

Land

Mali Umma

Kenya Land Alliance
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It goes without saying that, without the contributions of the individual participants the whole exercise would have been a flop. The list of the participants is long. It cannot be re-produced on this page. We thank all of them for their enthusiasm and valuable inputs.

However, all the participants are from organisations which are either members or, in one way or another, associated with the Kenya Land Alliance, under whose umbrella the workshop was organised. A big composite thanks to the Kenya Land Alliance is fair both to the participants and the Alliance.

Last but not least, Kituo would like to thank the Friedrich Ebert Stiftung (FES) for the support provided to make the workshop and publication of this book possible.

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Foreword

This book is a guide to direct the debate and eventual formulation of a legislative and policy framework to address issues of management and administration of public land in Kenya. It provides citizens and specific stakeholders with a checklist of areas of concern about public land that need to be addressed during the Land and the Constitution Review Processes.

This book provides a step-by-step introduction to the key issues of public land management and administration in an accessible format. The purpose is to enable all Kenyans to focus on the substance of public land management and administration and to make up their mind about the policy and legislative provisions they want.

It is the first volume in a series of Kenya Land Alliance proposals of land legislative and policy framework principles to be incorporated in the Land Reform. The series are developed to assist citizens to proactively contribute to the land and the constitutional review processes.

The copies of this volume 1 are available at Kenya Land Alliance Office, Nakuru and Kituo Cha Sheria Offices in Nairobi and Mombasa.

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October 2001*

Introduction

For a long time the issue of land and related problems has been debated mostly by academicians, politicians and professionals. Although the problem has remained more or less one of the most talked of in Kenya, the public has very often been left out of the debate. Again mostly the debate has been dominated more by complaining about either the lack of policy or the bad land policies and laws and the failure by successive governments to correct those problems.

It is not very common that you find people coming up with concrete suggestions on what needs to be put into place to replace existing laws and or policies. The government, by appointing the Commission of Inquiry into the Land Law system of Kenya, is somehow admitting that there is a problem.

Kituo Cha Sheria and the Kenya Land Alliance, hope to come up with clear legislative proposals to address issues of management and administration of public land in Kenya. This book carries the deliberations and consequent recommendations of the participants of the workshop.

This book, *Land: Mali Umma*, is one in a series developed by the Kenya Land Alliance in collaboration with partner and member organisations, that will carry proposals on land reforms in Kenya. It is hoped that this publication will assist the public participate more in discussions on issues concerning land.

Background and history of Public land

The debate on land is often heated and intense in this country. Currently, perhaps because of the harsh economic times, management of public wealth and land are coming under close scrutiny. This being the case there is urgent need to simplify and make effective the administration systems dealing with this resource.

Public land refers to all that body of land that is referred to as government and trust land. This position is as a result of the nature of tenure systems during the colonial period where nearly all land in Kenya was vested in the Crown. At independence the same was vested in the government of Kenya.

In the latter part of the 19th Century, East Africa was declared a protectorate. This gave settlers power to acquire titles to land and the leeway to exploit other resources. The British settlers could only acquire land through agreements, treaties or sale with the local inhabitants.

By 1900, the British government took control of all unoccupied land within the protectorate. What remained for the locals was what they occupied. By 1920 when Kenya became a colony, the colonial laws reserved no rights over land for the local people. This system was used to effectively dispossess the Kenyan public of their lands.

In 1964 all estates, interests and rights in and over land known

as Crown Land were deemed to belong to the government of Kenya - as from 22nd October 1964. In addition, all estates and interests vested in the Queen through her Commissioner, were transferred to the government. Finally all lands in Nairobi that were registered in the name of the Trust Land Board as at 31st May 1963, were vested in the government of Kenya.

The government became the administrator of public land which was referred to as Government land. The Constitution and the Government Lands Act CAP 280 of the laws of Kenya are the primary laws dealing with these lands. There are three situations under which government land can be disposed of.

These are:

- Offering of land for Agricultural purposes
- Disposal of land for special purposes
- Disposal of land within townships

Offering of land for Agricultural purposes

The Commissioner of Lands may, on directions of the President of the Republic, cause land available for alienation for agricultural purposes to be surveyed and divided into farms. Leases of farms are sold by auction with the proceeds going to the Consolidated fund.

However, most poor people cannot afford to buy these pieces of land. Consequently, it is those people with money in the community who buy them. Communities are therefore, dispossessed of land that was ordinarily under their occupation

and/or use. It is recommended that a system which can protect the rights of communities over traditional lands which have been expropriated by the state, be put in place. This would create a situation where if land is to be sold, in this case for agricultural purposes, first opportunity is given to the community from which it was taken. A special fund should be set up by the government to loan such community the money required to buy the land.

There is actually a Fund (The Settlement Fund Trustee) which was created to help people buy land. This, however, has been subject to gross abuse as rich or well connected persons have benefited from it. The issue is: Should land be sold? If land is a national resource, why not give leases freely especially to the poor and communities for settlement.

Disposal of land for special purposes

Government land can be disposed of for special purposes. The law, however, does not say what a special purpose is. This has led to corruption and abuse of power by those in high and powerful positions. To control and therefore, reduce this practice, the law should strictly state what a 'special purpose' is.

Disposal of land within townships

The Government Lands Act empowers the Commissioner of Lands to cause any portion of the township which is not required for public purposes to be divided into plots suitable for the building of business premises or residential houses. The

lease of township plots may be granted for any term not exceeding 99 years.

The Commissioner determines:

- rent which shall be payable on request of the plot
- the upset price at which the lease of the plot will be sold
- the building conditions to be inserted in the lease of the plot
- special covenants, if any, which shall be inserted in the lease before any plot is disposed of.

Leases of township plots shall, unless the President orders otherwise, be sold by auction. Some of the land in townships and cities is cultivable. Therefore, this type of land should be disposed of with special considerations to environmental and ecological balance. There are also many informal settlements in townships and cities. The government should recognise and protect the interests of the people who live there. Land where informal settlements are situated should not be privatised unless the government can provide alternative sites for shelter and housing.

Forest Land

Forest land is a special category of public land. There has been much controversy in the recent past surrounding the management and administration of these lands, in particular, the issue of excision. The primary responsibility of the government as trustee for the public is to ensure conservation and rehabilitation of forest land. Steps should be taken to conserve valuable ecosystems to maintain forest bio-diversity. It should be necessary to determine a minimum percentage of land mass that must be covered by forest.

The Environmental Management and Co-ordination Act 1999, provides for rules to be made to administer forest land and other natural resources. The proposed Forest Act provides that forest excision must be sanctioned by Parliament. It also proposes the creation of community forests in whose management the communities will be involved. Communities will also benefit from forest products.

The following principles should also be applied :

Sustainability of forests

- Any alienation, allotment and disposal of forest land should be done in a manner that maintains biological diversity, productivity, capacity for regeneration and vitality. It should give due regard to the future ecological, economic and social functions.
- Some communities have over time used forests resources for their livelihood. Where forestland is allotted to private individuals, there is the risk that the communities may lose their source of livelihood.
- The administration of forests land should be done in a manner that entails efficient production and utilisation of forest resources for present and future generations.
- Government should maintain an inventory of the forest areas that should be made public periodically.
- There should be a ceiling on forests land excision.

A mandatory limit should be set below which no forest land can be allocated or disposed.

- Where allocation, allotment of forestland is done, there should be at least an equal portion of land that should be subjected to afforestation.
- Particular forests, due to their unique role in the ecological and environmental balance, should not be excised at all. A good example is the Karura and Mount Kenya forests.
- The State should set up a fund to be used for afforestation programmes, research and where need be training in forest management.
- The management and administration of forest land should be placed under a special committee within the National Land Commission.

Trust land

The Constitution of Kenya describes a special category of public land called Trust land.

The Constitution states that all trust land shall be held in trust by the County council within their area of jurisdiction. It further states that each County council shall hold the Trust Land for the benefit of the residents. The County council shall give effect to such rights, interest or other benefits in respect of that land as may under the African customary law for the

time being in force and applicable thereto, be vested in any tribe, group, family or individual.

The Constitution also empowers a County council, through an act of parliament to set apart an area of Trust land vested in that County council for use and occupation:

- i) by a public body or authority for public purposes of prospecting for or the extraction of minerals or mineral oils.

- ii) by any person or persons for purposes which, in the opinion of that County council, is likely to benefit the persons

- iii) ordinarily resident in that area or any other area of Trust land vested in that County council. This applies either because of the use to which the area is apart of or because of the revenue it is expected to fetch.

The Constitution empowers the President to set aside an area of Trust land for:

- a) the purposes of the government of Kenya
- b) the purposes of a body corporate established for public purposes by an act of parliament.
- c) the purposes of a company registered under the law relating to companies in which shares are held by or on behalf of the government of Kenya.
- d) the purposes of the prospecting for the extraction of minerals or mineral oil.

The President and the County councils have thus, wide ranging powers with regard to Trust land. Because of these powers some people have been known to abuse their authority. Communities enjoy the use of Trust land through customary land use systems. This could present some hiccups as customary law is not held on the same footing as written law. Many communities enjoy common ownership of land. Written law does not recognise this type of tenure which means community land use systems are not protected by the Constitution.

It is important to note that government and local governments hold land in trust for the public. Therefore, they have a responsibility to deal with land issues for the benefit of the public.

Principles of Administration of Public Land

In general, administration of public land should be to the benefit of Kenyans and in particular, the community that is resident or uses a particular piece of land. That is to say, indigenous land use systems of local communities should be formally recognised by the law. Occupied public land should not be alienated. Where public land is alienated, this should be for public purposes only. Public land is a national resource. Therefore, the public should be involved in decisions affecting issues dealing with public land.

Defination Of Public Land

There has been debate whether public land should be referred to as government land. Land is a public resource and should, therefore, be identified as public land. The following definition could be adopted:

Public Land

- Public Land shall be All that body of land that is known as government land as at (a specific date) and shall include all land held by:-
 - parastatals
 - government Agencies
 - ministries
 - Local Authorities and other public bodies/ institutions.

But shall exclude land held by privatised government bodies.

Trust Land

There is also debate on whether the Trust land regime should be maintained. The concept of Trust land is land that is occupied or used by communities in a particular area outside townships and agricultural areas. Cultural or community lands must be protected. Therefore, it is important that Trust lands remain. However, communities should be allowed to manage this land if they so wish and need not rely on County councils to administer the land on their behalf. Trust lands should therefore be defined as:

- All that body of public land held in Trust by a corporate body for the benefit of a local community. Where a corporate body may include:
 - Council of elders or
 - Local authority or
 - Local community leadership structures

A community shall mean a group of people ordinarily resident and deriving benefit from a particular piece of land.

Other definitions may include:

- Group of people in a geographical location, ordinarily resident in that area with similar culture or common interests like, for example:
 - water
 - infrastructure
 - land use, among others

Community V/s National Interest

Communities should benefit directly from revenue generated from Trust lands. This should have a specific percentage, for example, 20% of revenue generated from any economic activity from which the government receives revenue. This will ensure equitable development and benefit from land use for local communities.

- On expiry of town plans, there should be a freeze on all change of user, alienation and development of public land in designated areas pending plan formulation by the relevant authorities.

The following principles should apply in the administration of public land.

1. Cultivable land

Public land which is cultivable should be used for purposes of promoting agricultural production. Cultivable land in this regard should not be held merely for speculative purpose.

2. Protected areas

It should be enshrined in the Constitution that the State holds all protected areas in trust for the Kenyan people. These areas include, but are not limited to, natural lakes, rivers, wetlands, forest reserves, game reserves, national parks and any land reserved for ecological and tourism purposes

3. First Registration

There is a provision in the law known as the ‘principle of first registration’. It protects persons whose names appear on title

documents from being dispossessed of the land in question. This means that one cannot reverse irregular allocation. Compulsory acquisition of land should be allowed when it is proved that it was obtained in an irregular or fraudulent way.

4. Land allocation

There is need for wider public sanctions and consultations when public land is being allocated. Land resources should be disposed of in a way that ensures an appropriate, varied system of use with the aim of developing local communities. It should emphasise on settlement and sustainable livelihood.

5. Community right to buy

Where public land, in which a community has an interest, is to be disposed of, communities should be given the first opportunity to buy it. A community may include those who live and/or work on the land. The definition of community must be broadened and made more flexible to accommodate new arrangements. In some cases, it will be right to define this quite narrowly, in terms of those who live and/or work on the land in question. It should, however, also include those whose livelihoods are affected by the management of that land. Further to this, communities must be afforded a reasonable period to source finances.

6. Constitutional position on land

- a) Land in Kenya should be in the hands of the people and not the government. This will empower individuals to take government or anyone else to court where one feels

aggrieved during any dealing in public land.

- b) The Government or a local government may acquire land in the public interest but the conditions governing such acquisition should be as prescribed by Parliament.
- c) The Government or a local government, shall, as determined by Parliament or law, hold in trust for the people and protect natural lakes, rivers, wetlands, forest reserves, game reserves, national parks and any land to be reserved for ecological and tourism purposes for the common good of its people.
- d) The Constitution should declare what type of land tenure is recognised. These should include:
 - i) customary
 - ii) freehold
 - iii) communal
 - iv) leasehold
 - v) temporary occupation licence
 - vi) group ranches

7. Use of land

If the person to whom the Government transferred public land does not fulfil the conditions for specific use within the specified time limit, the land should revert to the public.

8. Governance & Institutional Frameworks

One of the main weaknesses of the public land administration is the lack of transparent and effective institutions dealing

with public land. The laws of Kenya should create institutions that will protect and administer public land. These should include the following:

A. National Land Commission

This Commission should be created by the Constitution and should have the following responsibilities:

- allocate land for national interests
- maintain directories of information - these directories shall hold information from various fields sourced from experts. The information will include material relevant to town planning, environmental management and conservation of ecological sites, among others. This information shall be passed on to the District Land Boards and Divisional Land Committees to enable them make informed decisions while allocating public land.
- be a policy making organ with regard to public land
- be representative and recognise diverse interests and deliberately include at least 50% women in its composition.
- supervise the working of the District land Boards and the Divisional Land Committees.
- have independence from the government
- be financed by the Consolidated fund
- vet government acquisition of Public land for public interest. It shall consider justification for such application and evidence available for carrying out the project.

B. Land Claims Court

The judicial system in Kenya is very congested. This has resulted in land cases taking years to be resolved. There is

therefore, need for a special court which will handle land matters only.

- The court shall have jurisdiction to hear all land disputes, including disputes arising from allocation of public land.

C. District land Boards

These boards shall take the administration of public land closer to the people. They will hear appeals arising from the Divisional Land Committees and shall have the following features:

- its composition must be at least 50% women
- it shall be financed by the Consolidated fund.
- membership shall be elective

D. Divisional land Committees

These shall be the lowest level of administration of public land. They will be situated in every division in the country.

- they shall be responsible for allocation of public land.
- its composition shall be at least 50% women
- membership shall be elective
- they shall be financed by the Consolidated fund

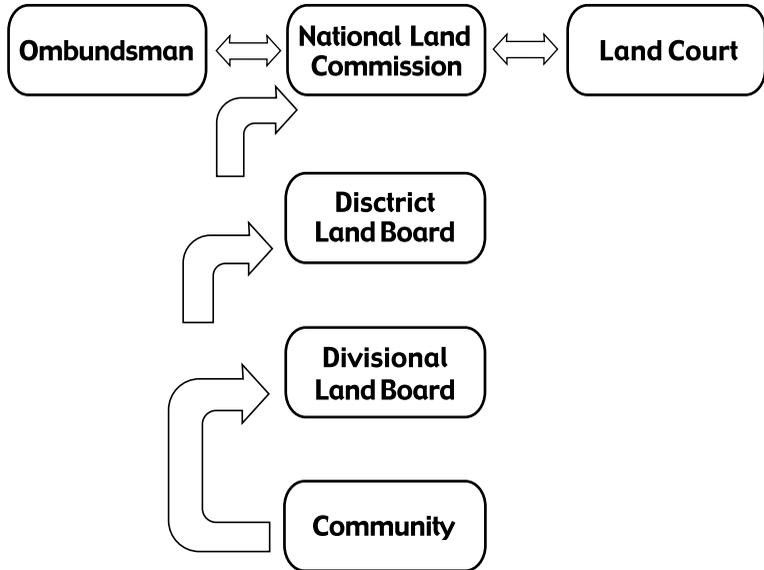
E. Ombudsman

The ombudsman shall be an independent person with constitutional security of Tenure. The holder of this office shall be nominated by the civil society and professional organizations. The persons nominated shall be approved by parliament for appointment by the President of the Republic. The ombudsman shall be responsible for:

- acting as public protector with regard to public land.
- shall be answerable to Parliament in all matters dealing with public land.

F. Structures of Public Land Management

The structure for the management of public land are proposed as hereunder:



G. Commoditisation of land

Public land should not be treated as a market commodity. It should be held for public use. Persons allocated public land shall give up the same if they are not able to put it to the purpose for which it was allocated.

H. Principles of leasing public land

- Reasonable restrictions shall be placed on persons holding leases to public land when alienating the same to third parties
- The original purpose of the allocation shall be borne in mind where leasing is done to third parties
- Leases shall be as follows:

- Agricultural land, 99 years and commercial leases in towns 49 years.

I. Separation of powers

There should be a clear separation of powers of the arms of government in view of the administration of public land. The same shall apply for all other institutions created by law to administer public land.

J. Idle land

There have been problems of landlessness created by instances where large tracts of land are set aside for private use and lie idle. Such land should be taxed heavily if it lies idle for five years and above.

- Land that lies idle for five years and above should be surcharged
- Differential taxation system based on land potential should be implemented
- When land ceases to be idle and is put to productive use, rate of tax should change in accordance with income tax returns of the user

K. Conflicting legislation policies

- Many problems in the administration of public land arise from the fact that there are many conflicting laws dealing with public land. There is need to harmonise these laws.
- The government should prepare a code regulating access to land use and management.
- A blue print should be developed to guide government agencies in policy formulation dealing with Public land.

Freedom of information on public land shall be perpetuated. This will include a periodical inventory of public land. All public land allocation will be done in a manner that fosters intra and inter generational and gender equity. Any dealings in public land that is discriminatory shall be illegal. This will include cultural practices.

- Publication on public land (e.g. government gazette notices), will be made both formally and informally. This should entail decentralisation of distribution of the Kenya Gazette to the District Land Boards and the Divisional Land Committees. Public announcements in public places shall also be employed where any dealing in public land is envisaged. This should include market places, schools, colleges, universities and churches
- Public land allocation to be based on a system through which competing diverse needs have been collectively agreed upon, that is, a balance between community and national interests shall be a guiding principle.

Customary ownership principles:

Customary tenure systems should be recognised on the same footing as statutory law so long as:

- they do not discriminate against women and other marginalised persons.
- explicitly recognise the equal rights of the woman and marginalised persons to land and other resources.

Customary tenure:

- should apply to former public land that has not been registered in any form

- should be registered by local customary rules (which should however, be in line with rules of equality and non discrimination)
- should provide for communal ownership, use and occupation of land;
- should also provide for individual and household use and occupation of (and rights and interests) in land according to rules and customs of the community
- should provide for individual, family or traditional institution to occupy a specific area (recognized as sub-division) of communal land
- A person, family or community holding land under customary tenure may (but does not have to) acquire a certificate of customary ownership in respect to public land
- The relevant land body that receives applications for certificate of customary ownership will apply respective customary law in order to come to its decision. But it is obliged to safeguard interests and rights of women, absent persons, minors and people with disabilities.
- Financial institutions, bodies and authorities are obliged to recognise a certificate of customary ownership as a valid certificate for purposes of evidence of title
- Any group of persons may form a communal land association (or trust) for any purpose connected to communal ownership and management of land whether under customary law or otherwise. At least a third of its officers should be women
- Certificate of customary ownership may be converted to freehold title upon application
- Effective control measures to guard against abuses by

group ranches representatives should be put in place

- Updating members of group ranches before alienation and other related issues should be made mandatory

National interest v/s community interest

Due to the conflict between community and national interests the following principles should be applied to protect the interests of the communities:

- communities should be truly represented in existing local government structures
- mechanisms through which a local community can challenge central government decision should be put in place
- impact assessment and interests of community should be taken into account before allocation of community land is done.
- reasons for allocation must be given where public land is being allocated

Accountability

Much injustice has been meted to Kenyans with regard to public land. There is therefore need to address the wrongs and provide systems that ensure accountability.

Here are some suggestions that would go a long way in helping correct the situation:

- Every member of the public should have a right to go to court and seek protection and enforcement of any public or private right relating to public land. This should be without having to seek the consent of the Attorney General.

- There are many landless people in Kenya and the following principles should be applied to ensure an equitable distribution of this important national resource:
 - there should be a ceiling on acreage of land an individual can hold
 - there should be a tax on excess acreage
 - extension should not be automatic when leases expire
 - expiring leases should be advertised for the general public
 - idle land should be taxed heavily
 - after the lease expires the land should automatically revert to the public domain

Redress of past wrongs

It is recommended to establish a Truth Commission. Its duties shall include:

- to cause an inventory of land to be carried out to ascertain how public land has transmited in terms of title and how its character has evolved
- to investigate wrongs in the past on public land allocation and other related issues.
- to make available information regarding public land dealings
- to recommend the resettlement of victims of ethnic/political clashes which occurred from 1992.

Notes