



# REPUBLIC OF KENYA

## MINISTRY OF LAND, HOUSING AND URBAN DEVELOPMENT

### LAND LAWS (AMENDMENT) BILL, 2015

#### 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 Orengo gazetted a task force on 27<sup>th</sup> 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 in 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.

#### 3.0 Objectives of the bill: Consistency with the Constitution of Kenya 2010.

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 emboldens 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**

**NOT** ownership. Indeed, Article 40 of the constitution is very clear on property ownership, which is a right of every Kenyan to own property according to their ability anywhere in Kenya. What these guidelines provide for is for the opportunity to better inform the planning and the development control function as per the requirements of agriculture, livestock, wildlife and town planning among others.

#### 6.0 Land Registration Act is amended.

Clauses 2-41 of the Bill contain proposals to amend the Land Registration Act to clarify the mandate of the National Land Commission and the Ministry of Land, Housing and Urban Development in order to eliminate the overlap of mandates that causes conflict between the Ministry and the Commission in matters relating to the registration of land.

Clause 3 of the Bill proposes to amend section 6 of the Act to confer the power to constitute land registration units to the Cabinet Secretary. This is in line with the provisions with the Constitution. The National Land Commission recommends the comprehensive registration programme, while the Ministry implements through gazettelement of registration areas and the setting up of Land registries under section 7 of the Act following the development and publication of a comprehensive registration of titles programme throughout the country.

Clauses 8-10 of the Bill propose to amend section 12 and 14 of the Act and the insertion of a new section to provide for the appointment of Deputy Land Registrars, County Land Registrars and Land Registrars, their qualifications and their respective mandates.

Clauses 11-12 of the Bill propose to amend section 16 and 17 of the Act to provide for the rectification, preparation, submission and custody of cadastral maps. Clause 13 of the Bill proposes to amend section 18 of the Act to provide for the procedure for determination of boundary disputes and other disputes relating involving a parcel of land. While clauses 14-31 of the Bill propose various amendments to the Act for consistency between the various provisions of the Act and to correct grammatical and typographical errors.

Clause 32 proposes to amend section 79 of the Act to provide for the rectification of mistakes and updating of the register. Clauses 33-40 of the Bill propose various amendments for consistency between the various provisions of the Act and to correct grammatical and typographical errors.

Clauses 42-46 of the Bill contain proposals to amend the National Land Commission Act in order to eliminate the duplication of institutions at the county level, provide the manner in which the National Land Commission shall undertake the investigation of historical land injustice complaints pursuant to Article 67(2)(e) of the Constitution and to harmonize the mandate of the Commission with that of the Ministry of Land, Housing and Urban Development. Clause 42 proposes to delete the definition of the term “Board” which refers to the County Land Boards established in section 18 of the Act.

Clause 44 proposes to amend section 15 to confer upon the Commission the power to request from any person

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 seeks 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 propose 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 typos 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 liberty 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

The proposed Land Laws (Amendment) Bill 2015, Community Land Bill 2015 and the Physical Planning Bill 2015 are the second tranche of land laws after the Land Act 2012, Land Registration Act 2012 and National Land Commission Act 2012, enacted in 2012.

It's now over three years since the enactment of the laws and stakeholders have had the benefit of understanding our national legislative process and testing the effectiveness of the laws. The general experience in applying these laws has been incessant institutional conflicts, inconsistencies in the land sector operation and loss of trust in the documents generated by the various authorities in the land sector. This has been occasioned by the failure of the statutes to comply with the Constitutional provisions on land.

Stakeholders now know that in discussing bills proposed for Parliament, it helps to avoid generalities and rhetoric and instead point out specific strengths and weaknesses in the respective bills. This makes it easier for Members of Parliament and legislative drafters to retain, amend or delete the proposed provisions. They also know that it's rather onerous to stop or rewind the parliamentary calendar. This experience should inform today's strategies.

#### 2.0 Overriding interests

Having applied the first set of laws for over three years, land registrars, landowners, developers, bankers and practising land professionals will tell you that indeed we have a big problem. Under the Land Registration Act, we have burdened our titles with about thirteen (13) overriding interests (unregistered burdens on title) which grossly undermine the quality of land transactions in title. Furthermore, this law does not recognize titles earlier issued under the Land Titles Act and the Government Land Act unless they first undergo examination. In addition the Registration Act did not provide for the offices, duties and qualifications of Deputy Chief Land Registrar and County Land Registrars. These call for amendments.

#### 3.0 Institutional Conflicts

It is in the public domain that the Lands Ministry and the Commission have had conflicts since the application of the laws. And, unlike what many have speculated, it is not about personalities at the top of the Lands Ministry but the inconsistency and contradictions in the laws. The Land Registration Act Sections 6, 7, 17, 108 and 110 give the National Land Commission roles directly in conflict with those of the Cabinet Secretary.

The National Land Commission Act Section 5 (1) reproduces the functions of NLC as assigned by Article 67(2) of the Constitution. However section 5 (2) and (3) of the same Act as read together with the Land Act Section 134 donates conflicting implementation powers to the National Land Commission contrary to the spirit and letter of the Constitution. A very careful reading of the Commission's roles under the Constitution Article 67 (2) reveals a general advisory, oversight and monitoring powers for the Commission. It is therefore not lost to any keen observer that Article 67 (3) was shrewdly used to assign unconstitutional implementation powers to the Commission.

Pundits have observed, which I agree with, that the creative use of Article 67(3) to assign additional functions was irregular. If the framers of the Constitution had intended to give additional powers to the Commission it would not have been so difficult to directly assign these additional functions to the Commission. It must be noted that without these proposed amendments, these jurisdictional conflicts cannot resolve themselves between the two key institutions and service delivery in the sector will forever remain problematic. Land registration; land information management systems, adjudication and settlement programmes are systematic technical processes that cannot be successfully driven under two separate command centres. Yet this is what the first set of statutes did.

#### 4.0 Welcome Features in the proposed legislation

Besides resolving the institutional conflicts, what other good features does the Land Laws (Amendment) Bill, christened 'Omnibus', spell? Here are a few examples that I can quickly pull out:

- It establishes the offices of a Deputy Chief Land Registrar and County Chief Land Registrars and provides for their powers and qualifications.
- The Bill expressly recognizes titles earlier issued under the Government Lands Act and the Land Titles Act hence enabling lending transactions.
- The Bill further mainstreams the use of Alternative Dispute Resolution Mechanisms (ADRM) and provides 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 open ended overriding 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 publicised court cases.

Are there any downsides in the Omnibus 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 resettlement 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 registering 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 inputs even at this stage.

Above all, let us take time to read each of the bills then provide input. This will help us to strengthen the proposed laws for the sake of this country.

**The Author is Licensed Practising Surveyor**

**He can be reached at [mwathane@landsca.co.ke](mailto:mwathane@landsca.co.ke) or on Twitter: @mwathane**