

World Bank Land Conference 2019

Theme: Land Policy and Political Economy

The Political Economy of Kenya Land Policy Review

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Abstract

The political quest to review the Kenya National Land Policy (KNLP) has been on the cards since it was formulated and endorsed by Parliament on December 3, 2009. This is despite the fact that the policy document was developed in tandem with the Framework and Guidelines on Land Policy in Africa (F&G), which spelled out a comprehensive process of restructuring three major components of the land system, namely its structure of land ownership (property system), land use and production structures, and the support services infrastructure for land delivery. The F & G was declared by the Heads of States and Governments in July 2009 as their commitment to the shared vision, objectives and principles on land policy matters. The Kenya National Land Policy whose principles are anchored in the Constitution of Kenya offers a framework of policies and laws designed to secure rights over land for sustainable growth, investments and the reduction of poverty in line with the Government's development blueprint, Vision 2030. The KNLP was one of the most important policies introduced in Kenya due to sustained pressure from the civil society and it captured all aspects of policies and practices that required reforming. Exploring the KNLP from the political economy theoretical perspective is key because as the policy was being finalized having attracted varied donor support through wide ranging participatory process, the USAID criticized it for its overly agrarian thrust and suggested the need of effecting changes before it was endorsed by the Parliament¹.

Key Words: land policies, political economy, frameworks and guidelines, land governance, Kenya

¹ USAID (2009) *Kenya Land Policy: Analysis and Recommendation*, Nairobi. The publication was produced by the United States Agency for International Development by ARD, Inc. under authorship of John Bruce, an ex-Senior Counsel in the Environmental and Social Sustainable Development and International Law Unit of the Legal Vice-President of the World Bank.

Introduction

The political quest to review the Kenya National Land Policy (KNLP) has been on the cards since it was formulated and endorsed by Parliament on December 3, 2009. This is despite the fact that the policy document was developed in tandem with the African Framework and Guidelines on Land Policy (F&G), which spelled out a comprehensive process of restructuring three major components of the land system, namely the structure of land ownership (property system), the land use and production structures, and the support services infrastructure for land delivery. Important to note is that the KNLP was endorsed after the Africa Heads of States and Governments had declared their commitment to the shared vision, objectives and principles on land policy matters in July 2009. The KNLP like other land policies across Africa was expected to be the blueprint with a set of principles to govern ownership, access, use and management of land resources to enhance productivity and contribution to social, economic, political and environmental development towards inclusive development. Unfortunately, for well over nine years the policy has not been duly implemented, which begs an understanding of how political interests continue to shape the performance of land markets in Kenya, without transformative change. This paper, thus, seeks to explore the historical political events that led to the endorsement of the KNLP and the implications of seeking to review it without implementation.

This paper will use political economy framework to examine political interests that have shaped the land policy trajectory in Kenya. The conditions that gave rise to the national land policy that ranged from corruption, political instability, other natural resources sectoral policies and laws, poor social and economic infrastructure, poor human resource development systems, malfunctioning land and real estate markets. While efforts were being made to put in place binding policy instruments, the global trend was for self-regulating mechanisms governing large-scale land-based investments. This inspired a closer look at the workings of land markets

and government interventions in the land sector deals (Quan, 1997; Toulmin & Quan, 2000; Quan, 2000; Platteau, 2000; Delville, 2000; Okoth-Ogendo, 2000; Cousins, 2000; Palmer, 2000; Wily & Hammond, 2001; Deininger, 2003). It is well established in neoclassical economic theory that, from an efficiency standpoint, land policies, like all forms of government interventions are desirable only on occasions of true market failures and instability (Coase, 1960; Pigou, 1962; Tisdell, 1974). Yet in reality, extensive research (Hogwood & Gunn, 1984; Rose, 1986; Nakamura, 1987; Stone, 1989; Jenkins-Smith, 1990; Lindblom & Woodhouse, 1993; Stone, 1996; Dye, 1998; Sutton, 1999; Parsons, 2003) shows policies, whether in sub-Saharan Africa or in advanced capitalists economies, are determined largely on political and bureaucratic considerations sometimes merely spiced with economic reasons. This implies the need to understand why land policies are political and bureaucratic instruments of control.

The processes by which policies evolve and get reviewed vary markedly between societies and political systems (Cobb & Elder, 1972; Jenkins-Smith, 1990; Rochefort & Cobb, 1994). While it is recognized that the policy processes can be examined from the rationalist and pluralist perspectives, there is no space here to look at both perspectives in an in-depth manner. Thus the pluralist approach is employed solely to examine the land policy process in Kenya as elsewhere in sub-Saharan Africa (for a discussion on the rationalist alternative, see Laswell, 1956; Simon, 1957; Mack, 1971; Jenkins, 1978; Hogwood & Gunn, 1984; Rose, 1986). The pluralists deem public policies as the outcome of free competition between ideas and the interests of many actors (Parsons, 2003). These actors typically comprise public opinion (Hogwood & Gunn, 1984), the media, experts and professionals including think tanks (Parsons, 2003), bureaucrats (Niskanen, 1973), interest groups (Sutton, 1999) and politicians and voters (Downs, 1957). The complexity here stems from the fact that each policy actor tends to hold peculiar ideologies, values and interests that are often in conflict with those of others (Dahl &

Lindblom, 1953). Policy formation accordingly turns on pluralism, mutual adjustment, consensus seeking and incrementalism (Lindblom, 1959; 1980; Nakamura, 1987; Stone, 1989; Sabatier & Jenkins-Smith, 1993; Lindblom et al., 1993). Progress is thus made in the policy process only when there are means of resolving conflicts of values, interests and ideologies between policy actors in a way that makes formation of Pareto efficient policies possible. Public policy studies (McKean, 1965, pp. 496-505; Haveman, 1976, pp. 235-250) suggest that in such a process optimal outcome in policy formation is achievable when all actors involved are fully equipped with relevant knowledge and are willing to negotiate and build consensus. This is the policy that drives the recipient economic system to the point where it is no longer possible to improve the well-being of one individual without making at least another individual worse off.

Kenya like many other African political scene has witnessed the concentration of power in the hands of a few in power in the emergent democratic processes. Suffice to point out in this analysis that, during this period, the exploitative objective still remain the driving force behind the land governance structure in Kenya. The main beneficiaries of land policies just like during the colonial regime are few private land holders with titles. A case in point is the land redistribution policies in Kenya the beneficiaries of the redistribution of lands by the administration in the colonial past were the white minority. Such was the generosity of the redistribution policy that at one time Lord Delamere, a European entrepreneur, owned more than 400,000 hectares of land in Kenya (Kaniki, 1985). As a result of these policies for instance, land ownership structure in Kenya is skewed in favour of few land barons. This has engendered postcolonial clamour for more equitable redistribution of land resources, which are being honoured through policy reforms at great costs (Toulmin and Quan, 2000). In some cases the

clamour is being honoured through forceful takeovers of lands leading to violent clashes, loss of lives, political instability and insecurity.

Justification for the review of the Kenya National Land Policy

Section 10 of the Sessional Paper No. 3 of 2009 on the National Land Policy provides for a review of the policy after 10 years taking into account the social and economic dynamics in the land sector. The ten year period lapses this year, 2019, and therefore the current policy needs to be reviewed. The Constitution of Kenya at Article 67 (2) (b) mandates the National Land Commission (NLC) to recommend a national land policy to the national government, although the principles of the land policy plus the basic substance of the policy were anchored into the Constitution at Chapter Five on Land and Environment.

Despite, the straightforward mandate, the NLC has allowed the political events to shape its performance of its Constitutional functions and consequently the Commission has declined to carry out the full process of formulating the next policy but rather recommend a framework to the National Government to execute its mandate. This NLC position is explained in the concept paper it has prepared and handed over to the Ministry of Lands and Physical Planning to be its understanding of its mandate taking into account the Supreme Court Advisory opinion No. 2 of 2014 paragraph 314. The NLC explanation is a clear pointer to how Kenya National Land Policy review will be determined largely on political considerations spiced with reasons such as Supreme Court Advisory Opinion.

The Kenya National Land Policy Review Process

The proposed KNLP delivery structure as set out in the concept paper by NLC concentrates power in the bureaucratic elite for allegedly effective delivery of the policy. The following recommended structure of the Steering Committee made up of the national government and the county government representatives is a testimony of the political influence:

- Cabinet Secretary, Land and Physical Planning - Chairman
- Chairman, National Land Commission
- Cabinet Secretary, Ministry of Petroleum and Mining,
- Cabinet Secretary, Agriculture, Livestock and Fisheries,
- Cabinet Secretary, Transport and Infrastructure, Housing, Urban Development and Public Works
- Cabinet Secretary, Water and sanitation,
- Cabinet Secretary, Ministry of Environment and Forestry,
- Cabinet Secretary, Ministry of the National Treasury and Planning,
- Cabinet Secretary, Ministry of Devolution and ASALs,
- Chairman, Council of Governors
- Chairman, Thematic Groups
- Coordinator - Secretary

Charged with the following Terms of Reference:

- Direct, facilitate and oversee the NLP process;
- Advise on the preparation of the Cabinet Paper on NLP;
- Guide on publicity and sensitization of the citizens on NLP;
- Ensure NLP is linked to national and other sectoral policies;
- Participate in all the National Forum on NLP;
- Mobilize resources for NLP process; and

- Oversee the management of the available resources for the process.

This means all other stakeholders can only oppose the policy process from outside.

Fifteen years since a participatory land policy process delivered the KNLP the review process envisaged shows there is no improvement in embracing a democratic process. The question to ask is why has the participatory democratic process failed to take root as envisaged? Secondly, why is the policy review process monopolized by political appointees. This remains to be answered and the best framework to explore it is the political economic analysis tool.

The Anticipated Implications

The likely outcome from this kind of land policy review process is an undemocratic policy review environment and the road-map that can hardly guide the delivery of the new National Land Policy, since it does not enjoy the consensus of all stakeholders. What is disquieting about the roadmap below is that it commenced in last quarter of 2018 and up to now towards the end of the first quarter of 2019 it has not been made public.

Road map for the delivery of the New National Land Policy

NO	Activity	Output	Time frame
1.	Developing a Concept Paper	A framework for formulating a National Land Policy for Kenya	Sept – Nov 2018
2.	Recommending the framework to the National Government.	The Concept Paper on the Formulation of the National Land Policy for Kenya	19th December 2018
3.	Inception meeting and formation of the Secretariat	<ul style="list-style-type: none"> • Inception report • Secretariat 	1st week January 2019
4.	Formation of Steering Committee	<ul style="list-style-type: none"> • Secretariat Steering Committee (Inception Report handed over to the Committee) • Work-plans; • Budgets 	1st week February 2019
5.	<ul style="list-style-type: none"> • Formation of Thematic Working Groups • Preparation of reports 	<ul style="list-style-type: none"> • Membership • Reports from Thematic Groups 	Feb - April 2019

6.	National Stakeholder Workshop - Launch	Approved road-map	May 2019
7.	Identification and analysis of key policy issues by Thematic Groups	<ul style="list-style-type: none"> • Issues reports • Consolidated thematic reports 	May - June 2019
8.	Regional workshops (clusters of counties) and select targeted groups (CSOs, Academia, Sector Experts, Government institutions)	Regional workshop report	July 2019
9.	Workshop to validate Regional workshop report	Consolidated regional workshop report	August 2019
10.	Benchmarking	Alignment of policy to best practice	August 2019
11.	National feedback workshop on consolidated reports	1st draft reviewed National Land Policy	October 2019
12.	Engagement with County Governments (land, environment, agriculture, mining, transport, water,)	2nd draft National Land Policy	November 2019
13.	National feedback workshop (including county representation) on draft policy	Final-draft National Land policy	December 2019
14.	Official submission of final draft policy to the Cabinet	Final-draft National Land policy	December 2019
15.	Submission to Parliament	Sessional Paper	March 2020

The National Land Commission indicative Roadmap for delivery of the New KNLP

Conclusion

Having examined the concept paper that provides the direction and guidance to the KNLP review process, there is every doubt that such a process would meet the Constitutional national values set out at Article 10 of the Constitution of Kenya.

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