



LAND UPDATE

A NEWSLETTER OF KENYA LAND ALLIANCE

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THE DRAFT NATIONAL LAND POLICY: A STEP TOWARDS LAND REFORMS



NATIONAL LAND POLICY
THE FORMULATION PROCESS

DRAFT NATIONAL LAND POLICY
OCTOBER 2006

THE MINISTRY OF LANDS AND THE KENYA LAND ALLIANCE URGES YOU TO READ, DEBATE AND CONTRIBUTE TO THE FINALIZATION OF THE NATIONAL LAND POLICY

INSIDE...

DNLP, A STEP INTO LAND REFORM DIRECTION P. 3

ADDRESSING CONSTITUTIONAL ISSUES P.5

CHALLENGES IN ADDRESSING SECURITY OF TENURE P. 8

REFORMING LAND ADMINISTRATION AND MANAGEMENT INSTITUTIONS P. 12

KEY ISSUES AND RECOMMENDATIONS OF THE DRAFT NATIONAL LAND POLICY P. 13

FACTS...YOUR LETTERS...NEWS...AND MORE



EDITORIAL

Through this Land Update, KLA appreciates that for the first time in the history of Kenya a comprehensive Draft National Land Policy has been formulated.

We therefore urge all Kenyans and the general public to read, debate and contribute to the finalization of the National Land Policy. This is because the final National Land Policy will provide the basis for the review and harmonization of the existing laws and enacting of new ones to facilitate the achievement of the objectives set out in the overall national development policy framework, Kenya Vision 2030.

True, the draft National Land Policy seeks to address most fundamental problems associated with the land question in the country, but it requires consensus on a number of land reform proposals for easy implementation to be achieved. Otherwise it is foolhardy to expect policy options enshrined in the draft National Land Policy to provide a panacea for all land problems beyond merely providing the framework and direction of dealing with issues of land ownership, security of tenure, land use development and environmental conservation on a sustainable basis.

Therefore in line with the principle of participatory democracy, KLA invites you as you read this Land Update to make salient contributions for the review of the policy proposals and any adjustments to

the draft National Land Policy so that it reflects the realities of our land situation and challenges.

KLA can clearly say that this Draft National Land Policy, if adequately debated and reviewed by all, should represent new turning point in land matters and overall development in Kenya. The present land law and tenure system entrenched since independence should be a thing of the past. Hence in their place shall be new land policy guidelines set out in the Draft National Land Policy, together with yet to be promulgated legislations that shall guide our development objectives.

Indeed the gist of the new land reform proposals require a new constitutional dispensation to anchor existing land rights as well as revisiting the same in the public interest as a basis of the national land reform as a new constitutional duty on the state.

In a nutshell the Draft National Land Policy is a special case of Kenya's transformation of property and proprietary relations in our society. The unequal gender proprietary relations that appear ingrained in our customary system of land relations need to be broadly debated and redressed for good. KLA acknowledges that some of the proposals in the draft National Land Policy will spark off controversy but we must debate and reach a consensus where it actually matters.

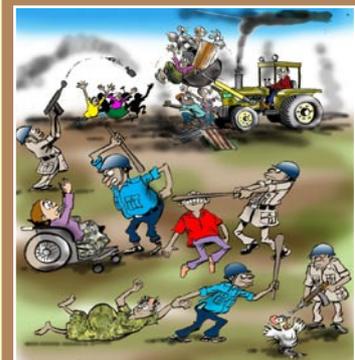
HIGHLIGHTS...



For effective implementation of land reforms, sections of the present constitutions must be repealed. - Page 3



Rights of minority communities to land as a source of livelihood has not been respected by government and previous constitutional arrangement. The DNLP is expected to address this. - Page 9



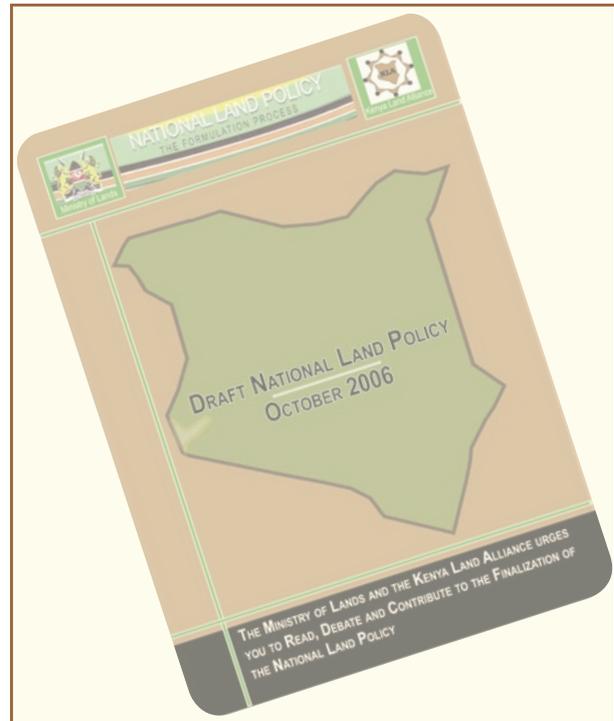
To uplift the level of livelihood of Kenyans and reduce poverty levels, land policies must ensure security of tenure to land for all Kenyans. Page 8

THE DRAFT NATIONAL LAND POLICY A STEP INTO LAND REFORM DIRECTION

Kenyans' desire and demand for land reform did not materialize at independence when the independence and post-independence regimes re-entrenched and continued with colonial land policies, laws and administrative structure. Thus, the unresolved land reform issues captured in the Constitution of Kenya Review Commission, and the Presidential Commission of Inquiry into the Land Law System of Kenya ('Njonjo Commission') reports was picked up and addressed in the Draft National Land Policy (DNLP) in Paragraphs 51 - 99. In 50 specific paragraphs and others littered elsewhere in the DNLP, issues broadly addressed are on land tenure reform – which is the establishment of secure and formalized property rights in land for all Kenyans and land redistribution – which is about access to land by the landless and disadvantaged groups.

Despite land reform issues being politically sensitive, the DNLP gives a concise narrative of some of the key land tenure and land policy issues by asserting that Kenya shall have broadly three land tenure regimes i.e. private, community and public. However, the DNLP recognizing that property rights in land is a social relation, tries to define what an individual, a community and the state can do and cannot do with land if Kenya is to attain sustainable land use and development. Since making policy recommendations about land ownership is not a technical matter the public has been called upon to read, debate and contribute to the finalization of the national land policy.

Sharp inequalities in the distribution of land being a major cause of extreme poverty in Kenya, KLA calls on all Kenyans from different persuasions to reflect on who owns what land where, when and how. It is only after such a reflection that one would appreciate the provisions contained in the DNLP. For security of tenure to be addressed property rights in land should be defined by the community (or the state), accepted and understood by all and be able to be enforced. And this is only possible if the severe inequality in land distribution is seen by all as a basic issue of social injustice. Hence despite many poverty reduction specialists being reluctant to address land reform for fear of altering the distribution of economic and political power in the country empirical evidence has it that land reform is critical to determining policies that could generate economic growth with



equity or pro-poor growth. Without confusing Private, Community and Public land tenure regimes, the DNLP tries to deal with prejudices and perceptions associated with the concept of private property with individual freedom. The wrong notion that under private land tenure a person can do as she/he pleases is put in perspective by reasserting that everywhere in the world private property rights in land are always regulated by the state. In reality, the presumed unfettered dealing with private property rights in land is commonly restricted.

To remove additional confusion across the three tenure regimes the DNLP policy options were formulated with a view that within the community and public tenure regimes, property rights can be individual or group. Simply, the three tenure regimes are not exclusive and stand alone, because a community can decide to give certain rights to a resource to an individual or a group. For example under community tenure a right to produce crops on a particular plot can be allocated to an individual, but a grazing area stand allocated to a group of all families living in the community. Equally important to note is that under public tenure regime, individual rights are regulated

by community as a first public, while under private property regime, individual rights are regulated by the state. The DNLP further appreciates the flexibility of the three tenure regimes in that it provides for livestock production system based on nomadism or trans-humance hence the provisions on pastoral land tenure.

The pastoralist tenure regime like fisheries tenure regime promotes a non-exclusive access to a large area, than exclusive access to relatively small areas. This provision for pastoral tenure simply means giving pastoralists property rights that match their activities and are regulated by access rights and rules that prevent over-use of the resources within a rangeland. The bottom line of this is that pastoralist historic economic rights shall be respected by the state and the farming communities.

The Draft National Land Policy, DNLP, process recognized the fact that creating secure and formalized tenure regimes can be a formidable task, involving major political, legal and social reforms. Thus, consensus is required through a constitutional political process to decide on property rights regimes and the distribution of rights within that system. Therefore the land tenure reforms in DNLP is all about the rules that govern relations between individuals with respect to land and how that is defined by the polity- the community or the state to which such an individual belong. Secondly it endeavours to ensure that sustainable development is



Squatters from Majaoni and Mwembelegeza in Coast Province launch a book recounting their struggle for land. **INSET** Squatters telling their story through role-play (See story back page)



attained within secure property rights clearly defined, well-understood, and accepted by all and consequently strictly enforced. On the other hand, the case for land redistributive reform in Kenya is due to a highly unequal distribution of land and DNLP recognized this and makes policy provisions which rests on strong arguments about conflict prevention, equity, economic growth, jobs creation and poverty reduction. In spite of this, considerable controversy exists about how land redistribution shall be achieved within the current constitutional dispensation with its provisions based on sanctity of private property.

A consensus is needed on how to implement the DNLP recommendations on land redistributive reforms by amending the current constitution to guarantee existing property rights on one hand; but yet on other hand simultaneously placing the state under a constitutional duty to take reasonable steps to enable disadvantaged groups to gain equitable access to land, while promoting security of tenure and providing redress to those who were dispossessed of their land as result of

past discriminatory laws or practices. In principal, this demands that under the new constitutional dispensation it is recognized that the public interest includes the national commitment to land reform.

As we engage in national debate about the land redistribution policies proffered in the DNLP, we should not lose sight of the fact that as a nation we have to deal with the legacy of historical land injustices and the need to redress old wrongs. What it takes is a reflection on the existing property rights in land and democratically making a decision about their distribution, because, as history shows, ignoring a looming land conflict, is a very risky economic strategy indeed. In Kenya, like elsewhere, restoring a more equitable distribution of land will greatly contribute to more social cohesion, which will foster more inclusive institutions and policies, and hence better long-term development.

ADDRESSING CONSTITUTIONAL ISSUES

A number of constitutional provisions are required for effective implementation of the Draft National Land Policy. Key among these are Property Laws which at independence allowed for exercise of dual, parallel and often contradictory systems i.e the Customary Property law and the English Property Law. The two were meant to favour the white settlers and their areas of interest within the economy while suppressing the natives of Kenya. To the present day these property systems have not been completely overhauled and continue to be practised under various statutes e.g. Registration of Titles Act Cap 281, Government Lands Act Cap 280 among others. For effective implementation of proposals in the Draft National Land Policy, these laws must be overhauled and a set of consistent tenure regimes entrenched into the constitution.

The Draft National land Policy proposes among others establishment of land banks, land redistribution and

resettlement. Kenya's land mass is and will remain 582,646 sq. km. hence for there to be any resettlement or redistribution, land ownership will have to change hands. The present Constitution, specifically section 75 declares the sanctity of titles, regardless of how it was acquired. In addition, the constitution provides for protection of private property including land. Attempts to change the status quo through constitutional provisions of the 'Bomas Draft' and the 'Wako Draft' have so far fallen on the way-side with the rejection of both drafts by the government and the people of Kenya respectively.

Thus unless there is a complete overhaul on provisions on property such as in Section 75, the envisaged land redistribution will not materialise. As the Draft National Land Policy proposes measures such as resettlement and redistribution, Kenya is faced with a number of other questions that need consensus. Firstly, whose land will be redistributed, and who will be the

persons to be resettled? Even as the draft policy proposes establishment of land banks, it is important to state clearly from who, where and how land will be gotten for establishing these land banks.

Land, as a principal category of property, a source of livelihood, wealth and with significant cultural connotation has hitherto been relegated and lumped alongside other categories of property in the current constitution. The effect of this is that the constitution failed to provide broad principles for its efficient and sustainable management. As such any new constitutional dispensation should ideally rectify the above anomaly and provide broad principles for its management.

Constitutional powers such as of Eminent Domain (Compulsory acquisition) and Police Power (Development control) are important instruments through which the state can and should use to regulate use of land in Kenya. Eminent Domain / Compulsory acquisition is the power of the state to extinguish or acquire any title or other interest in land for public purposes, subject to prompt payment of compensation. Police power / Development control on the other hand is the power of state to regulate property rights in land to ensure that there is no misuse of public land and ensure whatever uses land is put under, takes into consideration public interest. So far, the two have not been exercised accountably, transparently, in a coordinated and effective manner leading to a number of legal, land use and management related problems. In response the DNLP commits the government to review laws to provide for Compulsory acquisition process that is efficient, transparent, and accountable. It will further provide for harmonization of the institutional



“Sectors dominated by the rich are independent and producer driven while those dominated by the poor are under strict control and statutory regulation, leading to poverty and under development.”



Kenya National Commission on Human Rights, KNCHR Chair Maina Kiai, and Mr. Paul Ndung'u chair of Ndung'u commission join KLA National Coordinator in launching the book 'Unjust Enrichment.' The book detailing plunder of Kenya's Forestlands is testimony to inadequacy of the constitution to protect and secure public land (see story back page)

frameworks for implementing these two important constitutional instruments. Further to that, it transfers powers to exercise both compulsory and development control from the Commissioner of Lands, the President and Local Authorities to the National Land Commission.

The Proposed New Constitution acknowledged the centrality of land in the livelihood of Kenyans and sought to state the role of government in its regulation. Chapter Seven on Land and Property Article 84 (1) stated that "The State has power to regulate the use of any land, interest or right in land in the interest of defence, public safety, public order, public morality, public health, land use planning or the development or utilization of property." It further captured the proposal on establishment of a National Land Commission, NLC. Providing for establishment of a National Land Commission, NLC in the constitution and clearly stating its roles and responsibilities is essential for effective

functioning of this constitutional body. This is something that any new draft constitution should capture.

Another constitutional issue touches on the management of Kenya's Trust lands. Trust lands were established as a way to recognize group and native rights during the colonial era. Trust lands are vested in county councils, which manages them alongside all resources within the trust land. Governance of trust lands is managed under the Trust Lands Act. According to the present constitution, both the President and the local authorities have powers to exercise a modified form of acquisition, referred to as 'setting apart.' The DNLP provides for a revised law that will avoid overlapping mandates with regards to trust lands among other proposals. The DNLP explicitly states that land, whether private or communal is held in terms and conditions clearly subordinate to the doctrines of compulsory acquisition and police power. Powers of the President, the Commissioner of lands,

and the County councils to alienate and regulate management and use of Trust lands are constitutional issues. As such a constitutional amendment is required if the proposals in the Draft National Land Policy are to be implemented and to avoid a situation where decisions taken based on this new land policy are challenged.

The Draft National Land Policy commits the government to ensure protection of secondary rights holders by ensuring that their informed consent is sought before the land is sold to a third party. It further recognizes and seeks to protect women against disinheritance by providing for a review of old discriminatory laws and formulation of gender sensitive family laws. It further provides for harmonizing of multiple and often conflicting legal regimes i.e. gender-related constitutional provisions, International Conventions Kenya is signatory to and the customary laws. Specifically, it proposes employment of principles such as of co-ownership and co-registration of land and other related properties. By creating a regime of secondary rights holders, the DNLP recognizes and provides for protection of rights of informal land occupiers by establishing legal framework for transferring unutilized land and land belonging to absentee landlords to squatters and landless people.

A number of critical things need to be addressed with regards to the above provisions. Firstly, a constitution is not implemented in a vacuum; rather it operates within a socio-economic and cultural background. With a patriarchal society like Kenya, unless adequate public awareness is created, the laws may remain mere pronouncements and may not be implemented on the ground. Presently, section 27 and 28 of the Registered Land Act provides for absolute proprietorship.

It thus frees the registered proprietor from claims of other parties including those who have rights to the land that do not amount to ownership. Example of these rights holder are the landless, women and children whose rights are basically user rights. Most families designate one of their own, often the eldest male who is registered as the absolute owner without realising the authority they are giving such a person over the family land. According to the registration statute, right of occupation in customary law would only be protected if noted in the register. Apparently awareness of this provision is limited hence cases of male custodians of land dispossessing women off land upon death of their husbands is still rampant.

Many constitutional principles in the DNLP though seemingly well intentioned lack concrete policy options to back them, leaving a majority of policy statements as generic open-ended statements. Phrases such as 'the government shall develop, establish, put in place measures... are used often times, but with no tangible direction. Hence realization of a majority of the principles espoused remains a pipe dream. Success in implementation of the above constitutional principles is largely dependent on review of current constitutional provisions. However there are presently no outright immediate action activities designed to foster their implementation. As such there is always the danger of provisions on land being dropped from the new constitutional dispensation, and any such eventuality could put into limbo the land policy. As already stated, the continued existence of the Property Clause in its present form where it offers right to property like land without considering how it was gotten and the failure of the DNLP to provide for its repeal will lead to a number of land reform measures



Squatters living around Kitagich Forest and a Member of KLA in a Sharing session. Notice the Tea Factory in the background that stands on the forestland hived off ostensibly to resettle them.

not being realized. Aspects of land reform such rationalization of existing system of private ownership and redistribution will not be realized unless the Property Clause is repealed, as any such acts will be deemed as contravening existing property rights. Experiences from a number of countries, E.g. South Africa, have shown the complexities that could arise from on one hand protecting existing property rights while on the other redressing historical injustices. Thus the issue of the Property Clause is one that requires national consensus and it is the hope of KLA that during the ongoing debates on the Draft National Land Policy, stakeholders will openly debate and proffer policy options that will help midwife a consensus on the issue.

Practicality of a number of provisions is questionable. An example of this is one that seeks to oblige a primary rights holder to obtain written and informed consent of all secondary rights holders before exercising his power to alienate a piece of land. Firstly the secondary stakeholders' names do

not form part of the title and secondly, the law provides for individual, exclusive and absolute proprietorship over titles. Further, it is unclear how far back the law will go in regards to identifying secondary stakeholders to a piece of land. Another questionable provision is on informal settlements and squatters, where the DNLP proposes to create a regime of Secondary Land Rights as a means to protect and guarantee security of tenure to informal land occupiers. It is unclear how the government will create a regime of secondary land rights, and more so, upon whose primary land rights will these secondary land rights be based upon? Whereas it is important to recognize and guarantee security of tenure to informal land occupiers, KLA proposes that stakeholders debate and come up with clearer actionable means to achieve this. The policy needs to state for example that the state will issue either titles or temporary occupation licences are granted to informal land occupiers as a means to guarantee their security of tenure.

CHALLENGES IN ADDRESSING SECURITY OF TENURE

Insecurity of tenure has been an issue affecting millions of Kenyans. Presently Kenya has an estimated 2 million squatters all with no security of tenure to the lands they are living on. Pastoral communities and minority groups are increasingly being rendered landless. Reasons for this phenomenon are many and varied. Some stem from unresolved historical injustice of mass dispossession, presence of legal and policy frameworks that do not recognize customary tenure practices, introduction of individual exclusive land ownership as opposed to customary tenure, ineffective institutional framework and irregular and illegal allocations of public land among others.

Women too have had their share of challenges on land ownership, with just 5% of titles in their names, while persons living with HIV/AIDS and orphans are being disinherited of their lands. Thus one of the key desires at the formulation of a National Land Policy was the need to address land tenure issues since security of tenure is closely linked to food security land and resource based related conflicts.

As part of key principles to a firm foundation for land reform, the policy has sought to respect the security of legitimate right to land and equitable access in the interest of social justice, and also protect human rights for all, putting premise on protection against laws, customs and practices that discriminate against women, minorities, orphans and persons with disabilities. The Draft National Land Policy has further committed the Kenyan government to regulate land tenure and provide tenure security for all socio-economic groups, ensuring equal access for men and women, and

facilitating the enforcement of legal rights of access, control, ownership, inheritance, and access to credit.

The Draft Policy has proffered a number of policy, legal and institutional reforms. A number of land management and administration institutions with power and authority devolved to them, and that go down to the local level will be created to ensure representation and participation of local communities and these will be created country wide to ensure even the marginalized communities have a voice in land administration and management. With the draft policy released to the public domain and subsequently disseminated courtesy of a combined effort of Kenya Land Alliance and the Ministry of Lands, all stakeholders, particularly those from or representing the marginalized groups need to assess the structure and modus operandi of the proposed institutions to ensure that they are capable of living up to the role and the mandate for which they were formulated. The DNLP has made progressive proposals but their operationalization need to be assessed more critically.

A number of reform measures are envisaged in the draft policy to ensure that the rights of the landless and those without security of tenure are protected. These will be realised through measures such as restitution, meaning restoration of land rights of those unjustly deprived of such rights, redistribution, and resettlement. Apart from granting the poor and landless access to land, resettlement will look into other issues such as provision of infrastructure, and basic services such as shelter, water and sanitation.



Further there will be establishment of land banks to act as land reservoirs to enable processes such as resettlement to be carried out successfully.

The Draft National Land Policy has provisions for development and enforcement of progressive taxation system to discourage speculative hoarding of land thereby encouraging release of excess land through direct sale, or by leasing out land to other members of the public to put it into productive use. However, Draft National Land Policy preconditions resettlement to availability of land, and this, in the opinion of KLA, is a claw back. The DNLP needs to spell out clear methods that the government will undertake to make land available in the form of land banks and instituting a land ceiling for resettling of the landless people.

To address insecurity of tenure targeting communities, the policy recognizes community land as one of the three major categories of land. It further gives provision for documentation, mapping and incorporation of existing



"Minority Communities are now Recognized Internationally as a Group Deserving Special Attention."

customary tenure systems into the modern legal system. This, it states, will be done in consultation and with participation of local communities. It further proposes establishment of procedures for recognition and protection of customary rights to land and land based resources, and development procedures to govern community land transactions.

Minority communities are now recognized internationally as a group deserving special attention. Their loss of land has hitherto been to some degree as a result of acts of the state either through gazettement of their habitats as forests or natural reserves or excision and reallocation to individuals. Their political and economic marginalization through colonial policies and assimilation into neighbouring communities has further undermined their security of tenure to land. The policy proposes taking an inventory of existing communities to clearly ascertain their status and land rights. It will further offer them suitable legal

cover to practice their land tenure and resource management systems.

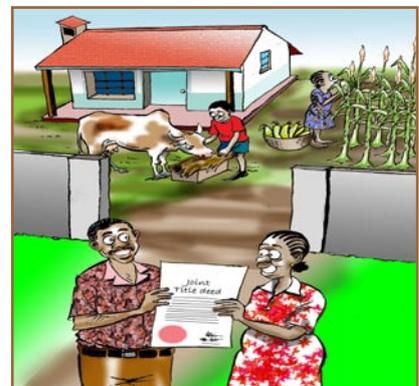
To further protect the interest of women, there is need to institute mechanisms to ensure there is equity in representation of women in land management and administration structures. In order to improve the gender inequality gap on land ownership and protect the land rights of spouses within the matrimonial setting, the Draft National Land Policy states that there shall be a review of existing discriminatory customary and statutory laws deemed to be discriminating against women.

There will be enforcement of existing laws and establishment of a clear framework for protecting the rights of the boy and girl child, youth and women on inheritance to land and land based resources. Whereas the DNLP provides for enactment of the law on co-ownership of matrimonial property in order to protect the rights of the widows, widowers, and

divorcees, it doesn't seem to have far-reaching recommendations that could remedy the present situation of lack of land ownership by women.

Co-ownership principle in itself cannot bridge the present gap of unequal land ownership. Other measures that have been cited as possible solutions include promotion of joint titling between spouses with a provision that will result into issuance of New Generation Joint Title Deeds. The issue further requires strong public awareness so that the country can collectively debate its merits and demerits and reach a consensus, so that the public is made receptive to it to enable its smooth implementation. This is necessary since cultures of a majority of Kenyan communities often only give women subsidiary user rights, derived from the title of their male counterparts.

It is hoped that at the National Land Policy symposium expected to take place by early December 2006, a consensus will be reached on 'controversial' policy proposals existing in the Draft National Land Policy. Only this way will Kenya as a country be in a position to adequately respond to the present land tenure challenges and be able to redress landlessness that prevails across the country.



Joint Title to land and property has been cited as possible remedy to land ownership inequality

REFORMING LAND ADMINISTRATION AND MANAGEMENT INSTITUTIONS

Absence of sound land management and administration structures has led to systematic breakdown in management of land, and communities not adequately represented in land management institutions hence not able to fully participate in decision making processes. Further, land management authority is centralized at the Ministry of Lands making the process of transacting in land long, tedious, expensive and prone to corruption.

It was thus expected that the National Land Policy Formulation Process, NLPPP, will produce a document that will form a basis for streamlining and strengthening land acquisition, management, disposal, adjudication, surveying, and mapping procedures.

The document would further ensure access to justice in land related matters, having strengthened and accessible land dispute resolution institutions plus establishment of independent, accountable, and democratic management systems. Further the proposed new institutions would ensure efficient and accessible land information systems that would lead to enhancement of quality and quantity flow of land information through the national to local level. The DNLP notes that so far the present land management institutions are numerous and perform varied and often conflicting functions, have weak and largely ineffective structures with poor information flow and a very complex legal system that is often inaccessible to poor people.

The policy has thus sought to reform land management institutional framework to ensure devolution and rational allocation of power, and authority while at the same time allow for participation, representation,

justice, equity, and sustainability whilst taking into account public interest, community values and environmental management. The above are based on related core values of equitable access, effective regulation of land development, and access to land information, efficiency, transparency, and democratic management.

In order to achieve the above reforms, the policy aims to have a complete overhaul of the existing Land Administration and Management structures. It seeks to establish a number of new management institutions, modify and re-structure old institutions, formulate regulations governing their operations and establish more efficient and representative oversight bodies.

In the interim, there is the question of a metamorphosis of the National Land Policy Formulation Secretariat into the Land Reform Unit, (LRU) with added capacity, enhanced technical assistance, and human resource. This body will be led by a land Reform Coordinator and will specifically handle tasks such as getting legislation drafted and passed, organizing of public awareness campaigns/ civic education, mobilizing of finances and overseeing the transition process.

The Land Reform Unit, LRU will later give way to the National Land Commission, NLC that will operate in tandem with two other land management institutions namely, the District Land Boards, and Community Land Boards, CLBs. The National Land Commission will be an overall land administration and management body lead by commissioners representing various interests, from public, private sector, civic to community interests. It will be the titleholder and administrator of public

land in Kenya, will oversee operation of land market, manage land tax revenue, act as custodians of records of public land, ensure documentation and authentication of all land records among other key responsibilities. The District Land Boards will be agents of the NLC at the District level and will also take over functions formerly held by the Ministry of Lands at the District Level. It will among other functions be charged with promoting of equitable access, conservation of cultural sites, protection of minority land rights etc with a majority of its membership positions being elective. Below it will be Community Land Boards, CLBs, whose membership will be residents of the area, and it will take into consideration special local interests e.g. gender, ethnic diversity etc. They will mainly vet and approve transactions relating to community land.

Whereas it is widely acknowledged by a majority of stakeholders that establishment of new institutions as per the DNLP and especially the National Land Commission, NLC, the District Land Boards and the Community Land Boards, remain of paramount importance for successful harmonization of land governance structures, leading to coordinated planning, development, and enforcement framework for implementation of provisions of the policy, the roles and functions of a number of the proposed institutions need to be rationalized. One such key area is the proposal to transform the National Land Policy Secretariat into the Land Reform Unit to plan and implement the change process. Land is a sensitive and emotive issue with vested economic and political interests and at times is used as a tool to acquire and manipulate power. Thus any organ mandated to spearhead its reform, even on interim basis must be as representative and as autonomous as possible from external influence. Additionally, persons serving on such

a body must be people of repute, acknowledged as reformers, and impartially selected based on the set upon terms of reference. Transforming the National Land Policy Secretariat into the Land Reform Unit presupposes that the said staffs are agents of change or reformers. It is also based on the assumption that the staff will be in position to marshal the requisite autonomy from the Ministry of Lands and their seniors while maintaining their position as employees of the ministry.

Part of the recommendations that Kenya Land Alliance carries to the ongoing debate on the DNLP for debate and consideration by other stakeholders is that of establishment of an autonomous body or agency, completely independent of the Ministry of Lands to serve as the Land Reform Unit. KLA further proposes that, as part of the envisaged minimum constitutional reforms, be the provision for establishment of a National Land Commission. This will among other things act as deterrence to irregular use and allocation of public land as a means of political patronage before and after the elections.

In a bid to further streamline and expeditiously resolve land-related disputes the DNLP proposes establishment of a Land Court to exclusively try land related matters. At the community level, there will be establishment of Land Dispute Tribunals, LDTs and use of Alternative Dispute Resolution, ADR. LDTs and ADRs stem from the desire of the new policy to incorporate customary mechanisms for land management and dispute resolution into the modern systems. Though these dispute resolution mechanisms seem noble and would ensure persons at the community level with no access to higher-level courts have an avenue to justice, the above two must be part

of the court system with a clear direction that these tribunals will first be explored before persons file a case at the High Court. This will for example deter mischievous persons who may have illegally acquired land and would like to defeat the course of justice by refusing to appear at the tribunals and taking their cases direct to the high court / land court with full knowledge that the person with whom they have a case may not afford the time and money to make requisite appearances at the high court for mentions and hearings.

To further ease administration and access to land information, the policy espouses the need to move away from the often inefficient and time consuming paper and manual form of information holding to proper organization of paper records and ultimately computerization at both national and local levels. It seeks to further remove unnecessary controls on availability of land information and facilitate information sharing.

The proposed organizational structure needs to be re-assessed and fine-tuned in the ongoing stakeholder deliberations to ensure proper division of power that will allow for its smooth operation. The DNLP seems to propose a superimposi-

tion of new institutions onto the old ones. In addition, the organizational structure in the DNLP uses normal lines, double lining and even dotted ones indicating links between various offices managing land at various levels, yet it offers no clarification to what they imply. First, when the proposed organizational structure places the local authorities in the same level as the District Land Boards, where will the final authority lie? Secondly, under Notes 1. of 'Implementing Institutions,' there is a statement that reads that, 'Civil Society will also be represented in all statutory bodies including the Physical Planning Liaison Committees.' It will be prudent to define this Civil Society representation and clarify what form this representation will take. Will the Civil Society be asked to nominate a recallable representative, or will the appointing body select whoever they wish to work with from the civil society? Finally, the National Land Commission, as a constitutional body, will be constituted through a parliamentary statute, setting conditions of details of its creation. Thus the constitution needs to broadly set out the functions and principles of the NLC, and this further underscores the danger of having the Land Reform Unit as a midwife to the NLC, which is a superior organ to it.



The NLC as the title holder and administrator of public land is expected to bring to a stop cases of illegal allocation of public lands e.g beaches and access corridors

DRAFT NATIONAL LAND POLICY: KEY ISSUES AND POLICY RECOMMENDATIONS

The following are some key issues and policy recommendations from a section of the Draft National Land Policy, DNLP

| Key Issue | Policy Recommendations | Key Issue | Policy Recommendations |
|---|---|--|---|
| CREATING A CONSTITUTIONAL FOUNDATION FOR LAND POLICY REFORM | <ul style="list-style-type: none"> - Rational allocation of powers and responsibilities, transparency and accountability - Citizen participation in decision-making - Security of land rights and equitable access | LAND READJUSTMENT - To ensure that land holdings are economically viable | <ul style="list-style-type: none"> - The government shall develop a legal framework for a periodic review of land use practices and reorganization of rural settlements to control excessive fragmentation and to provide infrastructure. |
| IMMINENT DOMAIN - Powers of Compulsory Acquisition "for Public Purposes and Subject to Prompt Payment of Compensation" of Trust Land | <ul style="list-style-type: none"> - Review law to harmonize institutional framework and avoid overlapping mandates with regards to Trust Land - Ensure compulsory acquisition procedures are efficient, transparent and accountable. - Powers to be exercised by the state through National Land Commission. - Preemptive right for original owners to reclaim the land if public purpose of acquisition fails. | LAND TAXATION | <ul style="list-style-type: none"> - The government shall put in place appropriate fiscal measures to promote efficient use of land and land-based resources. |
| POLICE POWERS - Development Control - Regulation of Property Rights to Protect the Public Interest | <ul style="list-style-type: none"> - Planning authorities to exercise this power to protect the public interest - Review legislative framework to establish clear standards and incorporate international conventions and national policies for sustainable use of land and environment - Exercise of power to take into account local or community values on land and environment. - Ensure effective participation in exercise of the power | OVERALL TENURE PRINCIPLES | <ul style="list-style-type: none"> - Designate all land in Kenya as Public, community and private. - Facilitate enforcement of legal rights of access, control, ownership, inheritance, access to credit, and co-registration in all tenure systems. - Regulate land tenure and ensure security of tenure for all groups - Ensure that women and men have equal rights of access to land for productive use. - Protect individual property rights and communal rights in urban and rural settlements through land registration. - Facilitate the protection of intellectual property rights over land and land-based resource |
| REDISTRIBUTION - To provide land for residential and productive use to the poor and disadvantaged- to address gross disparities in land ownership- to protect HIV/AIDS widows and orphans | <ul style="list-style-type: none"> - The government shall develop a legal and institutional framework that defines standards, procedures and criteria for land redistribution | PUBLIC LAND | <ul style="list-style-type: none"> - Do an inventory of all public land and vest in the National Land Commission to hold and manage in trusts for the people of Kenya. - Reposes all public land acquired irregularly and establish Land Tribunals - Facilitate establishment of participatory and accountable mechanisms for development and disposal of any land by the NLC |
| RESTITUTION - To restore land rights of those who have been unjustly deprived thereof | <ul style="list-style-type: none"> - The government shall develop a legal and institutional framework for handling land restitution. | COMMUNITY LAND | <ul style="list-style-type: none"> - Document and map all customary land tenure systems and incorporate into broad principles for orderly evolution of customary land law. - Establish legislative framework for managing customary land rights - Incorporate customary mechanisms of management and dispute resolution into the overall national framework. - Build capacity of traditional land governance institutions. - Vest rights of reversion to communities and thence to Community/District Land Boards |
| RESETTLEMENT - To grant the poor and landless access to land with infrastructure | <ul style="list-style-type: none"> - The government to establish criteria for determination of who qualifies to benefit from resettlement programmes and ensure that it is carried out in a transparent and accountable manner. | | |
| LAND BANKING - Ensuring availability of land for redistribution, restitution and resettlement. | <ul style="list-style-type: none"> - The government shall establish land banks in order to facilitate the successful implementation of redistribution, restitution and resettlement. | | |

| Key Issue | Policy Recommendations | Key Issue | Policy Recommendations |
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| FREEHOLD TENURE | <ul style="list-style-type: none"> - Merge freehold tenure with absolute proprietorship. - Modify incidents of freehold to permit-resumption of family ownership of land converted from customary tenure, co-ownership of land acquired during marriage, prohibition against sub-division of family land, and removal of absolute sanctity of first registration. - Regulate rights of primary holders to ensure written and informed consent of all secondary holders to any alienation. | LAND RIGHTS OF MINORITY COMMUNITIES | <ul style="list-style-type: none"> - Inventory of existing minority communities to assess their status and land rights. - Facilitate the practice of the land rights of minority communities and their resource tenure by establishing an appropriate legal framework. |
| LEASEHOLD TENURE | <ul style="list-style-type: none"> - Ensure periods of leases that promote long-term investment while allowing government regulation of land use - provide for renewal of all leases subject to planning requirements. - Ensure duration of all future leases shall be 99 years or less subject to revocation. - Ensure leases for the settling of urban poor take into consideration the principle of security of tenure, upgradability, affordability and collective ownership. | PRIVATE LAND - INDIVIDUAL OR OTHER ENTITY HOLDING UNDER FREEHOLD OR LEASEHOLD | <ul style="list-style-type: none"> - Ensure that all alienation of private rights to land takes into account interests of spouses and children. - Subordinate private land rights to the doctrines of compulsory acquisition and the police power. - Ensure private land is held and transmitted without discrimination on grounds of gender, ethnicity or geographical origin. - Subject all private land to the residual rights of NLC and the right of reversion to the NLC if the owner dies without heirs. |
| RESOURCE TENURE - Securing land based resources for the people of Kenya as communities and Individuals | <ul style="list-style-type: none"> - Align resource tenure to the three tenure systems and ensure sustainable management. - Ensure public access to beaches, lakes, rivers and fish landing sites. - In consultation with communities, identify, map and gazette critical wildlife migration and dispersal areas and corridors. - Develop a comprehensive resource tenure policy. - Establish institutional framework and capacity to implement international conventions on land related resources. | HIV/AIDS, LAND RIGHTS AND AGRICULTURAL PRODUCTIVITY | <ul style="list-style-type: none"> - Assess the impact of HIV/AIDS on agricultural production to facilitate reorganization of rural settlement systems - Review inheritance laws to recognize and protect land rights of orphans - Public campaigns to encourage abandonment of cultural practices that bar youth and women from inheriting family land |
| COMMUNITY INTERESTS AND BENEFIT SHARING | <ul style="list-style-type: none"> - Develop legal framework recognizing community rights over natural resources. - Compensation for loss of life and property occasioned by wildlife. - Develop mechanisms for the sharing of benefits from natural resources by communities living within or next to them. - Recognize and protect the rights of forest dwelling communities and other resource dependent communities and facilitate their access, co-management and benefits | DISASTER MANAGEMENT | <ul style="list-style-type: none"> - Government shall establish legal, policy and institutional framework for management of land-related disasters |
| PASTORAL TENURE | <ul style="list-style-type: none"> - Institute alternative methods of registration for pastoral communities that will ensure they maintain their unique land use system and livelihoods. - Ensure the rights of women in pastoral lands are recognized and protected. - Provide for cross-boundary access among clans, groups and communities to facilitate the migratory nature of pastoralism. - Ensure that all land use practices under pastoral tenure conform to principles of sustainable resource management. | ENVIRONMENTAL PROBLEMS AROUND REFUGEE AND IDP CAMPS | <ul style="list-style-type: none"> - Address environmental concerns in the establishment and management of camps, enforce EMCA, and negotiate with UN for resources for conservation and rehabilitation of refugee camps in Kenya |
| | | LAND USE PLANNING PRINCIPLES | <ul style="list-style-type: none"> - Government shall provide an appropriate framework for the preparation of national, regional and local area land use plans - Ensure the planning process is integrated, participatory and meets stakeholder needs - Facilitate the preparation of a national land use policy as the basis of land use management |
| | | URBAN AND PERI-URBAN LAND | <ul style="list-style-type: none"> - Government shall prepare and implement local area development plans (urban plans) for all urban and peri-urban areas in the country |
| | | SPONTANEOUS (INFORMAL) SETTLEMENTS | <ul style="list-style-type: none"> - Government shall develop a slum upgrading and resettlement programme with secure tenure for existing slums - Government shall put in place measures to prevent further slum development |

| Key Issue | Policy Recommendations | Key Issue | Policy Recommendations |
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| INSTITUTE PRINCIPLES OF NON-DISCRIMINATION | <ul style="list-style-type: none"> - Repeal laws that discriminate against women in relation to land and ensure legal framework for the protection of women's rights to land and natural resources - Review, harmonize and consolidate laws relating to children's inheritance of family property in order to protect orphans - Establish framework to secure rights of children in special circumstances (e.g. where both parents are living with HIV/AIDS) - Ensure representation of women in institutions dealing with land at all levels | DISTRICT LAND BOARDS | <ul style="list-style-type: none"> - To promote equitable access to land, conservation cultural sites, protection of minority land rights, redressing of historical injustices through appropriate awards and reducing of transaction costs of CLBs - Will take over the current functions of the MOL at the district level - Will coordinate and oversee the work of CLBs Members to be elected by eligible voters in the jurisdiction |
| PROTECTION OF MARGINALIZED GROUPS | <ul style="list-style-type: none"> - Identify marginalized groups, develop an inventory of them to understand their current status and related land rights - Develop legislative framework to protect their rights to land and natural resources Provide legal and institutional framework for restitution for destroyed property and loss of cultural habitats - Involve them in the management and benefit sharing of resources contiguous to them - Recognise and protect traditional knowledge of marginalized group with regards to land and natural resources | COMMUNITY LAND BOARDS | <ul style="list-style-type: none"> - Elected bodies which shall vet and approve all transactions in community land and submit the same to DLBs to facilitate recording and issuing of titles by the DLB - Community Land Act shall be enacted to replace the current Trust Land Act - Will operate at divisional and locational levels and coordinated by the DLBs, which shall also set standards and the regulatory framework for their operations |
| MATRIMONIAL PROPERTY | <ul style="list-style-type: none"> - Review succession, matrimonial property and related laws to ensure they conform with principles of equality between women and men - Enact new legislation on division of matrimonial property - Enact laws on co-ownership of matrimonial property to protect the rights of spouses, widows, widowers and divorcees - Put in place legal measures to ensure women and men have equal rights to land and land-based resources | SUPPORT AGENCIES | MOL, LOCAL AUTHORITIES, PROPERTY TRIBUNALS (Rent Restriction and Business Premises), LAND DISPUTES TRIBUNAL (To be established by Statute), LAND COURTS (To be established as a division of the High Court), LAND REFORM UNIT (Within the MOL) |
| REFORM PRINCIPLES | <ul style="list-style-type: none"> - Complete overhaul of existing LAM system - Devolution of power and authority - Community and stakeholder participation and representation - Justice, equity, gender, environment, and appropriate enforcement considerations - Set up National Land Commission, District Land Board, Community Land Boards | HISTORICAL INJUSTICES | <ul style="list-style-type: none"> - Establish mechanisms to resolve historical land claims arising in 1895 or thereafter - Establish a suitable legal and administrative framework to investigate historical injustices and recommend mechanisms for resolution - restitution, reparation, compensation - Review all laws and policies that exacerbate historical injustices, including the constitutional protection of private property however acquired |
| NATIONAL LAND COMMISSION, NLC | <ul style="list-style-type: none"> - Overall responsibility for land administration. - Members to be nominated by Parliament and appointed by the President - Existence and mandate to be founded on the constitution - Hold title to and administer public land - Set up a Land Titles Tribunal "which will sort out the bona fide ownership of land that was previously public or trust land" - Within 2 years create a framework for addressing historical injustices | COASTAL LAND ISSUES | <ul style="list-style-type: none"> - Inventory all government land along the 10 mile coastal strip and other problem areas in the province and set up framework for conversion to community land for adjudication Establish framework for addressing historical injustices in the Coast - Establish framework to protect Tenants at Will, provide public access to the coastline and control the construction of walls along the high water mark - Amend constitution to repossess idle land for purposes of redistribution to indigenous occupants |
| | | LAND RIGHTS OF VULNERABLE GROUPS | <ul style="list-style-type: none"> - Develop a framework for identifying, monitoring and assessing vulnerable groups to facilitate their access to land - Ensure participation of vulnerable groups in decision making over land and land based resources - Protect the land rights of the vulnerable, especially orphans |

FACTS

LETTERS TO THE EDITOR

Did you know that:

Eutrophication... is a slow process during which a lake or estuary becomes so rich in nutritive compounds, especially nitrogen and phosphorus, that algae and other microscopic plant life become superabundant. This leads to increased siltation, causing bodies of standing water to eventually dry up. Eutrophication is accelerated by discharges of nutrients in the form of sewage, detergents and fertilizers into the ecosystem. Eutrophication can be a natural process in lakes, as they age through geological time. Estuaries also tend to be naturally eutrophic because land-derived nutrients are concentrated where runoff enters the marine environment in a confined channel and mixing of relatively high nutrient freshwater with low nutrient marine water occurs. Lakes and reservoirs can be broadly classified as ultra-oligotrophic (extremely poor in nutrients), oligotrophic, mesotrophic, eutrophic or hypereutrophic depending on the concentration of nutrients in the body of water and/or based on ecological manifestations of the nutrient loading. In general terms, oligotrophic lakes are characterized by low nutrient inputs and primary productivity, high transparency and a diverse biota. In contrast, eutrophic waters have high nutrient inputs and primary productivity, low transparency and a high biomass of fewer species with a greater proportion of cyanobacteria.

Deserts... of North Africa in the 1970s, were moving relentlessly south and satellite photography revealed an expanding Sahara Desert. Recent work in the Sahel has shown both that the desert is now retreating and that enterprising farmers have improved their management of the soil so much that productivity is increasing and food production has improved beyond all expectations. In Egypt's deep south, along the shores of the country's largest strategic water reserve, ambitious efforts are underway to green the desert. The government plans to resettle one million people around Lake Nasser (one of the world's largest artificial lakes formed behind the Aswan High Dam across the Nile) by 2017. Small agricultural communities have already started sprouting up in this desolate land, but lack of basic amenities has so far been a hindering factor in this project realizing its true potential

Heritage... is our legacy from the past, what we live with today and what we pass on to future generations. The United Nations Educational, Scientific and Cultural Organization (UNESCO) seeks to encourage the identification, protection and preservation of cultural and natural heritage around the world considered to be of outstanding value to humanity. This is embodied in an international treaty called the Convention for the Protection of the World Cultural and Natural Heritage, adopted by UNESCO in 1972. What makes the concept of World Heritage exceptional is its universal application. World Heritage sites belong to all the peoples of the world, irrespective of the territory on which they are located.

The Salonga National Park... in the Democratic Republic of the Congo is Africa's largest tropical rainforest reserve. Situated at the heart of the central basin of the Zaire river, the park is very isolated and accessible only by water. It was added to the World Heritage List in 1984. It is the habitat of many endemic endangered species, such as the dwarf chimpanzee, the Zaire peacock, the forest elephant and the African slender-snouted or 'false' crocodile.

Dear Sir,

We acknowledge with thanks receipt of copies of Kenya Land Alliance, KLA Land Update Volume 5 No. 2 Titled 'Challenges Facing Implementation of the Forest Act 2005.

Our Library Users will find this publication useful as much as they have found the others we have previously received from Kenya Land Alliance.

We would like to register our appreciation to the Kenya Land Alliance for their unwavering support.

Thank You.
Benard Kamanda
Kenya School of Professional Studies.
Nairobi.

Dear Sir,

We acknowledge receipt of your letter dated 22nd August 2006 regarding the Forest Act 2005. We believe that through your efforts more and more Kenyans will come to understand the importance of the implementation of the forest act and the potential of forest resources to sustain both local and national economy. We hope that your mission and goal of educating the masses will be realized.

Thanking you for keeping us informed and sharing with us.

Gladys Wahinya
Trocaire East Africa Regional Office
Nairobi.

Your Letters



Send your views, opinions or contributions to the Editor, Kenya Land Alliance, P.O Box 2177 - 20100 Nakuru - KENYA and we will include them in our next issue.

NEWS

Squatter Groups Petition Lands Minister

Squatters have demanded immediate resettlement and urged the government to end the spate of land grabbing in the country. The squatters from Eastern Province, with support of their colleagues from Nyeri, Kitale and elsewhere within the republic converged at the Masaku Community Centre, Machakos Town on 2nd June 2006 and delivered their petition to the government through the acting Minister of Lands and Housing Prof. Kivutha Kibwana.

While recounting their plight, the squatters demanded that resettlement programs that have been ongoing elsewhere in the country be extended to them too. They also blamed land grabbing by a few rich people as a source of their landlessness, saying it was unfair for a few people to own thousands of hectares while they owned none. The event was facilitated by Kenya Land Alliance and ENE Land Commission.

Meanwhile another group of squatters in the Coast province have launched a book detailing their struggles for land. Dubbed 'Mapambano,' a Swahili word meaning struggles, the book recounts the vicious struggle squatters of Majaoni and Mwembelegeza in Mombasa have continued to put up to get back their land which had been grabbed by powerful locals in cohorts with foreigners.

The launch of Mapambano is a novel attempt by a squatter group to highlight and have documented evidence of important factors in their land struggles. It traces the origin of the land struggle, stakeholders involved, their roles in enabling or inhibiting the grabbing, lessons learnt and how these can be adopted as models elsewhere.

Documentation of this 115 paged book was facilitated by Action Aid Coast region through Ilishe Trust while the book launch was sponsored by the Kenya Land Alliance, KLA.

Government's Commitment at Stopping Grabbing of Forestlands Questioned

The commitment of both the present and past governments towards stopping of grabbing of forestlands is questionable. Speakers at the Launch of a book, 'Unjust Enrichment: the Making of Land Grabbing Millionaires' said despite there being reports from various commissions on the issue, nothing much was being done. These sentiments were expressed as Kenya Land Alliance, KLA in conjunction with Kenya National Commission on Human Rights, KNCHR launched the book, a joint project between the two. Speaking at the launch, Mr. Paul Ndung'u who headed the commission dubbed 'The Ndung'u Commission' said that despite continued formation of several commissions and release of their reports, the government already had all the information it needed, yet it had taken no substantive action on their recommendations. He added that were the government serious in taking action against such land grabbers it would have already done so.

Focusing on three forests, Ngong, Karura, and Kiptagich Forests, the book presents in monetary value what the country lost and the opportunity cost arising from the same. According to the book, over 18.4 billion was lost to a few individuals who with help of government officials of the day, grabbed parcels of land in the above forests. The book recounts how persons close to the former president grabbed the Kiptagich Forest ostensibly to settle the landless Ogiek community.



Chair KNCHR Maina Kiai and KLA National Coordinator display a copy of 'Unjust Enrichment' During its launch at the KNCHR Offices, Nairobi