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Abstract

This paper examines large-scale land acquisitions in Kenya by looking at the case of the Dominion Farms Limited takeover of Yala Swamp. The case study illustrates actual practices of Kenya’s land governance system in terms of how large-scale land acquisitions take shape and their results on the ground. The phenomenon in Kenya as elsewhere in Africa is not new except the scale and scope has been exacerbated by the increased demand for large-scale land acquisitions for production of food, bio-fuels and extractive industry raw materials since 2008 (Alden Wily, 2011; Anseeuw et al, 2012; Deininger, 2011; World Bank, 2010; Amanor, 2012). This paper seeks to use Dominion Farms Ltd, a project of an American investor to show how it forms the continuation of past practices. It explores whether or not the new land governance frameworks are able to regulate such investments to ensure that they address the implications such as loss of access by local communities to agricultural land and commons for grazing and fishing. The paper further explores changes that have taken place at Yala Swamp from 2003 to 2013 and assesses them against the backdrop of recent and emerging land governance regulatory frameworks at national, regional and global levels.

KEY WORDS

Large-scale land acquisitions, land governance, land policy reforms, constitutional reforms, local communities, commercial agriculture
Background and Context
The phenomenon of large-scale land acquisitions in Kenya as elsewhere in Africa is not new except the scale and scope has been exacerbated by the increased demand for large-scale land acquisitions for production of food, bio-fuels and extractive industry raw materials since 2008 (Alden Wily, 2011; Anseeuw et al, 2012; Deininger, 2011; World Bank, 2010; Amanor, 2012). This paper seeks to use Dominion Farms Ltd, a project of an American investor in Yala Swamp in Kenya, to show how it forms the continuation of past practices. It explores whether or not the new land governance frameworks are able to regulate such investments to ensure that they address the implications of large-scale land acquisitions such as loss of access by local communities to agricultural land and commons for grazing and fishing.

The context of this paper is that the emerging land governance systems not only seek to address the historical legacy of a dualistic system of economic development created by colonialism (Okoth-Ogendo, 1991), but also the unresolved and internationalized land question as a post-colonial and a global problem hindering economic transformation (Moyo, 2008). Under the dualistic system, land rights acquired by outsiders in host African local communities are secured while customary user rights by local communities are neglected, unrecognized and not protected amidst the increased large-scale land acquisitions since 2008 (Alden Wily, 2011). This paper argues that despite the legal recognition and protection of community land tenure by the Constitution of Kenya in 2010, which establishes the new land governance system, the slow implementation in practice still allows the government and its agencies to take undue liberties with community land. According to Okoth-Ogendo (2008), a number of African countries such as Botswana, Mozambique, Uganda, Ethiopia, Kenya, Tanzania, and Ghana have legislative frameworks that recognise customary land rights of their communities. However, Alden Wily (2011) demonstrates that they do not have the practice of enforcing them. Consequently, according to Amanor (2012:7), German et al (2011), and Cotula (2013),
large-scale land acquisitions undermine the land rights of customary users by facilitating the appropriation of their land despite emerging legal recognition of these rights. In this paper, I show how the Yala Swamp land deal in Kenya facilitates land dispossession by putting the interests of a foreign investor before those of locals. Instead of supporting smallholder-led development by securing their durable access to Yala Swamp, which is the key to their economic, social and environmental future, the government encourages the acquisition of their natural resource for the benefit of a private investor.

This paper is concerned with customary land rights, because of the continued appropriation of community lands in Kenya, as elsewhere in Africa. This has been observed by Peters (2013) who argues that the problem with customary land rights is the denial of property in land to Africans. Put simply, there is a need for implementation of legal reforms to ensure that customary land rights are documented and defendable by law to stop initiatives that push governments to give away local communities’ land to large-scale foreign investors and medium-scale domestic land acquirers. This builds on Alden Wily’s earlier observation that community lands in Africa are treated as if they do not amount to real property rights worthy of protection under the new land governance systems (Alden Wily, 2011).

The paper will be further concerned with continued practices on the ground that compromise the recognition and protection of customary land rights, despite the provisions of the land governance regulatory frameworks at national, regional and global levels, which seek to ensure that all categories of land rights enjoy comparable protection. Another concern is that despite the Kenyan state’s positive acknowledgement of the role of customary land users as the dominant smallholder producers (See Table 1), official agricultural policy encourages and promotes large-scale landholding by foreign investors. This practice dates from colonial times


<table>
<thead>
<tr>
<th></th>
<th>Total</th>
<th>Size of landholding (ha)</th>
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<tbody>
<tr>
<td></td>
<td>1994</td>
<td>2006</td>
</tr>
<tr>
<td>Number of farm households</td>
<td>2,404,076</td>
<td>3,008,975</td>
</tr>
<tr>
<td>% of hhs</td>
<td>22.8%</td>
<td>44.6%</td>
</tr>
<tr>
<td>Cumulative % hhs</td>
<td>22.8%</td>
<td>44.6%</td>
</tr>
<tr>
<td>mean landholding size (ha)</td>
<td>0.3</td>
<td>0.29</td>
</tr>
<tr>
<td>total land in size category (ha)</td>
<td>164,149</td>
<td>388,392</td>
</tr>
<tr>
<td>% of total landholdings</td>
<td>3.1%</td>
<td>10.9%</td>
</tr>
<tr>
<td>Cumulative % of landholdings</td>
<td>3.1%</td>
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The other reason why there is concern about customary land rights is that since the imposition of the colonial British property system in Kenya, the ultimate power over customary land rights was vested in the colonial and independence governments as trustees who continued to authorize transactions over community lands. This phenomenon amounted to the declaration of customary land users as mere tenants of the crown, as pointed out by Okoth-Ogendo (1991). Conflicts arising from this, form the foundation for struggles Kenyans have waged over many decades to secure their properties in land, which in part resulted in the establishment of the new land governance system as provided by the National Land Policy of 2009 and the Constitution of Kenya of 2010 (Republic of Kenya, 2009 and 2010).
Since the establishment of the colonial dual legal property system that began with the enactment of the East African Regulations of 1897 (Wanjala, 2000), which provided a land acquisition mechanism for settlers whose rights were documented and defenable by law. Kenya at independence continued with the resultant dual system of unequal land tenure. As a consequence, customary land tenure has been treated as inferior to the acquired freehold and leasehold tenure systems. This is the practice that the new Constitution, promulgated in 2010, seeks to redress. The greatest threat to the desired land reforms in Kenya remains the elite capture of the political process and its focus on how best to exploit under-utilized community land.

As Alden Wily (2011) points out, there is an historical assumption that uncultivated customarily-held lands used collectively in common are still treated as if they do not have owners until statutory entitlement is given by the state, despite the new emerging legal regimes relating to land tenure, use and management in general. According to Wanjala (2000) and Bates (1989), Kenya undertook privatization by systematic individualization, titling and registration. The pre-independence Swynnerton Plan of 1954 (Swynnerton, 1955) instigated a transformation in security of tenure away from a customary land tenure regime, which was considered as a static, pre-capitalist system that was inimical to capitalist transformation. Yet according to Okoth-Ogendo (2008), customary land tenure is a social system with enormous resilience, flexibility and continuity that sustained it under customary law without national legal support.

**Conceptual Framework**
This section discusses land governance and develops a conceptual framework, refined from Cheema and Maguire (2002:15) as a tool of analysis to interrogate fieldwork data collected in
2013 and relate it back to debates about the large-scale land acquisitions regulatory frameworks. Before introducing the conceptual framework, it is important to define the key concept of ‘land governance’ so that its usage throughout this paper is understood. This paper adopts a working definition, which conceptualizes land governance as being:

“the political and administrative structures and processes through which decisions concerning access to and use of land resources are made and implemented including the manner in which conflicts over land are resolved” (AUC et al., 2010).

This is the same understanding Palmer et al (2009) held when they stated that land governance is about:

“the rules, processes and structures through which decisions are made about access to land and its use, the manner in which the decisions are implemented and enforced and the way that competing interests in land are managed” (Palmer et al., 2009).

The two definitions are wider than the World Bank’s notion of land governance being “about the policies, processes and institutions by which land, property and natural resources are managed” (World Bank 2010:2). Thus, according to Burns and Dalrymple (2008:1), land governance addresses issues of land administration and land management institutions, processes and practices that are essential for sustainable development in terms of equitable stakeholder participation and benefits according to the law and policy provisions in force. This is ensured when land governance is anchored on the principles of participation, transparency, accountability, legitimacy, rule of law, equity, subsidiarity, sustainability, devolution of power, and integrity as espoused in Article 10 of the Constitution of Kenya, 2010 and the Framework and Guidelines on Land Policy in Africa (Republic of Kenya, 2010; AUC et al., 2010).

The conceptual framework adopted here is premised on the notion that a good land governance system is one founded on institutions and processes that are democratic and anchored in key principles of participation, the rule of law, transparency, accountability, legitimacy, equity,
strategic vision, devolution of power, subsidiarity and sustainability (Cheema and Maguire, 2002:2; Burns and Dalrymple, 2008:1; AUC et al., 2010; Republic of Kenya, 2010).

This conceptual framework, as shown in Figure 1 has been modified from the conceptual framework on democratic governance and human development (Cheema and Maguire, 2002:15). It is used here to reflect on - the ‘what’, the ‘how’ and the ‘why’ of the national land governance system in Kenya. Firstly, the ‘what’ component of this conceptual framework deals with what makes up the national land governance system in terms of institutions, processes and practices. Secondly, the ‘how’ is about the quality of the land governance system which is characterized by the principles of participation, transparency, accountability, the rule of law, equity, strategic vision, devolution of power, integrity and sustainability. This in turn translates into the guarantee of land rights despite the proliferation of global and regional regulatory frameworks which may present a challenge of interacting with local interests. Thirdly, the ‘why’ deals with internal and external factors that influence the development and operation of the land governance system.

This conceptual framework provides the analytical basis for assessing the quality of the land governance system not as a finished product, but in terms of rules and institutions that are chosen, the mode of decision-making leading to the selection of rules and institutions (that is the negotiations versus unilateral actions) and the type of alliances and coalitions forged in the process (Palma, 1990; Margulis and Porter, 2013). According to Margulis and Porter (2013) land governance comprises complex mechanisms, processes, relationships and institutions through which various actors articulate their interests, exercise their rights and obligations to mediate their differences. Figure 1 illustrates this complex situation as viewed from the perspective of the new Kenyan land governance system.
**Policy and Legal Frameworks on Large-Scale Land Acquisitions**

In the past 10 years a number of policy and legal regulatory frameworks have been developed by global, regional and national institutions to regulate land acquisitions generally and specifically to guide land investments. Most of those in Africa have largely been influenced by international instruments and policy frameworks by powers that started in 2003 with the World Bank Land Policy Framework for Growth and Poverty Reduction (Deininger, 2003). In 2004 the European Union released Land Policy Guidelines, which were designed to guide land policy reforms in developing countries (European Union, 2004). In the period 2006 -2009 the African Union Commission (AUC), in collaboration with the African Development Bank (AfDB) and the United Nations Economic Commission for Africa (UNECA) came up with a Framework and Guidelines on Land Policy in Africa to strengthen land rights, enhance productivity and secure livelihoods (AUC et al., 2010). Further, in response to the challenges of improving land governance to give recognition and protection to the land rights of local communities in land laws and facilitating the strengthening of security of tenure of communities, with particular focus on how best to promote women’s rights within the community context, the Land Policy Initiative (LPI) led the process of developing Guiding Principles on Large-Scale Land-Based Investments in Africa. Coincidentally and influenced by these initiatives between 2004 and 2009, Kenya developed a National Land Policy to regulate the land tenure rights whose principles are anchored in the Constitution of Kenya (2010) that established the National Land Commission as a land governance institutional framework (Republic of Kenya, 2009 and 2010).
Three major policy and legal frameworks developed expressly to regulate large-scale land acquisitions which this paper cite as global, regional and national land governance regulatory frameworks. At global, regional and national levels the regulatory frameworks stand to generate a lot of debate about their attempts to control and legitimize large-scale land acquisitions that are labelled as land grabs, land rush and/or a new land scramble.

These regulatory frameworks are:

(a) Principles for Responsible Agricultural Investment (PRAI), devised by a World Bank-led Consortium (FAO et al., 2010);

(b) Voluntary Guidelines (VGs) on the Governance of Tenure of Land, Fisheries and Forestry in the Context of National Food Security, developed by the FAO Committee on World Food Security (CFS) (FAO, 2012);

(c) The African Union Framework and Guidelines (F&G) on Land Policy in Africa (AUC et al., 2010);

(d) The Land Policy Initiative of Guiding Principles on Large-Scale Land-Based Investment in Africa;

The Global Regulatory Framework

Principles for Responsible Agricultural Investment (PRAI)

The call to develop principles to regulate foreign investments in land was initiated in 2009 by the Global Economic Forum of the Group of Eight (G8) at L’Aquila Summit (Stephens 2013). It called on international organizations led by the World Bank, the Food and Agriculture Organization (FAO), the International Fund for Agricultural Development (IFAD) and the United Nations Conference on Trade and Development (UNCTAD) to develop principles for responsible agricultural investment. As pointed out by Margulis et al. (2013:1-23), the principles were developed as a response to the negative implications of increased investment in agricultural land, water, grassland and other natural resources accessed and used by local communities in developing countries since 2008 (FAO et al., 2010:1). These principles were also in response to civil society protestation at the increase in large-scale land acquisitions or land grabbing (GRAIN, 2012). In a statement in April 2010, organisations including La Via Campesina, the Food First Information and Action Network (FIAN), and the Genetic Resources Action International Network (GRAIN) rejected the PRAI as a move to try to “legitimize what is absolutely unacceptable: the long-term corporate (foreign and domestic) takeover of rural people’s farmlands” (GCAR, 2010), Civil Society Mechanism, 2011; and Global Witness, 2010; also (See http://www.focusweb.org/content/stop-land-grabbing-now).

The seven Principles for Responsible Agricultural Investment (PRAI) that were publicized in 2010 are: respecting land and resource rights; ensuring food security; ensuring transparency, good governance, and a proper enabling environment; consultation and participation; responsible agro-enterprise investing; social sustainability; and environmental sustainability (World Bank, 2010: x, 68-91). In short, the seven principles stand for responsible agricultural
investment that respects rights, livelihoods and resources. However, scholars like Borras et al. (2013) call them a mere trajectory for facilitating private investment in agriculture rather than being a regulatory framework to contribute to economic growth and the reduction of poverty as alluded to by the World Bank in its defence of the seven principles (Deininger et al., 2011). Another major critic of these principles is Dr. Olivier De Schutter, United Nations Special Rapporteur on the Right to Food. He points out that the PRAI were not developed in an inclusive manner including grassroots organizations representing small farmers. He regards them as unacceptable principles for merely constituting a check-list unable, by itself, to slow down a trend they see as destroying peasantry in the global south (De Schutter, 2011:254). Consequently, the Special Rapporteur argues against regulating large-scale land acquisitions and leases, instead of proposing alternative agricultural investment models (De Schutter, 2011: 250). He concludes that:

What we need is a vision that goes beyond disciplining land deals and providing policy-makers with check-lists of how to destroy the global peasantry responsibly…agricultural investments must be investments that benefit the poor in the South, rather than leading to a transfer of resources to the rich in the North (De Schutter, 2011:275)

The International Food Policy Research Institute (IFPRI) is the strongest supporter of PRAI because PRAI is based on the IFPRI Code of Conduct for foreign land acquisition (Braun & Meinzen-Dick, 2009). However, despite the support from IFPRI and the G8 countries, the PRAI principles, devised by the World Bank-led group, were never formally endorsed (CFS, 2011; Stephens, 2013). Thus, the PRAI initiative is dismissed as mere self-regulatory policy advice to mitigate the negative impacts of large-scale land acquisitions.

In summary, the PRAI principles are not conceived as public policy on agricultural investments because they do not include any reference to binding legal instruments such as national laws and regulations or international human rights law, instead they build on voluntary frameworks
for corporate social responsibility (Borras Jr et al., 2013). PRAI principles are in the category of Equator Principles, the Extractive Industry Transparency Initiative (ETI), Santiago Principles, Organization of Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises among others, whose goal is to reduce risks to investors and to prevent risk to capital (Stephens, 2013). Simply put, the PRAI principles are highly criticized by civil society organizations and social movements of smallholder farmers and pastoralists, indigenous people and fisher-folks for lack of transparency in an agency-led initiative without participation and clear vision for the future.

I argue that because of the opposition and contestation about PRAI, the World Bank and its partners convinced the Committee on World Food Security (CFS) to stage another round of discussion on an initiative known as CFS Principles for Responsible Investments in Agriculture and Food Systems. The first draft was available for discussion in 2013. But on its part the World Bank, at the demand of the G8 countries in 2012, with funding from the Gates Foundation, the United Kingdom, the United States of America, the Dutch and Danish Governments, embarked on developing a new instrument for Benchmarking the Business of Agriculture (BBA). This started towards the end of 2013 and at the Spring meeting of the World Bank on 11th April, 2014, the ranking of over 40 countries was expected to take place, as the Bank released its 2014 ‘Doing Business Ranking Report’, the model on which agricultural benchmarking is tailored. Thus, whatever the World Bank does the stigma against its initiatives which are deemed to facilitate land grabs that are dispossessing and impoverishing local communities across the globe refuses to go away. My further argument is that since the 1980s and 1990s when the Structural Adjustment Programmes devastated the livelihoods of millions, the World Bank initiatives are seen as designs for empowering the corporate minority by exploiting both human and natural resources of developing countries.
The Food and Agriculture Organization Voluntary Guidelines on Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security

According to McKeon, (2013:105-122), the process that resulted in the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGs) was based at the Committee on World Food Security (CFS) as a more inclusive global forum. Compared to the PRAI process, which was based at the World Bank, its set of principles were opposed by global civil society and social movements for lacking legitimacy, despite involving international organizations such as FAO, IFAD, UNCTAD and the World Bank Group. The Voluntary Guidelines trace their origins to the FAO International Conference on Agrarian Reform and Rural Development (ICARRD), held in Brazil in 2006. Beyond the fact that the Voluntary Guidelines were adopted and endorsed by the international community, they embrace concerns of land tenure and land reforms of developing countries as expressed at ICARRD (McKeon, 2013; Seufert, 2013:181-186). This was the first time that such a detailed and internationally accepted voluntary and non-binding guide to regulate land governance practice had been drawn up and endorsed by the international community.

These Voluntary Guidelines are about four things: improving tenure governance and information on internationally accepted practices on rights to use, control and manage land and other natural resources; contributing to policy, legal and institutional frameworks regulating tenure rights; enhancing of transparency in the functioning of tenure systems; and strengthening capacities of implementing agencies (Seufert, 2013). But just like the PRAI principles they ended at promoting respect and recognition of existing rights without according them the property rights recognition that is legally binding. Thus, while they are independent of each other, the Voluntary Guidelines also include provisions on responsible investment as
they refer to large-scale land acquisitions (FAO, 2012:23-25). But more importantly, they both focus on the ‘what’ component of land governance and not the context of the issues that must be addressed.

The first difference between the two global voluntary and non-binding land governance frameworks is that PRAI is backed by the G8 nations, the corporate sector and the World Bank, while the VGs are supported by civil society, G20 heads of state, social movements and certain African countries which are most targeted by large-scale land acquisitions. Those in support of the VGs are those who prefer a land governance framework based on the existing human rights frameworks rather than a purely market-based framework sponsored by the World Bank and supported by the G8-led New Alliance for Food Security and Nutrition, backed by private Agribusiness.

The second difference between the two is that whereas PRAI went through a limited process, the VGs enjoy legitimacy because of an inclusive and participatory process endorsed by the G20 heads of state who committed to domestication of the guidelines into their internal laws and practices.

The third difference is that PRAI focuses on investment with support of large-scale commercial agriculture in rural areas, which are dominated by smallholder customary land users. VGs on the other hand focus on enhancing the tenure security of vulnerable and marginalized landholders and users to maintain the viability of smallholder production. Consequently, VGs enjoy the support of civil society and peasant movements as opposed to PRAI which was denounced as a threat to the land rights of the poor in favour of corporate sector takeover of rural communities’ farmlands (GCAR, 2010, Civil Society Mechanism, 2011; and Global Witness, 2010).
The differences notwithstanding, the two global regulatory frameworks (PRAI and VGs) both fall into the global governance architecture of the food and agriculture sector, spear-headed by FAO that participated in both processes (Cohen and Clapp, 2009:6). Thus, the Committee for Food Security has been mandated to involve all stakeholders in re-looking into the two investment frameworks with a view to setting up a new set of principles for responsible agricultural investments by 2014 to be endorsed by all state and non-state actors (Stephens, 2013; Blank, 2013). This effort and call to have a one-shop global regulatory framework to regulate land deals is supported by all the stakeholders (Cotula, 2013), because of the weakness in the compliance mechanism that is not supported by the majority of the international community and its networks. Global civil society and social movements that are opposed to the World Bank PRAI as the framework to regulate large-scale land acquisitions instead of the FAO VGs (Margulis and Porter, 2013; McKeon, 2013).

According to Borras et al (2013), the trajectory of the global land governance portrays three political tendencies in practice, namely ‘regulate to facilitate’, ‘regulate to mitigate negative impacts and maximize opportunities’ and ‘regulate to block and rollback’ land grabbing. The first and third tendencies are deemed as strategic from the standpoint of the World Bank and La Via Campesina who hold pro-capitalist and anti-capitalist positions respectively, on development pathways. The second is deemed as tactical and meant to address the inevitable negative implications or draw-backs faced by host communities at local sites of large-scale land acquisition/land grabbing. It is noteworthy to point out that the first and second tendencies emphasize procedural issues.
The Regional Regulatory Framework

The Framework and Guidelines on Land Policy in Africa was led by the Land Policy Initiative (LPI), which was formed in 2006 as a joint effort of the African Union Commission (AUC), United Nations Economic Commission for Africa (UNECA) and the African Development Bank (AfDB). The consortium’s aim was to initiate a process for the development of a framework and guidelines for land policy and reforms in Africa, with a view to strengthening land rights, enhancing productivity and securing livelihoods.

The Framework and Guidelines (F&G) were developed through continent-wide and regional multi-stakeholder consultations, refined by national experts and finalized by the Joint Conference of Ministers of Agriculture, Lands and Livestock in April 2009. Finally, the F&G were endorsed by the Assembly of African Heads of State and Governments at the African Union Summit in July 2009 (AUC et al., 2010: xii). Through a declaration, the Framework and Guidelines on Land Policy in Africa was established as a regional reference to guide the land policy process in African countries at national level. Thus, this framework gave impetus to the finalization of the Kenya National Land Policy document that was endorsed by Parliament on 3rd December 2009.

The reform of land governance in Africa was necessitated by the felt need ‘to foster good governance of land, natural resources and processes of land use change’ (AUC et al., 2010:20). This was to redress the predominantly colonial and post-independence dualistic system and an unequal enjoyment of land rights that limited equal opportunities for all land users in Africa because of patronage, nepotism and corruption that were prevalent in many African countries (AUC et al., 2010:20). For the first time, governments from across Africa endorsed key goals and best practices for reforming land governance in the region.
The Framework and Guidelines on Land Policy in Africa seek to provide a framework for understanding land issues in Africa by putting the land policy development process in context. Secondly, the F&G discuss the ecological, political, economic, social, cultural and demographic parameters in which the land question must be addressed, as well as discussing the upsurge in large-scale land acquisitions as the “new scramble for African land resources” (AUC et al., 2010:10). Thirdly, it discusses the implications of land policy for different sustainable development issues, including agriculture and other economic uses such as mining, energy, tourism and the need to protect ecosystems. Fourthly, it focuses on guidelines in terms of the process of policy development, the process of implementation, and the tracking of progress. Thus, the F&G are broadly about why and how member states must address land policy, and resolve challenges that have been encountered within Africa.

The Framework and Guidelines on Land Policy in Africa came into place at the time of an upsurge in large-scale land acquisitions by foreign and domestic investments in Africa, yet the continent’s economic growth depended largely on the way land and land-based resources were regulated, used and managed to ensure that all categories of land users enjoy comparable protection (AUC et al., 2010). As a peer civil society expert who participated in the process of developing the African Union Land Policy Framework and Guidelines, I contributed to the restructuring of three components of the land system in terms of its property structure, use and production structure and the provision of the support services infrastructure. That was with the aim of redressing the weak and bad land governance across the continent that gave the impression that Africa had abundant, unused and under-utilized land available to foreign land investors. This is consistent with Alden Wily’s (2010) argument that the land that was being acquired in Africa belongs de facto to rural communities under customary tenure system.
Contrary to the ‘wasteland’ theory that guided the colonial acquisitions of much of the community land all over Africa as uncultivated and unsettled lands according to John Locke’s 17th century treatise that argued that real property only comes into being through labour (Alden Wily, 2011). John Locke’s treatise is flawed in its assumption around there being ‘wasteland’ available to outsiders’ labour across the globe because what may appear available is land used for varied range of livelihood activities for local communities who use it in season.

As of 2013 following the assessment report on Large-Scale Land-Based Investments in Africa (LSLBI), the Land Policy Initiative (LPI) started a process to develop Guiding Principles on LSLBI in Africa. The Guiding Principles are an effort to have an African-owned process, but in reality they are building on the global effort on the platforms for implementation of the improved land governance frameworks. While improving land governance is important, I would argue that the focus is on how to exploit Africa’s under-utilized land rather than implementing agricultural strategies that effectively address the continent’s rural poverty and hunger problems. In my view, this requires exploring inclusive smallholder–led agriculture and with it, the formula in sharing benefits rather than marginalizing local communities by legitimizing the land deals of private corporations seeking land all over Africa.

In summary, the Framework and Guidelines on Land Policy in Africa provides a guide to African countries to design national land governance regulatory frameworks based on new national land policies that facilitate the security of land rights for investors and customary land users alike. However, according to Alden Wily (2011) customary land rights are not explicitly mentioned in the declaration, by which the Heads of State of the African Union endorsed the Framework and Guidelines on Land Policy in Africa in July 2009 – this is despite the fact that the majority of rural Africans occupy and use land under customary law.
Thus, since institutional land governance concerns are better addressed at the national level where infrastructure and mechanisms are needed to regulate land acquisitions and safeguard the land rights of customary land users, in the next section, I examine the establishment of a national land governance regulatory framework in Kenya.

**National Land Governance Framework**

This section examines the background and the process of establishing a new land governance system in Kenya, even though contemporary literature on this process is yet to emerge and be published. Before colonialism Kenyan native communities exercised a customary land tenure system whose regulatory framework is little known (Wanjala, 2000). The known land governance framework was imposed by the British in 1897 to regulate the acquisition and control over land under the British foreign property law regime that facilitated European settlement in Kenya (Sorrenson, 1968; Wanjala, 2000). The historical overview of the national land governance system in Kenya is a continuity of the colonial dual legal approach. The dualistic system secured acquired land rights for settlers, while ignoring African customary property laws under which native communities acquired, used and controlled land (Okoth-Ogendo, 1991 and 2008). In order to understand the Kenyan new land governance institutional framework, this paper use the land governance conceptual framework as shown in Figure 1, to facilitate the analysis.
This framework is premised on the notion that there are three questions upon which a land governance system can be assessed. The ‘what’ addresses the element of what makes up the land governance system in terms of institutions, processes and practices to address the
identified need or to fix the perceived concern or problem. For instance, in Kenya the land governance system was set up “to guide the country towards efficient, sustainable and equitable use of land for prosperity and posterity” (Republic of Kenya, 2009: ix), and as a means of reversing and redressing historical land injustices. The ‘how’ pertains to the key principles of governance, namely participation, transparency, accountability, legitimacy, rule of law, equity, strategic vision, devolution/subsidiarity and sustainability. It is about the quality of the institutions and processes. The ‘why’ component addresses the internal and external factors that influence the land governance system architecture, including the informal political processes and power dynamics that inform the degree of mobilization for and against the desired goal in terms of key land laws and regulations.

In practice, this conceptual framework is about principles of good land governance that can translate into the tangible regulation of land acquisition, access, use and control under representative institutions that provide oversight and adjudicate disputes. According to Alden Wily (2011) and Amanor (2012), such a land governance system decentralizes authority to the lowest levels that give communities a greater role in governance, which prioritizes the needs of the vulnerable people in society. However, whereas Kenya has made impressive strides in putting the land governance and management institutional framework in place. According to my observation on the ground, the elite who have captured the political process and those who have benefited from past land allocations have slowed down the implementation by denying the National Land Commission enough budgetary allocation to carry out its mandate. Consequently, according to Klopp and Lumumba in Kaag and Zoomers (2014: 67), there is every effort by domestic and foreign elites and their companies to undermine and stall the new land governance framework implementation.
Establishment of a New Institutional Framework for Land Governance in Kenya

The new Kenyan Land Governance Framework was established on the provisions of the National Land Policy (NLP) whose mission and objectives are:

Mission of the Policy

To promote positive land reforms for the improvement of the livelihoods of Kenyans through the establishment of accountable and transparent laws, institutions and systems dealing with land (Republic of Kenya, 2009:1).

Objectives of the Policy

The overall objective of the National Land Policy is to secure rights over land and provide sustainable growth, investments and the reduction of poverty in line with the Government’s overall development objectives (Republic of Kenya, 2009:1).

Specifically, the policy was designed to offer a framework of policies and laws to ensure the maintenance of a system of land administration and management that provides: all citizens with the opportunity to access and beneficially occupy and use land; economically viable, socially equitable and environmentally sustainable allocation and use of land; and efficient and effective utilization of land and land-based resources. These specific objectives of the policy capture the philosophy of the principles of Sessional Paper No.3 of 2009 on National Land Policy (NLP) that are anchored in the Constitution of Kenya (2010).

The philosophy behind the principles of the NLP is that land in Kenya is not just a commodity in the market place, it should be held, used and managed in a manner that is equitable, efficient, productive and sustainable in accordance with the following principles:

- Equitable access to land; security of land rights; sustainable and productive management of land resources; transparent and cost effective administration of land; sound conservation and protection of ecologically sensitive areas; elimination of gender discrimination in law, custom and practices related to
The criticism of the old land governance regime was that it promoted policies, laws and practices that valued land only as an economic resource that should be managed productively without recognizing the other values enshrined in the NLP principles, which the National Land Commission is now mandated to take into account. The NLP provisions were opposed by representatives of white settler communities under their network of the Kenya Land Owners’ Association (KELA), which was opposed to provisions requiring land acquisitions to be reviewed. Other groups that opposed the policy were donors led by United States Agency for International Development (USAID) who questioned the NLP’s overly agrarian thrust and its lesser focus on urban land issues. Ultimately the NLP was passed by Parliament in 2009 and its principles were geared to the establishment of new Kenyan land governance, as required by the Constitution.

Since the old land governance regime was entrenched in the old Constitution as a means of legal acquisition of land under the property clause, the Constitution of Kenya (2010) established the National Land Commission to reverse the old order, which represented the continuity of historical land injustices. Article 67 of the 2010 Constitution of Kenya establishes a National Land Commission as the new land governance institutional framework. The NLC has the following functions: to manage public land on behalf of national and county governments; to recommend national land policy to the national government; to advise the national government on a comprehensive programme for the registration of titles in land throughout Kenya; to conduct research related to land and the use of natural resources, and make recommendations to appropriate authorities; to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices; to monitor and have
oversight responsibilities over land use planning throughout the country (Republic of Kenya, 2010: 47-48, Article 67 (2) (a)-(h)).

The core mandate of this new land governance institutional framework is to seek answers to the historical land question posed by the old regulatory framework, which remains a major challenge given the new large-scale land acquisitions phenomenon.

The National Land Commission is required to operate both at national and county levels, as an integral part of the devolved government structure. The National Land Commission Act that operationalizes the Commission’s mandate underscores the requirement for it to manage and administer all unregistered trust land among other unregistered community land on behalf of the county government, but that was amended in the Land Law Amendment Act, 2016. Therefore, in line with the African Union Framework and Guidelines on Land Policy in Africa that espouses principles of democratization, transparency, good governance, popular participation, equity, poverty reduction, subsidiarity, gender equity and sustainability, the National Land Commission is supposed to inform the conduct of land acquisitions in the country. Consequently, the National Land Commission was set up to regulate operations in the entire land sector and to implement reforms that have been sought since colonialism, over 118 years ago. As the National Land Commission prepares to provide quality land governance, which is much needed in Kenya, the contestation and focus on the LSLBI as far as land governance and agricultural development is concerned has led to the LPI’s development of the Guiding Principles on LSLBI and country level platforms to anchor the new land governance systems.

The next Section explores the site of the Dominion Farms in Yala Swamp.
Case Study Site

Figure 2: Location of the Study Area Site


The site of the study area that informs this paper is the Yala Swamp located on the north-eastern shoreline of Lake Victoria in the western region of Kenya in the devolved governments of the Siaya and Busia counties. It is the third largest swamp after the Lorian and Tana River Delta in Kenya and an important riparian and floodplain wetland, which provides habitat to rare species of fish and sitatunga (*Trigelophus spekei*) antelopes. Its ecological and hydrological functions provide a source of livelihoods to thousands of people, both women and men who use Yala Swamp resources to support their well-being in neighbouring communities. The importance of the Yala Swamp was identified in the 1960s when it was the subject of reclamation for agricultural purposes. However, it has been observed that the reclamation proceeded on the notion that the wetland was only useful when converted to other uses. This view was held by an economist and politician the late Hon. Peter Okondo, who once said that...
the Yala Swamp was useless (Okondo, 1989: I [11-14]). This same notion was held by the eventual investor, Dominion Farms Ltd, a proprietor who justified the acquisition of the Yala Swamp by claiming that “the swamp is useless, empty boggy land” (Pearce, 2012:54). These views about the Yala Swamp were advanced notwithstanding the fact that for a long time, local communities accessed and used it as a valuable resource for various activities to improve their livelihoods.

Between 1965 and 1970 part of the Yala Swamp covering 2,300 hectares was reclaimed and put under the Lake Basin Development Authority for a rural integrated agricultural project involving immediate local communities for production of cereals, pulses and horticultural crops. The free access stopped with an agro-industrial investment deal begun in 2003 with Dominion Farms Ltd, a subsidiary of the Dominion Group of Companies based in United States of America. This resulted in the loss of livelihoods for local communities, whose secure customary land rights were interfered with. The Yala Swamp case became the subject of my study, 10 years after the entry of Dominion Farms Ltd.

The swamp area is approximately 17,500 to 21,765 hectares in size, inclusive of the three oxbow lakes of Lake Kanyboli, Namboyo and Sare. It is divided into three areas, namely: Area I (2,300 Ha), a reclaimed area originally used by the Lake Basin Authority before passing it to Dominion Farms Ltd in 2003; Area II (9,200 Ha), earmarked for future reclamation, from which Dominion was to get the additional aggregated area to the permitted 6,900 hectares by 2008 making up the large-scale irrigated farm, which remained contested until 2012 when the High Court ruled against community contestation; and Area III (6,000 Ha), earmarked as buffer zone between Lake Victoria and the areas earmarked for further reclamation. Figure 3
shows the acquired sections of the Yala Swamp by Dominion Farms Ltd and what was designated for local communities’ agricultural purposes on either side of the farm.

**Figure 3:** The Dominion Farm negotiated two phases (Phase I - 3,700Ha and Phase II - 3,200Ha) and the two proposed areas of 60.73Ha and 80.97Ha set aside for each of the Councils for use by the two surrounding local communities (i.e. Yimbo and Alego).

Source: Dominion Farms Ltd, Manager’s Office. Photo taken during a field visit and modified to show the marginal areas set aside for community use as depicted on the Dominion Farms Ltd Yala Swamp Development Proposed Land Use Plan, from the 2008 Agreement of Lease (Kaplan & Stratton Advocates, 2008).

This is the site of approximately 6,900 hectares of the large-scale land acquisition by Dominion Farms Limited, made up of Area I (2,300 Ha) and a portion of Area II (9,200Ha from which the reclamation of approximately 4,600 Ha is projected).
Population and Economy
According to Pearce (2012:55), there are 700,000 people living within 10 miles of the swamp, which according to the publicly available 1999 National Population Census Report includes the population of Siaya District of 480,184 plus 238,780 of Bondo District with high population densities of 316 and 242 persons per square kilometre, respectively (Republic of Kenya, 2008:4). This population density is high compared to the population densities of the first and second largest wetland ecosystems of Lorian and the Tana River Delta, located in low density arid and semi-arid areas of Kenya that are equally targeted for large-scale land acquisitions.

The economy of the area is dominated by small-scale rain-fed crop production of grains and tubers, livestock keeping and artisanal fishing. Due to constrained market access, the area has limited production of cash crops such as cotton and sugar cane. The area has limited non-farm business with high unemployment rates for both women and men, hidden in large participation in subsistence agriculture, fishing and livestock keeping.

Overall the area is ranked among the 10 poorest districts in Kenya, based on the total expenditure on food and non-food requirements (NEMA, 2005:7). Poverty levels stand at 58.02% against the current national figures of 46% of the population according to the Agricultural Sector Development Strategy, 2010-2020 (Republic of Kenya, 2010: xii). This situation is aggravated by the fact that the only major source of income is subsistence farming despite the irrigation potential in the area. Thus, despite agriculture being a mainstay of the economy, the sector’s performance is in decline due to traditional methods of agriculture, the high rate of deaths due to HIV/AIDS (which has been more serious in this area than in most parts of the country), unpredictable rainfall patterns, the collapse of main cash crops and the lack of agricultural processing industries (NEMA, 2005:7).
**Agro-ecology**
The agro-ecological setting of the Yala Swamp is an extremely flat area with minor irregularities between an altitude of 1135 metres and 1150 metres on the east and west of the swamp. The soils are fertile alluvial clay derived from both lacustrine and riverine deposits, which are suitable for agriculture and livestock keeping with average rainfall, which needs supplementary irrigation, because the area is a depression, which receives less rainfall. According to the Environmental Impact Assessment Report (NEMA, 2005:5), the swamp area is largely a wetland with a varying canopy of papyrus and other wetland grasses, shrubs and bushes on shallow waters with a bit of drier and raised grounds.

There are multiple tenure arrangements in the Yala area wetland, ranging from community land (formerly categorized as trust land) to private/individual land and public land (formerly categorized as government land). Despite the imposition of formal land tenure, in the form of a state sanctioned lease, the residents around the Yala Swamp consider themselves to be the customary land owners of the site area.

**Settlement and Politics**
The site area is settled by the Luo community, the community of the late Jaramongi Oginga Odinga, a radical nationalist who opposed the retention and continuity of colonial land policy and legal framework that subjugated the customary land users (Odinga, 1967; Okoth-Ogendo, 1981). According to Shipton (1988), the Luo remained in a relatively weak economic position due to their radical stance against the colonial customary land tenure transformation that drew African native communities into commodity production under the Swynnerton Plan of 1954 (Swynnerton, 1955). The post-independence successive regimes that embraced the Swynnerton Plan development pathway ensured that radical nationalists like Oginga Odinga and his Luo community did not benefit from foreign land investments (Sorrenson, 1968; Lamb, 1974).
In 2003 when the Luo community, led by Raila Odinga, son of Oginga Odinga joined the ruling coalition that formed the government after Moi, Dominion Farms Ltd was received as the first agricultural investment in Yala Swamp, the home and political constituency of the Odingas.

The Yala Swamp area is settled by the Luo community who engage in small-scale farming, artisan fishing, and livestock keeping. The settlement pattern of the area follows the agro-ecological setting with high potential areas having the highest population density. However, the two surrounding local communities of Yimbo and Alego, because of having settled on high rocky and sandy soils, depend on the Yala Swamp which provides major ecological and hydrological functions as a major source of their livelihoods. By the mid-1960s and 1970s the government, through the self-reliance and an integrated development strategy, embarked on the limited reclamation of the Yala Swamp as a targeted re-settlement of the local communities that were settled on surrounding less productive lands (FAO, 1970).

Politically, the Yala Swamp area is under a political regime, which is a hybrid of informal patron-client relationships that underlie and overshadow legal-rational norms. Consequently, as in most African communities, formal institutional rules are largely irrelevant; hence political leaders prefer personal rule which limits the need to use formal institutional channels. This political practice seems to limit the community’s efforts of holding formal institutions and their leaders to account (Shmuel, 1973; Hyden, 2006; Diamond, 2008).

Against this backdrop, the two County Councils negotiated the lease agreement with the large-scale land investor in 2003 over the Yala Swamp, with whom they agreed to identify and set aside at least 60.73 hectares for each of the Councils for the use by the local communities for agricultural purposes (Kaplan and Stratton Advocates, 2008). Thus, politically, the power to regulate use, and allocate land was radically vested with the County Councils as the trustees of the community who had ultimate control and authority over their land.
Data

This paper uses the field data of the study site of Yala Swamp collected and analysed in 2013. The data is presented as a narrative of the detail of how an agro-industrial investment deal begun in 2003, by Dominion Farms Ltd, a subsidiary of the Dominion Group of Companies based in the United States of America, is an on-going and controversial project. This is because land governance is about access and rights to land and all natural resources associated with it in terms of who uses what resources and how that is decided in the promotion of security of rights. The local communities, especially the youth and women surrounding Yala Swamp felt betrayed by their representatives who negotiated away their important source of livelihood to a foreign agricultural investment. According to Adhiambo (interviewed, May 2013), aged 40, of Aduwa village, East Yimbo, when asked about their land which was submerged when the reservoir was created after the construction of the weir, she lamented:

“I am not happy and feel betrayed about what happened but as a woman there is nothing I could do. Our land is owned by my husband who surrendered it to the company. I do not own the land”.

This means that women and youth who are struggling to find any land to sustain their new families are the majority of those affected by the project and to whom the loss of access to Yala Swamp for multiple alternative livelihoods, have their lives turned upside down. See Figure 4, showing a representation of women and youth as those who are disproportionately affected by the land loss. According to Obalo (interviewed, May 2013), a retired civil servant aged 64 and a Yimbo community elder in Kasau village on the Bondo side of Yala Swamp puts it:

“They came with promises and we supported the project, hoping it would change our lives, but now they have instead turned against us, destroying our very sources of livelihoods”.

The fresh water wetland serves as an important ecosystem that provides several local communities from near and far areas with the natural resources to secure their livelihoods, besides its high potential for agricultural production. Figure 3 shows how Dominion Farms Ltd
have taken advantage of an important ecosystem by taking up two huge areas and only setting aside two small parcels of land for the rest of the communities. In Figure 5 the satellite image shows how the entry of Dominion Farms Ltd displaced local communities from their strategic settlement around the Yala River and the Swamp as a major natural resource. This land acquisition clearly imposed a significant loss on host communities in terms of loss of land and disruption of multiple livelihoods (See Figure 5).
Figure 4: Respondents by age and gender of those who lost access to Yala Swamp

Figure shows women and youth within the age bracket of 18 to 39 accounting for 65 percent of the total number of respondents who are disproportionately affected by the loss of access to Yala Swamp.

Source: Author, 2013

Figure 4 further shows that the age range of 60 years and above, who the Department of Agriculture show as the average age of those engaged in farming in Kenya, accounted for less than 7 percent of those sampled. The cumulative implication is that Kenya being a land-constrained country, women and youth who enjoy weaker land rights are bound to suffer more from the loss of access to Yala Swamp as a means of their livelihoods. This is because the women and youth are disadvantaged in land ownership, yet Yala Swamp, which they considered for their agricultural and other livelihood expansion strategy, has been foreclosed by the land acquisition by Dominion Farms Ltd.
Figure 5: Satellite image showing portion of Yala Swamp excised from Bar Olengo and Nyamonye adjudication section in Siaya County

The Figure 5 satellite image shows the portion of excised land from the Bar Olengo adjudication section on the Siaya side of Yala Swamp, as well as from the Nyamonye adjudication section on the Bondo side of Yala Swamp. These exercised portions form an additional land to Yala swamp defined by the green line in 2003. The communities on both sides of Yala Swamp complained of the excision of their already adjudicated and certified parcels of land, contrary to the provisions of the Registration of Land Act, Chapter 300 of Laws of Kenya and the Compulsory Land Acquisition Act, Chapter 295 of Laws of Kenya. According to Obalo (interviewed, May 2013), from Nyamonye, East Yimbo the excision was intended to create a buffer zone between Dominion Farms Ltd and the communities, as seen in the satellite image.

Source: Winan Surveys, 2012
The Figure 5 satellite image also shows that the local communities from both sides of the Yala River (marked blue) were cut off from accessing the Yala River for water uses and fishing. According to Obalo (interviewed, May 2013):

“I am unhappy about what happened to us, but there was nothing we could do since we were told by government officials that Dominion had permission to construct a weir to create a reservoir for irrigation of the Dominion Farms. The official emphasized that the government had leased the land to Dominion Farms Ltd”

As further explained in the next section, the entry of Dominion Farms Ltd in Yala Swamp meant that local communities had to lose access to the Yala Swamp and river so as to make space for the investor operations.

**Local Communities’ Loss of Access to Yala Swamp**

Figure 6 shows what the large-scale land acquisition of Yala Swamp by Dominion Farms Ltd meant for local communities surrounding the land deal site. The taking of Yala Swamp from local communities meant that their multiple livelihoods activities such as growing crops, grazing of livestock, fishing and gathering various swamp materials had to stop to make space for the industrial agricultural investor project. The community lost land on which they depended to produce their food and make a living, for promised benefits that are yet to materialize. The promised benefits were the creation of employment opportunities, improvement of food security, electrification of the villages, improvement of infrastructure in the form of roads, and the building of schools and clinics. There is no reliable figure of how many people suffered this loss of access to the Yala Swamp area. The Dominion Farms Ltd Manager, Abir (interviewed, May 2013) puts the number at no more than 700 people from around and further along the swamp. Action Aid Programme Officer, Atieno (interviewed, May 2013), says the figure estimated by the Dominion Farms Ltd Manager is equivalent to 75 households in the reclaimed section of the swamp. Land was to be set aside for these families,
according to the Memorandum of Understanding between the two County Councils of Siaya and Bondo and Dominion Farms Ltd. Atieno emphasised that thousands of communities and schools from around and further along the Yala Swamp lost access to the Yala Swamp. According to Muga (interviewed, May 2013), a 55 year-old resident of Bar Olengo Sub-location on the Siaya side of Yala Swamp:

Many people who lost access to Yala Swamp were not strictly those who were settled or held parcels of part of the reclaimed section of Yala Swamp. For many villagers, this was losing land without being formally dispossessed. This is because families accessed Yala Swamp in season and for different uses on a temporary and need basis.

From the sample survey of 100 respondents from both sides of Dominion Farms Ltd around the Yala Swamp, 40 percent said their main source of livelihood is agricultural farming and livestock grazing. The rest, accounting for 60 percent were engaged in various sources of livelihoods ranging from casual employment to formal business (see Figure 5). Figures on the loss of access to the Yala Swamp remain contested because while local communities may not have been physically displaced from the very space occupied and used by Dominion Farms Ltd, Yala Swamp is a common property resource from which local communities as users were dispossessed thereby suffering a loss of access. The company’s attempts to play down the extent of loss fails to recognize local communities’ claims of dispossession from a communal or common property regime they accessed freely and used for growing crops, grazing, fishing and gathering swamp materials for multiple alternative livelihoods before the entry of the investor.
The local communities described how they derived their livelihoods from small-scale family farming of common rain-fed crops such as maize, beans, sorghum, potatoes, cassava, cowpeas, vegetables and rain-fed rice from unrestricted access to the Yala Swamp as a community resource. Figure 6 above shows the main livelihood occupation by age and gender. It reveals how women and youth in the age bracket of 18 to 39 years are disproportionately affected, accounting for 60 percent of those sampled. The other thing that Figure 5 shows is that as much as the area around Yala Swamp is categorized as an agricultural area with local communities engaged in small-scale agriculture and fishing, 60 percent of the random sample size are shown to be engaged in other livelihoods. Besides farming and grazing which are done in uncultivated
areas and off-season crop fields, during the dry season, other important sources of livelihoods were fishing and the production of handicraft products from swamp materials, particularly by women. This was confirmed by George Oraro Obalo, a Yimbo community elder whose parcel of land borders the Yala swamp on the Bondo side (Obalo, interviewed, May 2013). Obalo further explains:

Prior to the coming of the investor, we were able to produce our food, to access fresh drinking water from Yala River and were able to use natural resources from the swamp. Now we are forced to drink contaminated water because of the degraded environment as a result of Dominion activities.

A number of local community members in the field explained how the investor promised to improve their livelihoods by reclaiming part of the swamp and turning it into profitable rice paddies, which would provide food security and generate employment. From Kadenge village in Alego on the Siaya side of the swamp, a community leader, Ochieng (interviewed, May 2013), explains:

When the investor came, the company promised to ensure food security and also promised to improve infrastructure by building more health centres and schools, besides providing employment opportunities for our youth. But all we are seeing is increased poverty and marginalization.

Another local community representative, Odindo (interviewed, May 2013), a farmer aged 45 says that he was a youth leader who spear-headed the resistance against the Dominion Farms Ltd entry into Yala Swamp from the Bondo side of the Dominion farms. He acknowledges that the community was aware of Dominion Farms Ltd being allocated 3,700 hectares of land in the first phase of the company operations. However, they did not expect that Dominion Farms’ operations would infringe on their individual private parcels of land without proper consultations with local residents. He says that the company encroached on the private parcels of land next to the Yala River (see Figure 7), without proper compensation. Those affected (see Table 4) were only offered a once-off payment of about US Dollars 1,292.4 per one hectare,
which he claimed was not enough for the lost land and relocation costs. Odindo, who grows beans, maize and potatoes on 3.2 hectares on the Bondo side of the swamp, said he rejected Dominion’s offer to acquire his land, because the compensation money was too little compared to US$930 from his annual sales from farming. He explained further that local farmers around Yala Swamp feared that Dominion would eventually force them off their farms through flooding, aerial pesticide sprays that were bound to affect their drinking water from the Yala River, their crops and animals. According to Winan Surveys, a technical mapping services consultancy group based in Kisumu, which Action Aid International hired to undertake a map interpretation service and ground land survey around the Yala Swamp area in 2012, a number of local communities’ alleged complaints of encroachment on their land were vouchsafed after the adjudication map sheets’ interpretation and satellite image reading. According to the Winan Surveys’ findings a number of individual private land parcels in the Bar Olengo Adjudication Section on the Siaya side of the swamp and others on the Nyamonye Adjudication Section of the Bondo Side of Yala swamp were indeed found to have been encroached on as per satellite images as shown in Figure 8. Table 4 shows a list of some of the private lands encroached upon as per the complaints of the registered proprietors.

Table 4: Private lands encroached upon as per complaints of registered proprietors

<table>
<thead>
<tr>
<th>VILLAGE</th>
<th>NAME</th>
<th>PARCEL</th>
<th>Original Size;</th>
<th>Excised</th>
<th>REMARKS</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>FRANCIS OBIERO OJOW</td>
<td>1296</td>
<td></td>
<td></td>
<td>Not affected</td>
</tr>
<tr>
<td></td>
<td>OBONYO OJOW</td>
<td>1301</td>
<td></td>
<td></td>
<td>Not affected</td>
</tr>
<tr>
<td></td>
<td>MATHILDA MAYA</td>
<td>1852</td>
<td>3.4</td>
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<td></td>
</tr>
<tr>
<td></td>
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<td>1309</td>
<td>3.6</td>
<td>1.1</td>
<td></td>
</tr>
<tr>
<td></td>
<td>ONYANGO MUGA</td>
<td>1305</td>
<td>3.7</td>
<td>1.8</td>
<td></td>
</tr>
<tr>
<td></td>
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<td>1308</td>
<td>12.9</td>
<td>5.5</td>
<td></td>
</tr>
<tr>
<td></td>
<td>OUMA MAYA</td>
<td>1307</td>
<td>10.1</td>
<td>6.1</td>
<td></td>
</tr>
<tr>
<td></td>
<td>ORUYA OLWARE</td>
<td>1306</td>
<td>5.9</td>
<td>4.4</td>
<td></td>
</tr>
<tr>
<td></td>
<td>MURANDO OMWENDE</td>
<td>1304</td>
<td>4.9</td>
<td>2.8</td>
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</tr>
<tr>
<td></td>
<td>SEWE OCHIENG</td>
<td>1302</td>
<td>2.4</td>
<td>1.1</td>
<td></td>
</tr>
<tr>
<td></td>
<td>CARILUS AIRO</td>
<td>1048</td>
<td></td>
<td></td>
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</tr>
<tr>
<td></td>
<td>AYILA</td>
<td>1046</td>
<td>12.9</td>
<td>8.8</td>
<td></td>
</tr>
<tr>
<td></td>
<td>MARIA AYILA</td>
<td>1045</td>
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<td>4.0</td>
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<tr>
<td></td>
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<td>2.0</td>
<td></td>
</tr>
<tr>
<td></td>
<td>DSIRA MUMBO</td>
<td>1464</td>
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</tr>
<tr>
<td></td>
<td>LAWRENDE ODONGO</td>
<td>1008</td>
<td>7.3</td>
<td>2.8</td>
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</table>
Winan Surveys pointed out that Dominion Farms Ltd acquired individual adjudicated parcels of land without following procedures as set out in the Registration of Land Act, Chapter 300 and the Land Acquisition Act, Chapter 295 of Laws of Kenya. Thus, the affected proprietors of affected land parcels were free to raise a dispute as to the correct boundaries of their land.

Figure 7 shows private lands encroached on around the Yala River by the investor by way of pushing away local community members from their adjudicated private land parcels through flooding caused by water from the water reservoir. An entire village of farmers whose families have lived around Yala River for generations have had their land encroached upon by the investor. The terms of land acquisition have proved a source of dispute as many farmers did not receive compensation after protracted negotiations or the compensation amounts paid were deemed inadequate. The negotiation details included compensation for not only standing crops, but also for invisible losses of grazing land, fishing grounds, relocation costs, company buying them land of the same fertility, relocation arrangements within the same area surrounding the Yala Swamp rather than communities finding themselves alternative land elsewhere, and once-off adequate and fair payment to enable them to start new businesses or better livelihoods elsewhere.
The affected people whose land was encroached on complained that compensation paid was for crops and visible development, not for the land. According to Onyango (interviewed, May 2013), from the Bar Olengo Sub-location on the Siaya side of Yala Swamp:

I received one-off payment of US Dollars 1,292.4 per one hectare of my two hectares and told to get off my farm without compensation for relocation costs and losses of fishing grounds regardless of the impacts on my local livelihoods tied to my continued access to Yala Swamp, an important natural resource to my entire family.

Losses such as grazing land, fishing grounds or swamp material gathering space and farmland without standing crops at the time of taking the land were not counted for compensation. Corporate social responsibility initiatives were promised, such as: setting up rice selling kiosks for community members, training of youth in new agricultural technology and construction of fish ponds plus the supply of fingerlings for community members as an economic stimulus package. But no amount of these promises could change the individual private land owners’ attitude towards the new agriculture venture because compensation given could not restore their livelihoods to the pre-Dominion Farms Ltd project levels.

Figure 7 shows areas from which local communities were pushed, from next to the River Yala and its swamp which were crucial to the communities’ commercial fishing. This encroachment had adverse implications for families that had settled strategically within reach of the fishing grounds of the River Yala and the attendant Ox-bow lakes within the Yala Swamp. The resultant implications for peoples’ livelihoods were not anticipated and mitigated at the project design level. Therefore, affected people were expropriated from their land, without compensation, within the marked areas shown in Figure 6.
Table 4 shows the list of advance payments to some of the affected people, rather than a once-off payment that could facilitate the search for new livelihoods.

Source: Winan Surveys, 2012
Table 4 shows a compensation computation but does not reveal that by the company not being able to make a once-off cash payment to individuals whose land was compulsorily acquired, their ability to make alternative livelihoods was not tenable. Apart from the advance payment offered in cash of a uniform payment of US$ 5.81 regardless of the land size, the rest of the payment was channelled through the Provincial Administration by 2006, which some of the dispossessed owners claimed they had not received by 2013. However, it was not clear how much money was deposited with the Provincial Administration. From a number of community members talked to, similar disputes over compensation entitlements are evident, in addition to the common complaint that compensation was paid for trees but not any other resource lost in terms of grazing land or loss of farmland without standing crops at the time of expropriation.

Table 5: Compensation of community members whose private land parcels were compulsorily encroached on by the investor
<table>
<thead>
<tr>
<th></th>
<th>Name</th>
<th>ID</th>
<th>5%</th>
<th>10%</th>
<th>20%</th>
<th>50%</th>
<th>100%</th>
</tr>
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<td>Stephen Omondi Ogaya</td>
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<td>423.84</td>
<td>42.38</td>
<td>0.00</td>
<td>466.22</td>
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<tr>
<td>13</td>
<td>John Onyango Minyaho</td>
<td>2935</td>
<td>0.37</td>
<td>193.61</td>
<td>19.36</td>
<td>0.00</td>
<td>212.97</td>
</tr>
<tr>
<td>14</td>
<td>Alfred Owili Minyaho</td>
<td>3031</td>
<td>0.12</td>
<td>62.79</td>
<td>6.28</td>
<td>0.00</td>
<td>69.07</td>
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<td>17.27</td>
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**Source: Winan Survey, 2012.** Technical mapping services consultancy firm hired by Action Aid International to establish land ownership status, position and extent of individual land holding vis-a-vis the Yala Swamp.
Coming back to the controversy surrounding the Dominion Farms Ltd compulsory acquisition of private parcels of land, the controversy continues 10 years since the entry of Dominion Farms Ltd in Yala Swamp because the compensation payment was passed on to the provincial officials who are accused of having not passed on the same to all claimants. According to Atieno (interviewed, May 2013), a Programme Officer with Actionaid International, details about the compensation payments are scanty despite individual complaints received by the Actionaid Office at Usingu Village, Bondo. This is why the need to improve land governance is critical and at the centre of the debate on the envisaged community land law meant to operationalize the recognition, protection and redress of land injustices.

The other claim and complaint that the local communities had against the investor operations was the construction of a weir on River Yala in 2004 that serves Dominion Farms Ltd for irrigation. The weir caused a reservoir that flooded an area up to private individual farms, their market centre at Aduwa and also submerged a public road (classified E1176) connecting the two communities on the Siaya side of the swamp and the Bondo side of the swamp (see Figure 7). Figure 8 is a photograph showing a survey post placed by the District Land Adjudication and Settlement Officer (DLASO) deep in community land as the furthest point the wetland demarcation ought to reach. Consequently the area was flooded by the reservoir after the construction of the weir. Figure 8 shows how deep into community and private parcels of land the Yala wetland extended after the reservoir burst the weir height in 2007 during heavy rains. The yellow line marks the line joining beacons erected by the District Land Adjudication Settlement Officer (DLASO). The purple line defines the extent of the wetland before 2004, the year of the commencement of the Dominion Farms Ltd operations and the construction of a weir. The blue demarcation strips indicate the affected land parcels under water in the new swamp boundaries. The red markings are the beacons erected by the DLASO (See Figure 8).
The survey and satellite image was an initiative of Action Aid International in its efforts to support the Yala communities’ advocacy.

**Figure 8:** The survey post indicating how deep the wetland boundary was placed in adjudicated lands of the community.

*Source: Winan Survey, 2012*
Figure 9: The extent of Yala wetland after the reservoir extension into private land parcels.

Source: Winan Surveys, 2012

According to Aduwa villagers interviewed, the loss of local habitat, which was flooded in 2007 in the name of development, remains a painful experience because the community lost access to their farms and to Yala River. According to Owiti (interviewed, May 2013), an old man and resident of Aduwa village puts it:

“We have been subjected to living and using dirty water which has exposed us to diseases such as typhoid, bilharzia, malaria and skin ailments.”

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1 A village market, parcel number 1027 in East Yimbo in Nyamonye Adjudication Section is remembered as the investor mischief because the investor threatened to wipe it out through flooding and went ahead to construct a weir to abstract water for irrigated mechanized agriculture that affected 85 families by compromising their livelihood needs.
All the complaints and narratives of community members point to the community anguish over their loss of access to the Yala Swamp in general and particularly to 2,300 hectares of reclaimed swamp land. That land had been open to local communities’ agricultural use in the dry season, but due to the fence around most of Dominion farms, the surrounding communities are restricted from access to Yala Swamp resources. Community members from the Siaya side of the swamp narrated how access to water canals and dykes is no longer possible due to Dominion’s enclosure of the leased land (see Figure 10). Figure 10 illustrates where the old fence was before the takeover by Dominion and shows the new fence erected on the inner dyke of the swamp land by Dominion. The community members interviewed said that Dominion moved the fence to block the community and their livestock from the canals and dykes. According to Rebecca (interviewed, May 2013), and who also later testified at the Pan African Parliamentary Land Hearing, the Dominion Farms Ltd entry into Yala swamp impacted negatively on women more than other members of the local community around the Yala Swamp. She says:

   Dominion disrupted women’s means of livelihood and capacity as community managers. We lost our plots of vegetables in the swamp besides disruption of our private farms which were flooded thereby destroying our whole livelihood strategies, yet much of the land allocated to Dominion Farms Ltd remains idle and cannot be put to alternative use.

This sentiment is shared by the Vice-Chairman, Martin Magina Okoyo of the Yimbo Yala Swamp Farmers’ Association in the supporting affidavit sworn in their case in the High Court of Kenya at Kisumu Environmental and Land Division Civil Case No. 168 of 2011, who says:

   Despite living around Yala Swamp since time immemorial, engaged in subsistence farming, fishing and livestock rearing, Dominion Farms Ltd not only closed our access to Yala Swamp, but through its servants and agents descended on our farms with bulldozers and other big earth moving machines destroying our crops… (High Court Case No. 168 of 2011)
Figure 10: Fence moved by Dominion Farms Ltd. to block communities from accessing the canals and reclaimed land in the Yala Swamp

Figure 10 illustrates how the Dominion Farms enclosure fence cut-off communities from both sides of the Yala swamp, that is from Yimbo to Kadenge, which has caused great inconvenience to the local communities. Figure 8 shows a public road (classified E1176) connecting people from East Yimbo to Siaya through the Yala Swamp and eventually joining the Bondo to Siaya main road across the River Yala, without going through Bondo town. This road is completely blocked as a result of the construction of a weir, which has caused flooding that has submerged the road. According to Ogaya (interviewed, May 2013), from Aduwa village, he had this to say about the closed road:

I have no words to express how unhappy this village is about this road closure, but there was nothing we could do to stop Dominion mischief. Our own leaders and government insisted that our land was leased to the company, which could do as it wished to undertake its agricultural activities.
However, when the company manager was asked about the community complaints, he dismissed them and emphasized that the community has benefited massively from the Dominion investment by observing:

> The company has brought electricity to villages, constructed classrooms in some schools, improved road networks in areas of our operations as well as paid school fees for orphaned children among other corporate social responsibilities (Abir, interviewed, May 2013).

He further argued that the local communities’ claim that Dominion privatized a public road which passes through Dominion farms from Siaya to Bondo does not hold because an alternative perimeter road that goes around the edge of the farm was improved to connect the two towns. In addition, another dyke was built and a road was constructed which connects the communities on both sides of Lake Kanyaboli. What the Dominion Farms Ltd manager did not disclose is the fact that the detour around Dominion Farms had transport cost implications, in that it added a 20 kilometres distance to the local communities of Kadenge on the Alego side and to Nyamonye on the Yimbo side, especially for women who travel to access market places, clinics and schools for their children. The implications of the closure of the road leading to the towns of Siaya and Bondo mean that neighbouring communities have to take a considerable detour of 20 kilometres, costing US$ 2.3 by local taxi transport or motor cycles, which is too high for local community members who live below the poverty line on less than US$ 1.5 a day.

An analysis of the social relations and agrarian practice evolving around the Yala Swamp farming system points to local communities experiencing a development pathway beyond their comprehension. Dominion Farms Ltd introduced a development change where those who lost access to Yala Swamp are expected to work for the investor to obtain subsistence. However, members of local communities claim that the investor’s entry into Yala Swamp has denied them access to the land they used for the production of food, thus causing food shortages, despite the investor’s rice paddies producing 10-18 million kilograms of rice annually. One
community member, Mary from Ratuoro village who exemplifies the problems experienced by women as the main providers of food to the community, exclaimed:

How can the local community members pay for rice, and pond fish produced by Dominion Farms if their land is taken away and not enough employment opportunities are available?

According to Siaya County representative, Ochieng (interviewed, May 2013), Yala Swamp was a community common pool resource under multiple tenure regimes before Dominion took it over. Part of it was used by local communities, some of it was used by the Lake Basin Development Authority, while other areas were used by the researchers under the auspices of the County Councils of Bondo and Siaya. According to, Owalla (interviewed, May 2013), the Executive Director of the Community Initiative Action Group Kenya who works with local communities, they normally express the feeling that they were betrayed by their County Council’s leaders who undertook to negotiate with the investor about the land lease deal.

The next section deals with the betrayal of local communities by their representatives.

**Betrayal of Local Communities by their Representatives**

Besides having welcomed Dominion Farms entry into Yala Swamp in 2004 after they signed a Memorandum of Understanding with the Lake Basin Development Authority and the Siaya and Bondo County Councils, the local communities, especially women and youth who form the majority of the population and respondents interviewed, feel betrayed when Dominion blocks their access to Yala Swamp (Figures 4 and 10). According to Okello (interviewed, May 2013), Dominion has been allowed to grow rice on Phase I (3,700 hectares) out of a total 6,900 hectares negotiated to be leased to the company, including additional land in Phase II (3,200 hectares). While the terms were yet to be negotiated, Dominion was determined to delink the community from the land, which is intrinsically a source of their livelihoods. Joyce from the Bondo side of the swamp, like many residents of her village, found it hard to believe that their
own County Council could forsake their use of the Yala Swamp and allow Dominion to take over on the mere promise of boosting food security, creation of job opportunities and development of infrastructure at the expense of loss of access to the land that inspired their very existence and identity.

According to the Dominion Farm Manager, Abir (interviewed, May 2013), despite having been allowed to reclaim and use 6,900 hectares, the company had only reclaimed 3,000 hectares including 2,300 hectares formerly used by the LBDA, but were only using 1,417 hectares for production of 14-18 million kilograms of rice per annum. The slow pace notwithstanding, according to Were (interviewed, May 2013), the Dominion Agricultural Manager, they aim to plant the whole 6,900 hectares as follows: rice 1,619.4 hectares, soya beans 2,429.1 hectares, sugarcane 2,429.1 hectares and aquaculture 404.9 hectares. The two further argue that despite Dominion having negotiated to allow local communities to use 121.45 hectares of the reclaimed land, instead they say the company has given 182 hectares to Bondo and 190 hectares to Siaya communities respectively. According to Abir (interviewed, May 2013) says that if there is any betrayal, it’s the County Councils who represented the communities as their elected leaders, who betrayed the people. This argument confirms Peters’ argument that ‘land grabs’ in Africa are facilitated by national and sub-national government agencies who allocate land to foreign agents (Peters, 2013). According to the Community Initiative Action Group-Kenya Executive Director, Owalla (interviewed, May 2013), the Yala Swamp reclamation was meant as an integrated development plan for cultivation by local small-scale farmers. Therefore, the alternative cultivation of the reclaimed land as a large-scale farming enterprise by Dominion Farms as negotiated by the two local County Councils is a betrayal of the communities whose agricultural practices and skills were meant to be improved for their own increased productivity. The local communities from both sides of the Yala Swamp (Bondo and Siaya)
opted to sue their representatives and trustees in matters of community land held in trust for them.

The local community took advantage of the 2010 Constitution of Kenya, under Article 63 that provides for the recognition and protection of community land rights. They filed Case No. 168 of 2011 at the High Court of Kenya at the Kisumu Environmental and Land Division, suing the Bondo and Siaya County Councils as well as Dominion Farms Ltd. The charge was for betraying them by dispossessing them of community land covering 3,200 hectares of the Yala Swamp that is held in trust by the two councils. The case, filed by Martin Magina Okoyo and Thomas Ochieng Ongong, (suing on their own behalf and on behalf of the Yimbo Yala Swamp Farmers’ Society) was dismissed and struck out with costs. The case was dismissed on four technical grounds: firstly, that the interim orders of injunction to stop the defendants from interfering with community land measuring 3,700 hectares under jurisdiction of the County Councils of Bondo and Siaya were based on mere fears and apprehension. Secondly, the photographs showing the alleged destruction of crops were taken on 20th September, 2011 yet the alleged incident took place on 30th August, 2011. The two dates were materially different and could not aid the plaintiff’s case. Thirdly, the list of farmers as signatories and members of the Yimbo-Yala Farmers Society, who authorized Martin Magina Okoyo and Thomas Ochieng Ongongo (Vice-Chairman and Chairman of the Yimbo Yala Swamp Farmers’ Association) did not have the authority to act on their own behalf and that of the members. Fourthly, the applicants did not disclose that prior to filing the suit they had filed and withdrawn a similar suit in the Kisumu High Court, namely Case No. 141 of 2011.

The Community has since filed an appeal against the decision, which was allowed as per Civil Appeal No. KSM 94 of 2012, in a ruling delivered at the Kisumu Court of Appeal of Kenya on 25th September, 2013. The Court gave applicants five days to serve the record of appeal upon
each respondent (Bondo and Siaya County Councils as 1st and 2nd respondents and Dominion Farms Ltd as 3rd respondent).

**Figure 11: The extent to which adjudication is seen as an effective solution to land-based conflicts**

Figure 11 answers the question, to what extent the respondents say that adjudication is an effective way of resolving land-based conflicts.

Source: Author, 2013

Figures 11 to 13 demonstrate that affected people’s knowledge of regulatory frameworks governing large-scale land acquisitions limits the exercising of legal rights, owing to different levels of legal awareness and ability to navigate judicial procedures to make the most of the new land governance system. Women and youth who form the majority demographic sample size in the Yala Swamp surveyed, are most knowledgeable about how adjudication is an effective solution to land-based conflicts as shown by Figure 11. However, since the entire area
around the Yala Swamp has been adjudicated according to the District Surveyor, Bondo/Siaya, the Yala Swamp as a common pool resource, according to Ostrom (1986) is the only resource held under more than one regime that should be able to benefit all without conflict. Figures 11-14 are derived from Survey Questionnaire Section B, on questions about the level of awareness of regulatory frameworks on large-scale land acquisitions. The first part of the section asks about regulatory frameworks and part two is about dispute and conflict resolution mechanisms.

Figure 12 shows the frequency of awareness on Constitutional provisions, which keeps the enjoyment of local rights weak and insecure, despite the on-going land reform agenda. The awareness of the constitutional provisions is important because the 2010 Constitution of Kenya protects the right to property and requires compensation for expropriation. If a good number of the community members were aware of the constitutional provisions it would be a precondition for informed engagement with situations of violation of their rights since even the African Charter on Human and Peoples’ Rights require compliance with the applicable laws.

**Figure 12: Frequency table on Survey Question 10 on Constitutional Awareness**

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<td>100.0</td>
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*Source: Author, 2013*
Figure 12 shows the response to the question: “Do you know the constitutional provisions that regulate the large-scale land acquisition or usage?” This question aimed at assessing whether the communities surrounding Yala Swamp were aware that the 2010 Constitution of Kenya had ended government interference with unregistered community land as per Article 63 (4) that states that “community land shall not be disposed of or otherwise used except in terms of legislation specifying the nature and extent of the rights of members of each community individually and collectively.” The survey result in Figure 13 shows that 64 percent of the respondents were not aware of the constitutional provisions.

**Figure 13: Bar chart on Survey Question 10 on Constitutional Awareness**

Figure 13 answers the question: “Do you know the constitutional provisions that regulate the large-scale land acquisitions or usage?” Sixty percent of the respondents said “No”, while 25 percent said “Yes” and 10 percent did not state their position.
The second case was filed against the Kenya Wildlife Service for gazetting Lake Kanyaboli and its immediate surrounding as a National Reserve in 2010 without consultation and due regard to the traditional land use of the Yala Swamp as a community resource. This case exemplifies the community’s resistance to ‘green grabbing’ or conservation as a form of land grabbing. According to Mwangi (interviewed, May 2013), a Kenya Wildlife Service Officer in Siaya, the Kenya Wildlife Service lost the case and it is planning to engage the community in a more participatory, transparent and accountable dialogue to convince it about the greater gain they stand to get from Lake Kanyaboli as a National Reserve as compared to the present fishing and grazing rights they enjoy.
In sum, the Yala Swamp local communities’ feeling of betrayal by their representatives is borne out of negative impacts of displacement, lost livelihoods and promised benefits which have not materialized yet. But the betrayal argument is not unique to Yala Swamp because nation-wide development plans support foreign investment as a means of revitalizing the agricultural sector. Thus, the reclamation and development of the Yala Swamp by Dominion Farms Ltd is not different because its ambitious objectives are: the development of a profitable business model for the region; reduction of poverty in the region through employment opportunities; provision of sustainable livelihoods for rural households; and improvement of the socio-economic infrastructure. The figures of expected outputs in terms of workforce were proposed as 2,500 people, who were expected to do weeding and maintenance, has never been reached. This is because Dominion turned to mechanized farming systems, dashing the early optimism of generating more jobs when the company had initially hired over 1,500 manual labourers to clear the land, only to dissipate the numbers to the current workforce of about 600 (see Table 5). In many ways the local communities’ hope that the reclamation of the Yala Swamp into a productive agricultural enterprise to build better lives for them seem to be going wrong.

Table 6: Estimated employees at the time of fieldwork

Table 6 shows the employment figures of different categories of employees at Dominion Farms Ltd. In total as per the time of the fieldwork visit, Dominion Farms Ltd had 609 employees representing 24.34 percent of the 2,500 employers projected in its Business Plan.
<table>
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<th>Permanent</th>
<th>Contract</th>
<th>Casual</th>
<th>Total</th>
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<td>45</td>
</tr>
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<td>0</td>
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<td>8</td>
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<td>Workshop/Stores</td>
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<td>5</td>
<td>11</td>
</tr>
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<td>1</td>
<td>2</td>
<td>2</td>
<td>5</td>
</tr>
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<td>Soya Bean Project</td>
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<td>29</td>
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<td><strong>84</strong></td>
<td><strong>73</strong></td>
<td><strong>452</strong></td>
<td><strong>609</strong></td>
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Source: Author, From Dominion Farms Administrative Staff Tabulation, 2013

Generally, while there are no laws, regulations and directives that oblige the investor to ensure benefits sharing with local communities (Ochieng, interviewed May 2013), the company’s lack of a Corporate Social Responsibility strategy is a pointer to a misdirected corporate goodwill. Therefore, it is hard to manage expectations about promises made to local communities going back to the early days of a negotiation of the land deal between the community representatives and the investor. The main concern of the local communities is the future prospects for their children and the future generation around the Yala Swamp.
Local Communities’ Concerns and Future Generation Prospects
During the fieldwork data collection a number of local community concerns were raised by key informants and local community respondents interviewed. The main ones were the failure to recognize and incorporate communities living around the Yala Swamp into the Dominion Integrated Development Project Plan, Dominion land acquisition, cultural concerns, promised benefits, and environmental pollution and degradation.

Recognition and Incorporation of Local Land Users’ Rights in Yala Swamp
Whereas the Constitution and the National Land Policy provide for the recognition and protection of community land rights pending registration of the same as fully-fledged community property, including the rights of women and other marginalized groups, communities living around the Yala Swamp raised concerns about not being considered as part of the development efforts in the wetland. A local resident of Alego village on the Siaya side of the swamp proclaimed in protest that, “despite farming this reclaimed swamp land since 1970, nobody recognizes us as viable users of the reclaimed land; instead they are restricting our access to the swamp” (see Figure 14). Figure 14 shows small-scale farming of kale vegetables and bananas on a section of the reclaimed land in the Yala Swamp. This is a reflection of the fact that the community’s use of the Yala Swamp, as prior users, cannot be discounted as being irrelevant to the integrated development of the Yala Swamp as a common pool natural resource. There is a lack of balance between large-scale agricultural production and the communities’ small-scale production, despite the agricultural potential of the Yala Swamp to increase food security as well as to spur the surrounding area’s development.
Figure 14: Local communities’ farm on reclaimed land in the Yala Swamp

Source Author, 2013: Small-scale community farming on the reclaimed section of the Yala Swamp.

According to Pauline Atieno (interviewed, May 2013), a Programme Officer of Actionaid International, during a guided tour of the reclaimed section by the Dominion Agricultural Manager, remarked that:

In practice, customary land rights are not given adequate recognition and protection as provided in law.
Hence parts of Yala swamp, local communities used in season was set apart and acquired for public and private purposes without safeguard to customary land rights and sensitive ecosystems

In her view it appeared that the current land use in the Yala Swamp undermined the tenure security of the undifferentiated community land rights. She further argued that Dominion’s wish to develop and manage a large-scale irrigated farm of approximately 6,900 hectares of Yala Swamp including the additional area of 3,200 hectares, which has not yet been set apart in accordance with the provisions of Part IV of Trust Land Act, Chapter 288 of Laws of Kenya,
is a breach of the law. This was reflected by 39 percent of local community members’ response to the acquisition, arguing that the land in question was community trust land for people ordinarily resident around Yala Swamp and should not have been available for a foreign investor. This is what made the local communities sue the Bondo and Siaya County Councils for attempting to lease out a portion of un gazetted trust land that the two councils held in trust for the local community.

When Dominion Farms Manager, Abir (interviewed, May 2013), was asked to respond to the community’s raised concern, he acknowledged that whereas customarily, members of the local community depended on the Yala Swamp for water, grazing, fishing, subsistence crops and handicraft materials, they have not been excluded as they claim. He further explained that Dominion had given them more than 364.37 hectares instead of 121.45 hectares, which their County Council representatives had negotiated for at the start of the project. He further said:

I know as of personal knowledge that the land is by law vested in Bondo and Siaya Councils who having lawfully alienated the same to Dominion Farms Ltd at a valuable consideration, the communities’ complaint must be directed to their representatives, because Dominion did not grab their land nor displace them from their sources of livelihood.

That is the same position he held in the replying affidavit in the Case No 168 of 2011 where Dominion was mentioned as third respondent.
Dominion Farms’ Land Acquisition in Yala Swamp

According to the lease agreement displayed at the company office, Dominion Farms Ltd. acquired land measuring approximately 6,900 hectares in June 2003\(^2\) for agricultural investment for a period of 25 years (Abir, interviewed May, 2013). The Siaya and Bondo County Councils as trustees of local communities’ unregistered land under the Trust Lands Act (Chapter 288 of the Laws of Kenya) entered into a lease agreement with Dominion Farms Ltd following a Memorandum of Understanding. The land comprising approximately 3,700 hectares (“the gazetted land”) was duly set apart in accordance with the provisions of Part IV of the Trust Land Act. The other land comprising approximately 3,200 hectares (“the Additional Area”), was yet to be set apart, see Figure 2. The ‘Additional Area’ was allegedly set apart through Gazette Notices of 3\(^{rd}\) November, 2006 and 1\(^{st}\) December, 2006 which is a subject of dispute and law suit. Thus, the ‘Additional Area’ could not be used yet for agricultural purposes since it was under water and its exact boundaries were yet to be delimited (Abir, interviewed May, 2013). All the said parcels of land formed the principal lease that was approved by the Commissioner of Lands for a lease period of 25 years from June 1, 2003 with a provision for an option of extension for a further 20 years on terms and conditions to be negotiated later. This possibility of new terms of extension is what is causing great concern to the local communities. According to Martin Magina Okoyo in his supporting affidavit in a Civil Case No. 168 of 2011 against Bondo and Siaya County Councils as 1\(^{st}\) and 2\(^{nd}\) respondents and Dominion Farms Ltd as 3\(^{rd}\) respondent, the area consisting of 3,200 hectares was never and has never been gazetted and is left to be farmed by the local farmers.

According to a Siaya County representative, the land acquisition process lacked Free, Prior, Informed Consent (FPIC), as provided for in UN regulations on indigenous people and as

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\(^2\) This acquisition which is yet to be finalized is now subject to the land reform legal regulatory frameworks as provided by the Constitution of Kenya, 2010 and the National Land Policy of 2009.
adopted in the FAO Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forestry in the Context of National Food Security (Ochieng, interviewed, May 2013). This is because the FPIC normally involves three major aspects, according to Hoops (2014:3): the ability to participate effectively and the empowerment of disadvantaged people; the provision of information and obligation to furnish reasons; and the access to procedure and the form of participation that leads to consent. Therefore, regardless of procedural process followed by Dominion Farms, the local communities’ feeling remains that the company colluded with the two County Councils to cheat them out of their land without proper consultations. This is because the agreements for lease were negotiated with intermediaries: Bondo and Siaya County Councils and Ministry of Lands and Settlement following a Memorandum of Understanding with the Lake Basin Development Authority for the 1970s reclaimed portion of 2,300 hectares that was included in Phase 1 (3,700 hectares parcel).

The land acquisition process that took place at Yala Swamp was done under a land regulatory framework that secured the removal of local communities from the allocated land to the investor. This is because the investor, the local authority and the government officials had power balanced in their favour to seal the land deal with negligible consultation and participation of local communities, due to information and power asymmetries that put the local communities in a disadvantaged negotiation position. According to Okoyo (interviewed, May 2013), the Vice-Chairman of the Yimbo Yala Swamp Farmers’ Society, the land acquisition was insensitive to their prior use of the Yala Swamp for their subsistence farming, fishing and livestock rearing. He says:

The members of our society have since time immemorial been living along the Yala swamp, but since Dominion taking possession of the gazetted area, it has caused us great inconvenience.
According to the Siaya County Yala Swamp Farmers’ Forum Chairman, Were (interviewed, May 2013), he asserts that the Yala Swamp is a community resource, which must be recognized and protected as community land and any acquisition must be treated as a historical land injustice that must be redressed according to the provision of the Constitution and the Land Policy.

The Value of the Acquired Land
The other concern by community members interviewed during the field study on the value of the land acquired by the Dominion Farms was that Yala Swamp was acquired at a paltry rental of US$ 3.9 per hectare per year. According to Cotula (2013:74-75), many African governments are allocating land so cheaply at low fees and in some cases they are not charging it at all. Cotula’s argument is supported by Deininger et al., (2011:63) whose study found that companies were acquiring larger tracts of land than they could farm due to low costs for lease, rental or outright purchase in Africa.

According to Atieno (interviewed, May 2013), Action aid International programme officer, based at Usingu on the Bondo side of Yala Swamp, the land acquired by Dominion played a key role in the local communities’ dry season farming, livestock grazing and other multiple livelihoods from swamp raw materials beyond any economic gain they derive from it at the moment. Therefore, regardless of Dominion’s capacity of putting the acquired land to gainful use the affected communities hold that the surface rental is nominal and seems quite low and does not reflect the market price for land in the area, according to Oluoch (interviewed, May 2013). Generally there is no vibrant land market since land is held in trust for the family members. According to Okuku (interviewed, May 2013), a Siaya County representative, the land lease fees charged by Dominion are paid annually, but have not resulted in improvement of service delivery to the local communities. One community member, Ochieng (interviewed,
May 2013), summed up the value of the Yala Swamp as being “the cost borne by local communities, who have lost a means of their livelihoods for as long as Dominion Farms will remain in the wetland”.

Another common complaint raised is the problem of compensation computation for the payment of local communities, which is based on visible improvements on land such as crops and trees, and not for the land which is legally deemed owned by the government or local authorities as trustee of local communities. This perspective is well put by Abir (interviewed, May 2013), the Dominion Farms Manager in his reply affidavit in the community case against the Bondo and Siaya County Council plus Dominion Farms Ltd as a 3rd Defendant in which he says:

I know as of personal knowledge that Yala Swamp land is by law vested in Bondo and Siaya County Council (the 1st and 2nd Defendants) who having lawfully alienated the same to Dominion at a valuable consideration, the plaintiff remedy if any is with the two county councils and not Dominion as the 3rd Defendant.

**Compensation for Expropriated Community Private Parcels**

During the field research the community members claimed that apart from some private land holders having not received their compensation for expropriated land parcels, it would appear that the issue of the expropriation of communal land holdings and their compensation does not arise. A number of respondents claimed that they were not compensated by Dominion Farms as required by the law. However, Dominion Farms Manager, Abir (interviewed, May 2013), explained that the company paid a fair and adequate compensation for all affected to the Government, apart from three families who declined the move, “so I am not aware of how the onward payment was processed”. According to Atieno (interviewed, May 2013), a Programme Officer of Actionaid International there are more than three cases of community members not
satisfied with that decision to expropriate their land without due consultation regardless of the compensation which they deemed not adequate.

**Information Asymmetry on the Investment Deal**

According to the survey, about a third of 100 respondents said they did not feel adequately informed. Another third said they did not attend meetings and rallies at which Dominion proposed to acquire approximately 6,900 hectares of Yala Swamp. They simply heard about the deal through neighbours, the provincial administrators and through village elders. According to Obondo (interviewed, May 2013), a 33 year-old trained lawyer and co-ordinator of the Friends of Yala Swamp Network based in Siaya town, Dominion’s takeover of the Yala Swamp for exclusive use was without informed involvement of surrounding communities. According to Owalla (interviewed, May 2013), the head of the Community Initiative Action Group Kenya, said: “I am not happy about Dominion’s takeover of the Yala Swamp. I will support the local communities’ campaign against land grabs facilitated by the government.” However, according to Abir (interviewed, May 2013), the community can only complain to their County Councils if they were not well represented during consultations.

The other community concern was that information provided by the investor was not properly checked by concerned authorities hence its reliability and truthfulness was dubious. Interviews with Oriend (interviewed, May 2013), revealed that given the low water intake for irrigation from the Yala River, Dominion Farms may not have the capacity they provided when submitting the investment proposal to the concerned government agencies to utilize all the allocated land. This was further pointed out by community members interviewed who were concerned that information submitted by Dominion was rarely made available to the public. However, the investor representative, Abir (interviewed, May 2013), while admitting that information submitted by the investor was often treated with a veil of secrecy, the aim was not to deny information; rather, it was in the interest of protecting the confidentiality of the content
of the investment proposal. The County Councils of Bondo and Siaya, through the replying affidavit by the clerks to the Councils in the Case No. 168 by the local community members against the two Councils, state that all information about the Dominion land deal was known to the County Council Councillors who represent the community.

In summary, regardless of the counter-accusations and mentioned concerns there was clearly an information and power asymmetry between the local communities and the investor on the terms and condition of the lease, technology transfer, and promised benefits. Hence members of the local community talked about not fully understanding the process of the negotiated deal, which was compounded by the fact that they were not left with a copy of the negotiated and agreed agreement between the investor and their County Council representatives. To address such information asymmetries, the Constitution and the National Land Policy provide regulatory principles on devolution of power and authority, stakeholder participation, land acquisition compensation and land dispute resolution mechanisms, but 44 percent of community respondents interviewed had little to no knowledge about the new land policy framework. Only 28 percent said that they had reasonable knowledge of the regulatory framework provisions.

**Promised Benefits**

Dominion promised benefits such as jobs for women and youths, increase in food security, electricity power supply, construction of classrooms and health clinics and centres, and the improvement of roads. Several respondents said that a few unskilled jobs on a short term basis were available to a small number of community members relative to the size of the investment project and the surrounding area population of over half a million people. According to a Ministry of Land official, Ogola (interviewed, May 2013), even if the land deal does not fully address the livelihood aspirations of interviewed local community members, it is not accurate
to say that they were not benefiting entirely. He further explained that the local communities’ concerns about Dominion land investment has been due to the nature of its business model adopted so far which excludes the local communities from participating in the production, hence denying them a stake in the area’s future development.

But nonetheless, local communities look towards benefits to accrue to them. Interviews with Ministries of Lands, Agriculture and Labour officials (interviewed, May 2013), confirmed that benefit-sharing mechanisms are not envisaged in the investment proposal but could only be incorporated through a voluntary arrangement by the investor. According to Okuku (interviewed, May 2013), since proposed benefit-sharing mechanisms are not included in the investment proposal, coupled with the lack of a monitoring system to check whether or not the promised benefits are indeed materializing, it was difficult to assume that meaningful benefit-sharing was taking place.

When the Company Manager, Abir (interviewed, May 2013), was asked whether the promised benefits could be achieved without a proper plan for their delivery, he said their Corporate Social Responsibility plan is working:

We have built classrooms, health centres, clinics, roads, drilled water points and bore-holes. We are providing food security for local area, we provide jobs to many especially women. So far no profits nor dividends to Dominion Group of Companies based in Edmond, Oklahoma, United States of America.
Environmental Degradation Concerns
The local communities voiced their main concern about Dominion Farms project as being incompatible with the Yala Swamp conservation, pointing out the negative effects. According to Otieno (interviewed, May 2013), who was married into a family living in Magombe village on the Bondo side of the Yala Swamp, pointed out that:

the Dominion Farms operations have not only degraded the environment, but chemicals used to spray rice paddies are contaminating water and the surrounding ecosystem to the extent of poisoning pasture and water points for domestic animals and poultry.

Managing of Community Concerns
The local community concerns, according to Maganda (interviewed, May 2013), a representative of a women’s development organization called ‘Maendeleo ya Wanawake’ in Bondo, are valid, but she felt that the loss of land would be off-set through the agricultural investment project benefits. However, according to the Bondo County Assembly Representative, Okuku (interviewed, May 2013), “the promises that made the community support the project have turned into the destruction of the Yala Swamp, the source of their livelihoods.” Overall, the local communities’ concerns include the denial of access through a public road linking the Siaya side of the swamp to the Bondo side of the swamp, denial of access to Yala Swamp as a source of water, loss of fishing and farming opportunities, and loss of grazing grounds, all due to the investor’s enclosure fence. According to Obalo (interviewed, May 2013), Yimbo community elder from Kasau Village, on the Bondo side of the Yala Swamp, “life around Yala Swamp is a nightmare; we worked well with Lake Basin Authority, but things are not the same since the entry of Dominion Farms in Yala swamp”. He further explains that the Integrated Development Project which was conceived as a means of increasing the local community production and productivity, creating jobs and improving livelihoods is struggling to ensure that the promised benefits materialize.
According to Dominion Farms Manager, Abir (interviewed, May 2013), the company has delivered on its promise of benefits, including support to the Ratuoro Health Centre where they have constructed a laboratory, given bursaries to local students in secondary schools amounting to KES. 1 million per annum (equivalent to US$ 11,627.9), have repaired roads and improved food security. “Dominion cannot be blamed for the two County Councils’ failure to represent the local communities as trustees over Yala Swamp” (Abir, interviewed, May 2013). Put simply, it is the government and the community representatives as trustees that facilitated Dominion’s large-scale land acquisition in Yala Swamp not as a land grab. Government officials say that the law allows the government to allocate land as a means of promoting agriculture, including food production through large-scale production. Good intentions aside, the failure to involve the local community in a development project of Dominion Farms’ magnitude raises the question of the fate of small-scale producers who are being displaced from a valuable resource for their livelihoods.

Despite the project’s contribution to the transformation of the socio-economic situation of the area of study being long-term, the implications so far point to a project struggling to deliver on its long list of promised benefits. Hence, the community is demanding a guarantee in the sharing of benefits from investments in Yala Swamp. Any efforts without involving a bottom-up approach, with an inclusive agricultural model of investment that includes the investor’s agricultural technology transfer to the local community whose traditional hoe-based farming will continue to co-exist with modern mechanized agriculture as (seen in Figure 15), is detrimental to the local community’s support of the investor’s agricultural venture. Figure 15 shows the contrast between small-scale efforts as compared to the mechanised superior system of the Dominion Farms Ltd.
Figure 15: The contrast between the investor’s agricultural technology and the local community’s hoe-based farming

Source: Author, 2013
The field visit to the Dominion Farms Ltd office provided an opportunity to the Manager to explain the company’s Corporate Social Responsibility initiatives, ranging from the supply of power, construction of classrooms and supply of other educational facilities, construction and equipment of health centres to the improvement of infrastructure. Dominion Farms lack a good public relations and communication strategy to manage the expectations of the local communities. Community representatives, church leaders and politicians pledged and promised a lot of benefits, the investment company is unable to deliver. During the fieldwork, a number of women were sighted and captured on camera (see Figure 1), working in the rice fields as an opportunity to earn a wage as their own income. But even this was criticized by Atieno, an Action Aid Programme Officer who remarked that other local residents at Usingu village on the Bondo side expressly say the unskilled casual jobs are unacceptable and degrading, especially those offered to women, who were tasked with scaring away birds from rice fields. However, the women who earn US$ 2 per day, are fortunately happy to earn their own income.

*Figure 16: Women working in the Dominion Farms rice fields*

*Source: Author, 2013*
Role of Different Actors
With large-scale land acquisitions regulation being a complex matter and a topic of growing concern, it involves a wide range of actors at different levels. The 2013 study found differentiated actors ranging from government officials, investor agents, local communities, local representatives, local politicians and civil society groups at the field site.

The government officials’ compliance with the new regulatory frameworks was limited by uncoordinated administrative and management mandates of different departments all excited by large-scale mechanized agriculture as a means of modernizing agriculture to mind the nitty-gritty provisions of the new land policy, legal and institutional frameworks regulating land ownership and use. To a number of these officials in charge of water, land, environment, fisheries, wildlife and agriculture, the Dominion Farms Ltd kind of project was the most promising example of an agricultural cum-aquaculture venture to be emulated at all costs, according to Ogaola (interviewed, May 2013), a Land Settlement and Adjudication Officer.

The new regulatory framework at Article 63 (4) of the Constitution of Kenya provides that:

Community land shall not be disposed of or otherwise used except in terms of legislation specifying the nature and extent of the rights of members of each community individually and collectively (Republic of Kenya, 2010:46).

Thus, mandating Parliament to enact legislation to give effect to this Article, government officials had very little regard for customary small-scale users of Yala Swamp engaged in subsistence farming, grazing of livestock, fishing and gathering of swamp materials whose production and ways of life were deemed backward and unproductive (Ogola, interviewed, May 2013). In my view, the government officials are yet to come to terms with the new regulatory frameworks that limit their old practices of using the regulation of land ownership
and use as a mechanism of consolidating government control over areas like Yala Swamp where government authority was limited.

The second major actors in Yala Swamp were local communities’ representatives and local area politicians who were not in a hurry to see the compliance with the new regulatory frameworks in favour of communal land users. They saw large-scale farming as a solution to food insecurity, despite the fact that rice produced by the investor as the main crop was not the staple of the local communities. According to Ogola (interviewed, May 2013), a Land Settlement and Adjudication Officer, sacrificing large-scale mechanized agriculture for the sake of complying with the new regulatory frameworks, was not appealing.

The third significant actor with same ingrained perception that large-scale mechanized agriculture is the best way to use the ‘empty and under-utilized’ Yala Swamp, was the investor. To the investor, compliance with the new land policy, legal and institutional regulatory framework was secondary to the investor’s on-going operations especially that it had provisions limiting foreign national landholding to a lease not exceeding 99 years.

The fourth major category of actors were the community members to whom compliance with the new regulatory frameworks was welcome, because they seek to recognize, protect their fallow and grazing lands and fishing grounds which are important to local land use systems and livelihood strategies. According to Okoyo, the Vice-Chairman of the Yimbo Yala Swamp Farmers’ Society (Supporting Affidavit, Case 168 0f 2011), compliance with the new land governance system was a sure safeguard of their smallholder agricultural expansion frontier from the large-scale land acquisitions.

Civil society groups were the other major actors in Yala Swamp who advocated for compliance with the new land policy, legal and institutional frameworks for the regulation of land
ownership and use in Kenya, because local communities’ use of and claim to land stood to be recognized and protected. Owalla (interviewed, May 2013), the Executive Director, Community Initiative Action Group Kenya, argued that even where land is not being used to its full potential by local communities, that does not warrant it be allocated exclusively for mechanized agriculture whose benefits were not materializing as promised to local communities.

The civil society groups were using the new regulatory framework to campaign against the use of global and national governance systems to promote and facilitate large-scale land acquisitions instead of regulating aspects that undermined local land rights. Thus, using the new legal regime, Actionaid International, through its programme on community empowerment, was encouraging the local communities to go to court to seek enforcement of their land rights as provided for in land reform blueprints. Also in compliance with the new regulatory framework, the civil society groups managed to push for negotiation among different actors on how to address the emerging problems facing the Dominion Farms Ltd. Though not working as expected, a few meetings had been held by the time of 2013 study, with the participation of all actors including local communities’ direct representation. The meetings that were chaired by the District Commissioner of Siaya were appreciated as an effort to reduce tension and encourage the resolution of attendant disputes.

The final lesson that the Yala Swamp case offers is that gender-blind regulatory frameworks still perpetuate customary systems that foster the inequitable enjoyment of land rights along status, age and gender lines.
CONCLUSION
This paper examined the large-scale land acquisitions in Kenya by looking at the Dominion Farms Ltd takeover of Yala Swamp. The case study illustrates actual practices of Kenya’s land governance system in terms of how large-scale land acquisitions take shape and the results on the ground. The paper explored changes that have taken place at Yala Swamp from 2003 to 2013 and assessed them in relation to these themes: regulatory frameworks on large-scale land acquisitions, recognition of customary rights to land and associated resource rights, and the role of the state and other non-state actors in large-scale land acquisition. The study on which this paper is based found that the new large-scale phenomenon has a historical dimension in that those engaged in it are unfairly taking over large tracts of land held under customary tenure by creating private property interests just like the English colonizers did in the past.

Alden Wily (2012) argues that there is nothing new about the current land deals rather than ‘a significant surge in the continuing capture of ordinary people’s rights and assets by a capital-led and class-creating social transformation’. Despite times being different today, she points out one common aspect between the current and past large-scale land acquisitions that is the legal logic that ‘renders untitled (but traditionally occupied and used) lands as unowned, and the state, by default, their legal owners’ (Alden Wily, 2012). The paradox is that despite a number of initiatives at national, regional and global levels aimed at regulating large-scale land acquisitions, governments and international development organizations like the World Bank are promoting agricultural development that is resulting in investments and the dispossession of poor people from agriculture without absorbing them in the new agro-industrial enterprises.
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