

LAND RIGHTS AS AN IMPERATIVE FOR SUSTAINABLE LAND AND NATURAL RESOURCES MANAGEMENT IN KENYA.

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by

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ABSTRACT.

During the Colonial administration in Kenya, Land was managed using complex administrative structures, which were generally inefficient and unproductive. Key land reforms were postulated in the land policy developed in 2009, and subsequently in the Kenya Constitution 2010. However, failure to fully implement the intentions of the policy and the Constitution has put the goals of sustainable land and land resources management in jeopardy. A major contributor of this phenomenon has been the political economy in the country. Vested political and economic interests have ensured that radical reforms in the land sector do not see the light of the day.

This situation may be addressed by improved governance structures and more public participation in decision making up to the grassroots. The paper notes that the process of recognizing and accurately recording and managing records on land rights is a key ingredient in the protection of land rights.

Key words: Indigenous people, Land rights, public participation, land reforms, political economy.

1.0. INTRODUCTION AND BACKGROUND.

During the Colonial administration in Kenya, land was managed using complex administrative structures, which were generally inefficient and unproductive. There were a plethora of legal and policy instruments, which were never in harmony, and that made the process of land administration complex and inefficient.. Lack of a land policy in Kenya, further complicated the situation, leading to unsustainable land use.

Following independence, the new leaders entrenched their own interests at the expense of the majority poor Kenyans, by perpetuating the colonial economy, and partially co-opting the leaders of the independent movements. As a result the majority poor remained sidelined, not only within the economy, but also with respect to their land rights. Landlessness then became a thorny issue for the new rulers, prompting them to appease the vocal activists still clamoring for land taken from them by the colonialists

This created the process of agitation for more democratization of the administrative and governance systems by these Governments. This took the form of agitation for more involvement in decision making, more pluralistic systems of governance ushering in multiparty politics. There was less focus on the need for reforms in the governance and management of land and land based resources. The emerging elites controlled land through legislations and retention of colonial administrative structures.

This control caused disparities in access to land and land use between the dominant elites and the general peasantry, with the latter taking very subsidiary user rights. The elite also controlled most of the economic means of production, and land acquisition was just an additional asset for the same. This represents the initiation of disparities in land rights which impacted negatively on access and use of land and land resources for the less privileged.

In Kenya Land was managed for a very long time after independence without any policy. There existed several statutes, which at times conflicted, and rendered general land administration and management inefficient and unproductive (Sessional paper No.3, 2009). This system of administration gave rise to poor recording and insecurity of land rights, land conflicts, environmental degradation, land fragmentation, among other indicators of unsustainable land management (sessional paper, no.3, 2009). The land rights of the minorities, vulnerable and other specialized groups were trampled upon. Public land was vested in the executive, who allotted this with abandon, not sparing even areas such as forests and protected areas (personal observation).

Key land reforms, accompanied with policy, legal and institutional reforms, were postulated in the land policy of 2009; and subsequently in the Kenya Constitution 2010. The Constitution of Kenya, *Chapter Four on the Bill of rights* provides for the rights of all Kenyans, and allows an individual to petition a court of law for violations meted on third people. *Article 40* protects the freedom to own property, including land, in any part of Kenya. *Article 42* protects the rights to access clean and healthy environment. *Article 43* protects the rights to housing and food security. *Article 56* protects the rights of the Minorities and marginalized groups. These are just some of the Constitutional provisions of fundamental human rights in Kenya. The Constitutional reforms included a full chapter on land and environment (*Chapter Five*), and provided for the National Land commission, as an independent institution, far removed from the executive, to carry out a host of land reforms identified in the policy.

A National Land policy, developed as *Sessional paper No.3* of 2009 promised to bring radical reforms in the Land sector. The policy had the stated goal of achieving an “efficient, productive and sustainable

management of land in Kenya. It had streamlined the legal and institutional frameworks, fundamentally by merging the plethora of legislations into just three major land laws: The land Act, 2012, the Land registration Act, 2012 and the National Land Commission Act, 2012. The latter also provided for the creation of the National Land Commission as an independent institution to manage Land and implement the much needed reforms, critical for sustainable management of land.

However, failure to fully implement the intentions of the policy and the Constitution has put the goals of sustainable land and land resources management in jeopardy. A major contributor to this phenomenon has been the political economy in the country: vested political and economic interests have ensured that radical reforms in the land sector do not see the light of the day.

This may be addressed by improved governance structures and more public participation in decision making. Even though the Constitution of Kenya 2010, a radical reform itself, provides for public participation, there are no universally acceptable norms and guidelines on how this ought to be carried out, and what therefore forms the threshold for adequate public participation. This is an imperative if land rights of all Kenyans are to be achieved, especially the land rights of the weaker, vulnerable, minority and marginalized communities and segments of society.

The process of recognizing and accurately recording and keeping records on land rights is a key ingredient in the protection of land rights. A key reform proposed in this area was the creation of a *National Land Information Management System (NLIMS)*, with retrievability and public interface to be managed by the National land Commission. This was aimed enhancing and improving the processes of land administration; adjudication and survey towards efficiency, and transparency. Not only has NLIMS been returned to the Ministry of Lands, an executive arm, but the role of the commission has only been restricted to public Land management in a suit of land amendments carried out in 2016. In order to record and protect Land rights, the processes of land administration, adjudication and survey will need to be improved. Besides, there is a critical need to integrate adequate public participation, inclusive of local leadership in the process for validation purposes.

The Current Land Control Boards (LCBs) in the Counties should be abolished and replaced by the former County Land management Boards (CLMBs) led by a secretary appointed by the National Land Commission. This is because the Land control boards are not transparent, and fully appointed by the executive. Further there is need to devolve the land administration to the lower levels of a clan, under the leadership of a chief. The office of the chief should be regulated, complete with allowances for clan

representatives and disciplinary measures for breaches of protocol. This will make that office accountable, while the allowances will provide the incentives.

The National Land Commission should be revamped in line with desired reforms, and allowed to collect fees and levies for its administrative purposes.

1.2. LAND RIGHTS, LAND USE AND SUSTAINABLE DEVELOPMENT.

Land is a finite resource held as a source of wealth, financial security and livelihoods across generations (Ellis, 1994). In Kenya land is a fundamental source of production, with the majority using it for agricultural productivity. Land tenure is the means by which people get access and use rights of land and natural resources. It logically follows that an inflexible non-transparent, non-efficient tenure regime will certainly compromise the realization of land rights security; access and use, and consequently socio-economic development. To date the Country cannot boast of having come out of the woods on allocation and respect for tenure rights to all categories of people, as postulated in the land policy of 2009 and the Constitution 2010. Today, pastoral lands, community lands and land belonging to the minorities and vulnerable groups are consistently grabbed, in cahoots' with local leaders; in violation of even existing laws such as the Community Land Act, 2016. This is why public participation becomes critical ingredient in land administration and management.

Few studies have been carried out on land tenure and its effects on socioeconomic development in Kenya. Ntiati (2002) carried a study on the socio economic effects of group ranches sub-division in Kajiado and Lokititik Districts and found that sub division of land led to the marginalization of communities in political, social and economic terms. Waiganjo and Ngugi (2001) investigated the effect of the existing land tenure system on land use in Kenya. They found that land tenure types and policies had a direct influence on land use practices. Johnson, 1972, investigated whether different land tenure systems resulted in wealth maximization. He concluded that for a particular land tenure system to result into wealth maximization, there must be a definition and allocation of property rights, and a method of distributing the income earned from land so that this acts as an incentive for economic agents to use land for the most productive use, and minimal restrictions to the sale of land. These studies illustrate links between land tenure, land use and productivity. Sectoral productivity of land is what will enhance socio-economic development, among other factors. Therefore, no sustainable development will be achieved if there are intrinsic challenges with land tenure, land rights and land use. Land tenure must comprehensively capture all land rights for it to promote sustainable use of land and land based natural resources.

The land based natural resources contribute directly to the socio-economic well-being of the people, through the continuous provision of goods and services.

1.3. LAND AND LAND RESOURCE LEGISLATIONS.

The Kenya Constitution 2010 and the Land policy of 2009 have provided in a synergistic basis on which to attain sustainable land and natural resources management.

However, the non-development of relevant legislations to operationalize critical aspects of land and resources management, are likely to deny concerned population their land rights. For instance following the enactment of the Constitution, 2010 and the National Land Commission in 2012, land use laws were supposed to be harmonized to reflect these aspirations (Article, 68b, COK, 2010). This has not been effected todate, with the consequence of compromising the oversight role of the National land Commission to manage public land and other land based resources. This is because it's the implementation of *Article 68b*, which should have legally ingrained the Commission's role into sectoral legislation.

Where there has been progress to revise these legislations, a common bias to revert to the centralized Government control has been observed. The roles of the County Governments in devolved functions in the sector have equally been dimmed.

The revision of the Land laws, 2012 in the format of the "Omnibus Laws", returned critical powers to the executive, which has quite a poor profile in respecting the rights of Land users and overall management of land. The amendments to the *Community Land Act, 2016*, also eroded the centrality of communities in Community land and land resources management and benefit sharing. All these strategic amendments have stifled the pace of the anticipated reforms in the land sector, with consequences on land access, decision making and respect for land rights.

Land and Land resources in Africa, including Kenya, are increasingly governed by modern systems and less by customary systems. Unfortunately changing land use and land ownership patterns have not been accompanied by policies, legal and institutional reforms. There has been widespread wave of land reforms associated with political and social reforms in Africa following more democratization. There is need to ensure that appropriate land rights, complete with reformed legal and institutional frameworks accompany these processes.

Improved legislation and policies alone may not achieve this, as has been demonstrated by the sidelining, at times sabotage of the Land policy of 2009 and the Kenya Constitution, 2010, by various interest groups.. There is more need for public participation frameworks through various modes of participatory management to fix this malaise. Worse, at times, even passage of relevant legislations are ignored or slowed by parliament, notwithstanding specific directions in the Constitution that they be passed. For instance, the Kenyan parliament has harmonized the Land laws, but failed to do the same for Land use laws (*Article, 68b*), which patains to natural resources. This has thwarted controls and regulations on natural resources management and exploitation. Without significant controls in resource management, well connected private individuals will continue to exploit natural resources to their own benefits, notwithstanding a clear recognition in the Constitution that resources belong to all the peoples of Kenya, Clearly the land rights of a wide section of populations will be sidelined, with the minority, vulnerable communities, suffering more.

Poor tenure regimes will enhance unsustainable land use practices and poverty thereby compromising sustainable land and natural resources management, including the sustainable development goals (SDGs). There is therefore, need to protect the weaker sections through effective community land regulations and integration of indigenous knowledge in the management of community lands. The Kenya Constitution provides the protection of special categories land rights, such as indigenous and pastoral communities.

But unless these rights find location in revised policies, legislations and land regulations, followed by participation strategies, implementation will remain distant; notwithstanding the recognition of these rights in several international statues, such as the UN charter, ILO laws, these rights remain unrealized.

1.4. LAND TENURE, LAND RIGHTS AND LAND USE

Land is a finite resource held as a source of wealth, financial security and livelihoods across generations (Ellis, 1994). There is an intrinsic linkage between land tenure, land rights and land use. Land tenure is the means by which people get access and user rights of land and natural resources. In Kenya land is a fundamental source of production, with the majority using it for agricultural productivity. It logically follows that an inflexible non-transparent, non-efficient tenure regime will certainly compromise the realization of land rights security; access and use, for socio-economic development. This will also promote unsustainable land use practices.

Currently Kenya has three types of land tenure regimes: public, private and community land tenure regimes. These tenure regimes, as the only administrative structures for ensuring land tenure rights within Kenya are clearly inadequate to provide for that. Improved legislation and policies alone may not adequately secure the spectrum of land rights. The private land ownership model is specifically put to question in the Kenyan context, as it actually dislocates the realization of land rights to the economically weaker segments of society. It commoditizes land in contradiction to the aspirations of its own land policy direction. Nonetheless, the Constitution protects private ownership. The same constitution protects the interests of the Minorities and vulnerable groups. Thus the stated tenure regimes do not capture the full intentions of the land policy and legal documents. However, mixes of tenure regimes may be more appropriate to cover for various land and resources rights, e.g, the carbon credit rights and other rights under the realm of “bundle of Rights”. Further, there is more need for new public participation frameworks through various modes of participatory management to fix this malaise

1.4.1. LAND RIGHTS OF INDIGENOUS COMMUNITIES.

The land rights of the indigenous communities such as the *Ogieks* need to find location in revised sectoral policies, legislations and land regulations. Notwithstanding the recognition of these rights in several local and international statutes, such as the UN charter, ILO laws, these rights remain unrealized because they have not been mainstreamed into the sectoral legislations in Kenya.

The idea that local people do have a right to use, own and control developments on their land has created the issue that land rights are indeed human rights. Land rights do not just impact on individual property rights, but are central to social justice.

Indigenous people have argued that their culture will disappear without strong protection to their land rights. Indigenous communities argue that territories are not just their source of livelihoods, but also the source of their spiritual, cultural and social identity. In Kenya, the push by the indigenous *Ogieks* to be allowed to continue staying within protected forests such as *Mau* forest, *Mt. Elgon* Forests and *Embobut* forest has caused intense debate and even a successful litigation in the African Court of Justice for the recognition of their land rights. However, currently, implementation of such court rulings have got into conflicts with the goals of current forest legislations (Forest Management and Conservation Act, 2007). The said forest Act, is in conflict with these rights because of the anti-conservation land use practices such as cultivation and charcoal burning which are anti- conservationist. Besides, the populations of some

of such indigenous communities, has since increased, making their land use activities much more negative impacts.

Recent figures indicate that nearly half of global rural populations do not enjoy security of tenure in land, and that this is a major cause of poverty (United Nations Human Settlements Program, 2008). The idea that local people do have a right to use, own and control developments on their land has created the issue that land rights are indeed human rights.

Its suggested in this paper that improved governance structures, promotion of local level land use planning; a restructuring of the political economy, public participation in decision making, change/modifications of tenure regimes, issues of benefit sharing from resource exploitation as rights to Land, control of Land markets to prevent Land speculation and hoarding, and formulation of innovative Land taxation regimes/other incentives to regulate land use; are some of the ingredients necessary to safeguard the land rights of the different segments of the Kenyan society, and ensure equity in ownership and access.

1.5. LAND AS A HUMAN RIGHTS ISSUE.

Land rights are basically human rights issue. These rights broadly refer to rights to use, control, and transfer a parcel of land. They include rights to: occupy, enjoy and use land and resources; restrict or exclude others from land; transfer, sell, purchase, grant or loan; inherit and bequeath; develop or improve; rent or sublet; and benefit from improved land values or rental income (FAO,2002).

Internationally, no treaty or declaration specifically refers to a human right to land. In fact, strictly speaking there is no human right to land under international law. But strictly, land rights are human rights issues. Land rights constitute the basis for access to food, housing and development, and without access to land many peoples find themselves in a situation of great economic insecurity. Therefore Control of rights to land has historically been an instrument of oppression and colonization. An indeed land right was used as a center piece of apartheid South Africa.

In the worst situations, stratification in land access has been an ingredient in violent conflicts. The situation in the Occupied Palestinian Territories and Israel is a vivid illustration on the use of land rights as a means of oppression (Husseini; McKay, 2003).

Land rights play a catalytic role in economic growth, social development, and poverty alleviation (International Land Coalition, 2003). Recent figures indicate that nearly half of global rural populations do not enjoy security of tenure in land, and that this is a major cause of poverty (United Nations Human Settlements Program, 2008). Land reforms are usually necessary to deal with issues as poverty, equity, restitution for past expropriation, investment, and innovation in agriculture or sustainability.

Arable land is becoming increasingly valuable due to greater investor interests, population growth, migration and climate change. These interests also include large scale land acquisition, which has been labelled 'land grabbing'. This has raised the issue of the rights of the local population to access land for food security. The recent focus on climate change-offsetting measures, which has generated the acquisition of large tracts of lands to plant palm oil or other sources of bio-fuels, is likewise creating a pattern of acquisition of land for economic gains to the detriment of the local populations who are losing their lands to international investors. The idea that local people do have a right to use, own and control developments on their land has created the issue that land rights are indeed human rights. Land rights do not just impact on individual property rights, but are central to social justice. Land rights have been recognized within the context of gender equality. Women land rights are often dependent on marital status, which automatically causes bias and discrimination.

The Constitution of Kenya has recognized the right of women to own parental land (ref...). However, implementation is proving a challenge as married women also inherit the husbands land, and the proposal goes against the cultural grain in some communities in Kenya. Kenya has been able to develop and sell carbon credits from Kasigau Hills Forests in Taita Taveta, while several international firms have been looking for large tracks of land for investment purposes. Without clear tenure security for the local populations, no equity is realized from such resource exploitations.

Where does this leave the purity of private land tenure system, especially in Kenya where few individuals own large tracks of Land? Land represents not only a very valuable economic asset but is also a source of identity and culture. It therefore demands that regulations and policies on tenure be carefully crafted so as not to jeopardize the land rights of certain segments of the community. Clearly private land tenure system, compromises the land rights, access to land, and use by the weaker sections of the community.

Indeed the Kenya land policy philosophy (section 29) states that "land is not just a commodity to be traded in the market, but has multiple values which should be protected" for equitable use by generations. But this did not find any location in the Land laws, 2012, nether have the markets been managed or regulated in any objective manner to realize equitable access and use. This represents another case of elite

capture towards land reforms. The latter then becomes an impediment to the realization of equity in land rights. A national discourse is called for to debate these issues, and chart a way forward.

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The right to food has been recognized by international human rights law. A human rights approach to land rights is critical to addressing pre-conflict, conflict and post-conflicts situations. Whereas land has been exclusively commodified as a commercialized good, a human rights approach to land rights brings into sharp focus to the value of land as a social and Cultural asset, by suggesting that it is a fundamental right.

6.0. DISCUSSION AND CONCLUSIONS.

Land rights affect access, use and productivity of land by any particular community or category of persons. Political reforms, aimed at social-economic transformations, should also address the institutional, policy and legal dimensions of land rights. Equally land rights, though not explicitly covered within the realms of International human rights Law, has various dimensions of human rights and are indeed recognized as fundamental human rights. The violation, and non-protection of which, lead to discrimination in access and use of land, and consequently on sustainable development.

Even though Kenya has developed a progressive land policy (2009), legislations and Constitution (2010), there is very little to show for land reforms due to several factors such as lack of political will and elite capture. In order to promote sustainable development, and efficient use of land, improved land governance accompanied with legal and institutional reforms are required. But these in themselves, will not suffice to achieve the desired guaranteed land rights for all; because these can always be sabotaged or ignored by vested interests. In order to address the negative factor of interest groups, participatory governance approaches involving local leaders, populations in land administration will be inevitable. This requires unanimity on agreed public participation thresholds. The Current Land Control Boards (LCBs) in the Counties should be abolished and replaced by the former County Land management Boards (CLMBs) led by a secretary appointed by the National Land Commission. This is because the Land control boards are not transparent, and fully appointed by the executive. Further there is need to devolve the land administration to the lower levels of a clan, under the leadership of a chief. The office of the chief should be regulated, complete with allowances for clan representatives and disciplinary measures for breaches of protocol. This will make that office accountable, while the allowances will provide the incentives. In fact, the chiefs office should be the strongest in the land administration chain. They can keep their own Land registry to track land transactions in their areas of jurisdiction.

The National Land Commission should be revamped in line with desired reforms, and allowed to collect fees and levies for its administrative purposes.

Further, there are emerging frontiers of land use, such as the trading in carbon credits based on land and land resources, and large scale land acquisitions that will require more transformative applications of property law or other laws, in order to secure the rights of the affected entities.

Recent figures indicate that nearly half of global rural populations do not enjoy security of tenure in land, and that this is a major cause of poverty (United Nations Human Settlements Programme, 2008). The idea that local people do have a right to use, own and control developments on their land has created the issue that land rights are indeed human rights.

The Current three tier land tenure regime in Kenya to regulate land administration and management are clearly inadequate as they fail to address the bundle of rights pertaining to land and land resources. Other

models which accommodate more rights should be explored. The private land tenure model, in its absolute provisions, is discriminatory as it compromises the land rights of the weaker sections of society. It needs to be suitably constrained through various modes of regulations, in order to ensure that it does not become exploitative. Such regulations must also focus on containing the land markets to avoid unrealistic price hikes of land.

This may be addressed by improved governance structures and more public participation in decision making. Even though the Constitution of Kenya 2010, a radical reform in totality itself, provides for public participation, there are no universally acceptable norms and guidelines on how this ought to be carried out, and what therefore forms the threshold for adequate public participation. This is an imperative if land rights of all Kenyans are to be achieved, especially the land rights of the weaker, vulnerable, and marginalized communities and segments of society.

Regarding the indigenous communities, the same should also consider the overall functions of forests to humankind in the provision of goods and services, and tailor their land use practices to focus on conservation of these forests. The land rights of such communities must be addressed in policy and legal documents in the respective sectors, and implemented in a participatory manner, in order to take care of their unique interests.

In conclusion, it can be said that the recognition of land rights of the entire community, through comprehensive tenure regimes, will promote sustainable and productive use of land, enhance productivity in the sector and help achieve some of the goals of sustainable development. Necessary policy, legal and institutional reforms must accompany such initiatives. Proper and simple conflict mechanisms must be provided in the process of land administration.

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