

Kenya Land Alliance

POSITION PAPER

Civil Society Position on the Draft National Land Policy



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CIVIL SOCIETY POSITION ON THE DRAFT NATIONAL LAND POLICY

Introduction

The Civil Society commends the Ministry of Lands for spearheading the important process of developing the Draft National Policy, and affirms that land is central to the livelihoods of most Kenyans and as such its access, use, ownership, administration and distribution are of key national concern. Thus, having critically examined the Draft Policy we do hereby make our position on the way forward on the salient policy proposals of the Draft National Land Policy document.

From all perspectives, political, economic, sociological or purely casual look at the Draft National Land Policy it is a redress of a historical problem not only since independence, but indeed from colonial times. The draft

policy attempts to respond to the myriad of land problems generated by a complex and difficult legacy, which at various times have threatened to destroy the fabric of Kenyan society. To address the consequences of this legacy that are well captured in the problem statement of the Draft National Land Policy, it is the Civil Society's position that as a national issue of paramount importance, the finalization of the draft national land policy be linked to the finalization of the constitutional review process. This is because the Draft Constitution of Kenya (Bomas Draft), adopted by the National Constitution Conference on March 15, 2004, as well as the Proposed New Constitution of Kenya (August 2005) contain Land and Property, Natural Resources

and Environment provisions in two chapters that provide a constitutional framework for smooth implementation of the Draft National Land Policy proposals.

In light of the proposals of the Draft National Land Policy, we look forward to a new constitution that would include the land clauses as contained in the two national constitution drafts. Despite Kenyans' rejection of the Proposed New Constitution at the referendum, the letter and the spirit of the Draft National Land Policy points to the fact that Kenyans still need a new constitution with the provisions on Land and Property, Natural Resources and Environment that have been distilled from all national reform processes.

1. Position of the Civil Society on Entrenchment of Draft National Land Policy Proposals in the Constitution

There are several policy recommendations in the Draft National Land Policy which need to be entrenched in the constitution if the government is to have full capacity to adopt and eventually implement the National Land Policy. These range from regulatory and development control powers of the state in land matters to land redistributive reforms, reordering of land tenure regimes and introduction of a new institutional framework with constitutional powers to address and redress the complex and difficult legacy of historical injustices.

The current constitution guarantees existing property rights however acquired, without placing the state under a constitutional duty to redress historical injustices. This has perpetuated a highly unequal distribution of land and glaring inequities which the Draft National Land Policy proposes to address, but which it shall not be able to address within the framework of the existing constitutional order.

(a) Land, Property and the Constitution

For the Draft National Land Policy to be implemented it will be necessary to amend or repeal sections of the current constitution, or even to reform the constitution

as a whole.

In particular, *Section 75 of the current constitution entrenching the sanctity of property must be reviewed to allow for redress of historical injustices, land redistribution and restitution.*

Secondly, *Sections 114 - 120 which are contrary to the proposed draft land policy provisions for Community Land Tenure need to be repealed* because they lay down machinery for extinguishing communal/community rights. Thirdly, *Section 1* does not carry the letter and spirit of the Draft National Land Policy that the land and natural resources belong to the people of Kenya. In effect, land is not a constitutional category within the current constitutional order, something that has to be rectified before the far-reaching recommendations of the Draft National Land Policy can be implemented.

(b) Lease to Foreigners

The Civil Society concur that lease of land to foreigners be limited to a period shorter than 99 years. Presumably, foreigners are interested in land for purposes of investment, so that the period of leases for them should be considered having regard to the opportunities for them to recoup whatever investments they may put into the land.

In this connection, *a lease period of 30 to 50 years with provision for extension on agreed terms should serve the purposes of foreign investors*

(c) Land Redistribution and Equity in Land ownership

The Civil Society hold a position that if land redistribution, restitution and resettlement of the landless are to be implemented, it will be necessary to limit the land acreage that an individual can own. This will go far in addressing the problem of disparities in land ownership in Kenya. Revisiting the existing land rights requires **amendments to the Bill of Rights in the provisions of the property clause** so that the state is placed under simultaneous duty of guaranteeing existing property rights on one hand and on the other hand the duty to take reasonable steps such as establishment of a land ceiling and land taxation to enable citizens gain equitable access to land.

The Civil Society is live to the fact that a majority of Kenyans are dependent on land for their livelihood. In light of this, the current situation where a few individuals own large tracts of land while a large number have little or none is untenable. Consequently, **we propose that a system of land redistribution be made central to the process of resolving the land problems in the country.** The case for land distribution i.e. redistributing property rights from the landed rich to the landless poor, from large scale land owners to squatters, is justified from a perspective of equity, but will require an appropriate constitutional framework. In particular the **property clause in the current Constitution needs to be amended to expressly recognize that public interest includes 'the nation's commitment to land redistributive reform and justice'.**

2. Elimination of Discriminatory Practices in Women's Access to Land

The Civil Society endorses the prohibition of discrimination in land rights as envisaged by the Draft National Land Policy. Thus, point out that women's rights as guaranteed under the current constitution trump cultural preferences. Consequently, arguments of culture should not be used to dispossess daughters of their inheritance, to deny wives access, use and ownership of land or widows inheritance.

To promote gender equity in access to land, the Civil Society affirms that there is a need for constitutional reforms to secure the interests of women over land and natural resources. The Civil Society regrets that during the November, 2005 referendum, a number of arguments were advanced against the constitutional entrenchment of women's land and property rights, and caution that although the same important principles are captured in the provisions of the draft land policy, the same retrogressive arguments steeped in discriminatory cultural and traditional practices could be raised in the future to defeat the draft policy implementation. For this reason the draft land policy requires supportive constitutional provisions outlawing discriminatory land distribution practices and promoting the practice of co-ownership and joint-titling. In this connection, **the land**

policy should make it a duty of the government in land matters to ensure positive action to secure women's enjoyment of the constitutional right to equality before the law and the right to equal protection and benefit of the law.

Matrimonial Property

It is agreed that what constitutes family land¹ should be clearly defined. One way of ensuring that family land is not sold off without consultation, depriving spouses and children **is to register it in the name of the two spouses and even children.** The Civil Society also proposes that the draft land policy should seek to protect family land from the vagaries of the market by recommending the amendment of **the Registered Land Act to provide for the interests of family members to be registered as an encumbrance on land titles** because that is the nature of the interest they hold as opposed to ownership which is already secured on existing titles.

3. Institutional Framework

(a) National Land Commission

The Civil Society notes that the idea of a National Land Commission is a good one and appreciates that the powers and responsibilities of the Commission are clearly spelt out and that the Commission shall be entrenched in the Constitution to give it independence.

(b) Other Land Administration Institutions

The operations and accessibility of the proposed land administration institutions are clearly spelt out. The Civil Society takes note of the clarification on the separation of powers between the existing Ministry of Lands departments and the new proposed land administration institutions to avoid overlaps and mix-up of mandates. **However, the creation of the Land Reform Unit within the Ministry of Lands reflects a draw-back on Land Reform agenda.** Its composition and autonomy within the Ministerial laid-down operational culture is both doubtful and suspect.

The Civil Society appreciates the provision for community land tenure but observe that without recognized and legitimate institutionalized community leadership or authority in which to vest community land, the proposed Community Land Boards may not be enough. Otherwise it is noted that in a situation where we do not have a system for recognizing traditional or cultural leaders or authority system we will end up with a vacuum i.e. divesting Trust Land, as community land is known today, from County Councils and Group Representatives and having no entity in which to vest it.

Vesting ultimate ownership (radical title) in the community in Section 3.3.1.2 Paragraph 62 of the draft national land policy **is ambiguous and perpetuates an ambiguity that stands to generate anarchy.**

4. Other Issues of Concern

(a) Historical Injustices

It is felt that land reforms cannot be undertaken effectively unless they are linked to the question of historical injustices. Landlessness and inequitable distribution are the result of these injustices, going back to colonial times. Redistribution, restitution and resettlement cannot therefore be de-linked from this reality.

The Civil Society therefore stresses the need to **identify the victims of these historical injustices and to take measures to correct the injustices**. Laws that have facilitated the dispossession of individuals and communities need to be reviewed as part of this process. In particular, **the sanctity of the title enshrined in Section 75 of the current constitution should be reviewed** so that it does not shield those who have benefited from the historical dispossession of whole communities or families.

(b) Environmental Concerns

In addition to the laws identified in the Draft National Land Policy, there is also need to take into account other laws, conventions and treaties which may have environmental implications such as the Nile Treaty. However, we appreciate inclusion of provisions to deal with cross-border resources. Given the importance of incorporating environmental concerns in all project planning, we propose that the Draft National Land Policy should uphold the principle **that assessment of environmental sustainability should not be the prerogative of government officials alone**.

(c) Marginalized groups

We note that the Draft National Land Policy has recognized the vulnerability of marginalized groups. As the Draft proposes, **mechanisms for identifying these groups and measures to address their plight must be put in place**.

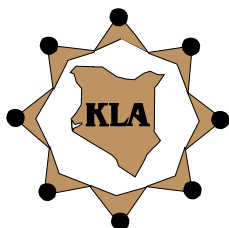
Conclusion

In the absence of a constitution that entrenches the proposed policy statements or principles, the National Land Policy shall be rendered ineffective if not out-rightly unconstitutional with regards to a number of its salient proposals. The inclusion of Land and Property, Natural Resources and Environment chapters in the Bomas draft and the Proposed New Constitution of Kenya (2005) was and remains the positive direction to ensuring land reforms.

The public and all stakeholders in reading, debating and contributing to the draft national land policy should also continue lobbying and advocating for entrenchment of land clauses or provisions in the constitution.

(Footnotes)

¹ 'Family land' means land on which is situated the ordinary residence of a family; or on which is the ordinary residence of the family and from which the family derives sustenance. In other words it's a parcel of land on or from which the family derives sustenance such as the family farm; or land which the family treats as the principle place providing their livelihood/source of income and food.



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