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THE EFFICACY OF ESTABLISHING A
NATIONAL LAND COMMISSION FOR
LAND ADMINISTRATION IN
KENYA

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PREFACE

The administration of land in Kenya has been characterized by inefficiency and corruption. For this reason, Kenya Land Alliance (KLA) proposes the establishment of a National Land Commission for the administration and management of land in Kenya. This is a reflection of the national opinion on the institution best suited to handle land matters in the country as captured in the Constitution of Kenya Review Commission, the Presidential Commission of Inquiry into Illegal and Irregular Allocation of Public Land ('Ndung'u Commission') and on similar principles in the Presidential Commission of Inquiry into the Land Law System of Kenya ('Njonjo Commission') reports.

The continued land administration crisis in Kenya compromises human existence and development. This indicates poor governance and lack of political will by the Government and land administration institutions to address land problems.

At this time of National Land Policy Formulation process, all stakeholders should ensure a National Land Commission is established, as a fair and democratic governance structure of land matters, which would ensure coordinated administration and management of land for the enhancement of livelihoods and reduction of poverty.

This technical paper presents the *Efficacy of Establishing a National Land Commission for Land Administration in Kenya*. KLA hopes that it provides ground for action to be undertaken under the auspices of the ongoing National Land Policy Formulation and the Constitutional Review processes.

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INTRODUCTION

Conceptualising land administration

Land administration has been described as the set of services that make the land tenure system within a country socially relevant and operational. This is through determining, recording and disseminating information about the tenure, value and use of land necessary for the implementation of land management policies.

General Functional Components of Land Administration

Land administration services may be classified broadly into the following functional components: **Juridical, Regulatory, Fiscal, Cadastral** and **Adjudicative**.

The **juridical** component of land administration ensures that the boundaries of property rights created under tenure law are clearly defined and maintained. To discharge this function, a good land administration system must have mechanisms for efficient land rights delivery, adjudication of rights, demarcation and survey, registration and record keeping.

The **regulatory** component ensures that performance standards in land resource management are properly designed, prescribed and enforced, and their integrity assured. At the core of this component, therefore, are mechanisms for land use planning, land market regulation and land quality assurance through environmental auditing.

The **fiscal** component of land administration ensures the existence of mechanisms for the proper assessment of land resources for revenue generation through a variety of land taxation measures. This function depends largely on how the *cadastral* component of the land administration is organised.

The **cadastral** component ensures the existence of appropriate mechanisms for retrieval of accurate information on:

- Who owns what interest in particular land(s)
- The proper identity of land parcels in maps

- The nature, quality and productivity of land and the extent of changes, if any, which may have occurred in resource characteristics as a result, *inter alia*, of use, population pressure and technological changes.

The **adjudicative** component ensures that mechanisms exist for the management and rapid resolution of land disputes. The peaceful enjoyment of property rights in land will, to a large extent, depend on how this functional component is designed and operationalised.

It should be clear that land administration is an essential factor in an integrated and sustainable land resource management system. All its functional components must therefore be properly designed and efficiently operated in tandem with other aspects of that system.

Land Administration Systems in Africa

Experience indicates that land administration systems in African jurisdictions have generally failed to operationalise most of the aforementioned functional components, efficiently, if at all. This is because most countries perceive land administration structures and infrastructures as factors external to the land system itself. In most jurisdictions, therefore, the various components of land administration are rarely, if at all, integrated into the design of macro-level policies on land. As a result, certain components of land administration, especially the *fiscal* and *cadastral* aspects, are generally neglected.

Similarly, land administration is often considered a part of routine public (Civil Service) administration. For this reason land administration is rarely regarded as a *skill-based or professional* function. Consequently, land administration personnel are often sourced from other government departments.

Unfortunately, due to the fact that land administration is a means through which land accumulation occurs, its capture and control by state elites in a predominantly land based economy is the norm rather than the exception in Africa. For this reason, there has been general reluctance to reform, privatise or re-engineer land administration structures and infrastructures.

Still, many African jurisdictions lack the technology or expertise to operationalise many of the functional components of land administration mentioned above. For instance, few African jurisdictions have fully

developed operational **Land Information Systems (LIS)** or **dynamic adjudicative mechanisms**. Indeed, only recently have there been attempts to build capacity in some jurisdictions. The effect of this situation is that land administration in Africa is plagued by:

- Substantial disuse
- Bureaucratic complexity
- Managerial opacity
- General inefficiency
- High transaction costs

The Kenyan situation

Like many African jurisdictions, the land administration system in Kenya *lacks transparent and effective institutions to deal with public land and customary land, the administration of which is perceived to be corrupt, over-centralised and remote from the resource users*. After extensive public enquiry into a wide range of issues including the land question, the Constitution of Kenya Review Commission (CKRC) also noted that the main weakness of the land administration system in the country is that it has:

- Legal overlaps and ambiguity
- Institutional rivalries
- Operational overloads

In addition, the Commission of Inquiry into the Land Law System of Kenya ('Njonjo Commission'), which focused on the *Principles of a National Land Policy Framework, Constitutional Position of Land and New Institutional Framework for Land Administration*, concluded that:

“The overall lack of policy, the destruction of the infrastructure, the interference in land matters by the Provincial Administration and most of all the failure to heed the views and needs of local residents, has brought land administration into total disrepute in the eyes of Kenyans” (Paragraph 292).

Also:

“The chaotic manner in which land is now managed by various sectors must be overhauled, as it is a recipe for disaster (Paragraph 302).

It was further noted that no component of land administration in Kenya was functioning efficiently or optimally and as a result, among other problems, there is severe insecurity of land rights caused by:

- Lack of proper record keeping
- Persistent inaccuracies in the land registry information
- Poor delivery of services
- General public distrust of land administration procedures and processes
- Land market imperfections at all levels and in respect of all tenure regimes

RE-ENGINEERING THE LAND ADMINISTRATION FUNCTION IN KENYA

Redefining the goal of land administration

Considering the CKRC and the ‘Njonjo Commission’ recommendations therefore, the radical re-structuring of the land administration system as part of an overall land reform process is urgent and overdue. The first step towards this is to redefine the goal of land administration, which should be reflected in an integrated land policy reform programme. The redefined goal should ensure that the land administration system, however structured, is organised, operated and maintained to:

- Guarantee the security of all categories of tenure.
- Keep all categories of land rights (whether individual, communal or public) clear and unambiguous.
- Provide a robust framework for the marketability (transfer and transmission) of different species of land rights, in specific cultural and economic contexts.
- Facilitate the sustainable regulation and management of all categories of land (public, private, community and commons).
- Provide an accurate and easily accessible land information system.
- Avail socially acceptable mechanisms for the expeditious and cost-effective resolution of land disputes.

The redefinition of the land administration goal must be followed with the design of a new structure or structures that are:

- Founded on the principle of stakeholder participation.
- Legally autonomous.
- Fully devolved to the lowest levels of public/community administration.
- Accessible and accountable to the public.
- Transparent and devoid of bureaucratic malaise.
- Able to acquire, manage and process the technologies required by an up-to-date land administration system.

The design of a structure or structures that provide viable solutions may vary from one jurisdiction to another. What is important, however, is that the design chosen takes account of the empirical circumstances of that particular jurisdiction.

Establishing a National Land Commission

Throughout East, Central and Southern Africa, reports indicate that the state through its public service institutions is an inefficient and wasteful manager of land resources. Even in countries such as Malawi and Tanzania where the law clearly imposes a duty of trusteeship on the state with respect to the allocation and utilisation of land resources, the so-called trustee has often ended up as the beneficiary. Where no public trust is imposed on the state, as is the case in Kenya and Zambia, plunder of land resources by the elite is the rule rather than the exception. The dominant land administration paradigm emerging from this region, therefore, points to the need for the establishment of new structures independent of government or political administration. These may be single or multiple function structures depending on the complexity of the land administration problem in each jurisdiction.

In Kenya, the Constitution of Kenya Review Commission, the Presidential Commission of Inquiry into the Land Law System of Kenya (‘Njonjo Commission’) and most recently the Presidential Commission of Inquiry into Illegal and Irregular Allocation of Public Land (‘Ndungu Commission’) have recommended a multiple function National Land Commission as the most suitable means of resolving the dilapidated system of land administration in the country. This is in contrast to Uganda, which opted for a single function structure at the national level and autonomous structures at the district administration levels. Given the magnitude and complexity of the land question in Kenya, KLA is persuaded that a multiple function land administration structure in the form of a National Land Commission would be appropriate.

General features of the proposed land administration structure

Kenya Land Alliance envisages a new institutional structure, which is relatively lean at the national level but fully devolved to all levels of government. There will be a multiplicity of functions to be performed by this institution. The functions to be assigned at each level to which the institution will devolve would be carried out with relative autonomy while the finances to sustain such an institutional structure would come from the Treasury or the treasuries of devolved units of government.

Depending on the system of public administration finally agreed upon, the land administration structure would then function at the National, Regional (or district) and Local (or area) levels. The proposed functions at national and devolved levels would be:

1. The National Land Commission (NLC)

This institution will be established at the national level and its functions would be to:

- √ Ensure the formulation and review of a National Land Policy including policies on tenure, settlement, use, physical planning and management of land in rural and urban areas.
- √ Hold, manage (as well as value) and allocate public land located within the administrative jurisdiction of any level of government.
- √ Review and ensure enforcement of all laws relating to land.
- √ Ensure preparation and maintenance of an effective Land Information System (LIS) and cadastral mapping and survey.
- √ Ensure generation and transmission of information required for the formulation of a national fiscal cadastre.
- √ Coordinate and monitor the work of all devolved levels of the land administration system.
- √ Promote research on issues of land and its development including the Commission of Studies on any aspect of the land system.
- √ Design and execute land reform programmes for implementation at all levels of government.
- √ Promote general educational programmes in land matters so as to create public awareness and facilitate participation in land administration.
- √ Ensure settlement of appeals from devolved levels of land administration.
- √ Advise the national and all levels of government on all land matters.
- √ Ensure conservation and preservation of ecologically sensitive zones.

2. Regional (District) Land Boards

At the regional (district) level the National Land Commission (NLC) would have the power to constitute **Land Boards** whose functions would be to:

- ◆ Establish and maintain land registration systems and registries.
- ◆ Settle appeals from lower levels of land administration.
- ◆ Establish principles and mechanisms for the regulation of land markets.
- ◆ Interpret, enforce, contextualise and audit land policies and laws at the regional (district) levels.
- ◆ Advise regional (district) levels of government on the mode of integration of National Land Policy into local development programmes.

Other functions of the land boards will be:

- ◆ Comprehensive regional (district) and lower level planning and plan implementation.
- ◆ Inter-sectoral liaison and co-ordination with other agencies exercising functions over land.
- ◆ Ensuring the conservation and preservation of ecologically sensitive zones wholly situated within their areas of jurisdiction.

3. Local (Area) Land Committees

At the local (or area) level the National Land Commission (NLC) would have the power to constitute **Land Committees** whose functions would be:

- ◀ Stimulation of community participation in land policy development and land management.
- ◀ Management and resolution of land disputes as the forum of first instance.
- ◀ Execution of local land use plans.
- ◀ Establishment and administration of land registries for their respective areas.
- ◀ Provision of services for the investigation and clarification of land rights for purposes of updating area land registries.

What is envisaged, therefore, is a powerful NLC operating with the support and assistance of lower level institutions that are functionally autonomous. All three levels would be coincident with the structure of public (political) administration without being dependent on it for resources and personnel. The regional (district) and local (area) institutions would report and be responsible ultimately to the NLC.

Powers of the National Land Commission, Regional (District) Boards and Local (Area) Land Committees

For effective execution of their functions, the Commission, Boards and Committees would have the power to enforce decisions made in respect of those matters for which they have primary competence. For the resolution of land disputes, these organs would exercise powers of subordinate courts and any aggrieved party would be at liberty to obtain specific enforcement orders from the courts in relation to decisions rendered by them. Further, immunity would be granted to officers of these organs to facilitate entry, search or verification of any matter within their functional jurisdiction. Beyond receipt of public funds, these organs will have the power to raise their own money.

Implementation and operationalisation of the proposed land administration structure

The process of establishment

The establishment and operationalisation of the proposed land administration system will depend on how soon a new law on land administration can be enacted. That law would establish the National Land Commission as a corporate institution with power, *inter alia*, to constitute the Regional (District) Land Boards, and Local (Area) Land Committees envisaged herein. The Commission must, in addition, have the power to establish and maintain an independent source of revenue, and to recruit and discipline staff at all levels of the land administration system.

A Law establishing such an institution (National Land Commission) will of necessity provide for the consequential amendment, repeal and revision of current laws establishing institutions or authorities performing land administration functions in Kenya. These laws include:

- Physical Planning Act – No. 6 of 1996
- Survey Act – Cap. 299.
- Government Lands Act – Cap. 280
- Registration of Documents Act – Cap. 285
- Registration of Titles Act – Cap. 281
- Land Titles Act – Cap. 282
- Land Consolidation Act – Cap.283
- Trespass Act – Cap. 294
- Rent Restriction Act – Cap. 296
- Landlord and Tenant (Shops, Hotels and
- Land Adjudication Act – Cap. 284
- Land (Group Representatives) Act – Cap. 287
- Trust Land Act – Cap. 288
- 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 – Cap. 302

- Catering Establishments) Act – Cap. 301
- Trustee (Perpetual Succession) Act – Cap. 164
- The Land Disputes Tribunals Act – No. 18 of 1990 Part XI of the Agriculture Act – Cap. 318
- Sectional Properties Act – No.21 of 1987
- Stamp Duty Act – Cap. 480
- Local Government Act Cap. 265 Sections 144 and 145

Anticipated Impediments to the implementation of the new land administration structure

Some of the impediments that may be faced during the implementation process include:

- Resistance by departments of line ministries and other authorities that now administer various aspects of the land sector.
- Political objection by people with vested interests in the *status quo*.
- Lack of the human, financial and technical resources required to establish and operationalise the new system.
- Absence of a social ideology supporting public participation in decision-making in the control, allocation, management and utilisation of land resources.
- Failure to establish a truly decentralised (or devolved) system of public (political) administration to support the new system.
- Delay in legislating the new system.

It is important therefore that adequate lead-time be created for the removal of these impediments. Of priority is the reorganisation of the structure of government so as to ensure effective democratic governance at all levels of society. This will not be achieved simply by creating decentralised or devolved structures. These structures must be supported by public and political commitment to a process based on informed public participation in the management of public resources. Once that democratic base is laid, steps must then be taken to build the capacity – human, financial, institutional and technological – which the sustainable management of the new land administration system would require.

CONCLUSION

The establishment of a National Land Commission to administer and manage land matters in Kenya will provide efficient and effective land administration and management structures which are a must for the attainment of peace, reconciliation and stability. This institution is also crucial for economic growth, reduction of poverty and assured secure livelihoods for the Kenyan people.



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