1.0 Introduction
The first set of the land laws were enacted in 2012 in line with the timelines outlined in the Constitution of Kenya 2010. In keeping with the spirit of the constitution, the Land Act, Land Registration Act and the national Land Commission Act respond to the requirements of Articles 60, 61, 62, 67 & 68 of the Constitution. The National Land Policy, which was passed as Sessional Paper No. 3 of 2009, arrived earlier than the Constitution, with some radical proposals on the land Management. Chapter five of the Constitution on Land and Natural Resources does not represent the entire radical proposals in the Land Policy. When faced with an election and the need to build consensus the National Assembly was informed by the Land Policy rather than the constitution to agree on some inclusions into the land laws that had the effect of importing into the legislation, unconstitutional provisions. Realizing the anomaly, the then Minister for Lands, Hon James Ongeri gazetted a task force on 27th July 2012 to among other issues “identify inconsistencies in the land registration Act, 2012, Land Act 2012 and the national land act 2012”.

2.0 Wide Consultations and stakeholder forums
The Land Laws amendment bill is a culmination of work that began way back in 2012. It is work that has been participatory, involving all types of stakeholders. Dr Mohamed Swazuri, the Chairman of the National Land Commission, chaired the Taskforce, which among other responsibilities, sought to iron out inconsistencies of the land laws. In that capacity and at public cost, the chairman led stakeholder forums and travelled to various countries to benchmark on our legislation. Other members of the Taskforce were drawn from the then Ministry of Justice, National Cohesion and Constitution, Kenya Law Reform, the State Law Offices, Non State Actors in the land Sector, Institute of Surveyors of Kenya, Kenya Institute of Planners, the Law Society of Kenya and the Ministry of Lands.

In its current form and context, the bill has been subjected to high-level scrutiny. After going round the country and visiting foreign countries, a report and draft amendment proposals were developed. However, along the way, the National Land Commission declined to associate itself with the recommendations of the Taskforce. They developed their own proposed amendments, which they handed directly to the National Assembly. In turn the Ministry handed the collectively agreed upon amendments to the National assembly. Faced with the diverse views placed before it, the National Assembly passed them onto the Commission for the Implementation of the Constitution (CIC), for their consideration and proposals.

The land laws amendment bill is the product that CIC developed having reviewed a matrix of the proposals and guided the final drafting of the bill by the Office of the Attorney General.

The Bill proposes amendments to the three land law statutes to align them with the Constitution and to eliminate duplication and conflict in roles between the Ministry and National Land Commission. In addition, the bill makes provisions to give effect to the provisions of Article 67 (2) (e) of the Constitution as read together with Section 15 of the National Land Commission Act, 2012, to provide for mechanism and procedures for the investigation into present and past historical land injustices by the National Land Commission. Further, the bill provides procedures for eviction from Public and Private Land.

The overall approach is consistent with the spirit and letter of the Article 68 of the constitution, which requires Parliament to consolidate laws on land rather to preside over an unnecessary increase of such laws.

4.0 The bill endorses the National Land Commission
Contrary to views being expressed elsewhere, this bill does NOT take away any Constitutional powers vested in the National Land Commission. As a matter of fact, the National Land Commission is emboldened by these proposed amendments. The Commission can now create time and concentrate on their core mandate, which is to:

• Manage public land on behalf of the National and County Governments,
• Recommend to the National Government a National Land policy framework,
• Advice on a comprehensive registration of titles,
• Conduct research on land use and natural resources and make recommendations to the appropriate authorities,
• Initiate investigations, on its own or upon complaint into present or historical land injustices,
• Encourage application of alternative dispute resolution mechanisms in land conflicts,
• Assess tax on rates and stand premiums.

The Bill only amends section 15 of the National Land Act by fortifying the ability of the National Land Commission in investing into present and past historical land injustices. The Bill recognises the provisions of Article 67 as read together with Article 248 and 249 on commissions and independent offices. The bill is cognisant of the fact that the National Land Commission like any other constitution commission exists to protect the sovereignty of the people secure the observance by all state organs of democratic values and principles and promote constitutionalism.

5.0 Land Act Amended
The bill proposes to amend section 159 of the Land Act, 2012, which required that the Cabinet Secretary commissions a scientific study to determine the economic viability of minimum and maximum acreages in respect of private land for various land zones in the country. By proposing to amend this section, the bill seeks to avoid the creation of a separate and stand alone legislation but gives guidelines as to how to implement the guidelines on minimum and maximum private land holding acreages.

The provision on minimum and maximum is only in so far as private land acreage holding is concerned, AND
PARTICULARS, DOCUMENTS AND INFORMATION REGARDING AN INVESTIGATION AND THE POWER TO SUMMON ANY PERSON TO APPEAR BEFORE THE COMMISSION TO PRODUCE DOCUMENTS OR OBJECT IN THE POSSESSION OF THAT PERSON THAT ARE RELEVANT TO ANY INVESTIGATION AND THE POWER TO ADVISE, BY NOTICE IN THE GAZETTE POTENTIAL COMPLAINANTS TO LODGE COMPLAINTS WITHIN THE PERIOD SPECIFIED IN THE NOTICE.

CLAUSE 46 OF THE BILL PROPOSES TO AMEND THE FIRST SCHEDULE TO THE ACT TO PROVIDE FOR THE PROCEDURE FOR APPOINTMENT OF THE CHAIRPERSON AND MEMBERS OF THE COMMISSION THROUGH THE PUBLIC SERVICE COMMISSION.

CLAUSES 47-109 OF THE BILL CONTAIN PROPOSALS TO AMEND THE LAND ACT IN ORDER TO HARMONIZE THE ACT WITH THE CONSTITUTION AND ELIMINATE OVERLAPS. IT ALSO SELLS TO CLARIFY THE MANDATES OF THE MINISTRY OF LAND, HOUSING AND URBAN DEVELOPMENT AND NATIONAL LAND COMMISSION, WHICH HAVE BEEN SOURCE DIFFICULTIES IN THE IMPLEMENTATION OF THE ACT.

CLAUSE 53 OF THE BILL PROPOSES THE INSERTION OF A NEW SECTION TO PROVIDE FOR THE CONTROLLED LAND, THE ACQUISITION OF CONTROLLED LAND AND THE PROCEDURE FOR APPLYING FOR THE TAKING OR ACQUISITION OF INTERESTS IN CONTROLLED LAND BY AN INELIGIBLE PERSON.

CLAUSE 95-96 OF THE BILL PROPOSES TO AMEND SECTION 134 AND 135 OF THE ACT TO VEST THE MANDATE OF IMPLEMENTING SETTLEMENT PROGRAMMES ON THE NATIONAL GOVERNMENT AND TO PROVIDE FOR THE ESTABLISHMENT OF A BOARD OF TRUSTEES TO ADMINISTER THE SETTLEMENT FUND.

CLAUSE 103 OF THE BILL PROPOSES TO AMEND SECTION 148 TO CONFER UPON THE CABINET SECRETARY THE POWER TO MAKE REGULATIONS PRESCRIBING THE CRITERIA TO BE APPLIED IN THE PAYMENT OF COMPENSATION UNDER THE SECTION.

CLAUSE 105 OF THE BILL PROVIDES FOR THE PROCEDURES FOR UNDERTAKING EVICTION OF UNLAWFUL OCCUPIERS FROM PUBLIC, COMMUNITY AND PRIVATE LAND.

7.0 CONCLUSION

OTHER PROPOSED AMENDMENTS DEAL WITH TYPOGRAPHY AND GRAMMAR IN THE LAW. IN GENERAL, THE MINISTRY IN CONSULTATIONS WITH KEY STAKEHOLDERS HAVE MADE LEGISLATIVE PROPOSALS. I BELIEVE THAT AS LONG AS THE DEBATES ARE OBJECTIVE AND INFORMED, KENYANS ARE AT LEAST IN THE ABILITY TO DEBATE AS THEY ARE DOING. I BELIEVE THAT SUCH CAN ONLY SERVE TO STRENGTHEN THE QUALITY OF THE LAW LIKELY TO BE PASSED BY THE NATIONAL ASSEMBLY.

I URGE MEMBERS OF THE NATIONAL ASSEMBLY, TO SUPPORT THE BILL AND PASS IT INTO LAW. ITS PASSAGE WILL ENSURE A HARMONIZED LEGAL FRAMEWORK FOR THE BETTER MANAGEMENT OF LAND, AND THE ELIMINATION OF UNNECESSARY INSTITUTIONAL CONFLICTS.

DR. FRED MATIANG'I

AG CABINET SECRETARY

LAND LAWS AMENDMENT BILLS: A PRACTITIONER'S PERSPECTIVE ON THE LAND BILLS

BY IBRAHIM MWATHANE

1.0 INTRODUCTION


IT'S NOW OVER THREE YEARS SINCE THE ENACTMENT OF THE FIRST SET OF STATUTES AND THE DEBATE HAS STARTED TO SURFACE. WITNESS WHAT COULD BE CALLED A SECOND TRANCHE OF AMENDMENTS.

IT'S A HUMOROUS EXERCISE TO THINK THAT IT'S ALL ABOUT THE PERSONALITIES AT THE TOP OF THE LANDS MINISTRY, THE LACK OF COMPETENCE IN THE MINISTRY AND THEIR INABILITY TO DO THE JOB. IT'S NOT JUST THE PERSONALITIES AT THE TOP OF ANY MINISTRY, NOT JUST THE LANDS MINISTRY, BUT THE INCONSISTENCY AND CONTRADICTIONS IN THE LAWS.

IT'S A BIG PROBLEM. UNDER THE LAND REGISTRATION ACT AND THE GOVERNMENT LAND ACT UNLESS THEY FIRST PROVIDE FOR USE OF SURVEYORS IN RESOLVING SIMPLE DISPUTES LIKE ESTABLISHING BOUNDARY CORNER BEACONS AND REALIGNING BOUNDARIES.

IT PROVIDES A SIX-MONTH TIMELINE FOR THE RESOLUTION OF REPORTED BOUNDARY AND LAND DISPUTES.

THE AMENDMENTS ALSO REDUCE THE THIRTEEN OVERRIDING INTERESTS TO SEVEN (STILL TOO MANY FOR TRANSACTIONS IN TITLE).

SPouses, WHO HAVE NOW BEEN CLEARLY DEFINED UNDER THE PROPOSED AMENDMENTS, HAVE BEEN PROVIDED FOR IN THE RESPECTIVE CLAUSES THAT ENABLE THEM TO INTERVENE SPECIFICALLY BEFORE COMPLETION OF A TRANSACTION. THE PROBLEM WITH THE EARLIER ORIGINS OVERSPRING INTEREST ON SPousAL RIGHTS WAS THAT THOSE WITH MISCHIEF OR WITHOUT LEGITIMATE INTERESTS COULD ACTUALLY FRUSTRATE THE LEGITIMATE SPOUSES AS HAS BEEN EVIDENT IN SOME OF THE RATHER PUBLICIZED COURT CASES.

ARE THERE ANY DOWNSIDES IN THE OMINOUS BILL? I BELIEVE THAT THE BILL CAN BE FURTHER IMPROVED TO GIVE CLARITY IN THE COMPENSATION AND APPEAL PROCESSES FOR COMPLAINTS IN HISTORICAL INJUSTICES. MAKE PROVISIONS FOR THE RESSETMENT OF VULNERABLE PERSONS ON PRIVATE, PUBLIC OR COMMUNITY LAND DURING PROJECT IMPLEMENTATION. THERE IS NEED TO TAKE A SECOND LOOK AT SOME OF THE CLAUSES THAT MAY APPEAR TO ENCOURAGE TRESPASS AND INVASION OF PRIVATE PROPERTY. THE MINIMUM AND MAXIMUM LAND SIZE PROVISION, THOUGH WELL MEANT, MIGHT CALL FOR FURTHER CLARIFICATION.

5.0 COMMUNITY LAND BILL

THE COMMUNITY LAND BILL SEeks TO FACILITATE THE UNLOCKING OF THE POTENTIAL IN THE OVER 60% OF THE COUNTRY UNDER COMMUNAL LAND HOLDING. IT ALLOWS COMMUNITIES TO BE REGISTERED UNDER THE SOCIETIES ACT, TO MAKE DECISIONS, INCLUDING RULES AND BY-LAWS, OVER THEIR LAND. AGREEMENTS ON INVESTMENTS ON COMMUNITY LAND WILL BE SHAPED TO BENEFIT COMMUNITIES. COUNTY GOVERNMENTS WILL APPROVE LAND USE PLANS TO COMMUNAL LAND WHILE THE CABINET SECRETARY WILL OVERSEE REGISTRATION PROCESSES WHERE COMMUNITIES DECIDE TO CONVERT OWNERSHIP TO PRIVATE AS PROVIDED UNDER THE BILL. HOWEVER, THERE IS NEED TO REVIEW AND PROVIDE FOR A MORE EFFECTIVE MECHANISM FOR REGISTRATION COMMUNITIES AND COORDINATION OF DECISION MAKING.

6.0 THE PHYSICAL PLANNING BILL 2015

THE PHYSICAL PLANNING BILL PROVIDES FOR THE PLANNING, USE, DEVELOPMENT AND REGULATION OF LAND. IT REPEALS THE 1996 PHYSICAL PLANNING ACT AND WILL GREATLY IMPROVE THE DEVELOPMENT AND USE OF LAND. IT PROVIDES FOR POLICY AND REGULATION AT NATIONAL AND COUNTY GOVERNMENT LEVELS IN LINE WITH THE CONSTITUTION. THIS IS THE LEAST CONTENTIOUS OF THE BILLS. THERE ARE HOWEVER COMPLAINTS OF NON-CONSULTATION. BUT PARLIAMENT SHOULD BE ABLE TO TAKE INTO ACCOUNT ANY HELPFUL INPUT EVEN AT THIS STAGE.

ABOVE ALL, LET US TAKE TIME TO READ EACH OF THE BILLS TO PROVIDE INPUT. THIS WILL HELP US TO STRENGTHEN THE PROPOSED LAWS FOR THE SAKE OF THIS COUNTRY.

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