



26th May 2015

17TH LDGI LAND WATCH NOTE

LAND REFORMS AFTER 5 YEARS OF IMPLEMENTATION

Background

Following the promulgation of a new constitution on 27th August 2010, the country embarked on fundamental legal and institutional reforms based on its Chapter Five on Land and Environment. The Fifth Schedule provides guiding timelines for the enactment enabling legislation. Time for each of the pieces of legislation identified in the Schedule began to run on 27th August 2010. Kenya had earlier in December 2009 obtained a national land policy whose principles informed the contents of the chapter on Land and Environment of the new constitution.

While the land policy and the constitution provide broad statements of intent, it is specific legislation that enables implementation of the provisions that speak to specific policy and constitutional intent. Legislation should be well done to accommodate the policy and constitutional aspirations of the people of Kenya. Importantly, in a situation like Kenya's where there is both a policy and a constitution, in the event that there is conflict between the two, the constitution holds supreme and informs legislation. Each of the land laws enacted so far provides for the development of regulations to clarify some of the actions, procedures and practices prescribed therein. But these have not yet been enacted. Without such regulations, the implementation of these laws remains subjective, making application difficult and haphazard.

Inconsistencies and gaps in legislation usually play out badly during implementation. They can be reason for conflicts, inaction, delays or inappropriate implementation. Kenya is in the process of documenting its implementation experiences and challenges. A major one that continues to play out in public is the dysfunction between the residual Lands Ministry which used to allocate and manage public land and the newly established land commission, now charged with the duty of managing public land on behalf of the national and county



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governments. Transaction uncertainties and delays are also playing out. These are some of the obvious. A thorough implementation audit would provide more comprehensive information. It is expected that future legislative efforts in the country will address the conflicts and gaps hitherto noted through appropriate amendments of the pertinent laws. It is also expected that Parliament will move with speed to enact the regulations to operate the land laws so far enacted.

I. Progress made on enabling Legislation

The key legislation enacted within the last 5 years include:-

1. The Environment and Land Court Act, 2011 (*provides for resolution of disputes*)
2. The Land Act, 2012 (*clarifies rights, obligations and transactions on public and private land*)
3. The Land Registration Act, 2012 (*provides for registration of titles to land*)
4. The National Land Commission Act, 2012 (*provides for the functions and of the national land commission*)
5. The Matrimonial Property Act, 2013 (*provides for rights and responsibilities of spouses in relation to matrimonial property*)

Legislation governed by constitutional timelines under the Fifth Schedule, but pending enactment, which must be delivered within the next three (3) months lest Parliament will be in breach of the constitution, include:-

1. The Community Land Bill, 2014 (Article 63)
2. Agreements on Natural Resources (Ratification by Parliament) Bill, 2015 (Article 71)
3. The Mining Bill, 2014 (Article 71)
4. The Physical Planning Bill, 2014 (Article 66)

Other closely related legislation pending enactment include:-

1. The Energy Bill, 2015
2. The Petroleum (Exploration, Development and Production) Bill, 2015
3. The Natural Resources (Benefit Sharing) Bill, 2014
4. The Evictions and Settlement Bill, 2014
5. The Prevention and Control of Marine Pollution, 2014



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It should be noted that the revision of sectoral land use laws, which calls for the alignment of existing legislation with the constitutional land policy principles as provided for in Article 68 (b), is yet to be done. The legal framework to support the resolution of historical land injustices in Kenya, which is supposed to have been completed within two (2) years of the coming into office of the land commission in accordance with Section 15 of the National Land Commission Act, is also yet to be done. This was due by March 2015 since the commission assumed office in late February 2013.

II. Progress made on sectoral programmes

Some of the sectoral programmes, though implemented in an adhoc manner within the last five years, are in conformity with the provisions and principles of the land policy and the constitution. These include:-

- Establishment of Environment and Land Courts for the resolution of disputes on environment and land around the country in compliance with Articles 162 (2)(b) and 60 (1)(g) of the constitution.
- Some components of computerization such as digitizing, scanning of land records and the provision of land rates and searches which are part of the principle of providing transparent and cost effective administration of land in accordance with Article 60 (1)(d). The ongoing audit and re-organization of land registries under the Ministry of Lands is also in line with this principle.
- Titling programmes, in accordance with the principle of securing tenure under Article 60 (1)(c), have also been moved in parts of Coast, Eastern and Rift Valley. A Titling center to expedite issuance of title deeds has also been established.
- The recovery of irregularly/illegally allocated public land by the national land commission in compliance with Articles 67 (2)(a) and 68 (c)(v). This applied to parts of Lamu County and continues to apply to allocations made in various urban centers in Kenya but with Nairobi City County coming under greatest focus.

III. Recommendations

The Institute therefore recommends as follows:-

1. That Parliament (The National Assembly and The Senate) makes efforts to conclude the pending Community Land Bill, Agreements on Natural Resources (Ratification by Parliament) Bill, the Mining Bill and the Physical Planning Bill

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which are bound by the five year constitutional timeline which comes to an end on 27th August, 2015, three months from now.

2. That Parliament enacts regulations to the Land Act, the Land Registration Act and the National Land Commission Act, which continue to be applied in the absence of guiding regulations.
3. That Parliament enacts amendments to address the inconsistencies and conflicts noted between the Land Act, the Land Registration Act and the National Land Commission Act and the non-alignment of some clauses in these laws with the constitution.
4. That Parliament obliges the relevant Ministries and the National Land Commission to expedite the development of other related legislation for enactment.
5. That the Lands Ministry and the Land Commission develop an integrated and clear implementation road map/plan of Kenya's land reforms so that all programmes to be implemented by any of the two are clear and sustainable for use in planning by implementing offices, budgeting offices, stakeholders and Parliament.

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