

Mission Impossible?



July 2009

Implementing the Ndung'u Report

Introduction

Land in Kenya has been poorly managed by various political regimes for decades. A particularly harmful aspect of this is the rampant corruption in the management of land.

Following the 2002 elections, the new NARC government, elected on an anti-corruption platform, took steps to investigate past cases of grand corruption and make recommendations for their resolution. The Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (known as the Ndung'u Commission after its Chairperson - Paul Ndung'u) was one such initiative.

However, progress in implementing the recommendations of the Ndung'u Commission - the most comprehensive investigation into the illegal/irregular allocation of public land in Kenya to date - has been slow and ineffective. This is largely due to political interference and low political will.

The Ndung'u Commission and "Mission Impossible?"

The Ndung'u Commission was appointed in 2003 to inquire into the illegal or irregular allocation of public land.

The Commission was required to recommend legal and administrative steps to restore illegally-allocated land to its proper use, and to carry out the necessary criminal investigations.

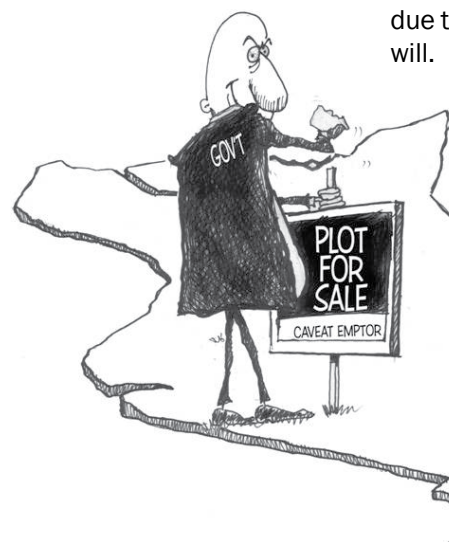
The complete Ndung'u Report was released in July 2005. It describes how land has been misallocated and recommends how such unlawful actions can be reversed through creating the right policies and laws.

This brief is a summary of "Mission Impossible?" - a recent report by AfricOG analysing the recommendations of the Ndung'u Report. It reviews the feasibility of implementing these recommendations and assesses progress in doing so. "Mission Impossible?" points to the complexities of the land question and the risks in trying to undo graft. However, it also emphasises that the Ndung'u recommendations realistically can, and indeed should, be implemented.

Why land is such a big deal

Land plays a major role as a social, economic and political resource in Kenya, both in real and symbolic terms. Post-election violence following the disputed 2007 elections was partly blamed on grievances arising from the inequitable distribution of resources, particularly land. There is no denying that land grievances have a real basis. However, land is also an emotive issue; grievances expressed over land sometimes mask deeper grievances over perceived political domination or inequity.

Good governance in land matters is critical to ensuring national peace and stability as land ownership is perceived to be closely associated with social, political and economic power. Establishing independent, accountable, and democratic systems to ensure justice and address inequalities in land matters is central to Kenya's reform agenda. This was identified as a priority



under Agenda Item IV of the National Accord and Reconciliation Agreement, spearheaded by the Kofi Annan-led mediation process in February 2008.

Misuse of public land in Kenya

Since independence, land has been used as a tool for political patronage. This rose to unprecedented levels in the 1990s due to shrinking resources to buy political support after a foreign aid freeze, and liberalisation of the economy. A government that had grown increasingly insecure due to the re-entry of multi-party politics turned to public land as a resource to solidify political support and for illicit enrichment.

According to the Government Lands Act, the President is vested with power to allocate government land. The Act allows the President to delegate these powers to the Commissioner of Land. However, since the 1940s, and in contrast with the law which requires that commercial plots be allocated through a public auction, successive commissioners have abused their power and granted land directly to favourable beneficiaries through letters of allocation. This facilitated the illegal and irregular allocation of public land, in total disregard of the public interest, leading to the pervasive corrupt practice popularly termed as 'land-grabbing'. This saw land that was not legally available for allocation, such as forest land and land reserved for road reserves or other public uses, allocated to well-connected persons and institutions.

How different types of public land were grabbed

Public land was classified by the Commission as urban, trust and private lands. Urban land refers to government land, which is alienated (reserved for public use in municipalities or townships) or unalienated (land which has not been leased or allocated). Trust land refers to all the land that falls in former native reserves for which individual titles have not been issued.

Urban land: Urban land had been illegally obtained by the widespread abuse of delegated presidential powers by Commissioners of Lands to allocate land to politicians and other well-connected people and institutions. Often, land meant for road reserves was sold by those it had been granted to, without considering the conditions of the letters of allotment.

Trust lands: The law states that trust lands can only be removed from the communal ownership of local people through specific legal processes, where local communities are given ample notice and opportunity to claim their ownership, in accordance with customary law. Despite these legal safeguards, trust lands suffered the greatest amount of land-grabbing.

Conspiracy in state corporations: Many illegal titles to public land were transferred to third parties, often State Corporations, for massive sums of money. This was the case with over 140 state corporations, including universities and the Central Bank of Kenya, and 113 companies in which the government held shares. Many such bodies participated in land grabbing schemes through which the public lost colossal amounts of money.

The issue of squatters and threats to the environment: Allocation of land to settle the landless took place without a clear legal and regulatory framework. This worsened the problem of landlessness and the squatter phenomenon resulting in widespread encroachment on wetlands and riparian reserves throughout the country. According to the Commission, only 1.7% of Kenya's total territorial land mass remains under forest cover, compared with 3% at independence. This is largely as a result of land grabbing usually made on the pretext of providing land for settlement schemes.

What are the implications of the Commission's findings?

Central to the Inquiry was the recommendation to repossess all illegally-allocated public land. The Commission arrived at this recommendation after a number of legal considerations, namely protection of the sanctity of title, protection of the first registration of land, and third party interests.

Sanctity of title: Once public land is registered in the name of a private owner, it becomes private property. On the basis of the principle of sanctity of title, the registered owners of the illegally allocated land can claim legal protection and the right to keep the property. The Commission however argued that such unlawfully acquired land cannot be protected by the law.

First registration: To solve the problem of beneficiaries of land grabbing claiming protection as the first registered owners of

Key recommendations of the Ndung'u Commission

1. Revoke all illegally-allocated titles
2. Set up three key institutions to facilitate land reforms: the Land Titles Tribunal; the National Land Commission and a Task Force

Whereas the Commission recommends the revocation of all illegally-allocated titles - a formidable task - in specific cases involving third parties, it also gives room for fair process and the consideration of these cancellations on a case-by-case basis.

the land, as provided under the Registered Land Act, the Commission argued that the Act stipulates that the government is the first proprietor of all land being registered for the first time and that failure to register the government as first owner is illegal, and an omission by the Commissioner of Lands.

Third party interests: Similarly, owners of illegally acquired land that were not involved in the original, dubious transaction (i.e. third parties), had no legal claim to the land even if they acted innocently in acquiring the land.

The Commission also recommended setting up a **Land Titles Tribunal, a National Land Commission and a Task Force** as further key institutions to facilitate the reforms.

Overall, the Ndung'u recommendations give valuable direction for breaking the vicious cycle of impunity through creating an enabling policy and legal framework.

What was the response to the Ndung'u Report?

The Report was met with severe criticism from sections of the public and political circles, and little acknowledgement from the President, who has not commented on it since its release in 2005. Nevertheless, the document has become the rallying point for land reform, with the Minister of Lands, Hon. James Orengo declaring his willingness to take forward the recommendations of the Ndung'u Report.

The contents of the Inquiry were key in informing the 2005 Draft Constitution and the Draft National Land Policy. Likewise, the Kenya Anti-Corruption Commission (KACC) has adopted some of the Ndung'u recommendations, with over 200 cases instituted. However, slow court processes and persistent political interference have limited KACC's effectiveness in this area.

Agenda 4 and the Truth Justice and Reconciliation Commission

Under Agenda Item 4, the National Dialogue and Reconciliation process proposed the establishment of mechanisms to handle long-term issues considered to be the basis of the post-election violence. The Truth, Justice and Reconciliation Commission (TJRC) is one such mechanism. The TJRC's mandate emphasises the investigation of economic crimes and includes what

appears to be a virgin mandate to investigate past wrongs relating to land, as if this has not already been done by, among others, the Ndung'u Commission. What will happen to the Ndung'u findings in view of proposed fresh investigations by the TJRC? It would be unfortunate if the TJRC were used to subvert progress on the Ndung'u recommendations.

What can be done about misuse of public land?

As part of efforts to ensure accountability in land matters, the President and Prime Minister should demonstrate the necessary political will and put their weight behind the implementation of the Commission's recommendations.

Greater pressure from civil society and the public is needed to ensure land reforms are enacted and the Ndung'u recommendations implemented. However, effective public participation in the debate on land is hampered by complicated land laws and the divisive and politicised nature of land issues in Kenya.

The three public institutions critical to the successful implementation of the Ndung'u Report must be set up as a matter of urgency. Failure to do so raises questions on the government's intent to ensure transparency in land dealings in Kenya.

Specific recommendations to deal with misuse of public land in Kenya therefore include:

1. Establishing a Lands Titles Tribunal to facilitate revocation, correction and validation of illegal and irregular titles.

This requires the enactment/amendment of the relevant laws to set up a tribunal. The Tribunal should provide a forum for justice on land matters, as a first step to litigation in formal courts of law. This would speed up the settlement of past land injustices.

2. Establishing a Land Division of the High Court

The land division would deal exclusively with cases related to land reducing the current delays in courts. Kenya's courts generally have a massive backlog with some cases as old as 15 years yet to be determined.

3. Establishing a National Land Commission

A well-constituted National Land Commission would be vested with all land matters in the country and help rationalise the powers of the President, the Commissioner of Lands and Councils over public land.

4. Reporting on the status of implementing the Ndung'u recommendations

The government and other institutions involved in implementing the Ndung'u Report should publish an implementation status report showing the actions taken, the challenges faced, and the steps these institutions will undertake to fully implement the Ndung'u recommendations within a binding time-frame.

5. Harmonising laws dealing with land administration, ownership and use and enacting a policy on the use of public land

Currently, there are over 40 different statutes addressing land issues. Harmonising these laws would rationalise land law and simplify land administration, making the system easier to understand and more difficult to manipulate.

6. Recovering wealth from illegal land transactions

The government should recover all assets that were unjustly gained through the illegal allocation and sale of public land and investigate and prosecute criminal offenders in the illegal allocation of land. Wrongdoers should be barred from holding public office and strict

disciplinary action taken against errant professionals by their professional organisations.

7. Facilitating disclosure of information on land

Kenya's laws should be changed to require unconditional disclosure of information by companies if the information sought is in the public interest. Land transactions have for long been shrouded in secrecy, and this has helped to perpetuate corruption.

8. Computerising Land Records

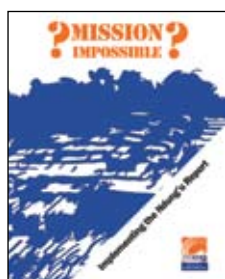
Mismanagement of files and records is a favourite tactic to enable corrupt dealings in government. Computerising land records will help ensure that documents of land transactions are systematically kept, minimise loss of files and help increase public access to land records for inspection. An inventory of all public land will help facilitate monitoring by the public and civic organisations.

9. Upgrading informal settlements

Upgrade informal settlements and provide the poor with decent housing through the Kenya Slum Upgrading Programme (KENSUP), an initiative between the Ministry of Housing and development partners.

10. Collaborating to address regional land issues

Regional collaboration would be essential in addressing trans-boundary land/resource issues, such as those relating to the Mau Forest and the governments involved should put in place urgent measures to address poor management of vital resources.



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About AfriCOG

AfriCOG is a civil society organisation dedicated to addressing the structural causes of corruption in Kenya. "Mission Impossible?" is part of AfriCOG's efforts to raise civic vigilance over governance issues; we believe that the best defense against corruption and the abuse of power is a well-informed and watchful citizenry.

"Mission Impossible?" is part of AfriCOG's series examining the implementation of the reports of commissions of inquiry. The full "Mission Impossible?" report is available on www.africog.org

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