mortgage or even sell the land without recourse to other members of the family, who although not owning the land legally, had access rights under customary law.

The individualization of tenure only took account of people who had land and not the landless or those whose interests did not amount to ownership. As a result, cases of family representatives seeking to evict other family members from the family land escalated. This system of land registration was adopted by the post-colonial governments and remains unchanged to date, thus facilitating fraud and corruption cases of disinheritance of families and communities (practising group ranching in pastoral areas) that have become rampant in the recent past.

It should be noted that this provision in the law made it difficult to implement the recommendations of the Ndung'u Commission, and will equally make it difficult for the NLC to carry out its work, because as it stands those allocated land irregularly and illegally are the first registered owners of public land. In view of this, the new Constitution proposes the enactment of legislation to enable the review of all grants of public land to establish their propriety or legality, and by extension ushers in the need to question the legality of first registration of land registered through the adjudication process. This will facilitate redress by allowing aggrieved parties (individuals, families or communities) to challenge the authenticity of a title that might have been fraudulently obtained.

4.1.3 Overall effects of colonial land policy on land ownership

The entrenchment of the colonial administration in Kenya led directly to inequality in land ownership and use, landlessness, squatting, land degradation, resultant poverty, and Africans' resentment of the whitesettlers. The colonial administration contributed to the infringement of entitlements to land access and ownership in several ways. First, it created two systems of land tenure based on principles of English property law applying to high potential areas, and a largely neglected regime of customary property law in the marginal areas. Second, it facilitated a structure of land distribution characterized by large holdings of high potential land by the white settlers, on the one hand, and fragmented small holdings on the African reserves, on the other hand. Third, the policy environment was designed to facilitate the development of the high potential areas and neglect of counterpart marginal areas.

More specifically, although individualization of tenure was justified on economic grounds, its implementation had a decidedly political motive. Colonial policy makers thought that it would be the beginning of a process that would create a class of African rural elite, rooted in land and committed to private enterprise, which would also provide liberal political leadership (Okoth-Ogendo,

1991; Bruce and Migot-Adhola, 1994). The tenure individualization did not increase the quantum of land, but emphasized improvement of technology of production on the basis of existing land distribution patterns that were already skewed in favour of the white settlers. For instance, the Swynnerton Plan recommended the removal of restrictions to allow Africans to plant coffee, but this was going to be on existing African reserves with overused small parcels of land, and thereby not facilitating land redistribution.

Many people, especially in central Kenya, were evicted from their land through consolidation. The reform therefore aggravated landlessness in a number of ways. First, those already landless but accommodated through customary tenure had their rights further violated through registration. Second, since only male heads of households were generally registered as parcel owners, the reform undermined the rights of women and children and rendered them liable to landlessness should the owner decide to transfer the land. And, the land grievances stemming from the resultant mass disinheritance of communities of their land have not been resolved to date. The failure of the independence pact to address the issue and its further neglect by the post-independence governments perpetuated historical land injustices to the detriment of the majority of Kenyans.

First, it created two systems of land tenure based on principles of English property law applying to high potential areas, and a largely neglected regime of customary property law in the marginal areas.

4.2 Impact of post-colonial land administration and management

While there were high expectations of the agricultural economy following independence, from the point of view of the African sector, there was very little change outside the high potential areas where agricultural production continued to support

the economy. Fundamental inequalities between the African sector (marginalized areas) and the former European sector (high potential areas) continued and in some cases probably widened. Policies, laws and practices adopted after independence saw a general re-entrenchment and persistence of colonial themes, policies and patterns of organization in all aspects of Kenya's economy, save only for inconsequential adjustments.

4.2.1 How prominent Kenyans got prime white settler farms under the Million-Acre Settlement Scheme

By 1960, the European settlers occupied some 7.5 million acres (3 million hectares) of land held on leases and freehold tenure, which the Africans

Thus, politicians with power and money and loyalists who had made their fortunes by being close to the colonial government, as well as businessmen with liquid cash, managed to acquire thousands of acres.

were demanding. Thus in order to safeguard their possessions in the event of a power transfer, the colonial government initiated a settlement plan for the Africanization of the White Highlands as well as an elaborate scheme of constitutional and statutory guarantees of property rights. The plan was informed, first, by a perceived need on the part of colonial authorities to entrench the settler community firmly in Kenya and maintain the rights they had to land, without having to give any land back to the natives. Second, it had to

achieve the aim of socializing the new elites into the colonial political, economic and social patterns through the establishment of a multiracial alliance of European settlers and African landowners to forestall independence and majority rule.

Third, the process was geared towards preventing the mobilization of a nationalist base that would be opposed to the continuation of colonial policies after independence (Wasserman, 1976). Thus, in 1960 a Land Development and Settlement Board

(LDSB) was established to devise and administer resettlement schemes for some 20,000 families of all races. Through a facility amounting to 7.5 million sterling pounds from the World Bank, the scheme also offered credit facilities to Africans who wished to purchase farmland in the White Highlands. The Yeomen programme, as it was called, envisaged buying 240,000 acres in the White Highlands to be subdivided into 100-acre parcels and distributed to a select group of Africans who would farm alongside the whites. The programme was in 1961 renamed Assisted Farmers Scheme and formed part of the independence negotiations as the Million-Acre Settlement Scheme to be funded by both the World Bank and the British government and handed over to the incoming Kenyatta government.

The Million-Acre Settlement Scheme involved the promotion of a rapid and orderly transfer of ownership of European-owned farms belonging to those settlers who wanted to leave or who otherwise could not stay after independence. The scheme was designed to comprise small- to medium-size holdings covering a total of 1.15 million acres to be sold to individuals who would be facilitated by a loan from the British government to buy out the departing settlers. The transfers were based on a willing-seller/willing-buyer principle, and the loans could only be given to those who qualified to repay or had the financial means to pay on cash basis (Leo, 1989; KLA, 2004). Thus, politicians with power and money and loyalists who had made their fortunes by being close to the colonial government, as well as businessmen with liquid cash, managed to acquire thousands of acres (Box 2). The process created a new African elite, which left the penniless scrapping for tiny pieces of land.

The general result was that the majority of the people who were actually settled were not necessarily the landless people who had provided the political impetus for those schemes. The beneficiaries were those who had accumulated some cash through farming, small business ventures, wage employment or sale of their existing holdings. Some people in

How prominent Kenyans got prime white settler farms

The genesis of the infiltration of the scheme by the “big fish” arose from an order by President Kenyatta in early 1964 that all colonial farmhouses together with 100 acres surrounding the farmhouses be reserved for “prominent people” alongside poor farmers in the settlement schemes. The idea of farmhouses and the 100 acres, called the “Z plots”, was unknown to the British government, which had given loans for the purchase of the farms to be allocated to the landless. The Z plots became an avenue for politicians to settle their kin and kith and get choice land for themselves. So scandalous was the sale of these houses that the British government appointed a commission in July 1966 to investigate the Million-Acre Settlement Scheme and what went wrong. This type of farmer, according to the British government, could have acquired land by private means without using the scheme funds.

On 23 April 1965, Dr. Julius Kiano, then Commerce and Industry minister, wrote a confidential letter to the Ministry of Lands permanent secretary, Peter Shiyuka, asking to be allocated a farm house in Dundori that had previously belonged to a Mr. Fitzmaurice, a white settler. Dr. Kiano wanted to purchase the “main house, the guest house and dairy premises together with approximately 100 acres around it”, not for his own use but to settle his sister, Mrs Penina Waithira. On 18 May 1965, Martin Shikuku, then MP for Butere, asked the Minister for Lands to be allocated Fraser’s house in Kiminini Scheme. On his part, former President Moi (then a cabinet minister) in 1966 applied to get Gunson’s house within the Perkera Scheme in Eldama Ravine. By July 1966, there were 296 plots excised and allocated to personalities including President Kenyatta, Minister Jackson Angaine, Assistant Minister Mwai Kibaki and Permanent Secretary Robert Ouko, among others.

Source: J. Kamau, (2009a, Daily Nation Special Reports, 11 and 12 November).

Central Province, for example, simply disposed of their land or assigned it to relatives in order to qualify for the cheaper and comparatively larger settlement plots in the Rift Valley. The land loan represented about 90 per cent of the subsidized purchase price of land to settlers in low-density schemes and 100 per cent in high-density schemes. By 1968, a total of 30,000 people had been settled on the scheme (mostly on 5–20 acres). Ironically, their numbers included President Kenyatta (216.5 acres) and Minister Jackson Angaine (252 acres) (J. Kamau, 2009b).

Besides individual applicants for the scheme, land buying companies were formed comprising mainly the farming communities of Central Province that freely bought land on offer from the Europeans. One such company is reported to have “settled their kin on 51,539 acres of land in Laikipia, 21,050 acres in Njoro and Nakuru, 1,200 acres in Molo, more than 4,000 acres in Bahati area of Nakuru and 1,400 acres in Mau Narok, all parts of traditional Maasai

territory” (Tiampati, 2004: 9). By the time the Million-Acre Settlement Scheme was completed in 1971, a total of 1.25 million acres had been used in resettlement, a comparatively small portion of the 7.5 million acres occupied by the Europeans at the time of independence. Since then, no other settlement programme of the same magnitude has been initiated to address the unequal distribution of land, although private land purchases continued, mainly by politically powerful Kenyans and their associates. This skewed distribution of land has created tensions between the big landowners (today mainly rich Kenyans) and the landless (Mortensen, 2004: 5). More importantly, tensions between indigenous residents of the Rift Valley, where the White Highlands are located, and those who were resettled there under the Million-Acre Settlement Scheme as well as other private

This skewed distribution of land has created tensions between the big landowners (today mainly rich Kenyans) and the landless

purchases, have escalated as land has become increasingly scarce.

The mode of resettlement and evolution of agrarian activities in the settlements where some tribes, principally the Kikuyu from central Kenya, were seen to be doing better than others gave rise to resentment by local communities, particularly in the Rift Valley, who did not benefit from the arrangements of resettlement. As ‘outsiders’ (also called *madoadoa*), they are vulnerable because their rights to land are contested. These ‘outsiders’ now comprise not only the resettled people, but also people who bought land through either land-buying companies or other private transactions (see Box 3). For example, some labourers on European farms or forest workers saved up and bought land as it became available from outgoing Europeans (Leo, 1989). Within the context of entitlement, this latter group genuinely acquired the land and should perhaps not be lumped together with those “assisted” through the Million-Acre Settlement Scheme.

Another group of landowners who may be unfairly accused are the first families, who by virtue of their access to resources reportedly own large tracts of

land. In the context of entitlement and distributive justice, nothing is wrong with ownership of large tracts of land provided that nobody was disadvantaged in the process of acquisition and, more importantly, that the land is used productively for national development.

4.2.2 Poor land allocation reportedly fuelled ethnic tension

While in later years Kenyans witnessed the grabbing of public land by politically well-connected personalities, in the early years, the skewed land allocation and grabbing mainly involved the farms owned by Europeans. The major concern was the ethnic dominance and concentration in the allocation. In the Rift Valley, for instance, the Kikuyu were seen as outsiders even though the majority had purchased the land they settled on. Nothing demonstrates the ethnic tension fuelled by skewed land ownership in Kenya more than the findings of the Akiwumi Commission of Inquiry established in 1998 to investigate the ethnic clashes related to the 1997 elections (Akiwumi Commission, 1999). The Commission reports that as early as 1957, the settlement of the Kikuyu community in the ancestral Kalenjin areas of larger Kericho district (Londiani, Kipkelion, Fort Tenan) had reached significant levels, with the District Commissioner’s annual report noting that tension was already growing between the two communities over land (Akiwumi Commission, 1999: 15).

With respect to the 1992 and 1997 violence, the Akiwumi Commission found evidence that long-standing Kalenjin aversion to strangers (especially the Kikuyu) living in their midst and on their ancestral land, which in colonial times had been set aside for European settlement, was exploited for political gain during elections. In the 1992 violence, for instance, the country plunged into chaos as a result of trouble between the Nandi and the Kikuyu farmers in a farm called Miteitei situated in Nandi district. According to evidence adduced before the Commission, politicians used a majimbo (federalism) campaign before the elections, not to advocate for

Land buying companies

Records now show that the Kiambaa Farmers Cooperative bought the 500-acre Kiambaa Farm in Eldoret in 1965 from one Giuseppe Morat. This was the scene where arsonists torched a church during the violence that erupted after the 2007 general elections. Another farm that has always been synonymous with tribal clashes since 1990 is the 1,636-acre Kamwaura Farm in Molo, bought in 1976 from a Lionel Caldwell who was leaving the country. Other big companies that bought land include Ngati Farmers Cooperative, which bought 16,000 acres in 1965 in Naivasha, and Kipsitet Farmers Cooperative, which bought 2,302 acres in Kericho.

Source: J. Kamau (2009a: *Daily Nation Special Reports*, 11 November).

federalism in the true sense of the word, but as a means to compel communities to return to their ancestral district or province. If for any reason they were reluctant or unwilling to go, they would be forced to do so through violent means (Akiwumi Commission, 1999: 10).

The same phenomenon could be said of the volatile larger Nakuru district, comprising Molo, Njoro and Naivasha, where as early as 1961 tension was noted by the then District Commissioner in his annual report. In the report, the District Commissioner explained that 'inter-tribal tensions [during the year had] increased markedly', with Kalenjins aiming to flush out Kikuyus from what they regarded as Kalenjin ancestral land. This situation was not made any better during the Million-Acre Settlement Scheme. In Nakuru, settlement farms were bought by tribal-based land-buying companies and societies with the result that in those farms one would find occupants wholly from one community. In these areas, political objectives were used to stir up and spur on the Kalenjin desire to regain their land (Akiwumi Commission, 1999: 54).

The findings of the Akiwumi Commission were later corroborated by the report of the Commission on Investigation of Post-Election Violence – the Waki Commission (GOK, 2008). The report noted that the constitutional liberty to own land anywhere in Kenya is merely *de jure*, but does not exist on the ground. Creation of districts has largely been ethnic-based, creating exclusive sub-national enclaves akin to 'native reserves' in which there are 'insiders' (ancestral land owners) and 'outsiders' (migrants) (GOK, 2008: 31). The Waki Commission concluded that the overt and covert pursuit of homogeneity (read concentration) in land allocation and acquisition has led to a type of 'residential apartheid' as Kenyans move into more ethnically homogeneous areas even within urban centres. This state of affairs has been tapped by politicians and has indeed spread to informal settlements in Nairobi, with Luos in Kibera and Kikuyus in Mathare.

4.2.3 Land grabbing phenomenon in the 1980 and 1990s

During the colonial period, the 1915 Crown Lands Ordinance regulated the manner in which government land could be allocated to individuals or corporations for development. The method of disposal was mainly through public auction, unless the Governor directed otherwise. Leasing for agricultural purposes was not to exceed 5,000 acres (2,000 hectares), except under special circumstances when the Governor could allow up to 7,500 acres (3,000 hectares). Later, in 1951, a circular was issued to change the allocation of land in townships from public auction to direct grants with the assistance of a local committee, while in municipalities the allocation would be by tender through public advertisements inviting those who were interested and met the set criteria (Okoth-Ogendo, 1991: 34, 42).

The provisions for allocation of government land provided for under the Government Lands Act of 1963, which superseded the Crown Lands Ordinance after independence, are similar, except that there are no limits to the acreage to be leased to an individual person or corporate body. Section 12 of the Act, for instance, provides that the town plots be sold by public auction, unless the President otherwise orders in any particular case or cases. Other options included tendering or direct grant. The public auction and tendering approaches, as opposed to direct grants, had upheld transparency in the availability of plots since the plots were advertised with indications of the conditions required for qualification. A successful applicant would then be given a letter of allotment by the Commissioner of Lands stating the fees to be paid to the government and any other conditions, such as not being allowed to transfer the land without it being developed in the first instance. With the passage of time, however, and particularly from the 1980s, the substantive and procedural safeguards in the

The public auction and tendering approaches, as opposed to direct grants, had upheld transparency in the availability of plots since the plots were advertised with indications of the conditions required for qualification.

allocation of land were blatantly disregarded as no public auctions of the plots ever took place.

It is important to note that during the colonial period and in the early years of independence the letters of allotment given to qualified applicants were never transferable to a third party, since such letters did not create an interest to be traded until registration was completed. In 1994, with allocations being mainly through direct grants, the government (under Legal Notice No. 305 of 1994) allowed for the 'selling' of allotment letters to third parties on payment of consent fees equivalent to 2 per cent of the selling price or capital value of the land, whichever was higher. It was this provision that fuelled the "land grabbing" mania in the country, where people would

be allocated land and immediately make arrangements to sell it for millions of Kenya shillings without first paying, the standard premium (calculated at 20 per cent of the assessed value of the land, with the balance of 80 per cent to be paid in the form of ground rent at the rate of 5 per cent per annum). The purchaser of the allotment letter, however, paid for full value of the land and then continued to pay the annual ground rent as stipulated in the letter of allotment and the subsequent lease. Most of the illegal allocations of public land took place just before or soon after the multi-party general elections of 1992, 1997 and 2002 through direct grants as political

reward or patronage, rather than public auction or tendering. Indeed, the Mau Forest Task Force reported that very prominent people had acquired land in the forest catchment area that had been set aside, ostensibly to settle squatters. A list of land allottees in Kiptagach Extension Settlement Scheme showed prominent government officials and political leaders who were each allocated land, some in excess of 5,000 acres (Okwembah, 2009).

During Mahihu's time, however, he made the recommendations for allocation directly to the Commissioner of Lands to facilitate the acquisition of beach plots by powerful individuals, mostly from outside Coast Province.

4.2.4 Role of provincial administration in land grabbing

There are situations in which – contrary to the provisions of the law – land was allocated by officers and persons without authority to do so, particularly the provincial administration and politicians. Land was no longer viewed as belonging to the Kenyan people, but as vacant space to be dished out to politically correct individuals for personal enrichment without being made known to the public or other interested purchasers. This practice not only created inequalities in land ownership, but also interfered with such protected lands as forests, wetlands, riparian reserves, the foreshore, and historical sites and monuments. These lands were indiscriminately allocated.

A case in point of such irregular allocations is that involving the Provincial Commissioner for Coast Province in the late 1970s, Mr. Eliud Mahihu, who allocated beach plots along the Indian Ocean coast. Ordinarily, people wishing to acquire a beach plot for development would apply to the Registrar of Titles in Mombasa, who would then forward the same to the Commissioner of Lands for consideration and appropriate recommendation (Box 4). During Mahihu's time, however, he made the recommendations for allocation directly to the Commissioner of Lands to facilitate the acquisition of beach plots by powerful individuals, mostly from outside Coast Province (M. Kamau, 2009: 4).

More recently, there have been cases of many individuals being forcibly evicted from their land following land conflicts. Often the land conflicts are reignited around election times, as happened in 1992, 1997, 2002 and 2007. It is estimated that during the 2007 post-election violence, over 140,000 households comprising 663,921 individuals were displaced from their land (Ministry of Special Programmes, March 2009, as cited by the Kenya National Dialogue and Reconciliation [KNDR] Monitoring Project, 2009). Many of them are yet to be resettled because of the rampant

corruption witnessed in the government re-settlement programme (Ngunjiri, 2009).

According to Ngunjiri (2009: 3), corrupt officials at Kenya's Rift Valley provincial land adjudication and resettlement office, working with rich crooks, are selling land bought by the government to resettle internally displaced people to the highest bidder. With between Kshs.s 65,000 and Kshs.s 90,000, and the right connection, one is legally acquiring a 2.2 hectares (five acres) piece of land within minutes. The price Ngunjiri notes is below market price, which ranges between Kshs.150,000 and Kshs.200,000, depending on the locality.

4.2.5 Slow land adjudication and dispute resolution procedures

In the 1994–1996 National Development Plan, the government of Kenya observed that previous development plans treated land administration and management rather casually, as no specific implementation proposals on land were reflected in the plans. For instance, while an independent Land Commission has been proposed since the 1970s, none has been set up. As a result, the weaknesses in land administration and management remained largely unresolved (GOK, 1994: 107).

First, although some 2.4 million titles have been issued under the land adjudication and registration programme in the rural areas that started in the 1950s with the Swynnerton Plan, 90 per cent of them are for plots in medium to high potential areas, which account for only 20 per cent of the total land area of Kenya. The low potential areas therefore remain marginalized.

Second, in the areas where the adjudication had started, particularly in parts of Eastern Province, more than 23,000 land disputes are pending and continue to delay registration, thus hampering economic development in these areas. Third, in areas where registration was completed and titles issued, land boundary disputes are prevalent, and the numbers are increasing annually because of the poor handling

Role of provincial administration in land grabbing

Seven years after independence, President Kenyatta issued a quiet decree on the acquisition of beach plots and what came to be known as second-row plots. Only Coast Provincial Commissioner, Eliud Mahihu could identify and recommend those qualified for these plots. The reality was that those who earned Mahihu's favour were highly placed political and civil service elites and their business associates.

Mahihu used his position to feather his own nest – building a multi-million shilling empire that made him one of the richest people in independent Kenya. He owned expansive land in Coast Province, including prime beach plots and hotels on the vast stretches of the Indian Ocean coastline. His signature meant the difference between being the proud owner of a beach plot or not, as he had the sole responsibility of approving purchases. Even Charles Njonjo, the former powerful Attorney General, wrote to Mahihu on government letterhead in both English and Kikuyu as he sought help for his friends.

Having very few people of their own in the right offices, the coastal communities largely missed out on the ensuing scramble for the beach plots, now worth billions of shillings. Coast Province bears the dubious distinction of having the largest number of squatters in Kenya – an anomaly that started in the colonial period, but which was deepened by the Kenyatta government. The land grabbing by the independence elite disinherited millions of Coast residents, planting seeds of discord in the province.

Source: J. Kamau (2009b: 26).

of the disputes. It should be noted here that title registration through the Land Adjudication Act is not based on cadastral surveys but on approximate aerial photos that require ground adjustment. The backlog of unsettled boundary cases both upcountry under the Registered Land Act (Cap. 300) and at the coast under the Land Titles Act (Cap. 282) exceeds 16,000. Finally, there are many cases of squatters in both rural and urban areas. In the rural areas, the cases are more dominant in Coast and Rift Valley

provinces, while in urban areas the cities and large municipalities are the victims of squatter and unplanned settlements.

4.3 Size and significance of contested of public land allocation

In Kenya today, individuals, households and corporate bodies access land through market and non-market mechanisms. Some of the non-market mechanisms through which individuals or other legal entities own land are state grants and inheritance; the market mechanisms include purchase or lease. The problem, however, is that the market and non-market means of owning land have had a weak

regulatory framework and this has resulted in their manipulation, leading to unjust and inefficient outcomes of land acquisition and transfer. As a result, individuals and businesses do not have equal opportunities of accessing land for occupation and use. This interference in the market and non-market mechanisms of owning land is seen as the key contributor to landlessness, historical injustices and inequality in land distribution.

As it stands, Kenya's total land area is 582,000 square kilometres for an estimated population of 40.4 million. Of this land mass, 17.7 per cent (68.1 square kilometres)

is currently occupied by water surfaces, national parks, game reserves and forests (GOK, 2004). Only 16.7 per cent of the remaining land is classed as high potential, with another 13.3 per cent classified as low to medium potential suited to ranching or irrigation. The bulk of Kenya's land – 70 per cent – is nomadic pastoral land with less than 300mm (10 inches) of rainfall per year (Syagga, 2006: 310). As a result, the bulk of the population is thus concentrated

in the south-western part of the country, covering some 25 per cent (14.55 million hectares) of the land area, with resultant high population densities (4,842 persons per square kilometre in Nairobi Province, 580 in Western, 466 in Nyanza and 370 in Central).

Besides the high densities, data from the national statistical office (GOK, 2007) show that a significant number of people in Kenya are landless – 28.9 per cent of the total population (including 89 per cent of urban and 13.6 per cent of rural populations) – while 32 per cent of the population live on less than 1 hectare per household and only 5.3 per cent own more than 5 hectares of land. This supports an earlier finding by El Ghonemy (1990) that cited the 1981 census of agriculture and gave the Gini coefficient of land concentration in Kenya as 0.77.

At the time, of the total number of 2.1 million holdings in the small farm sector, 83 per cent were less than 2 hectares. On the other hand, the large farm sector of only 2,192 holdings comprising 100 hectares and above, accounted for over 2.6 million hectares of the high potential land. Indeed, some of the leading families in Kenya reported as large-scale farmers individually own as much 90,000 hectares (221,000 acres) of land (Kahura, 2004).

Initiatives to establish and expand the individual property systems of smallholders have not improved the overall pattern of land distribution. The political and economic elites have retained significant control of land ownership through market purchase, government credit arrangements and political rewards, with the resultant high degree of land concentration, which seems to increase with impunity rather than reduce. Yet the evidence shows that there is a correlation between land holding and poverty in Kenya. The regions with a high proportion of landless households also have high poverty levels (Syagga, 2006).

It is these issues that bring into sharp focus the continued illegal and irregular allocation of public

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land, which the Ndung'u Commission conservatively estimated at 246,964.79 hectares or 2,470 square kilometres. Table 1 provides the status of public land from both central government and local authorities in Kenya in 1995. By that time a total of 72,943 square kilometres (7,294,300 hectares) of public land had been alienated (allocated on leasehold basis) in the form of farmland, including the Million-Acre Settlement Scheme described above. In addition, another 4,643 square kilometres (464,300 hectares) of land had been alienated in urban areas (indeed,

the total urban land area in Kenya is less than 1 per cent of total land area, but accommodates more than 25 per cent of total national population).

At the time of data collection, only 62,000 square kilometres (6.2 million hectares) of public land remained unalienated; of this, 53.87 per cent was trust land held by local authorities and only 46.13 per cent was held by the central government. Rampant land grabbing has taken place since 1995, particularly with respect to central government land

Table 1: Distribution of government land and trust land by use in square kilometers (2009).

a.) Distribution of government land by use in square kilometres								
Region	Forest	Townships	Alienated land	Unalienated land	National parks	Open water	Others	Total
Kenya	9,116	2,831	38,546	28,598	24,067	10,960	2,136	116,254
Nairobi	21	93	225	16	117	-	77	549
Central	2,541	156	1,505	28	900	3	155	5,288
Coast	454	838	15,202	19,979	15,065	563	1,022	53,123
Eastern	1,289	227	3,148	8,397	7,721	4,131	452	25,365
N. Eastern	-	-	-	-	-	-	-	-
Nyanza	-	179	113	1	-	3,480	23	3,796
Rift Valley	4,195	1,338	18,353	177	262	2,646	404	27,375
Western	616		-	-	2	137	3	758
b.) Distribution of trust land that is not available for smallholder registration by use and region in square kilometres								
Kenya	7,084	1,812	33,397	13,810	3,030		492	59,625
Nairobi	-	-	-	-	-		-	-
Central	9	94	102	-	-		163	368
Coast	63	214	3,881	1,687	-		52	5,897
Eastern	789	546	647	4,203	2,484		244	8,913
N. Eastern	-	396	202	3,142	-		-	3,740
Nyanza	1	285	177	119	-		5	587
Rift Valley	5,964	154	28,387	4,659	546		21	39,731
Western	258	123	1	-	-		59,625	389

Source: *Statistical Abstract (GOK, 2009)*.

and to a lesser extent in the trust land areas. It is mind boggling to many Kenyans that as public land dwindles in size, as much as 247,000 hectares (about 1 per cent) of it was being allocated illegally and irregularly for speculative purposes. The cumulative loss of public land grabbed is estimated at Kshs.53 billion (KNCHR and KLA, 2007). Some of this land is now being sold back to the government at very high prices, such as the 8,232 acres of land bought in Molo to settle internally displaced persons (IDPs), which had been listed by the Ndung'u Report and recommended for repossession (Ngunjiri, 2009). As a result, the government is being accused of buying land from individuals who stole it from the public, hence legitimizing the theft. According to Ngunjiri (2009: 3), it is this same land that corrupt officials at Kenya's Rift Valley provincial land adjudication and settlement office, working with rich crooks, are selling to the highest bidder (at Kshs.65,000–90,000), who thus acquire 2.2 hectares (5.0 acres) of land within minutes, instead of the IDPs.

5.0 Comparative Study of Land Reforms in Post-Colonial States

In the past decade or so many countries have been involved in land reforms to strengthen land rights, enhance productivity, secure livelihoods of all citizens and ensure political stability (UNECA/AfDB/AU, 2007). A common characteristic of all land reforms, however, is the modification or replacement of existing institutional arrangements governing the possession and use of land, principal among them being,

- *Land restitution* to provide for a process of restitution arising from past land injustices;
- *Land tenure reform* to provide for improved and diverse forms of tenure security for all;
- *Land redistribution* to provide the disadvantaged

and poor with access to land for beneficial use and occupation; and

- *Institutional reform* to provide for democratic governance of land.

Lessons from the countries, such as Rwanda, South Africa and Namibia, that have been pursuing land reforms indicate that public awareness is critical if the reforms are to succeed. An awareness education needs to begin during the process of policy formulation to allow citizens to articulate areas requiring reforms, as well as make proposals on how best to mitigate the pitfalls identified. While this path was taken by Kenya in the search for land reforms that made the process of land policy formulation participatory, the role of vested interests of past beneficiaries of bad land management practices seems not to have been considered, with resultant potential for undermining the reforms. This can be countered by concerted efforts by both state and non-state actors to explain the wider social, economic and environmental benefits of land reform, such as reducing poverty, contributing to economic development, and enhancing national social and political stability. Such education should allay the fears the public has of politicians and those who incessantly oppose land reform in order to protect personal rather than national interests. The administrators, particularly those in land management and administration, need to be persuaded to perceive the changes in proposed land reforms as a career opportunity rather than a threat to their employment.

5.1 Reparations and restitutions in land reforms

Reparations are defined as a 'legal remedy from a wrong doer to a victim, but without constraints of identity between the victim and the beneficiary' (Tucker-Mohl, 2005: 3). Thus the people paying reparations do not have to be the people who committed the wrong, nor do the people benefiting from the reparations have to be the people who were themselves harmed. A common application of reparations is a transitional justice situation in

which a new government holds itself responsible for the actions of a previous government.

In the context of land and property, the term used is “restitution” as a subset of reparations. Restitution refers to restoring or taking to its original status a property right that has been diminished, or providing a form of compensation if this is not possible. Countries often seek restitution when citizens have been harmed or have benefited unfairly at the expense of others, or both, in contradiction to principles of entitlement. Although currently land reforms involving restitution are taking place in many countries, including South Africa, Germany, Hungary, Australia, Estonia, New Zealand and Canada, the successes have varied depending on the methods used in implementation. South Africa and Hungary are reported to have achieved greater successes than other countries. This relates in part to the time frame: A rural claim may take 5 years to settle in South Africa, but in Canada the average land claim is settled in 15 years and in Australia and New Zealand one claim can take 15–20 years to be settled (Apel, 2007).

5.1.1 Land restitution process in Hungary

As reported by Tucker-Mohl (2005), during the years of the communist regime in Hungary, as elsewhere before the fall of the Soviet Union, a lot of land had been expropriated. Subsequently, however, a restitution policy was adopted to compensate those affected, and it was universally accepted to substitute monetary restitution for actual restitution of land. Two institutions were set up, the Compensation Office to examine and assess the claims and recommend how much money should be paid, and Land Allocation Committees to allocate collective farms being sold in auctions through privatization to those compensated who wished to purchase the land. Unlike in other countries embarking on restitution, in Hungary restitution based on monetary compensation was swift. The matter of what to buy was out of government hands and rested with individuals who were informed about

which properties were available in both urban and rural areas.

5.1.2 Land restitution processes in South Africa

In South Africa, land restitution was embodied in the Interim Constitution of 1993 and the subsequent 1996 Constitution, and implemented through enabling legislation, i.e., the 1994 Restitution of Land Rights Act (RLRA). The law defined who qualifies to make a claim and set the cut-off date for claims to be 1913, the year of enactment of the Native Administration Act, a racially discriminatory law that confined the blacks to ‘Bantustans/homelands’ (Dorsett, 1999). No claims would be entertained if just and equitable compensation was paid at the time of dispossession. All claims had to be lodged within five years and the whole exercise completed within ten years. Under the RLRA restitution could take any of the following forms: restoration of the land or a right in the land for which the claim was made; alternative state-owned land; inclusion of claimant as a beneficiary in a state support programme (housing or development of rural land); monetary compensation; or some form of alternative relief.

Two bodies were created to handle the restitution claims, the Restitution of Land Rights Commission (RLRC) and the Land Claims Court. The RLRC received and screened all claims – which had to be lodged by December 1998. It therefore did all the paper work including verification, notification of interested parties, preparation of project plans for claimants, monetary value of claims, preparation of negotiation positions and representation in court as appropriate. It also provided post-settlement support to claimants including settlement planning, land

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transfer and secure development funds, or financial compensation or other forms of redress if land was not restored. Only matters not resolved by the RLRC were referred to the Land Claims Court. The Land Claims Court was set up as a special court to hear not only claims under the RLRA (1994), but also matters arising under other acts designed to implement other facets of the land reform process (including land tenure reform, land redistribution).

In short, land restitution would require a case-by-case assessment and probably negotiation with the landowners and parties claiming ownership.

In terms of progress, by the deadline of ten years (31 March 2008) set for completion of the restitution process, a total of 79,696 claims had been lodged and only some 4 per cent of the claims remained to be finalized. The process had delivered more than 606,000 hectares (1.515 million acres) of land, most of which is agricultural and conservation land, at a cost of more than Rand3.3 billion (around US\$440 million), with more than 123,000 households (750,000 people) benefiting from the programme.

The cases that remained unresolved arose from a number of constraints, ranging from increased land costs (budgetary shortfalls) and claims referred to Land Claims Court for adjudication, to delays in producing identification documents to support claims and opposition to restitution by current land owners. Kenya needs to learn these lessons if the provisions of the new Constitution (Section 68(c)(v) and the National Land Policy (Section 3.6.1.2) on restitution are to be realized.

5.2 Redress in Respect of Disputed Public Land Allocations

While the Land Claims Court proposed for Kenya should ensure due process for claims related to historical land injustices for both individuals and public land, the question of “third party

purchasers in good faith” will be critical. Land restitution involving land that has been transferred to third parties must be treated with caution. As the Africa Centre for Open Governance observes, the government is not clean on such transactions, since it failed to guarantee the correctness of title (Africog, 2009). It would be unfair to penalize third parties for the failures of government. Besides, the third parties may have made significant investment in the claimed land. Whereas entitlement theory would recommend dispossession of such third party owners, such action would not necessarily lead to efficient outcomes. The state, therefore, should pursue different strategies to resolve the land restitution claims. For example, where land under claim is still in the possession of the original allottee and has not been passed on to third parties and has not undergone significant developments, the state could consider restoration of the land under claim. The rules of dealing with such cases must be clearly spelt out in law and regulations so as to ensure fairness and quick resolution. In addition, the process must guarantee public participation.

If ownership of land under claim has been passed to innocent third parties, the state could enter into voluntary agreements with landowners to purchase privately owned land on behalf of the claimants. For land on which significant investments have been made, the state should grant alternative land or provide financial compensation to the claimants. This would require special legal arrangement that would provide for alternative mechanisms for compensating those who may have been deprived of their rights to land. In short, land restitution would require a case-by-case assessment and probably negotiation with the landowners and parties claiming ownership. Table 2 provides possible options for dealing with restitution claims in the Kenyan context.

5.3 Land redistribution reforms

While the land restitution programme aims to restore land rights lost as a result of historical injustices, land redistribution aims to provide the disadvantaged

Table 2: Options for dealing with land restitution claims and disputed land allocation claims

Activity	Just and/or efficient outcomes	Unjust and/or inefficient outcomes
<i>a.) Institutions to deal with land restitution and disputed public land allocations</i>		
Independent agency to deal with land restitution	Appointment of the agency to involve Parliament and the Executive; public must have unlimited access to the agency; agency must be accountable to the public and it must have authority to make binding decisions	Appointment of agency by the executive, public has limited access to the agency; weak reporting and accountability mechanisms; agency has no authority to make final decisions
Arbitration of land claims	Special court at the level of the High Court to facilitate speedy delivery of land claims	Administrative procedures to deal with land claims other than High Court
Financing	Adequate financing of land reforms	In adequate financing of land reforms
Land banking	Voluntary donation or sale of land to the government by the public	Unwillingness of the public to donate or sell land to government; arbitrary and compulsory acquisition of land
<i>b.) Land restitution claims when land under claim has not passed on to third parties</i>		
Illegal and irregular land acquisition with no developments on the land	Restoration of land under claim	Any form of compensation to landowners
Illegal and irregular land acquisition with developments on the land	State should negotiate with landowners on behalf of claimants and seek financial compensation from the landowners. State should then provide grants of alternative land or financial compensation to the claimants	Restoration of land under claim; no grants of alternative land; no financial compensation
Non-cooperation from current land owners	State should use compulsory acquisition procedures, or any other due process provided under the constitution for recovery of such land	Use of extra legal procedures
<i>c.) Land restitution claims when land has been legally transferred to third parties</i>		
If there are no developments on the land	Negotiate modalities for surrender of land and reasonable form and level of compensation, or third parties to pay full market price where they did not do so, particularly in case of public land	Compulsory purchase of land from third party or takeover without compensation
If land has significant levels of developments on it	Negotiate a reasonable purchase price with landowners on behalf of claimants; or owners pay full price for the land where they did not do so	Compulsory purchase of land from third party or takeover without compensation
Where state needs the land	State should use expropriation orders to acquire land. This should be preceded by a process of identifying potential land for expropriation.	Failure to use state powers of expropriation will stifle strategic public projects such as airports, power stations, roads, water projects, etc.

and the poor with access to land for beneficial use and occupation. Redistribution involves taking land from large landholders, often absentee landlords or land that is underutilized, and giving it to those who do not have land. This can be done through a market approach in which government buys out large landholders on a willing buyer/willing seller basis, or through the use of eminent domain (expropriation/compulsory purchase), and allocates the land to deserving households at market or concessionary prices.

The laws empower the state governments to take possession of land in excess of the ceiling, and to redistribute the excess land to the landless. The laws vary from state to state, but have been mostly ineffective for several reasons.

In South Africa, for instance, whenever land was identified, the RLRC (as in the case of restitution) assisted the buyers with necessary documentation and business proposals. Buyers who earned less than R3,500 (US\$470) per month were given a grant of R15,000 (US\$2,000) per household towards the purchase of the land (Lahiff, 2009). Although described as slow, this process saw some 250,000 hectares sold to 19,736 black farmers by the end of 2007.

Similarly, in Namibia, where land redistribution is on the basis of willing buyer/willing seller, 5 million hectares have been purchased so far by black farmers through the Affirmative Action Loans Scheme administered by Agribank to provide targeted subsidized credit to formerly racially disadvantaged groups to assist them in buying farms from the whites (Donge et al., 2005). Sale of land to non-Namibians is not possible, except land in the hands of a company whose shareholders may be abroad. A second scheme for the poor is the Resettlement farms for individuals and groups; here, the government purchases farms on willing buyer/willing seller basis for resettlement of poor people. The process is slow, however, and unable to keep up with high public demand for agricultural land. Only some 800,000 hectares have so far been purchased to settle 37,000 people, while 240,000

Namibians are awaiting resettlement (Banville, 2004).

In both Namibia and South Africa, the governments have been accused by their supporters of not delivering land fast enough. Both governments have proposed to select farms that they felt were underutilized or excessively large, as well as those belonging to individuals with multiple farms, and to force owners to sell. This method has also been used in Rwanda since the adoption of a land policy in 2003 that set the maximum land size one can own at 25 hectares. President Kagame formed a taskforce comprising senior officers from both the Rwanda Defence Force (RDF) and the National Army, together with officials from the Ministry of Lands, Environment, Forests and Water, to identify areas with excess land that could be purchased for redistribution to people in districts experiencing high land pressure. The President presided over a ceremony at which formerly landless people were given 5 hectares each from farms in Eastern Province that had been surrendered by some top public officials in July 2008 (GOR, 2009).

In India, all Indian states also adopted land ceiling laws that limited the amount of agricultural land an individual or family can own. The laws empower the state governments to take possession of land in excess of the ceiling, and to redistribute the excess land to the landless. The laws vary from state to state, but have been mostly ineffective for several reasons. First, outdated and incomplete land records made implementation of the ceiling laws difficult. Second, landowners took advantage of the loopholes in the law. Third, the inadequate compensation paid for the appropriated land made the programmes unpopular among the landowners. Fourth, land distributed by the states often benefited only a small percentage of landless families.

In Brazil, land for redistribution was mostly acquired through expropriation. Prior to the expropriation programme, all landowners, regardless of the size of their holdings, were invited to declare details about

their farms. These farms were then classified into four broad categories based on size and use. Only the large and unused farms were earmarked for expropriation. The land expropriation programme was paid for with funds raised through the issuance of a 20-year public bond (Navarro, 2009).

In Kenya, where land ownership is heavily skewed, the resource requirements are certainly going to be huge, in terms of acquiring alternative land to compensate those whose titles are revoked as well as financing the operations of the institutions involved in land restitution. The land redistribution programme should be done in phases, with objective criteria and a plan put in place prior to commencement of the programme. The criteria for phasing the land restitution programme must be publicized to ensure transparency and fairness.

5.4 Institutional reforms

Many countries in Africa are devolving land administration and management (UNECA/AfDB/AU, 2007). For instance, Rwanda's 2003 land policy introduced land administration by local governments at district level and dispute resolution using indigenous mechanisms. In Uganda, the Land Act of 1998 introduced customary land certificates and a decentralized system of District Land Boards, Local Committees and Tribunals, while in Ethiopia the 1997 Land Law () enables each state to develop its own decentralized land policies and laws. The land policy in Ghana (1999) created a new single land agency with Customary Land Secretariats and introduced Alternative Dispute Resolution (ADR) systems, and the 1998 Namibia Land Policy introduced decentralized land administration systems for urban and rural areas, including controlling and ratifying land allocation by chiefs.

Kenya's new Constitution gives the NLC the mandate to manage public land on behalf of national and county governments, among other functions (Section 67). The Constitution does not, however, provide for regulations on how best to make the NLC effective.

Implementation of the land reform provisions of the new Constitution faces numerous obstacles in the form of governance and political economy risks. The realization of the objectives of the Constitution will therefore depend on how well the reforms are insulated from unnecessary political interference.

To ensure success of the land tenure reforms, the government must take measures to convince the general public of the legitimacy of the reforms by enhancing transparency and accountability. In this regard, it is imperative that the appointment of the NLC board and the recruitment of the chief executive and other senior officials of the NLC be conducted in a transparent manner. The enabling legislation ("NLC Act") should be clear on how these appointments will be carried out. It is also important that the independence of the NLC be guaranteed in law while at the same time requiring the Commission to be accountable to the public. Stringent reporting and accountability requirements will compel the NLC to adhere to the land laws. The process of drafting the NLC enabling legislation must also be consultative and should involve professionals, the private sector and civil society to guard against possible capture by the political elite who have demonstrated vested interests in land reforms. Similarly, there is need for consultative detailed work to be carried out on legislative reforms to revise, consolidate and rationalize existing land laws, and prepare appropriate draft bills for land administration and registration for consideration and enactment by Parliament before NLC comes into being so as to avoid delay in the implementation process.

The NLC must have sufficient powers to promptly punish individuals or corporate entities that contravene the land laws. Thus the law creating NLC

There is need for consultative detailed work to be carried out on legislative reforms to revise, consolidate and rationalize existing land laws, and prepare appropriate draft bills for land administration and registration for consideration.

Political and economic elites have taken advantage of their position to allocate themselves and their cronies land classified as public land, thus denying the non-elites equal opportunities in land acquisition.

must be specific on how to deal with impunity in land management and administration. To ensure good governance in land administration, an automated land information management system (LIMS) is a prerequisite. This of necessity requires authentication and updating of all manual land records prior to the automation of the records. In addition, the automated system must integrate all institutions involved in the administration and management of land through establishment of a National Spatial Data Infrastructure (NSPDI) to ensure integration of access to spatial data sets held by different national and sectoral agencies. Equally important is the need to establish a monitoring and evaluation framework to track the implementation of the land reforms. And, it should go without question that financing for the NLC must be guaranteed in law.

and allocated land irregularly and illegally, leading to unfair public land allocation and landlessness. This has led to the infringement of peoples' entitlements to land access and ownership, which to date remains largely unresolved.

Other political and governance problems that have contributed to the infringement of peoples' entitlement to land access and ownership include: distortions in competitive politics, the indiscipline of political parties, and weak oversight mechanisms for land transactions and professionals handling land transactions. Problems are exacerbated by a rogue, corrupt and incompetent bureaucracy (comprising the officials of the provincial administration and the Ministry of Lands) along with ethno-regional collective action that fuels land conflicts and therefore land dispossessions. Other factors are weak dispute resolution mechanisms; weak regulations that allow patronage politics and land-based rent-seeking to thrive; and limited democratic space for public participation in land administration and management.

6.0 Recommendations for Policy and Legislation

Land injustices in Kenya predate independence, and the post-independence governments did not make any effort to redress the problems created by the colonial government. Instead, successive governments facilitated land grabbing by a few political and economic elite at the expense of the non-elites who are the significant majority.

It is also evident that political economy and governance issues are to blame for the sorry state of the land sector. For example, executive institutions, in particular the President and the Commissioner of Lands, have had unwieldy powers in land administration and management. Often the President and the Commissioner of Lands disregarded the law

Consequently, political and economic elites have taken advantage of their position to allocate themselves and their cronies land classified as public land, thus denying the non-elites equal opportunities in land acquisition. Other communities have been dispossessed on their ancestral land, violently or through unfair executive decrees or legal provisions. Most of these injustices have not been resolved to date and continue to generate ethnic and regional tensions.

This study therefore recommends the following:

1. That land reforms in Kenya must have as the primary objective the restoration of peoples' entitlement to land as well as the delivery of efficient outcomes in the ownership and use of land. This restoration refers to both public land that was irregularly or illegally acquired and historical injustices meted out to communities and individuals. In this regard, the study recommends the setting up of appropriate

legislative and administrative mechanisms as was the case in South Africa. Both the NLC in respect of public land and individuals/communities in respect of inappropriate land dispossession should have an opportunity to present their claims within a given time frame.

2. That the public must be sensitized through civic education on the benefits of land reform that aims to achieve three objectives: equity in terms of opportunities for land access and ownership; efficiency in terms of improved land use; and development of the national economy. The process will entail review of all existing laws that have helped to sustain the historical land injustices and establishment of a new administrative and legal dispensation that will facilitate investigation, documentation, determination and redress of historical injustices.
3. That an independent body such as a Land Claims Court be appointed, with the recruitment of members subjected to a competitive process. Such members should be vetted by parliament before they are formally appointed by the executive. This will ensure that they are non-partisan. The criteria for land restitution, including land repossession must be clearly defined in law. The funding for the institutions handling restitutions should also be guaranteed in law to avoid political manipulation. In South Africa, the Land Claims Court, with powers equivalent to those of the High Court, was established to deal with land claims and other land-related issues. This helped to accelerate the settlement of land claims.
4. That in adjudicating the claims the appointed institution should on a case-by-case basis evaluate the land claims and use three approaches to land restitution: restoration/repossession of land under claim particularly where such land is either undeveloped or can be put to original use by the claimants; financial compensation for lost land at market prices; and grant of alternative land. For example, where land has been transferred to third parties or huge investment has been made on the land under claim, the state should consider alternative modes of compensating the claimants, while those using the land should make full payment for the land where evidence exists that they did not do so.
5. That the following further steps be taken with regard to procedures and processes:
 - *First*, the institutions handling land restitution must be made independent and open to public scrutiny to ensure the process is insulated from political manipulation;
 - *Second*, the rules and procedures of handling land transferred to a third party must be put in place to ensure fairness and speedy resolution of the claims without jeopardizing the rights of purchasers in “good faith”, but at the same time making recompense to those afflicted;
 - *Third*, because of the huge resource requirements, the land restitution programme and other land reform programmes should be rolled out in a phased manner and in accordance with transparent and credible criteria; and
 - *Fourth*, the land restitution programme must allow for public participation in decision making and monitoring.
6. That with respect to squatters and the landless, land redistribution and resettlement should take the forms of both market and non-market mechanisms as practised in both Namibia and South Africa. For the poor who are employed

That an independent body such as a Land Claims Court be appointed, with the recruitment of members subjected to a competitive process. Such members should be vetted by parliament before they are formally appointed by the executive.

and able to repay a loan, the state should provide preferential credit facilities to enable them to purchase land from landowners with excess land. For the extremely poor people, the state should consider providing grants. These redistribution and resettlement programmes must be guided by a legal framework to ensure fairness and transparency. Land for such redistribution should be generated through land banks that would include repossessed illegally and irregularly acquired public land as established through due process, and land purchased by the NLC on the open market.

7. That given the vested interest of the political and economic elites and the possible resistance to reforms from bureaucrats, the pressure from the reformers drawn from the non-state actors' fraternity must be sustained to see land restitution to its conclusion. Land reforms must also piggy back on other reforms that are running concurrently with land reforms in the Constitution, such as the constitutional protection of the key land reform institutions and checks and balances mechanisms.
8. That mechanisms be put in place for monitoring the activities of the professionals, ensuring that errant professionals are penalized, and providing opportunities for the public to report any errant professionals.

In order to guarantee the independence of the NLC and enhance its legitimacy and effectiveness, there will be need to:

- Ensure the NLC is run by a team of competent people, in the first instance through a competitive process of selecting the nominees of the Commission. As a constitutional commission, the nominees of the NLC will be appointed by the President upon vetting by Parliament. This provides a useful check that will minimize the opportunities for political mischief that could lead to the capture of the NLC.
- Ensure that the enabling legislation does not make it easy to amend the powers of the independent NLC, so as to avoid diluting the original intentions of creating the Commission.
- Ensure that the NLC has the authority to impose significant penalties on non-compliance with the law.
- Ensure that the NLC is accessible to the general public, so that any citizen with any matter requiring the attention of the NLC can be attended to with ease. The NLC must also report regularly to the public. This will enable the public to hold the agency to account.
- Ensure that the NLC is adequately endowed financially, since land reform will require substantial resources, particularly with respect to redress for historical injustices and illegally/irregularly acquired land in hands of bona fide third parties. Formulas must be put place to guarantee that part of the substantial revenue (estimated at Kshs.10 billion annually) that the NLC will be expected to raise from administration and management of land will be ploughed back to facilitate its operations.

In summary, future land allocations must be perceived to be transparent and fair. Only then will the public regard the land transactions as legitimate. Democratization of land administration and management through the involvement of the public in decision making and monitoring of land transactions will also help to enhance the legitimacy of the processes and institutions handling land administration and management. Public reporting on land transactions and an awareness campaign on the proposed land reforms would motivate public support for the reforms and enhance legitimacy in the land transactions – and would also help in reducing ethnic and regional tensions and mistrust.

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Published by:
Society for International Development (SID)
Regional Office for East & Southern Africa
Britak Centre, First Floor Ragati/Mara Road
P.O. Box 2404-00100 Nairobi, Kenya
Tel. +254 20 273 7991
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ISBN No: 978-9966-029-08-9