LAND UPDATE

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A Critical Analysis of the Report of the Presidential Commission of Inquiry into the Land Law System of Kenya: Sampled Reactions

The recently released report of the Presidential Commission of Inquiry into the Land Law System of Kenya has sparked varying reactions from Kenyans of all walks of life. While some complain that the Commission did not complete its task per all its terms of reference, the land gurus are thrilled by the fact that the report makes many far-reaching recommendations on the principles of formulating a National Land Policy Framework and the Constitutional Framework for Land Administration and Management. While reminding everyone of the numerous steps involved in the development of a National Land Policy, Kenya Land Alliance (KLA) notes that the release of the 'Njonjo Commission' report marks the crucial second stage of the National Land policy development process which involves debating of the report.

Nevertheless, the Law Society of Kenya (LSK) has noted with concern that the report is incomplete and that massive data is yet to be analysed. The thing that concerns LSK most is the announcement made by the Minister for Lands and Settlement when releasing the report, that an in-house committee within the Ministry would be formed to process the contents of the "Njonjo Commission" report and to analyse the remaining data. The LSK has problems with this approach because:

- The in-house committee is unlikely to have the desired public profile to effect the necessary changes;
- Some of the necessary changes target the officials within the Ministry, thus, it will be difficult for them to implement recommendations that go against their own interest; and that
- The terms of reference for the in-house ministerial task force are unclear and without some form of involvement by the public and/or stakeholders.

In view of the foregoing, the Law Society of Kenya proposes formation of an independent task force to carry on from where the "Njonjo Commission" left. Their argument is that an independent body will be by all means objective.

In the same wavelength, KLA is not oblivious of the bureaucrats. In line with its law counterpart proposal, the Alliance is quick to caution the Ministry of Lands and Settlement against allowing bureaucrats anywhere near the "Njonjo Commission" report before the public makes its input. Instead, KLA appeal to the Minister either to re-constitute the "Njonjo Commission" to clear its task or he advises the President to form another Commission to complete the task.

Nassir Ali, a Surveyor by profession, laments that although the report cover in detail and enunciate policies on land tenure and categories of land in Kenya, it did not give any mention on land registration system which is currently scattered in five statutes. Arguing that the framing of land policy and its execution largely depends on the effectiveness of land registration, he underscores the need for Parliament to promulgate a single substantive statute based on the new constitutional dispensation to replace the five outdated cumbersome statutes.

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Land Issues at the Plenary of the National Constitutional Conference at the Bomas of Kenya

The journey to the Bomas of Kenya was full of tension as the delegates approached the most delicate chapter of the Draft Constitution Bill, *Chapter 11 on Land and property*. The complex and multi-faceted nature of land politics in Kenya did not make the situation any better.

Kenya Land Alliance (KLA) was not lost to the fact that a large proportion of the Conference delegates may have been uncertain of the Draft proposals on land. As a contingency measure, KLA produced Information, Education and Communication (IEC) materials simplifying the chapter on Land and Property and one on Environment and Natural Resources in advance. At a glance, any layperson would recite every Draft proposal on land.

The first land issue to emerge at the plenary was the historical injustice that was meted out to communities in almost all regions of the country. All delegates appeared convinced that there are major historical wrongs over land especially to the pastoralists and marginalised communities. Nevertheless, the delegates were concerned that the Draft Constitution Bill did not provide constitutional steps to address the inherent historical wrongs. Instead, the Draft leaves this to Parliament.

In view of Kenya Land Alliance, historical land claims should be redressed in such a way to provide support to the process of reconciliation and development. Due to the regional and cultural uniqueness of these claims, there is not one single comprehensive way to deal with them. With regard to the over-arching consideration of fairness and justice for individuals, communities and the country as a whole, KLA proposes the following forms of redress:

- Restoration of land from which the claimants were dispossessed;
- Provision of alternative land;
- Payment of compensation;
- Alternative relief comprising of combination of the above; or
- Priority access to Government housing and land development programmes.

EDITORIAL

Other issues that triggered heated debate at the plenary floor were the issues of foreign land ownership and land ownership ceiling. While the Draft proposes that foreigners be allowed leasehold of a Century, the delegates were very uncomfortable with this citing the fact that land is a socio-economic as well as a political item and a powerful symbol of sovereignty for the Kenyan nationals. Some delegates proposed a reduction of the lease period of not exceeding 99 years to 33 years, but some very flexible delegates proposed a review of the lease period every 30 years subject to the kind of investment or activity on the land in question.

Contrary to the Draft proposal silence on ceiling on land ownership, majority of delegates strongly felt a need for it. However, a section of them felt that limit per se should not exist but all idle land should be taxed to discourage absentee landlords and speculative landholders.

Another issue that featured prominently at the plenary floor was devolution of power as regards the proposed establishment of a Land Commission. The debate here centred more on the composition rather than the functions and powers of the Commission. The Draft proposal of ten members (*Chairperson, Deputy and eight others*) seem to be targeting the eight provinces. In contrast, the delegates wanted a devolved Commission on the same basis of the envisaged devolved government so as to include community elders. The argument is that elders understand the local dynamics of land than a centrally placed National Commission. In a quest for a gender-sensitive Commission, there was a general approval by all delegates that a third of this Commission should be women.

As regards categorisation of land, delegates wanted a clear definition of 'community of interest' as one of the groups that can own trust land. The delegates wanted to know what this precisely entail and whether it includes co-operative societies, self-help groups, trade unions, foreign conservationist interests e.t.c. They also felt that private land ownership should be properly recognised to ensure development and entrepreneurship.

The role of women in land ownership and control could not be ignored. There was a general consensus from the plenary that matrimonial property in land be addressed in a bid to redress the inequities meted out to women, courtesy of the patriarchal inheritance system. Some delegates suggested that matrimonial land be registered in the family name, a proposal that no one seemed to object to, at least not from the plenary floor.

Over and above all proposals, the delegates were keen to see a stop to skewed land distribution, since all land in Kenya belongs to the people of Kenya collectively as communities and as individuals. Thus, they strongly opposed the idea of allowing Kenyans of means to monopolize land in a country where many lack the financial resources to compete for it.

Considering the fact that land matters are complex and sensitive, the delegates found it overly paradoxical for the Draft to shift the resolution of key land issues from the domain of the Conference to the domain of Parliament. The major land issues that the Draft leaves to Parliament are the redress of historical land claims (*cut-off date*), settlement of the landless and slum dwellers, organization and powers of the proposed Land Commission, establishment of the Lands Fund, disposal of Public and Trust Lands, making of legislation to define and regulate the conversion of land from one category to another, enactment of a law to protect matrimonial home during and on expiry of marriage and consolidation of numerous land laws into a single, coherent statute.

However good the intentions, leaving emotive land matters to a small investigative specialist committee of Parliament is inconsistent with the Government's commitment to incorporate real public participation in decision-making on critical issues such as land. In addition, since 'Parliament' in the Draft can only mean the Parliament as envisaged in the new Constitution, the tasks set out for Parliament can only be accomplished by Parliament elected under the new Constitution.

Acknowledgement
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Mr. Lucas Ole Naikuni
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The "Njonjo Commission" Report at Close Scrutiny: A Pastoralist's View

Lucas Ole Naikuni, an Advocate of the High Court of Kenya, could not resist the urge to read word-for-word of the "Njonjo Commission" report in a bid to establish whether the 'anti-pastoralism' legislations have been addressed.

According to Naikuni, a major contributory factor to the atrocities and the marginalisation of the pastoralists and especially the MAA speaking, is the contents and the provision of the existing laws and the national policies. He laments that the Constitution of Kenya fails to recognise the existence and the important aspirations, values and traditions of the pastoralists. It only makes reference to land in Section 75 but only to the extent of safeguarding the sanctity of individual property. Chapter IX of the Constitution makes provisions for the trust land in as far as making the County Councils trustees to the land on behalf of the residents.

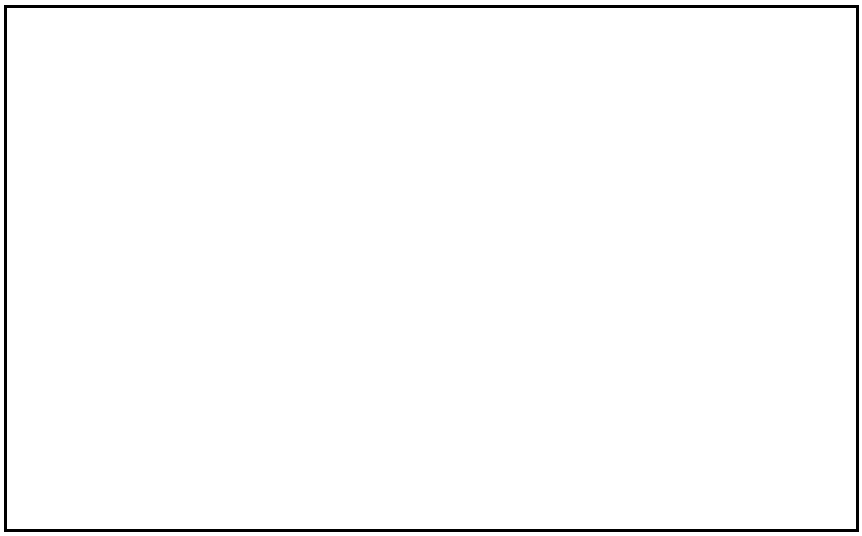
Against this backdrop, the pastoralists have taken cognisance that the report of the Presidential Commission of Inquiry into the Land Law System of Kenya exhibits the following strengths:

STRENGTHS

Classification of land-Pg. 44 para. 122

The report proposes to classify land in Kenya simply as Public, Commons or Private. Public land should comprise all land currently held as unalienated Government land except such land within the Coast Province that became Government land through the application of the Land Titles Act (Cap 282). The land covers all public roads and roads of access, rivers, lakes, the territorial sea and the seabed.

The Commons should comprise all land currently defined as Trust Land under the Constitution and the Trust Land Act other than land already registered under the provisions of the Registered Land Act (Cap 300). All Commons vested in County Councils should vest in and be held by the community-based institutions created by legislation and entrenched in the Constitution. The Common land should be held and managed as community forests, water sources, grazing areas and shrines identified as such by specific communities.



Pastoralists draw water for their livestock: They depend on livestock for their livelihood

This classification is important as it is a departure from the present situation where the allocation and administration of land is vested in the Commissioner of Lands or the County Council such that customary tenure principles are hardly respected. For instance, there have been instances of violation of the Constitutional and Statutory provisions relating to setting apart and adjudication of trust land; overstepping by the Commissioner of Lands of his agency mandate under the Trust Land Act; and abuse of trusteeship and fiduciary obligations by County Councils.

Indeed, there were several constitutional contempt of trust lands evidenced by the lack of security for customary land rights particularly those of women and the anxiousness to phase it out to be replaced by privatization of ownership rights. This expropriated the community in many ways.

Recognition of customary tenure regimes-Pg. 53

Customary land tenure is a complex system of land. The underlying commonality in all customary tenure systems is that rights are derived by reason of membership in a community and are retained as a result of performance of reciprocal obligations in that community. The kinship rights and obligations, social, political and economic processes need to be maintained. In particular, the aspects of resolution of land disputes as a community process.

The report recommends under para. 148 inter alia:-

- *that the broad principles of customary land tenure should be recorded and incorporated into a "framework" law designed to facilitate the orderly evolution of customary land law;*
- *that the framework law should address, inter alia, the following issues:-*
  - *recognition of two distinct estates under customary tenure, namely the commonhold as the primary estate and customary leasehold;*
  - *inheritance of land under customary tenure;*
  - *land rights protection for women, children and the disabled;*
  - *the relative position of individuals in communities in which they live;*
  - *the re-establishment of authority structures for land management in areas under customary tenure.*
- *a system for the documentation of customary land transactions which communities can operate and manage should be designed;*
- *there is need to develop a clear pastoral land use policy which would recognize land and promote pastoralism as a viable economic activity with adequate linkages with other sectors; and*
- *recognition of customary practices whereby the communities enter into reciprocal arrangement for the use of each other's land and resources particularly in times of drought and other natural calamities.*

(Continued on page 4)

A Pastoralist's View of the "Njonjo Commission" Report

Devolution and decentralization of land administration-para. 266; 304; 305; 306; 308-310

For land to be administered professionally, it is proposed that the District Land Authorities shall be established by legislation in the Constitution to hold and manage land on behalf of the citizens of Kenya. The District Land Authorities are established at district level. It is proposed that the basic title to Trust land shall vest in this authority. This will be done through a Constitutional amendment.

The authority will have the following functions:-

- *allocate Government land;*
- *facilitate the ascertainment, recording and disposing of customary interests in land;*
- *to control and regulate transactions in land;*
- *to take over the role and exercise the powers of the Commissioner of Lands, County Council and the Land Control Boards; control all resources owned by the community; planning;*
- *nominate candidates for appointment to land disputes tribunals;*
- *manage the land adjudication and registration within its jusisdiction.*

Rural land uses-Pg. 64 para. 173

The uplift of the livestock economy is critical. Livestock development is responsible for the country's dairy and beef requirements. 50% of the country's livestock is, however, reared in arid and semi-arid areas.

The recommendation made under para. 173 of the report thus:

- *the need to establish an enabling environment for agriculture and livestock development, especially as regards research, extension services, finance and infrastructure including marketing, agro-processing, rural electrification and farmers' training;*

- *the need to review the desirability of reducing/consolidating the existing multiple laws and institutions and bureaucratic agencies dealing with agriculture and livestock development and marketing.*

Land market control and regulation-Pg. 76 Para. 205

The experience of Botswana on the legal and institutional framework of managing ranches and market livestock products from pastoral communities need to be emulated. This country has a reputation for advanced system of managing ranches and elaborate beef marketing programmes.

Under para 206, it is recommended that the District Land Authorities are proposed to take over the functions of Land Control Boards. There will be urgent review and re-organization of the establishment and appointment of the Land Control Boards. In order to bring about economic and efficient land use planning, the boards should seek relevant technical advice.

Resolution of customary land disputes

The settlement of land disputes should be governed by traditional systems and structures. The land dispute tribunals should be governed by the District Land Authorities. The Customary Laws should be codified and made applicable where appropriate. Para. 221 proposes that there should be a special division in the High Court decentralized to the lowest court in the districts to handle land cases as a means of developing a consistent and rational jurisprudence on Kenya's Property Law. Section 143 should be amended to allow for challenge in any court of law where registration of title has been obtained, made or omitted by fraud or mistake. The recommendations under para. 217 should be adopted.

There should be a special division in the High Court decentralized to the lowest court in the districts to handle land cases as a means of developing a consistent and rational jurisprudence on Kenya's Property Law.

The pastoralists have identified the following weaknesses in the "Njonjo" report:

WEAKNESSES

Historical claims-Pg. 58

The recommendation under para. 155 of the report is self-defeating. It reads thus:-

"As part of the process of tenure reform, mechanisms be provided for investigation and resolution of historical claims by communities especially in the Coast and the Rift valley Provinces."

Why should there be an investigation on facts which are rather obvious? This will encourage bureaucracy and waste of time, hence, a bottleneck to the whole process.

Classification of land-group ranches as private land-Pg. 46

It is held that private land should comprise all land currently registered under the existing land registration statutes including Group Ranches. Group Ranches are community land belonging to certain section of the community known as the Olosho. There should be no aspect of private or individual land ownership among the Pastoralists.

Centralisation of administration of land-para 262, 304, 305, 310, 312, 313

It is good to have the matters of land delivery from the responsibility of the Commissioner of Lands and the County Councils. However, centralizing land administration to the National Land Authority is self-defeating.

The outstanding tasks-Pg. 12 para. 41 and 42

The Commission claims to have been given a very wide and involved mandate. As a result of this, the task under para 42 (ii) designated-problems concerning the Iloodo Ariak/ Mosiro land adjudication section could not be accomplished. It is stated that this will be done in the final report. This is unacceptable.

The land adjudication processes

This is the most dismal area in the report. It has only been analysed but not clear principles have been stated thereof. The land cases of Iloodo Ariak and Mosiro, though claimed that a comprehensive memoranda and evidence of land grabbing were presented, no tangible resolutions have been offered. The recommendation to enact the Land Adjudication (Amendment 199) Bill into law has been outrightly ignored.

Non-recognition of pastoral rights

Though the report recognizes the customary rights to land tenure, the pastoral rights or native rights have not been recognized.

Section 143 of the Registered Land Act and Section 75 of the Constitution

No tangible proposals have been made in this regard. Amendment of Section 143 does not cure the mischief. It should be repealed altogether. Section 75 still propagates for the acquisition of private property. It should be amended to avoid rampant cases of land grabbing and irregular acquisition of title deeds.

In light of the foregoing, the pastoralists recommend that the cut-off date for dealing with the historical land claims should be determined from 1890 when the Foreign Jurisdiction Act was applied to Kenya. They further recommend that all the land that was taken away through wrongful colonial and post-colonial policies should be returned and reverted back to the respective communities.

Co-ownership is passed as Family Land Right in Uganda

On 18th June 2003, Uganda passed a clause on co-ownership of family land to enhance security of occupancy on family land. Most African societies are patriarchal, a system that has pushed women to the periphery as regards property ownership and decision-making.

As Kenya grapples to push women issues in the new Constitution currently under debate, Uganda has already realised the critical role women play in development. In appreciation, the Government of Uganda has made every effort to beef up women's protection by clearly defining their right to ownership of family property especially land. This has been done by reviewing Section 39 and 40 of the Land Act 1998 to read as follows:

The New Section 39 and 40 of the Land Act 1998, passed by Parliament on 18th June 2003

"security of occupancy on family land"

Section 39 A

1) Every spouse shall enjoy security of occupancy on family land.

2) The security of occupancy prescribed under subsection (1) shall mean a right to have access and live on family land.

3) For the purpose of subsection (2), the spouse shall in every case have a right to use the family land and give or withhold his or her consent to any transaction referred in Section 40 which may affect his or her rights.

In this Section,

"family land" means land;

a) on which is situated the ordinary residence of a family; or

b) on which is situated the ordinary residence of the family and from which the family derives sustenance; or

c) which the family freely and voluntarily agrees shall be treated to qualify under paragraphs (a) and (b); or

d) which is treated as family land according to the norms, culture, customs, tradition or religion of the family;

"ordinary residence" means the place where one a person resides with some degree of continuity apart from accidental or temporary absences; and a person is ordinarily resident in place when he or she intends to make that place his or her home for an indefinite period;

"land from which the family derives sustenance" means-

a) land which the family farms; or

b) land which the family treats as the principal place which provides the livelihood of the family; or

c) land which the family freely and voluntarily agrees, shall treated as the family's principal place and source of income or food.

For Section 40, the following new subsection has been substituted

Section 40

1) No person shall

a) sell, exchange, transfer, pledge, mortgage or lease any family land; or

b) enter into any contract for the sale, exchange, transfer, pledging, mortgage or lease of any family land;

c) give away any family land inter vivos, or enter into any other transaction in respect of family land;

except with the prior consent of the spouse.

2) The consent required under subsection (1) shall be given under regulations prescribed under this Act.

3) Subsection (1) shall not apply to any transfer of land by the mortgage in exercise of powers under the mortgage.

4) Where any transaction is entered into by a purchaser in good faith and for value without notice that subsection (1) of this section has not been compiled with, the transaction shall be void but the purchaser shall have the right to claim from any person with whom he or she entered into the transaction any money paid or any consideration given by him or her in respect of the transaction.

5) Consent referred to in subsection (1) shall not be unreasonably withheld.

6) Where the consent referred to in subsection (1) is withheld, a person aggrieved by the withholding of the consent may appeal to the Land Tribunal and the Tribunal shall require the spouse to show cause why they cannot give consent and may, in its discretion, dispense with the consent.

7) A spouse, not being the owner of the land to which subsection (1) applies, may lodge a caveat on the certificate of title or certificate of customary ownership of the person who is the owner of the land to indicate that the property is subject to the requirement of consent under subsection (1)

8) Notwithstanding subsection (2) of section 149 of the Registration of Titles Act Cap 205, a caveat referred to in subsection (7) shall not lapse while the caveat's right to security of occupancy subsists.

9) For purposes of subsection (4)

"notice" means actual or constructive notice.

"purchaser" means a grantee, lessee, sub-lessee, assignee, mortgagee, chargee or other person who acquired an estate or an interest or right in the land.

Kenya Land Alliance hopes that the Government of Kenya will emulate the Government of Uganda, considering that the major contributing factor to under-utilization of land is the exclusion of women from land ownership, control and management. The Government should take a positive action to ensure that women are provided with incentives to participate fully in planning and implementation of land reform projects, since women are the major providers of land labour.

Women should be empowered in matters of land ownership, control, access, use and management at all levels, thus, before marriage, during marriage and at the dissolution of marriage. Only this way can they be able to transform land and other natural resources into assets that sustain national economic viability.

The Report of the Presidential Commission of Inquiry into Views on the Much-needed Land Reform for Sustainable

Having eagerly and enthusiastically gone through the report of the Presidential Commission of Inquiry into the Land Law System of Kenya, Kenya Land Alliance (KLA) is happy to comment that although the 'Njonjo Commission' had not finished its task as per all its terms of reference, the report makes many far-reaching recommendations on the principles of formulating a National Land Policy Framework and the Constitutional Framework for Land Administration and Management.

As earlier stated in our campaign for the release of the 'Njonjo Commission' report to the public, KLA wish to remind all that the process of National Land Policy development is a long and deliberate process that involve a number of steps not necessarily in a sequential order. This generally include:

- Public inquiry into identified land issues guided by clear terms of reference set out by the State
- Public debate on the conclusions and recommendations arrived at through the first step of the inquiry
- Formulation of the principles reflecting public consensus arising from the public debate upon which finally the National Land Policy Framework is drafted as a basis for Legislative, Institutional and Administrative Framework to guide the land matter operations.

The release of the 'Njonjo Commission' report marks the crucial second stage of the National Land policy development process which involves debating of the report. At this point in time, when the whole nation is focused on the National Constitutional Conference, KLA caution and lobby the Ministry of Lands and Settlement to desist from being tempted to derail the process by appointing a group of technical experts in the Ministry to finalize the outstanding task not covered by the 'Njonjo Commission' report. Doing so would be a total betrayal to the Kenya people's optimism for a people-driven National Land policy formulation process.

Although the 'Njonjo Commission' report cites Tanzania as an example where all the steps in formulation of the National Land Policy were followed, KLA wish to remind Kenyans that Prof. Issa Shivji, who chaired a similar commission in Tanzania confessed that the Government of Tanzania dangerously cheated its citizenry when it passed over the process to the ministry officials who drafted a position paper, which formed the basis of the Tanzanian National Land Policy upon which Tanzania ended up with the two pieces of legislations that are due for amendments before their implementation.

In view of the foregoing, KLA advises the Ministry of Lands and Settlement to keep away bureaucrats from the 'Njonjo Commission' report until the public is through with debating and making their final input. Although bureaucrats world over are normally uncomfortable with public debate on issues they consider to be their exclusive preserve, the KLA appeal to Mr. Amos Kimunya either to:

- Incorporate more people to join the team of experts at the Ministry who are looking at the report; or
- Re-constitute the 'Njonjo Commission' to complete its work within a stipulated period; or
- Advise the President to appoint another Commission to finalize the remaining bit.

This would definitely be consistent with the Government's commitment to incorporate real public participation in decision-making on critical issues such as land.

What KLA recommend and consider as the main proposals in the report

Kenya Land Alliance, having actively participated by giving its research findings and the recommendations of the National Civil Society Conference on Land Reform to the 'Njonjo Commission', in addition to facilitating and ensuring that the views of many people especially land-based communities were heard, considers the following as major proposals in the recently released 'Njonjo Commission' report:

Overall goal of land policy

The report gives a succinct overall goal of the national land policy and correctly observes that it should be situated within the broader context of the country's national development framework and strategies. Although there are no elaborate provisions of the fundamental assumptions informing the development framework and strategies, further reading and scrutiny of the report clearly shows that this did not prevent the Commission from coming up with fairly progressive policy principles meant to guide the overall goal of our national land policy yet to be formulated.

In summary, the principles of the National Land Policy Framework as outlined in the report underscore the importance of efficiency, productivity, sustainability, equity, transparency, accountability and participation in the use and management of land and land-based resources. The underlying premise being that land and associated resources should be used and managed for the present and the future benefits of the Kenya people, it being our common heritage and primary resource and the basis of livelihood for many people. This without doubt is a fundamental departure from what has hitherto been the practice that was characterized by gross abuse of natural resources by the ruling political class. KLA applauds the report on this score by recommending that we must decisively begin to reverse this trend and a starting point would be to debate, expand, strengthen and adopt the principles proposed by the Commission in its recommendations.

The constitutional position of land

The report makes a bold recommendation that is equally captured in the Draft Constitution Bill currently being discussed at the National Constitutional Conference. While under the Bill of Rights in the Draft Constitution Bill land ownership as existing property right is guaranteed, the report states that it should simultaneously place the State under constitutional duty to take reasonable steps to enable citizens to gain equitable access to land, to promote security of tenure and to provide redress to those who were dispossessed of their land as a result of past injustices or practices.

KLA further recommends that the Government should take such positive recommendation to devise strategies and procedures to ensure that women are enabled to equally own land through implementing land reform projects.

It is because of making such a far-reaching recommendation that the report concluded that the constitutional changes affecting land policy including the new institutional administrative framework ought to be entrenched in the new Constitution being discussed at the Bomas of Kenya.

the Land Law System of Kenya broadly Captures the Public Development: Kenya Land Alliance's Perspective

Historical claims

Given our land ownership and land development patterns that strongly reflect the political and the economic conditions of the historical land dispossessions, and in light with a number of historical land claims issues raised, both in the written submissions and in oral presentations to the Commission, KLA is compelled to state that this is one area where the report has little to offer.

Whereas it has to be recognised that proposals by different stakeholders are often difficult to reconcile, hence, compromises have to be found, and considering the seriousness of the claims arising from documented historical wrongs and the need therefore for redress, all the Commission could do was to suggest that mechanisms should be provided to investigate and resolve the claims. Granted that such mechanisms would of course be necessary, it would have been necessary to suggest some contours by which such mechanisms would be guided. For instance, how should we decide when this history begins (the cut-off date) and what factors need to be taken into account in deciding what may be regarded as a historical injustice.

These are surely weighty issues that can be informed by gathered and analysed information, but the Commission, which had benefit of listening to Kenyans and ought to have been able to assess the areas around which there was some consensus, shyed away from making a potent proposal. KLA feel that unless clear principles are agreed upon on this most sensitive matter, it may even have been prudent for the Commission to leave it out completely in its report.

The location of radical title (ultimate ownership) of land

One of the most critical issues that any national land policy must grapple with and resolve in a new globalised world is that of the location of the radical title in a country where majority still eke out a leaving from land as the main production resource. The location of the radical title is a contested issue as to whether it should be located in the President, Commissioner of Lands, Parliament, or the people as citizens. The Commission proposes some key principles that KLA feel that need to be debated very thoroughly for therein lies the tragedy that has dogged the land administration and management over the years. The Commission recommends the following:

- That all public land be vested and held by the National Land Authority on behalf of the people of Kenya.
- That all private land whose title was derived from or granted by the Government should vest in and be held by the National Land Authority and that all private land whose title was derived from Trust Land should vest in and be held by community-based institutions created by legislation and entrenched in the Constitution.
- All commons (read community land) vested in the County Councils should vest in and be held by community-based institutions.

An important issue raised by the above principles is that they are based on diversified sources of radical title in which a distinction is made between public land and commons (read Community Land) so that the location of the radical title of each is clearly identified. Further, there is an implicit assumption that the location of each radical title must be democratized through the establishment of accountable, broad and transparent institutions in the form of a National Land Institution (*whichever name it is given is really not important; the Draft Bill annexed to the report calls it National Land Authority, while the Draft Constitution Bill calls it the National Land Commission*) and community-based institution (*referred to by the Draft Bill annexed to the report as District Land Boards*).

It is a KLA argument that there is very close link between the use and control of resources and the organisation and exercise of power. Indeed, control over resources is the ultimate source of power. How land, which is our most important resource, is used and controlled is of paramount importance. Institutions that are answerable either to the people directly or through their legitimate representative should be created to ensure popular participation in the management, use and administration of land. The envisaged national land institution should be made answerable to Parliament while the community-based institutions should be answerable to their own communities. A real legal as opposed to political trust must be created between the Kenyan people and these institutions so as to hold trustees directly answerable for their actions.

Classification of land tenure

The report recommends that land in Kenya be classified under three categories namely Public, commons (read Community Land) or Private, and that the classification be entrenched in the Constitution. This recommendation is supposed to ensure that the classification is consistent with the new recommendation on the location of radical title. Since the Constitution is the Supreme Law of the land, giving Land Law System Constitutional status will accord land the profile it deserves and will make it difficult for future governments to arbitrarily change the Land Law System.

KLA's point of departure with the Commission recommendation of classification of land tenure is when against all public views of the occupants and residents of Trust Lands which form the bulk of land classified as 'Commons', the Commission simply refuse to acknowledge the demand to refer to such land as community Land. KLA contends that Commons are totally different from Community Land because Commons are derived from all tenure systems and they are held, used, accessed and controlled for the common good as special utility spaces.

Land re-distribution

The report does not squarely attempt to address land re-distribution. KLA recognise land re-distribution as an issue that need urgent redress through setting up a programme to provide the urban and rural poor with land for residential and productive purposes aimed at improving their livelihoods. The Government should provide a single, flexible re-distribution mechanism which can embrace the wide variety of land needs of all eligible applicants. Land re-distribution is basically intended to assist the urban and rural poor, farm workers, labour tenants, squatters, women as well as emergent street hawkers and families in our urban centres.

KLA feel that there are useful proposals in this report that can form a sound basis for coming up with an appropriate national land policy. KLA is appealing to the Government to ensure that urgent mechanisms are put into place to expedite and guarantee further public debate and participation to ensure that it embodies the emerging democratic governance principles and practices.

The formulation of a sound national land policy framework is one of Kenya's pre-conditon for attainment of peace, reconciliation and stability. Effective land reform programmes of land re-distribution, tenure reform and institution arrangements for implementation will contribute directly to increased production and poverty alleviation.

FACTS! FACTS! FACTS! FACTS! FACTS! FACTS! FACTS!

Titanium Mining in Kwale

Kenya has not always been known for any known mineral deposits or for mining activities. Indeed, apart from the infamous Goldenberg scam where lots of gold is alleged to have been exported from Kenya, not much has been heard of mineral exploitation in commercial quantities. However, that was to change with the discovery that Kenya was sitting on over ten percent of the total world titanium deposits. In fact, it is reported that this was the largest and most qualitative concentration.

Kwale's remote villages of Maumba and Nguluku, where poverty is widespread, are now hot and famous zones. Local residents and activists have been engaged in a tag of war with the Government and the Canadian Company, Tiomin Resources Inc. through its Kenyan subsidiary, Tiomin Kenya Limited.

The company seeks to mine the mineral and has acquired a 64 square kilometre concession to strip-mine titanium in Kwale, which will expose mineral deposits up to thirty metres deep. In Kilifi's Magarini area, Ksh. 1.7 billion worth of deposits is reported to cover 107.2 square kilometre in ten kilometres of the deep water of Kilifi harbour. Both deposits contain in economic quantities such heavy metals as ilmunite, rutile and zircon.

In July, 2002, the (former) government issued Tiomin Resources Inc. with an environmental licence, an indication that it wanted to see the project off the ground. However, this was only one of the licences and processes that the company has to undergo before eventually turning on the engines of the heavy mining machinery. Now, the Government ha agreed to issue the mining licence.

The titanium controversy has for the first time in Kenya's mining history brought to the fore a number of issues which include:

- Ownership of minerals in Kenya
- Public participation in decision-making in matters with significant impacts on the environment
- Compensation
- Re-settlement of displaced persons
- Sharing of benefits
- Right of injured parties to seek judicial redress
- Access to information
- Value addition and all its concomitant relevance to the country's industrialization and employment policies

An important and a legally paradoxical aspect of land tenure in Kenya is that even on private land where the owner has precedence, minerals are owned by the State. Hence, landowners cannot mine the treasures that befall their lands and are actually required to report such discoveries to the State, upon which they lose out.

The police power of the State, through legislation restricting certain activities on the land, does not always provide for compensation. Where land is adjudicated and the land itself is alienated by the State, full compensation is supposed to be paid. However, where resources on land such as minerals are alienated, compensation is not by right paid. In the absence of a right to compensation, property owners in whose land minerals are discovered have no incentive to exploit the minerals. This often breeds resentment and conflict between the Government and such property owners.

Another intriguing aspect of this issue is the fact that despite the State ownership of the mineral, the Government of the day left the negotiations for the value of the land that hosts the mineral directly between a foreigner and her nationals. This was not only imprudent, but it also exposed the Government's lack of appreciation of the quantum of its rights of ownership and the corresponding obligations.

In the English Common Law as was borrowed and applied in Kenya, compensation was always based on the principle expressed in the Latin maxim *resitutio in integram*, i.e. compensation is supposed to take the injured or wronged party back to the place where he was before the damage complained of occurred. Quite often, it is based either on a legal or equitable right, that is capable of being asserted by the wronged. In property regimes, it involved a question of ownership of something.

Rights relating to minerals are chiefly secured through public tenure. Therefore, the question of minerals and land tenure centres on the issue of public versus individual rights to land and natural resources. There are three systems of land tenure in operation in Kenya: public, individual/private and customary.
At independence, land that was previously known as the native reserves became trust lands administered by the County Councils. Section 115 of the Constitution of Kenya provides that all trust land is vested in the County Council within whose area of jurisdiction they are situated and is also to be held "for the benefit of the persons ordinarily resident on that land". In addition, this land can be acquired for public tenure either by the County Council or the national Government. Under Section 117 of the Constitution, Parliament may empower the County Council to set apart an area of trust land for use and occupation "by a public body or authority for public purpose" or by any person for a purpose which in the opinion of the Council is beneficial to the persons ordinarily resident in that area.

Section 118 of the Constitution provides for the vesting of portions of trust land in the Government where the President is satisfied that such land is required by the Government for purposes of the Government, a corporate body set up by Parliament for a public purpose, an enterprise in which the shares are held by or on behalf of the Government, or for the prospecting for or extracting minerals or mineral oils.

In all the foregoing circumstances, the Government is obliged by the Constitution to make prompt payment of full compensation. In a case where mining is to take place over a long period of time as is now proposed, there arises the question of re-settlement. Tiomin Resources Inc. reports that it has left this issue to the Government to deal with. However, this can not be divorced from the question of compensation. In the words of Mr. John Nyamai, at one time Chairman of the Maumba Nguluku Joint Mining Executive Committee, "It is ridiculous to say that one can leave an area and come back 21 years later. We want to go for good, so we want to be compensated adequately."

As regards compensation, Tiomin Resources Inc. had offered and indeed signed some agreements with some members of the local community for payment of Ksh. 9,000.00 per acre and an additional Ksh. 2,000.00 in yearly rental. By any standards, this is grossly inadequate. The Minister for Environment, Natural Resources and Wildlife, Dr. Newton Kulundu, in whose docket this issue falls recently called for Tiomin Resources Inc. to increase the compensation rate to Ksh. 80,000.00 per acre if they were to get further licences. Although this looks attractive, it is still froth with difficulties. Experts contend that where there is going to be re-location in the scale that is contemplated in this instance, the value of

The 'As' and 'Bs' of the Kwale titanium scandal

land in the surrounding area goes up by the number of the people affected. Considering that not everybody will be wise enough to buy an alternative piece of land, the prudent thing to do is to make a 'land-for-land' compensation. Otherwise, we will end up with increased poverty after people have exhausted their compensation money.

Another issue that is raised by this matter is the question of public participation in decision-making on matters with significant impact on the environment. Coupled with this is the related question of access to information. To be useful and meaningful, public participation must be effective participation. This can only happen if citizens are equipped with all the necessary information to enable them to meaningfully engage in the decision-making processes on development and environmental management.

Information raises the level of debate and influences opinion that might otherwise be compromised by mistrust and bias. However, the Government, especially the previous one, has treated this matter as a top State secret. The only time the local inhabitants get to know of anything is when they are being required to do one thing or other by the Government through the Provincial Administration.

The right of public participation can take many forms, for instance, the right to know about pending Government decisions (including legislative, administrative and policy decisions), public hearings, the opportunity to present written or oral comments and evidence, the requirement that Government consider citizen comments and the opportunity to present petitions, complaints or grievances to administrative authorities.

The involvement of citizens in governmental processes enables the citizens to influence the decisions and bring their perspectives to bear on the decision-making process. A decision arrived at with the involvement of citizens also has greater legitimacy and more chances of being successfully implemented. For instance, It has long since been recognised that if citizens are to have the requisite sense of responsibility towards the environment, they must be able to perceive their own involvement not merely with the environment as a retreat but in the routine activities that affect their surroundings.

Regarding projects with potential environmental impact such as the titanium one, the public must become increasingly involved, through individual and group inputs, in the decision-making process both at the point when a development scheme first becomes a possibility and then during its formulation and implementation. In this way, not only will the public become committed to the well-being of the environment, but also it will understand more fully the implications of environmental quality. For example, the two villages of Maumba and Nguluku are said to be the bread-basket of Kwale District. Additionally, part of the area within which the mineral is to be mined belongs to a defunct but soon to be revived sugar factory. If the public is involved in the decision-making process, they will be able to decide where to strike the balance or which of the two projects would be the opportunity cost. They will also be able to discuss the question of benefit-sharing.

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The foregoing are just but a few of the facts and issues about the titanium mining project in Kwale. At this juncture, one must say a word about the accusation that environmentalists and other activists oppose the project. On the contrary, what this group has been saying all along is a yes to the project as long as the environmental and other associated issues are sufficiently addressed. So far, the inevitable conclusion is that the proponent of the project is yet to fully satisfy these requirements. This fact notwithstanding, the Government has agreed to give a special mining lease to Tiomin Resources Inc. The initial lease is for 16 years but renewable. It has ignored the cries by environmental lobbyists that the titanium excavation should only be done after a thorough and independent environmental impact assessment.

To justify the Government's decision, the argument is that titanium mining will earn the country Kshs. 400 million per year in the next 16 years. As a bait to silence the groaning poverty-bitten Kenyans, the Government promises that the project will generate 1,000 direct jobs to Kenyans now that Tiomin Resources Inc. has accepted the Government demands to process the ore locally. In addition, the Government has promised to see to it that the displaced 420 families on the 2,010 acres are paid a paltry Kshs. 80,000 per acre.
Statistics revealed that the project will be designed to produce an average of 330, 000 tonnes of ilmenite annually in addition to 75, 000 tonnes of rutile and 37, 000 tonnes of Zircon for the first six years. It is projected that a total of 150 million tonnes of ore will be mined.

As regards the kind of mineral tenure system to be adopted, there were mixed reactions from the delegates at the recently adjourned National Constitutional Conference. While some had strong feelings that the owner of the property on which the minerals lie should own all the minerals and other natural resources, a section felt that the Government should hold such resources in trust on behalf of the people of Kenya and for the benefit of all Kenyans. However, the latter may raise eyebrows drawing examples from the past mismanagement of trust lands that had been vested in the County Councils.

In view of the foregoing, Kenya Land Alliance appeal to the technical committee at the National Constitutional Conference, looking into the chapter on environment and natural resources, to push for a new Mining Policy when the Conference resumes. They should also push for the review of the Mining Act to expedite the enforcement of the Mining Policy. To ensure that all Kenyans benefit, an Economic Management Plan need to be formulated.

It is not only Kenya that is grappling with unfriendly Mining Policy. The Tanzania Government is being urged to introduce regulations to enable people living in gemstone-rich areas to buy shares in foreign mining firms operating in their areas. This will enable Tanzanians to share ownership of proceeds of the mineral wealth found in their country instead of being paid paltry amount in compensation before being evicted from their land in favour of foreign investors. The proposal by the Executive Chairman of IPP Group of Companies Mr. Reginald Mengi is that Tanzanians be given 20 per cent of shares of their land in any big mining project owned by a foreigner. His argument is that locals should get shares valued against their pieces of land while the foreign investors get their shares out of the capital they bring in. (*The East African, July 7-13, 2003, Pg. 40*). The Government of Kenya could borrow a leaf from the Tanzanian argument.

All said and done, the only way for Kenya to avoid future controversy on mining is by entrenching all matters of mining in the new Constitution.

NEWS! NEWS! NEWS! NEWS! NEWS! NEWS! NEWS!

President Kibaki appoints a Commission to trace grabbed public land!

Due to the recognition of the centrality of land as a vital environmental, political and social resource in Kenya, the President has appointed a commission of 15 to look into the allocation of public lands to corporations and individuals. Among its duties, the Commission will collect evidence on allocations and prepare a list of all land that was irregularly allocated. The list will include the names of the beneficiaries, the date of allocation, details of subsequent dealings and the current ownership and development status. The commission will also identify public officials involved in the irregular allocations and investigate related issues.

The Commission's report is expected to make recommendations as regards how the land should be returned to its legitimate owners, taking into account the rights of people with claims on it. It will also suggest criminal investigations or court action against those who made possible irregular allocations and suggest ways of preventing such looting. Among other members of the Commission is Mr. Odenda Lumumba, the National Coordinator of Kenya Land Alliance.

The Commission will operate under strict terms such that it will only search for information that is relevant to the inquiry. It may only receive adverse evidence if the person to be named has been warned. In addition, people named during the inquiry will be given a chance to respond either in person or through their lawyers.

Kenya Land Alliance hope that this Commission will execute its mandate satisfactorily and come up with useful recommendations. We hope that it will exhaustively cover all its terms of reference.

The Government gives a green light to Tiomin Resources Inc. to mine titanium in Kwale!

Despite the persistent cries by environmental lobbyists and other activists that titanium mining should be done only after the environmental and other associated issues have been sufficiently addressed, the Government has already accepted to give a special mining lease to Tiomin Resources Inc. to mine titanium in Kwale District.

The Government believes that titanium mining will earn the country Kshs. 400 million per year in the next 16 years. The project is also expected to provide 1,000 direct jobs to Kenyans since it is reported that Tiomin Resources Inc. has agreed to process the mineral ore locally.

To resolve the contentious issues regarding compensation and re-settlement, the Government has promised payment of Kshs. 80,000.00 per acre to 420 families that are to be displaced from the 2,010 acres where excavation will take place.

The most unsure thing to the public is whether the Government has considered a thorough and independent environmental impact assessment in line with the new Environmental Management and Co-ordination Act.

Statistically, the project will be designed to produce an average of 330, 000 tonnes of ilmenite annually in addition to 75, 000 tonnes of rutile and 37, 000 tonnes of Zircon for the first six years. It is projected that a total of 150 million tonnes of ore will be mined.

With such projections, environmentalists shudder at the fear of radioactive emissions as these are dangerous to the Kenyans.

The Minister for Lands and Settlement disbands Land Boards and Land Tribunals!

In a rally held in Meru recently, the Minister for Lands and Settlement, Hon. Amos Kimunya disbanded Land Tribunals and Land Boards, with a view to constituting new ones, which are expected to be in place by August 2003.

This comes in the wake of major developments in the land sector apparently aimed at cleaning up the past evils that have bedevilled this sensitive sector for a long time.

In light of these developments, Kenya Land Alliance is deeply concerned about the short span of time within which they have occurred. Concisely, only two days after Dr. Newton Kulundu, Minister for Environment, Natural Resources and Wildlife announced the Government's move to grant a special Mining Lease to Tiomin Resources Inc., his land counterpart disbanded Land Tribunals and Land Boards. A day later, the President names a Commission of 15 that is constituted to probe grabbed public land. In addition, rumour has it that the Minister for Lands and Settlement has set up a task force within the Ministry to analyse the "Njonjo Commission" Report and come up with the National Land Policy.

The big question is why all these fundamental decisions are being made before the completion of the National Constitutional Conference which is supposed to give the supreme National Policy Principles on land, natural resources and environment.

It is the expectation of every Kenyan that the Government ought to be concentrating on the completion of the Constitution then embark on the National Land Policy Framework.

What a National Land Policy for Kenya should entail: Has the "Njonjo Commission" Report addressed it?

Noting that land is a highly emotive issue in Kenya, Nassir Ali defines land policy as a comprehensive set of principles that governs the relationship between the people, the State and the land. According to Ali, land is the greatest heritage we received from our forefathers. "*In land lies our salvation and survival. It is in this knowledge that we fought for the freedom of our country. Whatever our plans for the future, they must spring from a resolve to put our land to maximum production however small the acreage we may posses*" He quips.

A comprehensive land policy should address the social, cultural and legal aspects of land to facilitate a sustainable development of land and rectify any historical injustices as regards land ownership and distribution. In Ali's view, a comprehensive land policy should address the following:

- System of land registration and land tenure
- Categories of land in Kenya- Government, Trust and Private Land
- Mechanism for delivery of land at acceptable cost
- Land use and land planning
- Holding ground
- Public utility plots
- Forests and natural resources
- Agricultural land and land control boards
- Absentee landlords
- Squatters in rural areas and informal settlement in urban areas
- Extension of leases and renewal of leases
- Setting apart trust land
- Compulsory acquisition of land
- Settlement of land disputes
- Historical injustices to communities in their land
- Foreshore plots and land from receding oceans and lakes
- Consolidation and adjudication
- Settlement Schemes and Settlement fund trustee
- Protected areas
- Customary tenure
- Historical sites and monuments
- Land survey and preparation of official records

Nassir's observation is that the recently released report of the Presidential Commission of Inquiry into the Land Law System of Kenya, has attempted to cover most of the above policy issues as it appears in **PART II**.

However, although the report cover in detail and enunciate policies on land tenure and categories of land in Kenya, it did not give any mention on land registration system which is currently scattered in five statutes. It is important that a single substantive statute be promulgated by Parliament based on the new constitutional dispensation to replace the five outdated cumbersome statutes.

The "Njonjo Commission" report also did not address the management of rangeland, arid and semi-arid areas, which need comprehensive policies if the standards of life of the people resident there is to be advanced. Despite the fact that the main economic activity of the people resident in these areas is livestock keeping, and that to market their animals they need holding grounds, most of these holding grounds have been grabbed.

Noteworthy, although the "Njonjo Commission" report recommends the removal of the sanctity of first registration and addresses historical injustices meted out to the coastal communities and in settlement schemes in the Rift Valley, it fails to fix a cut-off date to mark when this history begins. Instead, the report suggests that Parliament makes this decision. Over and above this, the report narrows its reference to historical claims on only the Coast and Rift Valley provinces, while it is common knowledge that almost all communities in Kenya suffered this injustice in one way or the other.

The omissions notwithstanding, the recommendation that a National Land Authority and District Land Authorities be created by an Act of Parliament is a move in the right direction. This is a long step towards devolution of power in land administration and management, since the National Land Authority will remove the power vested in the President under the Government Lands Act and the Land Control Act. Once this is done, the government land will be under the National Land Authority while the trust land will be vested in the District Land Authorities.

To restore peace and justice, the report calls for redress of ancestral claims to land which was either expropriated by the colonial regime or irregularly allocated to individuals by the independent governments. The Government has already started acting on this by constituting a Commission of 15 to probe grabbed public land with a view to identifying irregularly allocated land, investigating the issues and making recommendations as to how the land should be returned to its legitimate owners.

With the new constitutional dispensation in progress, the fundamental land policies should be enshrined in the Constitution and be made part and parcel of human rights. It is only through comprehensive land reforms that the rights of people, more so for squatters and those in informal settlements, can be adequately addressed. For instance, the right to decent shelter starts with a realization of the role of land tenure as an inducement and incentive to develop a decent house. Therefore, security of tenure should be entrenched in the new Constitution to ensure that the poor in informal settlement access secured and well-planned piece of land with a decent shelter at an acceptable cost.

All said and done, the management of land can only be professionally done with a new institutional framework for land administration. The institutions should be staffed with professional people who are experienced in land matters and are beyond reproach. The system of land delivery in urban centres should be designed to meet the need and demand of land. This will ensure that the land market is never again abused for speculative purposes as demand for scarce urban plots exceed supply as witnessed in the last ten years. All this will be possible only in the presence of a comprehensive National Land Policy.

The Sanctity of Land Titles: Do we Need New Generation Titles?

In modern society, the need for security of title to ones property is the cornerstone of development. A proper land registration system, affording security of title at reasonable expense, is essential for the development of a dynamic and progressive economy. Such a system should indicate, quickly and cheaply, to interested persons what lands are being dealt with in any proposed transaction and what legal interests exist in those lands. This will save the citizens from being subjected to losses, heavy costs and much perplexity.

In Kenya, property rights are broadly classified into two categories viz: - Primary Estates and Derivative Rights. The Primary Estate is the largest claim that an individual or group of individual can hold over land. The two categories of primary estate in Kenya are the Fee Simple Estate introduced by Crown Lands Ordinance in 1915 and governed by Indian Transfer of Property Act and Absolute Proprietorship created by Registered Land Act, Cap 300.

The term, Absolute Proprietorship, first appeared in the vocabulary of Land Law in Kenya at the beginning of tenure reforms in the 1950's. The reports of the Working Party on Africans Land Tenure of 1957 had recommended that 'natives' be conferred with absolute title after the adjudication and registration of their rights to land under customary law. The Derivative Rights are curved out of Primary Estate, thus, they are lesser rights. The main categories are leases, mortgages and charges, easements, restrictive covenants, profits and licences.

A registration system should give the purchaser notice of the type of interest that the vendor has. If there are several interests involved, it should give notice as to their priorities and enable one to determine the rights of all parties claiming an interest in a particular piece of land. The system should also tell the purchaser whether the physical piece of land which is to be acquired is, in fact, the piece that the vendor owns. Therefore, land records are of great concern to all governments.

The framing of land policy and its execution largely depends on the effectiveness of land registration. Land registration is the process of making and keeping land records. Land registration is not only a device essential to sound land administration but it is also part of the machinery of government.

Land registration has several functions. One function is the public function which relates to the welfare of the state of community at large. Registration enables the State to make an inventory of the national land resource for fiscal purposes, or proper development or to ensure the rights of the owner or occupier of land and enables him to conduct his land transactions safely, cheaply and quickly. In most countries which use English Land Law, land registration has little to do with land tax or public inventory of ownership, but has been introduced to simplify conveyancing. Cadastre means a public register of the quantity, value and ownership of the immovable property in a country. A cadastre can be compiled to serve as a basis for taxation in a country. Cadastral survey has a wider connotation not just for tax purposes but also as a record of title.

Another function of land registration is the need for definition of the parcel and identification of those holding rights in it, that is the multi-purpose cadastre. Land registration also defines more precisely the nature of land ownership. A registered landowner is also deemed to have security of tenure, hence he/she is secure and safe in his holding of the land. This encourages, facilitates and permits development.

In summary, land registration has the following purposes:-

- A fiscal inventory of national land resource for tax purpose
- To simplify conveyancing.
- Provide a unit of record and parcel definition.
- To determine and ascertain the nature of land ownership
- To provide security of tenure
- To make land available

In Kenya we have two land registration systems currently in use namely registration of deeds and registration of titles. The five Land Registration Acts currently in operation are as follows:-

a) The Registration of Documents Act, CAP 285 of the laws of Kenya
b) The Land Title Act, CAP 282, of the laws of Kenya.
c) The Government Lands Act, CAP 280, of the laws of Kenya.
d) The Registration of Titles Act, CAP 281, of the laws of Kenya
e) The Registered Land Act, CAP 300, of the laws of Kenya.

It should be noted that the registration of title is a system of simplified conveyancing under which the Land Registrar examines the title to a particular land and thereafter prepares an authoritative record of that title called the register. A register of titles is kept in a public office and it is a record of rights to clearly defined units of land as vested for the time being in some particular person or body and of limitations, if any, to which these rights are subject. The register is the final authority and the State accepts responsibility of the validity of transaction which are affected by making an entry in the register.

The registered proprietor(s) is/are issued with a land certificate (title deed) which contain a facsimile of the official register. Thus, a title deed is a prima facia evidence of ownership of land. The final and authoritative evidence of ownership is the register. If there are two or more titles for the same parcel of land, an official search in the land registry should be able to authoritatively show which is genuine based on the register kept by the Land Registrar. A certificate of official search is then issued by the Land Registrar stating the facts as it relates to proprietorship and any encumbrance registered.

Everything depends on the register and the registrar who enters the title in it. If someone presents a forged instrument to the registrar and the registrar enters it in the register and issues a title deed, the person who committed this act would not obtain a 'clean' title by so doing, but anyone purchasing the property from him and relying on the register would get good title. It is up to the registrar to prevent registration if he finds any irregularities. The entire registration of title is protected guarantee from the state. The system indemnifies the holder of the title if the register proves to be defective.

The new generation titles will cost the tax payer millions of shillings and will not improve the registration system. The security of the register should be enhanced and computerized to provide enough back-ups and tamper- proof systems. The registrars and the register should be beyond reproach. The final authority will always be the register and a title deed will remain a prima facia evidence of ownership of land.

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