

LAND REFORMS IN KENYA: AN INSTITUTION OF SURVEYORS OF KENYA (ISK) INIATIVE

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Key words:

ABSTRACT

Land is, in most forms of society, the most important of natural resources required for the creation of wealth. As a direct result, control of the land brings economic power, which in turn, is often the basis of social and political power. The centrality of land in human life made it the main reason for the struggle for Kenya's independence from British colonial rule. Land has been, and will continue to be the mainstay of Kenya's economy, where over 80% of its population derives its livelihood from agriculture. This resource has continued to play a significant role in the socio-economic and political development of the country. Therefore, its ownership, allocation, distribution and utilization is of great concern to most Kenyans.

The present legal and institutional framework of land tenure, land use, and the system of acquisition and disposition of land rights which have been in place since the colonial times has brought about tension, strife and litigation in land matters. The structural framework and principles for the management and administration of land inherited from the colonial times and developed over the three decades since independence has largely failed to instill confidence in the land market. Some of the problems within the land sector in Kenya may be attributed to its colonial history, a proliferation of statutes governing ownership and use of land (some of which are conflicting), broad socio-economic patterns and demographic trends that have exerted pressure on usable land. Other issues that have taken centre stage in the land debate in Kenya include the optimal economic use of land, rural and urban development, squatting, the quality and security of tenure and the protection of the environment.

This paper is essentially a summary of the issues raised in the booklet – *“Land Reforms in Kenya: The Institution of Surveyors of Kenya Perspective”*, which is the result of extensive consultation and deliberations by a committee of ISK Council on broad land reforms in Kenya. It gives the position of the Institution on the Terms of Reference (ToRs) given to the Presidential Commission of Inquiry into the Land Law System of Kenya that was commissioned on 17th. November 1999. The Commission was to, among other things, undertake a broad review of land issues in Kenya and to recommend the main principles of a land policy framework which would foster an economically efficient, socially equitable and environmentally sustainable land tenure and land use system. The booklet and this paper gives proposals on the main tenets of a national land policy, and a reform of the entire land delivery system in Kenya, such as survey, registration and the preparation of official records relevant to such survey and registration. It also makes proposals on land distribution and redistribution, inheritance of land and access of land to women.

It is recognized from the outset that the (booklet) paper does not give a conclusive treatise on land reforms, – there are many more players (professional and civil society) within the land sector – but the issues raised will stimulate an informed discourse in Kenya on the all important land issue.

1. INTRODUCTION

Kenya has an area of approximately 582, 646 km², with an estimated population of about 28 million people by 1999, giving an overall population density of 48 people per square kilometer. Over 80% of the land area may be classified as arid and semi-arid with very low agricultural potential. As a result, over 80% of the population is settled on only about 20% of the land (considered to be of medium to high potential). Further, about 70% of the land is held under customary systems of ownership and use, while 10% is categorized as Government Land/Reserves, with only 20% being private land under statute.

In the past three and a half decades since Kenya's independence from British colonial rule, it has been observed that the general system of land delivery in Kenya, the land laws in place and the management of land has been inappropriate and has led to a great deal of strife, tension and controversy in dealings in land. Apart from the above, land has today, become a very sensitive issue in Kenya because of:

- The centrality of land in human life, making it the main reason for the struggle for Kenya's independence from British colonial rule.
- The complexity of the laws governing land ownership in Kenya, and the historical genesis of how these laws were applied to different "parts" of Kenya.
- The abuse of existing land laws and other state powers that have allowed the irregular allocation (grabbing) of public land to a favoured and privileged few.
- The disorganization, mismanagement and corruption at the Ministry of Lands headquarters and the various District Land Offices in the country.

On 17th. November 1999, the President of Kenya, through Gazette Notice No. 6593 and 6594 appointed a Commission of Inquiry into the Land Law System of Kenya to, among other things,

- undertake a broad review of land issues in Kenya and to recommend the main principles of a land policy framework which would foster an economically efficient, socially equitable and environmentally sustainable land tenure and land use systems;
- undertake an analysis of the legal and institutional framework of land tenure and land use in Kenya and to recommend a programme or programmes of legislation that would give effect to such policies;
- recommend guidelines for a basic land law and complementary legislation and associated subsidiary legislation which would address a number of issues such as appropriate systems of land tenure for the country, systems of land ownership and control, systems of acquisition and disposition of land rights, and the structural framework of land management and land administration in Kenya.

The above review was to also take cognisance of all customary laws relating to land and so far as is practicable, incorporate such laws as may be considered desirable into statute.

The ISK Council nominated a committee to deliberate on the terms of reference of the Commission of Inquiry, and also on general land reform issues, so as to be able to present an informed memorandum to the Commission. Apart from the terms of reference of the Commission, the ISK Committee on Land Reforms noted that the review should take into account other broader socio-economic factors that will influence the formulation of a comprehensive policy on land. The following were identified:

- Comprehensive changes in land use and land planning, coupled with the increase in human population during the past three and a half decades, have resulted in an increase in the demand for usable land and escalation in competitive bids for residential land in and around the main urban areas.
- Increase in rural population has equally increased the demand for agricultural use, resulting in encroachment into forested areas, and riparian reserves. The growth in the pastoral and livestock population has increased the demand for grazing pastures, resulting in urban immigration by pastoralists and has also created serious soil erosion problems in certain areas.
- While the population has been growing at about 3% per annum since independence, the industrial sector has not been expanding as fast. Land, has thus, remained the only source of income for most ruralites. Over 80% of the population draws their subsistence from land.
- The increased rural-urban migration has resulted in high demand for land for settlements while the decline in the agricultural sector has failed to halt such migratory habits owing to poverty in the rural areas. Such migrations have resulted in the increased demand and creation of squalid settlements devoid of planning and infrastructure in or about urban areas.
- The increase in rural population and the increase in demand for arable land, accelerated by the co-operative movement has resulted in intensive demarcation of land that has denied this country preservation of precious agricultural land that may sustain food production to feed the nation without relying on food hand-outs.
- The Kenyan culture that dictates that everyone should own some land, regardless of meaningful size, has resulted in an increased demand for land for developing a home or burial grounds. This has notably encouraged more and more people to bid for the limited number of demarcated plots, by itself, intensifying sub-division of available land or for parents to demarcate land for purposes of bequeathing some piece to each child depending on the local culture.

The following proposals and recommendations on various aspects of the land debate represent a culmination of extensive consultation, observations, deliberations of the committee, and also the recommendations that came from a workshop held at the Limuru Conference Centre held between 19th–20th July 2000, to deliberate on the report of the ISK Committee.

2. THE NEED FOR A NATIONAL LAND POLICY

Kenya now requires an elaborate land policy that would guide this country in the new millennium and beyond so as to dictate the manner in which the land is to be allocated, distributed, utilized and owned, and also provide a lasting solution to the long inherited land problems in the different parts of the country.

A land policy is a set of socio-economic, legal, technical and political measures that dictate the manner in which land, and benefits accruing from land are allocated, distributed and utilized. A National Land Policy promotes and ensures a secure land tenure system, encourages the optimal use of land resources, and facilitates broad-based social and economic development without upsetting or endangering the ecological balance of the environment. It further ensures that land is made available in sufficient quantities, in appropriate locations and at acceptable costs for different users.

Kenya does not have a clearly articulated national land policy that spells out the relationship between the people, the STATE and the land. Aspects of land policy are currently found in various sections of the Constitution of Kenya, Presidential decrees, administrative circulars, etc.

The major cause of the haphazard manner of land administration may be attributable partly to the total lack of a national land policy.

- Changes in land use and the increase in human population over the last 36 years since Independence have increased the demand for land especially in and around the major urban centers.
- Increased urbanization requiring more land for settlements, industries and commerce, etc., on the one hand, and the need to preserve valuable agricultural land on the other, has increased the pressure on the limited stock of land.
- Increasing awareness amongst the population of the value of land and property has led to an upsurge in the number of people wishing to acquire land, especially in the major urban centers. This has led to more competition for the limited number of plots available for allocation by the various authorities.
- For many people in Kenya, land remains the core of their existence since the majority of Kenyans are still dependent on the produce from the soil for food and other needs of life.
- The current categories of land, i.e., Government Land, Trust land and Private Land came about as a direct result of the colonial history when land was categorized on racial grounds and that these categories of land have contributed partly to the problems in the management and administration of land.

In view of the above, the Institution of Surveyors of Kenya recommends that:

- a well articulated national land policy must be formulated first before repealing and/or amending any existing land laws, or before the enactment of any new land laws.
- the land policy should be the result of a national political process, and its basic tenets should be enshrined in the Constitution of Kenya.

The basic tenets of the national land policy should include the following:

- The land policy should recognize and reaffirm the rights of all Kenyans to own land as a basic resource in order to enhance social and economic equity.
- The policy should encourage the private ownership of land but at the same time discourage the speculative holding of land and ensure that land is put to its most productive use to promote rapid social and economic development of the country. A land tax on idle land should be established.
- While the policy should be investment friendly, it should nevertheless discourage the ownership of freehold land by foreigners irrespective of the use the land will be put to.
- The land policy should redefine the categories of land so as to distinguish between State Land and Government Land.

In recognition of the fact that land is a national asset, the policy should reduce significantly the powers of one individual to allocate land. These powers should instead be vested in a Permanent Land Commission, which should be established by the Constitution to continually review matters relating to the formulation and implementation of land policy. The Constitution of Kenya should vest all State and Public land to the Permanent Land Commission as trustee on behalf of all citizens.

3. ABUSE OF EXISTING LAND LAWS

The main problems bedeviling land administration in Kenya can be attributed to the abuse of the existing laws and corruption. The most abused of these laws are the Government Lands Act, Cap. 280, and the Trust Land Act, Cap. 288. This is with regard to the allocation of Government land and the setting apart of Trust Land.

The Government Lands Act (GLA) was enacted about 70 years ago, and it is the statute under which all land in Kenya is administered – apart from Trust land or plots of land with freehold title which is registered in the name of an individual or a body corporate.

Under the GLA, only the President can sign documents granting title. The President can and has delegated his powers to the Commissioner of Lands. The GLA lays down the procedures the Commissioner of Lands must follow in allocating. In recent years, the GLA and Trust Land Act have been abused to irregularly allocate land to a privileged few for speculative purposes. Local authorities and parastatals like Kenya Railways, Kenya Ports Authority have abused the law to irregularly allocate land without adequate consultation with the Commissioner of Lands. The Commissioner of lands has also allocated local authority land without proper consultation with the local authorities hence leading to cases of double/multiple allocations of the same piece of land.

The Institution of Surveyors of Kenya therefore, **recommends** that:

- All allocations should be based on merit and the ability of the applicant to develop the plot.
- All plots prepared for allocation should be advertised in the Kenya Gazette and made by the Permanent Land Commission established above.
- The power given to the President to make direct allocations of land should now be exercised by the Permanent Land Commission; this provision should in any case be used sparingly in the rare and exceptional cases which require direct allocation.

- All allocations of government land must be through auction as required by section 12 and 13 of the GLA. This will reduce the temptation to allocate land purely on a speculative basis and also ensure that the state realizes full value of the nation's resources. The full benefit of the value should be derived by the whole nation and not by a few profiteers.
- Allocations of State Land, Government land, Public Land, and/or Trust Land must be approved by Parliament through the Permanent Land Commission.

4. LAND OWNERSHIP AND LAND TENURE

Before colonialism, land in Kenya was owned communally and governed by customary law. An individual did not own the land; a whole community owned the land with each individual having a right to use it in a manner acceptable to the others. The most important new concept introduced by the colonial rulers in land law was about individual ownership of land, which perceives a situation where an individual person owns a piece of land to the total exclusion of all others. English land law also introduced the concept of land tenure (freehold, leasehold) to define the kind of interest owned.

It is **noted** that while the concept of individual ownership and the land tenure systems is beneficial for economic development it has also created some problems:

- Individualization of tenure has in some instances resulted in landlessness especially in areas where land adjudication and/or consolidation has been implemented.
- Individualization of tenure may not be suitable in certain parts of the country, e.g., the pastoralist areas, due to ecological and socio-cultural factors.

It has also been NOTED that there is no clear policy on the security of the leasehold interest granted by the Government from the point of view of granting an extension or renewal of lease.

Having considered the above, the Institution of Surveyors of Kenya **recommends** that:

- Where individualization of tenure may be counter-productive, such as in North Eastern Province, parts of Rift Valley and Coast Provinces, a communal land tenure system should be established and codified. The current Land (Group Representatives) Act could be improved for this purpose. In parts of the country where subdivisions have rendered the parcels to be of uneconomic size, modalities should be put in place to facilitate combination/amalgamation.
- There should be a guarantee on the continued security of tenure in leasehold titles through the replacement of *extension of leases* with *renewal of leases*.
- The renewal of leases, however, should not be automatic:
 - a leaseholder should submit an application for renewal of lease so that physical planning authorities may have an opportunity to impose development conditions.
- Where it is necessary for a lease to be extended before its expiry, e.g. when a financial institution makes it a condition for granting a facility, extension of lease upto 50 years should be granted.
- All freehold urban land should be converted to leaseholds of 99 years to facilitate urban planning and development control.

5. PHYSICAL PLANNING

One of the main objectives of the enactment of the Physical Planning Act (PPA) in 1996 was to try to bring together the laws dealing with physical development in urban and rural areas. The enactment of the PPA repealed the Town Planning Act (TPA) and the Land Planning Act (LPA).

However, a number of problems still exist in the legal framework regulating physical planning:

- There are serious conflicts between the PPA on the one hand and other statutes dealing with control on the use of land, such as, the Land Control Act (LCA), the Government Lands Act (GLA), the Trust Land Act (TLA), and the Local Government Act (LGA). These Acts give different agencies powers to regulate the use of land, hence creating areas of conflict. For example, the Government Lands Act recognizes the Commissioner of Lands as the approving authority on development applications on leasehold land, while the PPA accords such powers to the Local Authority.

- A major challenge facing land-use planning is the uncontrolled subdivisions of agricultural land into very small parcels of land that cannot be economically utilized for agriculture. This is especially common in the rural areas and areas surrounding the big towns such as, Nairobi, Mombasa, Eldoret and Nakuru.

6. LAND MANAGEMENT AND ADMINISTRATION

The Institution of Surveyors of Kenya has noted a number of drawbacks within the land management and land administration structures and practices in Kenya, such as:

- the lack of clearly defined institutional hierarchy for land administration which has resulted in, for example, multiple land allocations, which in turn have led to complicated land disputes.
- the lack of an efficient land information system. Land is a limited resource, and it is important to know how much land is occupied by whom and for what purposes and how much land is still left out for further allocation/development. The lack of an efficient land information system has also led to multiple allocations of land.
- the volume of land information/data has increased substantially, making it difficult for the existing manual land information management systems to cope.
- the multiplicity of land laws and administrative procedures have tended to compound the problems that land managers and administrators have to deal with. These procedures sometimes cause land to be delivered to the wrong hands.
- persons not trained in the landed or legal professions being deployed as land managers/administrators.

The ISK therefore, **recommends** that:

- the numerous land laws be consolidated into a few Acts to take care of the substantive land law and registration of land, and to take care of physical planning and land law.

- in addition to formulating appropriate land policy, that ensures proper land management, it is also important that the administration and management of land be undertaken by competent and professionally trained manpower. Establishment of the National Land Commission as recommended elsewhere in this report will address this issue.
- there should be a clear institutional framework of land management, right from the local government level upto the central government level.
- a computerized National Land Information System should be established in order to facilitate the development of an accurate and complete database on land, which is a prerequisite to proper and efficient land management.

7. LAND SURVEY PROCESS

The role of land surveying and mapping in national development cannot be over emphasized. Constructions such as roads, buildings, water supply, dams, etc., and the services that go to facilitate technical civilization cannot be planned without a survey of the land. The basic surveying and mapping of a country including national survey control networks; national basic mapping; title surveys; national and international boundary surveys, must therefore be regarded as a capital investment whose immediate return is negligible but pays dividends later.

The following are problems that have been noted within the land surveying process:

- The processing of cadastral surveying documents that support registration of title takes too long – an average of 6 months from the time of survey to the production of deed plans or amendment of Registry Index Maps (RIMs).
- For efficient surveying and mapping, the national surveying and mapping agency is normally expected to provide adequate survey control networks both in extent and quality. In this country, that is the responsibility of the Survey of Kenya, which today is unable to fulfill this role because of financial constraints and also due to focusing too much on routine cadastral surveying matters.
- The Registry Index Maps (RIMs) are not updated quickly enough upon mutation surveys taking place. In this regard, the Department of Surveys is not able to keep up with the pace of development, e.g., subdivisions, combinations, etc.
- The approval processes are encumbered with many bureaucratic procedures; leading to lengthy subdivision approval processes.

The ISK makes the following proposals:

- Introduce and intensify the use of modern/innovative technologies for the updating of existing basic and special purpose maps and for production of new maps, especially in the inadequately mapped northern and northeastern parts of Kenya to facilitate development planning.
- Enhance the use of satellite technologies for the production of registry maps required for the issuance of title deeds, especially within the land adjudication programme to address both the problems of accuracy and the speed of obtaining the maps.
- The processing of cadastral records should be computerized to hasten the process of checking and authenticating survey records.
- Introduce an integrated and centralized land information system to network all agencies/departments that deal with land information, e.g., Local Authorities,

Department of Physical Planning, Department of Lands, Department of Survey, etc, so as to streamline and enhance the approvals process, access to land information, land management and development.

- Decentralize to the Districts the amendment of Registry Index Maps (RIMs) to hasten the process of updating the survey records for title registration to conform to the requirements of the Registered Land Act (RLA).
- Introduce semi-fixed boundary surveys to improve on the accuracy of general boundary surveys. This will require a review of sections 18 – 26 of the RLA.
- The Government should seek to establish a National Mapping Agency (NMA) charged specifically with national mapping, and to operate like a parastatal, while the land surveying activities, largely for titles and related development could remain in the present day Department of Survey – Cadastral Branch. Even then, these routine cadastral survey activities should increasingly be out-sourced from the private sector.

8. LANDLESSNESS

As has been noted earlier, land remains the core of the existence of the majority of Kenyans since over 80% of Kenyans live in rural areas and depend on the produce from the soil for food and other needs of life. There are many causes of landlessness in Kenya:

- Historical landlessness due to colonization and the allocation of indigenous land to foreigners by different powers at different times in history. After independence, most of these lands were acquired by the well connected. The Settlement Schemes Programme has not managed to settle the majority of Kenyans who were made landless by the colonialists.
- The individualization of tenure through the land adjudication and consolidation programmes and the subdivision of large cooperative farms and group ranches created landlessness in the rural areas. For example, when after registration, a piece of land is registered under the name of a father or elder brother; this could lead to the other dependants becoming landless. Title deeds give legal status over land. The absolute ownership of titled land enables the owner to evict anyone on his land.
- The recent land clashes of the 1990s in Rift Valley have created a class of “landless” people since it has proved difficult for the victims to go back to their original parcels of land.

The ISK **recommends** that:

- An orderly form of land redistribution is implemented by acquiring land compulsorily and resettling people.
- Resettlement of land – clash victims on their original farms should be adopted as official government policy.

9. WOMEN’S ACCESS TO LAND

Women farmers control the bulk of smallholder agriculture, which employs about 70% of the labour force. Women do 80% of the agricultural work and yet the majority of them have no legal rights to the same land. While the written laws do not discriminate against women in matters dealing with rights in land, a number of customary laws and

traditions discriminate against women when it comes to inheritance rights to land. Under customary land law, women generally have inferior land rights relative to men, and their access to land is indirect and insecure. Traditional provisions which used to protect women's land use rights have been eroded over time.

Women are usually given only usufructory rights (i.e., rights of use) over landed property, which are not "absolute". This in effect denies them the freedom, for example, to later sell or mortgage property, which may have been acquired by both husband and wife during their married life.

In the land adjudication process, for example, the land adjudication committees (which are predominantly male in membership), have largely continued to discriminate against women by allocating land to heads of households who are usually male.

It is **recommended** that:

- in order to enhance and guarantee women's access to land and security of tenure, women should be entitled to acquire land in their own right; not only through purchase but also through allocation. However inheritance of clan or family land should continue to be governed by custom and tradition.
- affirmative action is required to empower women in terms of adequate representation in bodies such as Land Control Boards, Land Adjudication Committees, Plot Allocation Committees, etc. However, this should be implemented while having due regard to customary laws.

10. REPEAL AND REPLACEMENT OF OBSOLETE LAWS

When the British established their rule over Eastern Africa towards the end of the nineteenth century, their first act was to appropriate all land to the Crown and declare it Crown Land. In order to administer these areas, the British promulgated land laws (essentially English land laws), starting with the East African (Lands) Order in Council of 1901. They were, later, to forcefully push the local people out of areas with high agricultural potential and declare them “White Highlands” for the exclusive settlement and use by the British, and into the crowded and less productive “Native Reserves”. The English land law is an embodiment of many principles that are foreign and have their origin in the history of England.

These laws have come to be in operation, to a large extent, alongside African customary land law. African customary land law embodies principles which have their roots in the traditions and customs of our ancestors; the main difference with English land law being that the latter is an expression of individual or private ownership of land while the former is an expression of communal or family ownership and use of land.

Much of the law governing the ownership and use of land in Kenya is essentially English land law simply extended to Kenya in colonial times, and others passed around the time of independence. By virtue of our colonial history, when land in Kenya was categorized on racial grounds, our land law is now expressed in the form of many Acts of Parliament (numbering about 40) to take care of the varied interests over time.

Although fairly well documented, these laws:

- are often complex, and are an embodiment of many principles that are foreign, and have their origin in the history and traditions of England. Sometimes, even the professionals in the legal and landed professions find them difficult to decipher.
- lack uniformity due to the fact that they were enacted in the absence of a coherent land policy and were essentially aimed at addressing specific interests and issues at different times in history. There was no attempt at harmonizing them.

This state of affairs makes the understanding and use of these laws a most difficult exercise, especially for the layman. The Institution of Surveyors of Kenya therefore **recommends** that:

- a number of these Acts need to be repealed, because they are either obsolete and no longer serve any useful purpose, or are fatally flawed and are causing more harm than good.
- a consolidation of the land law into a few Acts to take care of the substantive land law, registration of land, planning and survey.

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