Land Sector Non-State Actors Joint Petition to Parliament on the Land Laws (Amendment) Bill, 2015 and the Community Land Bill, 2015.

The Land Sector Non State Actors (LSNSA) is a network of civil society organizations working together to promote secure and equitable access to land and natural resource for all through advocacy, dialogue and capacity building.

We petition parliament on issues we hold to be of fundamental importance in the context and content of the two bills before the National Assembly. We believe that the objective of land reforms is to ensure equitable, efficient, productive and sustainable land use in Kenya. These are central tenets in promotion of societal justice and the realization of the potential of all Kenyans. For this reason, we have in the past not only pointed Parliament's attention to shortcomings in the Land Bill, Land Registration Bill and the National Land Commission Bill but also registered our displeasure with the manner the bills were being rushed through the National Assembly without proper scrutiny and with only cosmetic public participation. Unfortunately, not enough was done to remedy these pitfalls. Such action negates the investment that had been made when task-forces were appointed to draft the Community Land Bill and another to propose recommendations that would have remedied the gaps in the previous Bills.

Again, we are faced with the same self induced haste in developing the Community Land Bill, 2015 and the Land Law (Amendments) Bill, 2015.The two bills are enmeshed in the shortcomings we pointed out during the Land Laws development process. Imperatively, the bills undermine constitutional values, principles of governance and may perpetuate injustices and inequalities. The effectiveness of land reforms has a bearing on our future stability and democracy. We therefore call upon the institution of Parliament to reconsider the issues herein that go against a democratic system of land administration and management envisioned in our Constitution. The matters that concern us are:

Public Participation in the Formulation of the Community Land Bill, 2015 & Land Law (Amendments) Bill, 2015

Article 10 of the Constitution of Kenya on national values and principles of governance provides for public participation. In pursuance of this principle, we engaged in the formulation process of the Community Land Bill, the Evictions and Resettlement Bill and the Land Laws Amendments and Regulations, as members of the Taskforces and as stakeholders. While the formulation of the amendments to the 2012 Land Laws, Community Land Bill and the Evictions and Resettlement Bill were developed through a consultative process by ministerial taskforces (respectively: Gazette Notice No. 10604 of 19th July, 2012; Gazette Notice No. 13557 of 19th September, 2012); the contents of the Community Land Bill and the Land Laws (Amendments) Bill currently before the National Assembly vary greatly from those prepared by the Taskforces thereby demeaning the critical element of public participation. Thus, our participation in the bills' formulation processes cannot be cited to legitimize reforms that safeguard the interests of the political and administrative elites at the expense of the wider society.

THE LAND LAWS (AMENDMENT) BILL, 2015

This bill among other things, proposes to amend three laws (the Land Act, the Land Registration Act, and the National Land Commission Act all of 2012) supposedly to respond to constitutional requirements: the prescription of minimum and maximum land holding acreages in respect of private land (article 68 (C) (i)); for giving effect to both article 67 (2) (e) on providing redress to historical land injustices and; article 40 (3) (4) & 43 on the right to adequate housing and occupants of land in good faith. We draw Parliament's attention to the following issues:

1. Land Management and Administration Institutions

Section 6 of the Land Act, 2012 on the Land Management and Administration Institutions emphatically outlines only the function of the Cabinet Secretary. In so doing, this Act failed to provide a compressive framework reflecting the responsibilities of all key land institutions but only addressed the functions of the Cabinet Secretary. Despite the anomaly, the amendment proposed to this section leave the gap unaddressed by failing to provide an overarching framework of land governance institutions in Kenya. Rather it merely amends the marginal note on '**land management and administration institutions'** and replaces it with **'functions of the Cabinet Secretary'.** We therefore recommend a revision of the amendment to clarify the roles of all institutions (National Land Commission (NLC), Cabinet Secretary, County Land Management Boards, Land Registrars). We further recommend inclusion of provisions clarifying institutional linkages in as far as regulation, supervision and implementation of land management and administration is concerned.

2. Prescription of Legislation on Minimum and Maximum Land Holding Acreage in Respect of Private Land

Section 159 of the Land Act, 2012 being amended directed the Cabinet Secretary to commission a scientific study to determine the economic viability of minimum and maximum acreages in respect of private land for various land zones by May 2013.The study, which was to be debated and adopted by Parliament, was never carried out. The Acting Cabinet Secretary publicly stated that failure to commission the scientific study was occasioned by unavailability of funds. Nevertheless, the determination of the minimum and maximum land holding acreage was to be informed by the scientific study. In undue haste and an opaque process the Cabinet Secretary formulated the Minimum and Maximum Land Holding Acreages Bill, 2015 that was posted on the Commission for the Implementation of the Constitution (CIC) website for public input. The gist of that bill was the arbitrary prescription of minimum and maximum land sizes and the discretionary powers attributed to the Cabinet Secretary to regulate land ceilings. That draft Bill was latter withdrawn. The proposed amendments retain the letter and spirit of the withdrawn bill which was opposed widely by the public. The amendments perpetuate violation of the Constitution by deferring the prescription of the minimum and the maximum to undetermined period. Further, the amendments **yields immense powers to the Cabinet Secretary to: prescribe the minimum and maximum land holding acreage; issue guidelines on land holding among married couples and non citizens and; approve land holding larger than the maximum by a private land holding.** The prescription of the minimum and maximum land holding by the Cabinet Secretary is neither preceded by a scientific study nor subjected to parliamentary approval as was required under the Land Act. The study is to be done in future (between 8-12 years) to review the minimum and maximum set. We proposed in the past and do insist now that the minimum and maximum land holding cannot be predetermined and has to be preceded by a scientific study. While, prescribing the minimum and maximum land holding in the bill is not bad, the proposed amendment fails to enact provisions capable of implementing constitutional land reforms. This is unacceptable and must be rejected.

3. Undermining the Independence of the National Land Commission by amending the Appointment Procedure of its Members

The proposed amendment of First Schedule to the National Land Commission Act, 2012 deletes paragraph (1), setting out a multi-stakeholder selection panel. The multi-stakeholder's panel is intended to infuse diversity, objectivity and credibility in the recruitment process and to guarantee the independence of the Commission. The role of the multi stakeholder's selection panel has been reassigned to the Public Service Commission (PSC) to indentify suitable candidates and recommend them for appointment. This proposal is retrogressive and has serious implication on the independence of the NLC. The amendment shifts accountability from the people of Kenya to whom constitutional commissions are accountable to the PSC to whom the NLC would be answerable. We contend that the PSC is just one of the independent commissions and does not qualify to appoint members of other commissions. In fact, article 234(3)(a) of the Constitution of Kenya (CoK) disqualifies the PSC from appointing state officers (as defined in Article 260 of the CoK), including commissioners to the National Land Commission. Accordingly, all other commissioners of independent Commissions are appointed through a multi-stakeholder's panel. We petition that this proposed amendment should be abandoned for being unconstitutional.

4. Failure to Give Full Effect to Article 67 (2) (e) of the Constitution on Investigation and Adjudication of Claims of Historical Land Injustices

Section 15 of the National Land Commission Act, 2012 directs the Commission to, **within two years of its appointment, recommend to Parliament appropriate legislations to provide for investigations and adjudications of claims arising out of historical land injustices for purposes of Article 67(2)(e) of the Constitution.** However, the amendments delete this section and replace it with **"The Commission shall receive, admit and investigate historical land injustices and recommend appropriate redress"** .The proposed legislative framework sought to provide a legal regime to establish a fair process of admitting, adjudication and redress of historical land injustices, which the amendment entirely deny. Notably, the Bill developed by the

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Taskforce on Historical Land Injustices provided elaborate procedures on admission and determination of claims; institutional framework for determination of claims and appeal procedures and; redress to the victims of the injustices by way of compensation, apology, restitution, resettlement among others. The proposed amendments do not provide these essential details but instead avoids resolution of historical land injustices with finality. We recommend that section 15 of the National Land Commission Act be upheld.

5. Abolishing the County Land Management Boards Devolving NLC Functions

Repeal of section 18 of the National Land Commission Act, 2012 abolishes the County Land Management Boards (CLMBs) that perform NLC functions at the county level. This amendment goes against several constitutional provisions: Article 6 (3) of the Constitution, which directs state organs to ensure reasonable access to its services in all parts of the Republic; Article 10 of the Constitution identifies devolution of power as a national value that should guide governance; Article 174(f)&(g) of the Constitution on objectives of devolved government provides for the promotion of the provision of proximate, easily accessible services throughout Kenya and (h) to facilitate the decentralization of state organs, their functions and services from the capital of Kenya. We hold that devolving the NLC services through the CLMBs enhances popular participation in decision making, direct accountability and accessibility by remote, poor and marginalized Kenyans. It is very unfortunate that the Ministry of Lands, Housing & Urban Development through the amendments, devolves its function by establishing the office of County Land Registrars and County Registries but insists on the centralization of the NLC services. It is our view that such proposal escalates the never ending mandate rivalry between the NLC and the Cabinet Secretary and points to the efforts to whittle down powers of the NLC. We recommend that Section 18 of the NLC Act be upheld.

6. Failure to provide Adequate Safeguards on Evictions and Resettlement

Article 43 of the Constitution guarantees the right to adequate housing and reasonable standards of sanitation. While Article 40 (3) & (4) of the Constitution safeguards occupants in good faith. To effect these provisions a taskforce was appointed by the then Ministry of Lands in December 2012 to draft the Eviction & Resettlement Bill. The Taskforce completed its work and submitted its draft Bill to the Cabinet Secretary in charge of Lands, Housing & Urban Development in February 2014. However, instead of forwarding the Eviction & Resettlement Bill to the Parliament for debate, the proposed amendments insert Section 152 (a) to 152 (g) in the Land Act, 2012 that provide room for forced evictions. The proposed amendments to the Land Act, 2012 fails to protect the poor and marginalized from sudden and wrongful evictions. Firstly, the Taskforce bill prohibited evictions on private land unless carried out with a court order. The proposed amendment omits this critical provision without which many other fundamental rights cannot be realized. Secondly, evictions on public land are to be carried out when unavoidable and consistent with the bill of rights. However, in the proposed amendment this is no longer a requirement. Thirdly, the taskforce draft prohibited destructions of property of evictees, harassment of any kind, manhandling of evictees, physical or verbal abuse or any other act or omission that subjects evictees to inhumane or degrading treatment. Engaging in any of these acts is an offence, and the punishment was defined. These provisions have not been incorporated in the proposed amendments. Finally and most important, the Task Force's Bill proposed resettlement of persons evicted from public land. The proposed amendment is mute on the requirement for appropriate redress and resettlement of persons to protect evictees on public land.

7. Compensation of Leaseholders upon the Expiry of Leases on Public Land

Section 13(1) of the Land Act requires that upon expiry of a lease, land reverts back to the national or county government and the Commission may offer immediate past holder of the leasehold interest pre-emptive rights, provided that the lessee is a Kenyan citizen and the land is not required for public purposes. Our proposal was to amend the presumed lessee pre-emptive rights in keeping with leasehold tenure arrangement. Instead, the proposed amendments provide compensation to the departing lessee for lawful improvements if application for renewal is not granted. Compensation to the lessee, upon expiry of the lease defeats the purpose of the lease, which is subject to enjoyment for the specified period. In fact, after the expiry of the lease period, the land should automatically revert back to the lessor (the landlord). Accordingly, we recommend that the lessee's entitlement to compensation should be abandoned along with the pre-emptive right of the immediate lease holder (lessee).

8. Powers of Registrars to Omit and Cancel Entries in the Register

The proposed amendment to section 7 of the Land Registration Act (LRA) gives the registrar broad discretion to strike out entries that have 'ceased to have effect'. The bill however does not provide for any definition of 'entries that have ceased to have effect'. The high level of discretion granted to the registrars in the exercise of their duties increases the likelihood for corruption by providing opportunities for unethical actions on the part of the officials. The authority to cancel entries would be best accompanied by due process safeguards such as the requirement of notice to the affected persons and the right to contest such a decision prior to cancellation.

THE COMMUNITY LAND BILL, 2015

1. Administration and Management of Community Land

Part III, Sections 15 & 16 read together with the memorandum of objects and reasons purports to provide for an institutional framework through which community land shall be managed and administered. Distinctively, the bill is silent on how community land will be managed and controlled on behalf of those who have access to it. The supposed registration of communities under Societies Act is severely limiting and does not lend itself to communities' expectations who had proposed a three tier inverted pyramid institutional framework. The inverted pyramid structure has the Community Assembly at the top for overall governance, the Community Land Management Committee at the middle responsible for day to day management, and the Community Land Board at the bottom apex level for oversight and advisory purposes. We recommend this institutional framework to facilitate accountability of leaders, participatory decision making process and good governance critical in the current context of sharp competition for scarce land and natural resources.

2. The Nature of Community Land Title

The nature of community land title provided in Part IV borrows too much from exclusive individualistic private tenure titling without regard to the uniqueness, flexible and inclusive nature in which communities hold, access, and control and use community land. Conversely, community land title shall first of all be a collective belonging pertaining to all community members across generations. Secondly it shall be as flexible to allow different levels of social organization structure either as families, clan lineage or community. Lastly, access and control of land depends on individuals function and position in the social order of the community, nature of resource and defined internal rules. To secure community rights, the nature of community land title should be flexible and inclusive in nature to accommodate the broad spectrum of rights. The kind of title that we propose would allow pastoralists to exercise transhumance in search of pasture, water-point and salt-lick in season across their boundaries.

3. Conversion of Land Public Land to Community Land at the Coast Region

Part Five (V) of the proposed Community Land Bill, 2015 on conversion of land falls short of the communities' proposals to the drafters of the relegated Taskforce Community Land Bill, 2014 that had a schedule for specific conversion of public land back to community land especially in Coast Region where community lands were gazetted to become government land under the old constitutional dispensation leaving communities displaced, dispossessed and squatters in the fringes of their community land.

4. Continued Dealing in Community Land contrary to Article 63 (4)

The Constitution at Article 63(4) stipulates that community land shall not be disposed of or otherwise used except in terms of legislation specifying the nature and extent of rights of members of each community individually and collectively. This implies that all land deals in community land since the promulgation of the Constitution on August 27, 2010 until the enactment of community land law are unconstitutional. But last week Ministry of Land, Housing and Urban Development public notice, which grouped Group Ranches with other categories of private land earmarked for issuance of title deeds, was a pointer to continued violation of the Constitution. We therefore propose a schedule for auditing the illegal and irregular dealings in community land since 27th August, 2010 when the Constitution was promulgated till the enactment of the community land law.