LAND WATCH NOTE

NATIONAL LAND POLICY REVIEW AND LESSONS FROM KENYA’S FIRST LAND COMMISSION

Kenya’s land sector is guided by the Constitution of Kenya 2010, substantive land laws, the National Land Policy and National Land Use Policy. Among the key Institutions in Land Management and Governance in Kenya is the National Land Commission, whose establishment was based on the Constitution, The National Land Commission Act, and the recommendations of the National Land Policy. The Formation of the Land Commission was meant to address challenges witnessed in managing public land and compliment the Ministry and devolved institutions playing key roles in land administration in Kenya.

This year marks ten years since the passing of the National Land Policy; Nine years after promulgation of the Constitution; The completion of the term of office of the chairman and members of the National Land Commission. Between the adoption of the Land Policy and Now, a decade of vast changes in the sector has passed. A time has come for the Country to engage in reflection and evaluate the real gains made, the challenges faced and the adjustments needed to achieve the Citizens aspirations in realizing the full value of their land and supporting sustainable development. Of key importance is how land is governed; Efficient and accountable transition of the National Land Commission; improvement in service delivery, enhancement of tenure security, providing incentives to development in other sectors while achieving equity.

This 20th Land Watch note will be restricted to three areas that are pertinent in this significant year in the land sector calendar in Kenya. These are the review of 2009 national land policy; the lessons learnt as the term of Kenya’s first National Land Commission under the Constitution of Kenya 2010 comes to an end; the Implementation of Community Land Act, which is applicable to over sixty per cent of Kenya’s land.
1. Review of the national land policy after 10 years

Our national land policy is contained in the Sessional Paper No 3 of 2009. The vision of the policy is “to guide the country towards efficient, sustainable and equitable use of land for prosperity and posterity”. It is meant to ensure that Kenya puts its land into productive use on a sustainable basis. The policy provides that, in order to take into account current and future needs in view of the social-economic dynamics in the land sector, it shall be reviewed after every ten years. The ten years fall due within 2019.

Article 67(1)(a) of the Constitution of Kenya 2010 provides that the National Land Commission will recommend a national land policy to the national government. The 2017 Land Laws (Amendment) Act further provides that the Cabinet Secretary responsible for matters relating to land will provide policy direction regarding all classes of land in consultation with the Land Commission. It therefore follows that the review of our land policy requires the attention and inputs of the Ministry of Lands and Physical Planning along with the National Land Commission. Besides the Ministry and the National Land Commission it is a requirement of the Constitution that there must be effective public participation in policy formulation and implementation. We therefore call upon the Cabinet Secretary in Consultation with the National Land Commission to set in motion a broad based stakeholders engagement process to review the 2009 National Land Policy.

2. Expiry of the term in office of the Chairperson and Members of the National Land Commission

The National Land Commission assumed office in February, 2013. The Chairperson and commissioners are meant to hold office for a single term of six years and are not eligible for re-appointment. Their six years therefore come to an end in February 2019. The Government should therefore urgently put in place measures to recruit the new commissioners for Kenya’s second National Land Commission. According to the First Schedule of the National Land Commission Act, this should begin by the constituting the required selection panel. Within seven days of its constitution, this panel must convene a meeting and send out invites for applications by qualified persons. In twenty one days after expiration of the deadline for applications, the applications received should be considered, the shortlisted
applicants notified, interviews conducted and names of the qualified persons forwarded to the President.

Within fourteen days, the President will be expected to nominate the Chairperson and members of the Commission and forward the names to the National Assembly for approval. The National Assembly shall then proceed and vet the nominees within another twenty-one days of the day it next sits after receipt of the names and may approve or reject any or all of them. In the event that it approves, the speaker of the National Assembly shall, within seven days forward the names of the approved nominees to the President, who in return shall within seven days of receipt of the approved nominees from the National Assembly, appoint the chairperson and members of the Commission by a notice in the Gazette. From the implied arithmetic, this process will take a minimum of seventy-seven days if it was to run consecutively without gaps. The recruitment process therefore needs to be kick started urgently to avoid a prolonged period between the lapse of term of office of the current members and the assumption of office of the new team. Any extension of the recruitment period will occasion gaps in delivery of critical services to the public and adversely affect implementation of development projects.

As the Current team leaves office, it is critical that robust hand over mechanism is put in place to ensure that a smooth transition and the necessary accountability is achieved.

**Lessons**

Within the six years it has been in office, Kenya’s first Commission leaves lessons. While it worked hard to establish an institutional structure around which it recruited its secretariat and technical officers, there is the general perception that the Commission established far too many Directorates, leaving speculation that some of its senior officers are under-deployed. This structure may therefore need to be audited in future, and a rationalization of the available staff against their duties done. When it came to recruitment, there was a seeming block migration of the previous land administration staff in the Lands Department from the Ministry to the Commission, an eventuality that may have ended with a block shift of the old culture and attitudes too. This may explain why the Commission appears never to have brought in a semblance of new business methods and culture to land administration, much as it was a new institution.
Highly publicised conflicts with the executive leadership of the Ministry over office space and mandate defined the Commission right from assumption of office. This, sadly, led to the deterioration of services in the Ministry, rather than improvement. The preparation and renewal of leases are perhaps some of the processes that were most affected. Even as it leaves office, there is no clarity on the process of preparation of leases, a matter that causes confusion and delays for landowners and investors.

Along the way, the process of acquisition and compensation of private and community land for public use by various sectors of development seemed to have become a key activity of the Commission. Depending on the number and magnitude of the projects for which land must be acquired, compensation for compulsorily acquired land can exert a lot of pressure on the Commission and its technical officers. It is a process that calls for strict technical and financial supervision and accountability. In trying to discharge this responsibility, the Commission suffered a major dent to its public image following the numerous integrity-related complaints, which eventually saw some of the Commission’s senior officers charged in court. The implications of the compensation process to development in Kenya, particularly the time and money it takes, remains of major concern. The country may need to audit how the Commission has gone around this role, and make decisions on its capacity to effectively discharge it, and the institutional and policy changes that may be necessary to make it more efficient.

The office of the Chief Executive Officer of the Commission has seen three different occupants within the six years, with the last two serving in Acting Capacities within the sixth year. This has affected efficiency and continuity, and is likely to manifest itself as the next Commission assumes office. This is aggravated by the fact that some Directors of Directorates who have been on contractual terms may also leave office just before or after the exit of the chairperson and members of the Commission. In such cases, historical memory is likely to get undermined.

The Commission barely started on its expected functions of receiving, hearing and recommending appropriate redress on cases of historical land injustices, and that of advising the national government on a comprehensive programme of registration of title in Kenya. It made seed efforts in each of these, and the next Commission will be expected to build up on this.
The Commission made reasonable efforts in its role of reviewing grants and dispositions of public land, in order to establish their propriety and legality. Some of its decisions were however challenged in court. This process was however meant to be done within the first five years of the commencement of the National Land Commission Act, upon which it was based. Since the Act commenced in May 2012, the five years effectively ended in May 2017. Attempts by the Commission to obtain an extension of this timeline were not successful. Policy decisions on the matter still need to be made.


This Act was enacted and commenced in 2016. However, it’s regulations were passed by Parliament in 2018. This law provides for the recognition, protection and registration of community land rights and the management and administration of community land in Kenya. The category of community land accounts for over sixty per cent of Kenya’s stock of land. Furthermore, a lot of Kenya’s minerals and mineral oil resources, along with underground water, are to be found on such land. Key national infrastructure such roads, railway and oil pipeline, either pass or will pass through parts of such land. Other strategic state infrastructure sits or will have to sit on such land. The promotion of pastoralism and irrigation-based agriculture is also dependent on the tenure security of a lot of communal land.

For these and other reasons, the application of this Act in Kenya provides a major opportunity. Priority should therefore be accorded to the comprehensive implementation of this law. Communities need to be sensitized and prepared for their roles under this Act. Their traditional procedures on the access, use and dispute resolution of such land need to be documented, in preparation to enhance and use them as the byelaws anticipated under the Act. Government officers and policy drivers in the national and county government offices that will have a role in implementation also need to be sensitized at an early moment for effective implementation. But since this is a new law, whose application may affect communities in diverse ways, the government and stakeholders must keep prepared to learn lessons and where necessary, use them to improve this law as will befit.

Issued by the Land Development and Governance Institute (LDGI) on Wednesday 23rd January, 2019