# A Review Of Recent Land Policy Developments In Kenya

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*Abstract: Land Policy Reviews in Africa are currently supported by a Framework and Guidelines on Land Policy in Africa as developed by the African Union Commission (AUC) and the African Development Bank (AfDB) initiative. The document provides a comprehensive path for the development of land policies and land reforms in Africa with a view to strengthening land rights, enhancing productivity and securing livelihood for the majority of the continents population. The final out-come of the initiative was the Framework and Guidelines on Land Policy in Africa (FGL), which was approved by the Assembly of Africa's Heads of States and Governments in Libya in July 2009.*

*The FGL promotes the need for a shared vision among all stakeholders of a comprehensive and coordinated policy as a major factor in national development. It urges African Governments to pay attention to: (i) the status of land administration systems, land-rights delivery systems, (ii) land governance structures and land institutions, (iii) ensure adequate budgetary allocations for land policy development and implementation, (iv) enable African Governments learn from past successes and setbacks, and (v) make timely adjustments to national land policy processes.*

*The FGL reflects a consensus on land issues, and serves as basis for commitment of African Governments in land policy formulation and implementation, and a foundation for popular participation in improved land governance. Its other fundamental purpose is to engage development partners in resource mobilization and capacity building in support of land policy development and implementation. The FGL considers that land policy is a sine qua non for Africa's realization of its development agenda, and recommends that the FGL be adopted as a toolkit and reference for the development of efficient national and regional land policies and programmes.*

*This paper therefore summarizes recent land policy developments in Kenya based on the above guidelines; and also reviews the challenges that have been observed in the implementation of the new land policy.*

## I. INTRODUCTION

The land question facing Africa today has its roots in geo-political, economic, social and demographic factors compounded recently by emerging global and strategic imperatives. These include different forms and modes of colonization experienced in different regions of the continent in the past decades; the diversity and different degrees of persistence of indigenous cultural and normative systems, and different forms of economic organizations. These and other factors have, in turn, given rise to a variety of legal regimes relating to land tenure, use, and management and environmental governance.

European settlers gained control over land in Africa through agreements, conquests and appropriation. The consolidation of such control and subsequent regulation of the acquired lands was effected through the promulgation of a variety of European centric laws, and establishment of political, administrative and economic management systems, which were grafted onto a diverse range of indigenous economic and cultural practices thus leading to a dualistic land tenure and land administration regimes.

Efforts at the reform of land held by the indigenous communities through a variety of measures including individual and group titling or appropriation for cash crops in a variety of African countries however, have been met with limited success as a result of the persistence of social and cultural attachment to land and, in some cases, contestation and conflict. These efforts have therefore not adequately addressed the dualistic land holding systems resulting from colonization, nor have they improved government support for the development of the disadvantaged indigenous and minority groups neglected by the current land administration systems.

African scholars have observed that sustainable growth and development in Africa as well as the continents contribution to the world economy in the 21st century will depend largely on the manner in which land and land-related resources are secured, used and managed. This will require that these issues are addressed through comprehensive people-driven land policies and land reforms which confer full political, social, economic and environmental benefits to the

majority of the African people [AUC-ECA-AfDB Consortium, 2010].

In order to strengthen these policy requirements, the Consortium initiated a joint process of development of a framework for land policy and land reforms in Africa with a view to strengthening land rights, enhancing productivity and securing livelihoods. Building upon and complementing national and regional processes for land policy development and implementation, the process was conducted in close collaboration with Regional Economic Communities (RECs). In Kenya, the government took up the challenge and embarked on the process of developing a new land policy which would guide the country towards an efficient, sustainable and equitable use of land for prosperity and posterity

## II. THE NEED FOR A NEW LAND POLICY IN KENYA

At independence, Kenya had three substantive regimes in property law governing land of various tenures, five registration systems and an elaborate infrastructure of administrative agencies dealing with land and related issues [GoK, 2002]. The purpose of the infrastructure was to perpetuate a dual system of economic relationships consisting of an export enclave controlled by a small number of European settlers and a subsistence periphery operated by a large number of African peasantry.

After the attainment of political independence in 1963, it was expected that the transfer of power from the colonial authorities to the indigenous Kenyans would lead to fundamental restructuring of the dual land policy. This did not materialize and instead, there was a general re-entrenchment of the African ruling elites into the European economy, hence continuation of colonial land policies, laws and administrative structure. Infact, this scheme had been the main reason for the Swynnerton plan in 1954, where the colonial authorities realized that the most effective protection of the white settlers was the incorporation of the emerging African political elites into the principles of colonial agriculture. The colonial authorities were convinced that once firmly inducted into the white settlers' economy, the African elites would be prepared to defend it after independence.

With that arrangement in place, colonial authorities proceeded to negotiate power transfer arrangement based on the principle that the settler economy would not be dismantled. The final outcome of the negotiation was an independence settlement-plan that provided limited scope for land redistribution by removing racial barriers to land ownership in the settler areas, while at the same time confirming and safeguarding property rights acquired during the colonial period [GoK. 2002: 31]. One major product of the plan was the introduction of the settlement schemes which were designed to take off pressure for land redistribution exerted by the landless and squatters.

This was the primary rationale for the introduction of several settlement schemes such as; the one Million Acres scheme, Yeoman, and Z schemes of the early 1960s. The effect of introducing the ruling African elites into the settler economy ensured that the machinery of the state would continue to flow towards the settler agricultural economy. At independence Syagga [2011] reports that 7.5 Million hectares of land (half of agriculturally productive land in the country) were in the hands of the white settlers.

After forty years since the attainment of independence in 1963, the government realized that the situation was not sustainable and immediately embarked on the process of developing a new land policy. A number of developments brought land question in Kenya into a much sharper focus than at independence in 1963 and necessitated the need for a new National Land Policy document. These factors are summarized as follows:

- ✓ Rapid population growth, particularly in the trust land areas resulting in severe land pressure and fragmentation of land holdings into sub-economic units especially in Central, Eastern slopes of Mount Kenya region, and Western Kenya;
- ✓ The persistence and spread of HIV/Aids had negative impact on productivity as the labour-force dealt with the scourge, there was a general decline in food production and land productivity;
- ✓ A systematic breakdown in land administration and land delivery procedures throughout the country. The management and administration of land was over-centralized at the headquarters with inadequate participation of communities in the governance of land and natural resources;
- ✓ A rapid urbanization leading to uncontrolled developments and general disregard for planning regulations;
- ✓ The escalation of desertification in the ASALs, due to global climate change, leading to declining land carrying capacity for a rising population;
- ✓ The rise in levels of poverty due to lack of capacity to gain access to clearly defined, enforceable and transferable property rights;
- ✓ The multiplicity of legal regimes that relate to land and the confusion caused by involvement of unauthorized persons in land administration matters;
- ✓ The emergence of environmental management legislation which require the development of land to be carries out sustainably and demand a positive environmental impact assessment;
- ✓ The gross disparities in land ownership with regard to gender, and general discrimination in succession, transfer of land, and the exclusion of women and the youth in land decision-making processes;
- ✓ The poor management of essential infrastructure that inhibits sustainable development of rural areas, particularly roads, communication, power and water supplies;
- ✓ The privatization of public land through illegal allocations of such land to private developers and corporations in total disregard of the public interest in the post-independence period.

## III. DEVELOPMENT OF THE NEW NATIONAL LAND POLICY

On account of the above factors that perversely affected the welfare of society in Kenya, a holistic and systematic policy attention to the land question was needed from a historical as well as contemporary context to address the economic, social, cultural and political ramifications of the land issues. Recognizing the serious and explosive nature of the land issue, the Government appointed a commission of inquiry (popularly known as the Njonjo inquiry) to look into the existing land laws and tenure systems with a view to making recommendations to land administration and management [GoK, 2002]. The report finally recommended that there was an urgent need for development of a National Land Policy.

To address these problems, the Government immediately embarked on the formulation of a National Land Policy through a widely consultative process with the aim of producing a policy whose vision would be t*o guide the country towards efficient, sustainable and equitable use of land for prosperity and posterity* [MoL, 2007]. The National Land Policy Formulation Process (NLPFP) was launched at a stakeholders Workshop held at the Kenya School of Monetary Studies (KSMS) in February, 2004.

At this workshop, participants from public, private and civil society contributed towards the policy formulation through thematic groups-based discussions, regional workshops and written submissions. Past initiatives such as the Presidential Commission of Inquiry into the Land Law System of Kenya, the Constitution of Kenya Review Commission, and the Presidential Inquiry into the Illegal/Irregular Allocation of Public Land all informed the formulation process. An important outcome of this workshop was the consensus on the production of a concept paper to guide the development of the National Land Policy Formulation Process and formation of thematic groups.

Later, an inception workshop was held at on 4th- 6th August, 2004 at which all the six thematic groups developed their individual reports out of which an integrated inception report was compiled; and key issues in respect of each theme were identified.

## IV. THE ORGANIZATION STRUCTURE

The NLPF had a three tier management structure; namely, the Minister, the Steering Committee, and the Thematic Groups [MoL, 2005: 1-3].

### A. THE MINISTER

The Minister for Lands and Housing, being responsible to Parliament for the overall formulation of the National Land Policy, oversaw the process and was responsible for the final drafting of the policy document for submission to Parliament.

### B. THE STEERING COMMITTEE

The National Land Policy Steering Committee consisted of the Permanent Secretaries of the line Ministries, Chairpersons of the six Thematic Groups, who were all from the Civil Society and the private sector, the Departmental Heads within the Ministry of Lands and Housing, the National Coordinator, and the Technical Advisory Council. The Committee was chaired by the Permanent Secretary of the Ministry of Land and Housing and was mandated to set the goals and guidelines for the process, and to ensure that the process was linked to national and other sectoral policies of the Government of Kenya.

### C. THE THEMATIC GROUPS

Land policy issues were grouped into six broad themes, each of which was reviewed and analyzed by a Thematic Group. Each group was made of state and non-state actors from the public sector, private sector, the civil society and the communities. The groups were as follows:
✓ Rural Land Use, Environment and Informal Sector;
✓ Urban Land Use, Environment and Informal Sector;
✓ Land Tenure and Social Cultural Equity;
✓ Land Information Management System;
✓ The Legal Framework;
✓ Institutional and Financial Framework for Implementation

### D. TECHNICAL ADVISORY SERVICES

The technical advisory services were initially provided by a technical advisor and later by a Technical Advisory Council comprising of three experts on land issues. In addition, there were resource persons attached to each thematic group to provide technical input into the process.

### E. COORDINATING UNIT

A coordinating unit, headed by a National Coordinator, formed the link between the Steering Committee and the Thematic Groups. It also provided technical and administrative services to the other operational levels.

## V. MAIN OBJECTIVES OF THE NATIONAL LAND POLICY

The main objectives of the proposed National Land Policy were as follows:
✓ To provide an overall framework and define the key measures required to address the critical issues of land administration, access to land, land use planning, restitution of historical injustices, environmental degradation, conflicts, unplanned proliferation of informal urban settlements, out-dated legal and institutional framework, and information management. It was also required to address constitutional issues such as, compulsory acquisition, development control and security of tenure for all Kenyans.

✓ Designate all land in Kenya under three main categories; Public, Community or Private. Most significantly, it was expected to recognize and protect customary rights; private land rights and provide for derivative rights from all categories of land holdings.

✓ To provide a vehicle through which the government would ensure that all land is put into productive use on a sustainable basis by facilitating the implementation of key principles of land use, productivity targets, and guidelines as well as conservation. It would also encourage a multi-sectoral approach to land-use, and provide social, economic and other incentives, and put in place an enabling environment for investment, agriculture, livestock development, and the exploitation of natural resources.

✓ To support and implement planning principles and guide-lines for national, regional, urban, peri-urban, spontaneous settlements in a transparent, accountable, sustainable, comprehensive and transparent manner.

✓ To ensure sound and sustainable environmental management of land-based resources; and dealings in such land would be guided by conservation and sustainable utilization principles outlined in national environmental laws and policies.

✓ To address land administration and management problems through streamlining and strengthening surveying and mapping systems, land adjudication procedures and processes, land registration and allocation, and land markets.

✓ To assist the Government prepare and implement national guidelines to improve the quality and quantity of land information through computerization at national and local levels. This would cover all aspects such as standards, geo-referencing, Interlectual property rights and land information dissemination and pricing.

✓ To provide a framework for intervention in land issues requiring special intervention such as historical injustices, land rights of minorities, and vulnerable groups would be recognized and protected. Measures will be initiated to identify such groups and to ensure their access to land and participation in decision-making over land and land-based resources.

✓ To provide a platform for reforming the institutional framework to ensure devolution of power and authority on land, participation and representation, justice, equity, and sustainability. Three institutions would be set up; the National Land Commission, the District Land Boards and Community Land Boards. District Land Tribunals would be established as well as the National Land Trust Fund to mobilize finances.

## VI. LAND POLICY ISSUES AND RECOMMENDATIONS

These land policy activities resulted into two National Land Policy Draft documents, the 2005 Issues and Recommendations Report [MoL, 2005] and the draft National Land Policy Document [MoL, 2007]. The draft land policy document was tabled in the Parliament, debated and subsequently adopted gazetted in August 2009 as the Sessional Paper No. 3 of 2009 on National Land Policy document in Kenya [MoL, 2009]. This document marked the birth of a clearly defined and coded National Land Policy in Kenya and a social contract document between the Kenya people and the Government.

### A. THE ACHIEVEMENTS IN KENYA

In Kenya, although the implementation of the new Land Policy has been slow, it is guided by a time-bound time table enshrined in the Fifth Schedule of the Kenya Constitution 2010. This has made it easy to track and demand consistent implementation by the various stake-holder groups. Currently, the Government has implemented a large part of the Land Policy as detailed by Mwathane [2013], notably, the following milestones have been achieved:

✓ Enactment of the Kenya Constitution 2010
✓ Enactment of the Environmental Management Act No. 8 of 1999
✓ The enactment of the Environment and Land Control Court Act, 2012
✓ The establishment of the Land Commission Act No. 5 of 2012
✓ The enactment of the Land Act No. 6 of 2012
✓ The enactment of Land Registration Act No. 3 of 2012
✓ Enactment of the County Government Act 2012
✓ The Gazettement of the National Land Commission in February 2013
✓ Enactment of Urban Areas and Cities Act 2011
✓ Drafting of the Eviction and Resettlement Procedures Bill 2013
✓ Drafting of the Community Land Bill 2013

### B. CHALLENGES OF IMPLEMENTATION OF THE LAND POLICY

The following challenges have been encountered in the process of implementing the new Land Policy in Kenya: Institutional Resistance to change; inadequate implementation strategies; capacity constraints; lack of sustainable political goodwill; lack of monitoring and evaluation plans; inadequate public education and awareness. There are however new challenges that have emerged since the passage of the Land Policy Sessional Paper which will may require incorporation of new implementation strategies. These challenges include:

### EMERGING GLOBAL AND STRATEGIC CHALLENGES

A number of changes in the global environment politics and economy are beginning to exert new and significant impacts on Africa's land resources. The most visible of these are; response to changes in the global ecosystems, demand for energy supplies, and rapid increase in foreign indirect investment, Rapid Urbanization, African Land Grab. An important challenge for African countries will be to put in position adequate policies to ensure that the risks associated with these challenges are avoided or effectively managed.

*RAPID URBANIZATION AND POPULATION GROWTH*

With the current world population of 7 billion people by the year 2014, it is estimated that by 2050, 67% of the world population will be living in the urban areas; and population growth will therefore concentrate in the cities from 2050 and beyond. With the growth of the cities, there will be a dramatic increase in the number of people living in the slums or informal settlements. In 1990, the number of slum dwellers was 656 million, in the year 2000, the number grew to 766 million and by 2010, the number had reached 827 million [Van de Molen, 2014].

To meet the demands of sustainable cities, there will be need to prevent further slum growth and improve on slum up-grading. It has been observed that conventional ways of urban planning with master plan system has completely failed to deliver appropriate livelihood for the growing number of inhabitants; whereas provision of property tenure security has been found critical to the success of slum up-grade programs. It has also been observed that successful slum up-grades require good governance, sound financial systems and a working social framework. Although employment remains one of the major concerns in the informal settlements, frequently, development of these settlements is hampered by conflicting and unrecorded ownership claims and double or multiple sales of the same plots. Additionally, informal settlements are dynamic and complex environments with continuously changing circumstances. To map and provide secure tenure to the settlements therefore requires acquisition of current, accurate, social and spatial information. There is also a need to deliver quick and cheap cadastres, adopting methods of recording both spatial and non-spatial attributes of the settlements and integrating all the data in a Fit-For-Purpose Land Administration System.

*GLOBAL CLIMATE CHANGE*

The impact of global warming due to climate change is expected to affect land use systems in Africa in a profound way, although its extent and magnitude are still unfolding. Such impacts are expected to include; reduced availability and scarcity of water, saline intrusion, increased temperatures, biodiversity loss, and desertification as a consequence of frequent droughts, are known to reduce the productivity of land and accelerate poverty. In as much as African continent contributes least to Green House Gas Emissions (GHGE), which are primarily responsible for global warming, the overall impact of climate change on the continents ecosystem will continue to be disproportionately severe.

Land policy reforms will therefore need to pay particular attention to the design and implementation of mitigation and adaptive strategies, including the mobilization of human capacity to manage the long-term implications of such change. For coastal countries for example, evidence already indicates that rising sea levels will require relocation of populations, innovative land use planning, and massive land acquisitions accompanied with large-scale infrastructure; and service delivery and the costs associated with the flow of climate refugees into the contiguous urban areas.

*FOOD SECURITY, PRICES AND CHANGING LAND USE PATTERNS*

The recent surge in world food prices and food supply bottlenecks have tended to affect Africa the most, given the continents food production deficit and increasing dependence imports and food aid. Rising food prices are the result of complex interactions between a number of factors including; the diversion of land resources and farm inputs towards production of food grains and oil seed for agro-fuel stock feeds in North America, and Europe. The failure of African countries to pursue policies that promote increased agricultural productivity and persistent inequities and the global trade systems have contributed to such food scenarios. Land Policy Reforms in Africa will have to address these issues on food production.

*THE NEW SCRAMBLE FOR AFRICA LAND RESOURCES*

The first scramble for Africa which took place since the 15th century involved various European superpowers; e.g. Belgium, France, Britain, Germany, Italy and Portugal among others. Since then, these nations have receded in political strength in comparison to the USA and China. What has not changed however is the importance of Africa's land to the Western economies by virtue of its rich endowment in natural resources. In recent times, the significance of bio-fuels, minerals and oil have gained prominence. Increased oil production from existing discoveries in African countries has taken on a new strategic significance in the light of the unpredictability of future Middle East oil supplies, the insatiable demand for oil by western nations and china's colossal energy and raw material requirements. The accelerated exploitation of resources together with the establishment of industries and processing infrastructure in these countries, have led directly to a new scramble for Africans' land resources.

While this new scramble for Africa is often discussed primarily in the context of valuable mineral endowments, the concept has become more wide-spread in relation to demand for land for a wide range of investments in timber, tourism, commercial development, and lately food production for consumption abroad. The question of concern is whether these foreign demands can be met while observing sustainability guidelines and without marginalizing the land rights of African communities. Future land African land tenure systems and their cadastre have to address these concerns.

*REGIONAL CO-OPERATION AND INTEGRATION*

Increasingly, African countries are embarking on regional cooperation and integration, under the auspices of various Pan African Sub-Regional organizations. A growing number of cross border developments point to the need for regional co-operation over many issues including, migration, the movement of pastoral communities, refugees, transboundary ecological stresses (e.g., land and water degradation, desertification, and deforestation among others). Several Regional Economic Blocks currently have agreements on the

management of shared water, forestry resources and desertification. Civil society organizations are also mobilizing to influence land and resource management-policies across national boundaries. However, these ongoing regional cooperation and integration initiatives have not resulted in binding convergence in land policy framework, process and management systems.

In Europe for example, there are currently integration land policy documents and models which support land-based transactions and use. For example, the recently INSPIRE, ISO Certified Land Administration Models (LADM), the Global Land Tool Network, are land unifying protocols for the European region. The emerging African Regional Blocks need to be anchored on well-secured regional land policy frameworks that would superintend over land use policy, land development and tenure security issues among others.

The current Framework and Guidelines on Land Policy in Africa (FGL) prepared by the African Union Commission (AUC) in collaboration with the African Development Bank is a commendable initiative that should be encouraged and continued. The document provides a comprehensive path for the development of land policies and land reforms in Africa with a view to strengthening land rights, enhancing productivity and securing livelihood for the majority of the continents population. The final out-come of the initiative was the Framework and Guidelines on Land Policy in Africa (FGL), which was approved by the Assembly of Africa's Heads of States and Governments in Libya in July 2009.

## VII. CONCLUSION

Apart from the challenges indicated above, there are new cadastral models such as Cadastre 2034 and Cadastre 2014 and Beyond which are going to dictate policy formulation on cadastre and Land Administration in the 21$^{st}$ Century. There are also emerging geospatial technologies which will also impact on data acquisition and processing in this century.

These include; the Global National Satellite Systems (GNSS), Unmanned Aircraft Vehicles (UAVs), the Smart Phones, Web Mapping and Cloud Computing, Telegeoinformatics and Location Based Services and GIS among others. New Land Policy developments in Africa have to take into consideration these technological changes and the rapidly changing socio-economic development in the world today.

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