

## LAND IN THE PROPOSED CONSTITUTION OF KENYA: WHAT DOES IT MEAN?

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Kenyans have been developing a new National Constitution since 2002. A final draft is being placed before the electorate in August 2010. Should an absolute majority approve the draft, it will become the new Constitution of Kenya within 14 days.

The aim of this brief is to respond to common questions being raised about land in the proposed Constitution in as simple manner as possible and from the perspective of an independent specialist. This is followed by a more technical overview of what the proposed law clearly *does* say on land matters, and what it fails to cover or leaves uncertain. The brief ends with a general conclusion as to the overall utility of the land content of the proposed Constitution.

### 1 What is 'land' and what is 'property' in the proposed Constitution?

Land is only one asset which may be *owned* and therefore only one form of *property*. Moveable assets and intellectual property are other examples of property. Land is defined in the proposed Constitution as including not just the soil, but also water, sea, and natural resources above and below the land, even the air.

It is difficult to identify any land in Kenya which is not owned, and therefore not property. Lands which are not owned by individuals or communities are categorised in the proposed Constitution as public property, meaning the property of the *Kenyan nation* or parts of the nation, such as the residents in a county.

### 2 Where is land covered in the proposed Constitution?

Article 40:	Protection of right to property under the Bill of Rights
Articles 60-68:	Chapter Five: Land and the Environment
Article 174:	Chapter Eleven: Devolved Government
Articles 248-254:	Chapter Fifteen: Commissions and Independent Offices (in relation to the National Land Commission)
Article 260:	Interpretation, explaining terms used in the constitution like 'land', 'property' and 'effective date' (i.e. when the Constitution if approved comes into force)
Fourth Schedule	lists functions of national and county governments
Fifth Schedule	lists the time frame within which new land laws or changes have to be enacted
Sixth Schedule	says what the status of existing laws is until new laws are passed.

### 3 Common questions ... with some answers

- 1 Q: *Some people are saying that Government will now be able to take our land without paying any compensation. Is that true?*

A: It depends on the situation.

In general, compensation is always due *unless* the property is shown to have been acquired unlawfully. However, the Constitution also empowers the State (i.e. Government) to take lands without paying compensation *if this in accordance with the principles of land policy or other actions which are laid out in the Land Chapter.*

This is likely intended to cover instances where changes in rights to land will not see compensation. However these cases are no where listed. It may only be *speculated* that, for example, the reduction of freeholds held by non-citizens to leaseholds *may not* be compensated; that the removal of Trust Lands from County Councils into the hands of communities *may not* be compensated, and that when land is taken because it is idle, compensation *may not* be paid, or at least at the same rate open market value of land which is being actively used. But these are only speculations. New legislation will need to be considered by Parliament to specify exactly what is intended and will be debated at that time.

- 2 Q: *What does 'public purpose' cover? Can Government still get away with taking lands for purpose which are really for private benefit but dressed up as 'in the public interest'?*

A: Possibly.

Public purpose (and 'in the public interest') are not directly defined in the Constitution. Article 66 suggests a definition in declaring that the State may regulate rights and land use *'in the interest of defence, public safety, public order, public morality, public health, or land use planning'* (This borrows from Article 75 (1) (a) of the current Constitution 1963 and from the Land Acquisition Act, Cap 295, which provide the same, and fuller definition).

The main concern for ordinary citizens may be to ensure that 'private interests' are not easily covered by 'public interest' on grounds only that private developments indirectly bring benefit through taxation and revenue on those activities. It is therefore important that Article 66 does also provide that a law is to be enacted to *'ensure that investments in property benefit local communities and their economies'*.

- 3 Q: *Does compensation have to be paid before Government can take private property?*

A: No.

It merely has to be paid 'promptly'. [Some other new Constitutions including some of Kenya's neighbours *do* require payment before the owner is evicted and that payment is based upon agreement between Government and the owner].

- 4 Q: *If my land is unregistered, will Government pay me the same amount as if the land were registered when it takes my land for public purpose?*

A: Unclear.

Protection of unregistered but longstanding or customary occupancy is not explicit but implied. Article 40 (4) does suggest payment to unregistered occupants will be made, in that *'provision may be made for compensation to be paid to occupants in good faith where they do not hold title to the land'*. However it is not certain that this would be at the same rates paid to a titled owned.

5 Q: *Is it true that all freeholds will be reduced to leaseholds?*

A: No.

Only freeholds held by *non-citizens* will be reduced to 99 year leaseholds. The freeholds held by Kenyan citizens are untouched.

6 Q: *Will leaseholds be renewable?*

A: Probably.

Leaseholds are currently renewable and it is likely that this will be sustained in new land law – but we cannot know this until those new laws are enacted. At this point there is no reason to presume that leases will not be renewable.

7 Q: *What is the main difference between Private and Community land?*

A: Private land is land (and houses and buildings) held under *registered* entitlement (freehold or leasehold). Community Land has a different source: it is land which is implied as owned by a group on the basis of customary norms, not through formal registration. However this does not mean that Community land cannot be registered, but at registration it seems it will not become Private land.

8 Q: *Will all trust lands and group ranches automatically become the property of communities when the Constitution is approved?*

A: No.

The Constitution is not crystal-clear on exactly when Trust lands become Community land but this is unlikely to be until a new law is enacted. The law does not have to be in place for five years so it is likely that there will be no change in the immediate future.

9 Q: *Is 'community' the whole county community or just one clan or village?*

A: Any of the above, plus other social formations.

'Community' is not defined other than indirectly by saying that Community land will be vested in communities on the basis of ethnicity, culture or similar community of interest. In practice it will be up to each and every group to decide. It could become the practice that

each village or village cluster (sub-location, or location), or pastoral clan, or hunter-gatherer band, declares itself to be a community for the purposes of land ownership. However there may be cases where a whole ethnic group decides it will be the community for land ownership purposes.

10 Q: Is 'community' necessarily people of one ethnic group?

A: No.

The Constitution says ethnicity *may* be the determining factor (Article 63 (1)), not that it *must* be. And Article 27 is extremely clear that there cannot be discrimination on the basis of ethnicity; to do so would be an abuse of a fundamental freedom.

11 Q: *Are only hunter-gatherers considered communities with ancestral rights?*

A: No.

The Constitution refers to 'ancestral lands *and* lands traditionally occupied by hunter-gatherer communities' (Article 63 (2) (d)) (*my emphasis*). Ancestral lands are not defined. However it is safe to assume that they may apply to any group or community in Kenya which identifies itself as traditionally holding a specific area of land and over which it still has grounds to claim as its own.

12 Q: What does the proposed Constitution say about indigenous peoples?

A: Nothing.

The drafters have been very careful not to refer to indigenous peoples as exactly who is considered indigenous or not indigenous is debated in Kenya. International law tends to use indigenous peoples when referring only to hunter gatherers and pastoralists and this is not considered just in most African countries. The Constitution does require the State to put in place affirmative action programmes for marginalised and minority groups (Article 56) but noticeably not including land rights and defines marginalised and minority groups as including hunter-gatherers and pastoralists but also other marginalised or minority groups in society (Article 260).

13. Q: *May different groups of pastoralists have their own areas in the same district? What if they use different areas of different districts?*

A: Yes.

While this is not covered in the Constitution the *National Land Policy* (Article 180) pledges to developing a suitable legal framework for registering pastoral rights, including in a manner which enables cross boundary access as necessary.

14. Q: *Will Community lands be registrable private property?*

A: Probably.

Community land is registrable by implication in statement that any unregistered community land shall remain held in trust by country governments (Article 63 (3)). Whether by registration it then becomes private property (held in undivided shares by all members of the community) is not stated and not clear. It may be guessed that new law will make Community land a distinct class of private property, on grounds that its transfer, lease or sale is subject to special procedures and conditions (and sale may be disallowed altogether).

15 Q: *Are communities protected before this registration?*

A: Ambivalently.

No explicit protection is given. Improved protection of unregistered community land is clearly intended over the longer term (Articles 63 (4) and 66 (2)). A law on community land must be enacted within five years of the Constitution coming into force and this will include provisions ensuring that community land is not disposed of except in accordance with provisions laying out the individual and collective rights of the community. Until then County Councils will continue as trustees of Community land, and the Commissioner of Lands as the administrative agent. Under current law they have significant powers to lease or set apart Trust lands (Trust Land Act). However, interpretation of those powers is bound to be in conformity with the new Constitution, so it will be difficult for these trustees or land managers to so wilfully dispose of Trust lands or other lands which are defined as community land.

16 Q: *Will communities be able to get back forests and other special areas which Government has already taken and made into National or Local Authority Reserves or sold on to other people?*

A: Unlikely.

The proposed Constitution makes it clear that existing government forests and other reserved areas will be vested in government. Only unreserved forests and grazing areas will be declared to be Community land (Articles 62 (1) (g) and 63 (2) (d)).

Nor does the proposed law offer an alternative route through restitution of unjustly taken lands. It does bind the National Land Commission to investigate present or historical injustices and to make recommendations. The *National Land Policy* (Section 171) does commit to developing a legal and institutional framework for restitution but also gives no details. It will depend upon the recommendations of the National Land Commission to know if restitution will include forests and other valuable areas now held as national property.

On the other hand, the Constitution *does* provide that Community land will also include ancestral lands and lands traditionally occupied by hunter-gatherer communities (Article 63 (2) (d) (ii)) and these include a number of reserved forest lands (such as the Mau Forests)

17 Q: *Will the Constitution make it easier to bring to book those who stole public lands?*

A: Yes.

Three directives will contribute: (i) a new law has to be enacted to enable all grants or dispositions of public land to be reviewed to establish who is their owner and the legality of this; (ii) public land shall not be disposed of except in terms to be laid down by a law; and (iii) those who are found to have acquired land illegally will not receive compensation; this will make it easier for the State to speedily reclaim those properties.

18 Q: *Will the Constitution stop big men holding onto vast estates and which lie idle?*

A: Likely.

The Constitution directs that land must be held and used in an efficient and productive manner. It also requires a new law to lay out the maximum holding any one person may own. Depending upon what the new law says, it may become difficult for those with a lot of land or who do not use their land to hold on to these areas.

19 Q: *How will the Constitution affect those of us who live in squatter areas in Nairobi and other cities and who have no land title?*

A: Nothing directly.

All that is guaranteed is the right to accessible and adequate housing; this does not mean that current occupation will be guaranteed even if of very longstanding.

20 Q: *Will the proposed National Land Commission be any more accountable than the Ministry of Lands in dealing with public lands?*

A: Unknown.

The Commission will be autonomous (not subject to direction by any person or authority) (Article 249). However parastatal bodies and autonomous Commissions do not have a strong history in Kenya as being incorruptible and effective. A lot will depend upon how the law creating the Commission is laid out, particularly as relating to the strength of its powers and how far it will be genuinely accountable to the public. As currently laid out it has only investigatory and advisory powers (Article 67) and is required to submit reports to President and Parliament and to publish its reports (Article 254).

21 Q: *Does the Constitution devolve any powers over landholding to ordinary communities?*

A: No.

Communities will have powers as registered owners in due course. County Councils are representatives of communities so there is some indirect devolution but their powers are imply operational rather than policy or decision-making powers. Most important, no legal provision is made for Community Land Boards.

22 Q: *Why is the Constitution so important?*

A: Constitutions are supreme law and ordinary laws on any subject may not contradict the commitments they make.

#### 4 What does the proposed Constitution actually say on land?

Most of the land provisions of the proposed Constitution are *new*. The current Constitution (1963, last amended in 2001) limits its attention to (i) protecting private property and (ii) establishing Trust Lands. Both matters were then elaborated in ordinary laws – and which will remain in force until they are amended or repealed (particularly the Land Acquisition Act and the Trust Land Act).

The proposed Constitution significantly changes the situation in both areas. On private property, new limitations are proposed (to enhance fairness and to favour citizens). A much greater change is proposed in regard to Trust lands, and which cover the greater land area of Kenya. Again, the intention of the proposals is to enhance the land rights of ordinary rural Kenyans.

Specifically, the proposed Constitution does the following –

- 1 Reaffirms *an existing right* that any Kenyan may acquire and own land anywhere in Kenya.
- 2 Introduces a limitation on the same right which affects non-citizens, non-citizen companies and other non-citizen bodies; they may acquire land anywhere in Kenya but may not own the land absolutely, only hold it under a lease (Article 40 (1)).
- 3 Reaffirms that it is illegal for Government to *arbitrarily* deprive *any* person/s of their property, whether or not the right to land held is registered or not, whether the right is one of full ownership or less than ownership (such as in the form of an customarily accepted right to access an area for pastoral use), and whether or not the owner is individual, family, corporate association, group or community.

‘Arbitrarily’ is not defined but on the basis of existing law may be taken to mean an action taken which is outside the bounds of constitutional rights and freedoms and the provisions of existing laws which are themselves bound not to be against principles of equity and justice (Articles 27, 40 (2) & 260).

- 4 Gives stronger protection to all interests in land, *whether registered or not* and specifically including Community Lands (current Trust Lands) (Articles 40 (2) & 63 (4)).
- 5 Sustains the right of the State (i.e. Government) to take a person’s property if needed for a *public purpose* or in the *public interest*, but only on the basis of prompt payment of full and fair compensation. The holder or lawful user of the land is also guaranteed access to a court to challenge the legality of the proposal or the amount of compensation being offered, etc.

- 6 Is explicit that compensation must be paid not just to titled owners but also to those who occupy land in good faith but do not hold title (this includes occupants on Trust land, lawful occupants on Government land, and could include urban squatters of longstanding living on Government land in cities, or in parks and reserves and other areas). (Article 40 (3 & 4)).
- 7 Does *not* extend constitutional protection of property to those who are found to have acquired their land in an illegal manner (Article 40 (6)). This introduces an important limitation on the current situation whereby under the Registered Land Act those holding land under first registration are protected against challenge, even if known to have been obtained by fraud.
- 8 Introduces an important limitation on what constitutes *public interest*. Although ‘public purpose’ and ‘public interest’ are not defined in the proposed Constitution, the current Constitution and other laws (Land Acquisition Act) defines public interest broadly (as most Land Acquisition laws do). This has enabled Government and County Councils to take away people’s land on the presumption that this will be of some local public benefit. Article 66 of the proposed Constitution limits this by requiring Parliament to enact a law to ensure that investors/investments in property provide benefit to local communities and their economies.
- 9 Introduces a new reason why Government *may* deprive a person of property; to meet the principles and actions laid out in Chapter Five on Land and Environment (Article 40 (3) (a)). These are many but limited by fundamental rights and freedoms and by specific land principles listed later.
- 10 Does *not* bind Government to paying compensation in the above cases (Article 40 (3) (a)). The implication is that there will be conditions in which compensation is *not* payable. We may *speculate* that this will include instances where a freehold owned by foreigners are reduced to 99 year leaseholds; when land vested in a County Council is registered in the name of communities; when land currently vested in Government is returned to a local community; or when registration of primary household land in the name of a male household head is compulsorily presumed to be registered jointly in the name of spouses. But these are only speculations. New laws will need to specify exactly when compensation is payable and not payable.
- 11 Makes the formulation of a national land policy a *constitutional duty*, thereby giving the policy the backing of supreme law (constitutional law is superior to ordinary laws) (Article 60 (2)). The current National Land Policy was approved by Parliament in 2009.
- 12 Lays out seven principles which are to guide national land policy and through this will shape decision-making and laws about land -
  - a) Everyone has an equal right to *acquire* land (this does *not* mean equal sized holdings)
  - b) People’s rights to land cannot be randomly or unfairly interfered with; rights over land must be *secure*
  - c) Land must be used and managed *productively* and in a *lasting manner* (this suggests that idle lands or empty buildings may not be tolerated in the future)
  - d) Administration of land interests must be *transparent*, cheap to administer and cheap for landholders to follow rules and procedures
  - e) Ecologically sensitive lands must be protected
  - f) Gender discrimination in the ownership, transfer, inheritance or use of land is unlawful, even if this discrimination is customary, and



- g) Land disputes should be settled as far as possible through community-based procedures, as long as these follow constitutional rights and principles (Article 60 (1)).
- 13 Tries to bring above-pledged transparency to how lands are administered by
- a) moving control over public lands from the Ministry of Lands into a planned independent National Land Commission; and
  - b) empowering County Councils to make decisions about land survey and mapping, parcel boundaries, fencing and housing in their areas, and potentially to have a role in determining the management and exploitation of the county's resources (Articles 62 (2 & 3) and 185 (4) (a), and Fourth Schedule Article 8).
- 14 Requires that existing land laws be harmonised to remove duplication and contradictions (Article 68 (a)).
- 15 Makes it clear that even though all law in force will continue to be in force (until amended or repealed) they are to be interpreted in ways which conform to the new Constitution (Sixth Schedule Article 7 (1)).
- 16 Does away with the idea or legal provision for Government to absolutely own land as private property. Does this through -
- a) declaring that all land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals (Article 61 (1)); and by
  - b) Reclassifying land as Public, Community and Private Land (current land classes are Government Land, Trust Land and Private Land) (Article 61 (2)).
- 17 In so doing, the proposed Constitution would establish that -
- a) even so-called Government Lands are held only for public purpose, and are *national or county* properties and accordingly to be vested in either Government or County Councils as strictly trustees for the national or county population; the future owner of each type of Public land is specifically laid down in the proposed Constitution;
  - b) explicitly converts government forests, government reserves, national parks, sanctuaries, etc into national property;
  - c) makes all Public land a *residual* category in the sense that it only exists where individual or community ownership cannot be proven or where the Constitution considers such lands to be unsuitable for private or community ownership; the last includes rivers, lakes, sea, seabed, continental shelf, land between high and low tide marks, minerals and mineral oils;
  - d) Hands over the administration of Government lands (to be Public lands) to the proposed National Land Commission to administer;
  - e) Makes the disposal and use of any Public land subject to conditions already or in future laid down in law (there is no explicit Constitutional commitment to introduce a new law on this); and
  - f) Does make it a matter of new law that the protection, conservation and access to public land will be provided for in a law to be enacted within 18 months.
- 18 Lays the ground for doing away with Trust lands and the ownership of such lands by County Councils as trustees for the residents of those areas. Establishes that Trust lands will be vested directly in communities and known as Community lands (Article 63).

- 19 In doing so, the proposed Constitution –
- a) Lays down that County Councils will in due course be owners of only *unregistered* community land;
  - b) This suggests that in practice, the only way for a community to secure full ownership of any Trust land is through formal registration. The procedures for this do not have to be laid out in law for up to five years. Implementation will likely take many more years and perhaps decades (Article 63 (3) & (5)).
- 20 Opens the door for currently *unreserved* forest lands, grazing lands, shrines, lands traditionally occupied by hunter gatherer communities and ancestral lands to be owned directly communities (Article 63 (d)).
- 21 Enables groups of persons in cities, towns and rural areas, including a village, clan, sub-location or any other social formation to own land in just the same way as individuals do (Article 40 (1) & 260 (definition of ‘person’)).
- 22 Limits the way in which communities or County Councils holding unregistered community land may dispose of these areas, saying that this will be dependent upon new law specifying the nature and extent of both collective and individual rights (Article 63 (4)). It may be *speculated* that such new law will lay out procedures for consultation, and better, for clear prior *consent* of all members of the community to be obtained prior to lease or sale – but this is only speculation.
- 23 Makes it law that land investments (meaning commercial use of lands, often by non-customary land occupants) *must* benefit local communities, and that large concessions affecting natural resources will be made subject to Parliamentary approval but that this will only come into effect when the new is in place and that law only has to be enacted within five years (Article 66 (1) and Article 71).
- 24 Makes it a matter of supreme law that the rights of wives, widows and orphans to land be protected (and therefore upheld by the courts) (Article 68 (c) (vi)).
- 25 Implies that private ownership of Public lands which have been unlawfully obtained will be cancelled (Article 68 (c) (v)).
- 26 Promises legislation designed to limit excessively large holdings, and/or idle lands (Articles 60 (1), 68 (b), 68 (c) (i)).
- 27 Introduces the constitutional right to a clean and healthy environment (Articles 42 & 70 (1)).
- 28 Makes it a duty of the State to ensure that benefits from the exploitation, use, or conservation of the environment are shared equitably – implying but not specifying that this includes local communities (Article 69 (1) (a)).
- 29 Makes it a duty of the State to encourage public participation in the management, protection and conservation of the environment (Article 69 (1) (d)).
- 30 Establishes that two objectives of the devolution of powers to County Councils are to
- (i) better enable communities to manage their own affairs, and to
  - (ii) protect the interests and rights of minorities and marginalized communities; this does not specify but implies land rights are included (Article 174 (d) & (e)).

- 31 Promises future protection of Community land by the hand of County Councils or the President by requiring a new law on Community land to disallow disposal of these lands by communities or their trustees until the rights of each community individually and collectively is specified. Even before this new law comes into force, current land law and powers are to be interpreted in accordance with the Constitution including this provision.
- 32 Lays a foundation for limiting abuse of Public lands by (i) directing that a law be enacted to specify how land may or may not be disposed of by the trustee National Land Commission or County Councils and how lands they will hold in trust may or may not be used; and (ii) through directing that a new will enable the review of all grants or dispositions of public land.
- 33 Lays down that new laws have to be enacted *within 18 months* on these subjects –
- a) The smallest size of land which may be formally registered
  - b) The maximum land area which any one person may privately own
  - c) How the owner/owners of land brought into a marriage or acquired during the marriage are identified and those assets are distributed on the ending of a marriage
  - d) How, when a person dies, interests in his or her land by dependents and spouse(s) will be protected, especially where these people are living on the property concerned
  - e) Exactly how public lands will be protected from encroachment or sale, conserved, and how public access to these lands will be maintained, and
  - f) Guiding the review of all grants or dispositions of public land to establish if these were legal.
- 34 Lays down that *within five years* new laws have to be enacted on these subjects –
- a) All matters relating to Community Land
  - b) How the State may regulate the use of any land in public interest
  - c) How investments in property (such as by a foreign or local investor) will benefit local communities in the vicinity
  - d) How grants of rights or concessions to exploit any natural resource in Kenya will be made subject to Parliamentary approval.

## 5 What does the proposed Constitution *not* say about land?

The proposed Constitution –

1. *Does not* say that all land holdings have to be *equal in size* or that Government must make sure that everyone has a home or piece of land. Only the right to *acquire* and *own* land is equal;
2. *Does not* set a limit on the size or use of holdings or the number of properties any one person may hold, leaving this up to a new law to define;
3. *Does not* make any commitment to see County or Community Land Boards established, raising query as to how far devolutionary land governance will in fact be promoted, especially as there are to be fewer County Councils than presently;
4. *Does not* significantly empower County Councils (let alone County and Community Land Boards) to make land policy, address wrongful allocations of lands, undertake land decision-making and actions other than relating to survey and mapping, boundary and fencing, housing developments, and to receive and approve plans and policies for exploiting the county's resources (which suggests these may be delivered by central Government);

5. Does no more than obligate Government to *encourage* participation, and only in respect of the management of natural resources under the environmental section of the land chapter;
6. *Does not* bind the State to do more than *investigate and recommend* action as to present or historical land injustices;
7. Mentions *ancestral lands* as a category of future Community lands but does not define these or even say who is responsible for defining these;
8. Fails to define other crucial terms to land matters such as 'public purpose' and 'in the public interest';
9. *Fails to be clear* as to whether Trust Lands, group representative lands, and other lands which are to be Community land comes into effect with the Constitution, through new law and/or only through case by case registration;
10. *Is unclear as to State powers* to regulate land use and property, on the one hand seeming to limit this to defence, public health and safety, etc., while on the other laying out a hefty programme of changes which require powers to implement;
11. *Does not* adopt international best practice towards the conservation of natural resources by enabling Government Forests, Reserves, Parks etc to be restored to community ownership subject to conservation regulation by those owners;
12. *Does not* require that the State compensate land owners *before* their land is taken for a public purpose;
13. *Does not* clarify exactly which provisions under Chapter Five on Land and Environment will result in compensation *not* being paid to a lawful land owner or interest holder;
14. *Does not* explicitly limit public purpose to exclude purposes which are more accurately private purposes which may have a secondary beneficial effect; this is in the fact the current Constitutional position;
15. *Does not* unambiguously put a halt to wilful disposal of unregistered Trust Land/Community Land by failing to make this conditional upon consultation and the express consent of the owners;
16. *Does not* liberate customary land holding from the necessity of being formally registered in order to be protected;
17. *Does not* adopt best international practice in making customarily acquired and held lands registrable as private property *without* conversion into introduced freehold or leasehold forms (such as increasingly provided for in other African states);
18. Does not address customary land tenure at all in circumstances where one might expect a clear supreme law statement that customary land tenure and the interests in land which it delivers have equal force in law as property to the same degree as rights granted or acquired under statutory tenure;
19. *Does not* expressly tackle corruption in the Land Registry or related land offices;

20. *Does not* clarify how multiple title deeds for the same land parcel will be dealt with or the status of many holdings which were originally surveyed and registered but for which registration and entitlement remains incomplete, and/or change of owner is not formally registered;
21. Does not specify to whom the National Land Commission will be accountable;
22. Fails to make new agreements involving grant of rights or concessions to exploit any land or natural resources in Kenya *immediately subject* to Parliamentary approval; a long five years is available for a host of such agreements (e.g. with other countries) to go ahead without parliamentary scrutiny; and
23. *Does not* address the massive tenure insecurity of longstanding occupants on public lands, particularly in urban squatter areas.

## 6 So what is the verdict?

In relation to land matters, the proposed Constitution is -

1. *Sometimes unclear as to exact intentions, partly because of sloppy drafting.* This raises conflicting interpretations and uncertainties. One example is in the matter of the conditions under which compensation will or will not be payable for land compulsorily acquired by the State. Another is in the ambiguous timing associated with the establishment of Community land. What will be the status of Trust Land before a new law is enacted to give effect to this change and which could take up to five years to occur? Will County Councils in the interim still be able to dispose of Trust/Community land in accordance with the Trust Land Act?
2. *Leaves a great deal up to the development of new laws,* which will be slow. Much of the key legislation committed to does not need to be enacted before five years. While this is commonly the nature of constitutional law, special concerns could have been more precisely and swiftly addressed.
3. *Leaves significant gaps on important subjects and/or fails to adopt international best practice,* including as operating in many other African countries now. One would expect to see more specific commitment in this modern supreme law to –
  - a) devolved land governance (ideally to community and neighbourhood level) if only to dramatically enhance accessibility of land administration and accountability to ordinary citizens;
  - b) a clearer constitutional position on redress of wrongful loss of lands and injustice;
  - c) specific commitment to addressing the insecurity of tenure of several million citizens who have lived in urban areas without entitlement for many decades;
  - d) much more immediate constitutional protection of unregistered landholders (especially in Trust lands) whose lands are highly vulnerable to reallocation for investment purposes;
  - e) a clear delineation of what is meant by ‘public purpose’ and ‘in the public interest’ in respect of landholding and its limits;
  - f) a clearer supreme law commitment to restitution of wrongfully granted or acquired Public lands;

- g) a more just position on payment of compensation, including making payment payable before any eviction or transfer of owner may take place; and
- h) unequivocal statement that that unregistered Trust lands and other lands held on the basis of customary norms are real property, a special class of Private Land as subject to community based decision-making, and that this represents a fully lawful system of land ownership.

However, even without these provisions, the proposed Constitution –

- *Is fully consistent with and does lay a strong legal foundation for the now-approved National Land Policy (Sessional Paper No. 3 of 2009 adopted by Parliament 3<sup>rd</sup> December 2009), and under which aegis many issues as above may be explored and ruled upon;*
- *Does begin to make progress on abuse of public lands and the vulnerability of Trust lands;*

And, most of all -

- *Represents a marked improvement on the current 1963 Constitution in matters of land ownership, land use and land governance.*

CONCLUSION: The proposed Constitution *opens the door* to significant reforms. Failure to perform could be a matter of challenge in the courts. The challenge of ordinary Kenyans will be to hold the State to account in devising appropriate legislation and programmes swiftly and with the maximum of public participation.