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## Abbreviations and Acronyms

ADC	Agricultural Development Corporation
CBK	Central Bank of Kenya
EAC	East African Community
FSIs	Financial Service Institutions
KACC	Kenya Anti-Corruption Commission
LVEMP	Lake Victoria Environmental Management Programme
NSSF	National Social Security Fund
PDPs	Part Development Plans
TJRC	Truth, Justice and Reconciliation Commission

## Context of this Report

In the aftermath of the post-election crisis, the issue of land has gained increased urgency. Land reforms represent a central part of Kenya's reform agenda and indeed, the national reconciliation agenda as negotiated by President Kibaki and Prime Minister Raila Odinga under the aegis of Kofi Annan in early 2008.

This report examines the findings of the Ndung'u Commission, the subject of renewed debate in light of recent revelations of politicians' and well-connected individuals' allocations of land in the Mau Forest, one of Kenya's largest water catchment areas, with subsequent activities causing serious damage to the environment. Revelations on the theft of public lands are contained in the draft report of the Task Force on the Mau Forest recently commissioned by the Prime Minister.

This study attempts to answer a number of critical questions on the commitment to implement the recommendations of the Ndung'u report and the enforceability of these recommendations. Have there

been attempts to enforce the Ndung'u recommendations, and if so, how successful have they been? The report aims to identify key challenges, to the enforcement of the Ndung'u Report recommendations and to make proposals on addressing them.

AfriCOG's approach is informed by the emerging experience of the difficulties of policy implementation. While policy makers have focused on elaborating sound policies, they have rarely thought in advance of how to bring about the policy change or analysed the obstacles to implementation in order to overcome them.

It is hoped that this report will contribute to informed debate on the Ndung'u Report and the need for its implementation. This report is part of AfriCOG's series examining the implementation of the reports of commissions of inquiry which began with a general overview in 'Postponing the Truth: How Commissions of Inquiry are used to circumvent justice in Kenya'.

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## Foreword

Nearly five years after the release of the Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (the Ndung'u Commission), in December 2004, its recommendations remain largely unimplemented and corrupt dealings in public land continue. Recent revelations of officials in the Ministry of Lands colluding to sell public land to Kenyans in the diaspora and constant politicking on the Mau Forest crisis where many politically-connected individuals are reported to have been allocated land illegally, tell of continuing indifference to the deep ramifications of corruption and bad governance in the management of public land. In the aftermath of the post-election crisis, the issue of land has gained increased urgency.

Land and discontent over its distribution and ownership, was much cited as a driving factor behind the post-2007 election violence. This was reinforced by the National Accord and Reconciliation Agreement that emerged from the Kofi Annan-led mediation process in February 2008, which identified land reform as a priority under Agenda Item IV. This is exacerbated by decades of misuse of land as a source of patronage and illegitimate enrichment in Kenya, which touches on another key long-term issue under the National Accord, that of transparency and accountability.

Centralisation of power over land in the President has resulted in politicisation of the process of accessing as well as owning land. By making sound proposals for reforming land management and outlining viable legal, institutional, and policy strategies by which to surmount the expected implementation challenges, the Ndung'u Report provides a possible way out of a crucial aspect of Kenya's land dilemma.

Not implementing the Ndung'u Commission recommendations means that misuse of public land and the resultant damage - economic, environmental and socio-

political - continues unchecked. While the current Lands Minister shows some commitment to pursuing land reforms and implementing the Ndung'u recommendations, the President's silence on the report since its release in 2004 signifies lack of endorsement from the top.

As the Ndung'u Report, and, most recently, debate on the report of the Mau Forest Conservation Task Force make clear, much of Kenya's political and economic elite owes its wealth to decades of corruption and misallocation of land. This means that they would be losers in any serious attempt at land reform.

AfriCOG's strategic approach focuses on the structural weaknesses that perpetuate corruption and bad governance. Through this report, we aim to contribute objective analysis to the debate on resolving decades of past abuse and corruption and overcoming the underlying causes of repeated political violence.

AfriCOG's is mindful of the emerging experience of the difficulties of implementing policy. While policy makers have focused on elaborating sound policies, they have rarely considered how to bring about policy change or to analyse obstacles to implementation in order to overcome them.

Already, as AfriCOG has shown, Kenya has seen the recommendations of too many Commissions of Inquiry ignored or trashed altogether<sup>1</sup>. The anti-corruption performance of government since 2002 is not only deeply inadequate, but government itself, and highly placed individuals within it, have been the main culprits in perpetrating corruption<sup>2</sup>.

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<sup>1</sup> AfriCOG, 2008. Postponing the Truth: How Commissions of Inquiry are used to circumvent justice in Kenya. Nairobi: AfriCOG

<sup>2</sup> AfriCOG, 2008. Shattered Dreams: An audit of the Kibaki Government's anti-corruption drive 2003 - 2007. Nairobi: AfriCOG

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By summarising the key findings of the Ndung’u Report and attempting to answer critical questions on the enforceability of its recommendations and commitment to implement them, AfriCOG hopes that “Mission Impossible?” will make clear the complexities and risks associated with trying to undo a corrupt past; it is clearly

much better to attempt to prevent corruption than to cure its consequences.

Implementing the recommendations of the Ndung’u report is indeed a “mission possible”, given the political will, and an important step to addressing the impunity that thwarts Kenya’s growth and threatens its future.

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# Executive Summary

Since colonial times, land has been used as an instrument of political patronage in Kenya. At the height of political dissent during the KANU era, the ruling elite continually and illegally allocated public land to influential individuals and corporations in return for political support. The Ndung'u Commission of Inquiry into the Irregular and Illegal Allocation of Public Land in Kenya (also known as the Ndung'u Commission after its Chairman Paul Ndung'u) was appointed by the NARC government in 2003 to investigate the illegal or irregular allocation of public land in Kenya and to recommend legal and administrative measures for the restoration of such land to its proper title and purpose.

This report analyses the findings of the Ndung'u Commission and reviews the feasibility of implementing the recommendations made by the Commission in the light of recent post-election violence and the existing political, legal and socio-economic realities. The report also examines the attempts, if any, by various government institutions such as the Ministry of Lands, the Judiciary, and the Kenya Anti-Corruption Authority to implement the recommendations.

## Key Recommendations and Considerations of the Commission

Despite the limited time within which to carry out its work, the Ndung'u Commission carried out a thorough inquiry, documenting its findings in an impressive and extensive report. The Commission's findings aim to reverse unlawful actions and ensure land reform through creating an enabling policy and legal framework. At the heart of the Commission's report was the recommendation that all titles for illegally acquired land be cancelled and that such land be repossessed.

This study analyses the implications of these findings against the legal protection of the sanctity of title, the legal protection of first registration of land<sup>1</sup>, third party interests in the event of revocation and the practicality of revoking thousands of acres of illegally acquired land. The study finds that in the recent past, courts of

law have adopted a liberal approach when deliberating on the protection of a first registration in a bid to protect vulnerable family members. It is therefore possible for the courts to fashion specific mechanisms to deal with claims for protection on the grounds of a first registration in relation to titles that were allocated illegally.

The Commission also dealt with the effects of title cancellations on third parties, categorising them into three: parties holding titles as security for loans, such as banks and financial institutions; persons who acquired the land in question as successors in title; and persons who have received such land as a gift from the original allottees. The Commission pointed out that any of these parties may, in turn, have created further interests in addition to those received from the original allottees. The Commission concluded that since, under the common law, no one transfers a greater or better interest to another than what he holds, expressed in the Latin maxim, *memo data quid non habit*<sup>2</sup>, this principle extinguishes all third party rights since they were clothed in illegality from the very beginning. Third parties stand in the same position as the original allottee.

Whereas the Commission recommended that all illegal titles be cancelled, it nevertheless provided room to consider the effects of such cancellation on a case-by-case basis. The Commission indicated, in broad terms, the considerations that would go into deciding whether and how to revoke these titles, including the number and classes of persons who are financially involved in the title and the public interest. This calls for the establishment of criteria for revoking titles as well as the establishment of procedures to ensure that the process is fair. These rules would also help prevent unnecessary delays. Mechanisms for public participation and transparency would also be

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<sup>1</sup> The Registered Land Act stipulates that the government be registered as the first proprietor of all land being registered for the first time.

<sup>2</sup> 'One cannot grant what one does not have or you cannot give what you do not have'.

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built into the process. This ties in with a proposal by the Commission to establish a land tribunal.

Based on the existing law, this recommendation by the Commission amounts to the establishment of a framework through which third parties' rights and interests can be discussed and negotiated. This would put the government in a position where it would almost certainly have to pay off third parties who acted innocently in acquiring interests in the land in question.

### Three New Institutions

The Ndung'u Report concludes that analysing and implementing its recommendations is a formidable task even with the requisite political will and public institutions in place. This is due to the sheer number of titles identified for investigation or revocation. The Commission therefore recommended the establishment of three new institutions - **a Land Titles Tribunal, Task Force and the National Land Commission** to facilitate the reforms. A Lands Tribunal would serve the dual role of providing an alternative land justice system and a forum for addressing historical injustices related to land. To date, none of the recommended institutions has been established. Currently, there is no public institution with the capacity to implement the recommendations of the report.

The study concludes that the establishment of these organs can be viewed as foundational to the successful implementation of the report. The failure to deal with these two recommendations while purporting to implement the findings of the Ndung'u Commission, casts doubt on the intent to reform land in Kenya. **It is not realistic to expect land reform without establishing the requisite set of public institutions.**

### Sporadic Responses to the Ndung'u Report

While the Ndung'u Report has been the subject of severe criticism from sections of the Kenyan public, it remains the most conclusive document recently published on the governance of land affairs in Kenya.

The release of the report galvanized momentary action by public authorities to bring about accountability for historical injustices committed in relation to land. For a short period it appeared that a credible process to reclaim public land that had been allocated illegally was in place. Left in the hands of weak public institutions and bereft of political support, these efforts have in the end, however, been largely unsuccessful.

### Influence on the Culture of Impunity, New Laws and Policies

The Ndung'u Report has nevertheless produced at least one enduring result - it has become a reference point and a symbolic stand that impunity in dealing with public land is no longer acceptable. In this regard, the report and the half-hearted attempts to enforce it have hopefully generated a sense of caution in dealings with public land. Moreover, the report has become a rallying point for forces that seek accountability in relation to historical injustices on public land.

The contents of the Ndung'u report have greatly influenced two other important instruments: the proposed new Constitution which failed at the 2005 referendum and the Draft National Land Policy.

### Legal Action on Questionable Dealings in Land

The Kenya Anti-Corruption Commission (KACC) has also taken up some recommendations of the Ndung'u report and now has numerous cases pending in court, seeking the nullification of titles for illegally acquired land. Various factors including lack of political will, capacity constraints and limited powers have however limited the effectiveness of the KACC. Further, litigation, the method it has chosen for land recovery, is inherently slow. It may be a while before it is known whether these cases will succeed.

### Points of Concern

Political support for the Ndung'u Report has been worryingly low. The President has not publicly referred to the issue of illegal land acquisition since he released the Ndung'u Report in 2005. Successive Lands Ministers have spoken little of the contents of the report. The President, Prime Minister and Minister for Lands should speak openly on the issues raised in the report if true land reforms are to be realised. The new Lands Minister has demonstrated readiness to bring the Ndung'u Report back on the public agenda.

Public participation in discussions regarding the land issues raised in the Ndung'u Report is limited due to the complexity of land law and the divisive and politically loaded nature of the land question in Kenya. Efforts towards freedom of information must incorporate public information on land issues.

# PART I

## Report of the Commission of Inquiry into the Illegal/ Irregular Allocation of Public Land

### I. Mandate of The Commission

Land continues to command a pivotal position in Kenya's social, economic, political and legal relations. Perhaps this explains why, when other resources for political patronage have declined at any time in our political history, the ruling elite have resorted to illegally dishing out public utility land. This phenomenon of illegally and irregularly allocating public land to "politically well-connected persons" gains pace just before and after elections. Over the years, a culture of corruption and impunity flourished and went unpunished amongst those entrusted with power over public utility land.

On 30<sup>th</sup> June 2003, the NARC government appointed a commission of inquiry to investigate the illegal and irregular allocation of public land in Kenya. The Commission came to be known as the Ndung'u Commission, and its report as the Ndung'u report, after Paul Ndung'u, the Nairobi lawyer who chaired the commission.

### II. The Commission's Findings and Recommendations

In its report, released in part on 16<sup>th</sup> December 2004, the inquiry established that illegal allocation of public land is

#### The Commission's Tasks

- a) The Commission was required to
  - Inquire into the allocation of public lands or lands dedicated for research for public benefit to private individuals or corporations;
  - Collect all evidence and information available from ministry-based committees or from any other source, relating to allocation of such lands; and
  - Prepare a list of all land unlawfully or irregularly allocated, specifying particulars of the land and of the persons to whom they were allocated, the date of allocation, particulars of all subsequent dealings in the land concerned and their current ownership and development status;
- b) To inquire into and ascertain
  - The identity of any individuals or corporations, to whom such land was allocated by 'unlawful or irregular' means; and
  - The identity of any public officials involved in such allocation;
- c) Carry out investigations into any other matters related to land allocations as seen fit by the Commission, to facilitate execution of its duties;
- d) Carry out other related investigations as may be directed by the President or Minister for Lands and Settlement.
- e) The Commission was mandated to recommend:
  - legal and administrative measures for the restoration of such lands to their proper title or purpose keeping in mind the rights of any private person having authentic entitlement over the lands concerned;
  - legal and administrative measures to be taken in the event that such lands are for any reason unable to be restored to their proper title or purpose;
  - criminal investigation or prosecution and any other measures to be taken against persons involved in the unlawful or irregular allocation of such lands; and
  - legal and administrative measures for the prevention of unlawful or irregular allocation of such lands in future.<sup>3</sup>

<sup>3</sup> Legal Notice No. 4559 dated 4th July 2003.

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one of the most pronounced manifestations of corruption and political patronage in our society.

The Ndung'u Commission made a number of specific recommendations on all types of public land to help the government address past wrongs in land allocation and prevent illegal and irregular allocations of public land in future. These are detailed below.

The Commission's final report was released to the public six months after it had been presented to the President in December 2004. The Commission categorised its findings under three types of public land namely: Urban, State Corporations and Ministries' Land; Settlement Schemes and Trust Land; and Forestland, National Parks, Game Reserves, Wetlands, Riparian Reserves/ Sites, Protected Areas, Museums and Historical Monuments. An overview of these findings below illustrate.

## **Urban, State Corporations and Ministries' Lands**

### **a) Urban Lands**

The term "urban lands" was used in reference to all land located in cities, municipalities and townships, government land, whether or not this has been allocated, or land in former trust land areas designated for public use in municipalities or townships.

The Commission listed a number of ways in which public land falling under this category had been illegally obtained. These included:

#### ***Abuse of presidential discretion in apportioning land***

Successive Commissioners of Lands, acting in excess of the legal power vested in that office, had made direct grants of unallocated land to individuals and companies without written authority of the President.

#### ***Use of forged letters and documents***

The Commission found that forged letters and documents were used to illegally allocate land. Further, land that had been acquired compulsorily for public use was then illegally allocated through forged letters and documents. Those allocated such land would later sell it to third parties, some of whom developed it. Throughout the country, the illegal allocation of compulsorily acquired land includes land that had been acquired for road construction or road reserves.

Land which had been reserved for public purposes such as schools, playgrounds, and hospitals was later allocated without regard for the public interest for which it had been acquired. Such land would be allocated following the submission of Part Development Plans (PDPs) to the Commissioner of Lands who would indiscriminately give authorisation for change of use.

The Commission emphasised that although throughout the period under investigation letters of allotment were recognised and used as title deeds, this was illegal.

### ***Who is to blame for the illegal/irregular allocation of urban lands?***

Local authorities, in breach of the public trust conferred on them under the Constitution, actively participated in the allocation of public land. Further, these authorities failed to stop the unbridled plunder of public land over which the law required them to exercise trusteeship.

The Commission also apportioned some blame to professionals who acted to facilitate questionable land transactions. These professionals and local authorities acted at the behest of politicians.

Professionals including surveyors, engineers, valuers, lawyers, and architects, acted without regard for the public interest and in breach of the codes of ethics governing their professions, by facilitating the plunder of public land.

### ***Recommendations on illegal allocation of urban lands***

The Commission recommended that:

- Where public utility land had been allocated, such allocation should be nullified and the land repossessed and restored to the public use for which it had been reserved.
- Where land set aside to serve as road reserves had been illegally allocated, such land should be repossessed and restored to public use even if the land had since been developed. Developments on such lands should therefore be demolished without exception.

- Where the land in question was reserved for a public purpose other than a road reserve and had since been substantially developed either by the allottee or a third party, and if, after consultation with the local community it had been established that the land was no longer required for the purpose for which it had been reserved, the title should nonetheless be cancelled. A new title may be issued to the current registered proprietor upon paying the government the net value of the unimproved site, subject to compliance with planning and environmental laws.
- The inquiry noted that the use of letters of allotment had played an important role in facilitating the illegal allocation of land and recommended that all letters of allotment that were in force at the time of writing the report be revoked. The Commission further recommended that in future, letters of allotment strictly be utilised as offers for the purchase of unalienated government land and nothing more.
- The inquiry recommended that persons who had participated in or facilitated the illegal transactions should be investigated in accordance with the applicable law. Professional bodies were called upon to carry out investigations into the conduct their members who had participated in or facilitated the illegal allocation of land and take disciplinary action in accordance with professional codes of conduct. Finally it recommended that money paid in pursuance of the illegal allocation and sale of public land should be recovered by the government in accordance with the law.

#### **b) Land Belonging to State Corporations**

At the time the inquiry was concluded, there were 140 state corporations, inclusive of universities, pension schemes, the Central Bank of Kenya (CBK), and 113 companies in which the government held shares but which had been sold through pre-emptive rights offer<sup>4</sup>. The Commission found that although each state corporation had its core business provided in the legislation under which it had been established, many state corporations had acted as “conduits for land-grabbing schemes through which the public had lost colossal amounts of money.”<sup>5</sup>

Again, the Commission found that public land under the care of state corporations had been unlawfully allocated

to private persons using various methods. Land reserved for a number of these corporations was illegally allocated to influential individuals in the Moi and Kenyatta regimes. On the other hand, corporations were pressurised to purchase illegally-acquired land, becoming “captive buyers of land from politically-connected allottees.”<sup>6</sup> In other cases, state corporations were forced to exchange their land, with individuals or companies for speculative purposes. The National Social Security Fund (NSSF) was identified as the most abused state corporation. This corporation had been forced to either buy illegally-allocated land or land from individuals at exorbitant prices. The Commission concluded that there had been plunder of land belonging to state corporations, imprudent management of state corporations and that as a result, individuals had been unjustly enriched.

#### **Recommendations on Illegal Allocation of Land Belonging to State Corporations**

- All land belonging to state corporations that had been illegally acquired should be repossessed by the Government and all titles issued for the land revoked.
- Where the land had been substantially developed, the titles should nevertheless be revoked but the existing registered proprietors may be issued with new titles upon new terms and conditions and in line with the planning and environmental legislation.
- The Government should repossess all illegally-acquired public utility land purchased by state corporations. Where such land had been sold at below market value or at inflated prices, those responsible for such transactions should be investigated and prosecuted.

#### **c) Land Reserved for Ministries and Departments**

Related findings emerged with regard to various government ministries which had lost land through illegal and irregular allocations. The Commission described the illegal allocations as follows: a letter from a ministry official

<sup>4</sup> The right of a company’s existing common shareholders to have the first chance to purchase shares in a company’s future stock issue.

<sup>5</sup> Republic of Kenya, *Report of the Commission of Inquiry into the Illegal/ Irregular Allocation of Public Land*. Government Press, Nairobi, 2004, p.

<sup>6</sup> *Ibid*, p.92

to the Commissioner of Lands indicating that the ministry no longer required a certain tract of land would usually trigger the illegal allocation of the land in question. The Commissioner of Lands (acting in excess of his authority) would allocate this land to an applicant through a letter of allotment. Government houses and properties were also similarly allocated.

The actions proposed by the Commission were consistent with the recommendations indicated above.

## Settlement Schemes and Trust Lands

### a) Settlement Schemes

Trust land and settlement schemes, purchased through loans advanced to Kenya by Britain<sup>7</sup>, were aimed at stimulating agricultural production and addressing landlessness in Kenya. The land is formally administered by the Settlement Fund Trustees while District Plot Allocation Committees are responsible for implementation.

The inquiry established that in the early years of independence, settlement schemes were largely established and allocated in line with identified objectives. Later, however, there was a general deviation from original objectives.

The Commission found that District Plot Allocation Committees wielded enormous power in the land allocation process and that they were almost wholly unaccountable. The Commission identified eight farms belonging to the Agricultural Development Corporation (ADC) which had been allocated to individuals and companies under the guise of settlement schemes, and concluded that the allocation was contrary to the Agricultural Development Corporation Act.

Allocation of land on settlement schemes took place without a clear legal and regulatory framework, providing opportunity for civil servants, politicians and other individuals to illegally acquire land meant to benefit the landless.

<sup>7</sup> Kenya and British Governments entered into an agreement whereby the latter agreed to finance Kenya through loans and grants to purchase European Settler Farms at the prevailing market rates

### Recommendations on Illegal Allocation of Settlement Schemes

- All land allocations made to public officers, politicians and others at the expense of the landless and contrary to the established policy and procedure should be revoked. This land should be repossessed and allocated on the basis of 60% in favour of local residents and 40% in favour of the landless from other parts of the county.
- The government should prepare a Sessional Paper setting out objectives and policy guidelines for the management of settlement schemes.

### b) Trust Lands

Trust land refers to all land that falls in the former so-called native reserves for which individual titles have not been issued. Such land is usually regarded by the resident community as belonging to them, or some of them, collectively. The Constitution of Kenya vests trust lands in the local authority within which the land falls. However, the local authority is a trustee and not the owner of this land. The Constitution requires the local authority to hold such land in trust for the benefit of the local inhabitants of the area – the actual owners of the land. In appropriate circumstances, such land, or a part of it, may be privatised through issuing individual titles. The Trust Lands Act provides for the governance of trust land while the Land Adjudication Act provides for the privatisation of trust land.

The Commission found many instances in which trust land had been allocated contrary to the Constitution, the Trust Land Act and the Land Adjudication Act. County councils and the Commissioner of Lands apparently colluded to illegally allocate trust land to individuals and companies. A number of such allocations included the Iloodo-Ariak and Mosiro Adjudication Sections, Kiamura “A” Adjudication Section, Fourteen Falls Integrated Programme in Thika and Hill Farm Kamwenja in Mathari, Nyeri.

### Recommendations on Illegal Allocation of Trust Lands

- Where there were no pending judicial proceedings, the allocations should be revoked.

- Where land set apart for public use (under Section 117<sup>8</sup> of the Constitution) had been allocated to individuals, the allocation should be revoked and the land should revert to its original purpose.
- The Ministry of Lands and Settlement should prepare a comprehensive register of trust lands to help in clearly identifying land set apart for public use.

### **Forestlands, National Parks, Game Reserves, Wetlands, Riparian Reserves/Sites, Protected Areas, Museums and Historical Monuments**

The investigation established that a number of illegal allocations of land falling under this category had been made in favour of individuals, schools, the Agricultural Society of Kenya and the Nyayo Tea Zones Development Corporation. One of the consequences of this was that only 1.7% of the total territorial land mass remains under forest cover as compared to 3% recorded at independence. Key findings revealed that most illegally allocated forest land was excised without considering social, economic and ecological implications and in total violation of existing legal provisions.

The investigation also found that there had been widespread encroachment on wetlands, riparian reserves and sites throughout the country. Fortunately, most land allocated

in National Parks and Game Reserves remained protected because the Kenya Wildlife Service prevented allottees from taking over land within the parks. Nonetheless, the Commission recorded 26 instances of illegal allocation of land set apart for nature reserves. The Commission however reported that it had experienced great difficulty in accessing information from official sources which would have enabled the inquiry to identify persons who had been illegally allocated land set aside as protected areas.

#### ***Recommendations regarding illegal allocation of Forestlands, National Parks, Game Reserves, Wetlands, Riparian Reserves/ Sites, Protected Areas, Museums and Historical Monuments***

- Cancel all allocations of forestland and wetlands made contrary to the law.
- Abolish the Nyayo Tea Zones
- Resurvey forest boundaries
- Table the Forest Bill should be tabled in Parliament
- Develop a comprehensive Wetlands Management Policy
- Promote international cooperation on trans-boundary wetlands.

### **General Recommendations on Illegal/Irregular Allocation of Public Land in Kenya**

In addition to the recommendations made specific to each type of public land, the Commission made a number of recommendations to help correct past wrongs and prevent unlawful and irregular allocation of public land in the future. These included:

1. Computerise land records and create an inventory
2. Establish a National Land Commission which would be vested with the power to allocate public land - a power largely vested in the President and in some circumstances the Commissioner of Lands.
3. Enhance the capacity of certain land institutions
4. Establish a policy on the development of public land
5. Establish a Land Titles Tribunal to embark on the process of revoking and rectifying titles. This was considered particularly important given the massive plunder of public land.
6. Harmonise land legislation
7. Establish a Land Division of the High Court
8. Upgrade informal settlements

<sup>8</sup> Section 117 of the Constitution refers to setting apart of Trust Land by County Councils for public purposes.

# PART II

## Implementing the Ndung'u Report: Mission Impossible?

The Ndung'u Commission made recommendations which can broadly be divided into two levels:

1. *Recommendations aimed at the establishment of enabling policies and laws to ensure that the Commission's proposals would be implemented. These recommendations also addressed the prevention of future wrongful dealings in public land.*
2. *Recommendations aimed at reversing the unlawful actions which had been committed in connection with public land.*

Annex I of this report reproduces the main recommendations of the Ndung'u Report and summarises progress in their implementation.

A question that remains to be answered is the viability of the Commission's recommendations. Can they be enforced?

For the purposes of this report, it is assumed that recommendations for the establishment of policies and laws for land reform will be considered within the context of ongoing governance reforms. As such, implementing the Ndung'u recommendations faces the challenges typical of other policy reform initiatives.

The most radical of the Ndung'u recommendations are those that seek to address what are deemed as past wrongs in relation to dealings in public land. These seek to cancel all illegal titles and repossess the land in question. Ultimately, the viability of the Ndung'u report turns on this set of recommendations. Whether or not these repossessions can successfully take place will be the real test of whether the Ndung'u report is feasible. The soundness of recommendations for the cancellation of titles is therefore examined below.

### Can Illegally Allocated Land Be Repossessed?

The recommendation to repossess illegally-allocated public land must be considered against a number of factors:

- the accuracy of the Commission's finding that the documented irregularities in issuing titles provide sufficient grounds for revoking such titles
- the tension between the legal protection of the sanctity of title and the recommendation that cancellation of irregularly issued titles should override this protection
- the legal protection of a first registration of land
- the place of third party interests in the event of revocation of titles, and
- the reality of revoking thousands of illegally acquired titles

The section below discusses these five issues in some detail.

### I The Findings of the Ndung'u Commission on Illegal and Irregular Titles

The crux of the Ndung'u Report is the notion that a number of irregularities in the process of issuing certain titles were so fundamental as to make these titles illegal. The Commission established two categories of wrongfully-issued titles: one that it called "**illegal**" titles and another that it referred to as "**irregular**" titles.

#### Illegal Land Titles

The Commission observed a number of factors that render a land title illegal. One of these is when a title is issued for a piece of land which is not legally available for allocation.

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In such a case, there is an apparent allocation, complete with the formality of a title. However, since the land in question could not be legally allocated, the title is “illegal”. Also, a title that has been created directly as a result of one or more illegal acts is considered an illegal title.

### **Irregular Land Titles**

According to the Ndung’u Commission, an irregular allocation takes place where land that is legally available for allocation is allotted in circumstances where the requisite standard operating or administrative procedures have been flouted. In addition, the titles to such land are not void if all legal formalities have been complied with. Irregular titles can be rectified by undertaking the administrative steps which had not been previously observed.

Thus, according to the Commission, irregular issuance of titles is mainly procedural. The main procedures for the issuance of titles are contained in the Government Lands Act. As these provisions form the basis for the Commission’s findings on the irregularity or illegality of titles, they are discussed below.

## **The Government Lands Act**

### ***Role of the President***

The Government Lands Act places the President at the centre of land administration in Kenya. The President is vested with power to make allocations of government land, to vary the terms of an existing allocation of government land, to extend the period for which government land is allocated, and to accept the surrender of government land by a person to whom it had been allocated.

### ***Role of the Commissioner of Lands***

The Act establishes the office of Commissioner of Lands as the main official to carry out the administration of land. The Act allows the President to delegate any of the land administration functions to be performed by him to the Commissioner. The Commissioner may, subject to the general or special direction of the President, execute any instrument that the President has power to execute in relation to government land.

The President has conferred a standing delegation of his powers to the Commissioner with respect to:

- The allocation of land for religious, charitable, educational or sports purposes;
- Town planning;
- The sale of small remnants of land in the city of Nairobi and Mombasa municipality for the use of local authorities for municipal and district purposes;
- The extension of township leases and for the sale of farms and plots offered for auction but which remain unsold.

### ***Dividing land in townships into plots and conditions for the allocation of public land***

The Commissioner is allowed to divide into plots any land in townships and offer it for the public for lease. The length of lease may not exceed 100 years. The Commissioner must determine the price of such plots.

Unless otherwise directed by the President, such plots are to be sold by public auction. The place and time for the sale of such plots must be announced in the Gazette, with an indication of the number of plots on offer, the area where these are situated, the price, the survey fees, the term of lease and the building conditions applicable.

Public land is allocated under the Government Lands Act under two important conditions:

1. That the person allotted the land must not transfer, or use the land as a security, without the consent of the Commissioner.
2. That the person allotted the land develops the land within the period specified in the terms of the grant.

These conditions are designed to avoid speculative applications for allocation of government land.

An identical set of provisions are contained in the Act in relation to agricultural land. With regard to such land, the Commissioner is granted the mandate, subject to the direction of the President, to divide agricultural land into farms and offer them for sale to the public. Again, the sale is by a gazetted public auction. The term of the lease must not exceed 999 years.

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Despite these legal requirements which are still in place, public land has not been sold through public auction for over 50 years. During much of the colonial period, government land was allocated by public auction. The need to diversify land ownership led to a review of this method.

In 1951, as a result of recommendations by a committee headed by the Commissioner of Lands, the Governor issued a circular requiring that land allocations be by tender, instead of the auction system.

During the Kenyatta and Moi years, the allocation of government land followed the informal methods of allocation that the colonial government had put in place. While this had served colonial interests well enough, it led to poor accountability in post-independence land allocations. Further, although the law has remained unchanged, its provisions, that require the advertisement of government land for sale, have rarely been met.

### **Anomalies in the Allocation of Land: The Commission's Findings**

The Commission found a number of procedural and substantive abuses in the allocation of public land that, in its view, constituted the basis for concluding that the titles thus issued were illegal. The abuses in question are:

- a) Where the Commissioner of Lands, without written consent of the President, allocated un-alienated government land under section 3 of the Government Lands Act in circumstances other than in exercise of delegated authority
- b) Where the President allocated un-alienated government land contrary to the provisions of the Government Lands Act and other applicable laws in circumstances that show a total disregard of the public interest. For example, where the only cemetery in Ndhiwa, Nyanza was allocated to area MP, Tom Obondo, in the early 1990s depriving the public of burial grounds and providing no alternatives
- c) Where the President or Commissioner of Lands allocated alienated land or land designated for public use. For example, where land set aside for the future erection of public facilities was allocated to an individual without making provision for building such facilities.

- d) Where the Commissioner of Lands allocated a township plot without auction or other form of public sale without written exemption from the President.
- e) Where the Commissioner of Lands allocated land suitable for agricultural purposes without auction or other form of public sale and without written exemption from the President.
- f) Where the President or Commissioner of Lands allocated land classified as a protected area. According to the Commission, land classified as a protected area cannot be allocated.
- g) Where the President, Commissioner of Lands or county council allocated trust land in contravention of the Constitution, the Trust Land Act and the Land Adjudication Act. Local authorities are merely custodians of trust land and must protect the interests of local inhabitants in dealings with such land.
- h) Where a county council, or other local authority, allocated land in its jurisdiction which is set aside for public use. This is only acceptable where the allocation is a sublease for the same public purpose.<sup>9</sup>

Further abuses included allocation of land that had not yet been declassified as forest land and issuing titles before a certificate of change of use had been obtained, as required by physical planning laws.

The Commission also found that unauthorised officials such as chiefs, District Commissioners (DCs), District Officers (DOs) and Provincial Commissioners (PCs) were allocating public land in what can be considered a complete breakdown of the rule of law.

The Commission discussed the legal status of the titles to the land which was the subject of the inquiry and the legal implications of revoking these titles. It concluded that in all the above cases, the titles issued were illegal and void, and therefore incapable of conferring a right in the land in question.

The Commissioner also concluded that Legal Notice No. 305 of 1994 issued by the Minister for Lands - entitled

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<sup>9</sup> Republic of Kenya, *Report of the Commission of Inquiry into the Illegal/ Irregular Allocation of Public Land*. Government Press, Nairobi, 2004, p.53

Government Lands (Consents) (Fees) Amendment Rules - was illegal. The Notice, which was entitled *Government Lands Amendment Rules*, purported to allow government land to be transferred before it was developed. This clearly contravenes the Government Lands Act which states that land can only be transferred after it is developed.

### **The Public Interest as a Basis for Establishing the Validity of Transactions in Public Land**

The Commission determined that any land allocation that went against the public interest was illegal and could be nullified. The Government Lands Act, the legal basis for allocations that have now come under question, provides no direction in resolving these questions.

It can be argued that the principle of the public interest, on which the Ndung'u Commission so heavily relies, is an ideological interpretation of statutory provisions insofar as they do not contain in their plain text, the meaning that the Commission appears to give them. If so, the doctrine of public interest as applied in the Ndung'u Report, does not necessarily enjoy universal recognition or approval.

However, there is evidence of judicial approval of this doctrine: for example, Justice Phillip Waki while presiding over a case in which the owner of a beach front plot lost access to the ocean when the adjoining property and access road became private property, stated that the first plot owner was entitled to expect that the open space leading to the ocean would remain accessible for the benefit of all beach front plot owners and members of the public in the area. Since the land in question had already been entrusted to the Council as a road reserve, it could not have been taken without the correct procedures being followed under the law.<sup>10</sup>

This decision imposed limitations to the powers of the Commissioner of Lands to alienate public property. The limitations imposed by the court, while not contained in the written law, were based on the notion of the public interest. The argument in this case can be applied in other cases across the country, where government land that had been alienated as road reserves is then allocated to individuals. According to Justice Waki's reasoning, such land is not available for alienating as it has already been alienated. Similar rulings have also been made regarding

the allocation of trust land. For instance, in a case where 65 residents of Wote Town Council sought an injunction to restrain the Council from planning, alienating, selling, transferring or otherwise disposing of land reserved for a bus park, the court was of the view that the rights of a community can only be extinguished through adjudication and registration or setting apart of trust land.

### **Conclusion**

The courts have demonstrated readiness to ensure accountability in dealings in public land by using wider arguments than are contained in the literal meaning of the laws in question. They have relied on two sources for this kind of interpretation: firstly, the Constitution - the primary instrument for the protection of the right to property and secondly, arguments that recognise the existence of an unstated public interest in the management of public affairs. There is scope for the development of these arguments so that the courts can apply them more consistently.

In addition to positive law reform, judicial activism can contribute significantly to the promotion of accountability in the management of land. Based on the decisions reviewed, it is reasonable to conclude that a court of law may find favour with the findings by the Ndung'u Commission that, for the reasons indicated, a number of titles over land were issued illegally.

## **II Sanctity of Title**

Once public land that was illegally allocated 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 can claim legal protection and the right to keep the property. Sanctity of title poses a unique challenge to the recovery and revocation of titles to land illegally acquired public land. As the Commission observed, "this extreme notion of the sanctity of title has fuelled illegal and irregular allocations of public land in Kenya".<sup>11</sup>

Section 75 of the Constitution protects the right to private property. Additional protection is provided in other specific

<sup>10</sup>See *Insurance Company of East Africa v Attorney General & 4 others (KLR) E & L*

<sup>11</sup>Report of the Ndung'u Commission, p.16

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laws. For example, the effect of registration is captured in some land laws which declare the person named in the Certificate of Title as the “absolute and absolute owner”.

It was noted that Section 75 of the Constitution safeguards private property ownership by assuring protection from arbitrary confiscation without compensation. The Commission observed that such protection presumes that the property was lawfully acquired. It therefore follows that illegally acquired property is not protected under the Constitution. This being the case, the Constitution cannot protect the rights of third parties in these circumstances.

### **III. Protection of the First Registration**

The Registered Land Act gives absolute protection to the first registration of land, even if such registration may have been fraudulently obtained. According to the Ndung’u Commission, this makes first registration privileged as it cannot be challenged even if it was wrongfully obtained<sup>12</sup>.

The Commission however argued that the Act stipulates that the government be registered as the first proprietor of all land being registered for the first time. According to the Commission, failure to register the government as first owner is illegal, and an omission by the Commissioner of Lands.

The Commission proposed an alternative argument against the absolute protection of a first registration: according to the commission, it is possible for a court of law to override the protection given by section 143 by arguing that a law which seeks to protect or has the effect of protecting fraud, is unconstitutional.

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<sup>12</sup>Report of the Ndung’u Commission, p.16, “Subject to subsection (2), the court may order the rectification of a register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake”. Subsection (2) further stipulates that the register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or causes such omission, fraud or mistake or substantially contributed to it by his act, neglect or default

The Commission also cited some sections of the Registered Land Act that somewhat amend the absolute protection stipulated. The following exception was cited:

Nothing contained in the Act shall be construed as permitting any dealing which is forbidden by the express provisions of any other law, or as overriding any provisions of any other written law requiring the consent or approval of any authority to any dealing.

This provision clearly subjects the Registered Land Act to other written laws for dealings under its provisions to be valid.

The Commission concluded that the requirements of the Registered Land Act regarding absolute protection of title can be overcome if it is shown that the requirements of the law have not been met, that for example, a relevant consent, relating to the de-classification of forest land, was not met before first registration under the Act.

### **The Significance of a First Registration**

It is important to understand Kenya’s land registration systems, as well as the basis and goals for the absolute legal protection provided by first registration.

Kenya has two land registration systems:

- Registration of titles (also called the Deeds or the Title system)
- Title by registration (also called the Torrens system)

### **Registration of Titles/Deeds System**

Under English common law, in order for the holder of a title to a particular piece of land to establish a good title, he needed to show that it was transmitted legitimately from the original grant of title by the Crown, down through all the various persons who may have held the title. In other words the holder of the title had to establish a “chain of title” all the way to the original grant. The chain of title could be several hundred years old and the land in question may have undergone various changes over time since the original title was issued.

Under this system, a physical document, the title deed, was proof of ownership (entitlement) to the land and was

passed down the chain of owners of the land. However, ownership could be challenged, resulting in high dispute-resolution costs. The system was inherently insecure and thus discouraged development of the land in question. Naturally, cases of fraud occurred including, for example, when X would sell land to Y, and before Y could take possession of the title deed, X would sell the same land to Z, to whom he would then deliver the deed. The effect would be that both Y and Z may have acted innocently but Z could register his interest in the land defeating the possibility of Y laying a claim to the same land, even though both may have innocently paid for the same land. The case of *Pilcher v Rawlings*<sup>13</sup> was one such instance.

### Title by Registration/the Torrens System

Under the Torrens system, a centrally-maintained register of land protects titles to various land parcels, guaranteeing the rights of those named in the register as the legal owners. The Torrens system was developed in Australia as a response to the complexity and cost associated with the titles system. The Torrens system has since become a common method of registering land in the British Commonwealth and around

the globe. A number of states in the United States also use the system. Through this system, registered interests over land are prioritised over unregistered interests or interests registered at a later time.

### Introduction of Torrens Systems in Kenya

The Torrens system was introduced in Kenya in 1963 through the enactment of the Registered Land Act. Until then, different parcels of land had been registered using the title system. The Government's intention was to ensure mass registration of land using the Torrens system.

It is important to note that the introduction of the Torrens system did not affect the use of other previous systems of land registration or seek to register already-registered land under the Torrens system. That situation has continued to date. The effect is that Kenya has multiple land registration regimes; the Torrens system - under which huge chunks of land have been registered since 1963, and the earlier titles systems - still in use especially for urban land in Nairobi and Mombasa.

#### Main Differences between the Deeds and Torrens Systems of Land Registration

##### Deeds/Title System

- issuance of a deed which evidences registration
- physical deed, which is in the custody of the owner of the land, is the guarantee of title
- need to establish a chain of title, which is usually done through a chain of instruments that act as proof of transactions for the land in question
- the title holder and each person who deals with the title has to take individual responsibility for their transactions, and has to establish entitlement down the line of the various owners

##### Torrens System

- Registration of title, in a centrally-controlled register
- the contents of the register are the guarantee of title
- no need to establish a chain of title as proof of ownership is through the land register
- The State undertakes the onerous task of guaranteeing the correctness of all the entries indicated in the register. The government also assumes all the risks regarding correctness of title. The land buyer only needs to examine the register and does not need to even see a copy of the title certificate. A certificate of official search issued by the registrar is conclusive proof of the correct state of the title. Under this system, the government undertakes to indemnify the public for loss resulting from incorrect information contained in the register. In practice, however, this rarely occurs.

<sup>13</sup>*Pilcher v Rawlins* (1872) 7Ch App 259 – A seller conveyed land to a buyer, X but retained the title. He then fraudulently conveyed the same land to Z, a second buyer, who had no notice of the earlier transaction involving X. The court actually decided the case in favour of Z, although both X and Z had acted innocently and had paid money for the same land. The difference was that Z's interest had been registered, even though he had paid later.

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## Principles of the Torrens system

In sum, the Torrens system is based on three principles:

1. **The mirror principle** which stipulates that the register accurately and completely reflects (mirrors) the current facts about a person's title. This means that a transfer of ownership of the parcel of land will only affect the name of the registered owner and all the other facts in relation to the title will remain unchanged
2. **The curtain principle** which states that one does not need to go beyond the register as it contains all the relevant information on the land in question. This is unlike in private conveyances of land where title has to be investigated using documents in the personal custody of the owner
3. **The insurance principle** which provides that the government will compensate losses resulting from errors in the register.

### How is Land Registered under the Torrens System?

The Torrens system simplifies land registration, land transfer and other dealings in relation to land. Each registered parcel of land is given a unique number (called a folio) in the register and is identified by reference to a registered plan. The folio records:

- the dimensions of each parcel of land
- the boundaries of each parcel of land
- the proprietor of the land and
- any legal interests such as mortgages, affecting the land in question

The register is maintained at public expense in a central registry. On a first registration of land under the system, the land is given a unique number/folio which identifies it by reference to the registered plan. To change the boundaries of a parcel of land, a new plan must be prepared and registered. It is not possible to remove from registration a parcel of land that has been registered under the system.

### Change of Ownership under the Torrens System

A change of ownership is marked by the registrar noting the required changes in the register. The registrar must ensure that only legally valid changes are made. The law prescribes the kind of evidence of change of ownership which the registrar must be provided with in order to effect a change of ownership in the register.

### Why First Registration and Why the Torrens System?

One of the purposes of registering land is to guarantee security of title to those who may wish to deal with the land, as buyers, or as lenders of money using the title as security. The absolute protection of a first title is based on the need to provide maximum assurance to those who deal with the land down the line, and to eliminate doubt as to the rightful owner.

Through the Torrens system, the government provides assurance that the title is correct, thus eliminating the need for third parties to establish the validity of the title for themselves. In order to protect parties who may transact with the land later, the law makes it very difficult to overthrow the rights of the first registration since this is the basis on which the entire registration system derives its legitimacy.

### Reclaiming Illegally Allocated Land that is Registered under the Torrens System

The Ndung'u Commission found that land that was reserved for public use has been corruptly registered to individuals. Almost all wrongfully allocated public land was registered under the Torrens system. This means that the beneficiaries of the land would, on the face of it, be able to claim protection under the law. Third parties who have dealt with the land in question in good faith could also claim the indemnity provided in dealing with such titles.

Equally importantly, the political and economic ramifications of renouncing such titles would have to be considered

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carefully and managed properly, in order not to negate the benefits that registration of land under the Torrens system seeks to confer.

### **Legal Protection of a First Registration: Views of the Commission**

Notwithstanding the intentions of protection of first registration, the Commission proposed three possible grounds for withholding legal protection of such a registration:

*First, on the ground that the government, or the relevant local authority, is always the first registered owner of land and therefore, the only beneficiary of legal protection of a first owner.* The (illegal) allottee for whom the first title was issued cannot claim protection under first registration. This argument has never been tested judicially. However, a reading of the laws interpreted by the Commission leaves no doubt that it is a persuasive argument.

*The second argument is that the Constitution can be used to invalidate the provisions of section 143 which gives absolute protection for first registration of land.* However, the basis on which this can be done is not clear - Section 143 is based on the social goals of ensuring certainty of ownership once land is registered. The social goals that this protection serves will be upset if a court finds that the provision is unconstitutional.

*Thirdly, the Commission argued that the Registered Land Act (section 4) recognises that it only applies as far as it does not contradict other laws relating to land, such as the Forests Act.* Where forest land is irregularly/illegally allocated without first declassifying its as forest land, it is argued that not even a first registration of the land will protect the allottee.

An additional argument can be made in support of this position: an exception to the absolute protection of first registration is made in Section 143 (2) when a proprietor is aware of fraud or error in the land transaction. Declassification of forest land is published in the Gazette therefore every person is deemed to know which land can rightfully be parcelled and sold as plots.

### **Legal Protection of a First Registration: Views of the Courts**

Over the years courts have upheld titles, including those fraudulently acquired, as long as they fall under the category of first registrations. A series of court decisions asserted the indefeasibility, or irreversibility, of a first registration even on allegations of fraud or mistake. The Court of Appeal, in a 1986 decision, held that “even if fraud had been established, inasmuch as the respondent’s title was acquired by first registration, it can, in no circumstances be defeated”.<sup>14</sup>

In later years, the courts have revised this thinking as seen in the case of *Obiero v. Esiroyo*. The courts held that where a customary land trust exists, registration of land even as a first registration does not exempt the proprietor from obligations as a trustee of the customary land. The concept of a “customary land trust” was developed by the High Court to give recognition to claims based on customary law against registered land. The late Justice Madan, while reiterating that a first registration holds even if it is obtained or omitted by fraud or mistake held that first registration does not exclude recognition of a trust provided it can be established. Justice Madan further held that in protecting first registration, Parliament could not have intended to destroy this custom of one of the largest sections of the peoples of Kenya. In 1984 and 2005, the Court of Appeal reiterated Justice Madan’s reasoning on customary law trust vis-à-vis the provisions of the Registered Land Act.

### **Conclusion**

The rigid protection of a first registration has now somewhat been relaxed by the courts. This has occurred mainly out of the need to protect vulnerable members of a family from being disinherited of family land. A large number of the disputes in which the protection of a first registration is claimed is in relation to family land registered in the name of a single member of the family, usually the oldest or the most educated, who is able to overthrow the interests of other family members in the land in question. In response to this threat, the courts fashioned the notion of a customary land trust, as a

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<sup>14</sup>*Ambale v Masolia* (1986) 241 an *Mugogo v Sihowa* (KLR) 1988 1

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mechanism to ensure that registration is not misused to overthrow the legitimate interests of others.

In the same way, it is possible for the courts to develop a specific mechanism to deal with claims for protection on the grounds of a first registration for illegally-allocated titles.

## IV. The Dilemma of Third Party Interests

In many cases, individuals and institutions involved in titles for land investigated by the Ndung'u Commission were not party to the original transactions. These individuals and institutions are referred to as third parties.

According to the Commission, third parties are all persons who have acquired an interest in the land that was investigated after such land had been allocated to the original beneficiaries.

- The Commission identified four categories of third parties:
- Persons who purchased or leased land from the original allottees;
- Persons to whom titles for the land in question have been offered as security for loans. Banks would feature prominently under this category;
- Persons who acquired the land in question as *successors in title*. This category comprises persons who have inherited the land as well as administrators of the estates of deceased persons;
- Persons who have received such land as a gift from the original allottees.

The effects of the Commission's recommendations on the rights of third parties raise significant concerns - the Commission appreciated that any of these third parties may have transacted further with the land received from the original beneficiaries. For example, a third party who bought the land may have sold the land, or a successor may have passed on the land to next of kin, or provided the title as security for a bank loan.

In analysing the legal position of third parties, the Commission referred to the maxim of common law to protect rights of ownership expressed as "no one

transfers a greater or better interest to another than what he holds" (translated from Latin *memo data quid non habit*). The Commission asserted that this principle extinguishes all the rights of third parties since they were illegal from the very beginning and that the third parties stand in the same position as the original allottee.

The Commission considered the practical effects of nullifying titles in which third parties such as banks, and subsequent purchasers, some of whom may have acted innocently, have acquired an interest. Third parties in the following positions were singled out as some of the most problematic in relation to the decisions that might need to be made which would affect third party interests:

- third parties that have made substantial developments on the land whose title is under question;
- state corporations that hold land which they were forced to as a result of political pressure; and
- lenders of money, such as banks and other financial institutions that have lent money on the security of titles that are now questioned.

The Commission proposed that as a general rule, all illegally issued titles that have passed on to third parties and which have not been developed should be revoked and the land repossessed. Where the land has been developed, consideration should be given to all the circumstances of the case including the cost incurred in developing the land and the number of persons involved financially, the economic value of the development and the public interest in relation to the development. If the decision is made that it is in the public interest not to cancel the title, the third party should be made to pay the market value of the land. The Commission discussed a number of scenarios that may have to be confronted in relation to titles that have passed on to third parties and whose land has been developed, and concluded that each case would have to be dealt with on its own merits.

Regarding titles that have been passed to state corporations, the Commission recommended that these should be revoked and the land should revert to the government.

Banks and other financial service institutions (FSIs) that have given loans on the security of illegally-issued titles may have been done so without knowing that the titles would

eventually be challenged. Cancelling such titles may expose the banks to losses through unsecured loans. Further, a large cancellation of titles would probably shake the confidence in land titles as an acceptable security for loans.

The Commission proposed that where such titles were irregularly issued they should be validated. Despite proposals to the contrary by the Kenya Bankers Association, the Commission also recommended that all illegally-issued titles be cancelled.

In the event of cancellation, FSIs would have to sue the borrowers for refunds of the money loaned, as they would have lost their securities. Where the land has been substantially developed through financing by a bank or other lender, and the land is no longer required for public use, the title should still be revoked. However, the government may negotiate with the borrower to issue a new title on condition that the borrower pays the full net unimproved site value of the land<sup>15</sup>.

### Proposals on Third Party Interests

The absolute dependence on the contents of the register, which the Torrens system imposes on third parties, would seem to make it untenable for the government to turn around and cancel titles for land in which third parties who acted innocently have acquired an interest. Even if the government succeeded in doing so, it would be difficult to defend itself against claims by third parties for a breach of its undertaking regarding correctness of title.

Whereas the Commission, in principle, recommended that all illegally-created titles be cancelled, it nevertheless allowed for the effects of such cancellation to be considered on a case-by-case basis. The Commission indicated in broad terms the criteria for deciding whether and how to revoke such titles, including the number and classes of persons who are financially involved in the title and the public interest. This implies that:

1. A mechanism to deal with each case individually must be established and the principles on which

<sup>15</sup> Net unimproved value means the amount a parcel of land could be expected to sell for at the date of valuation, assuming that no improvements exist on the land. 'Improvements' are houses, fences, levelling, filling, etc

to base the decisions on whether or not to revoke a given title would have to be developed.

2. Rules of procedure would have to be provided to ensure that the process is fair and prevent unnecessary delays.
3. Mechanisms for public participation and transparency would have to be built into the process. One such mechanism could be the Land Tribunal as proposed by the Commission.

### What Does this Mean for the Government?

Based on the existing law, these proposals amount to the establishment of a framework through which all the rights and interest involving third parties can be discussed and negotiated.

Current laws would put the government in an extremely weak position in any such negotiations as it would almost certainly have to pay off third parties who acted innocently in acquiring interests in the land in question.

## V. The Practicality of Revoking of Titles

### Which Titles and Where?

Although the Ndung'u Commission identified limited time within which it was to conduct and complete its inquiry as one of its key challenges, it nevertheless produced an impressive report.

The Commission's main report covered 244 pages and had two annexes. Volume I of the annexes ran into 976 pages while the second volume had 797 pages. Still, the Commission complained that it had been frustrated by official stone-walling and lack of co-operation without which it would, no doubt, have turned out an even more comprehensive report.

Volume I of the Report recommended that:

- 105 plots meant for the Nairobi bypass be revoked
- titles issued for 250 pieces of land reserved for the Nairobi by-pass but whose files could not be traced at the Ministry of Lands be investigated

- 551 plots reserved for public use and illegally allocated be revoked by Nairobi City Council, 186 by Kisumu Municipality, 86 by Meru Municipality, 270 by Eldoret Municipality, 30 by Kisii Municipality, 407 by Mombasa Municipality.

## Revoking Thousands of Titles: Mission Impossible?

The prospects of analysing and implementing the recommendations of the report presents a formidable task. Even if Kenya had the requisite political will and public institutions to implement these recommendations, the large number of titles identified for investigation or revocation would be present a significant challenge. Currently, there is little political support for the contentious recommendations and no strong public institutions to back their implementation.

The Commission understood the complications of implementing these proposals and further recommended the establishment of three new institutions:

### 1. A Land Titles Tribunal

The proposal for the establishment of a Land Disputes tribunal is perhaps one of the most important recommendations to be made by the Ndung'u Commission. The Tribunal would provide inexpensive and speedy resolution of past wrongs in relation to land. It would also provide a forum for justice on land matters as a first step before litigation in formal courts of law thus alleviating current delays.

The Tribunal would sit in several panels, each of which would be empowered to investigate and cancel illegally-issued titles, and ensure that the government receives the full value of any land that it sells.

Legally, the Tribunal would be established as an institution under the Government Lands Act. This would be done through an amendment of the Act.

### 2. A Task Force on Land

The Task Force would be established by presidential authority and would consist of non-government land specialists and public sector representatives responsible

for land administration. The Task Force would play an advisory role to the Ministry on the revocation of illegal titles, repossession of land, and court action in relation to land.

### 3. The National Land Commission

The Commission would be responsible for the functions which are currently the shared by President and the Commissioner of Lands in relation to the administration of land.

## Why We Need These Institutions

So far, neither of these institutions has been established and there is no public institution that can successfully implement the recommendations of the Commission.

Setting up these three institutions is critical to implementing the Commission's recommendations. Failure to establish them while purporting to implement the Ndung'u recommendations casts doubt on the sincerity of implementation efforts. It is unrealistic to expect any degree of success without a dedicated set of public institutions.

## VI. The Ndung'u Report on Managing Transboundary Resources

The Ndung'u Commission recommended that measures be put in place for the management of trans-boundary wetlands and natural resources. Under the East African Community (EAC), a number of arrangements have been put in place for the management of such resources.

### Management of Lake Victoria and its environs

The Lake Victoria Environmental Management Programme (LVEMP) is an example of a trans-boundary management programme, under the auspices of the EAC. The central concern is to reduce the flow of nutrients and pollutants into the lake and reverse adverse environmental developments of the past.<sup>16</sup>

<sup>16</sup>See, website of the The Lake Victoria Management Programme, [www.iwlern.net](http://www.iwlern.net) accessed on 15 May 2008.

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## Controversies around the Mau Forest

The allocation of part of the Mau forest for human settlement is currently the subject of national debate and concern in Kenya. The proposed eviction of settlers from has drawn much controversy.

Mau forest is a trans-boundary resource; Mara River, the life line of the Mara-Serengeti ecosystem (from Kenya to Tanzania), originates in the Mau forest. However, the debate in Kenya regarding the Mau is projected as a local problem which has no implications for countries other than Kenya and is certainly not seen as a trans-boundary issue.

The EAC's management of trans-boundary resources has focused on the management of Lake Victoria to the exclusion of other resources. Although the Mara-Serengeti ecosystem is a cross-border natural resource, there is little acknowledgment by the EAC of this and consequently no specific initiative aimed at addressing its management.

If the East African Community is unable to prioritise the Mau issue as a trans-boundary problem, the governments of Kenya and Tanzania - the affected countries - should put in place urgent steps to address proper management of the resource. A good starting point would be for groups in Kenya to recast the domestic debate on the Mau in regional terms and link it with the recommendations of the Ndung'u Commission.

### The Lake Victoria Environmental Management Programme (LVEMP)

LVEMP aims to collect information on:

- the environmental status of the lake
- the catchment area and practices of the lakeside communities
- institution establishment
- capacity building
- actions to deal with environmental problems of the Lake and its catchment
- water hyacinth control
- improving water quality and land use management
- sustainable utilisation of the wetlands

The governments of Kenya and Tanzania should put in place urgent steps to address proper management of the Mau Forest, which is a transboundary resource

## VII. State of Implementation of the Ndung'u Report

### The Ndung'u Report and Constitutional Reform in Kenya

The Ndung'u Report was released amid debate on constitutional reforms in Kenya in 2004. A number of the issues that had been raised by the Report found their way into documentation that emerged from the constitutional debate.

The Proposed New Constitution of Kenya 2005 declared land to be "Kenya's primary resource and the basis of livelihood for the people". It categorised all land in Kenya into three: private, community and public. It restricted the right of non-citizens to own land in Kenya, declaring that these can only own leaseholds of a maximum of 99 years. Any deed which conferred a right to land greater than this period was declared to be void.

### The National Land Commission

The Proposed New Constitution 2005 recommended that a National Land Commission be established to:

- manage public land
- formulate the National Land Policy
- advise the government on a policy frame work for the development of selected areas of Kenya.

The responsibilities of the National Land Commission closely mirrored the recommendations of the Ndung'u Commission. These include:

- initiating investigations on its own or upon a complaint from any person or institution on land or injustices both present and historical and ensuring appropriate redress
- consolidating and reviewing all laws relating to land
- bringing about the registration of all land in Kenya

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## Proposed Role of Parliament in the Land Reforms

Under the Constitutional draft of 2005, and as partly recommended by the Ndung'u Commission, Parliament would be empowered to:

- Revise and consolidate all land laws governing conversion of land use from one category to another
- Protect and provide unfettered access to all public land
- Review all grants or dispositions of public land to establish legality and propriety
- Settle landless people
- Upgrade spontaneous settlement
- Ensure availability of sufficient land for public use

## The Draft Land Policy

The 2002-2005 constitutional reform process foundered on both political and technical grounds. Land reform was one of the prevalent contentions in the Draft Constitution, which was voted down by a 58% majority of voters in the 2005 referendum. Some of the recommendations made by the Ndung'u Commission fell victim to this failure.

The Ndung'u Report broadly informed the process that formulated the Draft Land Policy that was debated by the ninth Parliament but not approved. Formulation of the policy began in 2004 and was supposed to have been completed by 2005. However, the policy is still under consideration after a long and winding process.

In relation to public land, the Draft Land Policy provides for:

- The repeal of the Government Lands Act
- The establishment of a National Land Commission 2005 which will prepare and maintain a register of public lands
- A Land Titles Tribunal to determine the *bona fide* ownership of land that was previously public or trust land.

## Proposals of the Draft Land Policy

The Draft Policy makes proposals similar to those of the Ndung'u report and the Proposed New Constitution. For example, it seeks to:

1. Classify land tenure in Kenya into three categories (private, community, public)
2. Abolish the protection of a first registration of title
3. Unify the types of private land tenure
4. Put in place a more accountable process for the allocation of public land

## Cases Filed by Kenya Anti-Corruption Commission

In its 2005/06 Annual Report, the Kenya Anti-Corruption Commission (KACC) states that it had issued 450 formal demands to various persons requiring them to surrender illegally allocated public land. At the time of publishing the report, KACC had recovered 37 title deeds and 11 Deed Plans totalling 223 acres whose estimated value was KShs. 144 million.

In 2006/07 KACC filed 112 cases for restitution or preservation of illegally alienated public land. The value of the property being recovered was estimated at 1.4 billion.<sup>17</sup>

152 cases filed by KACC on restitution of land are pending in court in addition to 143 applications made to the courts, which seek to preserve the status quo in relation to the titles in question, so as to allow the suits by the KACC to be heard.<sup>18</sup>

Viewed against the large number of titles recommended for investigation and revocation, this number is a drop in the ocean - Volume I of Annexes of the Ndung'u Report recommended:

- Revocation of 105 plots meant for the Nairobi bypass and investigation into 250 titles reserved for the Nairobi by-pass but whose files could not be traced at the Ministry of Lands
- Revocation of 551 plots of land for public use which were illegally allocated by Nairobi City Council; 186 by Kisumu Municipality; 86 by Meru Municipality; 270 by Eldoret Municipality; 30 by Kisii Municipality; 407 by Mombasa Municipality.

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<sup>17</sup> Kenya Anti Corruption Commission, Annual Report, 2006-2007, p.15.

<sup>18</sup> This is according to the information contained in the official website of the Kenya Anti-Corruption Commission, [www.kacc.go.ke](http://www.kacc.go.ke) accessed on 15<sup>th</sup> May 2008.

## Actions by the Judiciary

- *Establishment of the Land and Environment Division*  
In 2007, the Land and Environment Division was established in the Nairobi High Court following the large number of land cases filed in the courts. The division is a prelude to fully-fledged land and environmental courts.

- *Dismissal of Applicability of the Ndung'u Recommendations*

Some recent court decisions have highlighted the legal challenges facing recommendations of Commissions of Inquiry. In *Mureithi v Attorney General*<sup>17</sup>, the court held that the respondents (Attorney General, Commissioner for Lands, Nyeri District Land Registrar and the Catholic diocese) were under no statutory duty whatsoever to implement the recommendations of the Ndung'u Report. The applicants, members of the of the Mbari-ya-Murathimi clan in Nyeri, had sought for judicial review orders against the respondents to implement the recommendations of the report in so far as it touched on their land.

The court pointed out a weakness in the Commission of Inquiry Act that once the President is presented with the report of a Commission of Inquiry, he has complete discretion on what to do with it and he is not obliged to respond in any particular way. In dismissing the application, the court held that it is not

In 2007, the Land and Environment Division was established in the Nairobi High Court following the large number of land cases filed in the courts. The division is a prelude to fully-fledged land and environmental courts.

its mandate to formulate and implement policy matters as this is the mandate of the Executive and Parliament.

Similar findings were made in the Saitoti Case<sup>19</sup> where the court, acting on the doctrine of separation of powers, held that findings of the Commission of Inquiry into the Goldenberg Affair encroached on the powers of Parliament. The court stated that the Executive and Parliament have a monopoly on issues of policy and with Parliament playing a key watchdog role. Executive decisions and policies, except where they can be reviewed by the Court are the jurisdiction of the Executive and Parliament and not the courts, commissions and tribunals.

## Ministerial Backing and Proposed New Comprehensive Laws

The Minister for Lands, James Orengo, in August 2008 announced that he would start implementing the recommendations of the Ndung'u Report. He announced that "those who were allocated public land with impunity will have themselves to blame". He further announced that he would push for cabinet approval of the National Land Policy and, thereafter, parliamentary approval before the new Constitution. The Minister also announced plans to reduce the number of land laws from the current number of 15 and over, to just two, to reduce complications on land matters."<sup>21</sup> These laws are the Land Titles Act and the Administration and Management of Land Act. Annex I

<sup>19</sup> *Mureithi v Attorney General & 4 others*, KLR (E & L) 707.

<sup>20</sup> *Republic v Judicial Commission of Inquiry into the Goldenberg Affair & 2 others Ex Parte Saitoti* [2006] eKLR.

<sup>21</sup> See, Patrick Beja, "Government to implement Ndung'u Land Report", the East African Standard, 25th July 2008, p. 8.

## Functions of the Truth, Justice and Reconciliation Commission

1. To establish an accurate, complete and historical record of violations of human rights and economic rights inflicted on persons by the State, public institutions and holders of public office since 1963.
2. To establish as complete a picture as possible of the causes, nature, and extent of gross violations of human and economic rights committed between 12<sup>th</sup> December 1963 and 28<sup>th</sup> February 2008 (during the post-election violence)
3. Provide victims of human rights abuses and corruption with a forum to be heard and restore their dignity
4. Investigate economic crimes and further, investigate violations and abuses of gross human rights violations relating to abductions, disappearances and expropriations of property during the period in question
5. Investigation economic crimes including grand corruption and the exploitation of natural or public resources and the irregular and illegal acquisition of public land and make recommendations on the repossession of such land or the determination of related cases

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of this report lists 31 recommendations of the Ndung'u Report and the status of implementation for each one.

#### **Agenda Item 4: The Truth Justice and Reconciliation Process and the Ndung'u Report**

Under Agenda Item 4, the National Dialogue and Reconciliation process proposed the establishment of mechanisms to handle long term issues that were considered to be the basis of the widespread violence in Kenya following the December 2007 elections.

One of the mechanisms identified was the establishment of the Truth, Justice and Reconciliation Commission (TJRC) to deal with historical injustices in Kenya including land allocation and distribution.

Parliament passed the Truth Justice and Reconciliation Commission Bill in October 2008<sup>22</sup>.

#### **Observations and Concerns on the TJRC and its Potential Role in Addressing Land Grievances**

A number of observations can be made on the mandate of the proposed commission. Firstly, there is a strong emphasis on the investigation of economic crimes. The duty to investigate such crimes is mentioned alongside, and in parity with the duty to investigate gross violations of human rights. It is fair to conclude that the commission will have a big mandate in relation to economic crimes and not just human rights violations.

Secondly, there is comprehensive treatment of economic crimes under the proposed TJRC terms of reference including various references to "grand corruption" and "irregular and illegal acquisition of land".

The TJRC Bill has been assented to by the President. Parliament is in the process of nominating commissioners for the TJRC as articulated in the Act. The TJRC may provide an additional platform for the ventilation of the contents of the Ndung'u Report. This is because the terms of reference for the commission are wide enough to cover matters that were of concern to the Ndung'u Commission.

The inclusion of matters that have already been investigated by the Ndung'u Commission in the mandate of the TJRC may be seen as an attempt to undermine or postpone the implementation of the Ndung'u recommendations. If so, this amounts to a betrayal of the public's expectations.

Thirdly, it is disturbing that the truth commission will be given what appears to be a virgin mandate to investigate past transgressions relating to land, as if this has not already been done by among others, such as the Ndung'u Commission. What is the value of these previous investigations in view of proposed fresh investigations by the TJRC? Will the Truth Commission be elaborating on the work of these earlier inquiries or is it expected to develop its own findings? If so, what will happen to the Ndung'u recommendations in the face of this new investigation? Unfortunately, none of these questions is answered in the TJRC Bill, or in any other available documents.

While there has been some action by the Government to implement the Ndung'u report, for example in the demolition of a shopping complex on Thika Road and the impending demolition of a shopping complex built on riparian land in Nairobi's Westlands area, the action has been delayed and sporadic. There is little to encourage the belief that the results of the Truth Commission would be treated any differently<sup>23</sup>.

### **VIII. Conclusion**

Whereas the Ndung'u Report has not been formally implemented, and despite severe criticism from sections of Kenyans, it is still the most influential, recent document on the governance of land issues.

The release of the Report galvanised momentary action by public authorities to ensure accountability for historical injustices committed in relation to land. For a short period, it appeared that a credible process to reclaim illegally-allocated public land was in place. However, left in the hands of weak public institutions and bereft

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<sup>22</sup> The Truth, Justice and Reconciliation Bill, 2008.

<sup>23</sup> Cf. Postponing the Truth. Etc, etc., Afric Centre for Open governance etc

of political support, these efforts have ultimately been largely unsuccessful.

## Some Successes

### 1. Rallying Point for Land Reform

The Ndung'u Report has nevertheless had at least one positive result: it has become the reference point for a symbolic stand that previous impunity in public land dealings is no longer acceptable. In this regard, the Report, and even the half-hearted attempts to implement it, have generated a sense of caution in dealings with public land. This has arguably, to some extent, curbed the previously unbridled tendency for wrong-doing in relation to public land. Moreover, the Report has become the rallying point for forces that seek accountability for historical injustices in relation to public land.

### 2. Informing the Proposed New Constitution and National Land Policy

The contents of the Ndung'u Report have greatly influenced two other important instruments: the Proposed New Constitution (which failed in the 2005 referendum) and the Draft National Land Policy (currently under consideration). The land proposals of the Proposed New Constitution have highlighted the importance of implementing the Ndung'u Report thus making it difficult to ignore.

### 3. Prosecution of Cases by the Anti-Corruption Commission

The Kenya Anti-Corruption Commission has taken up some of the Ndung'u recommendations – its 2007 and 2008 annual reports indicate that about 214 cases have been instituted and several recoveries of irregular/ illegally acquired land have been made.

However, low credibility of the KACC, partly due to low political will, or worse - perceived political interference, has hindered its effectiveness in this area. Further, litigation, the method the KACC has chosen to bring about the recovery of land, is inherently slow. Much time will pass before it is known whether these cases will succeed or not.

## Key Challenges

### 1. Low political backing

The level of political support for the proposals contained in the Ndung'u report has been inadequate. The President has not publicly referred to the problems of illegally acquired land since he released the Ndung'u report in 2005.

### 2. Insufficient acknowledgement of the Report

Successive Ministers of Lands since the release of the Report have spoken little of its contents. The President and the Prime Minister need to give more attention to the findings and recommendations of the report particularly now as the management of water catchment areas, such as the Mau Forest, is in high focus. To his credit, the new Minister for Lands, Hon. James Orengo appointed after the formation of the Coalition Government, has shown promise in tackling issues of the Ndung'u Report head on.

### 3. Political connections of beneficiaries of illegally allocated land

It can be expected that well-connected individuals and other parties that benefited from the irregular and illegal allocations highlighted in the Ndung'u Report will resist any attempts at genuine land reform and even attempt to derail these efforts.

### 4. Public cynicism

Cynicism over half-hearted and sporadic attempts at land reforms will likely diminish public support for land reforms.

### 5. Low public participation in the land reform process

Public participation in debate informed by the Ndung'u Report is hampered by the inherent complexity of land law and the divisive and politically-loaded nature of Kenya's land challenges, now intensified by the post-election crisis. The drive towards freedom of information must embrace public information on land issues.

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## Recommendations

As stated earlier, the Ndung'u inquiry is the most comprehensive investigation into the illegal/irregular allocation of public land in Kenya. Our analysis highlights the viability of its recommendations, despite the identified challenges and threats to implementing them. The Ndung'u Report proposes sound courses of action to overcome these challenges, in order to restore public land to its rightful use for Kenyans. The recommendations of the Ndung'u Report should therefore be implemented in full and as a matter of priority. A number of actions should be taken towards resolving Kenya's land dilemma, amongst others:

### 1. Establish a Lands Titles Tribunal to facilitate revocation, rectification and validation

This calls for the enactment/amendment of the requisite laws to make provision for a tribunal. The Tribunal would provide inexpensive resolution of past wrongs in relation to land and provide a forum for justice on land matters, without having to go through the formal courts of law. This would speed up the settlement of past land injustices.

### 2. Establish 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 have a massive backlog with some cases as old as 15 years yet to be determined.

### 3. Establish a National Land Commission

The Ndung'u Report recommends the formation of a National Land Commission that is to be vested with all land matters in the country. The Land Commission would help rationalise the powers of the President, the Commissioner of Lands and Councils over public land. The proper constitution of the Commission ensuring transparency and independence would be key to achieving this objective.

### 4. Upgrade 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.

### 5. Report on the status of implementing the Ndung'u recommendations

The Government and other institutions involved in the implementation of the Ndung'u Report should publish an implementation status report. This should clearly show

the actions that have been taken, the challenges faced, and the steps these institutions will undertake in order to fully implement the Ndung'u recommendations.

### 6. Computerise Land Records

This will help ensure that records of land transactions are systematically kept, minimise loss of files and help increase public access to land records for inspection. There is also need to make an inventory of all public land to help facilitate monitoring by the public and civil society.

### 7. Collaborate to address regional land issues

While land issues in the Mau Forest may be argued to be a domestic concern, the Forest serves as an important catchment area for Tanzania. Regional collaboration is therefore key in addressing trans-boundary land/resource issues such as these and the two governments should put in place urgent measures to address poor management of the resource.

### 8. Harmonise laws dealing with land administration, ownership and use and enact 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 easy to understand and more difficult to manipulate.

### 9. Recover wealth from illegal land transactions

The government should recover all assets that were unjustly gained through the illegal allocation and sale of public land from all parties involved and the offending parties should be punished. The government should also investigate and prosecute criminal offenders in the illegal allocation of land, and obtain restitution. Wrongdoers should be barred from holding public office and disciplinary action taken against errant professionals. The Law Society of Kenya for instance disciplines members who violate its code of conduct/ethics. Other professionals' associations also need to examine members' conduct and ensure disciplinary action to deter future misconduct. There should be a focus on restitution of land intended for the landless.

### 10. Facilitate 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 in land dealings.

# Annex I: Progress in Implementing Recommendations of the Ndung'u Report

Recommendation	Implementation	Remarks
1. Nullification of titles allocated for public utility land.	Implemented in part.	
2. Repossession and restoration of such land to the Government	Implemented in part; forced eviction.	Between 2005 and 2008 the KACC recovered a total of 83 illegally or irregularly alienated pieces of public land countrywide worth Ksh 4.037 billion.
3. Demolition of developments on public utility land.	Structures erected on road reserves (lower and upper bypass) earmarked and demolished.	In 2006/2007 the KACC reported 3 cases of recovered land on road reserves to be demolished and is following up on recovering 15 other such cases of land standing on road reserves.
4. Revocation of titles for land reserved for a public purpose other than a road reserve; issuance of new titles upon payment of the net value of unimproved site (subject to compliance with planning and environmental legislation).	Implemented in part, current status unknown.	In 2005/2006 the KACC issued over 450 demand notices in respect of illegally or irregularly alienated public land. Following the notices, 48 title documents were surrendered to the KACC. These were for public properties in rural and urban areas whose approximate value is Ksh 97.29 million.
5. Revocation of all letters of allotment issued as a consequence of an illegal allocation and in force at the time of the report. All expired letters of allotment should stand expired.	Implementation progress unknown.	
6. Change of user with respect to public land should of necessity factor in public interest.	Recommendation integrated into the Draft National Land Policy. The Policy suggests that District Land Boards and Community Land Boards to be set up to manage land issues while the Ministry of Lands is to perform a residual role.	
7. Investigation and prosecution of persons who facilitated or participated in the illegal allocation of public land in accordance with the laws in force.	Action yet to be taken.	Prosecution has focused on recovery of land rather than on prosecuting persons involved in illegal land transactions
8. Investigation, prosecution and disciplinary action on public officials (professionals, original allottees, brokers or speculators) who facilitated or participated in the illegal of public land.	Work in progress.	In 2007/2008 the KACC opened 50 Case files of which 2 public officials (a financial controller at a state corporation and a chief accountant in a government

Recommendation	Implementation	Remarks
9. Investigation, prosecution and disciplinary action on public officials (professionals, original allottees, brokers or speculators) who facilitated or participated in the illegal of public land.	Work in progress.	In 2007/2008 the KACC opened 50 case files of which 2 public officials (a financial controller at a state corporation and a chief accountant in a government ministry) were being investigated on the acquisition of illegally allocated assets worth approximately Ksh 129.7million.
10. Disciplinary action by professional bodies of persons who participated in the illegal allocation of public land in accordance with their Codes of Conduct.	Status not known.	In 2007/2008 the KACC investigated allegations that the Nucleus Estate of Miwani Sugar Company Limited (under receivership) that stood on 9,349 acres land worth Ksh 2.3 billion was irregularly disposed of through a public audit.
11. Recovery of monies and other proceeds paid following illegal allocations and sale of public land (whether by original allottees, brokers, speculators or professionals).	KACC pursuing asset recovery on the basis of the recommendation of the Ndungu Commission on irregularly and illegally acquired public land; and asset recovery under the Commission's independent mandate under the <i>Anti-Corruption and Economic Crimes Act 2003</i> .	In 2005/2006 the KACC obtained orders to preserve property worth over Ksh 568,361,613 in applications brought under either Section 56 of the <i>Anti-Corruption and Economic Crimes Act 2003</i> or the provisions of the <i>Criminal Procedure Code</i> . In 2007/2008 the KACC obtained orders to preserve property worth over Ksh 933,000,000 in 103 applications.
12. Investigation of companies used for acquisition of public land.	Status specific to this recommendation unknown; drafting of a new bill to overhaul the legal framework on companies, Companies Bill 2007.	
13. Recovery of land and houses belonging to Government Ministries.	Recovery of some illegally allocated houses and land	In 2005/2006 the KACC recovered a total of 45 cases of illegally allocated land and houses from government ministries. In 2006/2007 the KACC recovered a total of 13 cases of illegally allocated houses belonging to government ministries in Joseph Kangethe Estate in Nairobi and 6 illegally allocated pieces of land that belongs to the government. In 2007/2008 the KACC recovered 4 illegally allocated houses belonging to government ministries in Joseph Kangethe Estate and 6 illegally allocated land that belongs to the government.

Recommendation	Implementation	Remarks
14. Revocations of all ADC land titles issued as settlement schemes.	A Draft National Land Policy formulated with provisions for improved land tilting and ownership, and the authority to recapture public land sold to cronies and relatives of the political class.	
15. Repossession of all land improperly earmarked for settlement schemes.	Recommendations contained in the Draft National Land Policy; Forced eviction.	In 2005/2006 the KACC recovered land improperly earmarked for settlement schemes in Kipkatic Settlement Scheme area.
16. Revocation of 999-year leases granted by the British colonial government and replacement with 99-year leases.	Recommendations contained in the Draft National Land Policy; the recommendation is now a Ministerial directive.	
17. Equitable allocation of lands among locals and others	Proposals contained in the Economic Recovery Strategy 2003; recommendations contained in the Draft National Land Policy including the following: Slum dwellers to be given the land they occupy and pay taxes on it; Absentee landlords to lose their plots; Owners of idle land to pay rent; Commissioner of Lands to lose power to allocate land at will; Depoliticisation by divesting allocation powers from the President and into a Land Commission; Foreign investors be allowed to own land, but only for a limited period.	
18. Government to develop a sessional paper setting out objectives and policy guidelines for the management of settlement schemes.	Progress status unknown.	
19. Revocation of all illegally allocated trust land, particularly the eight allocations specifically identified by the Commission.	On the Ndung'u Report, the Commission has established a Surrender and Reconveyance Desk to process voluntary return of titles illegally and irregularly acquired as listed in the Ndungu Report, giving affected persons 30 days for surrender and reconveyance. This window closed on Thursday, 13th April 2006, following which the Commission resorted to the necessary legal action; In 2006, KACC filed 6 civil cases for recovery of public land.	

Recommendation	Implementation	Remarks
20. Revocation of titles issued in respect of land set aside by Section 117 <sup>24</sup> of the Constitution.	Not yet implemented.	
21. Ministries in charge of Lands and Settlement to prepare a comprehensive register of trust lands set aside for public purposes.	Not yet implemented.	
22. Cancellation of allocations of wetlands and forestlands.	Recommendations contained in the Draft National Land Policy. Specifically, it suggests that where the land in question is a water catchment area or a fragile ecosystem, the Government should urgently settle the landless on alternative appropriate land.	In 2007/2008 the KACC recovered 14 parcels of land hived off from Karura Forest land with an estimated value of Ksh 495,384,000.
23. Development of a comprehensive Wetland Management Policy.	Recommendations contained in the Draft National Land Policy. In particular, it suggests a total ban on the allocation of forests, water catchment areas, road reserves, kayas (sacred forest groves) wildlife corridors and mountain tops.	
24. Promotion of international co-operation regarding transboundary wetlands.	Under the framework of the EAC, a number of arrangements are in place for the management of trans-boundary wetlands, principally the Lake Victoria Development Programme.	
25. Computerise and make inventories of land registries; make an inventory of public land owned by Ministries; State Corporations and Departments.	Action being undertaken on an incremental basis.	
26. Establishment of a Land Commission	Recommendation integrated into the Draft National Land Policy for the establishment of a National Land Commission.	
27. Formulation of a policy on the development of public land.	Proposals in the Draft National Land Policy	
28. Establishment of a Land Titles Tribunal	Recommendation integrated into the Draft National Land Policy for the establishment of a National Land Commission: <i>“Given the fact that each case of a suspected illegal or irregular allocation of public land must be dealt with on its own merits, it is recommended that a Land Titles Tribunal be immediately established to embark upon the process of revocation and rectification of titles in the country.”</i>	

<sup>24</sup>Section 117 of the Constitution refers to setting apart of Trust Land by County Councils for public purposes.

Recommendation	Implementation	Remarks
29. Harmonise land legislation.	Action yet to be taken. The Draft National Land Policy recommends the establishment of a Land Reform Unit to coordinate and implement the policy.	
30. Upgrade informal settlements.	Eliminate slums and replace them with decent housing through the Kenya Slum Upgrading Programme (KENSUP), an initiative between the Ministry of Housing and development partners; establishment of the Civil Servants Housing Scheme through which the Ministry is constructing houses for sale to civil servants in order to empower them to own homes.	
31. The Forests Bill should be tabled in Parliament	The Forest Bill was passed into law in 2005.	

### Sources

1. KACC Annual Reports
2. The Draft National Land Policy
3. Evidence of action on the ground as reported by the media
4. Interview with Ministry of Lands





Permanent Civic Vigilance

### **WHO WE ARE**

AfriCOG is a civil society organisation dedicated to addressing the structural causes of corruption in Kenya. It seeks to rebuild and entrench the anti-corruption and pro-reform coalition which remains under serious strain, given uneven progress and setbacks to reforms since 2002.

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