

LAND, ENVIRONMENT AND NATURAL RESOURCES

SUBMISSION TO THE CONSTITUTION OF KENYA REVIEW COMMISSION *from the* KENYA LAND ALLIANCE July 2002

Preamble

The Kenya Land Alliance (KLA) is a focal point for information sharing and networking among those pressing for land reform in Kenya. It was formed in 1999 by members of civil society to propose reforms both to the Commission on the Review of Land Laws, appointed by the President, and the Constitution of Kenya Review Commission, appointed by Parliament. Over the last two years, the KLA has coordinated a programme of research on land issues in Kenya by member organisations. This culminated in the *National Civil Society Conference on Land Reform and the Land Question* held at the Kenya College of Communication Technology, Mbagathi, May 21-23, 2002, which was addressed by the Chairperson of the CKRC, Professor Yash Pal Ghai. This submission is based on the research and the conclusions and recommendations of the Conference.

1. THE COMMISSION'S MANDATE

1.1. The Commission's mandate with respect to land

The mandate of the Commission under the Constitution of Kenya Review Act (Cap 3), with respect to land, environment and natural resources, draws from the Commission's functions and powers to examine and recommend the governance role of the state, and from the explicit reference to land rights in the Act: *vide*

S. 17 (d) (vii) examine and review the place of property and land rights, including Private, Government and Trust land in the constitutional frame-work and the law of Kenya and recommend improvements that will secure the fullest enjoyment of land and other property rights.

1.2. The central importance of land reform and the land question

In drafting the new constitution, the land and environment clauses in particular, the Commission is expected to take account of relevant principles set out in the Act (i.e. Section 3, a-f). The new constitution, as a matter of principle, is expected to:

- guarantee peace, national unity, safeguarding the well being of the people;
- establish a free and democratic system of government that enshrines good governance, constitutionalism, the rule of law, human rights and gender equity and the demarcation of responsibility among the state organs;
- promote people's participation in governance;
- respect ethnic and regional diversity and communal rights;
- ensure the provision of basic needs of all Kenyans, conditions for economic growth and equitable access to natural resources.

Ample evidence of the importance of land reform and the land question has been provided to the Commission in its hearings throughout the country. Indeed, there is hardly an area of the country that does not suffer land conflicts.

The underlying causes of land-related conflicts include:

- the colonial and post-colonial legacy;
- the downgrading of customary law in relation to received law;

- the use of powers over land allocation to further political and ethnic interests;
- widespread manipulation and deeply rooted corruption in the alienation of government land;
- deprivation of the poor of their land and the displacement of people;
- the concentration of land ownership in a few hands;
- the increasing privatisation and commoditisation of land and the erosion of people's rights to use and occupy land, to bury the dead and to have access for gathering natural products;
- the breakdown of rights to exclude others and rights to the enforcement of the law;
- the growing poverty and human misery created by landlessness and tenure insecurity in both rural and urban areas;
- environmental degradation due to the breakdown of natural resource management, particularly common property resources;
- the degazettement and alienation of forest reserves, in some cases long used and occupied by indigenous people;
- lack of state organs to address complaints and to resolve land disputes in a timely and even-handed manner;
- gender and age discrimination in both customary and statutory law and land administration; and
- the lack of a coherent national land policy.

The KLA and its member organisations have deliberated on these issues and have concluded that the New Constitution must protect and guarantee the land rights of all the people of Kenya. In the 36 years since Kenya's Independence, land reform has become a central issue. A fundamental goal of land reform policy in Kenya must be to enhance people's land rights and thus provide tenure security. This is necessary in order to avoid the suffering and social instability caused by arbitrary or unfair evictions, landlessness and the breakdown of local arrangements for managing common property resources. Land reform is essential if the people of Kenya are to be allowed to, invest in the land, better to manage natural resources and to use the environment sustainably.

1.3. Land in the existing Constitution

The land-related clauses in the Constitution of 1963 relate to procedures for the settlement of Kenyans who may have been dispossessed during the colonial period and on provisions for land tenure changes in Trust Land areas. The last-mentioned were meant to provide for the introduction of individual private ownership, popularly referred to at the time as 'English tenure'. For a number of reasons, this system has been found to be inappropriate for land occupation and use over much of the country by many Kenyans. The provisions in the 1963 constitution must be considered obsolete.

2. SITUATION ANALYSIS

In this section we analyse three principal areas of concern: (i) land relations, (ii) land rights and (iii) land administration and management. Proposed principles, to be taken into account by the Commission when drafting the New Constitution are provided in Section 3 of this submission.

2.1. Land relations

2.1.1. The underlying ownership of land in Kenya

Background: The ultimate sovereignty over land in Kenya lies with the state. Represented by the president, it holds the underlying title to the land. This situation arose because the land law of England, whereby no one owned land but the king, was extended to Kenya by the colonial power. The assertion that the imperial power and not indigenous inhabitants held radical title permitted the expropriation of land and its conveyance to settlers. Various laws further strengthen the president's position with regard to land resources. Chief among them is the Government Lands Act that empowers the president to make grants of unalienated government land to any person.

Problems arise because of the overwhelming power and control of land by the state. It is the holder of the radical title. It is also a substantial landowner. Government controls land allocation, survey and the registration of titles. This has led to the perception that whoever wields executive authority in Kenya can deal with land in any way he chooses. It is necessary to replace the Government Lands Act with a 'public land act' and to de-link the sovereign authority of the state from radical land title.

Issues to be resolved: There is a widespread view, endorsed by the Conference that the land of Kenya should belong to all citizens. And further, land that is not owned by any person or authority should be held on behalf of citizens by some independent and democratically controlled body. This view arises from the perception that past governments have abused their fiduciary responsibilities.

That land belongs to the people, was also the position taken by the drafters of the Uganda Constitution of 1995. It has created some uncertainty, in terms of the constitutional classification of land ownership, by vesting radical title directly in the general citizenry. The formulation means that there is no specific juridical persona that owns the territory of Uganda as a whole. The land boards and the Uganda Land Commission, created by the Constitution and the Act, are merely allocation authorities without any residual title to the land itself. The vesting of radical title in the public at large can have serious implications for the State and local communities. The location of radical title determines the derivation, security and integrity of land rights. This confusion needs to be clarified.

2.1.2. Land tenure

2.1.2.1. Customary tenure (currently a statutory trust held by agencies of the state)

Background: The colonial government limited the ability of Africans to hold land, especially outside the 'native reserves'. The adjudication of customary land rights, the consolidation of holdings, and the registration of titles in the names of individuals or group representatives, was introduced in some areas in the late 1950s in the reserves. The aim was to extinguish customary land tenure in favour of the English system of property holding. The explicit reason was to encourage investment and development. It resulted in insecurity and destabilized the customary tenure system.

Over-centralization of land administration and management also undermined local institutions and the organic evolution of customary land law in accordance with changing land availability and local needs. Despite the increase in tension brought about by tenure changes and increasing population density, little was done to strengthen local institutions for conflict resolution.

At Independence, land in the 'native reserves' was designated as Trust Land. The County Councils held this land in trust for the benefit of the local residents. The Commissioner of Lands was charged with the management of the land in terms of the Trust Land Act. The applicable law governing local land tenure is the relevant African customary law. It focuses on the community rather than the individual and draws its inspiration from an ancient African culture. While its origins are indigenous, it has evolved to accommodate changes in the availability of land and the needs and capacities of local people. Customary law has proved resilient in the face of many changes. Communities have become increasingly attached to their land and to their systems of dispute resolution.

Issues to be resolved: Customary land tenure has been subject to both external and internal pressures. The colonial authorities restricted members of particular ethnic groups to prescribed land units. Population growth has resulted in land pressure in many areas. In the absence of technological innovations that increase yields, there has been increased internal land-related conflict as well as agitation for expansion of ethnic territories. Unfortunately, while County Councils were supposed to hold trust land as trustees for the benefit of local residents, they have dealt with the land as if they own it. They have consequently irregularly alienated such land in total disregard of the interests of the people for whom such land was intended. The Commissioner of Lands, using his vast discretionary powers, has periodically

allocated trust land to individuals for whom it was not meant. This has caused justifiable resentment among the local residents. Further, the adjudication of land rights has led to corruption and the marginalization of the rights of women and children through vesting of land rights in male proprietors. Sensitive ecological systems in arid and semi arid areas have been disrupted.

There is need for a comprehensive land law that will reconcile customary and statutory law. The law should combine knowledge of Kenyan culture and traditions as well as the land legislation and institutions of neighbouring countries, where they have proved successful in grappling with similar problems. The law should provide for the confirmation and continuation of existing customary family rights, which are exclusive and heritable, and for the large areas of land that will remain communal. It is further recognised that persons holding land under customary tenure may wish to convert their customary law title and interest to a statutory right. Provision should therefore be made for persons holding land under customary tenure to convert and to register such titles.

2.1.2.2. Private tenure (freehold or leasehold)

Background: Until the late 1950s, the only land units held on the basis of private tenure were located in the white settler areas and the towns. These units were held on freehold or leasehold titles and were registered in state-maintained land registries. Attempts to ‘reform’ customary land tenure extended private ownership to the trust land areas. For this purpose, a separate land registry was established. In law, therefore, land held on private tenure now extends to all registered land, irrespective of its previous tenure category.

Issues to be resolved: Since Independence, many Kenyans have acquired private rights over land. This may have been through inheritance or through some other transaction. Some may have acquired private land through presidential grants. Others may have acquired private land upon first registration during the individualization of tenure.

The redistribution of private land owned by white settlers after Independence has led to an extremely complex and inequitable situation. Farm areas are now of mixed size ranging from 10,000 ha to less than one hectare. Smallholders rarely have registered titles and operate in accordance with customary law and land use systems. Apart from change in the technical description of land title, land relations in registered areas of trust land have barely changed. Attempts to assert private title are often fiercely resisted by kinsmen and are a frequent cause of violent confrontations.

A new constitution should not aim to destabilize the private property regime despite its imperfections. The new constitution should seek to establish a system of good governance in which free enterprise and state programmes interact for the realization of human dignity. The new order should guarantee basic human rights of which property rights form an integral part. But because land belongs to the people of Kenya through the superintendence of institutions of state, the constitution needs to clarify certain questions regarding the status of private tenure.

2.1.2.3. Public land (currently ‘government land’)

Background: In 1963, a considerable amount of land consisting of gazetted forests, national parks and reserves, bodies of water, wetlands, and unalienated range or agricultural lands in such areas as Lamu and Tana River Districts passed on to the state as government land. Because radical title to all land outside the native reserves (later trust land) also passed over to the independent state, all land held on freehold or leasehold grants also remained government land. On surrender of such titles, or expiry of any term, land so held reverted automatically to the Government.

Issues to be resolved: The major problem with government land is that it has never been clear whether it is to be held in trust for the people of Kenya, or whether it is the private property of the Government. In

practice, government land is treated as if it were private property to be disposed of at will. That interpretation has been extended to forest reserves leading to the wanton destruction of forest catchments and areas of unique biodiversity. It has been extended to unregistered trust land areas, even though both the Constitution and the Trust Land Act provide that these be administered by the Commissioner for Lands strictly as trustee for customary inhabitants. The government has proceeded to make land grants without regard to the public interest and in accordance with criteria not subject to public scrutiny. All categories of government land including land in urban areas the leases for which have expired or which are reserved for public purposes have become vulnerable.

Very little unalienated government land still remains. The State has abused its powers to such an extent that government land (and thus public tenure) could become extinct. The constitutional reform process must save Kenya's public tenure for present and future generations. It must conserve Kenya's unique habitats as an international heritage.

2.1.3. Land expropriation

Background: All states, including Kenya have clauses in their constitutions that deal with protection from deprivation of property except on certain stated grounds, for example for a public purpose or in the public interest and subject to the prompt payment of adequate compensation. The Constitution of South Africa states that the 'public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources'.

Issues to be resolved: There is a provision in the law of Kenya known as the 'principle of first registration'. It protects persons whose names appear on title documents from being dispossessed of the land in question. The provision originates from the colonial era, as it was to the benefit of settlers to acquire land and be protected by the law of first registration whether the acquisition was regular or not. This means that irregular allocation cannot be reversed. Compulsory acquisition of land should be allowed when it can be proved that it was obtained in an irregular or fraudulent way. Compensation should be dependent on strict proof that the purchase made was in good faith. Where third parties are involved the party who sold such land should be under obligation to compensate them and indemnify them against such loss occasioned.

The payment of prompt and adequate compensation should not be confined only to the compulsory acquisition of private land. It must also apply to the compulsory acquisition of customary rights.

2.2. Land rights

2.2.1. Women's land rights

Background: Despite the fact that women constitute 50.5% of the Kenyan population and play a central role in agriculture, they own less than 10% of the available land. Yet 69% of the active female population works as subsistence farmers compared to 43% of men. Women form the majority of the poor. Lack of ownership of property by women reduces production incentives, retards development and contributes to poverty and low-self esteem.

Many local cultures do not guarantee a wife's rights to inherit her husband's property. Widows are often dispossessed by their in-laws and rendered homeless. Even when they have taken care of their parents, brothers often evict sisters when parents die. Since many wives have little control over income during marital discord, many women are sent away with little if any means of survival. Ten percent of women slum dwellers left their rural homes because their marriages broke down, eight percent because they were widowed and eight percent due to pressure of single motherhood. In Kenya, HIV/AIDS is seriously affecting the rights of surviving widows and orphans on customary land. In some cases, women are dispossessed of their land and property after their husbands' death. Widows are often unjustly condemned

as the ones who have infected their husbands and are subsequently under pressure to leave their marital homes.

In some localities such as Nyeri, on **titled land**, women face heightened tenure insecurity when an infected husband or father dies, as land is normally registered in the names of men. Widows are mere trustees of the property, on behalf of the children. They cannot mortgage the land and lose the right to retain it on re-marriage. Where such women are married without children, the norm is for them to be sent back to their families as soon as the spouse is buried. Children, irrespective of their ages, are the most affected. Their adult male relatives often disinherit orphans. The rights of children of single mothers who die of AIDS are at greatest risk due to the uncertain position of the mother in her community and the stigma associated with the disease.

Issues to be resolved: African customs support patrilineal inheritance and male control of decision-making that exclude females from land ownership. Women are regarded as neither belonging to their natal nor their marital clans. Male family members take advantage of the adjudication and land titling process to deny women their share in family land. Ethnic sentiment and identity is still very strong in Kenya. Aspiration for clear patrilineal lineage is still in place and many women subject themselves to these customs. This situation is upheld at high levels and is marked by tokenism in gender matters.

Although the Constitution of 1963 prohibits discrimination on the basis of sex, Section 82 (4) makes exceptions with regard to adoption, marriage, divorce, burial, and devolution of property upon death or other matters of personal law. The Law of Succession Act tried to expand the notion of dependants to include widows and children in polygamous as well as monogamous union. However, the exception in s. 32 thereof of agricultural land, livestock and crops in gazetted areas represents a submission to customary law. Kenya does not have a local statute on division of matrimonial property. The courts use the 1882 Married Women's Property Act of England.

2.2.2. Land rights of pastoralists

Background: Pastoral people hold that land belongs to a group or 'family' that is linked by descent or cultural affiliation. It is not owned in the sense that users enjoy unlimited rights to exploit and dispose of it at will. It is held in trust by the living for future generations. To ensure that they inherit land currently enjoyed by the living, the right of usufruct limits the intensity of use. This is the right to enjoy the product of land only in so far as it does not cause damage and reduce its long-term productive capacity. Today, this concept is little understood and even less respected. The result has been the over riding of customary pastoral land tenure systems to the great disadvantage of pastoral peoples. Lands once used sustainably have been alienated and have often become degraded.

In 1968, with the support of donors, Kenya introduced group ranches in the semi-arid regions, which conferred formal and legal land tenure to a community of co-residents. Some pastoralists accepted the group ranch concept as a way to acquire legal tenure that would enable them to qualify for loans. However, the programme was unsuccessful because none of the group ranches were viable as ecological or social units. In the 1980s, the government encouraged subdivision of the group ranches for individual owners. This created a stampede for individual titles, widespread fraud and land theft. Today, land use patterns and holding units are not able to meet subsistence and social needs of the people as well as enhance sustainable resource management.

Despite a great deal of research which has demonstrated the value of the pastoral way of life and the inappropriateness of past government policies and interventions aimed at settling pastoralists, the negative image and poor understanding of the pastoral way of life continues.

Issues to be addressed: Any attempt to secure pastoral land rights must be informed by a clear understanding of the reality of pastoral land use. Pastoral communities must be effectively involved in decisions that have a direct bearing on their livelihoods.

Securing pastoral land rights entails giving legal recognition to the existence and validity of Community-based property rights. These are rights that derive their authority from the community in which they are practised and realized. This is an essential pre-condition for the realization of participatory development in which the poor are fully integrated.

2.2.3. Land rights of farm dwellers

Background: Farm workers and their families and so-called ‘squatters’ often live on land owned by others. Landowners often infringe their basic human rights (e.g. human dignity, freedom and security, protection from servitude and forced labour). In South Africa, there are new land tenure laws to protect people living on other people’s land from summary eviction. A 1996 law gives farm workers and tenants rights of occupation on private land. It lays down the steps that owners and persons in charge land must follow before they can evict people. The law also regulates the day-to-day relationships between owners and those living on the land. But, as has been found elsewhere, legislation to protect evictees is next to worthless unless the capacity is put in place to inform people (landowners, tenants, police, magistrates, court officials, etc.) of their rights and responsibilities, to advise and assist evictees and, if necessary, to provide for their representation in court.

Issues to be addressed: The redistribution of farms in the former ‘white-highlands’ has resulted in complex land use and tenure arrangements. Due to spontaneous settlement, poor people are frequently without formal title and subject to eviction, as landowners (often absentees) seek to assert proprietary control over their land. An inevitable result of the sale or transfer (or redistribution) of large farms and certain types of government land is that farm-worker tenants and their families, as well as other beneficial occupiers, are subject to summary eviction without compensation.

Kenya should introduce effective tenure reforms to protect farm dwellers and people in long-term beneficial occupation of land from eviction. Given the shortage of funds, the problem will be to extend legal advisory services to remote areas. Poor rural people have little or no recourse to the legal system, which is based in distant urban centres. Illiterate and poorly served by public information services, they will remain unaware of their rights under the existing or any new constitution and other new laws. The few rural legal advisory offices, operated by NGOs, will be inadequate for the immense task of providing advice, information and representation in rural areas.

Another fundamental dilemma will be how to reconcile the rights of the landless poor with the rights of private property owners.

2.2.4. Land and housing rights of the urban poor

Background: Of Nairobi’s population of 2.5 million, about 60% live in slums. Kibera, Africa’s largest slum is in Nairobi and is home to an estimated 0.75 million people. Municipal waste-collection rates dropped from 90% in 1978 to 33% in 1998. When it rains, storm water washes the accumulated waste into water sources used by the poor. Despite all this, poor landless people continue to move to the city. Similar problems occur in and around Mombasa and other major towns.

Of the many lessons being learnt from past urban-development failures, the most important is that improvements must involve local people in a meaningful way. Building trust and co-operation between government officials and residents in informal settlements and creating the conditions for delivery of basic services (e.g. water and sanitation, waste management, safety and security) will take time. The efforts made by residents in informal settlements to improve their lot and organise services in the absence

of any official assistance should be acknowledged. They find ways to clear and remove rubbish and construct latrines without official assistance. Community leaders emerge and small amounts are collected for services that people organise for themselves. These bottom-up developments in urban management and service delivery can be built on by the authorities and facilitated as part of a programme to bring informal tenure arrangements within the ambit of the law. New ratepayers with property rights are in a much stronger position to improve their own social and economic well being by investing in their holding, in the knowledge that shelters will not be bulldozed and that they will reap the benefit of their labours.

Issues to be resolved: Family members in informal settlements need to be assured that they will not be evicted without compensation; that they can improve their house to protect themselves against weather, thieves, fire and floods, etc; that their children can inherit the property or that they can sell or otherwise transfer it. They may need to borrow money using the property as collateral. They may seek a reduction in property related disputes and to have access to potable water, electricity, solid and wastewater collection, basic health services, safe playing areas for children and upgraded roads. They need an inexpensive and accessible system of administering their property rights and escape from exploitation from ‘slumlords’.

The government needs the system to be nationally uniform and sustainable. It needs a basis for implementing local taxation, land use and building control and for the provision of infrastructure. It requires a flexible means of administering property rights (e.g. the ability to accommodate individual and group rights, the rights of the middle class, business and poor people). It needs to deliver land titles to the people in an accessible and user-friendly manner and to allocate land titles that are not perceived as inferior and can be upgraded to full freehold.

2.2.5. Redress of historical injustices

Background: The alienation of land from Africans goes back to the coming of Arabs to the Coast in the 14th century, but the land problem assumed its current dimensions with the imposition of colonial rule in Kenya in 1895. To further settler interests, laws were passed in complete disregard of the rights of Africans. The result was to convert the landowners into squatters on their own land, so-called native reserves defined on an ethnic basis.

The colonial dispossession had knock-on effects over much of the country, but particularly in the Rift Valley where several groups now have overlapping claims. The process of removing people to reserves continued into the 1950s. In post-independence Kenya, Trust land continued to be alienated for government projects and parastatals. Serious dispossession also occurred as a consequence of the ethnic clashes of 1991 and 1997. The aftermath of the 19th century displacement of Africans by Arab and Swahili people and the injustices of the colonial era continue to be suffered in Coast Province.

An important lesson emerging from the research into land dispossession that preceded the Land Conference is the different manner in which communities have been dispossessed and suffered as a result. There is unlikely to be a simple solution or formula that will right the historical injustices.

Issues to be addressed: There are three basic options: land restitution, land redistribution and tenure reform. Given the complexity of the situation the new constitution should provide for all three.

Land restitution: In many cases, to reverse the process of land dispossession and return the original land to the descendants of previous users presents major practical difficulties. Today’s communities are much larger than those originally evicted. It would be necessary to determine the situation prior to eviction and to identify the qualifying descendants of former owners. To what precise point in history should the clock be turned back? What criteria should be used for evaluating claims?

Experience from South Africa has shown that many of the difficulties of restitution arise out of the fact that even the most advantageous resettlement can only do so much to heal the injuries of the past. Consensus among diverse claimants often falls away when the time comes to plan and implement a restitution award and experience the inadequacy of resettlement solutions. A limited programme of land restitution is proposed for areas affected by the ethnic clashes in the Rift Valley and the ten-mile strip along the Coast. If a negotiated settlement could be reached with the occupants/owners, expropriation and financial compensation would be required.

Land redistribution ('taking land from the rich for the poor') would not return the original land, but offer comparable redress in some situations. This could take the form of compulsory land acquisition of designated large farms or negotiated land reform on a willing-buyer, willing-seller basis.

Tenure reform may be an option in some cases and may not involve resettlement and all its attendant costs. This would involve upgrading or confirming the land rights of beneficial occupiers *in situ*.

2.3. Land administration and land management

2.3.1. Land administration

Background: Land administration embraces law as:

- the basic framework of land matters; rights and duties with respect to land;
- the protector – rights and their enforcement; gender; minorities; 'squatters'; rights of indigenous communities; administrative justice; access to justice;
- the facilitator – land markets; transactions; transparency; tenure security; title registration; land reform;
- the regulator – land use planning; legal framework for a land market; the institutions of land administration;
- the dispute settlement – courts and other formal judicial bodies; alternative dispute resolution; arbitration; informal arrangements.

The implementation of the comprehensive land policy and land reform envisaged by KLA would require a radical overhaul of land administration arrangements.

Issues to be addressed: The main weaknesses of the current land administration is the lack of transparent and effective institutions dealing with Public Land and Customary Land, the administration of which is perceived to be corrupt, highly over-centralized and remote from the resource users.

The land survey and title deeds registry for private land will have to be thoroughly overhauled if confidence in private land titles is to be restored and the land market and investment area is to flourish. Decentralization of the land registry is essential. The current situation, in which titles are issued to strangers, without any reference to the informal rights holders, who are using and occupying the land, is intolerable and represents a gross violation of basic human rights.

The KLA proposes a National Land Commission (NLC). Its establishment would have to be enshrined in the new constitution. The NLC will have a vital role in carrying on the work initiated by the CKRC and the 'Njonjo Commission'. An important aspect will be the supervision of the proposed independent, elected, gender-sensitive, District Land Boards and Divisional Land Committees. Further decentralisation of functions to 'community' level must be considered along with the role, responsibilities and relationships of these structures.

KLA also proposes a special Land Claims Court (LCC) in view of the very great backlog of unresolved land cases awaiting the attention of the courts. To do justice to the outstanding claims and the detailed local knowledge required the hearings of the LCC would have to be decentralised.

2.3.2. Land market

Background: Rights (e.g. freehold, leases and rental agreements) to immovable property change hands in the 'land market'. An efficient land market encourages transactions between individuals, which are underwritten by the rule of law and registered service providers but with minimal direct government intervention or supervision. The hallmark of an efficient land and housing delivery system and well-managed settlements is a transparent and efficient land market. Availability of essential information about land transactions, land allocation and land management greatly contributes to transparency in land markets and ensures easy access to land by consumers. Transparency in land markets also enables land authorities to manage land efficiently.

Issues to be addressed: Government's role in the facilitation of the land market is to:

- Provide a sound legal basis for the ownership and occupation of land;
- Reconcile the customary and statutory land allocation system and ensuring that the system is predictable, reliable and consistent;
- Provide institutions to facilitate and guarantee transfers of interests in land;
- Establish an efficient, up-to-date and accessible land information system;
- Provide an accessible means of dispute resolution e.g. courts and tribunals;
- Establish a fair and equitable land compensation strategy;
- Control and regulate the development, usage and subdivision of land and property for the benefit of the public e.g. land use and physical planning and building regulations;
- Make sufficient land available to meet the needs of developers;
- Manage the lands and property held in the public estate for public purposes;
- Institute and operate a land/property tax system;
- Recoup for society as a whole windfall profits resulting, not from the owner's efforts, but from social action, while still allowing land to be put to its most profitable use.

Because of the deep cultural significance of land, the topic of land markets is hotly debated in Africa. A central issue in rural areas is the extent to which transactions in land should be permitted. Should they be confined to members of the group or should outsiders also be allowed to buy land? The question needs to be addressed by the local 'community'. In cities and urban areas a free-wheeling land market is likely to be acceptable, but if the needs of the urban poor for affordable housing there will be need for government intervention in the land market on their behalf. The nature and scope of this intervention needs to be debated.

2.3.3. Land development for social infrastructure and affordable housing

Background: Land development describes the process of identifying, acquiring and releasing land for development – for housing, for schools and other public services and for productive infrastructure. Where settlement has taken place without formal planning, land development is concerned with upgrading and ameliorating physical conditions. Land development policy therefore has to cater for a wide variety of needs.

Issues to be addressed: The basis of successful approaches elsewhere:

- Support community-based service-delivery initiatives with a view to progressive establishment of trust and confidence between local residents and the authorities and the regularization of tenure.
- Decisions governing land zoning are most effective when they are decentralised in the direction of those most affected by those decisions.
- Define the geographical limit of further expansion of illegal settlements.
- Put in place the measures to enforce a ban on further illegal construction and strengthen development control and enforcement.
- Make available the necessary funds and resources for land acquisition for land development and release for low-income housing.

2.3.4. Environmental management

Background: In the colonial era, laws regulated specific sectors (e.g. land, forests, water, minerals, wildlife, fisheries, etc.). Laws were concerned with the allocation and exploitation of resources rather than their management. Due to the focus on use, the laws contained limited provision for regulation of adverse impacts. Each of the legal instruments created a sectoral implementation agency. The result was uncoordinated environmental management and diffused responsibility. Jurisdictional overlaps and gaps were created. The laws make no provision for preventive measures. The principal focus is apportioning criminal responsibility. No provision is made for public participation in conservation measures. Apart from the Physical Planning Act, there is no provision for Environment Impact Assessment, often an avenue for public participation. In 1999, Kenya enacted the Environmental Management and Co-ordination Act that invests relevant agencies with broad regulatory powers to deal more comprehensively with environmental issues. The main focus is prevention and management rather than coercion and punishment.

Issues to be addressed: The Environmental Management & Co-ordination Act Section 3.1 provides that ‘Every person in Kenya is entitled to a clean and healthy environment’, but for greater protection it is necessary to elevate this ‘entitlement’ to the constitution as a justiciable ‘right’ which can be enforced by the courts.

The new constitution should provide for land rights in such a manner that ecological and socio-economic activities are enhanced, for the enjoyment of equity, spiritual and cultural values, while at the same time ensuring the sustainability of land based resources.

3. CONCLUSIONS

3.1. Constitutional principles

3.1.1. Underlying ownership of land in Kenya

- All land in Kenya shall vest in the Kenya Land Commission as trustee for the citizens of Kenya.
- Parliament shall enact legislation to define the terms and conditions upon which the Kenya Land Commission will hold such land as trustees for the citizens of Kenya.

3.1.2. Land tenure

- The State must take reasonable legislative and other measures, within its available resources, to foster conditions that enable citizens to gain access to land on an equitable basis.
- Land in Kenya shall be held under: customary, private or public tenure.

3.1.3. Customary (or community) land tenure

- All land hitherto known as trust land, which is still un-adjudicated and unregistered, is to be referred to as land held under customary tenure.
- All such land which is used and/or occupied by local residents and from which they derive their daily livelihoods shall be vested in them on the basis of either private or customary tenure depending on the prevailing circumstances.
- Such land that is not occupied or not in the immediate use of the local residents of an area shall be set apart for and vested in the indigenous communities of the area as commonage.
- Any other such land not used or occupied, or set apart as above, shall be reserved for future use in the public interest.
- Any trust land for which the lease has expired, shall immediately revert to the National Land Commission for re-allocation by the land board and reclassified as stated above.

3.1.4. Private tenure

- Private landowners shall enjoy security of tenure over their land, but with due regard to any public interest that may take precedence over individual rights.
- The extinction of a private landowner's rights will take place only in accordance with the requirements of the constitution.

3.1.5. Public land

- All land hitherto referred to, as unalienated government land shall be 'public land' belonging to the people of Kenya in their sovereign status and held by the National Land Commission.
- All public land shall be used only for public purposes and in the public interest.
- Privatisation of public land shall take place only if it promotes the public interest.
- The Government or Local Government may acquire land in the public interest in a manner prescribed by Parliament.
- The Government shall, as determined by Parliament, protect lakes, rivers, wetlands, forests, game reserves, national parks and hold them in trust for the common good of the people.
- Any alienation and disposal of protected areas, including forest reserves, should be done in a manner that maintains biological diversity, productivity, capacity for regeneration as well as paying due regard to its future ecological, economic and social functions and to the land needs of local people.

3.1.6. Land expropriation

- No one may be deprived of land except in terms of a law of general application.
- Land includes customary interests in land.
- No law may permit arbitrary deprivation of land.
- Land may be expropriated only for a public purpose or in the public interest, and subject to compensation.
- The amount of the compensation and the time and manner of payment should be just and equitable reflecting an equitable balance between the public interest and the interests of those affected, having regard to relevant circumstances, including the history of the acquisition and use of the land.
- Public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all Kenya's natural resources.

3.1.7. Women's land rights

- All citizens are equal before the law and in all spheres of political, economic, social and cultural life and in every other respect shall enjoy equal protection of the law.
- Men and women are entitled to equal rights in marriage, during marriage and at its dissolution.
- Upon marriage, the husband and wife shall enjoy common ownership of spouse land as long as such land is the principal residence of the family or is the principal source of income or sustenance of the family.
- No citizen may be deprived of property on the basis of gender, marital status or age or any other reason created by history, tradition or custom.

3.1.8. Land rights of pastoralists

- All land hitherto known as trust land, which is still un-adjudicated and unregistered, is to be referred to as land held under customary tenure.
- All such land which is used and/or occupied by local residents and from which they derive their daily livelihoods shall be vested in them on the basis of either private or customary tenure depending on the prevailing circumstances.
- Such land that is not occupied or not in the immediate use of the local residents of an area shall be set apart for and vested in the indigenous communities of the area as commonage.
- Any other such land not used or occupied, or set apart as above, shall be reserved for their future use in the public interest.

3.1.9. Land rights of farm dwellers

- The state must take reasonable legislative and other measures, within its available resources, to foster conditions that enable citizens to gain access to land on an equitable basis.
- No law may permit arbitrary deprivation of property.
- Public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all Kenya's natural resources.
- A person or community whose tenure of land is insecure as a result of past unjust laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure, or to comparable redress.

3.1.10. Land and housing rights of the urban poor

- Everyone has the right to have access to adequate land and housing and information on how this can be obtained.
- The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
- No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances.
- No legislation may permit arbitrary evictions.

3.1.11. Redress of historical injustices

- The state must take reasonable legislative and other measures, within its available resources, to foster conditions that enable citizens to gain access to land on an equitable basis.
- A person or community whose tenure of land is insecure as a result of past unjust laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure, or to comparable redress.
- All irregularly acquired public land shall immediately revert to the National Land Commission. Otherwise the holder of such land shall pay to the authorities compensation that is considered reasonable in the circumstances.
- A person or community unjustly dispossessed of land after 1895 is entitled to the extent provided by an Act of Parliament, either to restitution of that land, or to equitable redress.
- There shall be a permanent Land Claims Commission that will investigate claims of historical injustices to individuals or communities in relation to land.
- The State shall recognise and protect the rights of indigenous cultural communities to preserve and develop their cultures, traditions and institutions with respect to land. It shall consider these rights in the formulation of national plans and policies.

3.1.12. Urban and Rural Environmental Management

Everyone has the right –

- to an environment that is not harmful to their health or well-being; and
- to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that:
 - a) prevent pollution and ecological degradation;
 - b) promote conservation; and
 - c) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

3.1.13. Land administration

- An independent National Land Commission and District Land Boards, and a Land Claims Court financed by the Consolidated Fund, shall be established in terms of an Act of Parliament.

- Women may not be discriminated against, either directly or indirectly, in determining the occupation or use of, or access to land; attendance at, or participation in, decision-making forums regarding the occupation or use of, or access to land; or membership of any structure involved in the administration and management of land rights.

3.2. *The land policy process*

In an ideal world, the land policy process consists of a series of steps, some of which run concurrently:

- a) Consultation and formulation of a national land policy;
- b) Formulation of a land sector strategic plan which is in harmony with the PRSP;
- c) Rationalisation of land-related legislation;
- d) Rationalisation of the institutional responsibilities for implementation of the laws and regulations;
- e) Dissemination of information to the public, training and capacity building;
- f) Development of land information systems.

At the policy level, the above constitutional principles require policy direction. Specifically they require:

- a national land policy that broadly defines the rights and responsibilities of access and use and measures for prevention of abuse;
 - legislation that conforms both to the constitutional principles and the Environmental Management & Co-ordination Act;
 - the reform of land administration to accommodate all tenure categories (i.e. for customary, private and public land) and place responsibility for democratic decision-making at the local level;
 - environmental impact assessment and its corresponding activities of environmental audit and environmental monitoring;
 - effective land dispute resolution.
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