

LAND REFORM IN THE CONTEXT OF DEVOLUTION

By

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Background

Kenya has an area of approximately 582,646 sq. Km of which most is either arid or semi-arid. Agriculturally the country has been classified into three broad zones high, middle and low¹. The high and medium potential areas cover about 18% of the total land area while the low potential is the arid and semi arid areas cover about 82% of the total land area with very low agricultural potential. As a result, over 80% of the population is settled on only about 20% of the land considered to be of medium to high potential. Further, about 70% of the land is held under customary systems of ownership and use².

Until recently the highly centralized Kenyan state distributed most of its investments in the so-called high-potential areas – those which, as stated in the Sessional Paper Number 10 of 1965, had ‘abundant natural resources, good land and rainfall, transport and power facilities, and people receptive to and active in development. The main economic activities in the high and medium potential is characterized by intensive agricultural and livestock husbandry while in the low potential areas is pastoral, ranching and wildlife based systems and in some places, dry-land farming. In urban areas, land use was determined by various zoning laws, which prescribe the areas to be used for commercial, residential, industrial, recreational and public purposes.

Five decades after independence, Kenyan communities remain closely tied to land. In this regard, land is still viewed as an important element in the construction of social identity, the organization of religious life and the production (and reproduction) of culture. The link across generations is ultimately defined by land resources which families, lineages and communities share and control³. Land is also the most important natural resource required for the creation of wealth in a nascent economy like Kenya, where the land title is the main instrument used to secure loans. This is against the continued heavy reliance of the Kenyan economy on agriculture⁴. The control of land brings economic power, which in turn, is often the basis of political power as exercised by the colonial state and post independence governments⁵.

Right from the pre-colonial Kenya, decisions about access to and use of land were controlled by traditional institutions that were political in nature. Kenya’s history of settler colonialism, labor migration, and land dispossession characterized much of the pre-independence period and continues even currently. This has had the effect of compounding Kenya’s development challenges which today largely revolves around land. Notably the problem of land and governance in Kenya are deeply intertwined into the cultural and socio-political history of the country. Land is a treasured community and individual asset as well as an explosive political

¹ See Republic of Kenya, Sessional paper No 10 of 1965 on African Socialism and Its Application to Planning in Kenya

² See Republic of Kenya Economic Survey 1994

³ See AU-AfDB-ECA Consortium, 2009

⁴ See Republic of Kenya, Kenya’s Agriculture Sector Development Strategy (2010-2020)

⁵ See Mweseli, 2000

issue that triggers conflict. Along the same lines, is the reduced productivity of land which has meant that a huge majority of Kenyans dependent on land can no longer secure their livelihoods. Besides, Kenya is still grappling with many historically unresolved land issues. These range from huge tracts of land held by absentee landlords, numerous squatters, unregistered land, internally displaced persons who remain un-resettled, and land grabbing especially of public spaces.

Most recently the country has suffered from alienation of large swathes of indigenous peoples' proportions of savannah and semi-desert land held in tenure by pastoralists for purposes unrelated to their livelihoods. This has deprived them of their customary land use of two of their most relevant resources land and water. In the context of rapid population growth and urbanization, Kenya's urbanization trend continues unabated which according to the 2009 Kenya National Population and Housing census, it was estimated that 11,545,571 people live in the urban areas⁶ accounting for thirty nine percent (39%) of Kenya's total population with projections that close to fifty percent of Kenyan population will be living in urban areas by the year 2030.

The National Land Policy of 2009 alongside preceding and succeeding national reports⁷ further itemized the issues facing the country as deterioration in land quality, squatting and landlessness, disinheritance of some groups and individuals, urban squalor, under-utilization and abandonment of agricultural land, tenure insecurity and conflict. Women and indigenous communities in Africa who depend heavily on land as a resource given their strong socio-cultural relationship to land, are especially affected and discriminated by lack of transparency in land governance and the lack of opportunities for participation in land markets. In the same token only a small percentage of women have secure rights with regard to access to land. Land has also been a primary driver of conflict as seen in the 2007 post-election violence. Further interrogation of the issues at hand, shows a clear co-relation between management systems of land, lack of transparency and accountability and the resultant land problems.

As a departure from the dark echoes of the past, Kenya in 2010 adopted a new constitution anchored upon the promise of entrenching transparency and accountability in all spheres of social, political and economic life. Key among the transformations related to the question of land ownership and use under chapter five of the constitution of Kenya, 2010 (CoK, 2010). Subsequently a number of land laws have equally been promulgated to realize the aspiration of equity and equality in land ownership and use. Alongside, a number of key institutional developments related to land have now been put in place. In the Kenyan situation the decentralization framework is set out in the Kenya Constitution (2010) under article 1 (3) and (4) which establishes two levels of government: the national and county levels of government.

As a key pillar of the COK 2010 the introduction of the Devolved Government System in Chapter 11 established 47 counties as well as the provisions for administering and managing the County Governments. The realization of the Devolved Government System features in the general provisions of the Constitution, including Citizenship Chapter 3, the Bill of Rights,

⁶ See Opata Getal, 2013 Urbanization and Urban Environmental Development Control Policies and Practices in Kenya. Research Journal in Organizational Psychology & Educational Studies 2(3) 132-138

⁷ See the Njonjo commission report, Ndungu Commission Report, Waki Commission Report, Akiwumi Commission Report

Chapter 4, Land and Environment Chapter 5, Leadership and Integrity Chapter 6; and several other Acts in particular the Devolution Acts⁸ and Land Acts⁹. Therefore the devolved system has now come to define the parameters of the new legislation within the social- economic context of Kenya.

Evidence based policy making

Arising from the foregoing developments accorded by the CoK, 2010 for devolved governance and land reforms, the Kajiado County Executive Committee led by the Governor through the County department of Lands, initiated the development of a County Land Policy. Through stakeholder consultations involving the county government, civil society organizations (CSO) and academia, the land policy making process begun in earnest. At the very onset, the partnership had great leadership, resonated well with the majority of people and was aligned to CSO's objectives of realizing social justice for vulnerable groups such as women and youth with each actor bringing on board complimentary experiences on land matters.

To begin with the process sought to generate evidence that could form a sound basis for generating a county land policy. In this regard, an extensive review of all relevant documents and a survey¹⁰ was done with support from a civil society organization¹¹ already working in Kajiado. From the study¹² a number of findings emerged that can broadly be described either as social, economic and governance related. At the social level findings showed that in Most household land was held in the name of the male household head (the title holder) who made most decisions regarding land including the acreage to sell, when to sell, to whom to sell, at how much to sell and how to spent the money.

Women, children and youth were found to have little control if any at all hence easily dispossessed. Besides consent from kin especially women was neither sought in many cases or there was use of impersonators as wives. In a number of group ranches they were many conflicts arising between members with corruption frequently mentioned as the cause. Besides, there was also an increase in conflict over grazing between land sellers, neighbors and land buyers. Also uncovered were disputes between land buyers, land sellers and their families especially where land sellers felt cheated especially when buyers started varying the terms. This was significant since it tended to undermine inter ethnic relations in the absence of a credible community based conflict resolution mechanism making disputes drag on for long.

The average Kajiado woman's life was also characterized by a myriad of issues¹³. Chief among them was the exclusion from decision making at both the household and community level. This was especially significant in relation to the ownership of land and disposal that has been rampant

⁸Urban Areas and Cities Act, County Government Act, Public Finance and Management Act, Transition to devolved Government Act and Inter governmental Relations Act

⁹Land Act, Land Registration Act, National Land Commission Act and Land And Environment Court Act

¹⁰ Survey was undertaken by Dr Beneah Mutsoso and Elijah Agevi of the University of Nairobi, Department of Sociology and Research Triangle Africa, an urban governance brain trust respectively

¹¹ Youth Empowerment Support Services with support of the Swedish embassy in Kenya's CRM facility provided financial support for the baseline

¹² See Baseline study on effective land ownership, management and transfer in the context of rapid urbanization and change among the Maasai in Kajiado

¹³ See Eva Komba, 2015 Empowering Maasai Women in Kenya: the Kajiado Land Policy. SAC IAWJ, Newsletter, December 2015 5-8

within Kajiado. The sale of Land, a basic factor of production for many households in Kajiado County compromised families and undermined the community's emerging sedentary mode at a time when climate change has had an impact on their transhumance lifestyle. In many instances, the utilization of the proceeds of land sales at household level was wanting.

Consequently, poverty became a permanent visitor in many of the households while unchecked sales gave rise to landlessness and marginalization. Among the more determined women who opted to pursue alternative income generation opportunities after losing land, this was confined largely to brewing illicit alcohol, burning charcoal and sex trade all of which had legal and health consequences. This further led to disintegration of household bonds, conflicts within families, homelessness and increased violence against women and deviance among youth. Besides, a number of families and households have now been left without any land and financially constrained and still challenged by the problems of lack of housing and weak food security.

Emerging findings with an economic aspect related to subdivision of land into small unviable plots for speculation. Notably was the reduced access to pasture which meant that family's still relying on pastoralism now had to cover longer distances to reach pasture due to by intensive fencing. Related to this were the competing and contradictory land uses side by side leading to decline of pastoralism as an economic activity. Besides, Land sales were found not to benefit ordinary Maasai with some payments done in-kind notably vehicles, meat, beer and mobile phones hence the adage of selling wealth to buy poverty¹⁴. Selling of family land had forced many youth without land to move to urban areas to eke a livelihood.

From a governance perspective the study discovered the key issues bedeviling land management in Kajiado included indiscriminate allocation of public land, illegal allocation of public utility land, multiple allocation and multiple issuance of land ownership documents, issuance of fake land documents, unapproved land uses, failure to follow procedures, cheating and dispossession of illiterate land owners, high ignorance of land selling procedures, multiple selling of land to different buyers. Besides there was a proliferation of land brokers, both formal and informal. In addition there was a contradiction between the county policy directives and practice by its officers. There were also many actors in the land sector from national and county governments, private sector, community and civil society.

At the inter-governmental level there was hardly consensus leading to confusion and lack of coordination. Also noted was the increase in environmental depletion and increasing effects of climate change characterized by pollution of water sources and human and wildlife conflicts. Land use planning function at the county was found not well resourced/capacitated. Consequently massive subdivision of land had led to rapid growth of small centers into shanty towns giving rise to a situation where urbanization has become a widespread poverty driven economic survival strategy¹⁵. Corridor type developments along the tarmac roads were clearly evident. This was coupled with insufficient information management to ensure identification of suitable land to ensure the most optimal use of land.

¹⁴ See Rutten (1992) Selling Wealth to Buy Poverty: The Process of Individualization of Land Ownership among the Maasai pastoralists of Kajiado District 1890-1990.

¹⁵ UN-HABITAT, State of African Cities, 2008

Arising from the foregoing a number of recommendations were suggested. Key was to have a policy that recognized the values of economic productivity, equity, environmental sustainability and the conservation of culture, and seeks to facilitate their protection for future generations. In addition the recommendations called for an institutional framework for implementing and ensuring the optimal utilization of land resources within a devolved system.

Further the recommendations acknowledged the role of the National Land Commission to manage public land on behalf of the National and County Governments. It sought to rationalize and enhance cooperative governance between the National Government through the line Ministry in-charge of Land and the County Land Department as well as securing the place of participatory governance. In order to actualize the recommendations, a comprehensive county land policy was mooted.

Framing the policy

Upon validation of the evidence gathered by the survey, the County Executive in charge of Land kick started the policy process by seeking leave from stakeholders gathered at the workshop to form a policy formulation steering committee. The committee formed consisted of county government staff, community representatives, county land management board, civil society organization members and the academia. The terms of reference required the committee to among other things undertake an extensive review of all existing documents and align the findings in a policy format for wider discussions. Secondly develop a standard policy document outline and populate the same for consultations, thirdly, Avail in acceptable format a final Kajiado Land Policy in ready format for presentation to the county legislative assembly.

To begin with the policy steering committee took stock of all the critical issues facing Kajiado County's land management and utilization as detailed in the survey and other additional documentation. Expertly, the committee guided the development of the policy goal that was ultimately captured as to influence how people live, work and travel in the County for years to come. They guided the generation of an over arching vision that was decided as to have a transparent, efficient, sustainable and equitable land use and management framework that is effective and accountable. In similar fashion, they helped craft the overall purpose of the policy which was to develop a land management framework that balances the economic, social, political, cultural and environmental concerns of the present and future people of Kajiado County to ensure sustainability.

Anchoring on the CoK, 2010, the policy took cognizance of long-standing land administration issues of the past and acts of irregular allocation and illegitimate transactions by the different levels of government and departments. In this regard the policy prescriptions set out the elements for effective administration and management of land in Kajiado County. The Policy now recognizes the values of economic productivity, equity, environmental sustainability and the conservation of culture, and seeks to facilitate their protection for future generations. It provides the institutional framework for implementing and ensuring the optimal utilization of land resources within a devolved system. In this respect it acknowledges the role of the National Land Commission to manage public land on behalf of the National and County Governments. It seeks to rationalize and enhance cooperative governance between the National Government through the line Ministry in-charge of Land and the County Land Department as well as securing the place of participatory governance.

The Kajiado land policy also had prescriptions for enhancing women empowerment. In this regard, the policy now seeks to promote among the conservative Maasai community joint land ownership thus bringing constitutional intentions closer. This is further buttressed by proposals for the formation of both housing and land cooperatives in which women are properly represented. The involvement of women is further entrenched in the land control boards where women will not only be members but can also lodge complaints and seek reprieve on land sales without spousal consent. To strengthen governance, the policy also proposed the establishment of more consultative citizen fora with significant representation of women.

In the same token, policy prescription to safeguard interests of Youth included calling for the establishment of mechanisms to enable families retain minimum percentage of acreage thereby assuring availability of land to future generations. Besides, the County government has been tasked with furthering public education on land rights especially those relating to Law of succession, Matrimonial property act and Children's act. Further, the county government is tasked with ensuring greater participation of vulnerable and marginalized groups in decision making organs

Public participation

The emphasis on public participation is now universal and in the case of Kenya is a constitutional imperative. Whereas in the past, only a few people determined all the governmental policies and legislation, in the Constitution of Kenya, 2010 (CoK, 2010) citizen participation is enshrined in Article 1, and the concept is now anchored solidly as a value proposition and principle of governance under Articles: 10. Similarly, the African Charter on popular participation in development and transformation lays out the basic principles underlying the practice of stakeholder engagement which it is expected informs the on-going discourse on the management of sustainable societies. It further presupposes that all levels and functions of government should seek to build citizen and stakeholder involvement into the respective policy making processes and activities

In tandem with the foregoing, the policy document was then shared at the County Assembly Sectoral Committee on Lands, Physical Planning, Environment, Wildlife and Natural Resources Management for deliberation by the peoples elected representatives and for wider public participation. This was also necessary to ensure that the Policy would benefit from a rigorous consultative process. This was also necessitated by the recognition among stakeholders that popular participation function with regards to policy and legislation was under the purview of the County Assembly. Consequently, the County Assembly leadership led by the Speaker and the departmental committee chair took over the policy and took it through the rigor of constituency consultations and legislative processes. Ultimately there was overwhelming support from the grassroots that the policy is adopted as is with minimal amendments, thus securing its adoption in 2015.

Conclusion

A number of conclusions can be drawn from the foregoing. First, evidence based public policy making process need not be a preserve of government departments or agencies but rather should embrace the plurality of stakeholders. Second, although public participation can manifest itself in many ways, a number of actors – notably government – must take a proactive role in establishing effective mechanisms of public participation in delivery of public goods and services. Thirdly,

deliberate attempt should be made to establish the type and extent of vulnerability to inform targeted inclusion and integration of women, youth, and other marginalized groups. Fourth, working through legitimate mechanisms and ongoing processes can go a long way in consolidating buy-in by the public. Finally, a number of lessons on what can inform other similar public policy engagements related to land can be derived from the Kajiado experience as ingredients for evidenced based public policy making process as follows;

Political will and teamwork

Wholesome support to the process given by the Governor and the CEC through the continuous presence of the Minister of Lands, housing and Natural resources in all facets of the process was useful and reassuring. Besides, the policy steering team demonstrated amiable team work that enabled a seamless execution of tasks. The team expertly shared responsibilities in guiding the policy making process and keeping it focused on its core deliverable. This leadership provided stability and the bulk of the critical institutional memory of the policy formulation work.

Popular Participation and Multi-stakeholder engagement

There is merit in involving both individuals and institutions in public policy making processes. Lasting solutions must be driven by the knowledge, experience of local communities. In this regard, at the micro level the involvement of individual and community resources was worthwhile serving as bulwark against selfish interest. Dialogue at different levels between competing interests, views and priorities of various groups must be well captured and negotiated.

Inclusivity and gender sensitivity

Inclusivity and dialogue at different levels was important to ensure that the views and priorities of various interest groups were well captured. In this regard there was inclusiveness and protection of minorities and marginalized groups. The interests of the Executive and Legislative arms of the County government also found accommodation within the policy. The Policy formally also helped consolidate the provisions on gender sensitivity as framed in the CoK, 2010, the vision 2030 and related national legislations. Further it resonates with the African Charter of human rights as well as other regional instruments such as the Maputo protocol. In addition it promotes the ideals of the universal declaration of human rights, the Sustainable Development Goals (SDG's) as well as Africa's Planet 50-50. Besides it is a testament to the efforts of the 1979 Convention on the Elimination of All Forms of Discrimination (CEDAW) and its Optional Protocol in 2000; the 1995 Beijing Declaration and Platform of Action (BDPA), the Protocol to the African Charter on Human and People's Rights in 2003 as well as the solemn Declaration on Gender Equality in 2004.

Legitimacy and Understanding the Context

The policy formulation process was anchored firmly on governance processes and institutions established by the CoK, 2010. In this regard, the county executive and legislature provided institutional legitimacy. The involvement of other grass root actors such as community elders, community based organizations notably Mpido, Nia and Dupota Maa provided another level of legitimacy given their long interaction with land issues. In the same token the evidence gathering was critical in understanding and integrating context specific issues within the wider public policy making process.

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