
ISSUES PAPER

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**THE NATIONAL LAND POLICY IN
KENYA**

Addressing Historical Injustices



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PREFACE

The Historical Injustices Issues Paper seeks to present the various historical land claims issues and perspective related to them and consequently proffer policy statements for their redress. In this Issues Paper, Kenya Land Alliance (KLA) has tried to integrate information, issues and perspectives in relation to what was presented to the Constitution of Kenya Review Commission (CKRC), the Presidential Commission of Inquiry into the Land Law System of Kenya and at the Civil Society National Conference on Land Reform together with the ongoing debate on historical injustices.

Cases of historical injustices now manifest themselves in the form of squatters, absentee landlordism, land clashes and lingering land claims. We therefore hope that this Issues Paper will be able to initiate a well-informed discourse and public debate on the need for policy statement(s) on the historical injustices particularly in relation to the hue and cry over historical land dispossession. We further hope that this initiative of KLA will strengthen the campaign for fair and just National Land Policy championed by various social change Civil Society Organizations and peoples' movements.

We have drawn information on historical injustices from various sources to provide a relatively better information base on the topic. We present this Issues Paper with the hope that all of us would be able to take the responsibility to build up a people-centred advocacy for advancing the land rights of the marginalized sections of our society.

KLA would like to record its warm appreciation for the effort of our partners and members for their creative contributions to this Issues Paper. Dr. Smokin Wanjala pulled out all stops to putting together this Issues Paper and we extend our gratitude to him for his continued cooperation.

The continued strong support received from the Department for International Development (DFID), Danish International Development Agency (DANIDA)/ Danish Association for International Cooperation-Kenya (MS-Kenya), Oxfam, and other partners who contribute to the sustenance of KLA land reform efforts is much appreciated. The views expressed in the Issues Paper, however, are not necessarily those of our partners.

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RATIONALE FOR ADDRESSING HISTORICAL INJUSTICES IN A NATIONAL LAND POLICY

The National Land Policy Formulation process like other review processes on the constitution and land law system of Kenya before it has stimulated the urge to address the crisis of legitimacy of land rights occasioned by historical injustices in matters of land acquisition and ownership in the country. Indeed the history of Kenya, like that of any colonized territory, is fundamentally one of land dispossession and subsequent staking out of individual claims of title to property that legitimately belongs to others through a mechanism of land registration. For this reason it is important that the National Land Policy Formulation process addresses historical injustices.

True, from the first settlers at the Coast of Kenya to the formalized annexation of the Kenyan hinterland by the British Colonial government to the myth of the sanctity of title at independence, when it was argued that once a person acquires title to land, it can not be questioned even in a court of law! Customary Land Tenure holders inexorably lost their land to Individual or Private registered land holders. The result of which is that Kenya at independence inherited one of the most skewed patterns of land distribution in the world compared only to Brazil, South Africa, Zimbabwe and Namibia, where equally crisis of legitimacy of land rights/titling system and security of tenure is a bewildering variety of tenure arrangements befitting redress. Equally important to note is that the National Land Policy Formulation process like the Constitution of Kenya Review Commission (CKRC) and the Presidential Commission of Inquiry into the Land Law System of Kenya has the redress of historical injustices as one of its terms of reference. And indeed the two Review Commissions (the CKRC and the 'Njonjo' Commission) came up with the conclusion that historical land claims be redressed as historical injustices as a sure means of dealing with insecurity, landlessness and poverty among the majority of citizens.

In line with the provisions of the Draft Constitution of Kenya 2004, that guarantee existing property rights; but simultaneously places the state under a constitutional duty to take reasonable steps to enable citizens to gain equitable access to land, to promote security of tenure, and provide redress to those who were dispossessed of property since colonial time to the present as a result of past discriminatory laws or corrupt practices, the historical injustices indeed deserve to be addressed.

Since in the world over the process of democratization often involves the redress of historical injustices through clear land reform programmes the National Land Policy Formulation process presents the best opportunity to our country to follow suit. This is the only sure way our land policy development process shall ensure establishment of credible basic legal and institutional frameworks that would improve secure property rights as a means to protect environmental and cultural resources to facilitate productivity.

INTRODUCTION

The National Land Policy, which is being developed through a variety of consultative processes, is expected to provide a broad framework for the ownership, access, use and management of land in Kenya. The task entails a re-thinking of land relations in the country since independence to the present with a view to laying a firm foundation for the future on the basis of which land as a resource and national heritage may be used in a productive, efficient, equitable and sustainable manner. It is the heritage value of the land which gives the state and the citizens as a whole the right and the duty to ensure that no one individual or community can use the land in a manner that is detrimental to the present and future generations.

The general thrust of the policy formulation exercise will be forward looking in that it shall aim at systematizing and modernizing the laws, policies, and institutions that have hitherto regulated dealings in land. Archaic laws and systems will have to be discarded while new and more relevant ones will be formulated. The National Land Policy will therefore be responding to the social, economic, ecological and political challenges facing the country as it seeks to harness its scarce resources for development needs in a rapidly globalizing world.

Thus stated, some would be tempted to question whether addressing land related historical injustices would be a preoccupation worthy of a policy formulation exercise. Forty years of independence is a long time during which any historical injustices regarding land should have been resolved. The fact of the matter however is that there are certain deep rooted injustices which still rankle whole communities in Kenya.

The Government's post independence land policies have not resolved or fundamentally addressed these injustices. The politically ignited land clashes of the 1990s are a manifestation of deep rooted grievances which cannot be glossed over in a reform process. The Draft Constitution of Kenya 2004 recognizes this fact and requires the Government to embark upon the task of redressing historical injustices. What is not clear or agreed upon is the nature and extent of these grievances and their possible long term solutions .

1. THE PROBLEM

The issue of what constitutes a historical injustice or grievance must be resolved at the outset. The debate as to what is a historical land grievance is not new. A number of forums have been held at which this issue was a subject of protracted discussion. Within the context of this paper, and drawing from some of the basic agreements at the symposia referred to, a historical injustice is a land grievance which stretches back to the colonial land policies and laws that resulted in the disinheritance of communities from their land. Such grievances were not resolved upon the attainment of independence. They have persisted through out the Kenyatta and Moi regimes. They remain sticking points in the efforts to development and nation building.

What is however not agreed upon is the cut off date for a problem to be considered a historical grievance. This is not surprising since the issue is not really the period when a problem started manifesting itself. Rather, the historicity of the problem in question lies in its widespread and resilient nature; calling for a comprehensive and long-term solution, which is all-inclusive. The grievances have served as rallying and reference points for political agitation by various communities in the country. Demands for redress have been voiced during various phases of national discourse as the country seeks a new political dispensation. This became more evident during the constitutional reform hearings conducted by the Constitution of Kenya Review Commission, the Presidential Commission of Inquiry into the Land Law System of Kenya and various Non-Governmental Organizations. Calls for state intervention in the injustices again resurfaced after the historic 2002 general elections.

The grievances remain unresolved because successive post independence governments have failed to address the land problem in a wholistic manner. In fact, the land policies pursued after independence either exacerbated the problems or only offered artificial and temporary solutions to them. The consequence of this approach by the Government is that there are a number of land problems in the country, which have refused to go away. What this also means is that there cannot be a comprehensive land policy which does not offer practical ways of achieving long term solutions to the historical injustices. Arising from this reality, the land policy must deliberately acknowledge the existence of these injustices and declare the Government's intent and commitment to resolve them once and for all.

Given this country's colonial legacy of land alienation and dispossession of entire local communities from their land, it was incumbent upon the post-independence governments to resettle all the displaced people and restore their rights over land. The political realities at the time however meant that a radical one track land restitution and redistribution programme could not be undertaken without upsetting the platform upon which independence had been negotiated. A cautious, land market-based and hybrid system of resettlement was preferred to a wholesale and massive land restitution programme. This meant that lands which had been lost to white and other settlers could not be entirely repossessed for restitution by the Government. In addition, the Government adopted certain policies and laws that had been introduced into the colony by the colonial government. These policies and laws had fundamentally affected the land rights of certain communities in many parts of the country in a variety of ways. The decision by successive governments to continue with this colonial legacy has meant the intensification of these problems over the years.

Policy Statement

The National Land Policy should state that:

The Government shall in consultation with local communities, civil society, religious sector and Parliament embark upon an all inclusive, comprehensive, consultative and realistic programme of resolving historical injustices on a long term and permanent basis. In so doing, the Government shall pay due regard to the rights of other communities which have been acquired over the years. The main objective will be to devise mechanisms of responding to the historical wrongs through any available forms of redress.

2. The Squatter Problem

The Squatter problem is a direct consequence of the colonial land policy and law. Ever since the Supreme Court declared Africans as Tenants at Will of the Crown following the promulgation of the Crown Lands Ordinance of 1915, the problem of landlessness has never really been resolved. The dispossession of many Africans from their lands meant that only a massive resettlement programme could provide a solution to the problem of landlessness. However, the negotiations for independence extracted guarantees from the

nationalist political leadership whereby white settler farmers who had opted to remain in the country could retain their lands. The consequence was that many displaced peasants never got back their land.

The Kenyatta Government opted to resettle the displaced peasants through the settlement scheme programme. Many of the peasants were resettled outside the settler zones. But the settlement scheme programme had its own limitations. It was based on free market principle of 'willing buyer- willing seller'. Market- based processes of resettlement have never given back land to the displaced. Many people were left out of the resettlement programme as middle class elites took advantage to acquire land at the expense of the peasantry. The latter day resettlement programmes were seriously abused by the political elite. Instead of resettling the poor and landless, the schemes were used by the political class and the provincial administration to accumulate large parcels of land. The genuine landless people were again left out. The squatter problem therefore persists to this day.

The squatter problem must be addressed by the National Land Policy since it has political connotations. People should never be squatters in their own country. The struggle for independence was inspired by the deep sense of injustice occasioned by the alienation of land by the colonial government. The grievances which led to the war of liberation still manifest themselves in the demands for land from the Government by the landless all over the country. While it may not be realistic for the Government to avail land to all the landless, a clear policy statement on the squatter problem is required.

Policy Statement

The National Land Policy should state that:

- ✿ The Government will undertake a comprehensive audit of the resettlement programme which has been actualized through the settlement schemes with a view to determining whether and to what extent it has availed land to the genuinely landless people. All schemes especially those undertaken during the 1980s to the present will be forensically audited.

- ✿ Land, which may have been acquired by undeserving personalities, will be repossessed for the purposes of re-settling the landless. In the long run however, given the fact that land is a scarce resource, innovative ways of utilizing land by the landless shall be designed.
- ✿ Forms of transitory tenure, which can avail land to the landless on a temporary and needs basis shall be designed and given legal form.

Questions may arise as to how the Government would fund such a costly process of repossession given the fact that compensation would have to be paid to those who stand to lose their land. In most cases however, there would be no need for compensation where it is shown that the land was acquired illegally. The constitution of the Republic only protects property which was lawfully acquired.

3. The Coastal Land Problem

The colonial government introduced a system whereby those claiming ownership rights within the Ten Mile Coastal Strip could get titles under the Land Titles Ordinance. This process gave undue advantage to the few who were aware of the office of the Recorder of Titles. The majority of the local inhabitants at the Coast were ignorant of this procedure. They could therefore not lay any claims of ownership as envisaged in the Ordinance. All land inhabited by them was consequently declared Crown Land. Such land became Trust land at independence. Many people of Arab origin had acquired titles to vast parcels of land within the Ten-Mile Coastal Strip. To this day, they continue to collect rent from the local inhabitants. There is thus a twin problem of absentee landlordism and landlessness. During the constitutional reform hearings conducted by the Constitution of Kenya Review Commission, it emerged that this twin problem is a deeply felt grievance by the local coastal people. Many of the people are technically squatters on their own land. Land titles have been issued to people who are not ordinarily resident in the coastal area contrary to the provisions of the constitution regarding the privatization of Trustland. Such titleholders are viewed as aliens who have cheated the locals out of their land. It is a problem which must be comprehensively addressed.

Policy Statement

The National Land Policy should state that:

- ✿ The Government will embark upon a programme to address the twin problem of absentee landlordism and landlessness within the Ten-Mile Coastal Strip. The rights of the local inhabitants to their land shall be legally recognized.
- ✿ All idle land shall be accounted for with a view to establishing the legal ownership thereof. Where the ownership is not established, the land in question shall revert to the state for purposes of resettling the landless. Where the identity of the owner of the land is established he/she shall be called upon to justify such ownership in the face of rising landlessness.
- ✿ The local inhabitants and wider public shall be guaranteed access to the ocean for purposes of economic activity and recreation. This will be done through conditional public easements to the ocean.

4. Displacement Occasioned by Land Clashes

In the 1990s politically instigated land clashes led to the displacement of many people from their lands in the Rift Valley. Those displaced had acquired title to the land either through the resettlement programme or through outright purchase. They had been long viewed as foreigners by the original inhabitants of the area. The political leadership at the time whipped up emotions against the title holders and instigated the clashes. No serious efforts aimed at resettling the displaced have been made by the Government. Failure to resettle the displaced will send a dangerous message to the people regarding the sanctity of title in the country. It could also serve as a precedent for politically instigated ethnic evictions in other parts of the country. The potential for civil war cannot be ruled out if such phenomena were to spread countrywide.

It should be further noted that although the Rift valley was the most affected by the clashes, other parts of the country were also affected. In this regard, the clashes spread to all areas that were perceived by the ruling political elite as not being supportive of Kenya African National Union (KANU). Thus, the clashes affected large areas of Western, Nyanza provinces and later the Coast.

Policy Statement

The National Land Policy should state that:

- ✿ The Government shall immediately embark upon the process of resettling all those people who were displaced from their lands due to the land clashes. The identity of all those who were displaced will be proven through the production of the relevant ownership documents. Where for any reason it is not possible to resettle the displaced on their lands, alternative land shall be found for that purpose.
- ✿ The Government may also consider claims for compensation of the land clashes victims.
- ✿ National civic education programmes on peaceful coexistence will be mounted so as to heal the wounds inflicted during the land clashes and restore confidence in inter and intra-ethnic ownership of land in the settlement areas.

5. Lingering Claims to Land by Certain Communities

The acquisition of land by white settlers meant the displacement of entire communities from their ancestral land. Upon independence, the lands in question either remained in the hands of the settlers or were acquired by other communities through purchase. The most pronounced of this scenario is the land which had been occupied by the Pokot and which now forms Trans-Nzoia District in the Western Rift. The other is the land which was formerly inhabited by the Maasai community and which now forms Laikipia District. In both cases the communities were pushed into marginal areas which have not adequately catered for their pastoral needs. The Pokot claim that the British government did pay compensation to the Kenyatta Government for onward transmission to the community. They have frequently agitated for compensation or resettlement. On occasions, they have threatened to re-enact the land clashes of the 1990s so as to reclaim land that historically belongs to them. The Maasai on the other hand claim they were cheated out of their land through the Maasai Agreements of 1904 and 1911 respectively. They have also threatened and indeed invaded some white owned farms and ranches in Laikipia District. Again, these grievances were expressed during the constitutional review hearings. In both instances, the threatened invasions could lead to serious disruptions of peace and actual civil war not to mention the harm to the country's economy. The problem is more complex in that it cannot be resolved without hurting the rights of other communities.

Trans-Nzoia District is one of the most fertile agricultural areas, which produces more than half of the country's maize needs. The farmers are non-Pokot who acquired title to their lands and who have lived there since independence. To restore the land to the Pokot people would mean the dislocation of hundreds of thousands of the communities who now inhabit the area. Equally, to compulsorily acquire the white owned farms for the purposes of handing the land back to the Maasai would be politically explosive since such an action would expose the Government of the day to international sanction.

Yet amidst all these, the land policy must address this issue in a manner that satisfies the aggrieved communities. One way would be to seek solutions through organizing and holding a land conference to discuss the historical claims to land by the Masaai and the Pokot people with all the other communities concerned. The conference will address all the claims and grievances raised by all affected parties in a manner that maintains national unity and harmony. The needs of these communities shall be addressed on a long-term basis. The conference would provide the government with an opportunity to devise ways whereby economic incentives are offered to the communities in lieu of the land they lost to other communities. In return the affected communities shall undertake to recognize and respect the rights of title holders to the land. The agreements struck at the conference shall form a binding declaration to be honoured by the present and the future generations. The Government shall also develop capacity building strategies for alternative land based and off-land economic incentives to the affected communities.

However, questions may arise as to why these particular communities have been singled for special treatment if any. This is due to the fact that all communities in Kenya were dispossessed in one way or another. The answer is that these are the most glaring of the injustices meted against a community as a whole. Theirs is a grievance that refuses to recede. They also remain largely dependent on land resources for day-to-day survival.

Questions may also be raised as to what value such a conference would add to a long term problem given the fact that conferences are held in Kenya on a daily basis. This however would be no ordinary conference. It would give Kenyans an opportunity to sit together and peacefully search for long-term solutions to a

recurrent problem. Perhaps this is the way Kenya and other African countries should go in resolving their problems.

Policy Statement

The National Land Policy statement should state that:

- ✿ The government shall always provide broad based land claims mechanism for mediating any future land related disputes.
- ✿ The government shall establish a National Land Claims and Restitution structure to handle land claims within a set period.
- ✿ The Restitution of Land Rights Act should be drafted to enforce redress of historical land claims/restitution.

6. Minority communities and their claims to land

Certain communities are culturally and economically dependent on specific geographical areas and habitats. The Ogiek people are one such community that is dependent on forest habitats. Over the years, they have lost their forest land through governmental action. Either the Government has gazetted certain forest areas thus making them public land or the areas have been allocated to individuals not ordinarily resident in the area. Such individuals have acquired title to the lands in question. Sometimes the land has been occupied by other communities who are not necessarily forest dependent.

Minorities such as the Ogiek are now recognized internationally as deserving special protection by the state so that their rights over forest land are not compromised. The cultural practices of the minority groups are protective of the environment and should be encouraged. Forests are habitats to some rare flora and fauna which are important components of the country's biological diversity. Some of these flora and fauna are foreign exchange earners. The minority communities have conserved these species for centuries yet have not benefited from them financially. The Convention on Biological Diversity does recognize the rights of such people over the genetic resources found in their habitats. Apart from the Ogiek, there are other

habitat dependent communities in Kenya whose interests have been as adversely affected as the Ogiek. These communities have not voiced their grievances as forcefully as the Ogiek. Their legitimate claims cannot be ignored simply because they have not been voiced. Examples of such “silent but suffering communities are the Sengwer, the El Molo, among others.

Policy Statement

The National Land Policy should state that:

- ✿ The Government shall enact laws that recognize and protect the rights of forest dependent peoples in the country. Such rights shall not be defeated by the claims of private ownership derived from the acquisition of title.
- ✿ State -sponsored conservation policies will be implemented in a manner that does not infringe upon the rights of forest dependent people. To this extent, the government shall enter into appropriate partnerships with the local communities aimed at conserving the country’s forests. The minority groups will be encouraged to use forest products in a manner that protects the forest.
- ✿ Where the minority communities have lost their land, the Government will take appropriate measures to restore such land in a manner that does not infringe upon the rights genuinely acquired by others over such land.
- ✿ The Government will enact laws to protect the intellectual property rights of indigenous people over the genetic resources found in the forest habitats in accordance with the provisions of the Convention on Biological Diversity. Any wealth generated from the forest resources will be equitably shared so that actual benefits trickle down to minority communities.

7. Neighbouring Communities

The wholesale alienation of land and the displacement of the African population created a situation in certain areas of the country that has led to incessant conflict between neighbouring communities. The communities usually clash over scarce resources such as water and pasture. Some of the conflicts arise from different land uses. The conflicts have not been resolved permanently. The potential for armed conflict between communities has remained. Thus armed conflict does erupt between the Marakwet, Pokot and Turkana in the north rift, Pokomo and Somali in the Tana Delta, Kisii and Maasai in Transmara border and also between the various Somali clans in the northeastern part of the country.

Although these conflicts may appear to be largely ethnic in character, they are in fact disputes over scarce land resources. Some of them are a consequence of conflicting land uses and practices. It is important that long-term programmes of harnessing harmonious existence between neighbouring communities be evolved and implemented on a sustainable basis.

Policy Statement

The National Land Policy should state that:

- ✿ The Government will in consultation with neighbouring communities devise land use programmes that minimize conflict between them. In addition, all the root causes of armed conflict between communities will be identified with a view to reaching long-term solutions through an all-embracing consultative process.

8. The Nubian Question

The Nubian community moved and settled in Kenya from the Sudan as part of the Kings African Rifles(KAR) during the First World War. They were moved and settled in the Kibera area of Nairobi by the colonial government. They were reputed loyalists to the British during the two world wars. After the Second World War, they made demands for land given the fact that their counterparts were being settled in what became known as the “White Highlands”. The Nubians have lived in Kibera since then to the present time.

There are Nubian generations who know Kenya as their only home. However, Government policy has treated the Nubians as second-class citizens especially regarding their rights to the land they occupy. They have been denied title deeds to the land they inhabit. Other communities have since moved into the area and acquired titles to parts of the land. They have held demonstrations in the streets of Nairobi demanding their rights just as other citizens. The Nubians also inhabit other areas apart from Kibera. For example, there is a large Nubian community in parts of Kisumu and other parts of the country. A long-term solution to the Nubian question must be part of the National Land Policy.

Policy Statement

The National Land Policy should state that:

- ✿ The Government shall officially recognize the rights of the Nubian community over the land they have traditionally occupied since they moved into the country. To this extent, the Government will conduct a comprehensive adjudication to establish the nature and extent of these rights. The rights so established will consequently be registered and titles thereto issued.
- ✿ In issuing titles, the Government shall emphasize the rights of the community as opposed to individual exclusive rights. Other communities who may have acquired rights in the area will also have their claims adjudicated upon for purposes of verification.

CONCLUSION

The issue of historical injustices in regards to land rights is complex, manifesting itself in numerous forms and magnitude, and affecting different communities across the country. Different communities have responded to these injustices in varying degrees, but fundamentally, very little, if anything, has been done to address them. While processes that led to community dispossession may have emanated from the colonization and colonial policies, the present generations continue to witness and experience its manifestations and impacts.

Taking this into account, the process of formulating the National Land policy must bring out well thought-out strategies, which will address these historical injustices, all of which must be dealt with individually and collectively. Since the persistence of the injustices has also proved that they cannot be wished away, the strategies must be credible enough to deal with them in a holistic and comprehensive manner, once and for all.



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