

**ASSESSING THE EFFECTIVENESS OF THE NATIONAL LAND  
COMMISSION IN ADDRESSING IRREGULAR AND ILLEGAL  
ALLOCATION OF LAND IN KENYA**

**Thesis Submitted in Partial Fulfillment of the Requirements for the Award of the Degree of  
Master of Laws (LL.M) of the University of Nairobi.**

**BY: BETTY ATIENO**

**G62/67803/2013**

**SUPERVISOR: JOY K. ASIEMA**

**NOVEMBER, 2016**

**DECLARATION**

I **BETTY ATIENO** do hereby declare that this thesis is my original work and has not been presented for the award of a degree or any other award in any other University. Where works by other people have been used, references have been provided.

**Name: Betty Atieno                      Registration Number: G62/67803/2013**

**Signature** \_\_\_\_\_ **Date:** \_\_\_\_\_

This Thesis has been submitted for examination with my approval as the University Supervisor.

**Name: JOY K. ASIEMA**

**Signature** \_\_\_\_\_ **Date:** \_\_\_\_\_

University of Nairobi, School of Law Parklands Campus, Nairobi.

## **DEDICATION**

This thesis is dedicated to my loving father and mother for their love and prayers have brought me this far.

To my daughter Joy Valerie, no daughter could make a mother proud than you have made me.

To my husband Sam thanks for everything.

## ACKNOWLEDGEMENT

I wish to acknowledge assistance and contribution of those who participated in encouraging me to put this thesis together.

I acknowledge the contribution of my supervisor, Joy K Asiema for her guidance and insights during the study period. Along with my hard working supervisors who played a big role during the writing process.

I am grateful to Brenda and Sheila for their assistance in interviewing contributors during the data collection. To the interviewees who participated thank you.

I also wish to thank my friends and colleagues at work for their moral support during the study.

Finally I wish to thank my family for their ever-unfailing support. Special thanks to my mother Margaret and father Rev. Fanuel Nyambuoro for their prayers and encouragement gave me the strength to complete this thesis.

Above all I thank the Almighty God for this far he has brought me.

## TABLE OF CONTENTS

### Contents

<b>DEDICATION .....</b>	<b>III</b>
<b>TABLE OF CONTENTS .....</b>	<b>V</b>
<b>ACKNOWLEDGMENT.....</b>	<b>IV</b>
<b>ABSTRACT.....</b>	<b>VIII</b>
<b>1.1 CHAPTER ONE .....</b>	<b>1</b>
<b>INTRODUCTION .....</b>	<b>1</b>
<b>1.1 BACKGROUND OF THE STUDY .....</b>	<b>1</b>
<b>1.2 THE PROBLEM STATEMENT .....</b>	<b>6</b>
<b>1.3 OBJECTIVES OF THE STUDY .....</b>	<b>7</b>
1.3.1 GENERAL OBJECTIVE .....	7
1.3.2 SPECIFIC OBJECTIVES .....	8
<b>1.4 RESEARCH QUESTIONS .....</b>	<b>8</b>
<b>1.5 HYPOTHESIS .....</b>	<b>9</b>
<b>1.6 JUSTIFICATION TO THE STUDY .....</b>	<b>9</b>
<b>1.7 THEORETICAL FRAMEWORK.....</b>	<b>9</b>
<b>1.8 RESEARCH METHODOLOGY .....</b>	<b>11</b>
<b>1.9 LIMITATION TO THE STUDY .....</b>	<b>12</b>
<b>1.10 THESIS OUTLINE .....</b>	<b>13</b>
<b>2.0 CHAPTER TWO.....</b>	<b>15</b>
<b>2.1 LITERATURE REVIEW .....</b>	<b>15</b>
<b>2.2 PROCESSES USED TO ILLEGALLY/IRREGULARLY ACQUIRE LAND IN KENYA .....</b>	<b>17</b>
2.2.1 LETTERS OF ALLOTMENT.....	21
2.2.2 ILLEGAL/IRREGULAR ALLOCATIONS OF ALIENATED PUBLIC LAND .....	23
2.2.3 PURCHASE OF ILLEGALLY ACQUIRED PUBLIC LAND BY STATE CORPORATIONS/PARASTATALS .....	23

2.2.4	ALLOCATION OF LAND BY UNAUTHORISED PERSONS.....	24
2.2.5	UNJUSTIFIED EXCISIONS OF PROTECTED AREAS.....	26
<b>2.3</b>	<b>NDUNG’U COMMISSION REPORT SOLUTIONS FOR ILLEGAL AND IRREGULAR LAND ALLOCATIONS.....</b>	<b>30</b>
<b>CHAPTER 3.....</b>	<b>.....</b>	<b>32</b>
<b>THE LEGAL FRAMEWORK FOR ILLEGAL AND IRREGULAR LAND ALLOCATION.....</b>		
<b>3.1</b>	<b>INTRODUCTION.....</b>	<b>32</b>
3.1.1	THE CONSTITUTION OF KENYA.....	32
3.1.2	THE LAND REGISTRATION ACT.....	34
3.1.3	THE LAND ACT.....	36
3.1.4	NATIONAL LAND COMMISSION ACT.....	38
<b>3.2</b>	<b>THE NATIONAL LAND COMMISSION.....</b>	<b>39</b>
3.2.1	CAPACITY OF THE COMMISSION.....	41
<b>CHAPTER FOUR.....</b>	<b>.....</b>	<b>46</b>
<b>4.0 PERFORMANCE OF THE NATIONAL LAND COMMISSION IN ADDRESSING IRREGULAR AND ILLEGAL LAND ALLOCATION.....</b>		
<b>4.1</b>	<b>INTRODUCTION.....</b>	<b>46</b>
<b>4.2</b>	<b>REVIEW OF GRANTS AND DISPOSITIONS OF PUBLIC LAND IN LAMU.....</b>	<b>43</b>
<b>4.3</b>	<b>CASE LAW ON REVIEWS UNDERTAKEN BY THE COMMISSION.....</b>	<b>55</b>
<b>4.4</b>	<b>THE INADEQUACIES OF THE NATIONAL LAND COMMISSION IN CURBING ILLEGAL AND IRREGULAR LAND ALLOCATIONS.....</b>	<b>62</b>
4.4.1	Lack of Capacity.....	59
4.4.2	Lack of Political Goodwill and the Vague Mandate of the NLC.....	59
4.4.3	National Land Commission’s Powers to Investigate Land Injustices.....	60
<b>4.5</b>	<b>RECOMMENDATIONS FROM INTERVIEWEES.....</b>	<b>65</b>
<b>CHAPTER FIVE.....</b>	<b>.....</b>	<b>68</b>
<b>5.0 CONCLUSION AND RECOMMENDATIONS.....</b>		
<b>5.1.1</b>	<b>CREATE A NATIONAL LAND COMMISSION FUND.....</b>	<b>68</b>

<b>5.1.2</b>	<b>CLARIFY NLC’S MANDATE <i>VIS-À-VIS</i> THE MINISTRY OF LANDS’ MANDATE.....</b>	<b>69</b>
<b>5.1.3</b>	<b>AMEND ARTICLE 67(2)(E) OF THE CONSTITUTION .....</b>	<b>69</b>
<b>5.1.4</b>	<b>DIGITIZATION OF LAND RECORDS .....</b>	<b>70</b>
<b>5.1.5</b>	<b>OPERATIONAL GUIDELINES .....</b>	<b>71</b>
<b>5.1.6</b>	<b>INCREASED CAPACITY .....</b>	<b>71</b>
<b>5.2</b>	<b>CONCLUSION .....</b>	<b>72</b>
	<b>BIBLIOGRAPHY.....</b>	<b>73</b>

## ABSTRACT

Irregular and Illegal allocation of land is a major component of the land question in Kenya. The land question is a major rhetoric as it is not one issue but a myriad of issues entrenched in archaic, pre colonial administrative methods and systems which led to lack of transparency and abuse of high held offices in the self interest of individuals as pertaining to land. The targets for fulfilling such self interests were public land and land that could not be acknowledged by law for the simple and erroneous fact that the law did not allow for the means of acknowledgment by affording the custodians of such land the luxury of registration. Indeed the effects of such systems were to be felt decades later and brought out in broad daylight by such painful happenstance as the post election violence of 2007. Many stakeholders championed the land reforms as the answer to the land question. The issues needed addressing and the national land policy was birthed, intricately identifying and detailing the issues marring the then land regime and recommending curative measures.

The Constitution of Kenya promulgated in 2010 embedded the core values of the land policy giving the government the mandate to see to it that land in Kenya is managed in a manner that is equitable, efficient, productive and sustainable. Different laws were therefore enacted and the land regime equipped with the institutional capacity to see this through. The National Land Commission was the ‘saviour’ institution. This study has a general objective of assessing the effectiveness of the National Land Commission in addressing illegal/irregular land allocations in Kenya. The specific objectives include establishing the extent to which the commission has managed to deal with illegal/irregular land allocations four years since its inception and the forms of such allocations while detailing the challenges it faces. The study also reviewed the current laws relating to illegal/irregular land allocations. The research methodology involved the

use of qualitative and quantitative data with desktop research taking the bulk of the data supplemented with interviews conducted on Ministry of Land officers from the relevant departments that deal with allocation of land. The study found that there exists a Constitutional and legislative framework that is ill-prepared to curb illegal and irregular land allocations; lack of a critical mass of political goodwill and the obscure mandate of the National Land Commission; and, the capacity of the National Land Commission to investigate historical land injustices having been tied to Parliament's legislative discretion and political whims. It therefore recommended the establishment of a fund account for the National Land Commission as well as a raft of Constitutional and legislative amendments, not only to reinforce National Land Commission's institutional capacity to address the problem, but also to expand its scope to cover the management of community land. It also recommended speedy digitization of land records.



## 1.1 CHAPTER ONE

### INTRODUCTION

#### 1.1 Background of the Study

Government control of land ownership under the repealed constitution and the Government Lands Act (repealed) was a great recipe for not only inequitable land ownership, but also illegal distribution of public land. When Kenya gained Independence in 1963, it inherited a highly unequal land distribution pattern that disadvantaged the African population in terms of ownership over productive land.<sup>1</sup> This gave rise to pressing questions about land distribution and reform strategies up to the present day. Many Sub-Saharan African countries grapple with land centred questions on the redistribution of land to those previously disadvantaged.

Kenya's land question has been compounded by rampant land acquisition through illegal means commonly referred to as *land grabbing*.<sup>2</sup> This practice has become rampant among the politically well-connected individuals and the elite segments of society.<sup>3</sup> Thus, land grabbing in Kenya has unjustly benefited private developers and a few well-connected investors.<sup>4</sup>

---

<sup>1</sup> Syagga, Paul Maurice, Land Ownership and Use in Kenya; Policy Prescriptions from an Inequality Perspective, 315.

<sup>2</sup> Ibid 336.

<sup>3</sup> Ibid 337.

<sup>4</sup> Lumumba, Odenda (2004) Kenya Land Alliance, *The National Land Policy in Kenya: Addressing Historical injustices issues* (Paper No. 2 of 2004) [Http://www.Caledonia.Org.Uk/land/documents/kla\\_issues\\_paper.Pdf](http://www.Caledonia.Org.Uk/land/documents/kla_issues_paper.Pdf). Available at: [http://www.caledonia.org.uk/land/documents/kla\\_issues\\_paper.pdf](http://www.caledonia.org.uk/land/documents/kla_issues_paper.pdf) (Accessed: 13 May 2016). Para 3.2

Majority of Kenyans have condemned grabbing of public land and are increasingly aware of blatant irregularities in national land administration in recent years. Glaring examples include the infamous land incidents involving; Mau forest reserve, Ngong forest, Kenya Railways Corporation properties and Karura forest among others. In 2003 President Mwai Kibaki came under significant public pressure to look into a phenomenon that was claiming so much of Kenya's land. In response, the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land was established.<sup>5</sup> The Commission examined the allocation and management of Kenya's public land over a period of nine months. The Commission of Inquiry commonly known as the Ndung'u Commission after its Chairperson, Paul Ndung'u completed and submitted its report, which was published in December 2004.

The report revealed details showing the serious crisis in the management of Kenya's land, which was being illegally and/or irregularly allocated to well-connected individuals. However, although the Ndung'u Commission Report made a number of recommendations concerning revocation of title deeds and remedies for illegal/irregular activities involving public land, with the exception of few high-profile revocations and repossessions, it has thus far had limited impact on the phenomenon of land grabbing.<sup>6</sup>

When exploring rampant land acquisition through illegal means by Kenyan elites, it must be noted that there is little concrete statistical information as to the amount of land in question

---

<sup>5</sup> O'Brien E. (2011) *Irregular and illegal land acquisition by Kenya's Elites: Trends, processes, and impacts of Kenya's land grabbing phenomenon*. International Land Coalition: Kenya National Alliance. 1-2.

<sup>6</sup> Ibid 2.

except for the properties listed in the Ndung’u Commission report.<sup>7</sup> This is largely due to the lack of transparency in the documentation of land transactions, particularly from 1990 to 2002, when land acquisition through illegal means (land grabbing) reached its peak. The lack of transparency surrounding allocations of public land continues, despite the awareness of the issue by officials and the general public. The Kenya Land Alliance (KLA) and the Kenya National Commission on Human Rights (KNCHR)<sup>8</sup>, have attempted to increase awareness regarding land grabbing and its implications, as well as to support the implementation of the Ndung’u Commission Report’s recommendations, through an accessible publication entitled “Unjust Enrichment: The Making of Land Grabbing Millionaires” (2006) which consists of two volumes focusing on “The Plunder of Kenya’s State Corporations and Protected Land” and “Abetting Impunity: The Other Side of the Ndung’u Report on Illegal and Irregular Allocations of Public Land.”<sup>9</sup>

The KLA/KNHR reports, supported by the Ndung’u Commission Report and related/additional reports form the basis of this study. The most important of these reports is the Ndung’u Commission Report because it formed the strongest recommendation and proposed a framework for the establishment of the National Land Commission, which was set up to address the problem of illegally and/or irregularly allocated public lands.

---

<sup>7</sup> The Commission of Inquiry into Illegal/Irregular Allocation of Public Land was appointed in 2003 and submitted its report in 2004 (Republic of Kenya, Ndung’u Commission Report (2004)).

<sup>8</sup> Unjust Enrichment, The Making of Land Grabbing Millionaires; *The plunder of Kenya’s State Corporations and Protected Lands*, Vol 2, Kenya Land Alliance, Kenya National Commission on Human Rights 2006

<sup>9</sup> Ibid.

A lot of effort has been made in the past to repossess illegally and irregularly acquired land such as the recommendations of the Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land' as well as attempts by the Kenya Anti-Corruption Commission (KACC) to repossess such lands. These have been met with legal hurdles on grounds of sanctity of title at first registration, irrespective of how the title was obtained.<sup>10</sup>

Implementation of the recommendations of the Ndung'u Commission Report's findings focusing on the evictions or land repossessions of minority groups from protected areas and a handful of high profile repossessions has not addressed the bulk of the illegal and irregular land allocations in Kenya.<sup>11</sup> The selective implementation of these recommendations continues to deepen ethnic tensions resulting from unequal land distribution through questionable land administration practices, thereby continually undermining Kenya's young democratic foundation.<sup>12</sup>

Land holding, access and use as well as the need to sustain the environment influenced the constitution making process in Kenya. Many commissioners of Land abused the presidents' powers to allocate lands in cities, municipalities, townships and indiscriminately apportioned government land acquired for public use was illegally allocated through forged documents and letters of allotment.<sup>13</sup>

In light of these problems arising from lack of constitutional focus on land in the old Constitution, the new Constitution has classified land into public, private and community land

---

<sup>10</sup> Paul Syagga, 'The Public Land, Historical Land Injustices and the New Constitution' (2011) Constitutional Working Paper Series No. 9, 2 <<http://www.sidint.net/sites/www.sidint.net/files/docs/WP9.pdf>> accessed 30 February 2015. Page 1.

<sup>11</sup> Roberts Mara J., *'Conflict Analysis of the 2007 Post election Violence in Kenya'* [2009] 9–10.

<sup>12</sup> Ibid 3-4.

<sup>13</sup> O'Brien E. (2011) *Irregular and illegal land acquisition by Kenya's Elites: Trends, processes, and impacts of Kenya's land grabbing phenomenon*. International Land Coalition: Kenya National Alliance. 18.

and further established a constitutional platform for land reform in the country.<sup>14</sup> The constitution also provided for institutional mechanisms to address the eminent land issues. The National Land Commission of Kenya<sup>15</sup> is an independent commission established by the Constitution of Kenya to; manage public land on behalf of the national and county governments; initiate investigations into present or historical land injustices and recommend appropriate redress and; to monitor and exercise oversight over land use planning throughout the country, amongst other duties. It is established under the Constitution as well as the National Land Commission Act, 2012.

The mandate of the National Land Commission is drawn from the Constitution of Kenya 2010, the National Land Policy of 2009<sup>16</sup>, National Land Commission Act, 2012<sup>17</sup>, the Land Act 2012<sup>18</sup> and the Land Registration Act of 2012<sup>19</sup>. The provisions from the Constitution<sup>20</sup>, the National Land Act and the Land Act give the commission various powers and clearly spell out its duties for effective running. With regard to Illegal and irregular land allocations, the functions of the National Land Commission include to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices and recommend appropriate redress; within five years of the commencement of the National Land Commission Act, the Commission, on its

---

<sup>14</sup> Constitution of Kenya 2010 Art 61(2).

<sup>15</sup> Constitution of Kenya 2010 Art 67(1).

<sup>16</sup> National Land Policy of 2009.

<sup>17</sup> National Land Commission Act, 2012.

<sup>18</sup> Land Act No. 6 of 2012 (LA).

<sup>19</sup> Land Registration Act No. 3 of 2012 (LRA).

<sup>20</sup> Constitution of Kenya 2010 Art 67(2) (a) –(h).

own motion or upon a complaint by the national or county government, a community or an individual review or grant disposition of public land to establish their propriety or legality.<sup>21</sup>

## 1.2 The Problem Statement

Kenya's land question has become culturally, ethnically, and economically sensitive as a result of its growing population. In a country where 85% of the population relies on agriculture as their primary livelihood source, yet 88.4% have access to less than three hectares of land, tensions over land simmer. This is particularly true for minority ethnic groups, who have largely been excluded from land ownership.<sup>22</sup> These tensions are exacerbated by two inextricably linked phenomena: the disappearance of large tracts of public land and the enormous wealth accumulated by elite members of Kenyan society.

The Kenyan Government holds land "in the public interest" yet public land has continued to be grabbed particularly (in the case of government land) in instances where land is earmarked for urban development, land is allocated to fulfil ministry and state corporation/parastatal functions, and protected land, particularly forests, and (in the broad trust land category) resettlement and trust land. These lands are generally uninhabited or inhabited by marginalized communities, which make them easy targets.

---

<sup>21</sup> Ibid n20

<sup>22</sup> O'Brien E. (2011) *Irregular and illegal land acquisition by Kenya's Elites: Trends, processes, and impacts of Kenya's land grabbing phenomenon*. International Land Coalition: Kenya National Alliance.1-5.

The National Land Policy provided an overall framework and defined the key measures required to address the critical issues of land administration, access to land, land use planning, restitution of historical injustices, environmental degradation, conflicts, unplanned proliferation of informal urban settlements, out-dated legal framework, institutional framework and information management. It also addresses constitutional issues such as compulsory acquisition and development control as well as tenure. The Ndung'u commission revealed trends of illegal and irregular public land allocations, and named many prominent individuals, companies, and organisations, both public and private, that had benefited from large-scale land graft. The commission made several recommendations that have encountered opposition from powerful vested interests and are yet to be implemented.

Cases of acquisition of land through illegal means still continues four years after the National Land Commission came into place. It is against this backdrop that this study seeks to assess the effectiveness of the National Land Commission in addressing illegal/irregular land allocation and provide a way forward in dealing with this vice.

### **1.3 Objectives of the study**

#### **1.3.1 General objective**

To assess the effectiveness of the National Land Commission to address illegal/irregular allocation of land in Kenya.

### **1.3.2 Specific objectives**

1. Establish the extent to which the commission has managed to deal with illegal/irregular land allocations four years since its inception
2. Document the various forms of illegal/irregular land allocations the commission is dealing with
3. To find out the challenges the commission face in dealing with illegal/irregular land allocations
4. Provide recommendations with a view of mitigating the challenges the commission is facing

### **1.4 Research questions**

1. To what extent has the commission managed to deal with illegal/irregular land allocations four years since its inception?
2. What are the different forms of illegal/irregular land allocations that the commission is dealing with?
3. What challenges does the commission face in dealing with illegal/irregular land allocations?
4. What can be done to mitigate the challenges the commission is facing?

## **1.5 Hypothesis**

This study will be premised on the hypothesis that the National Land Commission has not effectively addressed the issue of illegal and irregular allocation of land.

## **1.6 Justification to the study**

There is phenomenal litigation pertaining to land encompassing a variety of issues. These include whether the absolute proprietorship any longer holds against other interests; to what extent should the public interest be taken into account when dealing with issues pertaining to land and what reforms are necessary to address the illegal/irregular land allocations and the mischief hitherto evident in the actions of those whose authority is to exercise power with regard to land. These persistent problems of Kenya's land allocation need an academic assessment, which should form a basis for policy and legal intervention. That constitutes the rationale for the study.

## **1.7 Theoretical framework**

This study will be premised on Karl Marx's social reform theory.

Karl Marx was a philosopher, social scientist, historian and revolutionary born and lived in the 19<sup>th</sup> century. Central to this body of theory are several key ideas: the view that capitalism embodies a system of class exploitation; that socialism is a social order in which private property

and exploitation are abolished; and that socialism can be achieved through revolution. The latter is the most relevant to this study.

He was passionate about effecting revolutionary societal change through the overthrow of the existing, dominant capitalist order with the aid of knowledge acquired from multidisciplinary sources. He said that law is a tool for the promotion of capitalist ideology for the benefit of the bourgeoisie but to the detriment of the proletariat. Similarly, he posited that law was at the service of the State for the perpetration of the interests of the dominant class, the capitalist class.

His definition of law was that Law is the totality of rules of conduct, which express the will of the ruling class and are laid down in a legislative manner, along with the rules and practices of communal life, which are sanctioned by the power of the State. The application of these rules is backed by the coercive power of the State in order to secure, reinforce, and develop the social relationships and conditions, which are agreeable to the interests of the ruling class.

When this theory is juxtaposed with the Kenyan situation leading to land reforms, we see that the issue of illegal and irregular land allocation was as a result of a flawed system with loopholes and no accountability checks that allowed the ruling class in this case the political elite to have their way when it came to acquiring land. This was done with great disregard to squatters among other stakeholders, the communities that had known such land as their home from time immemorial.

The land reforms that came along decades after using the now defunct land administration system shows an uprising of a revolution where the Kenyan people had a homogenous outcry as to the land issues that had bothered them for a long time. It is not an uprising against capitalism

per say as was a big pillar in Marxism rather an uprising against the laws in place that are only there to serve the elite by furthering capitalism.

## **1.8 Research methodology**

This study was based primary and secondary research methods. Primary data was gathered through face-to-face interviews. In conducting of interviews questionnaires were used as a method for data collection. Unstructured questions were used to encourage respondents to give an in-depth response without feeling held back in revealing any information.

The questionnaire technique gave the respondents enough time to respond to the questions as they were given some days to answer the questionnaires. Also the element of anonymity associated with the questionnaire survey technique enhanced the chances of getting honest responses. The interviewees were also given pseudonym to ascertain confidentiality.

Regarding the interviewees who were selected to answer necessary questions about the national land commission; consideration based on internal knowledge, position and experience on allocation of land.

The target population for the study was the land administration officers, land registration officers, legal officers with the national land commission, land registrars and other stakeholders. The researcher met 20 interviewees in their offices and had estimated to have at least 15 minutes with each of them per session but some interviewees ended up taking more than an hour.

The interviews were done at Ministry of Lands, Ardhi house, in Nairobi where most of the interviews are based. The same were conducting in the month of May 2016.

The study also relied on library and Internet sources as secondary sources. The reason why this study took this approach is the fact that there are many books, articles, journals and other literature that pertains to the land question.

#### **1.10 Limitation to the study**

The land administration office was not particularly comfortable enough with the research topic due to government bureaucracy and general suspicion. This impeded on the likelihood of forthrightness with information. However the researcher cultivated trust at the initial stage of research and assured respondents of confidentiality both verbally and in writing.

Some targeted interviewees were not interviewed. The targeted judicial officers did not avail any data to the researcher crediting their very busy schedule.

## **1.11 Thesis outline**

### **Chapter One**

Chapter one gives the introduction to the research. It outlines the background to the study, the problem statement, objectives to the study, research questions, justification for the study, theoretical framework, limitations to the study and the thesis outline.

### **Chapter Two**

Chapter two encompasses the literature review. It outlines the processes used to illegally/irregularly acquire land in Kenya and solutions given to prevent illegal and irregular allocation. This chapter also gives a report of the fieldwork.

### **Chapter Three**

Chapter three sets out the legal framework for illegal and irregular allocation of land. By outlining the land legislation, it picks out the provisions that are relevant to or address the issue of illegal and irregular land allocation. It also discusses the institutive capacity of the National Land Commission in addressing illegal and irregular land allocation.

### **Chapter Four**

Chapter four is an analysis of the performance of the National Land Commission in addressing illegal and irregular allocation of land. It discusses legal basis for repossession of illegally/irregular allocations visa vie provisions of Article 40 of the constitution. This chapter further discusses as a case study the efforts of the National Land Commission in reviewing land grants and dispositions in Lamu.

## **Chapter Five**

This chapter is the recommendation section of this thesis and offers solutions to the problem questions unearthed by this study. It goes ahead to elicit what measures if taken by all stakeholders regarding dispositions of public land would encourage a reduction if not, put to stop cases of illegal and irregular allocation of land.

## 2.0 CHAPTER TWO

### 2.1 LITERATURE REVIEW

Land formed the basis of independence movement in Kenya and continues to command a pivotal position in Kenya's social, economic, political and legal relations.<sup>23</sup> In addition to being a source of economic accumulation and means through which to access variety of resources, it also has symbolic, cultural, and historical importance.<sup>24</sup> Today, both additional value and additional strain have been put on land as Kenya's population continues to increase at a rate of 2.9% per annum the highest rate in East Africa. Thus pressure on land, particularly productive land, is mounting yet a mere 20% of Kenya's total landmass is suitable for cultivation: 12% is classified as high-potential agricultural land (having adequate rainfall) and 8% is considered medium-potential land; the rest is arid or semi-arid.<sup>25</sup>

Given these modest figures, the distribution of land in Kenya is a highly important and sensitive issue. It is recognised that a "lack of access to land is a major determinant of poverty" in Kenya, as 85% of Kenyans live in rural areas and an estimated 80% of the population rely on agriculture for their primary livelihood. Despite the importance of access to land to meet basic needs, 88.4%

---

<sup>23</sup> Africog (2011) 'Mission Impossible, implementing the Ndung'u Report', (2011)"10" (2011).

<sup>24</sup> Mara, R.J. (2009) 'Conflict Analysis of the 2007 Post-election Violence in Kenya September, 2009', p. 8.

<sup>25</sup> O'Brien E. (2011) *Irregular and illegal land acquisition by Kenya's Elites: Trends, processes, and impacts of Kenya's land grabbing phenomenon*. International Land Coalition: Kenya National Alliance.3-6.

of Kenyans own or have access to less than three hectares of land each, with 28.9% of the population landless and 27% having access to less than one hectare.<sup>26</sup>

These stark figures are sharpened by the reality that a small portion of the population comprising remaining white settlers, large-scale farmers, power-brokers, current and former politicians, and business people, most of whom are politically connected patrons of past and present post-independence governments own hundreds of thousands of hectares of land in Kenya. The vast majority of the land holdings of these powerful individuals and their companies are concentrated in Kenya's 17–20% of arable land meaning that half of the arable land nationwide is owned by a mere 20% of the population.<sup>27</sup>

Access to land, in addition to being a question of political connections, also has a history of systematic exclusion of segments of Kenya's population, particularly its ethnic minorities. These communities were marginalised during the colonial era and their plight has continued post-independence. They are particularly vulnerable as their entire livelihood system is dependent on access to specific types of land (e.g. forest dwelling communities, from which they have been removed and excluded. Thus, the concentration of land ownership and the controlled access to land has both psychological implications deeply entrenched ethnic tensions and material implications accumulation of enormous wealth and significant loss of public funds) for the country. Médard notes that, the history of Kenya's land administration has led to a mentality of

---

<sup>26</sup> Paul Syagga, *'Public Land, historical injustices and the New Constitution'* (Society for International Studies, Constitutional Paper No. 9) 16.

<sup>27</sup> O'Brien E. (2011) *Irregular and illegal land acquisition by Kenya's Elites: Trends, processes, and impacts of Kenya's land grabbing phenomenon*. International Land Coalition: Kenya National Alliance.3

“he with control over the land is King”.<sup>28</sup> This mentality has its roots in the colonial era if not before and continues to dominate in Kenya, as those with access to land also have access to power and resources in this case even basic services, and vice versa.

## **2.2 PROCESSES USED TO ILLEGALLY/IRREGULARLY ACQUIRE LAND IN KENYA**

Illegal allocation of land has been defined as occurring when land that is not available for allocation or land that has already been dully allocated or reserved for public purpose is allocated or re-allocated in a manner that offends provisions of the law.<sup>29</sup> Irregular allocation, on other hand, is an allocation of land that is available for allocation but in circumstances where the standard operating or administrative procedure have not been observed.<sup>30</sup> Irregular and illegal allocation of land can be traced back to the post-colonial government and has been largely attributed to the powers previously vested in the president under the Government Lands Act<sup>31</sup> to issue direct grants or dispositions of estates or interests over unalienated government land.

Kenya adopted the English law heritage, where the monarch’s ownership of land was extended to the Kenyan colony. The Crown Lands Ordinance of 1915 empowered the commissioner of lands to cause any portion of land in a township, which was not required for public purposes to

---

<sup>28</sup> *ibid* 3

<sup>29</sup> Government of Kenya, ‘Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land’ (Government Printer 2004) 48.

<sup>30</sup> *Ibid* 49.

<sup>31</sup> *Government Lands Act* (Repealed), s 3 (The law was silent on who qualifes for allocation of land).

be divided into, plots suitable for erection of buildings for business or residential purposes.<sup>32</sup> The Ordinance also empowered the Commissioner of Lands to cause land available for leasing for agricultural purposes to be surveyed and divided into farms.<sup>33</sup> The Government Lands Act repealed the 1915 Ordinance and the substance of section 15 of the Ordinance is reflected in section 12 of the Government Lands Act where the word ‘governor’ was merely deleted and replaced with the word ‘president’. Section 25 of the Ordinance was substantially replicated in sections 19 and 20 of the Government Lands Act save that this act did not limit the number of acres to be leased by the Commissioner of Lands. Therefore, at independence, the President got the power to make grants of un-alienated government land to any person.<sup>34</sup> Since the state controlled all aspects of land allocation and registration, the dealings in land became subject to abuse by the persons or entities well connected to the ruling elite.

According to the Commission of Inquiry into the Illegal and Irregular Allocation of Public Land (Ndung’u Commission),<sup>35</sup> the system of allocation of land by way of direct grant succeeded in controlling the mischief of land allocation in the colonial administration. However, this was not the case for post-colonial governments. The Ndung’u Commission attributed the powers vested in the President under the Government Land Act to issue direct grants to massive illegal and irregular allocation of public land.<sup>36</sup> The Commission reported that the abandonment of public auction system gave the President and the Commissioner of Lands the opportunity to allocate land in ways that amounted to abuse of office. The Commission found that the powers of

---

<sup>32</sup> *Crown Lands Ordinance*, s 15.

<sup>33</sup> *Ibid* 25.

<sup>34</sup> *Ibid* n 31

<sup>35</sup> Established vide Gazette Notice Number 4559 of 4<sup>th</sup> July, 2003

<sup>36</sup> *Ibid* n 31

allocation vested in the president pursuant to Section 3 of the Government Lands Act as exercised by the Commissioner of Lands under Section 7 of the Act have been avenues through which the Commissioner of Lands has irregularly allocated land.

Mutai stated that there is indeed a difference in the term irregular and illegal allocation of land.<sup>37</sup> He explained that irregularity arises where there existed land for allocation, was legally allocated but there was an omission in the administration process.<sup>38</sup> He further stated that illegal allocation occurs where there did not exist land to be allocated but was still allocated or available land was procured through fraud.<sup>39</sup>

Kerron on the other hand defined irregular allocation of land as the giving of a grant without following due process.<sup>40</sup> He further stated that illegal allocation would entail a situation where double allocation of land occurs.

Carol defined irregular and illegal allocation of land by simulating a scenario where such a phenomenon comes to existence.<sup>41</sup> She stated that such allocation happens when land that is used for public utility- and wasn't surveyed and titled- is given to an individual. She further stated that this happened during former president Moi's time where he had powers to grant any individual

---

<sup>37</sup> Interview with Mutai, Nairobi Kenya, 5<sup>th</sup> May 2016

<sup>38</sup> Ibid.

<sup>39</sup> Ibid

<sup>40</sup> Interview with Kerron, Nairobi Kenya, 18<sup>th</sup> May 2016

<sup>41</sup> Interview with Carol Nairobi Kenya, 18<sup>th</sup> May 2016.

public land.<sup>42</sup> She mentioned that individuals in the President's party would come to him with a sketch plan notwithstanding that the map wasn't the map of the actual land, and ask to be granted that land. The president would then make a grant.

The processes used to illegally/irregularly allocate and acquire land range from the questionable sometimes fraudulent, irregular and blatantly illegal<sup>43</sup>. A recurring characteristic is that these processes often involve the manipulation of existing laws and procedures. The Ndung'u Commission Report summarises eight main processes used by elites in illegally/irregularly acquiring public land: Direct allocation by the President and/or the Commissioner of Lands, contrary to the law; Illegal surrender of ministry and state corporation land and subsequent illegal allocations; Invasion of government and trust lands and subsequent acquisition of titles to it, contrary to the law; Allocation of land reserved for state corporations or ministries; Allocation of trust land contrary to the Constitution and related laws; Allocation of land reserved for public purposes; Allocation of riparian reserves and sites; and Allocation of land compulsorily acquired for the public interest to individuals or companies<sup>44</sup>

All of the eight methods of illegal/irregular land acquisition are worrying, as they all imply either an abuse of public office, an abandonment of the public trust doctrine implying decisions made in the public interest, illegal activity, or all of these. The sections below highlight the most

---

<sup>42</sup> Ibid n 41

<sup>43</sup> Bruce, J. (2009) *Kenyan Land Policy: Analysis and Responses*. Response paper prepared for USAID, Arlington, USA. (John, 2009) 4.

<sup>44</sup> O'Brien E. (2011) *Irregular and illegal land acquisition by Kenya's Elites: Trends, processes, and impacts of Kenya's land grabbing phenomenon*. International Land Coalition: Kenya National Alliance.17.

common means of illegal/irregular land allocation and provide examples of the processes employed in acquisition of public land; -

### **2.2.1 Letters of allotment**

A letter of allotment is a document or letter of offer given to an applicant when the government seeks to allocate land to an individual or company. This letter is drafted once a candidate has been approved to receive the land, and constitutes an offer that contains the conditions of the land transfer. The letter and its conditions expire 30 days after it is issued. Although not a legal requirement, the letter of allotment is a binding document for the stipulated 30 days and is protected under Kenya's contract laws.<sup>45</sup>

For the purposes of the present report, there are three important considerations to be taken into account when a letter of allotment is issued. First, the transfer of the land in question via a letter of allotment must be made in consideration of the public interest; Second, a letter of allotment, i.e. the letter and its contents (offer and conditions), are valid only to the person to whom the letter is addressed, and the offer and conditions cannot be sold or transferred to another party whether an individual or a company. The letter also gave a provision that the land cannot be sold or used for purposes not stated in the letter, without the consent of the Commissioner of Lands. Any deviations from the original letter must be considered by the Commissioner of Lands with regards to the development conditions contained in the title deed for the land in question.

---

<sup>45</sup> Commission of Inquiry into Illegal/Irregular Allocation of Public Land appointed in 2003 and submitted its report in 2004 (Republic of Kenya, Ndung'u Commission Report (2004)).

Abuse of letters of allotment often occurred when these documents were made to represent an interest in land capable of being transferred. Letter of allotment previously was never transferable to a third party since the letter did not create an interest to be traded until registration was completed<sup>46</sup> Thus, “On obtaining a letter of allotment from the Commissioner of Lands, the prospective allottee would sell it to a purchaser as if the letter itself were land at a premium. The purchaser then would assume responsibility of paying the Government all levies and charges, and obtain the title in his/her name. Thus, the original allottee would not feature anywhere in the title deeds that are open for examination by the public...”<sup>47</sup>. An attempt to legitimise this practice was made by the Minister of Lands and Settlement in Legal Notice 305 of 1994. This increased cases of illegal and irregular allocations. People were allocated land and they would immediately make arrangements to sell at for prices that exceeded market value<sup>48</sup>

In illegal and irregular land allocation schemes, up to 8.5 times as much. Even if sold at market value, this constituted an illegal sale of land and interests therein. Abuse of letters of allotment was commonly seen in the acquisition of urban, parastatal, and forestland. Highlighted below is an example of that kind of abuse.<sup>49</sup>

---

<sup>46</sup> Syagga, Paul Land Ownership and use in Kenya: Policy Prescriptions from an inequality Perspective 337.

<sup>47</sup> Commission of Inquiry into Illegal/Irregular Allocation of Public Land was appointed in 2003 and submitted its report in 2004 (Republic of Kenya, Ndung'u Commission Report (2004) 8.

<sup>48</sup> Syagga, Paul Land Ownership and use in Kenya: Policy Prescriptions from an inequality Perspective 337.

<sup>49</sup> Ibid 19.

## **2.2.2 Illegal/irregular allocations of alienated public land**

Similar to abuses through letters of allotment, other processes have been used to irregularly allocate alienated public land. State corporations/parastatals or ministries hold most of these lands. The Ndung'u Commission Report cites the loss of thousands of hectares arising from these allocations. These processes often constituted an abuse of public office and of legal processes to facilitate private gain and to promote political patronage, often at great expense to the Kenyan public.

## **2.2.3 Purchase of illegally acquired public land by state corporations/parastatals**

This is the process by which Kenyan elites were involved in irregular and illegal land allocations, where they made exorbitant profits at the expense of the state. In this process, “state corporations became captive buyers of land from politically connected allottees”<sup>50</sup>. The state entity most implicated in this process was the National Social Security Fund (NSSF), which spent Kshs. 30 billion between 1990 and 1995 buying land from many illegal allocations as a way of quick disposal.<sup>51</sup>

In this process, alienated government<sup>52</sup> land was divested through a letter of allotment to an individual, on the pretext that it was no longer required for the mandate of the ministry or

---

<sup>50</sup> Ibid 19.

<sup>51</sup> Ibid 81.

<sup>52</sup> O'Brien E. (2011) *Irregular and illegal land acquisition by Kenya's Elites: Trends, processes, and impacts of Kenya's land grabbing phenomenon*. International Land Coalition: Kenya National Alliance 23.

parastatal. A notification was then issued by an official in another department or parastatal, suggesting that additional land, often the land recently allotted, should be acquired for the fulfilment of this organisation's mandate. The land was then purchased from the allottee at an exorbitant price<sup>53</sup>. Thus the Kenyan public was being defrauded through the loss of land and the wanton waste of public funds in reacquiring the same land. This process has been used repeatedly to transfer ownership of both alienated and unalienated public land, in particular in cases concerning land owned by the Kenya Railways Corporation, the Kenya Veterinary Vaccines Production Institute, the Kenya Pipeline Company, and the Kenya Port Authority. The KLA report compiled a list of what it deemed to be the "ten most outrageous purchases" using this land grabbing and enrichment process<sup>54</sup>.

#### **2.2.4 Allocation of land by unauthorised persons**

Investigations into illegal and irregular land allocation indicate that civil servants, ranging from national to local level government, have exercised extensive improper influence over the allocation of land. Chiefs, District Officers, District Commissioners, Provincial Commissioners, and Members of Parliament, none of who have powers of allocation, are among those implicated<sup>55</sup>. Examples of abuses of office include situations where:

---

<sup>53</sup> Ibid n 52 p 23

<sup>54</sup> Ibid

<sup>55</sup> Ibid

- Chiefs and local authorities meant to manage trust land on behalf of their communities have dealt with land as though it was their own private property, by selling, leasing, and/or allocating it to individuals, with no regard for the public interest (Ndung’u Commission Report 2004);
- Local and District Officers and Commissioners took over the sale or transfer of township lands. Township and other forms of urban land held by the state could be sold only through public auction, unless specifically designated for sale or transfer under special circumstances by the President or the Commissioner of Lands.

The Commissioner of Lands also allocated unalienated public land to unauthorised persons. The Ndung’u Commission Report states that

“...Often the Commissioner of Lands made direct transfers of land to individuals or companies without ...written authority from the President”.

This is a significant overstepping of responsibility, as the Commissioner only had the authority to allocate land on President’s instruction or in the circumstances explained earlier, which mainly concern development in the public interest.

Where unauthorised as well as authorised persons have gone beyond their jurisdiction regarding land allocations, it often emerges that land has also been allocated to “undeserving individuals”, i.e. persons not eligible for allocation of the land in question, or access to it.<sup>56</sup>

---

<sup>56</sup> Commission of Inquiry into Illegal/Irregular Allocation of Public Land was appointed in 2003 and submitted its report in 2004 (Republic of Kenya, Ndung’u Commission Report (2004) 11.

### 2.2.5 Unjustified excisions of protected areas

Protected areas are essential for the well being of all Kenyans, as they play a major role in ecological balance, water provision, and prevention of soil degradation. Their legislated protection has not, however, protected these areas from the people meant to safeguard them. The Ndung'u Commission Report<sup>57</sup> outline the excision of extensive tracks of Kenya's protected forestland.

The way in which forestland has been illegally and irregularly excised from protection and later allocated to private beneficiaries is explained by Southall as having taken place “without any reference to scientific considerations or under the guise of settlement schemes” (2005, 146). The KLA report builds on this analysis, citing the disregard of such activities for social, ecological, and economic implications. At the peak of forestland grabbing in Kenya before 2007, when the Forest Act 2005 was finally enacted<sup>58</sup>, the Forest Act (Cap 385) along with the Government Lands Act dictated the management of Kenya's protected forestland. Under these laws, the Minister of Forests and Wildlife was permitted to alter forest boundaries through “degazettement” in the national gazette. The notice needed to be in the public domain for 28 days prior to any formal alteration; this was meant to allow concerned parties to voice opinions on the proposition. The KLA report on forests explains the proper procedures for excisions: “The area intended for excision must be surveyed and a boundary plan drawn and approved by the Chief Conservator of Forests before it is excised. The forest is deemed excised after the expiry of the 28 days notice through the issuance of a legal notice by the Minister”

---

<sup>57</sup> Ibid n56

<sup>58</sup> Ibid.

In 1999 the Environmental Management and Coordination Act made environmental impact assessments obligatory for any major changes in land use. Despite the processes and protective legislation in place, significant tracts of protected forestland were excised much of it controversially<sup>59</sup>. These clearly demonstrate that the processes and legislation to protect forestland have been breached through blatant disregard or manipulation of these safeguards. For instance when land grabbing was at its peak in the 1980s to early 2000s, excisions executed “under the guise of settlement schemes in circumstances which constitute illegal allocations” were relatively common.<sup>60</sup> These included exchanges of land between the Forest Department and individuals, which were not scientifically justified and which involved transfers of large tracts of forestland in exchange for significantly smaller and less valuable pieces of land. In many cases, the Forest Department never actually acquired the land it was supposed to get from the exchange. Further, these forestlands turned settlement schemes, in many cases, were still gazetted forestlands, which amounts to an outright illegality<sup>61</sup>.

Also of significant concern is the disinheritance and displacement of forest dependent minorities as the result of illegal/irregular allocations through misguided resettlement schemes. This process is inextricably linked to the process of excisions under the guise of settlement schemes described above. However, it warrants separate mention, as the impact on both the land and communities in question has been devastating, as can be seen in the on-going eviction of forest dwelling

---

<sup>59</sup> Commission of Inquiry into Illegal/Irregular Allocation of Public Land was appointed in 2003 and submitted its report in 2004(Republic of Kenya, Ndung’u Commission Report (2004) 11

<sup>60</sup> Commission of Inquiry into Illegal/Irregular Allocation of Public Land was appointed in 2003 and submitted its report in 2004(Republic of Kenya, Ndung’u Commission Report (2004) 148 - 169.

<sup>61</sup> Ibid.

communities. The restoration of forest cover through the cancellation of all irregular/illegal titles is a recommendation of the Ndung'u Commission Report, but questions have been raised "as to whether the evictions were being carried out as recommended by the Ndung'u Commission"<sup>62</sup>. The historical neglect of Kenya's forest dwelling communities makes them a highly vulnerable segment of the population. As apparent compensation, settlement schemes have been implemented in excised forest areas. In several of these settlement schemes, the excision was not published in the gazette as required by law, illegal surveys took place, and title deeds were drafted. However, it has emerged that very few of the intended beneficiaries from forest dwelling communities actually received title deeds rather these were given to "politically correct" individuals for development purposes. Thus in this process several laws were broken, including the then current Forest Lands Act and the Government Lands Act, along with the environmental protection legislation, which stipulates that protected land can be allocated only to landless settlers

- Another way in which protected land was illegally excised is through the creation of deliberate inconsistencies between the boundaries of the survey and boundary plan and the title issued. This is used to give the impression that the proper 30 process has been followed, while reserving the omitted land for allocation/sale to "private developers". The KLA posits that the "belated issuance of selective title deeds to Karura and Ngong forests ... deliberately excluded a total area of 1125.5 ha from titled areas"<sup>63</sup>

---

<sup>62</sup> Ibid 4-8.

<sup>63</sup> Commission of Inquiry into Illegal/Irregular Allocation of Public Land was appointed in 2003 and submitted its report in 2004 (Republic of Kenya, Ndung'u Commission Report (2004) 11

Illegal excisions of protected forestland also took place during the process of adjudication of trust land throughout the country. In this process, trust land (i.e. community) land was allocated to individuals and became private land. However, irregularities were detected concerning areas of protected land, including forests and wetlands particularly water catchment areas, steep slopes, hills, and marshes. This was land that was not eligible for the process of adjudication, but was bundled with the land adjudicated to the private ownership of individuals or companies who were often not eligible to receive parcels of trust land, as they were not community members. Furthermore, according to the Report of the Inter Ministerial Committee on Forest Excisions, 16% of any adjudicated section of forest area should be retained as forests, and this has not been the case. The Ndung'u Commission Report estimates that, had the legal procedures been followed and enforced, 119,493 hectares of gazetted forestland could have been conserved between 1963 and 2005.<sup>64</sup>

In early 2016, there were fresh claims of how a chunk of Karura forest had been grabbed. The attempt to grab a huge chunk of Karura forest was allegedly by individuals who could not be identified.<sup>65</sup>

---

<sup>64</sup> Erin O'Brien, 'Commercial pressures on land irregular and illegal land acquisition by Kenya's elites: Trends, processes, and impacts of Kenya's land-grabbing phenomenon' (2011) <<http://www.kenyalandalliance.or.ke/wp-content/uploads/2015/03/KLA-commercial-pressure.pdf>> accessed 20 July 2016.

<sup>65</sup> 'Karura forest faces fresh grabbing threats' (20 February 2016) <<http://www.nation.co.ke/news/Karura-Forest-faces-fresh-grabbing-threats/-/1056/3086212/-/wgj0c5/-/index.html>> accessed 21 July 2016.

## **2.3 NDUNG’U COMMISSION REPORT SOLUTIONS FOR ILLEGAL AND IRREGULAR LAND ALLOCATIONS**

The Ndung’u Commission Report established that illegal allocation of public land is one of the most pronounced manifestations of corruption and political patronage in our society<sup>66</sup>. On a conservative estimate, some 200,000 illegal titles were created between 1962 and 2002. Of these 98% were issued between 1986 and 2002<sup>66</sup>. The categories of public land affected include forests, settlement schemes, national parks and game reserves, civil service houses, government offices, roads and road reserves, wetlands, research farms, state corporation lands and trust lands. The report makes it clear that the illegal allocations took place either on the direct orders of the president or on the orders of prominent senior public officials and well-connected business people and politicians. Those who benefited from the illegal or irregular allocations of grabbed land included ministers, senior civil servants, politicians, business people, churches, temples and mosques.

The study looks at the effectiveness of the National Land Commission in addressing irregular and illegal allocation of land. It differs from existing literature in that it seeks to examine the performance of the National Land Commission with respect to its role in review of grants and dispositions. It also looked at the current laws relating to illegal and irregular allocation of land and whether the new National Land Commission will effectively achieve the reforms in the land administration and management system in Kenya.

---

<sup>66</sup> O’Brien E. (2011) *Irregular and illegal land acquisition by Kenya’s Elites: Trends, processes, and impacts of Kenya’s land grabbing phenomenon*. International Land Coalition: Kenya National Alliance 23



## **CHAPTER 3**

### **3.0 THE LEGAL FRAMEWORK FOR ILLEGAL AND IRREGULAR LAND ALLOCATION**

#### **3.1 INTRODUCTION**

This chapter will give an in depth analysis of the new land legislation that saw the first step of implementing the national land policy provisions and the constitutional mandate. The different laws will be discussed and their provisions examined with regard to their address of the issue of illegal and irregular land allocation.

##### **3.1.1 The Constitution of Kenya**

On the approval of the National Land Policy of 2009 by the Kenyan parliament, the constitution of Kenya as the supreme law of the land had to envisage the vision of the land reforms. This was implemented in the form of a whole chapter dedicated to land provisions and land rights. Article 40 of the constitution states that, every person has the right to individually or in association with others to acquire property of any description and in any part of Kenya.<sup>67</sup> This is a very crucial right to the citizens of the country as pertaining land owning rights. The article gives the people of Kenya the right to own land individually or as a collective. The right is further supported by

---

<sup>67</sup> Constitution of Kenya, Art 40 (1).

the express acknowledgment of community land in that article 63 recognizes land held by communities identified on the basis of ethnicity, culture or similar community of interest. Article 63(2)<sup>68</sup> further depicts what community land consists of and sub-article 4 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 acknowledgment of community land and further the vesting of rights in such communities is pertinent to the issue of illegal and irregular allocation of land. This is because illegal and irregular allocation of land involves land that isn't registered. The lack of a title deed is a catalyst to illegal and irregular allocation of land since there is no proof of an owner of the said land. It therefore becomes easy to grab land or allocate land to anyone.

The absence of a title deed does not necessarily mean that there is no owner of a piece of land. The former land regime however did not acknowledge this fact and more so negated the fact that most African land was owned communally. This resulted into a system that did not recognize any other land apart from public and private the consequence being capitalization of the lacuna by land grabbers and corrupt parties perpetrating illegal and irregular allocation of land.

---

<sup>68</sup>Community land consists of a) land lawfully registered in the name of group representatives under

The provisions of any law; (b) land lawfully transferred to a specific community by any process of law; (c) any other land declared to be community land by an Act of Parliament; and (d) land that is—

Lawfully held, managed or used by specific communities as

Community forests, grazing areas or shrines;(ii) ancestral lands and lands traditionally occupied by hunter gatherer

Communities; or (iii) lawfully held as trust land by the county governments, but not including any public land held in trust by the county government under Article 62(2)

The constitution mandates parliament with the task of enacting legislation that will oversee the administration of community land. This is still work in progress as the Community Land Bill has just been passed and is yet to be implemented.

Article 68 (v) of the constitution states that parliament shall enact legislation to enable the review of all grants or dispositions of public land to establish their propriety or legality. This is a positive step towards the curbing of illegal and irregular allocation of land presuming that such legislation is aimed at establishing legality of dispositions of public land. This provision is seen in the National Land Commission Act that gives the Commission the duty to review grants and take further action as to their legality or lack thereof.

### **3.1.2 The Land Registration Act**

The Act<sup>69</sup> was enacted in 2012 with the aim of revising, consolidating and rationalizing the registration of title to land and to give effect to the principles of devolution. It provides that the registration of a person as a proprietor of land shall vest in him/her the absolute ownership together with all the rights and privileges belonging thereto. The registration of a person as a lessee shall vest in that person all the leasehold interest together with all the rights and interests described in the lease. The rights of a proprietor whether acquired through first registration shall be indefeasible.

The Land Registration Act further provides that the certificate of ownership will be held as conclusive evidence of ownership. The registered owner is the absolute and indefeasible owner

---

<sup>69</sup> Land Registration Act No. 3 of 2012 (LRA).

but is subject to encumbrances contained in the title.<sup>70</sup> The only exception is on the grounds of fraud or misrepresentation or where the title is acquired illegally. The indefeasibility of title then guarantees individuals or custodians of customary land some security from incidences of double allocation, which falls under illegal allocation of land. Customary trusts have been provided for as overriding interests and this places a restriction on transfer of land generally.<sup>71</sup> This may not be addressing illegal and irregular allocation of land per se as the nuisance usually involves public land.

The Act repealed the previous registration statutes. It was able to bring registration under one Act of Parliament but the provisions relating to indefeasible title, first registration and the absolute nature of sanctity of title provided under the repealed RTA and RLA are not different. This is a limitation as far as resolving the landless land problem is concerned. The reason is that the policies and laws that had made people landless have not changed despite the coming in of the Constitution of Kenya 2010<sup>72</sup> and the Land Registration Act. Even though the Commission of Inquiry into the Illegal and Irregular Allocation of Land recommended that the said provisions should not be taken as absolute, the statute did not consider that but rather upheld the position that has always existed.

Title deeds issued under the GLA and LTA on the other hand, will have to be examined and registered afresh under the new laws.<sup>73</sup> There are no specific timelines prescribed for the examination and fresh registration, save that this has to be done '*as soon as conveniently*

---

<sup>70</sup> Land Registration Act (2012), Section 26.

<sup>71</sup> Land Registration Act (2012), Section 28.

<sup>72</sup> Constitution of Kenya 2010.

<sup>73</sup> Land Registration Act (2012), Section 105.

*possible'* - as provided in the new laws.<sup>74</sup> This **does not** mean that GLA and LTA title deeds invalid.<sup>75</sup> However, they will only be recognized under the new laws after their examination and fresh registration.<sup>76</sup> Public land was majorly registered under the GLA and the LTA. Having the titles examined before registration is a mechanism used to examine titles for defects that would give away irregularities and illegalities concerning the piece of land and the title.

### **3.1.3 The Land Act**

The Land Act 2012<sup>77</sup> was enacted to give effect to the provisions of Article 68 of the Constitution and to revise and rationalize land laws. Its aim is to provide for sustainable administration of land and land-based resources and for connected purposes. The Act defines public purpose to entail settlement of landless, the poor and the internally displaced persons.<sup>78</sup> It defines a landless person as one who occupies land that legally belongs to another person.<sup>79</sup> The Act makes provisions for settlement programmes to be administered by the National Land Commission. In that regard, the settlement programmes shall be used to make land accessible to landless. The act proposes establishment of land settlement Fund to be managed by the

---

<sup>74</sup> Coulson Harney Advocates, 'A Snapshot of the New Land Laws' (31<sup>st</sup> May 2012), <<http://www.coulsonharney.com/News-Blog/Blog/A-snapshot-of-the-new-land-laws>> accessed 12<sup>th</sup> August 2016.

<sup>75</sup> Ibid.

<sup>76</sup> Land Registration Act No.3 of 2012 Section 105.

<sup>77</sup> Land Act No. 6 of 2012 (LA).

<sup>78</sup> Land Act No. 6 of 2012 Section 2.

<sup>79</sup> Ibid.

Commission. The fund is to be used for among other purposes, the provision of access to land to landless and to purchase private land for settlement programmes.

The Act gives the National Land Commission or the Cabinet Secretary power to make rules where applicable to ensure the better carrying out of the Act. The challenge with the provisions is that the LRA makes it easy for land to be registered in the names of private individuals. The repealed land laws made provisions protecting first registration, which is to the effect that a title deed makes one, an indefeasible owner despite historical injustices. There is however need to reconcile the provisions of the Land Registration Act and the Land Act. Whereas it is possible to register land in the names of few private individuals, the Land Act has made provisions to transfer unutilized land to landless. The issue that would then arise is the issue of transferring land that is already registered. Previously, the government bought land from private owners and in such instances negotiations were done with the private owners. The Land Act makes provisions for the role of the National Land Commission to implement settlement programmes and to provide access to land for shelter and livelihood. This is to be done on behalf of the national and county governments. The settlement programmes are supposed to provide access to land for landless among other things.

The National Land Commission is the body mandated with the administration of public land and therefore follows that it will undertake exclusive allocation duties. The fact that a single body has been mandated with the administration of land avoids and curbs the issue of overlapping of tasks and the consequence lack of accountability and transparency. This then goes a long way in the fight against future illegal and irregular allocation of land.

Section 12 of the Land Act outlines the ways the commission can allocate land. These are; public auction to the highest bidder at prevailing market value subject to and not less than the reserved price;(b) application confined to a targeted group of persons or groups in order to ameliorate their disadvantaged position;(c) public notice of tenders as it may prescribe;(d) public drawing of lots as may be prescribed; (e) public request for proposals as may be prescribed; or (f) public exchanges of equal value as may be prescribed.<sup>80</sup> The allocation methods are purposely-public methods for the sense of transparency. Transparency of the whole allocation process will pose a challenge to any future illegal and irregular allocation of land.

Section 14 of the Act provides that the Commission shall issue, publish or send a notice of action, to the public and interested parties, at least thirty days before, offering for allocation, a tract or tracts of public land before any allocation under the act is done.<sup>81</sup> Most cases of illegal and irregular allocation of land in Kenya were homogenously politics related. The political elite who knew which channels to manipulate would do so without the public eye scrutiny. The notification process adds to the transparency of the process and therefore a method of reducing illegal and irregular allocation of land.

### **3.1.4 National Land Commission Act**

This is the Act that outlines the functions of the National Land Commission whose establishment was proposed by the National Land Policy and made official by Article 67(2) of the constitution.

---

<sup>80</sup> Land Act No. 6 of 2012 Section 12.

<sup>81</sup> Land Act No. 6 of 2012 Section 14.

The elements of the Act consist of provisions with regard to: powers of the Commission and its composition and Administration.

The powers of the commission are: to manage public land on behalf of the national and county governments; to recommend a national land policy to the national government; to advise the national government on a comprehensive programme for the registration of title 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, and recommend appropriate redress; to encourage the application of traditional dispute resolution mechanisms in land conflicts; to assess tax on land and premiums on immovable property in any area designated by law; and to monitor and have oversight responsibilities over land use planning throughout the country.<sup>82</sup>

The NLC act is more of an administrative guideline for the governance of the commission than it is a guideline to how the duties and powers should be performed.

### **3.2 THE NATIONAL LAND COMMISSION**

This is the institutional capacity that Kenya will use in implementing and bringing to fruition the national land reforms through policy formation and on ground materialization of the policies.

The Commission is a young body being incorporated in 2012. Since then it has made a few achievements with regard to its mandate. The Commission has: participated in opening up closed

---

<sup>82</sup> National Land Commission Act, Section 5.

or grabbed public spaces and access routes, including grabbed islands and facilitated acquisition of land and compensating affected persons for road constructions and creation of way-leaves.<sup>83</sup> It is continuously addressing public complaints regarding land issues, either through written memoranda or visits by delegations and individuals to Ardhi House.<sup>84</sup> The National Land Commission is drafting Rules and Regulations to operationalize the National Land Commission Act, the Land Act and the Land Registration Act.<sup>85</sup> It has commenced formation of County Land Management Boards in line with the devolution vision encamped in the Constitution of Kenya.<sup>86</sup> The Commission is also participating in formulation of the Evictions and Settlement Bill and the Community Land Bill. It is also verifying and streamlining records.<sup>87</sup>

The Commission has admitted that is working very hard to resolve a number of issues. These include: Delayed issuance of title deeds; Backlog of court cases; Conflict among communities; Conflicts among communities and boundary disputes. Minor shortcomings in land law; Delivery of services in a timely and efficient manner; Creating an understanding between the Commission, stakeholders and our key partners; Integrity of records including verification and updating of such records and double allocations.<sup>88</sup>

---

<sup>83</sup> National Land Commission 'Achievements' <<http://www.landcommission.go.ke/about-nlc/achievements>> accessed 16th August 2016.

<sup>84</sup> Ibid.

<sup>85</sup> Ibid.

<sup>86</sup> Ibid.

<sup>87</sup> Ibid.

<sup>88</sup> Ibid.

### 3.2.1 Capacity of the Commission

For an institution to be effective and achieve its mandate, it has to have the capacity to operate and do so with much efficacy. The capacity of the commission can be analysed in terms of the composition of the commission itself and the qualifications of the members, its financial independence, its institutional autonomy and actual power.

- **Composition**

The Act provides that the composition of the commission shall consist of a chairperson and 8 other members.<sup>89</sup> The qualifications of the chair and members are: a bachelors degree, and at least 15 years of experience in the fields of public administration; land management and administration; management of natural resources; land adjudication and settlement; land law, land survey, spatial planning or land economics; or social sciences.<sup>90</sup> The members must also meet the integrity criteria provided for in the sixth chapter of the Constitution and have a distinguished career.<sup>91</sup>

The act further encapsulates who is not eligible for the position of chair and the criteria is a member of Parliament or county assembly; is an official of a governing body of a political party; has at any time within the preceding five years, held or stood for election as a member of

---

<sup>89</sup> National Land Commission Act, Section 7.

<sup>90</sup> National Land Commission Act, Section 8.

<sup>91</sup> Ibid.

Parliament, a county assembly or as a governor; is an un-discharged bankrupt; has been convicted of a felony; has benefitted from, or facilitated an unlawful or irregular allocation, acquisition or use of land or other public property; or has been removed from office for contravening the provisions of the Constitution or any other written law. The rationale behind excluding anyone involved in the political sphere is to rid the commission and any remedial or restorative processes the commission will undertake from political influence.

The qualifications of the members of the commission seem satisfactory enough until you probe the intricate issues regarding non-academic qualifications. One issue that rears itself is that Kenya is a big country and no doubt the members of the commission haven't amassed their vast wealth of experience from every corner of the country. The question therefore is if a member of the commission has worked in Nairobi for all the 15 years needed as experience, would he be able to tackle issues of irregular and illegal allocation of land in Turkana? The country's land issues are not homogenous even if they would fall into the category of illegal and irregular allocation of land.

The quantity of the workforce also comes under scrutiny. This is one commission that is tasked with solving all the land issues accumulated over the decades. Its practicality is questionable. The establishment of the county land management boards would help in devolution and delegation terms but until then the commission bears the grunt of this insurmountable task. Adelphi<sup>92</sup> and Mutai<sup>93</sup> both agree that the workforce capacity is lacking even without the establishment of the county land boards stating that the employees have to do a lot of work, as there aren't enough workers.

---

<sup>92</sup> Interview with Adelphi, Nairobi Kenya, 18<sup>th</sup> May 2016.

<sup>93</sup> Interview with Mutai, Nairobi Kenya, 5<sup>th</sup> May 2016.

- **Autonomy**

The independence of the commission is scrutinized through the financial and institutional lenses. Section 26 states that the commission shall rely on funds consisting of monies allocated by Parliament for the purposes of the Commission; such monies or assets as may accrue to the Commission in the course of the exercise of its powers, or the performance of its functions under this Act; and all monies from any other source provided or donated or lent to the Commission.<sup>94</sup>

The second option source of its funding would mean the monies that are paid in terms of fees required for the various processes to be commenced. The public would pay this. The third option being grants and donation is fair but impractical in that a parastatal rarely gets grants from donors and more so should not be in a position to be asking for grants since it is a government institution and the budget should cover all financial requirements of any parastatal.

The fact that the commission receives its money from parliament is a reason to question its financial independence. Keeping in mind that the irregularities and illegalities taking place in the old land regime was involving political elites, there is a conflict of interest in that there is a chance the same political elite might still be in parliament and therefore be the same controllers of budget with regard to the National Land Commission fund.

The National Land Commission needs to have institutional capacity for it to function effectively. The commission and the Ministry of Lands still have some overlapping tasks, which inevitably lead to a power tussle and a go-slow on the progress of the commission.<sup>95</sup>

---

<sup>94</sup>National Land Commission Act, Section 26.

<sup>95</sup> Interview with Mutai, Nairobi Kenya, 5<sup>th</sup> May 2016.

The powers of the commission include among others; conducting research related to land and the use of natural resources and making recommendations to appropriate authorities; initiating investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress. The mentioned powers can be questioned to be powers per se as they all end up with the commission making a recommendation to the relevant authorities. For instance, the commission may undertake to investigate a case of illegal allocation and when its finding is positive, can only recommend revocation of the title to the registrar who has to then get a court order on the same as it is only a court than can revoke a title. This process is assured of protraction.

- **Guiding Regulations**

The NLC act has clearly elucidated the powers and duties of the commission. What it has failed to do is provide for any guidelines as to how these various duties are to be undertaken and powers exercised. Mutai has been part of the groups that undertake title investigation to find out if the process of acquiring that land was illegal or marred with any irregularities. He explained the procedure The NLC takes up a case on its own volition or when a member of the public files a complaint .The team set up by the commission then validates the complaint by conducting a historical search. A notice is then placed in a national newspaper giving information to the public about the review-taking place.

The notice invites anyone with an interest in the land to come to a designated place to be part of the review process. The interested parties give information on the type of interests they have and how they came to have those particular interests and supply documentation to support their

claims. The team then analyses the documents and the statements by all parties before making a decision either to uphold or recommend revocation of a grant.

This procedure was created and applied by the commission on the basis of necessity. It is not official nor has it been sanctioned as being the appropriate and effective method of conducting investigation. This is because the commission lacks regulations on how to employ the provision of the act yet are still expected to meet its tasks.

## **CHAPTER FOUR**

### **4.0 PERFORMANCE OF THE NATIONAL LAND COMMISSION IN ADDRESSING IRREGULAR AND ILLEGAL LAND ALLOCATION**

#### **4.1 INTRODUCTION**

Restitution of illegally or irregularly allocated land has not been easy globally due to the justice point of view where the parties concerned must agree upon terms.<sup>96</sup> The process of restitution must go to the root of unjust expropriation in the first place. As expected, this can be particularly challenging and is bound to face stiff opposition from beneficiaries of the illegal/irregular allocations. This Chapter examines the efforts of the National Land Commission to review grants of public land in Lamu County and make recommendations. This aims at showing that although challenging, reclamation of irregular/illegally allocated land is possible. The Chapter will link the case studies to the weaknesses of the current legal framework that will be identified in order to show how these weaknesses can be sealed.

---

<sup>96</sup> Patricia Kameri-Mbote, 'Righting Wrongs, Confronting Land Dispossessions in Post- Colonial Contexts' (Conference on Land, Memory, Reconstruction and Justice: Perspectives on Land Restitution in South Africa, Cape Town, 13-15 September 2009) 2.

## 4.2 REVIEW OF GRANTS AND DISPOSITIONS OF PUBLIC LAND IN LAMU

The National Land Commission was created by the Constitution and has 3 roles vested in it as the other commissions created by Constitution. These are: to protect the sovereignty of the people; secure the observance by all state organs of democratic values and principles; and promote constitutionalism.<sup>97</sup> In line with the roles, Article 67 makes provisions on the functions of the National Land Commission.<sup>98</sup> Article 68 states that parliament shall make further legislation to enable the review of all grants or dispositions of public land to establish their propriety or legality.<sup>99</sup>

The National Land Commission Act being the legislation Parliament was to enact to govern the National Land Commission, has administrative provisions on the governance of the commission. Section 14 of the act provides for the review of grants and dispositions. It states that Subject to Article 68(c)(v) of the Constitution, the Commission shall, within five years of the commencement of this Act, on its own motion or upon a complaint by the national or a county government, a community or an individual, review all grants or dispositions of public land to establish their propriety or legality.<sup>100</sup> The jurisdiction for the review and revocation of titles, bestowed on the Commission by the Constitution and the National Land Commission Act, was a

---

<sup>97</sup> Constitution of Kenya, Art 249(1).

<sup>98</sup> Constitution of Kenya, Art 67.

<sup>99</sup> Constitution of Kenya, Art 68 c(v).

<sup>100</sup> National Land Commission Act no. 5 of 2012, Section 14.

jurisdiction of the High Court of Kenya under the repealed land statutes.<sup>101</sup> This makes the Commission's functions and powers quasi judicial over and above their administrative nature.

On 31<sup>st</sup> July 2014, President Uhuru directed the National Land Commission and the Ministry of Lands Housing and Urban Development to investigate the allocation of large parcels of land as ranches in Lamu County, with a view to ascertaining their legality or otherwise. The directive was with respect to allocation of an estimated 500,000 acres of land allocated to 22 companies and societies in Lamu County.<sup>102</sup>

The methodology used to carry out any of the Commission's functions is subject to rules and regulations made by the Commission itself.<sup>103</sup> To this effect the commission made and submitted to the National Assembly a draft of the National Land Commission (Review of Grants and Dispositions) Regulations 2014.<sup>104</sup> These are yet to be tabled in Parliament for approval. The Commission has then adopted its own processes and procedures for undertaking the review of grants and dispositions of public land.

On 4<sup>th</sup> August, the Commission published in the local dailies, a notice of the review timetable for a number of parcels of land. The Commission requested the attendance of interested parties.<sup>105</sup> The Commission used 'hearings' to gather information. A hearing in this context is a forum where all the interested parties are given a chance to explain their interest and how they came to acquire it. This exercise is mainly for information gathering in order to investigate the

---

<sup>101</sup> National Land Commission, 'Report on the Review of Grants and Dispositions of Public Land in Lamu. (October 2014)

<sup>102</sup> Ibid.

<sup>103</sup> National Land Commission Act no. 5 of 2012, section 14(1).

<sup>104</sup> National Land Commission, 'Report on the Review of Grants and Dispositions of Public Land in Lamu. (October 2014).

<sup>105</sup> Ibid.

complaints regarding the allocation of public land. In the Lamu case, the Commission collected information from the owners of the parcels of land and any persons with an interest in the property, to ascertain the process of the allocations of the properties, and the various interests affected by those allocations.<sup>106</sup> The information gathering exercise included oral and written submissions of the interested parties.

Based on the cumulative information gathered, the Commission was of the opinion that the indeed there existed issues regarding the legality and propriety of the grants and dispositions of public land, subject to the proceedings.<sup>107</sup> The Commission then sent to the parties, particularized written complaints, and summoned them for hearings. The commission rendered its determinations on the legality and propriety of the grants and dispositions of various parcels of public land.<sup>108</sup>

The Commission pointed out the 3 different categories of grants based on the different land regimes and their transition periods. The commission highlighted these as:

- Grants and dispositions of public land undertaken before 27<sup>th</sup> August 2010 subject to the repealed constitution of Kenya 1965 and the relevant land laws and related statutes in force at the time.
- Grants and dispositions of public land undertaken between 27<sup>th</sup> August 2010 and 2<sup>nd</sup> May 2012, subject to the new Constitution of Kenya 2010 and the relevant land laws and related statutes in force at that time.

---

<sup>106</sup> Ibid n 104

<sup>107</sup> Ibid.

<sup>108</sup> Ibid.

- Grants and dispositions of public land undertaken after 2<sup>nd</sup> May 2012, subject to the new constitution of Kenya the relevant land laws and related statutes in force at that time, and the new land laws and related statutes which came into force on 2<sup>nd</sup> May 2012.

The report by the National Land Commission on the grants and dispositions of public land in Lamu highlighted a few issues that arose during the hearings. The issues included

- a. Definition of legal/illegal and regular/irregular titles under section 14(5) and (6) of the National Land Commission Act.
- b. Protection of the right to property under Article 40 of the Constitution
- c. Constitutional Principles of land policy under Article 60 of the Constitution.
- d. Public interest/the doctrine of public trust under Article 62 of the Constitution
- e. Indefeasibility of titles under Section 23 of the Registration of Titles Act
- f. Rights of a *bonafide* purchaser for value without notice of defect of title under Section 14(7) of the National Land Commission Act
- g. Observance of democratic values and principles by state officers in allocation of public land.
- h. Promotion of constitutionalism in the grants and the disposition of public land, and the review of the said grants and allocations. The provisions of the National Land Commission Act further give the remedies available to the commission. Where there is established that the allocation was unlawful, the commission is obliged to recommend

revocation.<sup>109</sup> Where it is established that the allocation was irregular, then the commission shall recommend regularization.<sup>110</sup>

The commission made reference to article 68(c) v<sup>111</sup> of the Constitution and further to section 14 (5) and (6) of the National Land Commission Act when defining what illegal and irregular land allocation.

In addressing the issue of definition with respect to the terms illegal and irregular allocation of land, the Commission was of the view that the legality or lawfulness of a title hinges on the compliance of the process of allocation of that land with the constitutional and statutory requirements for the grant of that land.<sup>112</sup> If the grant is in contravention of the legal requirements, it is null and *void ab initio*, and requires only the order of this commission for revocation of title for it to revert to public land.<sup>113</sup>

The Commission takes irregularly allocation to mean titles that were procured in compliance with the constitutional and statutory requirements for the grant of that land but which, in the process, were marred by certain administrative anomalies that do not go to the root of the title. On this view the commission relied on the case of ***Gitwany Investment Limited v Tajmal Limited & 3 Others [2006] eKLR***. The court upheld the validity and legality of a title, despite its Land Reference number erroneously referring to a parcel of land non-existent within the

---

<sup>109</sup> National Land Commission Act no. 5 of 2012, section 14(5).

<sup>110</sup> National Land Commission Act no. 5 of 2012, section 14(6).

<sup>111</sup> Parliament shall enact legislation to enable the review of all grants or dispositions of public land to establish their propriety or legality.

<sup>112</sup> Ibid.

<sup>113</sup> Ibid.

respective locality, but whose Deed Plan correctly identified and demarcated the boundaries of the land allocated.

The right to protection of property under article 40 of the Constitution and section 75 of the repealed constitution was an arising issue raised by the parties who have an interest in the pieces of land under investigation. The commission applied section 40 (6) of the Constitution, which states that the rights under Article 40 do not extend to any property that is unlawfully acquired. The commission further supported its stance by quoting Angote J in *Adan Abdirahani Hassan and 2 Others v The Registrar of Titles, Ministry of Lands and 2Others [2013] eKLR* The learned judge stated that, “Article 40 of the current constitution just like section 75 of the repealed Constitution protects the right to own property. This Article should however be read together with the provisions of Article 40(6) which excludes the protection of property which has been found to have been unlawfully acquired. This requirement recognizes the fact that the Constitution protects certain values such as human rights, social justice and integrity amongst others. These national values require that before one can be protected by the Constitution, he must show that he has followed the due process in acquiring that which he wants to be protected.”

Indefeasibility of title was a major issue arising from the hearing exercise and the commission’s consideration of the legal framework for allocation of public land. Section 23 of the now repealed Registration of Titles Act CAP 281 grants this right.<sup>114</sup> Many parties before the commission tried to assert section 23 of the RTA as a defense against the commission’s

---

<sup>114</sup> Section 23 of RTA states: The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances easements, restrictions and conditions contained therein or endorsed thereon and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.

constitutional and statutory mandate to review the legality of grants and dispositions of public land.

To address this issue, the commission relied on Article 40(6) of the Constitution, which qualifies the right to property by adding the legality condition. The commission also relied on Article 2(4) of the Constitution, which states that any law including customary law, which is inconsistent with the Constitution, is void to the extent of the inconsistency, and any act or omission in contravention of the Constitution is invalid.

The report on the review of grants and dispositions of public land in Lamu gives a background of the County in order to have an insight of how the land is held in the county. The report recounted that the population density of the county is 16 people per squared kilometer.<sup>115</sup> The population poverty levels were recounted as 31.6% and age dependency levels is 100:82.<sup>116</sup> To be noted is that a large population of settlers from upcountry occupying mainly Mpeketoni and Hindi areas.<sup>117</sup> The main economic activities were reported to be wildlife, fishing, tourism, livestock rearing, and water and tourism attraction sites.<sup>118</sup>

The various lands issues in Lamu County had been apparent to the Ministry of Lands, which undertook the initiative to start various programs and policies to address these issues. The programs included, establishment of settlement schemes, regularization of informal settlements

---

<sup>115</sup> National Land Commission, 'Report on the Review of Grants and Dispositions of Public Land in Lamu. (October 2014) 19.

<sup>116</sup> Ibid.

<sup>117</sup> Ibid.

<sup>118</sup> Ibid.

through documentation of Swahili Villages and establishment and documentation of ranches to protect the land rights of indigenous people and avail land for large-scale development.<sup>119</sup>

The first case to be reviewed was the ranches that were allocated to the local communities, private companies and institutions in order to create employment and protect land rights of the indigenous people of Lamu County. This initiative was birthed during the 1970s discussions involving the then Ministry of Livestock Development, the Treasury, the World Bank, the Agricultural Finance Corporation who developed policies geared towards poverty eradication and resolving insecurity (shifita menace) in Lamu County.<sup>120</sup>

The then Ministry of Livestock in consultation with all the concerned authorities drew the plans for the ranches, which covered the terms and conditions to be applied when allocating the proposed ranches.<sup>121</sup> The county council of Lamu applied for documentation of the ranches and allocation of various pieces of land to the council, local communities and indigenous persons within Lamu County following the passing of the land policies in 2010.<sup>122</sup>

The report names the cases by the name of the owner of the land, most of which are companies and cooperatives.

The first case documented is that of **Witu Nyongoro Ranch (DA) Company Limited Land Reference No. 29274**.<sup>123</sup> The commission conducted its hearings in which all stakeholders came to submit their submissions. The findings of the commission were that the company was offered

---

<sup>119</sup> Ibid.

<sup>120</sup> National Land Commission, 'Report on the Review of Grants and Dispositions of Public Land in Lamu. (October 2014) 20.

<sup>121</sup> Ibid.

<sup>122</sup> Ibid.

<sup>123</sup> National Land Commission, 'Report on the Review of Grants and Dispositions of Public Land in Lamu. (October 2014) 22.

a grant for the ranch by the government through the directed agricultural investment facility for ranching purposes.<sup>124</sup> A plan was drawn for the company and a letter of allotment was issued thereafter on 6<sup>th</sup> December 1979. The company accepted the offer and paid the legal fees to the Commissioner of Lands. A title deed was however not issued until 2012 due to delays of surveying the land.

The commission also visited the land and reported that there were 600 cattle on the land and the company had also leased a great portion of the land to Better Global forest project and Witu Conservancy Group for tree planting.<sup>125</sup> There were no documents evidencing the lease arrangement. The commission also reported that during the preliminary hearings, the Giriama people presented that the parcel of land was originally their ancestral homeland before being pushed out of their land by the management of Witu Nyagoro (DA) Ranch Limited.<sup>126</sup>

The Commission determined that the owners of the land procedurally applied for and were allocated the land. It further determined that the lack of survey was in contravention of the Government Lands Act and the Survey Act. This was cited as an irregularity. The lack of full information on the grant as required by the Registration of Titles Act was deemed an irregularity. The commission then recommended regularization of the grant and compliance with the laws mentioned. The commission further recommended that the rectification of the grant should take into account the interests of the farmers, pastoralists, squatters and other interested parties.

---

<sup>124</sup> Ibid n 123

<sup>125</sup> Ibid.

<sup>126</sup> National Land Commission, 'Report on the Review of Grants and Dispositions of Public Land in Lamu. (October 2014) 23.

The title of the piece of land recognized as Land Reference Number 29256 and owned by **Mokowe-Kibokoni Ranch Limited** was subjected to a review by the commission.<sup>127</sup> The owner of the land is a cooperative with a membership of 74 people. The owners applied to the Lamu District Development Committee to be allocated 5000 hectares for agricultural purposes.<sup>128</sup> The Commissioner of Lands later approved the application and Mokowe Kibokoni ranch was issued with a letter of allotment. The cooperative was allocated 2722.6 hectares of land for a term of 99 years.<sup>129</sup> The offer was accepted and payment made. The commission made a physical inspection of the land and observed that there were no agricultural activities going on in the land. The preliminary hearings were not without complaints from the local communities claiming the land was grabbed from them. They further claimed that the company had only put up structures on the land recently when investigation into the Lamu ranches commenced.

The determination of the commission was that the main issue of this grant was the term of the grant for agricultural use, which was 99 years instead of 44 years, as required under the policy and regulations for allocation of agricultural public land.<sup>130</sup> This was deemed an administrative impropriety and anomaly in the grant, which does not nullify it. It recommended regularization of the grant.<sup>131</sup>

The report included some reviews that on analysis, the commission's recommendation was revocation based on some illegality in the procurement process. An example is Land Reference

---

<sup>127</sup> National Land Commission, 'Report on the Review of Grants and Dispositions of Public Land in Lamu. (October 2014) 24.

<sup>128</sup> Ibid.

<sup>129</sup> Ibid.

<sup>130</sup> Ibid.

<sup>131</sup> Ibid.

number 29246 registered under **Fincorp Investment (K) Limited**. The ranch had been originally allocated to Akiro ranch that failed to accept the offer and it was therefore reallocated to Fincorp investment on 26<sup>th</sup> March 2012.<sup>132</sup> The offer was accepted and payment for the legal fees received. A grant was later processed, forwarded and executed by the commissioner of lands on 26<sup>th</sup> July 2012.<sup>133</sup> The commissioners and relevant technical officers overflew the ranch/farm on 18<sup>th</sup> September 2014 and found the ranch was bushy with indigenous trees growing and browsing wild animals with no agricultural activities on the ground.<sup>134</sup>

The commission found that the allocation was illegal on the following grounds.

- The process of allocation of the land was flawed since there was no application for allotment nor was there acceptance. This was a contravention of the Government Lands Act.
- The property was allocated to an unincorporated entity with no legal personality since *Fincorp Investment* is not registered as a company.

The commission thereby recommended revocation of the grant on the basis of its illegality.

The land held by *Kaab Investments* underwent a similar verdict after a review was carried out.<sup>135</sup>

The recommendation was based on the fact that the owners of the land neither made an application for a grant nor accepted an offer.<sup>136</sup> Further supporting the commission's decision

---

<sup>132</sup> National Land Commission, 'Report on the Review of Grants and Dispositions of Public Land in Lamu. (October 2014) 31

<sup>133</sup> Ibid.

<sup>134</sup> Ibid.

<sup>135</sup> National Land Commission, 'Report on the Review of Grants and Dispositions of Public Land in Lamu. (October 2014) 34

<sup>136</sup> Ibid. 34

was the lack of consultations between the Ministry of Lands and the County Government of Lamu to ascertain the availability of the land.<sup>137</sup> This was evidenced by the fact that said parcel of land has been occupied by the local community for decades.<sup>138</sup> The procedure was deemed to have violated the Constitutional requirements for consultation and equitable access.<sup>139</sup> It also violated the statutory and policy requirements under the Survey Act and the Physical Planning Act, requiring the allocation to be based on a Part Development Plan.<sup>140</sup>

The verdict of the commission was that the grant should be revoked and the land to revert back to the Count Government of Lamu.

#### **4.3 CASE LAW ON REVIEWS UNDERTAKEN BY THE COMMISSION**

The decisions taken by the Commission to undertake reviews and thereafter to recommend regularization or revocation of grants has been received and met with a lot of resistance. There exist cases where parties have invoked the court for judicial review orders to either quash the decision of the National Land Commission or to prohibit it from undertaking further decisions.

This was seen in the case of *Republic vs. The National Land Commission and Tropical Treasure Limited ex-parte Krystalline Salt Limited*<sup>141</sup>The applicant prayed for an order of

---

<sup>137</sup> Ibid. 34

<sup>138</sup> Ibid.34

<sup>139</sup> Ibid.34

<sup>140</sup> Ibid. 34

<sup>141</sup>Republic Vs The National Land Commission And Tropical Treasure Limited Ex-Parte Krystalline Salt Limited Jr Case No. 309 Of 2014 .

certiorari to quash the decision made by the respondent to review the grant and titles of the subject suit properties. The applicant also prayed for an order of prohibition to prohibit the respondent from reviewing of the titles of the suit properties and from interfering in any manner whatsoever with the applicant's ownership and quiet possession of the suit properties. The applicant contended that Article 40 of the Constitution provides that every person has the right, either individually or in association with others, to acquire and own property of any description in any part of Kenya. Further, that the Constitution provides that Parliament shall not enact a law that permits the state or any person to arbitrarily deprive a person of property of any description. The applicant submitted that the respondent breached its constitutional right when they placed an advertisement at page 43 of the Standard newspaper stating that the applicant's properties were up for review. The applicant further submitted that that the Respondent's decision to review private land was irrational unreasonable and based on fundamental error of fact and gross error of law. The Applicant asserted that the Respondent committed an error of law by interpreting Section 14 of the National Land Commission Act so as to claim jurisdiction over its parcels of land. Additionally, the applicant submitted additionally, that it was never notified of any complaint against its properties and neither did it have any information or knowledge of the complaint.

The respondent made its submissions stating that their mandate is not limited to managing public land as alleged by the Applicant but extends to review of all grants or dispositions of public land to establish their propriety within five years of the commencement of the National Land Commission Act.

The Respondent contended that any lease or certificate of title where the government remains the head lessor and determines the conditions under which the said land is to be held and utilized and

which upon expiry of the lease reverts to the Government, falls under the purview of a grant and the Respondent has jurisdiction to review and determine its legality or propriety. It is the Respondent's case that the Applicant's properties are under leasehold tenure and the Government is the head lessor thus making them subject to its review. The respondent tendered as a fact that with regard to due process, notice of the review had been given and a date for the hearing stated yet the applicant did not appear to state his claim.

The court stated that the two issues for determination were whether the Respondent had jurisdiction to hear and determine the Interested Party's complaint and if so whether the Respondent complied with the rules of natural justice.

The judge was of the view that Under Section 14 of the National Land Commission Act the Respondent is given jurisdiction to enforce Article 68(c)(v) of the Constitution and review all grants or dispositions of public land to establish their propriety or legality. He further reiterated that the Respondent could only fulfill this responsibility by querying the process under which public land was converted to private land. It would defeat the purpose of the Constitution to imagine that unlawfully and irregularly acquired land once registered, as private property is no longer within the reach of the Respondent.<sup>142</sup> The judge further found that the Respondent was acting within its mandate of enquiring into the legality and propriety of a grant or disposition of public land. The Respondent should, however, have the courage to tell the parties to go to the right forum if it finds that it has no jurisdiction to deal with the dispute.<sup>143</sup> The question of natural justice was however answered in the negative. The judge stated that a mere advertisement

---

<sup>142</sup>Republic Vs. The National Land Commission And Tropical Treasure Limited Ex-Parte Krystalline Salt Limited Jr Case No. 309 of 2014 paragraph 55.

<sup>143</sup> Ibid (paragraph 63).

without sufficient information on who was the complainant and what the complaint was denied the applicant sufficient opportunity to rebut the allegations. The judge hereby granted an order of certiorari quashing the decision to revoke the titles.

Many judicial review cases involving applicants and the National Land Commission as a respondent have to do with the question of whether the commission can review private land. This was answered in the case of ***Republic vs. The National Land Commission ex parte Holborn Properties Limited***<sup>144</sup> where the applicant's submissions were that the commission lacked jurisdiction to review and revoke a grant of private land. In answering this question, the judge gave a summary of the history of the land policies and the creation of the commission highlighting its powers and functions.

He stated inter alia that the body that was to be given the mandate to review such grants or dispositions by Parliament was not only supposed to deal with public land that was illegally or irregularly allocated after the promulgation of the Constitution but even before.<sup>145</sup> He further stated that although the Constitution has defined private land to consist land registered under any freehold or leasehold tenure, and whereas Section 14(1) of the National Land Commission Act gives the Respondent the powers to review all grants or disposition of public land, it follows that such a review can only entail land that has been converted from public land to private land.<sup>146</sup>

He further reiterated that the Respondent could not review what public land is still, according to the records. One must have acquired land that was initially public land and issued with a title

---

<sup>144</sup>Republic Vs. The National Land Commission Ex Parte Holborn Properties Limited ELC JR No 5 of 2015.

<sup>145</sup> Ibid (paragraph 58).

<sup>146</sup> Ibid (paragraph 59).

document, either as a freehold or leasehold, for a review to be done.<sup>147</sup> It is therefore not true that once land falls under the purview of the definition of “private land”, the same cannot be reviewed.<sup>148</sup>

#### **4.4 THE INADEQUACIES OF THE NATIONAL LAND COMMISSION IN CURBING ILLEGAL AND IRREGULAR LAND ALLOCATIONS**

##### **4.4.1 Lack of Capacity**

The establishment of the commission was a means of giving the land reforms institutional capacity and a positive step forward towards the sessional paper’s goals and recommendations. As has been discussed above, the commission however lacks capacity to undertake its duties and exercise its powers effectively therefore rendering the implementation of the national land policy and the constitution null.

##### **4.4.2 Lack of Political Goodwill and the Vague Mandate of the NLC**

As already discussed above, and as demonstrated by Venezuela’s example, a lot of political goodwill is required in order to repossess illegally/irregularly allocated land. This goodwill is expected from both the executive and legislative arms of government. There have been constant wrangles between the NLC and the Cabinet Secretary for Lands, which have seen the NLC seek the Supreme Court’s Advisory Opinion<sup>149</sup> on its mandate in relation to land management and

---

<sup>147</sup> Ibid (paragraph 60)

<sup>148</sup> Ibid (paragraph 61).

<sup>149</sup> In the matter of the National Land Commission (2015) eKLR, Advisory Opinion Number 2 of 2014.

administration. NLC claims that the Cabinet Secretary has failed to consult it on formulation of guidelines, while the Cabinet Secretary insists that NLC's mandate does not extend to guidelines relating to private land.

Parliament on the other hand, is yet to enact legislation on management of community land and on acreage limits for private land as requires by the Constitution.<sup>150</sup> These scenarios betray a lack of goodwill by both arms that may result in the hope provided by the current legal framework being watered down. This has led to a situation where there is no clear distinction between the mandates of the Ministry of Lands and the Commission in the administration and management of the different types of land. Considering that past abuse of procedures have seen public land converted to private land, the mandates of the two institutions are bound to overlap and without clear mandate and conflict resolution mechanisms as is the case presently, these wrangles are bound to escalate.

#### **4.4.3 National Land Commission's Powers to Investigate Land Injustices**

The Constitution at Article 67(2)(e) mandated the NLC to initiate investigations into present or historical land injustices, and recommend appropriate redress. The NLC Act attempted to operationalize this constitutional provision by providing that-

---

<sup>150</sup>Constitution of Kenya, 2010, arts 63(5) and 68(c)(i).

The Commission shall, within two years of its appointment recommend to Parliament appropriate legislation to provide for investigation and adjudication of claims arising out of historical land injustices for the purposes of Article 67(2)(e) of the Constitution.<sup>151</sup>

The two particular problems with the above provisions are that there is neither an obligation on Parliament to pass the recommended legislation nor on the government to act on the NLC's recommendations. The NLC has been reduced to a mere recommender of actions and not the implementer of such actions. Even if Parliament passed the recommended legislation, which has so far not been passed, then the executive is at liberty to disregard any subsequent proposals from the NLC on the matter.

Other provisions of interest are Articles 68(c)(v) of the Constitution and Section 14(1) of the National Land Commission Act, which mandate the NLC to review all grants or dispositions of public land to establish their propriety or legality. It is noteworthy that this provision restricts this review to public land. From the discussions above, it is evident that irregular and illegal allocations affected trust (community) land in as much the same way as they affected public land. The failure to extend this review to community land therefore means that the NLC has no legal backing to review allocations of community land and as a result it will be difficult to resolve historical land injustices relating to community land.

---

<sup>151</sup> National Land Commission Act, Section 15.

## 4.5 RECOMMENDATIONS FROM INTERVIEWEES

Majority of the interviewees had recommendations pegged on increasing efficacy and capability of the National Land Commission. Nicholas was of the opinion that there should be some provisions in the National Land Commission act that would make it more effective.<sup>152</sup> He suggested that there should be provisions that protect the autonomy of the Commission. He gave an example of a power that was lacking stating that the NLC should be able to order for a rectification in the land register by the registrar.<sup>153</sup>

He was of the opinion that the National Land Commission and the courts should work together because the courts can use the information that the National Land Commission has with regard to land matters in order to make better decisions and to arrive at those decisions expeditiously.<sup>154</sup> His recommendation for curbing cases of illegal and irregular allocation of land is simply to follow the law that is in place.

Mr. Kerron was of the opinion that no new statutory provisions will help make the Committee effective.<sup>155</sup> He stated that the law as it is now was sufficient. He recommended the digitization of the whole registration system.<sup>156</sup> He believes the manual system is archaic and brings with it

---

<sup>152</sup> Interview with Nicholas, Nairobi Kenya, 18<sup>th</sup> May 2016

<sup>153</sup> Ibid.

<sup>154</sup> Ibid.

<sup>155</sup> Interview with Kerron, Nairobi Kenya, 18<sup>th</sup> May 2016.

<sup>156</sup> Ibid.

dangers such as easy alteration of documents and therefore issues such as illegal allocation of land.<sup>157</sup>

As a final recommendation to the effort of stopping illegal and irregular allocation of land, Mr. Ngumbao advocated for transparency of the allocation process.<sup>158</sup> He further stated that accountability of the office charged with allocation should be an imperative issue. In furtherance of his statement, he mentioned that one of the methods to ensure accountability was to ask the potential grantees of what their reasons for acquiring the land were. He was of the opinion that if the reasons aren't for development, the grant should not be awarded.

Carol advocated for the collaboration of the NLC with the courts in curbing illegal and irregular allocation of land.<sup>159</sup> He also was of the opinion that the Commission should seek and use the goodwill of other departments of the Ministry of Lands. Mr. Cao recommended the formation of legislation that would make land administration easier and therefore stop the issue of illegal and irregular allocation of land altogether.

As a recommendation to future endeavours to curb illegal and irregular allocation of land, Mr. Adelphi stated that the process of allocation should be simple and transparent.<sup>160</sup> He further added that the autonomy of the institutions was imperative to their efficiency and effectiveness.

---

<sup>157</sup> Ibid.

<sup>158</sup> Interview with Ngumbao, Nairobi Kenya, 18<sup>th</sup> May 2016.

<sup>159</sup> Supra (n46).

<sup>160</sup> Interview with Adelphi, Nairobi Kenya, 18<sup>th</sup> May 2016.



## **CHAPTER FIVE**

### **5.0 CONCLUSION AND RECOMMENDATIONS**

This Chapter summarizes the findings of the research and recommends a way forward. Based on the analysis of the research the study sort to assess the effectiveness of the National Land Commission in addressing illegal and irregular allocation of land. The decisions taken by the Commission to undertake reviews on illegal/irregular allocations and thereafter to recommend regularization or revocation of grants has been received and met with a lot of resistance. There exist cases where parties have invoked the court for judicial review orders to either quash the decision of the National Land Commission or to prohibit it from undertaking further decisions. Other challenges include lack of political good will, inconsistent provisions; land records are still in the process of digitization. The workforce capacity is also lacking.

### **5.1 RECOMMENDATIONS**

#### **5.1.1 Create a National Land Commission Fund**

As already discussed above, the National Land Commission is tasked with very politically sensitive yet significant task of investigating historical land injustices. It has emerged from the discussion above as well as from the Commission's report that most beneficiaries of

illegal/irregular land allocations were and still are influential members of the society. As such, the likelihood of interference and sabotage of the National Land Commission's work is very high. One way to frustrate the National Land Commission would be use political contacts within Parliament to minimize funds allocated to the National Land Commission. Article 249(3) of the Constitution and Section 26 of the National Land Commission Act leaves the National Land Commission at the mercy of Parliament financially by empowering Parliament to allocate adequate funds to the National Land Commission. What qualifies as 'adequate' is neither defined nor determinable from these provisions of the law. A most appropriate way of ensuring financial independence of the NLC would be to create a special fund for the National Land Commission to cater for its administrative expenses.

### **5.1.2 Clarify NLC's Mandate *vis-à-vis* the Ministry of Lands' Mandate**

Judging from the conflicting jurisdiction of the NLC and the Ministry of Lands, which threatens to derail land reforms, it is prudent to consider an either amendment of the Land Act and the National Land Commission Act to clarify their respective powers. A clear prescription of what both parties are responsible for will enhance co-operation between the two entities, which is necessary for the two to effectively deliver on their crucial mandates.

### **5.1.3 Amend Article 67(2)(e) of the Constitution**

In order to ensure the NLC's investigations of historical land injustices is not in vain, Article 67(2)(e) of the Constitution should be amended to either make the NLC's recommendations binding or to bestow the NLC with the power to ensure redress. The Article should read-

67. (2) the functions of the National Land Commission are-

- e) To initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and ensure appropriate redress;

OR

67. (2) the functions of the National Land Commission are-

- e) To initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and make binding recommendations for appropriate redress;

#### **5.1.4 Digitization of land records**

Land records in Kenya have been over the years managed through paper-based systems, which are vulnerable to loss, wear and tear, compromise and poor usability. Consequently, land administration processes became inefficient, time consuming, unreliable, costly and ineffective.

To address these challenges, the Government of Kenya in 2007 resolved to automate all land records and transactions by developing and deploying a land information management system founded on big data technology which is capable of holding vast and diverse data sets on land ownership and transactions. The decision to automate land records and transactions was in compliance with the provisions of the country's National Land Policy launched in 2009.

The digitisation process is currently being undertaken in various land registration units in Kenya and if achieved it is aimed at creating a digital record management system.

#### **5.1.5 Operational Guidelines**

The National Land Commission does not have any guidelines on how its duties and powers should be undertaken and exercised. Lack of guidelines to guide such an institution means that the commission would likely come up with ad hoc regulations that haven't been thoroughly analysed or thought through in order to make operations smooth and effective. Ad hoc regulations may also mean that the regulations change depending on the task at hand and the location of the task. Such a system is not sustainable. Parliament should come up with regulations that would help the commission identify how to perform duties they have been tasked with.

#### **5.1.6 Increased Capacity**

It is clear that the National Land Commission lacks the requisite capacity to conduct its business effectively. The technical capacity should be increased. The duty of the commission is a mean feat and it cannot afford to have a less than ideal workforce quantity. Their institutional capacity should also be increased. The National Land Commission should be given powers that go further than making recommendations rather take action on the recommendations they would forward to the relevant authorities.

## 5.2 CONCLUSION

Land has historically been used as a resource of political patronage to reward those who were part of a political system that personified the ideals of its leaders. Land was also used to punish, those who were perceived as outsiders in an evolving political system that personified the ideals of its leaders gained a particular premium, easily manipulated across the successive regimes. Whereas efforts have been made in trying to redress the situation, the practice continues, thus lending to the thinking that the vice is attributable to a weak legal framework, poor implementation of the law as well as a poor institutional framework for the management of public land. This study sought to assess the effectiveness of the National land Commission in addressing the problem of illegal and irregular allocation of land in Kenya.

The research methodology involved the use of qualitative and quantitative data with desktop research taking the bulk of the data supplemented with interviews conducted on Ministry of Land officers from the relevant departments that deal with allocation of land. The study found that lack of a critical mass of political goodwill and the obscure mandate of the National Land Commission; and, the capacity of the National Land Commission to investigate historical land injustices having been tied to Parliament's legislative discretion and political whims. It therefore recommended the establishment of a fund account for the National Land Commission as well proposed legislative amendments, not only to reinforce National Land Commission's institutional capacity to address the problem, but also to expand its scope to cover the management of community land. It also recommended speedy digitization of land records.

## **BIBLIOGRAPHY**

### **Statutes and Policy Papers**

1. Constitution of Kenya 2010
2. National Land Commission Act No. 5 of 2012 (NLCA).
3. National Land Policy of 2009.
4. National Land Commission Act, 2012.
5. Land Act No. 6 of 2012 (LA).
6. Land Registration Act No. 3 of 2012 (LRA).
7. *Government Lands Act* (Repealed)
8. *Crown Lands Ordinance*,
9. Established vide Gazette Notice Number 4559 of 4<sup>th</sup> July, 2003
10. Bruce, J. (2009) *Kenyan Land Policy: Analysis and Responses*. *Response paper prepared fro USAID, Arlington, USA.* (John, 2009)
11. Republic of Kenya Sessional Paper No 3 of 2009 on National Land Policy August 2009.
12. Kenya Land Alliance, *The National Land Policy in Kenya: Addressing Historical Injustices Issues Paper No 2 of 2004.*

## **Books and Publications**

1. Syagga, Paul Maurice, Land Ownership and Use in Kenya; Policy Prescriptions from an Inequality Perspective.
2. Lumumba, Odenda (2004) Kenya Land Alliance, *The National Land Policy in Kenya: Addressing Historical injustices issues* (Paper No. 2 of 2004) [Http://www.Caledonia.Org.Uk/land/documents/kla\\_issues\\_paper.Pdf](http://www.Caledonia.Org.Uk/land/documents/kla_issues_paper.Pdf). Available at: [http://www.caledonia.org.uk/land/documents/kla\\_issues\\_paper.pdf](http://www.caledonia.org.uk/land/documents/kla_issues_paper.pdf) (Accessed: 13 May 2016). Para 3.2
3. O'Brien E. (2011) *Irregular and illegal land acquisition by Kenya's Elites: Trends, processes, and impacts of Kenya's land grabbing phenomenon*. International Land Coalition: Kenya National Alliance.
4. The Commission of Inquiry into Illegal/Irregular Allocation of Public Land was appointed in 2003 and submitted its report in 2004 (Republic of Kenya, Ndung'u Commission Report (2004)).
5. Unjust Enrichment, The Making of Land Grabbing Millionaires; *The plunder of Kenya's State Corporations and Protected Lands*, Vol 2, Kenya Land Alliance, Kenya National Commission on Human Rights 2006
6. Paul Syagga, 'The Public Land, Historical Land Injustices and the New Constitution' (2011) Constitutional Working Paper Series No. 9, 2 <<http://www.sidint.net/sites/www.sidint.net/files/docs/WP9.pdf>> accessed 30 February 2015. Page 1.
7. Roberts Mara J., '*Conflict Analysis of the 2007 Post election Violence in Kenya*' [2009]
8. Africog (2011) 'Mission Impossible, implementing the Ndung'u Report', (2011) "10" (2011).
9. Government of Kenya, 'Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land' (Government Printer 2004)

- 10 Commission of Inquiry into Illegal/Irregular Allocation of Public Land appointed in 2003 and submitted its report in 2004 (Republic of Kenya, Ndung'u Commission Report (2004).
- 11 Bruce, J. (2009) *Kenyan Land Policy: Analysis and Responses*. Response paper prepared for USAID, Arlington, USA. (John, 2009) 4
- 12 'Karura forest faces fresh grabbing threats' (20 February 2016) <<http://www.nation.co.ke/news/Karura-Forest-faces-fresh-grabbing-threats/-/1056/3086212/-/wgj0c5/-/index.html>> accessed 21 July 2016
13. Patricia Kameri-Mbote, 'Righting Wrongs, Confronting Land Dispossessions in Post-Colonial Contexts' (Conference on Land, Memory, Reconstruction and Justice: Perspectives on Land Restitution in South Africa, Cape Town, 13-15 September 2009) 2.
- 14 Erin O'Brien, 'Commercial pressures on land irregular and illegal land acquisition by Kenya's elites: Trends, processes, and impacts of Kenya's land-grabbing phenomenon' (2011) <<http://www.kenyalandalliance.or.ke/wp-content/uploads/2015/03/KLA-commercial-pressure.pdf>> accessed 20 July 2016
15. National Land Commission, 'Report on the Review of Grants and Dispositions of Public Land in Lamu. (October 2014).
16. National Land Commission 'Achievements' <<http://www.landcommission.go.ke/about-nlc/achievements>> accessed 16th August 2016.

## TABLE OF INTERVIEWS

<b>Interview</b>	<b>Interviewee/occupation</b>	<b>Mode of interview</b>	<b>Place and time</b>
1.Mutai	Legal officer National Land Commission	Face to face	Nairobi 5 <sup>th</sup> May 2016.
2.Carol	Legal Officer	Face to face	Nairobi 18 <sup>th</sup> May 2016.
3.Nicholas	Land Registrar Ministry of Lands	Face to face	Nairobi 25 <sup>th</sup> May 2016
4. Juma,	Lands settlement and Adjudication officer Lands settlement and Adjudication Office, Estate Section	Face to face	Nairobi 16 <sup>th</sup> May 2016
5.Ngumbao	Land Registrar Registration department	face-to-face	Nairobi 18 <sup>th</sup> May 2016.
6.Adelphi	Land Administration Officer Land Administration department	face-to-face	Nairobi 25 <sup>th</sup> May 2016.

## Case Law

1. *In the matter of the National Land Commission (2015) eKLR*  
Supreme Court of Kenya, Advisory Opinion Number 2 of 2014
2. Republic Vs. The National Land Commission And Tropical Treasure Limited Ex-Parte Krystalline Salt Limited Jr Case No. 309 Of 2014.
3. Republic Vs. The National Land Commission And Tropical Treasure Limited Ex-Parte Krystalline Salt Limited Jr Case No. 309 of 2014.
4. Republic Vs. The National Land Commission Ex Parte Holborn Properties Limited ELC JR No 5 of 2015.
5. In the matter of the National Land Commission (2015) eKLR, Advisory Opinion Number 2 of 2014.