



14TH LAND WATCH NOTE

INCONSISTENCIES IN THE NEW LAND LAWS CONTRIBUTING TO LAND SECTOR WARS BETWEEN LANDS MINISTRY AND LAND COMMISSION

Since the assumption of office by the National Land Commission, there have been consistent differences over their mandate and that of the Lands Ministry. These differences have slowed down some of the expected land sector programmes and undermined service delivery at national and county level.

There is therefore need for interventions to bring these turf wars to an end at an early moment lest services to Kenyans by the two institutions continue to suffer. A careful look at the new land laws, and in particular the Land Registration Act which spells the roles of each of the institutions on matters of land registries and land registration over which there has been the most visible wars, reflect obvious conflicts in some of the clauses. The National Land Commission Act, the Land Act and the Executive Order No 2 on the Organization of Government, looked at against the Constitution, also contain inconsistencies that call for attention. Until the conflicts in the laws and the Executive order are attended to, the current differences between the Land Commission and the Lands Ministry are unlikely to end. The pertinent provisions in the laws and the Executive Order are reflected in the matrix below will to help to illustrate:-

Art 67 (2): The functions of the National Land Commission are

- (a) To manage land on behalf of the national and county governments
- (b) To recommend a national land policy to the national government
- (c) To advise the national government on a comprehensive programme for the registration of title in land throughout Kenya

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Role of Land Commission	Role of Cabinet Secretary, Public Service Commission and Land Registrar
<ul style="list-style-type: none"> • <i>On land registration units</i> <p>6. (1) For the purposes of this Act, <u>the Commission in consultation with national and county governments may, by order in the Gazette, constitute an area or areas of land to be a land registration unit and may at any time vary the limits of any such units</u></p> <ul style="list-style-type: none"> • <i>On documents to be maintained in a land registry</i> <p>7. (1) There shall be maintained, in each registration unit, a land registry in which there shall be kept— (a) a land register, in the form to be determined by the Commission (d) any plans which shall, after a date appointed by the Commission, be geo-referenced</p> <ul style="list-style-type: none"> • <i>On cadastral maps</i> <p>17. (3) The office or authority responsible for the survey of land shall submit to the Commission a copy of the cadastral maps <u>and the Commission shall be a depository of the maps.</u></p> <ul style="list-style-type: none"> • <i>On land rent</i> <p>56 (4) The Registrar shall not register a charge, unless a land rent clearance certificate and the consent to charge, <u>certifying that no rent is owing to the Commission</u> in respect of the land, or that the land is freehold, is produced to him or her</p>	<ul style="list-style-type: none"> • <i>On establishment of land registries</i> <p>7 (3) <u>In establishing the land registry, the Public Service Commission and Cabinet Secretary, shall be guided by the principles of devolution set out in Articles 174 and 175 of the Constitution.</u></p> <ul style="list-style-type: none"> • <i>On appointment of Chief Land Registrar and other land registry officers</i> <p>12. (1) There shall be <u>appointed by the Public Service Commission, a Chief Land Registrar, and such other officers who shall be public officers</u> as may be considered necessary for the effective discharge of functions under this Act. (2) Any officer appointed under this Act shall be competitively recruited and vetted by the Public Service Commission.</p> <ul style="list-style-type: none"> • <i>On regulations governing registration of instruments presented for registration</i> <p>36 (4) Subject to Article 67(2)(c) of the Constitution, <u>the Cabinet Secretary shall make regulations prescribing the time within which instruments presented for registration must be registered and providing for the supervision of the registration process to achieve the objectives of efficiency, transparency and good governance.</u></p> <ul style="list-style-type: none"> • <i>On instruments executed outside the country</i>

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On guidelines for rectifying the register

79. (1) The Registrar may rectify the register or any instrument presented for registration in the following cases—

(2) Notwithstanding subsection (1), the Registrar may rectify or direct the rectification of a register or document where the document in question has been obtained by fraud.

(4) The Commission may by regulations prescribe the guidelines that the Registrar shall follow before rectifying or directing rectification under subsection (2) and without prejudice to the generality of the foregoing, the regulations may provide for—

- *On regulations by the cabinet secretary*

110 (2) In making the regulations, rules or prescribing any matters required under this Act, the Cabinet Secretary shall take into account the advice of the Commission as required under the Constitution and such regulations or rules shall be tabled before Parliament for approval

44 (4) An instrument executed out of Kenya shall not be registered unless it has endorsed on it or attached to it a certificate in the prescribed form completed—

(b) if the instrument was executed in a foreign country outside the Commonwealth, by any other person or class of persons as the Cabinet Secretary may prescribe.

- *On documents needed to accompany transfer instruments*

44 (5) The transferee shall in addition to executing the instrument, attach the following—

(a) such other identification documents as the Cabinet Secretary may prescribe.

- *On recovery of money*

84. If any funds are paid by way of indemnity under this Part, the Cabinet Secretary shall be entitled to recover by suit or otherwise the amount so paid from any person who has caused or substantially contributed to the loss by fraud or negligence, and to enforce any express or implied agreement or other right which the person who has been indemnified would have been entitled to enforce in relation to the matter in respect of which the indemnity has been paid.

- *On rates and fees payable in land registries*

102. (1) The Cabinet Secretary may prescribe the rates of fees payable for any matters in respect of which, by this Act,

prescribed fees are required to be paid by any person and shall keep such fees under continuous review.

- *On regulations to operate the Act*

108. Until the Cabinet Secretary makes the regulations contemplated under section 110, any rules, or other administrative acts made, given, issued or undertaken before the commencement of this Act under any of the Acts of Parliament repealed by this Act or any other law, shall continue in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring them into conformity with this Act

110. (1) The Cabinet Secretary shall make regulations prescribing anything which may be prescribed under this Act generally and for the better carrying into effect the purposes and provisions of this Act and without prejudice to the generality of the foregoing, such regulations may prescribe—

(a) the forms to be used in connection with this Act;

(b) (b) the manner and form of the registries of land, the procedures to be followed by the registries and hours they are to be open for business;

(c) (c) procedures for the transfer of land from one category to another;

(d) (d) particulars and format to be contained in a register or other

document required to be kept under this Act; and

(e) (e) any other matter for the better carrying into effect of the provisions of this Act.

(2) In making the regulations, rules or prescribing any matters required under this Act, the Cabinet Secretary shall take into account the advice of the Commission as required under the Constitution and such regulations or rules shall be tabled before Parliament for approval

• *On maintenance of the land register*

9. (1) The Registrar shall maintain the register and any document required to be kept under this Act in a secure, accessible and reliable format including—

(a) publications, or any matter written, expressed, or inscribed on any substance by means of letters, figures or marks, or by more than one of those means, that may be used for the purpose of recording that matter;

(b) electronic files; and

(c) an integrated land resource register.

(2) The register shall contain the following particulars—

(a) name, personal identification number, national identity card number, and address of the proprietor;

(b) in the case of a body corporate, name, postal and physical

address, certified copy of certificate of incorporation, personal identification numbers and passport size photographs of persons authorized and where necessary attesting the affixing of the common seal;

(c) names and addresses of the previous proprietors;

(d) size, location, user and reference number of the parcel; and

(e) any other particulars as the Registrar may, from time to time, determine.

- *On the general powers of Land Registrars.*

14. The Chief Land Registrar, County Land Registrars or any other land registrars may, in addition to the powers conferred on the office of the Registrar by this Act—

(a) require any person to produce any instrument, certificate or other document or plan relating to the land, lease or charge in question, and that person shall produce the same;

(b) summon any person to appear and give any information or explanation in respect to land, a lease, charge, instrument, certificate, document or plan relating to the land, lease or charge in question, and that person shall appear and give the information or explanation;

(c) refuse to proceed with any registration if any instrument, certificate or other document, plan, information or explanation required to be produced or given is withheld or any act required to be performed under this Act is not performed;

(d) cause oaths to be administered or declarations taken and may require that any proceedings, information or explanation affecting registration shall be verified on oath or by statutory declaration; and

(e) order that the costs, charges and expenses as prescribed under this Act, incurred by the office or by any person in connection with any investigation or hearing held by the Registrar for the purposes of this Act shall be borne and paid by such persons and in such proportions as the Registrar may think fit.

- *On issuance of Certificate of title and Certificate of lease.*

30. (1) The Registrar may, if requested by a proprietor of land or a lease where no certificate of title or certificate of lease has been issued, issue to him or her a certificate of title or a certificate of lease, as the case may be, in the prescribed form showing, if so required by the proprietor, all subsisting entries in the register affecting that land or lease.

On lost or destroyed certificates and registers

33. (1) Where a certificate of title or certificate of lease is lost or destroyed, the proprietor may apply to the Registrar for the issue of a duplicate certificate of title or certificate of lease, and shall produce evidence to satisfy the Registrar of the loss or destruction of the previous certificate of title or certificate of lease.

(2) The Registrar shall require a statutory declaration to be made by all the registered proprietors, and in the case of a company, the

director, where property has been charged, the chargee that the certificate of title or a certificate of lease has been lost or destroyed.

(3) If the Registrar is satisfied with the evidence proving the destruction or loss of the certificate of title or certificate of lease, and after the publication of such notice in the Gazette and in any two local newspapers of nationwide circulation, the Registrar may issue a duplicate certificate of title or certificate of lease upon the expiry of sixty days from the date of publication in the Gazette or circulation of such newspapers; whichever is first.

(4) If a lost certificate of title or certificate of lease is found, it shall be delivered to the Registrar for cancellation.

(5) The Registrar shall have powers to reconstruct any lost or destroyed land register after making such enquiries as may be necessary and after giving due notice of sixty days in the Gazette.

- *On searches and copies.*

34. A person who requires an official search in respect of any parcel, shall be entitled to receive particulars of the subsisting entries in the register, certified copies of any document, the cadastral map, or plan filed in the registry upon payment of the prescribed fee.

- *On evidence in proceedings*

35. (1) Every document purporting to be signed by a Registrar shall, in all proceedings, be presumed to have been so signed unless the contrary is proved.

(2) Every copy of or extract from a document certified by the

Registrar to be a true copy or extract shall, in all proceedings, be received as prima facie evidence of the contents of the document.

(3) Every entry or note in or on any register, cadastral map or filed plan shall be received in all proceedings as conclusive evidence of the matter or transaction that it records.

The National Land Commission Act

- *On NLC managing land*

5(1) Pursuant to Article 67(2) of the Constitution, the functions of the Commission shall be:-

- (a) to manage public land on behalf of the national and county governments.

5 (2) In addition to the functions set out in subsection (1), the commission shall, in accordance with Article 67 (3) of the Constitution:-

- (b) monitor the registration of all rights and interests in land

<p>5 (3) Despite the provisions of this section, the Commission shall ensure that all unregistered land is registered within ten years from the commencement of this Act.</p>	
<h3>The Land Act</h3>	
<ul style="list-style-type: none"> <i>On Settlement Schemes</i> <p>134 (1) The Commission shall, on behalf of the national and county governments, implement settlement programmes to provide access to land for shelter and livelihood</p> <ul style="list-style-type: none"> <i>On Land Settlement Fund</i> <p>135 (1) There is established a Fund to be known as the Land Settlement Fund which shall be administered by the National Land Commission</p>	<ul style="list-style-type: none"> <i>On making regulations</i> <p>160 (1) The Commission or the Cabinet Secretary, where applicable, make regulations prescribing anything which may be prescribed under this Act and generally for the better carrying into effect of the purposes and provisions of this Act.....</p> <ul style="list-style-type: none"> <i>On the existing Land Adjudication and Land Consolidation Acts</i> <p>No repeal or amendments were made!</p>
<ul style="list-style-type: none"> 	<p><i>On functions land management and administration institutions</i></p> <p>6. The Cabinet Secretary shall, in relation to the management and administration of land:-</p> <ul style="list-style-type: none"> (a) develop policies on land, upon the recommendation of the Commission (b) facilitate the implementation of land policy and reforms (c) coordinate the management of the National Spatial Data Infrastructure

- (d) coordinate the formulation of standards of service in the land sector
- (e) regulate service providers and professionals, including physical planners, surveyors, valuers, estate agents, and other land related professionals, to ensure quality control; and
- (f) monitor and evaluate land sector performance

According to the Executive Order No 2 of May 2013, the Cabinet Secretary in charge of Land is in charge of:-

- Land Policy Management
- Physical Planning
- Land Transactions
- Survey & Mapping
- Land Adjudication
- Settlement Matters
- Rural Settlement Planning, i.e. eco-villages
- Land Reclamation
- National Spatial Data Infrastructure
- Land Registration
- Land and Property Valuation Services
- Administration of public land as designated by the Constitution
- Land Information System

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Important notes to the above matrix on the key areas of concern and conflict

1. As is highlighted in the text box above, the constitution in its Article 67 (2) (a) requires the land commission to manage public land on behalf of the national and county government, it is expected that all its policy decisions and any allocation or renewal of leases to public land should be shared and done in consultation with the national and county governments respectively.
2. As highlighted in the text box above, the constitution in its Article 67 (2) (c) requires the land commission to advise the national government on a comprehensive programme for the registration of title in land throughout Kenya, sections of law that appear to give it or imply its direct role in the registration of title to land should come under review.
3. As seen in the matrix above, Section 134 (1) (highlighted) of the Land Act requires the Land Commission to implement settlement programmes on behalf of the national and county governments. Since the Land Adjudication Act (Cap 284) and the Land Consolidation Act (Cap 283) which allow the Ministry of Lands to drive adjudication and settlement programmes in Kenya were not repealed by the Land Act, this role cannot then be effectively undertaken by the Land Commission without conflict with the Ministry.
4. From the matrix, Section 6 and 7 of the Land Registration Act (highlighted) gives the Land Commission powers to determine the form of register to be kept in a land registry and powers to appoint the date for geo-referencing any plans to be kept in land registries. But Section 110 of the same Act gives the Lands Cabinet Secretary the powers to make regulations to determine the kind of forms, the manner and form of registries, the procedures and hours of opening for business to be observed in land registries. These two are in direct contravention and are recipe for conflict.
5. From the matrix, Section 5 (2) (b) (highlighted) of the National Land Commission Act gives the Commission the power to monitor the registration of all rights and interests in land while Section 5 (3) (highlighted) of the same Act requires the Commission to ensure that all unregistered land is registered within 10 years from the date of commencement. This appears to give the Commission powers to monitor registration on one hand yet expecting it to have a direct role in implementing which is inconsistent.
6. From the matrix, one easily notices that the Section 7 (3) (highlighted) of the Land Registration Act vests the power to establish land registries on the Public Service Commission and the Cabinet Secretary.
7. From the matrix, Section 12 (9) of the Land Registration Act vests powers to appoint the Chief Land Registrar and other officers of land registries on the Public Service Commission.
8. From the matrix, the Land Registration Act vests the power to maintain the land register (Sect 9), to compel a person to produce instruments or any certificates in respect to land, summon persons, administer oaths and make orders on costs (Sect 14) on the land registrar. The Act also empowers the land registrar to issue certificates of title or lease (Sect 30 (1),

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replace lost certificates of title or lease (Sect 33) and provide extracts of certified documents in all proceedings (Sect 35). These powers therefore clarify that all certificates of title and leases shall be registered and issued by land registrars working under the Chief Land Registrar in land registries throughout the country.

The Institute therefore recommends:-

- That Parliament undertakes a thorough audit of the new land laws, the National Land Commission Act, the Land Act and the Land Registration Act.
- That parliament effects amendments to ensure that the roles and functions given to the Land Commission and the Lands Ministry under each of the laws are consistent with the constitution. The Executive Order No 2 of 2013 should also be in alignment.
- That the respective clauses in each of the laws are consistent and not in conflict and necessary amendments/repeals of other laws are effected.
- Regulations are formulated soonest to govern the smooth operation of each of the laws

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