



Kenya Land Alliance

POLICY BRIEF

PUBLIC LAND TENURE AND MANAGEMENT OF PUBLIC LAND IN KENYA



Hakijamii Trust

Introduction

The present public land tenure management system in Kenya is fragmented, uncoordinated and non-transparent. The public land tenure as embodied in the Government Lands Act, Cap 280 of the Laws of Kenya lacks a coherent information system and is bedeviled by a lack of clarity in the roles, responsibilities and policies of different institutions in its administration, planning and disposal. Thus, there is a need for a set of national norms and standards to ensure efficient and effective use of public land as an asset in support of land reform.

The continued expansion of private tenure domain by ruling elite at the expense of public tenure cannot go on unmitigated. The concept of public land tenure is appreciated worldwide notwithstanding the complex tenurial arrangements. It is predicated on the public trust doctrine, which revolves around matters of public good such as environmental sustainability, public safety, security, health, defence, morality, town and country planning, infrastructure and general development imperative. The doctrine is very broad and it is enshrined in the current Kenyan Constitution in section 75 within the salient elements of the public interest.

In addressing the land question in Kenya, it must be acknowledged that land by its very nature belongs not to a class or a few, but to present and future generations and this is best achieved through the promulgation of the public land tenure regime in policy and law. Through public land tenure the policy makers shall confront the often neglected but persistent concerns of social equity, historical injustice, democratic decision-making and the rational balancing of competing uses of land.

Public Land

Public land is simply all land that is not private land or community land, and any other land declared to be public land by an Act of Parliament. Thus, public land is collective property of the present and future generations and shall vest in and be held by the National Land Commission in trust for the people of Kenya. It includes all land held by the government or any other public agency for the benefit of the entire public. Public land is a national resource, the uses of which should be governed by the National Land Policy that supports the public's macro-economic, human development and redistribution goal. While securing the rights of those who beneficially occupy public land, the asset that is public land should be effectively managed in the public's best interest. However, what exists as public land in Kenya at the moment is described as Government Land. The Government Lands Act defines Government Land as "Land for the time being vested in the Government by virtue of Sections 204 and 205 of the Constitution (as contained in Schedule 2 to the Kenya Independence Order in Council 1963) and Sections 21,22,25 and 26 of the Constitution of Kenya (Amendment) Act, 1964." This definition has grave implications in law and practice. It gives the erroneous impression that the government owns the land as a private entity and can use, abuse and dispose it as every private owner.

Public Land Management

Tragically, the undemocratic and exploitative colonial system still informs the policies, laws and institutions charged with management of public land in Kenya. The colonial legal system commencing with the Foreign Jurisdiction Act of 1890, which provided that the imperial power had control over and could therefore freely dispose of "waste and unoccupied land in protectorates, where there were no settled form of government and where land had not been appropriated to the local sovereign or individuals" was adopted wholesale in both the Crown Lands Ordinance of 1902 and of 1915 and at independence in the Government Lands Act. Principally, the President enjoys the same powers the Governor had over land in the Kenya Colony. Indeed through the provisions of the Government Lands Act, the president is at liberty to make grants of public land to individuals and corporate entities either in leasehold or freehold.

Trends and experiences from the world over show that there is a broad range of policies in relation to public land. However, the bottom line is that public land is a national public resource that should be effectively managed in the public's best interest. The over arching management framework within which land use and development decisions around public land should be made is public good. The government of the day's key responsibilities in regard to public

land is to ensure that the policy, legal and institutional framework adopted and enacted guarantees the following:

- That public land as a national resource is only released for sustainable development in the public interest.
- That accessible, accurate and comprehensive information system is in place on public land holdings.
- That a clear and transparent mechanisms for allocation and disposal of public land is established
- That an acceptable mechanism for public participation and consultation on use of public land is established and operational
- That clear roles and responsibilities of different tiers and departments of government in regard to public land are established.

KEY POLICY CONCERNS AND RECOMMENDATIONS

1. Institutionalization of Public Land Tenure Regime

Both the Proposed New Constitutional dispensation and the Draft National Land Policy propose and provide for public land tenure regime as a sure way of addressing difficult problems created by the current systems of public land-holding, land rights and forms of ownership. The Draft National Land Policy goes further to state that in order to secure tenure to public land the repeal of the Government Lands Act (Cap 280) is necessary. However, in addition consequential amendment, repeal and revision of current laws governing various aspects of public land and establishing institutions and authorities performing public land administration functions in Kenya is necessary. See Box 1:

Box 1.

- Physical Planning Act - No.6 of 1996
- Survey Act - Cap. 299
- Forest Act No. 7 of 2005
- Registration of Documents Act - Cap.285
- Registration of Titles Act - Cap. 281
- Government Lands Act - Cap. 280
- Land Titles Act - Cap. 282
- Land Consolidation Act - Cap. 283
- Trespass Act - Cap. 294
- Rent Restriction Act - Cap. 296
- Landlord and Tenants (Shops, Hotels and Catering Establishments) Act - Cap. 301
- Land Adjudication Act - Cap. 284
- Trust Land Act - Cap. 288
- Land (Groups Representatives) Act - Cap. 287
- Trusts of Land Act - Cap. 290
- Equitable Mortgages Act - Cap. 291
- Wayleaves Act - Cap. 292
- Distress For Rent Act - Cap. 293
- Land Acquisition Act - Cap. 295
- Registered Land Act - Cap. 300
- Land Control Act - Act 302
- Local Government Act - Cap. 265
- Stamp Duty Act - Cap. 480
- Trustees (Perpetual Succession) Act - Cap. 164
- The Land Disputes Tribunals Act - No. 18 of 1990 Part XI of Agriculture Act - Cap.218
- Sectional Properties Act - No. 21 of 1987
- Wildlife Management and Conservation Act - Cap 376
- Environmental Management and Coordination Act of 1999

The new public land tenure system shall be consistent with the Proposed New Constitutional dispensation principle that public land shall not be disposed of or otherwise used except in terms of legislation specifying the nature and terms of that trust to the National Land Commission, in order to deliver security of tenure in line with operations of public land tenure worldwide. The operation of public land tenure shall ensure equitable access to common property resources that are significant to livelihoods of many poor and rural people and in keeping to wise and sustainable use of fragile ecosystems.

2. Clarification of Institutional Roles and Relationships

To ensure effective and transparent system of public land management in Kenya, it is important to clarify the roles and responsibilities of the different tiers of government and other government departments and agencies in relation

to administration, planning and disposal of public land. In so doing the Draft National Land Policy provisions and Proposed New Constitutional dispensation need to be considered in order to establish clear mechanisms and procedures to facilitate co-operative governance. The salient proposal that a participatory and accountable mechanism for allocation, development and disposal of public land be established under the National Land Commission shall redress all substantial administrative difficulties.

3. Allocation and Disposal of Public Land

Public land is crucial for social upliftment and economic development both in the rural and urban areas. Therefore, allocation and disposal of public land must be done in a socially responsible and economically sensible way. At all times both the need for public land, especially for poor and dispossessed and the development potential of particular parcels of land should be considered when determining its use and allocation.

In responding to requests for public land use, the proposed National Land Commission shall have a constructive attitude to the disposal of public land for development after identifying potential developments for a particular parcel of land within the context of national, provincial and local development plans. In prioritization of land uses and hierarchy of needs the National Land Commission shall be guided by Environmental Management Coordination Act (EMCA) in its decision making. In rural context the allocation of land for redistribution purposes has a high priority. In urban context the use of public land for social infrastructure, including housing programmes for low income groups, small and medium enterprise development and streamlined urban agriculture are priority uses.

For consistency each piece of public land should be evaluated in relation to hierarchy of needs and uses before any disposal decision is taken. Hence disposal of public land on open market should be considered only if the land is unsuitable for public purpose. But even then the money generated should be used, where practicable in support of further land acquisition to be set aside or kept for development purpose.

To ensure transparency in the processes around the disposal of public land, disposal or allocation should take place through a range of mechanisms, including and not limited to calls for proposals from the public for development of land, open tender, invited tender and as matter of last resort public auction. Despite all these, transparency and legitimacy of the process will depend mainly on the extent to which information is widely disseminated to all interested parties, including the basis on which decisions are to be made.

4. Redress of Public Land Abuses (Public Land Grabbing Phenomenon)

The country having experienced a major crisis in public land tenure where land meant for public purposes had over the years been illegally and irregularly allocated to private individuals and corporations in total disregard of the public interest, there is a need for urgent redress as recommended in the report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land. This policy concern is based on the understanding that there is no country in the world without public tenure since development imperative depends largely on the manner in which the country balances private and public land rights.

As things stand today Kenya has two options of reconstituting its public land tenure system. Either, the state resort to massive and large scale compulsory acquisitions of private lands, which is extremely expensive to an already burdened and impoverished tax payer, or the state should embark on the implementation of the 'Ndung'u Commission' report recommendation of tracing illegally allocated public land with a view to repossessing and restoring the same to the public tenure for its original purpose.

5. Public Land Information

As proposed in the Draft National Land Policy the National Land Commission is charged among its duties with the responsibility of creating and keeping an inventory of all public land as a best way of holding and managing public land in trust for the people of Kenya. This concern and policy recommendation is a clear pointer that effective use of public land rests to a significant extent on the availability and accessibility of information regarding the location, current and potential future uses and value of public land. Without such a record, the current confusion, lack of coordination and illegal and /or irregular decisions over public land will continue. To compile a register of public land important information exists in the Ministry of Lands' registry, including that which can be drawn from government departments and agencies charged with different public lands. It would be prudent also to include relevant information that was collected during the compilation of the 'Ndung'u Commission' Report.

6. General Obligations

Holding of public land by the National Land Commission does not mean that other State Agencies do not have obligations in relation to it. Public land shall be regulated by public law as provided in the Constitution and statute. Development on public land shall be facilitated by uniform norms and standards applicable to all public land in the country.

The holding of public land by the National Land Commission on behalf of the public brings with it the concept of trusteeship. Thus, the National Land Commission shall be responsible for the manner in which the land is held and dealt with. This implies that should the responsibility be abused, it shall attract criminal and civil liability. Further to carry out its tasks effectively the National Land Commission should be established as a body corporate with legal personality and capacity to enter into contractual arrangements and to sue and be sued. The National Land Commission shall be responsible for maintaining a public land register and be accountable to the Auditor General. In view of legal and practical consequences of National Land Commission holding public land, clear line of responsibility shall be drawn in relevant statute establishing the National Land Commission.

Conclusion

The current legal and policy regime for the management of public land is outdated and ineffective. Past efforts by government have not been far reaching. It is only in the last few years that four initiatives have been pursued by the Government. These include the Commission of Inquiry into Illegal and/or Irregular Allocations of Public Land, the Presidential Commission of Inquiry into the Land Law System of Kenya, the Constitutional Review Process and the development of a National Land Policy. The draft national land policy has made attempts to address critical public land issues. However, as the draft rightly points out, dealing with land policy and public land issues holistically will require the existence of a supportive constitutional framework. Unfortunately, the current constitution has been part of the problem as far as land is concerned. It is important that efforts be directed at finalizing the process of giving Kenya a new constitution. For, without a sound and supportive constitutional dispensation that clearly recognizes and protects public land tenure regime the problems discussed in this policy brief might not be adequately resolved.

The other critical issue relates to implementation. The existence of a good legal and policy regime is half the story. The other half is implementation. The urge is that all actors need to be vigilant and the government specifically must rededicate itself to ensure that the laws and policies once adopted need to be implemented. The process of implementation should be participatory since the challenges regarding public land tenure are not a problem for the government only. They are a problem for all Kenyans and every Kenyan has a role to play in their resolution, the government's role is only one of leadership and facilitation.

REFERENCES

- 1) Cap 280, Laws of Kenya at section 2
- 2) Juma, C. & Ojwang' J.B., In Land We Trust (ACTS, Nairobi, 1996)
- 3) KLA and KNCHR, *Unjust Enrichment* (2006)
- 4) KLA, *Land Reform: Constitutional Principles* (2001)
- 5) KLA, *the National Land Policy in Kenya: Critical Public Land issues and Policy Statements* Issue paper no 3/2004.
- 6) Ochieng-Odhiambo. M., *Liberalization, Law and the Management of Public Land and Forests in Kenya: Proceedings of the Regional Symposium on Common Property Resources Management in East Africa, held in Kampala, March 26-28, 1996.*
- 7) Okoth-Ogendo, H.W.O., *Tenants of the Crown*, (Acts Press, Nairobi, 1991)
- 8) Republic of Kenya, *Report of the Commission of Inquiry into Illegal/Irregular Allocation of Public Land*, (Government Printer, Nairobi, 2004).
- 9) Shivji, Issa, G. *Not yet Democracy: Reforming Land Tenure in Tanzania* (IIED and Hakiardhi, 1998).
- 10) Toulmin, C. & Quan, J. *Evolving Land Rights, Policy and Tenure in Africa* (DFID/IIED/NRI, London, 2000).
- 11) Wanjala, S.C. (ed.) *Essays on Land Law: The Reform Debate in Kenya* (ACTS, Nairobi, 1991).



Kenya Land Alliance, C.K. Patel Building, 6th Floor,
Kenyatta Avenue Nakuru, Kenya.
P.O Box 2177-20100 Nakuru. Tel.: 254-51-2210398
Telefax: 254-51-2215982
E-mail: klal@africaonline.co.ke
or info@kenyalandalliance.or.ke
Website: www.kenyalandalliance.or.ke

Economic & Social Rights Centre-Hakijamii Trust,
2nd Flr, Golf Course Commercial Centre, Kenyatta
Mkt, P.O.Box 11356-00100,Nairobi-Kenya.
Tel: 254 - 020 - 2713166 / 2720751.
Fax: 254 - 020 - 2726023.
E Mail: esrc@hakijamii.com

