
ISSUES PAPER

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**THE NATIONAL LAND POLICY
IN KENYA**

**Critical Public Land Issues and Policy
Statements**



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PREFACE

The *National Land Policy in Kenya: Critical Public Land Issues and Policy Statements* serves as a guide to steer the debate that aims at the eventual formulation of a National Land Policy and legislative framework that will address issues of management and administration of public land in Kenya. The Issues Paper aims at filling-in the gaps in the debate on public land management and administration for the good of the present and future generations. It also provides the general citizenry, and specifically the stakeholders in the National Land Policy Formulation process, a checklist of areas of concern about public land that need to be addressed.

This Issues Paper was commissioned following the social audit of the public land by the Presidential Commission of Inquiry into Illegal and Irregular Allocation of Public Land (“Ndung’u Commission”) and provides a step by step in-depth analysis of key issues in the management and administration of public land and offers policy statements for addressing them. The uncoordinated management systems of public land by a number of line Ministries and Government departments and agencies and the contradictions inherent in them have also been brought out. The Paper further underscores the fact that the problem of public land management has been exacerbated and further complicated by the powers vested on the President and the Commissioner of Lands who is the principal agent for the alienation and allocation of public land.

This Issues Paper demonstrates that in many different rural and urban communities, a long-term approach to restoring and protecting public land as a national asset can and will lead to new livelihood opportunities and renewed vitality. It is expected that readers and stakeholders in the National Land Policy Formulation Process will find this Issues Paper informative and insightful.

KLA expresses its gratitude to all those who provided the information and materials needed for this Paper. Sincere thanks go to Mr. Odindo Opiata of Kituo Cha Sheria for collecting and analyzing the information required and Dr. Smokin Wanjala for editing the draft Issues Paper. KLA would also like to acknowledge the KLA staff and members for additional editorial work and our partners, the Department for International Development (DFID), Danish International Development Agency (DANIDA)/Danish Association for International Cooperation Kenya (MS-Kenya), Oxfam, ActionAid Kenya, FES and others, who are making a difference by enabling KLA to chart a new course for our communities and the entire nation in the National Land Policy Formulation process.

Odenda Lumumba
National Co-ordinator, KLA

WHY THE CONCEPT OF PUBLIC LAND MUST BE INCORPORATED IN THE NATIONAL LAND POLICY

As the process of formulating a National Land Policy gathers momentum, a number of hitherto critical issues need to be sufficiently addressed. The active participation of members of the public and other interested actors in the Presidential Commission of Inquiry into the Land Law System of Kenya ('Njonjo Commission') and the subsequent Constitution of Kenya Review Commission (CKRC) provides a sound basis upon which the National Land Policy must be grounded. For the on-going National Land Policy Formulation Process (NLPPF) to adequately respond to the current needs of the Kenyan population, the following key issues must be addressed and guided:

- ▣ Sovereignty over land
- ▣ Classification of land
- ▣ Land tenure systems
- ▣ Land based resource
- ▣ Productive and Sustainable Use of Land (Environmental considerations)
- ▣ Equitable management and development of land.
- ▣ Land rights delivery
- ▣ Effective settlement of land disputes.

It is within the above context that any discussion on the formulation of a policy or policies on public land should flow.

The legal and administrative framework governing land and land systems in Kenya has its historical genesis in colonialism. Colonialism, whose primary objective was the exploitation of resources, including labour and land, was based on the erroneous assumption that indigenous people had no right of ownership over land. To achieve their objective, the colonial systems established a property regime whose major thrust was to place all land in the hands of the Crown through the Governor. The ultimate ownership, or radical title, was vested in the Crown. This was given legal legitimacy through the enactment of the Crown Lands Ordinances of 1902 and 1915. It was expected that with independence this inequitable system would be radically changed. However, this did not happen with key contours of the colonial land system remaining substantially unchanged. The new independent State simply assumed the powers that the colonial State had enjoyed and crown lands simply renamed government lands. The powers hitherto

exercised by the Governor with regard to land were transferred to the President and the Commissioner of lands as the principal agent.

In the current land system, the category of land known as public land is unknown. The closest we have is what is known as government land. This is probably the category that has continued to generate a lot of controversy.

The implication of this state of affairs has been catastrophic with the following results:

- ✉ The executive arm of the Government through the President and the Commissioner of Lands have monopolized the control over the administration, allocation and disposition of all government (public) lands.
- ✉ The President and the Commissioner of Lands have the exclusive power to make all decisions over the allocation, use and development of government (public land) without being required by law to consult peoples' representative organs.
- ✉ The State monopoly of the radical title undermines the democratic management of resources and violates the principle of transparency in governance. In the process it institutionalizes abuse of power and encourages corruption.

The administration of land under local authorities (in townships, municipalities and cities) has also been affected by the same authoritarian and totally unaccountable management practices.

It is as a result of this situation that people across the country unanimously petitioned both the Presidential Commission of Inquiry into the Land Law System of Kenya and the Constitution of Kenya Review Commission ('Njonjo and Ghai Commissions') to introduce radical changes in the manner in which government land is owned, controlled, administered and managed. The Report of the Commission of Inquiry into the Land Law Systems and the Draft Constitution of Kenya March 2004 contain bold provisions that would radically change the way public land is controlled and administered. This should be the basis of any discourse on policy formulation in this area and indeed in the entire National Land Policy Formulation Process (NLPFP).

The problems surrounding the issue of public land in Kenya require systematic solutions and not just superficial institutional, administrative or personnel changes. That was the verdict of the Kenyan people through their representations to the 'Ghai and Njonjo Commissions'. The fact that one of the first actions of the new government was to form a special commission to look into previous allocations of government (public) land is a clear testimony of how critical public land management is.

INTRODUCTION

Public land, however defined, includes land held by government ministries, departments, statutory bodies and agencies. It also includes land controlled and managed by local authorities in townships, municipalities and cities and that belonging to parastatals or other enterprises wholly owned by the government. Principally, despite the varied government control over this category of land, public land is a national resource, the use of which should be governed by a policy that supports the Government's macro-economic, human development and redistribution goal.

Given the land grabbing mania in Kenya, there are a broad range of policy issues in relation to public land that need to be highlighted with a view to bringing to the fore possible policy options that could redress the numerous illegalities and irregularities that have been witnessed in public land dealings. For instance, there is concern that public land should be effectively and efficiently managed in the public's best interest, that the tenure rights of those who legitimately and beneficially occupy public land should be secure, and that public land should be procedurally and properly allocated for the development agenda and other uses that are of public interest.

We in Kenya Land Alliance (KLA) hope and believe that the ongoing National Land Policy Formulation Process (NLPFP) will come up with a viable framework within which land use and development decisions around public land should be made. We propose that the Government's key responsibilities in regard to public land should be to:

- ☞ Ensure the security of public land as a resource for sustainable development for the present and future generations.
- ☞ Create an accessible, accurate and comprehensive database on public land holdings.
- ☞ Establish, in consultation with other envisaged devolved tiers and departments of government, clear transparent procedures for development or disposal of public land.
- ☞ Establish acceptable mechanisms for public consultation(s) on the use of public land.
- ☞ Clarify the roles and responsibilities of different tiers and government departments with regard to public land administration, planning, allocation, use and management.

KLA proposes further that to ensure an effective and transparent system of public land management in Kenya, it is important that the envisaged National Land Policy (NLP) to be formulated clarifies the roles and responsibilities of different tiers of devolved governance, and of other authorities in relation to the administration, planning and disposal of public land. In so doing, a range of factors needs to be considered, including and not limited to relevant Draft Constitution of Kenya March

2004 provisions and recommendations of the 'Njonjo' and the 'Ndung'u' Commission reports on the establishment of clear mechanisms and procedures to facilitate an all inclusive and well coordinated process of public land governance.

A number of line ministries and departments are involved in the management of public land. The NLP should therefore provide for contractual undertakings with all those involved in the management of public land. It should also recognize the need to rationalize public land custodianship, administration and disposal functions between the envisaged and proposed National Land Commission and the line ministries or departments whose roles and responsibilities should be distinct and complimentary.

KLA's view is that holding or being in custody of public land does not preclude other State agencies and the general public/citizenry in having general obligations or interests in relation to the same. This is primarily so because public land is also regulated by public law and statute. Thus, the NLP should clarify that holding public land on behalf of the public brings with it criminal and civil liabilities hence the legal necessity to enter into contractual arrangements relating to the land. In this regard, we propose that the holders of public land should also be responsible for maintaining an asset register and be accountable to the Auditor General. In view of the legal and practical consequences of holding public land, clear parameters of responsibility need to be outlined.

Since, public land is a subject of the public land tenure regime, its allocation and disposal should strictly be for promoting the public's socio-economic standards and development. We emphasize that this must be done in a manner that is socially responsible and economically viable. Further still, a lot of public land is needed to settle the displaced and historically dispossessed if there is hope for economic growth and reduced poverty levels in Kenya. This means that allocation of public land should give priority to public interest of the communities contingent to it after which allocation to other users may be considered. This should follow an elaborate mechanism, including calls for proposals from the public for development, open tender, invited tender and as a measure of last resort, public auction. Where these forms of disposal methods are chosen, the transparency and legitimacy of such processes will depend significantly on the extent to which information is widely disseminated to all interested parties, including the basis on which decisions are to be made. We propose that clearly structured public participation and consultation is essential for decision-making on the allocation and use of public land. This makes absolute sense as the amount of time and resources invested in the process significantly reduces conflicts and disputes that may arise due to dissatisfaction with the decisions made without people's approval or participation.

In light of the concerns, fears and issues regarding the management of public land in the past it would be prudent to publicize the 'Ndung'u Commission' report in its entirety to inform debate on

the NLPPF. The report in question is an audit of the status of public land. It reveals what is left of public land and exposes the past illegalities and irregularities in the allocation of public land that need to be addressed and redressed as a basis of making informed policy options.

1. Public Land Management

Issue

The manner, in which we manage our land, and more so public land, is of crucial importance to the political stability, social cohesion, economic development, poverty reduction, and good governance of this nation. The problems relating to the management of public land can be traced to the existence of the colonial government in Kenya. The land regime established by the colonialists was premised on the assumption that the indigenous occupants and users had no ownership rights over the land. This was done through vesting of the ultimate ownership and control of land (radical title) in the State and was achieved through the 1902 and 1915 Crown Lands Ordinances which defined Crown lands to include almost all the land in the territory. The *raison d'être* for this was not difficult to discern: the colonial government sought to have a free hand to control and alienate indigenous lands, unencumbered by any legal obligations. No wonder indigenous people were soon to be declared as 'mere tenants at will of the Crown'

The expectation was that, on the attainment of political independence, a fundamental change in the property regime would be initiated. This was not to be. The post-colonial government chose continuity. Thus, Crown Lands were simply renamed Government Lands and the power, hitherto, enjoyed by the Governor in respect to such land was transferred to the President with some residual power being exercised by the Commissioner of Lands. This remains the situation to date. In effect therefore:

- The ultimate owner of all public land in Kenya is the President and not the people.
- The Executive arm of the State through the Ministry of Lands and Housing has the exclusive power to make all important decisions over the administration, disposal, allocation, use and development of all the public land without being required by law to consult peoples' representatives organs such as the National Assembly and the Local Authorities.

Policy Statement

The National Land Policy should state that:

- All land in Kenya belongs to the people of Kenya collectively as a nation, communities and as individuals.
- All land currently held as un-alienated government land and all land used or occupied by any Ministry, Department or Agency of the Government, Public institution or Statutory Corporation, local authority other than County Councils and all public roads and access roads, all rivers, lakes, the territorial sea and seabed and the reversionary interests in all Government land shall be considered public land.

2. Tenure of Public land

Issue

The term land tenure is defined here, as the terms and conditions, under which access to land rights are acquired, retained, used, disposed off or transmitted. The classification of land as ‘Government land’ has in the past been construed to mean that such land is ‘private’ to the Government in general and to the President in particular. This totally authoritarian interpretation has further been legitimised by the courts that more often than not have consistently given the President a free hand in dealing with government land. The doctrine of the indefeasibility of the title and first registration as found in the Registration of Titles Act and Registered Land Act respectively has been used to out rightly legalise fraudulent grants and allocations of public land.

This is in direct contradiction to the doctrine of trusteeship under which the President and any other public official should hold and administer public land. This assumed political trusteeship has been a monumental failure and the so-called trustees have been involved in “systematic misuse of obligations of trusteeship in the process of land delivery, administration and control”. Thus, the

President, not only has the power of management and administration but also that of ownership, allocation and alienation of public land, which has often led to Heads of State acting as if public land were private property.

The current debate on the nature of democracy and a new constitutional order provides an ideal opportunity to link land to one of the critical issues of democracy: the democratisation of control over land and land-based resources. It is important to ensure that the entire citizenry actively and effectively participate in the debate regarding public land.

Policy Statement

The National Land Policy should state that:





- All public land should be vested in an independent, accountable and representative Authority to be known as the Kenya National Land Commission created under the Constitution.
- The National Land Commission should both be a political trustee answerable to Parliament and a legal trustee having a fiduciary relationship with the people of Kenya.
- A national legislation to be called the Kenya National Land Commission Act should be enacted to make detailed provisions regarding the composition, powers and functions of the National Land Commission and provide for effective checks and balances within its structure including the provision of devolved semi-autonomous and elected divisions at local levels.
- The devolved structures of the National Land Commission should be in accordance with the devolution of power as will be provided for in the Constitution.
- Membership to the National Land Commission and its devolved structures shall be based on proportional and effective representation of the general public and especially women, youth and other vulnerable groups.

- The envisaged National Land Commission will deal with all land matters that require State intervention at policy and legislative levels. The guiding principle to determine whether a matter falls within the purview of the National Land Commission will be a demonstrable public interest in the matter at hand.

3. Administration of Public Land

Issue

The root cause of massive mismanagement and corruption that has been the hallmark of public land administration in Kenya is the highly centralized and bureaucratized system that has existed since the colonial times. Land Laws have perpetuated the enjoyment of near exclusive power by the President and the Commissioner of Lands who can intervene and make decisions regarding:

-  All matters to do with the administration of all public land.
-  The allocation of public land
-  Adjudication, titling and registration of titles.
-  Removal of the administration of trust lands from County Councils.

Over the years the power vested in the President and the Commissioner of Lands with regards to the administration of public land has been abused and misused. The Provincial administration which has become the most important actor in the allocation of public land was, and still is, viewed as inherently corrupt and thus incapable of being reformed.

Besides this, the exclusion of any form of participation of the citizens in the administration of public land and the secrecy that surrounds the entire process has meant that hardly are public interests and concerns taken into account when decisions are made.

Policy Statement

The National Land Policy should state that:

- The administration of all public land should be placed under the Kenya National Land Commission which shall be the only authority in charge of all public land in the country.
- The Recommendations made by the Commission of Inquiry into Illegal and Irregular Allocations of Public land (The 'Ndung'u Commission') regarding the need and process of repossessing illegally and irregularly acquired public land shall be implemented taking into account their viability and overall effect on the economy of the country.
- The current Government Lands Act shall be repealed and replaced by a Public Lands Act, which shall provide for a system that is open, transparent, participatory, equitable and efficient and promoting accountability in the administration of all public lands.
- All existing legislations governing other public lands and natural resources such as the Forest Act, Mining Act and Wildlife Act shall be revised and rationalized to ensure the administration of all such lands are brought under the National Land Commission and the principles applicable thereto are consistent with those provided for under the Public Land Act.
- To provide for effective checks and balances, a Public Lands Dispute Tribunal should be created, composed of representatives of relevant citizens' groups and whose main duty would be to hear and determine complaints from members of the public with regard to questions or disputes arising from the decisions of the National Land Commission on public land.
- Every member of the public has a right to seek the enforcement of the provisions relating to the administration of Public Land even if (s)he is not personally affected by any decision or lack of decision.
- Members of the local community within which any public land is situated shall always be allowed to participate in any decision-making relating to such land.

4. Acquisition of public land by foreigners

Issue

There are a number of reasons why ownership of land by foreigners is a critical issue to be included in the National Land Policy. Firstly, land is the most important factor of production in the country. The Kenyan economy is primarily dependant on agriculture and is the source of livelihood for the majority of the population. It is estimated that over 75% of the country's population directly depend on agriculture and pastoralism and these economic activities support 70% of all wage earners and contribute over 80% of export earnings.

Besides this, for many people land also has social and spiritual values. It is a medium, which defines and binds together social and spiritual relations within and across generations. The import of the aforesaid is that issues relating to who and how land is owned are of direct national security concern.

With the current trends of globalization epitomized by policies of privatization and liberalization, land is under intense pressure from the proponents of the free market economy. The strong focus on land reform in the sub-Sahara Africa has been seen as an attempt to create so-called land markets. What would this mean if the Kenyan "land market" were open to foreigners without any restrictions? Therefore, land as a national heritage and a source of economic/material well being of the people is at threat of being overwhelmed by foreign monopoly capital in the name of globalization and we therefore must make policy choices to remedy the situation.

Policy Statement

The National Land Policy should state that:

- Public land shall not be alienated to foreigners except where the National Land Commission is fully satisfied that the Applicant has a viable development plan.
- No grant of public land shall be given to a foreigner or anybody else unless all the conditions and requirements relating to Environmental and other Planning Legislation have been complied with. A foreigner shall only be granted land on the basis of a lease whose term shall be determined by the use to which the land shall be put.

- Before granting public land to a foreigner the National Land Commission must consult with the local community of the area within which the land in question is situated and where the use of such land is for the exploitation of natural resources an equitable arrangement in the sharing of the benefits accruing therefrom must be negotiated with the local community before such grant is made. The consultations shall be structured and shall be based on technical and cultural considerations. The consultations shall also take into account the overriding interests of the State and shall not be used as avenues for political intrigue or advantage.

5. Allocation and Disposition of Public Land

Issue

The most contested area with regard to government/public land has always been the powers and processes of allocation and disposition. Allocation is the process through which grants of public land is made for a specific purpose and for a definite period. In other words the tenure that results from allocation is always leasehold. Disposition is the process through which public land is formally and permanently given out to individuals on freehold and has been used mostly with regard to the settlement of squatters and other landless people. There have also been instances where 'politically correct individuals' have been beneficiaries of public land. A key characteristic of disposition is that it has the effect of transforming the tenure system of public land into private tenure (freehold) and therefore has serious implications with regard to the administration of public land.

The centralization of the powers and processes of the allocation and disposition of public land in the offices of the Commissioner of Lands and the President has been a source of concern to many Kenyans. The fundamental problem with such a colonial and undemocratic arrangement is that it, in effect, permits a small clique of individuals to deal with a key national resource (land) as if it were personal property. Further retention of this system is thus not justifiable.

The existing secretive/bureaucratic procedures, where participation of land users is totally ignored, is no longer acceptable and is, in any case, totally inconsistent with the current democratic ethos. The systems and processes of allocating and disposing public land should therefore be democratized and the creation of a more open and accountable National Land Commission is the first step in this process. It is, however, equally important that clear principles are set out to inform the decisions of the National Land Commission and prevent the misuse and wastage of our land and natural resources.

Policy Statement

The National Land Policy should state that:

- The allocation of public land shall be done in a transparent, open and participatory manner.
- The Allocation of public land must be done in non-discriminatory manner and should in particular eliminate all aspects of discrimination, misallocation or multiple allocations.
- Before any public land is allocated the National Land Commission shall publish such intention giving out information regarding the reasons for the allocation, to whom the allocation is intended to be made, for what period and any other such information as may be necessary, to enable members of the public to contribute to making of informed decisions.
- The members of the public shall be allowed to make any objections to an intended allocation of public land and such objections must be heard and settled by an elected decision- making institution before the allocation can proceed.
- In allocating public land, the National Land Commission shall be guided by a system through which competing diverse needs are collectively agreed upon so that there is a balance between community and national interests.
- In allocating public land, the National Land Commission shall ensure priority is given to squatters, the homeless, the internally displaced and other vulnerable and marginalized groups.
- Where poor or low-income communities already occupy public land no allocation shall be considered in favour of any third party unless appropriate alternative relocation site has been found for the occupying communities. In such cases however priority should be given to those already in occupation.
- In urban areas public land must always be set aside for the development of affordable and habitable housing for the low-income groups and such land must be protected from the classical land markets.

- Under no circumstances should there be an allocation of protected areas and reserved land such as forests, water catchment areas, road reserves, areas of cultural significance, public access routes to beaches, fish landing sites, foreshores, wildlife corridors, mountains, historical sites and monuments and where any areas may already have been allocated such allocation should be immediately revoked and the land repossessed without compensation. An allocation may, however, be made in the rare event that circumstances have so fundamentally changed that it is no longer rational to continue preserving the land in question.
- In allocating public land for whatever use, no allocation shall be allowed that may or is likely to interfere with sensitive eco-systems such as wetlands, marine resources, sand dunes, biodiversity colonies, mountains, river basins and banks.
- No public land shall be disposed to any person or persons except where the disposition is to settle those who are genuinely landless or to promote the public interest. Before any such disposition is made the National Land Commission shall undertake a thorough public inquiry to determine the cause and nature of the claim and the identity and background of the claimants to ensure the resultant beneficiaries deserve to be settled.
- Where landless persons are settled through the disposition of public land, restrictions shall be put on the title to prevent speculation and to protect public interest. Any beneficiary who violates any such restrictions shall forfeit his/her land.

6. The Power of Compulsory Acquisition

Issue

Compulsory acquisition is commonly recognized as a legitimate intervention measure that allows the State to have the power to extinguish or acquire any title or other interest in land for public or any other use. The practice is premised on the understanding that such power is necessary to enable the State to promote public benefit since States at one point or the other would be called upon to provide land for public use.

The issues that need to be addressed are:

- ☞ Should this power be exclusively vested in the State?
- ☞ What key principles should be adhered to while exercising this power?

Policy Statement

The National Land Policy should state that:

- The power of compulsory acquisition should be exclusively vested in the State.
- The conditions necessary and sufficient for and the manner in which the power is exercisable as well as the category of and/or interest thereon should be clearly spelt out in the legislation that should, among other things, provide for the effective participation of the local communities and other public land custodians like the local authorities.
- Before any compulsory acquisition of public land is done, mandatory Environmental Impact Assessment shall be undertaken to establish the likely impact of the project on the environment.
- In determining the amount of compensation to be paid consideration shall be given to the manner in which the land in question was acquired and the purpose for which the land is to be used.
- Where the public purpose or interest for which the acquisition was done fails or is exhausted, the original owners of the land or their descendants should be given the first option of restitution subject to such terms and conditions as may be provided by the law.
- Where the compulsory acquisition is being undertaken for the purpose of exploiting natural resources account must be taken of the need to share the benefits accrued or to co-manage and develop such resources by the local community.
- Local communities shall be consulted before the projects are initiated and that their sentiments are included in the Environmental Impact Assessment.

7. Public land and the Indefeasibility of Title

Issue

The inclusion in Kenya's Land Laws of the so-called principle of "the indefeasibility of title" has been one of the most effective ways through which the grabbing of government/public land has been effected. The major thrust of this principle is the wholly unjustifiable presumption that once someone is registered as the owner of a parcel of land such registration will be considered as conclusive proof of such title. Courts have used this dubious assumption to legalize transactions relating to public land by totally declining to allow any inquiry as to how such titles were acquired. In essence, this system has legalized corruption. Arguably it was and still remains the most effective weapon used by land grabbers. It is not unusual to find large tracts of public land in urban areas occupied by thousands of slum dwellers being given out to individuals or companies and such allocation validated by the courts on the basis of the indefeasibility of the title deed. This is an issue that requires urgent policy intervention.

Policy Statement

The National Land Policy should state that:

- The National Land Commission or any other relevant institution should be authorized to investigate all claims alleging irregularity in the allocation of public land. A law should be enacted to provide for the definition as to what amounts to an illegal or irregular allocation of public land and the procedures for conducting an inquiry into land irregularly or illegally acquired. The legislation should as far as possible be based on the legal opinion contained in the 'Ndung'u Commission' Report.
- Where it has been established that public land was illegally allocated repossession should be done without any compensation and where this may not be possible alternative effective remedy should be provided for.
- Legislation should be passed to provide for stiff penalties for public officials who use their positions to irregularly deal with or facilitate irregular dealing in public land.

8. Public land and Land Markets

Issue

The colonial system made land a commodity as it was the only way to bring the colonies into the orbit of capital. The enactment of the first Land Laws especially the **Crown Lands Ordinances** of 1902 and 1915 was intended to release the so-called *native land* for commercial use and exploitation. Even though the communal land holding was not completely eliminated, the 1954 **Sywnerton Plan** completely radicalised the land tenure system in the country. Previous communal land ownership was transformed to focus on changing all the hitherto communal land into individual tenure and make land a negotiable instrument. This was a most comprehensive attempt to institutionalise land markets in the country.

The current World Bank driven liberalization and privatisation policies are posing a further and more serious threat to the accessibility to land by the poor. The *Sywnerton Plan* was based on the assumption that with the opening of the land markets through the process of individualization and titling, the customary land holding would rapidly collapse and land transactions through sales or mortgages would increase massively. This did not happen and hence the current push to open public land to private investment and the resultant market forces.

The central thrust of this neo-liberal economic thought is to create an atmosphere conducive to free market forces and encourage foreign investment and generally privatise land ownership. What this means is that land ownership and management will be opened to the market forces. The likely impact would be to make it possible for land to be concentrated in the hands of the few who have the requisite purchasing power.

Land, however, cannot be regarded as any other commodity since it is a social, communal and spiritual asset. If public land is commodified it would result into the extinction of public land tenure within a very short period of time as it would all be bought by the rich. We shall have completely lost control over the most important means of production. The victims in this scenario will be the poor and other vulnerable groups who do not have the capacity to compete with the owners of capital.

Policy Statement

The National Land Policy should state that:

- Public land will only be granted on leasehold whose term shall be based on the use to which the land in question is to be put. At the end of leasehold the land shall automatically revert to the National Land Commission but any application for extension by the lessee shall be considered under and in terms of the law for the time being in force.
- A lessee will not be allowed to transfer the land to a third party unless s/he has complied with development requirements and even so such a transfer must have the consent of the National Land Commission to ensure that the lease terms and conditions are adhered to and that the purpose for which the grant was given has not been fundamentally changed.
- Land set aside for the development of housing for the urban poor shall not be allocated for any other purpose unless the National Land Commission has determined that the use is no longer imperative and the land is needed for a more productive venture to the economy.

9. Land owned by Statutory Bodies

The immediate post- independence period witnessed a frantic rush to create State Corporations as this was seen as the most effective way to spur economic development. A lot of public money was used to set up these corporations. Some of the entities were inherited from the colonial government including the Railways Corporation, Ports Authority, Telkom Kenya, Postal Corporation, among others. A number of these corporations were granted large tracts of land. Indeed, at some point Kenya Railways was reputedly the largest 'landowner' in Kenya. The advent of massive land grabbing experienced since independence and especially in the late 1980s and early 1990s, was characterized by the unprecedented disposal of land belonging to these corporations. The most affected were the Kenya Railways Corporation, the Agricultural Development Corporation and Kenya Agricultural Research Institute. This exercise was done without

clear policy guidelines and colossal losses of revenue arising from blatant corruption were recorded. The Corporations dealt with the land entrusted to them, not as trustees but as absolute proprietors who did not owe the public any duty to prudently manage the land in public interest.

It is instructive to note that this was the subject matter of the Presidential Commission of Inquiry into Illegal and Irregular Public Land Allocations ('Ndung'u Commission'). The Commission handed its report to the President and it is hoped that realistic recommendations on how to deal with these plunders by the State Corporations were made and that the Report will be made public in its entirety soon and implemented in totality. The above notwithstanding, it is important to focus on State Corporations within the context of the on-going pressure for privatization. The land held by these State Bodies is clearly public land given free of charge only on condition that the land was to operate in and serve public interest. In the face of the impending privatization, the question remains: What should be the status of the land on privatization of State Corporations?

Policy Statement

The National Land Policy should state that:

- No State Corporation shall transfer any interest in land under its management unless there is written authority from the National Land Commission and no such authority shall be given unless such transfer is in the public interest and is for a period not exceeding 10 years. In the case of a mortgage the Commission shall be convinced that the purpose thereof makes prudent economic sense and that the corporation in question has demonstrated the capacity to service the loan.
- In cases where a State Corporation no longer requires public land under its management it shall immediately surrender the land to the National Land Commission, which shall administer and manage it as any other public land.
- On privatization of any State Corporation the National Land Commission shall transfer the land to the investor at the current market rates and for such period as the Commission

deems appropriate provided that such period shall not exceed 99 years and on condition that the investment in question will be consistent with the purpose for which the land had been granted to the corporation.

- All land records in the Ministry of Lands and Housing shall be computerized and digitalized and all facts relating to the history of each parcel of land securely stored. An appropriate legal framework for the computerization of land records shall be urgently enacted.
- There shall be established a Land Titles Tribunal to expeditiously revoke or validate titles to public land that may have been illegally or irregularly acquired.
- A comprehensive Land Title Insurance Scheme shall be established in the Country. A consortium of Insurance Companies shall be licensed to invest in this venture.
- The technical and personnel capacities in the Ministry of Lands and Housing, the Judiciary and the Attorney General's Chambers shall be enhanced to more effectively and competently deal with land matters.
- All ministries, local authorities and State Corporations shall maintain accurate and up-to-date registers of all public land they hold.

10. Legislative Framework

Issue

Weak, ineffective, contradictory legislative framework coupled with impotent laws and weak enforcement mechanisms and a passive judiciary have greatly contributed to the plunder of public land in Kenya.

While it may not be necessary or possible to legislate on all the aspects of land-related issues covered in the afore-mentioned policy principles and while legislation may not solve all the policy issues cited, KLA nevertheless believes that legislation is in some instances a necessary prerequisite for the success of any policy. For the proposed policy principles to be viable and effective, the following issues, among others, should be decisively dealt with at legislative level:

Policy Statement

The National Land Policy should state that:

- The main contours and perimeters of the land tenure system should be entrenched in the Constitution and this should include a clear outline of the power of compulsory acquisition as well as the nature and mode of exercising the regulatory power of the State. (Fortunately the Draft Constitution of Kenya March 2004 already provides for this.)
- A Basic Land Law should be enacted to spell out the fundamental principles and rules governing public land in Kenya.
- The entire Government Lands Act should be revised and in its place a new legislation known as Public Land Act be enacted.
- The new public Land legislation should abolish the current powers vested in the President and the Commissioner of Lands and instead transfer these powers to a new transparent, accountable and participatory National Land Commission.
- That a new legislation known as the National Land Commission Act should be enacted to provide detailed provisions for the composition, functions and powers of the National Land Commission.
- All the laws dealing with the administration of public land including protected areas and sensitive eco-systems should be revised, rationalized and brought in line with the basic principles outlined above.
- All the laws governing the tenure and exploitation of land- based resources should be revised, rationalized and brought in line with the new policy principles.
- Planning and environmental requirements should be considered as cross-cutting issues in all the new legislations.

CONCLUSION

The Issues Paper on *Critical Public Land Issues and Policy Statements* seeks to address the problems relating to Public Land Management in Kenya and takes into account the existing fragmented, uncoordinated, non-transparent and inequitable public land management system. The Paper proposes policy statements to guide the National Land Policy Formulation Process. It also addresses the lack of a coherent information system on public land and lack of clarity in the roles, responsibilities and policy direction of different institutions and agencies involved in the administration, planning and disposal of public land. With this regard therefore, there is need for a set of norms and standards to ensure the effective use and management of public land as a way of supporting land reform in Kenya.



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THE KENYA LAND ALLIANCE

C.K Patel Building, 6th Floor, Kenyatta Avenue, Nakuru.

Tel: 254-51-210398

Telefax: 254-51-215982

E-mail: klal@africaonline.co.ke; info@kenyalandalliance.or.ke

Website: www.kenyalandalliance.or.ke