



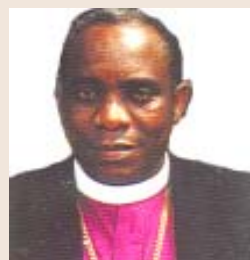
LAND UPDATE

A NEWSLETTER OF KENYA LAND ALLIANCE

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How Should the 'Ndung'u' Report Recommendations be Implemented? - What Kenyans Say.



INSIDE

Exclusive interviews with:

- ◆ Honourable MPs Paul Muite and Koigi wa Wamwere
- ◆ Ms. Carol Thuranira and Mr. Gabriel Muyale
- ◆ Institution of Surveyors of Kenya
- ◆ Kenya Bankers Association
- ◆ The Law Society of Kenya
- ◆ Rev. Mutava Musyimi and Rev. Benard Njoroge

Plus

- ◆ The Ndung'u Report Recommendations

The report of the Presidential Commission of Inquiry into the Illegal/Irregular Allocation of Public Land is finally out! Popularly known as the 'Ndung'u' Report, the publication of this three-volume document is important to the Kenya Land Alliance for two major reasons.

Firstly, the appointment of the Coordinator of the Kenya Land Alliance to the Commission marked a threshold in the relations between KLA and the Government of Kenya. Coming in those heady first six months of the NARC government, the appointment caused quite a stir among the KLA membership and the general public.

On one hand, there were those who saw Odenda Lumumba's appointment to the 'Ndung'u' Commission as a clear indication that this Government was different from its predecessor, and that it was prepared to work with all key stakeholders to address the major problems facing the country, and would not shy away from including even its critics in solving those problems. On the other hand, there were those who saw this as the first step in the co-optation and neutralising of KLA by the government. After all, there were already clear indications that many major NGO actors were moving into government in what was seen in some quarters as a containment strategy.

Secondly, once the Commission presented its report to the President and it became apparent that there were moves within the Government

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to delay, suppress or otherwise 'manage' the publication of the report, KLA spearheaded a campaign to have the report published in its entirety at once and its recommendations acted upon. In addition, considering the fact that from inception one of KLA advocacy strategy has been informed by concerns on the management of public land, we at KLA celebrate the publication of the 'Ndung'u' Report.

We are into the third year of the NARC Government, and we in KLA are concerned about the lack of progress in delivering a new constitution, lack of significant progress in the prosecution of known cases of corruption, emergence of new forms and networks of corruption, and persistent wrangling within the ruling coalition, which clearly impacts negatively on the capacity of the Government to deliver on its key electoral promises. We are also concerned that at this rate, the country will lose a critical opportunity to start the journey to addressing past failures and injustices and open a new chapter in the management of national affairs and resources.

The sentiments expressed by the diverse stakeholders interviewed for this issue of the *Land Update* indicates that Kenyans are keen to see definite action by the Government in reclaiming public land acquired illegally and/or irregularly, punishing those responsible for such acquisitions

and putting in place mechanisms for protecting the public interest in these lands for the current and future generations.

What must now be done is for the appointing authority to react to the Report in a systematic manner, to let Kenyans know which recommendations of the Commission have been accepted and which ones have been rejected, and why. For those recommendations that have been accepted, the appointing authority should then indicate clearly how it intends to act on them, with a timetable for implementation spelling out what action shall be taken in the short, medium and long-term. The ongoing knee-jerk reactions by the Minister for Lands and Housing may be good for political games, but we are not persuaded that they will deliver what Kenyans expect and are entitled to from the 'Ndung'u' Commission process and report.

We at Kenya Land Alliance will continue to follow this issue and to commit our membership and resources to the realisation of the dream that Kenyans hold for a land management and administration system that is responsive to the needs of the majority and not just a few individuals who have access to political and economic power. We intend at our Annual General Meeting later this month to launch a process of advocacy aimed at ensuring that the Government acts on the recommendations of the 'Ndung'u' Report to the fullest extent possible.

“All land illegally acquired must be repossessed by the Government.”

- Hon. Koigi wa Wamwere, MP Subukia

The investigation into illegal and irregular allocations of public land, which was long overdue, is a step in the right direction.

I agree with the ‘Ndung’u’ Report recommendations that all illegally acquired land especially that classified as *urban land* for public utilities like schools, hospitals, playgrounds and markets, and as *State Corporations* land such as ADC farms, and land set aside for forests must revert back to the Government.

We have seen how the Kenyan forest cover has been reduced due to illegal (and legal) acquisitions. I fully support the recommendations to repossess land illegally acquired.

The report, however, is silent on the legal acquisition of Government land. This is a criticism the commissioners should accept.

In implementing the recommendations of the report, the Government should address both the illegal and legal acquisitions that should not have been done.

The Report also did not address the issue of land buying companies that were taken by the Provincial Administration, who then grabbed public utility plots and private land and later sold this land to people who were not members of the land buying companies. This has resulted in thousands of people especially in rural areas who bought shares in the land buying companies having no land.

My constituency has been badly affected by legal and illegal acquisition of land, and Bahati is one of the places where the politically correct and other affluent people own land.



Besides illegal land acquisitions in Subukia, there is also enormous inequality between the landless and those who own land. People who bought land through the land buying companies and those displaced during the land clashes of the 1990s are squatters in Subukia, and they work in the farms of rich people in Bahati.

The ‘Ndung’u’ report should have squarely addressed the question of squatters especially where large farms were sold without regard to Government policy that required squatters who had lived in the farms for many years to be settled elsewhere. These squatters were thus, merely inherited by new ‘African owners’.

As for the implementation of the Report’s recommendations, I foresee this Government, like the Commission, failing to go beyond the scope of the ‘Ndung’u’ Commission because of the assumption that all land legally acquired had been rightfully allocated and should be maintained. I even

doubt that Members of Parliament will accept the illegalities in land allocations that have been pointed out in the report. I foresee them defending the illegalities and going to court to try and stop the regularisation of the acquisitions. The Government, however, does not need Parliament’s endorsement especially where illegal acquisitions as this was outright breaking of the law. All the Government needs to do is to repossess this land and those who will be affected can go to court to challenge the action. If they would like to go beyond the Report, a motion can be brought to Parliament on how much land an individual, family or company should own. This would rectify the situation where some families own entire provinces.

Such action would however, require a Parliament very different from the current one, to pass such a law. I say this because I moved a motion to have tax levied on all idle land and it has been pending since 2003.

“Political will is all that is needed to implement the ‘Ndung’u’ Report Recommendations.”

- Hon. Paul Muite – MP Kabete and Practising Lawyer

Q: What do you make of the findings and recommendations of the ‘Ndung’u’ report?

A: It is a major step as for the first time the Government is trying to address the land question, but the report also concedes that it is not exhaustive and recommends a more permanent tribunal. This way, Kenyans who know of parcels of grabbed land can continue to file complaints and reports to enable the tribunal compile a complete list of all grabbed land so that repossession can take place. There is, however, enough in the ‘Ndung’u’ report to begin the process of repossession.

Q: Members of Parliament are implicated in the report. Would this hamper the implementation of its recommendations?

A: It is a minority of legislators who have been involved in the land grabbing mania and for that reason, the majority will not want their names to be soiled by the minority. I am confident that the majority of members of Parliament will pass any legislation, motion or resolution that recommends the repossession of all grabbed land, including that grabbed by their Parliamentary colleagues. If the implementation of the report is to be credible to the Kenyan people, then there must not be any selective repossession of grabbed land, irrespective of who the individuals involved are.

The Legislature is capable and has the political will of passing any legislation to address these issues. But there are some actions that do not require any legislation or even court action; criminal cases where titles were issued by land registrars and even the



Commissioner of Lands through conspiracy by the registrars and surveyors. These parcels should be repossessed immediately even without going to court. In addition, the individuals implicated should be criminally prosecuted for fraud.

Q: Do you expect the House Business Committee to prioritise the enactment or amendment of laws to deal with the recovery of grabbed public land?

A: I am sure the committee and Parliament will act with speed, but the ball is not in their court; it is in the Government’s court. The Government must fully implement the ‘Ndung’u’ report and where legislation is needed. It should, through the Attorney General, come up with the Bills.

Q: Does the Attorney General have the drafting capacity?

A: The drafts section of the Attorney General’s office certainly has the

experts, but it is at the level of the Executive arm of the Government that a firm decision needs to be made. The Government will also need to have the political will to move forward once the Cabinet makes those decisions.

Q: Banks have advanced loans using grabbed land as collateral. Can they plead ignorance or should they be held accountable?

A: Banks are not innocent as they acted irresponsibly, despite public outcry particularly in the last 15 years. In the Goldenberg case, it is not that the banks did not know what was going on when they were depositing money and earning interest rates of up to 70 per cent. Thus, in regard to the bad debt portfolio, banks were not sincere because they knew the customers could not service their loans when interest rates rose from 16 to 40 or 50 per cent.

Banks must, therefore, surrender any title of grabbed public land in their custody and recover their losses from the people they lent.

Even those claiming to have bought grabbed land innocently ought to have known and where development has taken place, the individuals should be made to pay market prices of the land at the time they acquired it.

For a refund, third parties can then go and follow the individuals from whom they bought the land.

There are also many powerful and politically correct individuals who made money by getting pieces of land for peanuts and selling them the next day for millions of shillings. This group must return the money with interest to the public coffers.

I have no sympathy for either the initial allottee or the purchaser; it is the public that must not lose.

Q: In implementing the report's recommendations, what should be done with different categories of grabbed public land?

A: Areas classified as urban lands, state corporations land, land reserved for the use of Ministries and their departments and public institutions, settlement schemes and trust lands, forestlands, national parks, game reserves, wetlands, riparian reserves, national museums, historical monuments and protected areas, that have been grabbed should be repossessed in consultation with the legislation or sections in the constitution that govern them.

The details and mechanisms in the legislation are not complicated; all the Government needs to do is make the right decisions and follow them through with political will.

“Repossess land illegally and irregularly acquired so that the poor can access it.”

- **Gabriel Anzu Muyale, Security Guard.**

Fifty-eight year-old GABRIEL ANZU MUYALE, a security guard in Nairobi says his four sons are pressuring him to give them land to till, which he does not have. He says, the Government should repossess land illegally and irregularly acquired so that the poor can access it. Mr Muyale spoke to Kenya Land Alliance.



people named in the report might not have taken the land or some of those who did might not have been included in the report.

A: To some extent, I think that remark shows that the committee may not have been able to do everything. But I think the report could form a basis for the Government to start streamlining land issues. However, the Government should not give excuses for not working on the recommendations.

Q: Are you aware of the Ndung'u Commission on Land and its Report?

A: Frankly speaking, I have always followed the commission's work in an ardent manner. I know it was formed to look into ways of repossessing grabbed land. So I am happy with what the team has done.

Going by what I have read in the newspapers – because I have not yet read the report - I think the commission did a commendable job. My fear is that some of the recommendations would not see the light of day. This is because there are many Government reports that have been left to rot in the shelves.

Q: Despite your praise of the report, the Lands and Housing Minister, Amos Kimunya said there is a possibility that some

Q: Do you think it is necessary to form a Land Titles Tribunal to authenticate land ownership?

A: All we want is for grabbed land to be repossessed and shared out to deserving cases. There are a few people who have large tracts of land when majority of the people have nothing. Therefore, a tribunal should be formed as soon as possible to identify the rightful owners of land so the process of recovering land that was irregularly acquired can be started.

Q: What of the proposed Advisory Task Force to implement the report?

A: A Land Titles Tribunal, if formed, would efficiently implement the recommendations. Formation of an

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The Press- on the 'Ndung'u' Report

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advisory task force is, therefore, unnecessary.

Q: Do you think it would be right to strip the President of powers to allocate land?

A: Much as the proposal is a good one, it may not be the panacea to all our problems. We may strip the President of the powers but hand them over to a worse institution. All we need is a system that works; one that will have institutional checks and balances.

Q: The Commission recommended that all title deeds illegally acquired should be cancelled and that land in question be repossessed.

A: There were many pieces of land that were awarded to people through fraudulent means. Thus, as much as we might want to avoid witch-hunting, there is reason to follow up on cases deemed corrupt to streamline the land allocation system. The repossessed land must be reallocated to needy and deserving people. Public officials who were involved in allocating land irregularly and releasing questionable title deeds should be arrested and punished.

Q: What is your opinion on the laws governing land issues in Kenya?

A: Some of the problems we are experiencing emanate from the fact that laws that regulate land allocations are outdated. Thus, as the Commission proposed, the legislation must be reviewed to reflect changing society needs on land.

Other reforms should include the computerization of land records.

Q: What do you think of the general trend in the implementation of the Ndung'u Report?

A: It is sad that little is being said on the implementation of the Commission's recommendations. I can only assume that the silence means there is work in progress towards implementing the report's recommendations.

The collage features several prominent headlines from Kenyan newspapers. At the top left, a large headline reads "Cabinet to discuss land report today" with a sub-headline "Standard Correspondent". To its right is another headline "Why the Ndung'u report is a minefield". Below these are "Big names shocker in land-grab report" and "Kibaki no grabber, says Kimunya". In the middle section, there are articles titled "Release Ndung'u report, Kihoro tells government", "Ex-PS denies land report claim", "Family wants Ndung'u report released", and "Kimunya's refusal to release Ndung'u report his Waterloo". The lower half of the collage includes "Members protest at delay on Ndung'u Report", "LSK picks Imanyara to sue State over Ndung'u Report", "Minister fails to release Ndung'u report annexes", and "Seize grabbed land, says Ndung'u report". At the bottom, there is a headline "Land report is out, the President must act now" and a section titled "From this..." with a sub-headline "NEW HOMES, NEW HOPE".

“Repossess land illegally and irregularly acquired but consider the cost of doing this and whether it will be used for the intended purpose .”

- Institution of Surveyors of Kenya



Reginald Okumu, Honorary Secretary, Institution of Surveyors of Kenya

According to Reginald Okumu, the Institution of Surveyors of Kenya agrees with most of the recommendations of the ‘Ndung’u’ Report. He says that we must, however, ask ourselves how much it would cost the country to repossess the land that was grabbed and were it to be repossessed, would it still be used for the purpose intended originally.

The Honorary Secretary of the Institution says:

“Land taken from the public should be repossessed but we must ask ourselves-: if somebody has put up a building that is housing many families, is it worth repossessing the land?” Each case of illegal or irregular allocation should, however, be treated uniquely. If a piece of land was set aside for a school, it must be repossessed for use by the school no matter what use it has been put into.” “We as an institution also agree that where land

meant for roads was grabbed, it must be repossessed whether developed or not. Despite the fact that road bypasses were planned for, there is immense traffic congestion especially in Nairobi.

Land classified as forestland, and is now substantially developed with no indication that it was forestland need not be repossessed. Such owners should, however, pay market values so that the public benefits. Forestland that has not been developed, must be repossessed.

We support the formation of a Land Titles Tribunal it might take too long and we might still be sorting out title deeds for generations to come. But if the Government ensured there were enough resources, the tribunals sat continuously and there were tribunals at the district level, the rectification of improperly created titles would be done quickly.

The question is; is there sufficient political will to establish such a Tribunal?

Take the example of the Mutava Musyimi Anti- Corruption Committee; we are heading towards the end of the financial year and it has not received any money to date. The Land Titles Tribunal could also be frustrated in a similar way.

We appreciate that surveyors actually demarcated land and valuers assessed the same for stamp duty. Surveyors and valuers are actually given instructions and they work on documents given to them. If you give a surveyor an authentic development plan, he would take it as valid instructions.

Where we have received allegations of our members being clearly involved in illegal allocations such as those of road bypasses, disciplinary action has been initiated. We consider it important to hear their side of the story and action is taken against those found to have breached our rules, regulations and professional ethics. If, for instance, one surveyed Lake Naivasha for purposes of allocation to individuals, with full knowledge that it is an illegal allocation, then one has breached public trust. Similarly, if one surveyed an ecologically sensitive area for another purpose other than the establishment of boundaries, one is in breach and should be prosecuted. We still do sit and hear such cases but those who sit on the council of the institution are volunteers and sometimes it is not too easy to schedule these hearings.”



Land is a sensitive issue in Kenya that the 'Ndung'u Commission' Report is expected to help streamline.

- Carol Thurania, Health Worker

What is your interest in land?

Every Kenyan has an interest in land. I dream about owning land around Nairobi to construct a house. What I am sure of, however, is that I will not get a piece in a prime area because all the land in such areas has been grabbed or sold out expensively.

The Government is attempting to sort out illegally and irregularly allocated land through the 'Ndung'u Commission'. Are you aware of this?

Yes. I know the commission was appointed and that it had completed its work. But I have not seen the implementation of the recommendations.

On releasing the Report, the Lands and Housing Minister, Amos Kimunya said the report might not have the names of all those people who grabbed land and that it could also have names of those who did not grab land.

I remember reading about that. But I thought the Minister was just joking. How can we spend a lot of money on such work only to receive a shoddy report? This is why the public is waiting for action to see whether it would be implemented in full or exclude some people named in it. My view is that people named in the report should all be followed up to establish the role they played in questionable land deals.

Do you think a Land Titles Tribunal should be set up to authenticate land ownership?

Land is a sensitive commodity. Some people acquired it cheaply because they were in senior government positions. Some of the land was later sold to unsuspecting citizens. It is, thus, very difficult for such a tribunal to work even if it was to be formed. It is a good proposal but its work would easily raise eye-brows among key figures, even in the Government itself.

Should the President's powers on land be cut?

It is true the President has excessive powers on land issues. But I would rather this was dealt with under the current constitutional review process. Dealing with it when the Ndung'u Report is being implemented would only divert attention from the main issue of repossession. The report should be implemented within the existing constitution no matter how faulty it is.

Do you support the recommendation that title deeds of illegally and irregularly acquired land should be cancelled and the land reposessed?

Land grabbing has been practiced for a long time. It is thus risky to wake up one morning and start cancelling title deeds of grabbed land. The danger is that the land might have been sold to

innocent people who may have put it to meaningful use. It would therefore be necessary for the Government to track down all the people involved in corrupt land deals including public officers, who should also be sacked. If possible, the culprits should be made to pay the worth of the land while the Government directs those who bought the land to put it to the right use.

The Report points out that the lands records in this country are archaic and that a computerized/automated system is necessary. Do you agree?

That is a good move if it is ever realized. With the growing technology, a computerized system would make operations easier.

Generally, what direction should the implementation of the report take?

As a starting point, I suggest a fresh amnesty for those who grabbed land to return it. Thereafter, the Government could use the recommendations of the Ndung'u report to streamline land issues in the country, for instance, put a ceiling to the size of land a foreigner, and any other person can own, to give the public an opportunity to own land.

“How the Church deals with the land illegally and irregularly acquired determines its moral and social authority.”

- Rev. Mutava Musyimi, National Council of Churches of Kenya

Q: What is the opinion of the Church on the ‘Ndung’u’ Report recommendations?

A: The issue of land in this country was sensitive before independence and continues to be, but at last the report was prepared. We hope its recommendations will be included in the National Land Policy that many people have been calling for.

We support the recommendations of this report. What Kenyans know has been properly documented.

Q: What is your opinion on how the recommendations of the Report should be implemented?

A: Implementing broad recommendations can be very tricky and I think it is important to include members of the ‘Ndung’u’ Commission into the committee that will be charged with the responsibility of implementing the recommendations. We need an all-inclusive panel consisting of not only lawyers, but also other professionals involved in land matters.

Q: The Church has been cited as an interested party in the irregular/illegal allocation of public land. What is your opinion?

A: I am ashamed to hear the Church has been involved in the grabbing of public land, but I would imagine that applications were made and allocations given. I am, however, happy to say that NCCCK is not one of the beneficiaries of grabbed land because we would not want to find ourselves in situations that would take our space



– the freedom to express our views about the direction of the country. The Church needs to lead by example and since it exists partly to render service to society, it is only fair that it regularises the questionable titles and sanitises their otherwise good intentions.

Q: If titles were revoked, what would be the legal/social consequences to the Church?

A: There are serious legal consequences that would result from such revocations particularly to third parties. This includes loss of title and ownership of land, prohibitive costs in legal fees if churches resort to courts for redress and loss of the moral voice to speak against corruption. The Church must always remember that how it deals with the issue of land it acquired illegally or irregularly, will determine its moral and social authority.

The Holy Bible is clearly against unjust gain, corruption and related vices especially land grabbing.

Q: What are the options for churches holding titles that are likely to be revoked?

A: The options vary from one case to the other and from a purely legal point of view I would recommend that:

- a) Where land in question has not been developed, churches should surrender the land and the titles so that it can be used for the intended public purpose.
- b) Where the land has been developed, the Church should petition the Ministry of Lands and Housing indicating that the development is in public interest and that revocation would serve no purpose. In this regard, the cost of the development, its economic value, the number of people involved financially or otherwise and the fact that if

demolished it could be a disruption to the public should be clearly indicated. In this case the Church could be required to pay market value for the land.

Q: How about if the Minister for Lands and Housing insists on revoking the title, the Church's offer notwithstanding?

A: A church may seek legal redress in court if it has strong reasons to retain the land(s) in question or if they want to recover the money used to purchase or/and develop the land. The church could also sue the Minister if there is reason to believe that by revoking the title, he erred in law and fact.

Religious bodies should, however, hold consultative meetings with the Ministry of Lands and Housing to determine the fate of the lands whose titles may be revoked once the implementation of the 'Ndung'u' Report recommendations commences.

On the other hand, if I were the Minister, I would set up a sub-committee to look into land irregularly or illegally allocated to churches. This is because religion is a sensitive subject and it may not be fit to approach religious institutions in the same way as individuals or other

entities. This does not mean that their involvement in illegal or irregular transactions is any less worrying but as institutions that uphold moral values, many of them would have got land for very different reasons. It is therefore, not expected that an individual who grabbed thousands of acres of land would be handled in the same way as a church or churches, which on average got about an acre of land each.

Q: Do you expect the current political establishment to seriously tackle the recommendations contained in the 'Ndung'u' Report?

A: I do not expect our politicians to forfeit land acquired illegally or irregularly since they have not been convincing in their willingness to bite the bullet and pay the price. They have not demonstrated that they enjoy sufficient moral restlessness to be provoked to act in such a sacrificial and selfless manner. I also doubt that they will enact laws that will see them lose those lands, but the Government has policies that can be used to ensure the wrongs are somehow made right.

“ The Church needs to lead by example and since it exists partly to render service to society, it is only fair that it regularizes the questionable titles and sanitizes their otherwise good intentions.”

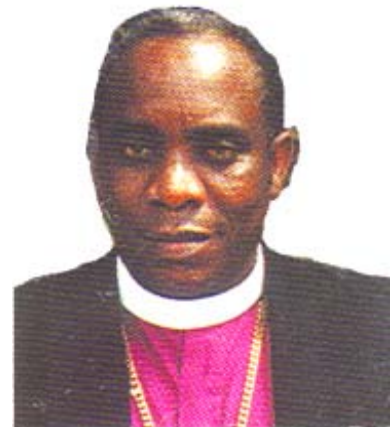
According to Bishop Bernard Njoroge of the Episcopal Church of Africa, all land allocated illegally or irregularly should revert back to public use, but compensation should be made at market value for those with structures that would cost more to demolish.

Also:

- The Church must not be exempted from the revocations, if it is to criticise the Government and others now and in future,

since it would have lost its moral authority to play the advocacy role. Churches that have erected permanent tents and other structures on public land must destroy them and or surrender the Government land or pay for it at market value.

- The Government must implement the 'Ndung'u' Report recommendations immediately to avoid creating doubt on its commitment to deal with land grabbing in the country.



Rev. Bernard Njoroge, General Secretary, The Episcopal Church of Africa

According to Law Society of Kenya Chairman, Ahmed Nasir Abdilahi, “A title document remains sacrosanct and should only be revoked through a judicial process. The process of revoking titles should not be rushed; it requires careful consideration and sober decision-making devoid of witch-hunt.”

Because of grabbing of Government land, transactions have become more complicated and lawyers have to be more thorough in their checks. In terms of due diligence, this has introduced a whole new ball game for lawyers in terms of the searches one has to do and in terms of the legal ramification once a title is challenged in court.

Despite the inherent limitations in terms of the evidence gathered, the ‘Ndung’u’ Report is a step in the right direction and should be welcome by all. This is the first time a comprehensive audit has been done on land vis-à-vis corrupt allocations. The umbilical cord that attached grabbed land to political power has been eliminated.

What may be challenged, however, is the qualitative aspect of the Report. I have gone through it and from a factual point of view some issues are quite contentious. For example, a client of mine has been mentioned to be from Somalia, but the man has never even been to Somalia; he has actually been described in two different ways.

I read somewhere that the Minister will nullify the titles of grabbed land. This is misleading, as the Minister has no power to revoke titles; no matter how it is issued, a title document remains sacrosanct and should only be revoked through a judicial process. The recommendations given in the ‘Ndung’u’ commission should be handed over to an independent tribunal to pursue either new legislation or improve existing legislation on land.



Ahmed Nasir Abdilahi, Chairman, the Law Society of Kenya

In my view, the best way to address this issue would be through judicial adjudication; it should not be subject to executive fiat. The Tribunal should then clarify or correct some of the recommendations. For example, you cannot revoke the title of a building that has changed hands five times. Nevertheless, where public utility land has been grabbed, the tribunal should revoke the titles. The report should not be taken as gospel truth; it only contains recommendations following an investigative process and should now be subjected to a full adversarial inquiry.

If the recommendations of the ‘Ndung’u’ Report are implemented, it could have enormous legal ramifications, as the whole land tenure

system would be subjected to the greatest pressure ever.

Land classified as urban land for establishing public purposes such as schools, hospitals, military operations, playgrounds, cemeteries and historical sites was grabbed mostly because of lack of title deeds. These public purposes must now be provided with the documents to legalise ownership of the land.

On revoking titles of grabbed land issued to banks, my opinion is that it was difficult for banks to tell that they were accepting titles of grabbed land since a land title deed does not indicate if the land is grabbed.

The process of revoking titles should not be rushed; it requires careful consideration and sober decision making devoid of witch-hunt.”

It is absolute nonsense for anyone to revoke a title deed.

- Kenya Bankers Association

The Kenya Bankers Association has been critical about some recommendations of the Ndung'u Report. The Association's Executive Director, Mr Joseph Wanyela, is against the recommendation that titles of land illegally and irregularly acquired should be cancelled since most clients of banks have taken loans for which title deeds are used as securities. Mr Wanyela spoke to Kenya Land Alliance.



Mr. Joseph Wanyela, Chairperson, Kenya Bankers Association

Q: The Ndung'u report asserts that there are title deeds that were illegally and irregularly allocated and that these should be cancelled and the land in question reposessed. What is the position of KBA on this?

A: Our basic understanding is that it is absolutely nonsense for any one to revoke a title deed.

Only the Government issues title deeds. The documents are issued on the basis that all matters regarding the land in question and the title deed itself have been adhered to. In short, no one makes the authorities to issue them under duress.

Q: If the Government were to cancel some title deeds, what is the likely impact on you and your clientele?

A: We will not expect title deeds, which were formally released by the Government to be casually withdrawn. Thus, I do not want to discuss that possibility since such a recommendation does not merit implementation.

Q: Put another way, when should there be cancellation of any title deed?

A: If it must happen, and in very isolated instances, then the Government must indemnify all third

parties who are affected by the cancellation/revocation. The Government must agree to compensate the third parties because it (Government) is always approached whenever specific transactions requiring title deeds as securities are effected. That is how bankers ended up issuing loans to customers with title deeds as security. Usually, the Government clears such title deeds as free from legal questions and could thus be used as security. Only upon such certification do banks issue loans to customers. Therefore, the Government should protect its credibility when purporting to cancel title deeds. The sanctity of title deeds must not be tampered with at all.

Q: Are you saying that you do not like the recommendations of the Ndung'u Report?

A: That is a good question. We have yet to be given a copy of the report despite the fact that the Association is a key stakeholder. What we know about the report is all we read from the newspapers and questions such as the ones you are asking me. This is a sad situation that recently compelled me to write to the Permanent Secretary for Lands and Housing (Erastus Mwangera) asking for the copy as soon as possible.

Not long ago, the Lands and Housing Minister, Amos Kimunya – perhaps recognizing our role as a stakeholder – asked me to give him title deeds that I considered faulty. So, I only dislike some of the recommendations that I have got to know about.

Q: Did you present any faulty or fake title deed?

A: No. I simply told him I have never seen a faulty or fake title deed. How would I differentiate a good or bad title deed yet all those I have seen have Government seals to show they are all genuine? In any case, it must be noted that any land allocation issues hinged on the Presidential powers and are not rested on the consumer of the land. Therefore, when did we start questioning the Constitution? Even when we admit there was no good policy on land allocation, we must not punish people who became victims of

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mistakes of past regimes or what was done according to the Constitution. It is, therefore, not possible to undo everything. Most of our laws are archaic and we must reform them instead of seeking to punish innocent people.

Q: Are you therefore saying that the report made some wrong recommendations?

A: Yes. I particularly think that by seeking to, for example, demolish some buildings that stand on what they claim was grabbed land, the Government is failing to move with the times. Planning is dynamic and the Government thinking must also be dynamic. It is wrong to use a law that was formulated in 1915 to inform our planning of land now.

Q: How do you think the recommendations over title deeds would affect business?

A: Threats to repossess land considered irregularly allocated or to cancel respective title deeds are unfortunate. What the threats have best achieved is that they have created a lot of confusion among traders, us included. Many transactions have stalled because of the uncertainty that surrounds title deeds. We do not know which ones the Government will declare genuine or not. I am not sure I know what the Government's statements on these means and, therefore, we need a consistent and clear statement on that. Even the clashes we are witnessing in some parts of the country emanate from the uncertainty arising from non-clarity of Government statements.

At the moment, no one wants to touch a title deed as good security as all pieces of land are now under question. The sooner this problem is addressed, the better since there are many jobless people who have title

deeds as the only security for getting loans.

Q: The report proposes that the President be stripped of powers to allocate land. What is your position?

A: It is not our business to indulge into that. We, however, insist that if the Government wants to come up with a new policy to manage land issues, it should be enforced from the time it is formulated. Its implementation date should not be extended to what had been done in the past regimes when such a policy was not in place.

Any new policy should not be forced down the throats of Kenyans. It should be systematically discussed and agreed upon by all stakeholders.

Q: It is proposed that a Land Titles Tribunal be formed to authenticate land ownership.

A: It is not possible. Why should I go through a process when there is an easier way of getting my problem solved? By merely setting up the tribunal, the Government would be running away from the problem – unless they have ulterior motives.

It is possible for the Government to know who are the rightful owners of land and therefore the tribunal is unnecessary.

Q: Do you think an advisory taskforce is necessary to implement the report?

A: Such a task force is not necessary at all. This is where I blame the Government for always resorting to this and that committee or task force, instead of confronting the problem head on. By seeking to form a task force, we are making existing authorities to “sleep on their job”. The result is that of taxing the public for nothing. Land adjudication boards that exist within the provincial

administration should do much of the work.

Q: What is your position regarding the recommendation that public officers who engaged in fraudulent land deals should be prosecuted?

A: Such individuals should be punished within the confines of the law. Besides, each case should be dealt with on its own merit and without malice.

Q: Comment on the recommendation that all land records should be computerized.

A: That is a very good move. But the process must be thorough and fast. Such a system will allow us to conduct transactions involving land fast enough and in an easy way and records should be available at all district headquarters if they have to make sense.

Q: What is your opinion on the review of the Government Land Act?

A: This is long overdue. We have many pieces of legislation, which must be reviewed and harmonized. Some of them are archaic, thus out of tandem with current needs in land management.

Q: Are you satisfied with the way the Government is dealing with the report?

A: No. As you can see, the Government is dillydallying as can be seen from the delay of the release of the report. Even now, we are yet to access the copies. This is a problem the Government must address given its tendency to make promises without fulfilling them. The implementation of the report should be done according to the law with a clear understanding that all recommendations in the report are merely proposals. The ‘Ndung’u’ Report is not a judicial Court and thus should be subjected to clear scrutiny.

The Ndung'u Report Recommendations

In its Report, the Commission of Inquiry into the Illegal and Irregular Allocation of Public Land made a number of specific recommendations which apply to all types of public land, and which should help the Government redress the harm done in the past and prevent illegal and irregular allocations of public land in future.

The following are some of the general recommendations of the 'Ndung'u' Report.

1. Establishment of a **Land Titles Tribunal** to embark upon the process of revocation and rectification of titles in the country.
2. **Computerization** of land records in the Ministry of Lands and Housing to make it easy for members of the public to trace and keep track of the history of transactions relating to particular titles of land.
3. Devising of a **secure system of insuring land titles** to ensure the title deed can be relied on as a valid legal document. This is to remove uncertainty that surrounds questionable titles, which has the potential of disrupting the land market and jeopardizing the general development of the country. Thus, a comprehensive Land Title Insurance Scheme should be established for the country to eliminate the risk and uncertainty of dealing with forged titles.
4. Establishment of a **Land Commission** which would be a professional body charged with the duty of land administration to prevent illegal allocation of land and to deal with all land matters in the country, such as allocating public land and supervising management and allocation of Trust Land.
5. **Enhancing the capacity of Institutions** such as Ministry of Lands and Housing, the Judiciary and the Attorney General Chambers in order to competently and efficiently deal with land matters.
6. A **policy on development of public land** should be made to prevent abuse of the law in enforcing the development conditions contained in leases or grants of title to land.
7. A **complete record or register of public land** in the country should be prepared and all Ministries, Local Authorities and State Corporations should maintain registers of all public land they hold.
8. **Land legislation should be harmonized** to prevent the double issuance of land titles and other abuses.
9. **Restitution**
The Government should embark upon the legal recovery of all monies that were unjustly gotten through the illegal allocation and sale of Public Land and should be extended to original allottees, professionals, brokers, among others.
10. **Prosecution**
All public officials, private individuals, companies as well as those professionals who participated in the illegal and irregular allocation of public land should be investigated, prosecuted and/or retired from public service.
11. **Upgrading of informal settlements** should be done using part of the recovered public land.
12. Establishment of a **Land Division of the High Court** should be done to eliminate the backlog of land related disputes in the courts.

FACTS

Did you know that:



More flexible land tenure systems are needed to deal with the large number of informal settlements in Kenya.

Despite continuous public outcry on the problem of illegal and irregular allocations of public land, past efforts by Parliamentary watchdog committees such as the Public Accounts Committee, the Parliamentary Select Committee on Corruption, as well as of Public and Civil Society groups have been futile. Even when Parliamentary Committees have presented reports on addressing the land grabbing issue, no official action has been taken to address the problem. Besides this, Presidential directives banning allocations of public land have been largely ignored and backdating of letters of Allotment has continued.

In its report, the *Commission of Inquiry into Illegal and Irregular Allocation of Public Land* pointed out reluctance by officials charged with the responsibility of addressing the problem as a hindrance to eliminating land grabbing in the country.

It is expected that a Land Titles Tribunal to look into illegal and

irregular land allocations will provide a means to recover the public lands in question.

Over-emphasis on privatization and individualization of land has led to the exclusion of poor people leading to the increase in the number of informal settlements. Individual freehold tenure, and complex rigid planning and registration procedures that are costly, lengthy and often inaccessible to the poor has led to the rapid increase in the gap between those who can and those who cannot afford to buy land.

There is need for more flexible land tenure systems that are accessible and affordable and which will ensure security of even informal settlements where the poor are mostly housed. In particular, the position of customary tenure should be stated clearly in the (new) constitution as communal land tenure systems are still part of the social and economic fabric within ethnic societies in Kenya.

Letters to the Editor

Send your views, opinions or contributions to the Editor, Land Update, Kenya Land Alliance, P.O BOX 2177-20100 Nakuru and we will include them in our next issue.

NEWS

KENYA LAND ALLIANCE LAUNCHES ISSUES PAPER ON HISTORICAL INJUSTICES

Kenya Land Alliance (KLA) successfully launched the Issues Paper No. 2/2004 on **The National Land Policy in Kenya: Addressing Historical Injustices**, on 11th November after failing to do so on 16th October 2004 due to interference from the police.

The Issues Paper that has been circulated widely in the country and which is now available in the KLA offices in Nakuru, has produced loud response from the public with some groups at the Coast and Rift Valley demanding for their inclusion in the National Land Policy Formulation Process that will hopefully resolve historical land grievances and injustices that has caused untold suffering and poverty among Kenyans.

Some of the issues highlighted in the Paper include the:

- √ Squatter problem.
- √ Coastal land issue.
- √ Displacement of people occasioned by land clashes.
- √ Lingering claims to land by certain communities.
- √ Minority communities such as Ogiek, Sengwer and El Molo, and their claims to land.
- √ Neighbouring communities and conflicts between them.

√ The Nubian land question.

The recommendations on resolving historical land grievances and injustices have been given in form of Policy Statements and it is recommended that the National Land Policy deliberately acknowledges the existence of historical injustices and declares the Government's commitment to resolve them.

KLA will publish Issues Papers on Critical **Public** and **Customary Land** Issues and a Technical Paper on the **Efficacy of Establishing a National Land Commission for Land Administration in Kenya**.

GOVERNMENT STEPS UP RESETTLEMENT OF SQUATTERS

The Government has stepped up its plans to re-settle squatters, some of whom were displaced during the land clashes of the early 1990s. There are plans to re-settle squatters in Naivasha who were displaced from their homes. Five hundred squatters are also to be resettled in Nyando. In addition, 12,000 title deeds are to be given to the Ogiek community resident in Mau West forest.

In resettling squatters, it is important to create a balance in the land use. In Kibwezi, there are more than 500 squatters but hundreds of thousands of acres of land have been set aside for wildlife

and for research institutions and this has generated great resentment from the squatters resident in and around these lands.

Human beings should be allowed to live a respectable and comfortable life. Thus, to prevent conflict, land should be set aside for different purposes for particular areas to best serve the interests of all those involved. In addition to land alienated for wildlife migratory corridors, there should be land for resettling squatters, to prevent discord with wild animals, and also to prevent the squatters from invading private farms that more often than not results in fighting between squatters and private land owners and/or with the police.

In resettling squatters, the Government should also take into account the following:

■ Land set aside for forests should not be hived off for resettlement since forests are a source of water and a habitat for a diverse range of flora and fauna. Also, forest-based activities contribute to the national economy.

■ Land set aside for resettlement purposes should only be given to the genuinely landless people and not to senior government officials or other 'politically correct' individuals. Misallocations of land meant for squatters should be nullified and used for the intended purpose.