Irregular and illegal land acquisition by Kenya's elites: Trends, processes, and impacts of Kenya's land-grabbing phenomenon

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INTERNATIONAL LAND COALITION

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A global alliance of civil society and intergovernmental organisations working together to promote secure and equitable access to and control over land for poor women and men through advocacy, dialogue, knowledge sharing and capacity building.

Our Vision

Secure and equitable access to and control over land reduces poverty and contributes to identity, dignity and inclusion.

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KLA

The Kenya Land Alliance (KLA) is an umbrella network of Civil Society Organizations and Individuals committed to effective advocacy for the reforms of policies and laws governing land, environment and natural resources in Kenya. KLA was founded in 1999 as a membership not- for-profit and non-partisan network and got registered in November 2000 by the government of Kenya as a Trust. The KLA Secretariat based in Nakuru Town is headed by a National Co-ordinator who reports to the Board of Trustees and the Annual General Meeting of members.

Its current membership comprises of 27 Non-Governmental Organizations, 31 Community Based Organizations and 32 Individuals.

Our vision is a society in which all people are assured of sustainable livelihoods through secure and equitable access to and utilization of land and natural resources. And our mission is to facilitate participatory and comprehensive land and natural resource policy, legislative and institutional reforms through networking, information generation, sharing, advocacy and empowerment.

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ISBN 978-92-95093-29-4

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The Kenya Land Alliance

January 2011

Acknowledgements

The author would like to sincerely thank Odenda Lumumba of the Kenya Land Alliance (KLA) for his content contributions to the present document. It is hoped that our combined efforts will further the ongoing work carried out by the KLA and its partner organisations.

Also, the author gratefully acknowledges the International Land Coalition for the support provided to produce this booklet. Further thanks are extended to Dr. Ward Anseeuw, (Centre de Coopération Internationale en Récherche Agronomique pour le Développement, CIRAD), for comments and inputs for its finalisation, and to David Wilson for his invaluable editing inputs.

This report is based on the KLA/Kenya National Commission on Human Rights (KNCHR) series "Unjust Enrichment: The Making of Land Grabbing Millionaires, Volumes 1 and 2", which focuses on the grabbing of state corporation land and protected forest land. It also draws heavily on the report of the Commission of Inquiry into Illegal and Irregular Allocations of Public Land, commonly known as the Ndung'u Commission Report (2004). These documents, with support from additional secondary sources, form the basis of the present report. The opinions are those of the author, and not of the supporting institutions.

The research project of the Commercial Pressures on Land Initiative was coordinated in the ILC secretariat by Michael Taylor, with the support of Andrea Fiorenza. Ward Anseeuw of CIRAD provided technical support to all studies and the project was based on a conceptual framework developed by Michel Merlet and Clara Jamart of Agter. A large number of members and partners of ILC and independent specialists have contributed to the research, analysis and documentation of the project.

ILC wishes to thank the following donors, whose support made possible the research under the Commercial Pressures on Land Initiative:

Canadian International Development Agency
Agence canadienne de développement international

Ministry of Foreign Affairs

IFAD
Enabling poor rural people to overcome poverty

Schweizerische Eidgenossenschaft
Confédération suisse
Confederazione Svizzera
Confederaziun svizra

Swiss Agency for Development and Cooperation SDC

The views expressed herein can in no way be taken to reflect the official opinion of these donors. ILC Secretariat would appreciate receiving copies of any publication using this study as a source at info@landcoalition.org.

Foreword

The International Land Coalition (ILC) was established by civil society and multilateral organisations who were convinced that secure access to land and natural resources is central to the ability of women and men to get out of, and stay out of, hunger and poverty.

In 2008, at the same time as the food price crisis pushed the number of hungry over the one billion mark, members of ILC launched a global research project to better understand the implications of the growing wave of international large-scale investments in land. Small-scale producers have always faced competition for the land on which their livelihoods depend. It is evident, however, that changes in demand for food, energy and natural resources, alongside liberalisation of trade regimes, are making the competition for land increasingly global and increasingly unequal.

Starting with a scoping study by ILC member Agter, the Commercial Pressures on Land research project has brought together more than 30 partners, ranging from NGOs in affected regions whose perspectives and voices are closest to most affected land users, to international research institutes whose contribution provides a global analysis on selected key themes. The study process enabled organisations with little previous experience in undertaking such research projects, but with much to contribute, to participate in the global study and have their voices heard. Support to the planning and writing of each study was provided by ILC member CIRAD.

ILC believes that in an era of increasingly globalised land use and governance, it is more important than ever that the voices and interests of all stakeholders – and in particular local land users - are represented in the search for solutions to achieve equitable and secure access to land.

This report is one of the 28 being published as a part of the global study. The full list of studies, and information on other initiatives by ILC relating to Commercial Pressures on Land, is available for download on the International Land Coalition website at www.landcoalition.org/cplstudies.

I extend my thanks to all organisations that have been a part of this unique research project. We will continue to work for opportunities for these studies, and the diverse perspectives they represent, to contribute to informed decision-making. The implications of choices on how land and natural resources should be used, and for whom, are stark. In an increasingly resource-constrained and polarised world, choices made today on land tenure and ownership will shape the economies, societies and opportunities of tomorrow's generations, and thus need to be carefully considered.

Madiodio Niasse

Director, International Land Coalition Secretariat

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ADC	Agricultural Development Corporation
CIRAD	Centre de Coopération Internationale en Récherche Agronomique pour le Développement
FIAN	Foodfirst International Action Network
KARI	Kenya Agricultural Research Institute
KLA	Kenya Land Alliance
KNCHR	Kenya National Commission on Human Rights
NSSF	National Social Security Fund
UNFF	United Nations Forum on Forests

Summary

The International Land Coalition (ILC) has commissioned this present report to analyse the illegal/irregular acquisition of land by Kenya's elites to ascertain the types of land affected, the processes used to acquire land, and the profiles of the perpetrators, as well as to identify the victims and the impacts of land grabbing. The report is drawn largely from the Kenya Land Alliance (KLA)'s series "Unjust Enrichment: The Making of Land Grabbing Millionaires", which focused on the illegal and/or irregular allocation of protected (forest) land, and land held by public corporations and parastatals (2006a and b) and the report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (2004), known as the Ndung'u Commission Report.

Kenya's land questions are culturally, ethnically, culturally, and economically charged, and become increasingly urgent as pressure on land increases as a result of its growing population. In a country where 85% of the population rely on agriculture as their primary livelihood source, yet 88.4% have access to less than three hectares of land, tensions over land simmer. This is particularly true for minority ethnic groups, who have been systematically excluded from land ownership.

These tensions are exacerbated by two inextricably linked phenomena: the disappearance of large tracts of public land and the enormous wealth accumulated by elite members of Kenyan society. In 2003 President Kibaki appointed a Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (commonly known as the Ndung'u Commission), which revealed shocking trends of illegal and irregular public land allocations, and named many prominent individuals, companies, and organisations, both public and private, that had benefited from large-scale land graft. Its many recommendations have encountered much opposition from powerful vested interests and are yet to be fully implemented, and abuses of public land continue.

The Kenyan Government holds government and trust land[1] to be managed "in the public interest". It is these categories of land that have borne the brunt of land grabbing, particularly (in the case of government land) land earmarked for urban development, land allocated to fulfil ministry and state corporation/parastatal functions, and protected land, particularly forests, and (in the broad trust land category) resettlement and trust land. These lands are generally uninhabited or inhabited by marginalised communities, which makes them easy targets.

These allocations involve processes that range from the questionable to the blatantly fraudulent or illegal; these processes depend on the type of land targeted. Recurring characteristics are the abuse of public office and the manipulation of legal processes to obtain or allocate public land for personal gain or to ensure political patronage. The most common processes involve the following:

[1] As a result of the National Land Policy (2009), these categories of land have been renamed "public" and "community" land. The third category is "private" land.

- Letters of allotment (which set out an offer of land transfer) being treated as saleable interests in land;
- Illegal/irregular allocations and appropriations of alienated[2] public land, including abuses of public office; allocation of high-value public land to private interests; parastatals acting as land brokers; direct sale of public land to private interests; and unpunished invasion and privatisation of public land;
- Parastatals and ministries paying exorbitant prices to acquire land from private individuals;
- Illegal and/or irregular excisions[3] of protected forestland to private interests and for unauthorised uses (tea farms, community resettlement, etc.). This includes resettlement schemes where vulnerable communities have been relocated to protected land because the land intended for their resettlement was allocated to other parties. This often concerns marginalised communities, and results in their further victimisation through evictions.

These activities have been facilitated by the highly centralised nature of Kenya's land administration and management system, initially introduced by the colonial administration. Under this framework, land grabbing has proliferated as a form of political patronage. It has a wide range of beneficiaries, including national and international private interests (companies and individuals), foreign and diplomatic missions (embassies, etc.), religious institutions, foreign governments, etc., while those facilitating grabs of public land have accumulated massive personal wealth.

The impacts of land grabbing by Kenya's elites have yet to be fully quantified; however, to put the problem into financial context, the KLA estimates the public losses incurred for parastatal land and protected forestland to be Ksh 53 billion. However, the effects are long-term and include degradation of (protected) national resources, speculation on land prices, increased rents, landlessness, and missed development opportunities. These impacts are particularly dangerous given the fragile state of Kenya's power-sharing government following the 2007 post-election violence – in which land played a part. Land-related ethnic (and political) tensions and violence have a long history in Kenya, and land grabbing has exacerbated these tensions.

Progress towards addressing Kenya's land-grabbing problem and its negative impacts was made in 2006, when Kenya's parliament endorsed in principle to the new National Land Policy (adopted by Cabinet in June 2009), which will be central in forming the structures needed to remedy land administration problems, including land grabbing. For the interests of this report, the two most important features of this policy are the decen-

[2]Alienated public land is land that the government has leased to a private individual or body corporate, set aside for the functioning of a ministry or parastatal, or has been set aside for planning and/or development purposes (Ndung'u Commission Report 2004).

[3] Excising land involves extracting a very precisely delineated portion of a greater area of land to be used for another purpose.

tralisation of land administration functions to a three-tiered system comprising national, district, and local land boards to increase accountability and to facilitate enquiries into land allocations, and the government's new right to investigate title deeds for validity and to revoke illegitimate title deeds (which previously went unquestioned).

On 4 August 2010, a referendum was held on the (then proposed) Constitution, which, among other issues, allows for the creation of the necessary structures for the National Land Policy's implementation. Despite strong opposition to the land chapter of this document from religious, political, and high-level business interests, the new Constitution was approved by 66.9% of the voters and its opponents accepted the result. Nevertheless, this opposition – particularly from politicians who supported the land policy (knowing that a legislative framework is required) – raises serious concerns about the real commitment of officials in addressing the land-grabbing issue.

With the passing of the Constitution, the Ministry of Lands now faces the task of creating the necessary structures and implementing the National Land Policy to restore confidence in Kenya's land administration processes and authorities. In creating these structures, and knowing that expeditious action is needed to redress Kenya's currently skewed land-holding situation, the Ministry of Lands and the Government of Kenya must ensure the efficient and democratic design of these structures to reassure all stakeholders that their interests are duly represented. This is the first recommendation of the present report.

Second, it is recommended that bona fide beneficiaries who have lost out due to illegal/irregular allocations (e.g. resettled communities) be treated differently in comparison with those gaining by means of unscrupulous land grabbing. This requires adequate planning to restore protected areas and rightful land uses, while providing for proper resettlement planning so as to ensure that communities are not further victimised. In the same vein, it is recommended that companies suspected of benefiting from illegal/irregular land allocations be required to conduct a title deed search stretching back to the instance of first registration. Full title deed searches should become common practice for all companies registering land as part of their corporate governance and responsibility in Kenya.

Finally, it is recommended that Kenya's land administration and National Land Registry be thoroughly updated. This will likely require a large-scale re-survey of public land holdings in Kenya to obtain an updated inventory and to assist in the ongoing investigations into illegal and/or irregular land allocations.

1 Introduction

When Kenya gained Independence in 1963, it inherited a highly unequal land distribution pattern that disadvantaged the African population in terms of ownership over productive land. This has resulted in pressing questions about land distribution and reform strategies up to the present day. While many sub-Saharan African countries grapple with land questions centred on the redistribution of land to those previously disadvantaged, Kenya's land question has been compounded by an additional factor: large-scale land grabbing, which has become a rampant practice among the politically well connected – ironically referred to as the "politically correct" by Kenyans – and the elite segments of society. Thus, land grabbing in Kenya unjustly benefits international conglomerates and foreign investors, as it does in other countries, but also national elites who work within legitimate institutional and legal frameworks to protect their ill-gotten gains.

The Kenyan public has begun to notice blatant irregularities in national land administration in recent years, and in 2003 President Mwai Kibaki came under significant public pressure to look into a phenomenon that was claiming so much of Kenya's land. In response, the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land was established, and examined the allocation and management of Kenya's public land over a period of nine months. The Commission of Inquiry – commonly known as the Ndung'u Commission after its Chairperson, Paul Ndung'u – completed and submitted its report, which was made public December 2004. The shocking report made it clear that there was a serious crisis in the management of Kenya's land, which was being illegally and/or irregularly parcelled off to well-connected individuals. However, although the Ndung'u Commission Report made a number of recommendations concerning revocation of title deeds and remedies for illegal/irregular activities involving public land, with the exception of few high-profile revocations and repossessions, it has thus far had limited impact on the phenomenon of land grabbing.

When exploring land grabbing by Kenyan elites, it must be noted that there is little concrete statistical information as to the amount of land in question. This is due to the lack of transparency in the documentation of land transactions, particularly from 1990 to 2002, when land grabbing reached its peak. The extent of the phenomenon is still being determined as the current Minister of Lands grapples with the recommendations of the Ndung'u Commission Report.

The lack of transparency surrounding allocations of public land continues, despite the awareness of the issue of officials and the general public. The Kenya Land Alliance (KLA) and the Kenya National Commission on Human Rights (KNCHR), among other civil society groups, have attempted to increase awareness regarding land grabbing and its implica-

tions, as well as to support the implementation of the Ndung'u Commission Report's recommendations, through an accessible publication entitled "Unjust Enrichment: The Making of Land Grabbing Millionaires" (2006), which consists of two volumes focusing on "The Plunder of Kenya's State Corporations and Protected Land" and "Abetting Impunity: The Other Side of the Ndung'u Report on Illegal and Irregular Allocations of Public Land". These KLA/KNHRC documents, supported by additional sources – particularly the Commission Report itself – form the basis of the present report.

Based on these publications, this report highlights the processes used by Kenya's elites in illegally and/or irregularly accessing or allocating public land earmarked for management in the public interest, for personal gain and the accumulation of wealth. The general profiles of perpetrators and the extent of the impacts on specific victims and on Kenyan society as a whole are discussed. The policies that have been approved and enacted to curb land grabbing in Kenya and to deal with the repercussions of past acts are also discussed and analysed, with accompanying recommendations to support their implementation.

Through this discussion, it becomes evident that piecemeal implementation of the recommendations of the Ndung'u Commission Report's findings – mainly focusing on the evictions or land repossessions of minority groups from protected areas and a handful of high-profile repossessions[4] – has not addressed the bulk of the illegal and irregular land allocations in Kenya. The selective[5] implementation of these recommendations will continue to deepen tensions, among the most dangerous of which are ethnic tensions resulting from unequal land distribution through questionable land administration practices, thereby continually undermining Kenya's fragile state.

[4] For example, Daniel arap Moi's Kiptagich Tea Plantation was scheduled for repossession in November 2009, though it has not yet been repossessed.

[5] "Selective" both in terms of bona fide political will to do so and in terms of limitations presented by the current legal framework.

Why is land a controversial issue in Kenya?

Land formed the basis for the independence movement in Kenya. In addition to being a source of economic accumulation and a means through which to access a variety of resources, it also has symbolic, cultural, and historical importance (Roberts 2009). In the current context, both additional value and additional strain are put on land as Kenya's population continues to increase at a rate of 2.9% per annum – the highest rate in East Africa. Thus pressure on land, particularly productive land, is mounting (FIAN 2010). Yet a mere 20% of Kenya's total landmass is suitable for cultivation: 12% is classified as high-potential agricultural land (having adequate rainfall) and 8% is considered medium-potential land; the rest is arid or semi-arid. Given these modest figures, the distribution of land in Kenya is a highly important and sensitive issue.

It is recognised that a "lack of access to land is a major determinant of poverty" in Kenya, as 85% of Kenyans live in rural areas and an estimated 80% of the population rely on agriculture for their primary livelihoods (FIAN 2010, 16). Despite the importance of access to land to meet basic needs, 88.4% of Kenyans own or have access to less than three hectares of land each, with 28.9% of the population landless[6] and 27% having access to less than one hectare (Syagga 2006). These stark figures are sharpened by the reality that a small portion of the population – comprising remaining white settlers, large-scale farmers, power-brokers, current and former politicians, and business people, most of whom are politically connected patrons of past and present post-Independence governments – owns hundreds of thousands of hectares of land in Kenya.[7] The vast majority of the land holdings of these powerful individuals and their companies are concentrated in Kenya's 17–20% of arable land – meaning that half of the arable land nationwide is owned by a mere 20% of the population (Syagga 2006, 336).

Access to land, in addition to being a question of political connections, also has a history of systematic exclusion of segments of Kenya's population, particularly its ethnic minorities. These communities were marginalised during the colonial era and their plight has continued post-Independence. They are particularly vulnerable as their entire livelihood system is dependent on access to specific types of land (e.g. forests for forest-dwelling communities), from which they have been removed and excluded.

Thus, the concentration of land ownership and the controlled access to land has both psychological implications (deeply entrenched ethnic tensions) and material implications (accumulation of enormous wealth and significant loss of public funds) for the country. Médard (2009) notes that the history of Kenya's land administration has led to a mentality of "he with control over the land is King". As explored further in the following section, this

[6] In Kenya, "landlessness" often refers to non-ownership of land, rather than lack of access to land.

[7] *The Standard* newspaper, 1 October 2004.

mentality has its roots in the colonial era (if not before) and continues to dominate in Kenya, as those with access to land also have access to power and resources (in this case even basic services), and vice versa.

Historical context of land grabbing in Kenya

Kenya, it has been said, is a nation built on land grabbing (Klopp 2000). This history of land grabbing has its foundations in the arrival of white settlers who claimed ("grabbed") what they deemed to be unused land for private ownership in the name of the British monarchy. Not surprisingly, this land – mostly in the Central Province (the White Highlands) – was also the most fertile land. To make it available, indigenous communities were arbitrarily relocated to different areas. One such example was the 1939 eviction of the local Kikuyu population from the fertile land of the Central Province, after which many of them travelled north to the Rift Valley to resettle (Roberts 2009).

To facilitate the "clearing" of land and to ensure its centralised management and control, institutions and practices were established during colonial times to allocate land, particularly the most fertile 20% of land, to white settlers. Under this system, "land rights were manipulated to pacify vociferous settler demands and buy African support when unrest seemed likely" (Klopp 2000, 16). For Africans, "trust lands", organised according to tribal and ethnic lineages (or colonial interpretations thereof) were managed by land boards accountable to the Governor of the colony. In 1915 the Crown Lands Ordinance Act established the legal processes by which land could be allocated to individuals and privatised (this is further explained below). Overall, the land was vested in, and managed by, the Governor on behalf of the British monarchy.

These highly centralised and essentially top-down approaches to land administration and management remained in place in post-Independence Kenya. Perhaps more alarmingly, the practice of allocating land according to ethnicity also survived the transition to an independent Kenya. Both of these characteristics of the land administration system have played significant roles in facilitating grabs of public land by Kenya's elites.

In early post-Independence Kenya, into the 1970s, the laws governing land were closely adhered to. Subsequently, as chronicled in the Ndung'u Commission Report (2004), a "major crisis in Public land tenure" took hold of consecutive administrations. This crisis involved the privatisation of large tracts of public land, through processes that circumvented or blatantly defied established laws and procedures to divest the public of land held in trust by the government on behalf of its citizens.

Klopp (2000) posits that this betrayal of trust and the doctrine of public interest was the result of a decline in "traditional forms of patronage" (for example, international aid,

which is increasingly closely monitored). This led officials to seek less scrutinised forms of patronage (particularly as political competition increased with the opening of the public space via multi-party elections in 1992) to maintain the support of powerful members of society. Thus, public land emerged as an attractive asset to ensure political allegiance and the re-election of officials, from the local to the national level. While at the local level trust and township land has been the currency at stake, among the nation's top officials, lucrative urban, agricultural, parastatal, and protected land has been sacrificed to secure support.

Kenya's current land issues

The violence that followed the national election in December 2007 had many of its roots in the land issue and in the land-grabbing phenomenon. The tensions over scarce resources in the Rift Valley, for example, have been simmering for many years and have come to a head at different points in the past (for instance, in the 1950s and even the 1920s). In post-Independence Kenya, some feel that the Kikuyu and Kalenjin groups rose to power and gained access to vast land resources as a result of the centralised land administration practices. This is not to suggest that land grabbing has only benefited individuals or entities from these ethnic groups, as the gains have been spread across Kenyan elites of all ethnicities. It does demonstrate, however, that ethnic differences over land are longstanding and continue to emerge in political and national dialogues (Lafargue 2008).

As recently as July 2010, land, its ownership, and its administration have generated a vehement public debate, driven particularly by landowners. As government continues to grapple with the new National Land Policy, approved by Parliament in December 2009, the constitutional referendum (which was held on 4 August 2010) also had Kenya's land question at its core. The "No" campaigners (those who oppose the Constitution, claiming it will lead to a nationalisation of land – a particularly troubling thought in sub-Saharan Africa following the land reform policies enacted in Zimbabwe) – include many beneficiaries of the illegal and irregular land allocations of the past decades, including churches and large tea estate owners. It should be noted, however, that the "Yes" side also had large-scale landowners among its supporters.[8]

The "No" side, however, also linked the Constitution with fears about ethnic tensions relating to land. One prominent opponent, Assistant Roads Minister Wilfred Machage, promised that it would lead to claims to ancestral land, which would result in evictions, adding that his own Kuria community would "surely reclaim" its ancestral land, as this would be an action supported by the law – even if it meant the use of force (Omanga

[8] Agence France-Presse, 4 July 2010.

2010).[9] This possibility is linked to the proposed policy's vague terminology concerning "community" land, which does not clearly define a community (i.e. on ancestral lineage or on area-based definitions). These and other ongoing debates have been significant obstacles to implementing the policies needed to safeguard Kenya's land. As it stands, the country remains vulnerable to large-scale land grabbing, both by national elites and by foreign interests.

The following section examines the way in which land has been held and administered in Kenya since Independence, to help explain the processes that have been used by elites to access public land for ends that are clearly contrary to the public interest.

[9] Machage was suspended from his post in June 2010, accused of "hate speech".

2 Government custodianship of public land

The practice of governments holding public land in trust and managing it in accordance with the public interest is common practice worldwide. In Kenya, under pre-colonial customary tenure arrangements, land that was accessible to all (generally referred to as "the commons") was land vital to the functioning of the community: it included, *inter alia*, pathways, watering points, recreational areas, meeting venues, and ancestral and cultural grounds (Southall 2005). In this case, restrictions on land were exclusive in terms of *how* it was used, rather than in terms of *who* could use it. A recognised political authority managed control over these lands and access to them was determined "on the basis of reciprocal duties performed by the rights holder to the community" (Ndung'u Commission Report 2004, 2).

Kenya's colonial past plays a large role in the current institutional and legal apparatus that supports the holding of public land in trust by the Government. By virtue of the Crown Lands Ordinance Act of 1915, land was appropriated and managed on behalf of the British monarchy by the Governor of the colony. The position of the Commissioner of Lands, to whom the Governor could delegate some powers of allocation, was also introduced in this legislation. This institutional arrangement was maintained, with relevant alterations, in the post-Independence land legislation, namely the Government Lands Act 1984 (revised 2009). In place of the Governor, the President of the Republic became the holder of public land, while the position of Commissioner of Lands remained. The guiding principle for the government's handling of public land, through these positions and their supporting institutional frameworks at all levels, is that of the "public interest".

Although no strict definition of the term "public interest" exists, the Constitution of the Republic of Kenya implies that it "revolves around matters touching upon public safety, security, health, defence, morality, town and country planning, infrastructure, and general development imperatives" (Ndung'u Commission Report 2004). Thus, when the government makes decisions regarding public land, the measure of the validity of its decision is its benefit, or otherwise, to the general public.

According to the Constitution, there are three categories of land in Kenya: government land, trust land, and private land. In the new National Land Policy, the categories have been amended to public, private, and community land, replacing government land with

public land and trust land with community land.[10] These three categories are further explained below (Ndung'u Commission Report 2004):

Government land (now public land): two types of land are held by the Government of Kenya as a result of Sections 204 and 205 of the Constitution and a number of subsequent Acts:[11]

- *Unalienated government land:*[12] land held by the government in the public interest that is not leased by the Commissioner of Lands to another person via a letter of allotment, and over which no private title has been granted. This land is public land, i.e. owned by the people of Kenya and held in trust by the government until such time as it is legally privatised; and
- *Alienated government land:* land held by the government in the public interest which has been leased to a private individual or corporate body, or which has been reserved for the use of a government ministry, department, parastatal, or other public institution, or has been set aside for a planned public use.

Trust land (now community land): this is land that is owned by a community but is held in trust by a county council on behalf of local inhabitants (managed in accordance with customary law), as long as the land remains un-adjudicated or unregistered (i.e. not allocated to an individual or entity, who subsequently registers it). Once it is adjudicated (allocated) or registered, it becomes private land, belonging to the person/entity that holds the registration. "Settlement trust land" is land that has been purchased by the government on behalf of landless Kenyans and is to be used for human resettlement.

Private land: this is land that is registered according to law and for which a title deed has been issued to a private individual or a company. "Private land can be created from either Government or Trust land through registration after all the legal procedures have been strictly followed" (Ndung'u Commission Report 2004, 44).

[10] Trust land was renamed "community land" in the new National Land Policy to reflect the fact that this category of land actually belongs to the community, and is held in trust for it by the government and administered by local leaders according to the applicable customary laws.

[11] Other Acts delegating government land to the Government of Kenya include the Kenya Independence Order in Council (1963), the Constitution of Kenya Amendment Act (1964), and the Government Lands Act (1984).

[12] Unalienated government land is land held by the government for which no private title has been created, no lease has been issued, and no letter of allotment has been drafted by the Commissioner of Lands (Ndung'u Commission Report 2004).

Who can allocate Kenya's public land?

At the peak of the land grabbing phenomenon in the 1980s to the early 2000s (few data are available on more recent years), allocations of public land were dictated by as many as 42 different laws, in a system lacking in coherence and consistency. Among the many land-related laws in Kenya are the following:

- The Constitution of the Republic of Kenya
- The Government Lands Act (Cap 280)
- The Registration of Titles Act (Cap 281)
- The Trust Land Act (Cap 288)
- The Land Adjudication Act (Cap 284)
- The Registered Land Act (Cap 300)
- The Sectional Properties Act
- The Forests Act (Cap 385) – replaced by the Forest Act in 2005
- The Physical Planning Act
- The Wildlife Management Act (Cap 376)
- The Survey Act (Cap 299)
- The Land Consolidation Act (Cap 283)
- The Environmental Management and Coordination Act.

These acts established which position-holders were legally able to allocate public land in Kenya. The new National Land Policy and the new Forest Act (2005) have redefined these processes and have made a start towards establishing coherent and systematic land administration laws, while the new Constitution will also have significant impacts on land administration, as discussed below. However, for the purposes of this study, the legislative documents above are referred to, as they have provided the framework for land grabbing in Kenya to date and, until the newer policies are fully implemented, will continue to govern land management and allocations.

Broadly speaking, in the post-Independence legislative framework the President has been responsible for the allocation of unalienated public land in the public interest and in consideration of the applicable laws. No-one – not even the President – can arbitrarily allocate unalienated public lands to an individual or company. For these lands to be allocated, they must be made available through "de-gazettement".[13] In light of the realities of land administration (and the lengthy processes involved), the President can request/approve that certain powers of allocation are delegated to the Commissioner of Lands, if the allocation involves:[14]

[13] De-gazetting land requires publication of the intent to remove the land in question from the public domain in the Kenya Gazette, a legal information document made available to the public.

[14] Ndung'u Commission Report 2004, 9-10.

- Use for religious, charitable, or sports purposes on terms and conditions in accordance with general Government policy and the terms prescribed for such purposes by the President;
- Town planning exchanges on the recommendation of the Town Planning Authority, Nairobi, within the total maximum permitted value and subject to the conditions laid down by the President;
- The sale of small remnants of land in the City of Nairobi and Mombasa Municipality acquired for town planning purposes and left over after those purposes have been met;
- Use by local authorities for municipal or district purposes, i.e. office accommodation, town halls, public parks, native locations,[15] fire stations, slaughterhouses, ponds, incinerators, mortuaries, crematoria, stockyard sales, hospitals, child welfare institutions, libraries, hospitals, garages, housing schemes, markets, and public cemeteries;
- The extension of existing township leases, on the fulfilment of specified conditions;
- The temporary occupation of farm-lands on grazing licences, terminable at short notice;
- The sale of farm plots that have been offered for auction and remain unsold, such grants being subject to general terms and conditions for the advertised auction sale and the application being therefore submitted within six months of the date of the auction in the case of farms.

Township[16] land is considered to be alienated land, and the Commissioner of Lands can in theory dispose of it by auction, as long as it is not required for public purposes. The process would be as follows:

- Plots are sub-divided into suitable sizes for buildings;
- A valuation is conducted to determine the selling price, taking into account the basic cost of the land and any infrastructure on it;
- The Commissioner of Lands must determine the conditions of land use for each plot (land rent, building conditions, special covenants, etc.);
- The plots must then be sold at public auction, unless otherwise instructed by the President;
- Plots must be developed within 24 months of the buyer being issued with the title and the Commissioner of Lands must approve any land-use change or sale of the plot to a subsequent owner.

[15] "Native locations" refers to separate areas demarcated for inhabitation by indigenous populations, starting in 1919. These locations were generally outside of major centres on marginalised land (Campbell 2005).

[16] Generally land outside the formal urban jurisdiction allocated for both residential and commercial purposes.

The Ndung'u Commission Report (2004, 10) notes, however, regarding township plots, that, "no plots have been sold by auction in more than 50 years. It can only be assumed that the plots have been sold by direct allotment pursuant to Presidential orders; otherwise they would have been illegally allocated." As will be explained later, many allocations of township and urban plots have not followed the prescribed procedures and therefore are indeed illegal.

3 What land is targeted?

Broadly speaking, all types of land that have a potential to generate profit have been impacted by land grabbing by Kenyan elites. The Ndung'u Commission Report focuses on public land that has been illegally or irregularly acquired, particularly land held by the Kenyan government in the public interest. The land that is involved may at first glance seem inconsequential (e.g. the site of a public toilet) but it is the value vested in it by virtue of its location and subsequent potential (illegal) resale value that is of interest to those benefiting from such endowments.

There is an appetite for land in general, but some trends can be noted in terms of elite land acquisition. Southall (2005), following the Ndung'u Commission Report, indicates that the land most vulnerable to acquisition by elites can be broadly grouped into three categories: urban, state corporation, and ministry land; settlement schemes and trust land; and forestlands, wetlands, riparian reserves, national parks, game reserves, and protected areas.

Urban, state corporation, and ministry land

This category encompasses several types of land, all of which are to be managed and used in the public interest. These types of land and their legal uses/means of allocation are outlined below.

Urban land

Located in cities, municipalities, and/or townships, this category of land includes both alienated and unalienated land. Only previously unalienated or unallocated urban land can be allocated to an individual or entity by the President, in accordance with the provisions of Section 3 of the Government Lands Act (thus by public auction). It is important to note that all urban land is meant to be used in accordance with the public interest and that this constitutes what is generally referred to as "public tenure" (Ndung'u Commission Report 2004). Urban land is used through excision for amenities such as public roads, playgrounds, public schools, stadia, hospitals, markets, fire stations, police stations, public toilets, cemeteries, theatres, monuments, historical sites, social halls, housing estates, research institutions, and other public utilities to serve the public interest (Ibid.). Such land is held in trust by local-level government.

State corporation land

This is land held by Kenyan parastatals under conditions determined by Acts of Parliament. Parastatals have powers to acquire and dispose of land to meet their needs and to perform their functions on behalf of the State;[17] such land can also be used for offices and/or housing for staff. A parastatal's need for land is determined by its activities. Land can be allocated to parastatals from existing unalienated government land, or can be set aside from trust land (Ndung'u Commission Report 2004, 87). The government can also purchase land on behalf of the parastatal or provide funds through the Exchequer (Treasury) for its purchase.

If a parastatal no longer requires land acquired for its mandate, the manner in which it should dispose of it depends on the way in which it was acquired. For land allocated by the government, parastatals should return it to the government to become unalienated land once again, which cannot be sold to private individuals or companies. Where land has been purchased by profits generated by the parastatal, it can be sold at fair market value. This can be done through a private sale or through a public auction, where the land would be assessed to establish a minimum selling price. Transfers of this type of land without purchase at fair market value would be considered irregular, if not illegal. In either of these situations, all information (including the price and the buyer's identity) would be public information, as the land is public land. The acquisition or disposal of parastatal land is to be carried out in the public interest. It is important to note that these acquisitions and disposals of land are not the central function of any parastatal and "that it is not the business of state corporations [parastatals] to buy and sell land, let alone to speculate in land" (Ibid.).

Ministry public land

As with parastatals, ministries are allocated land to carry out their duties, which they hold in trust for the public. This land, as with parastatal land, can be excised from alienated or unalienated government land, but is not intended for sale unless ordered by the President, and unless strict regulations are followed, as for state corporation land.

[17] For example, the Agricultural Development Council would require agricultural land for crops and livestock to fulfil its mandate.

Settlement schemes and trust land

Settlement scheme land

This category involves land that has been acquired by the government in order to address the distortions in land ownership resulting from colonial rule. The post-Independence Kenyan government engaged in a market-based land redistribution strategy whereby African farmers could purchase European settlers' land through financing made available from the British government.[18] Loans for settlement schemes were made to the government and repaid by the Exchequer. Such programmes, including the 1 Million Acre Scheme; and the Shirika and Haraka programmes, were used to reduce pressure on densely populated "native" land and were followed by schemes that were less agriculturally targeted but intended to settle Kenya's landless people. Land for more recent and less agriculturally intensive schemes was excised from alienated and unalienated government land (controversially, including protected areas such as gazetted forests) and trust lands (Ndung'u Commission Report 2004, 124). As this land was acquired for the benefit of the public, it falls under the category of public land. For later settlement schemes, the Ministry of Lands and Settlement was the implementing body, along with the Settlement Fund trustees and the District Commissioner in a given area. These bodies were supposed to identify people eligible for resettlement and determine the amount of land they were to receive.

Trust lands

This category of land has its roots in colonial history, being land that was set aside and held in trust by the colonial administration for the African population. African customary law determined access to the land, commonly referred to as "native reserves", "special reserves", or "African reserves". After an attempt to individualise tenure in the reserves during the 1950s, in 1963 it became clear that this option was not appropriate for these lands. With Independence, land that was not impacted by the adjudication and individualisation process of the 1950s became "trust land". County councils hold the title for trust land on behalf of local communities (in accordance with the Constitution and the Trust Land Act), for as long as it remains unadjudicated or unregistered – this is the only process by which trust land can legally be removed from community ownership to the ownership of an individual or a group of individuals (according to the processes described in the Land (Representative Groups) Act, Cap 287).

[18] However, as the Ndung'u Commission Report explains, because redistribution and resettlement were such pressing issues in post-Independence Kenya, the government maintained a degree of control over the market-based process to ensure stimulation of agricultural production or to resettle the landless (2004, 124).

Forestlands, wetlands, riparian reserves, national parks, game reserves, and other protected areas

Forestlands

This category covers lands that are "gazetted and protected ... due to their ecological, cultural, and strategic value and should never be allocated to private individuals unless the public interest dictates otherwise" (KLA 2006b, 5). In 1895, forestland represented approximately 30% of Kenya's overall landmass; in 1964, a mere 3% of the land mass was under closed canopy forests (Ibid.). This degradation has continued: at present, total forest cover has been reduced to 1.7% of Kenya's total landmass (compared with the recommended 10% for a nation (UNFF 1992)), which suggests the illegal and/or irregular allocation of 1.3% of Kenya's scarce and protected forest cover.

Since the publication of the Ndung'u Commission Report (2004) and the KLA report (2006), the President has assented to the Forest Act 2005, which has changed the rules on administration for this category of land. Under the previous legislation – the Forest Act Cap 385 – which was active at the time when vast amounts of gazetted and protected forestlands were grabbed, the Minister in charge of forests was "empowered to alter forest boundaries by publishing the intent to do so in the Kenya Gazette providing 28 days notice. The area for excision must be surveyed and a boundary plan drawn and approved by the Chief Conservator of Forests before it is excised" (KLA 2006b, 7).

This process, and publication in the gazette, were meant to allow for public reaction to the decision. However, Kaptoyo and Athman note that, although the Minister's powers in this process were not absolute, and all excisions were meant to be in consideration of the public interest, "the minister in charge of environment was considered infallible, and his/her decision could not be challenged" (Kaptoyo and Athman, undated, 1). The authors also highlight the fact that the decision-makers (i.e. the Minister and the Chief Conservator) were not required to respond to objections to excision plans, which significantly reduced the accountability and transparency of these transactions. The new legislation calls for increased public consultation and stakeholder inclusion in decisions affecting various aspects of forest protection, particularly excision.

Wetlands

This type of land is considered integral to Kenya's ecosystem, as a water resource. By definition,[19] wetlands are found where the water table is near the land surface and where

[19] Kenya uses the Ramsar Convention definition: "Wetlands include areas of marsh, fen, peatland, or water, whether natural or artificial, permanent or temporary, with water that is static, flowing, fresh, brackish water or salt, including areas of marine water the depth of which does not exceed six metres." (Ramsar Convention 2006).

water is the controlling factor of plant and animal life. This category of land includes riparian and coastal zones and lagoons where tidal variation is less than six metres, as well as land bordering rivers, mangroves, peatlands, and coral reefs (Ramsar Convention 2006 (originally drafted 1971)).

National parks and game reserves

This category comprises land set aside for the preservation of nature and game, both integral parts of Kenya's ecosystem (and both crucial to the national economy through tourism revenues). National parks are controlled by the central government and are considered protected areas; the relevant local authorities manage game reserves, according to the Wildlife (Conservation and Management) Act (Ndung'u Commission Report 2004, 150).

Forests, wetlands, national parks, and game reserves are protected by the "precautionary principle", which aims to avoid irreparable damage to national natural resources. This forms part of the public trust doctrine, explained above, wherein the government has "an inalienable duty to protect the common wealth" (Ibid.) and, in this case, natural land and ecosystem resources.

All of the above categories of land have fallen victim to elite land grabbing since Independence. The pace of this illegal and detrimental practice accelerated in the 1990s and continues into the present, despite attempts by the general public, civil society, and academics to sound the alarm. How then do Kenya's elites continue to access land, a resource of national interest and one subject to controversy, despite heightened public awareness of the issue?

4 How do Kenya's elites access land?

The strategies used to grab land are often dependent on the type of land in question. Several of these processes include abuses of official power at one level or another (ranging from the highest offices to local-level administration), wherein legal avenues for land allocation are manipulated by either "tailoring" or completely disregarding regulations and guidelines to meet the desired (often illegal or irregular) ends. Through these means, significant tracts of public and trust land have been allocated to elites and members of politically influential families, entities, and/or ethnic groups. Often this land is then fraudulently sold on to third parties, who may either be complicit in the illegal/irregular transaction or wholly unaware of the irregularities. Examples of both the former and the latter are provided in this section.

Processes used to grab land

The processes used to illegally and/or irregularly allocate and acquire land range from the questionable to the irregular, fraudulent, and blatantly illegal (Bruce 2009). A recurring characteristic is that processes often involve the manipulation of existing laws and procedures. The Ndung'u Commission Report summarises eight main processes used by elites in illegally/irregularly acquiring public land:

- Direct allocation by the President and/or the Commissioner of Lands, contrary to the law;
- Illegal surrender of ministry and state corporation land and subsequent illegal allocations;
- Invasion of government and trust lands and subsequent acquisition of titles to it, contrary to the law;
- Allocation of land reserved for state corporations or ministries;
- Allocation of trust land contrary to the Constitution and related laws;
- Allocation of land reserved for public purposes;
- Allocation of riparian reserves and sites; and
- Allocation of land compulsorily acquired for the public interest to individuals or companies.

All of the eight listed methods of illegal/irregular land acquisition are worrying, as they all imply either an abuse of public office, an abandonment of the public trust doctrine (implying decisions made in the public interest), illegal activity, or all of these. The sections below highlight the most common means of illegal/irregular land allocation and acquisition and provide examples of these processes being employed to access public land.

Letters of allotment

A letter of allotment is a document offered in the process by which the government seeks to allocate land to an individual or company. This letter is drafted once a candidate has been approved to receive the land, and constitutes an offer that contains the conditions of the land transfer. The letter and its conditions expire 30 days after it has been issued. Although not a legal requirement, the letter of allotment is a binding document (for the stipulated 30 days) and is protected under Kenya's contract laws (Ndung'u Commission Report 2004). For the purposes of the present report, there are three important considerations for the issue of a letter of allotment:

- First, the transfer of the land in question via a letter of allotment must be made **in consideration of the public interest**;
- Second, a letter of allotment, i.e. the letter and its contents (offer and conditions), are valid only for the person to whom the letter is addressed, and the offer and conditions cannot be sold or transferred to another party (whether an individual or a company);
- Finally, the letter states that the land cannot be sold or used for purposes not stated in the letter, without the consent of the Commissioner of Lands. Any deviations from the original letter must be considered by the Commissioner with regards to the development conditions contained in the title deed for the land in question.

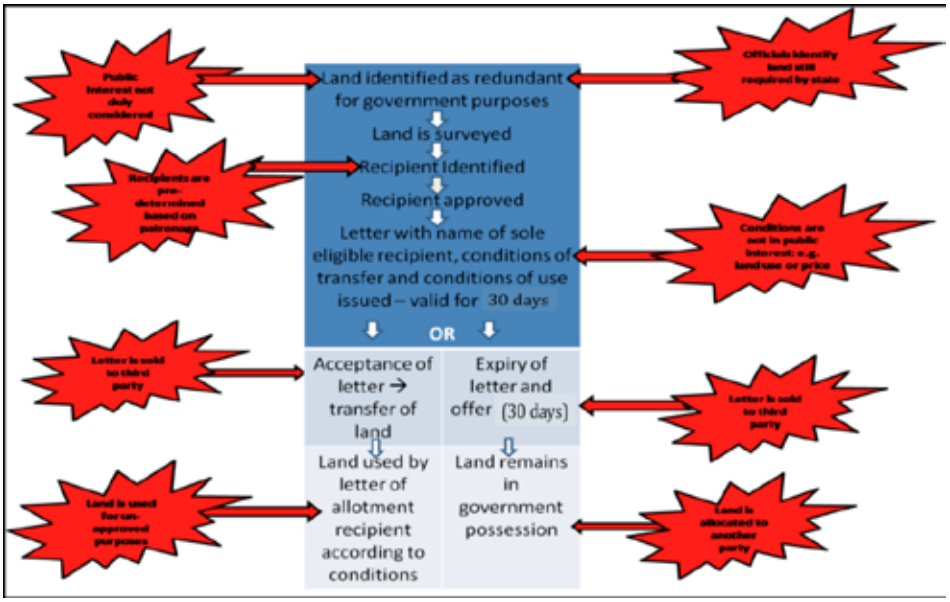
Abuse of letters of allotment often occurs when these documents have "been institutionalized as representing an interest in land capable of being bought and sold" (Ndung'u Commission Report 2004, 19). Thus:

> "On obtaining a letter of allotment from the Commissioner of Lands, the prospective allottee will sell it to a purchaser as if the letter itself were land at a premium. The purchaser then would assume responsibility for paying the Government all levies and charges, and obtain the title in his/her name. Thus, the original allottee would not feature anywhere in the title deeds that are open for examination by the public…" (Ibid.).

An attempt to legitimise this practice was made by the Minister of Lands and Settlement in Legal Notice 305 of 1994. However, this notice was itself illegal, as a minister cannot amend an Act: any amendments to an Act must pass through Parliament.

In land-grabbing schemes, letters of allotment are often sold for prices that drastically exceed market value (up to 8.5 times as much). Even if sold at market value, this constitutes an illegal sale of land and interests therein. Abuse of letters of allotment is commonly seen in the acquisition of urban, parastatal, and forestland. Figure 1 illustrates the process and highlights where the inconsistencies generally occur that can lead to land grabbing, while Box 1 highlights just one example of this abuse.

Figure 1: How letters of allotment are used to grab land



Source: author 2010, after KLA (2006a and b) and the Ndung'u Commission Report (2004)

Box 1: The allocation of the Westlands Market, 1994

In the 1960s a delegation of small business people asked the Government to designate an official marketplace in the upmarket area of Westlands in Nairobi, because of high public demand. The Government purchased the land and granted the plot to the Nairobi City Council in 1965 on a 99-year lease, with the stipulations that it be used as a market and (as noted on the title deed) that it could not be sub-divided or sold. The Council built stalls and rented them out to local business people. Other traders were invited to erect their own stalls when the 93 built proved to be insufficient.

The market endured several significant setbacks, including a police raid and demolition squad in 1974 (an order from the Nairobi City Commission that was reversed after an appeal to the President) and a fire in 1983 that gutted it, after which the traders reconstructed their stalls.

The biggest threat came, however, in 1994 when a surveying team arrived in prepa-

ration for the sub-division of the market land (deemed "undeveloped land") into plots for private developers, on behalf of its "new owner", a former Nairobi City Commissioner. The Town Clerk had issued the former commissioner a letter of allotment for the land (on the stationery of the then defunct Nairobi City Commission). The letter requested a payment of USD 171,700 for land valued at USD 1 million because of its central location. The payment was made out to the Nairobi City Council, but the receipt was issued by the defunct Nairobi City Commission. This, therefore, was a fraudulent transaction on several levels: the Town Clerk had no jurisdiction to assign a letter of allotment; the sale of such land should have been carried out through public auction unless otherwise instructed by the Commissioner of Lands; the decision was not made in the public interest; and the receipt for the payment was made by a defunct body.

The results of this illegal allocation were a series of violent attacks on the market by police and hired security men on the part of the "new owner" and violent retribution on the part of the market business people. The case was eventually brought to court.

Source: summarised from Klopp 2000, 10

The processes outlined above and in Box 1 are alarming enough, but another particularly disturbing aspect of the abuse of letters of allotment by the "politically correct" is that the third party to whom they sell the interest in the land via the letter of allotment is often not Kenyan. In the example of the Westlands Market, the City Commissioner who had been offered the illegal letter of allotment was representing the interests of a foreign company, and was acting as a broker to facilitate the deal for this company to access land slated for public use by the Kenyan people (Klopp 2000).[20]

[20] At the time of Klopp's publication, the court case was still pending; despite the author's research efforts, updated information regarding the case was not available.

Illegal/irregular allocations/appropriations of alienated public land

Similar to abuses via letters of allotment, processes have been used to irregularly allocate alienated public land usually held by state corporations/parastatals or ministries. The KLA report on "The Plunder of State Corporation and Protected Public Lands" (2006) highlights this phenomenon, while the Ndung'u Commission Report cites the loss of thousands of hectares due to these allocations.[21] The KLA report (2006b, 7) summarises the schemes used to allocate alienated public land as follows:

- Unrequested reallocation of title deeds by the Commissioner of Lands for parastatal land. This involves title deeds being issued, without the knowledge, consent, or request of the parastatal, to high-ranking private or public individuals;
- The surrender of high-value parastatal or ministry land to the Commissioner of Lands under the pretext of disuse, followed closely by a private application for allocation of the land, which is most often granted;
- Negligence in managing parastatals with valuable land to the point where they enter receivership/liquidation; the parastatal's assets, most importantly land, are then sold at far below market value to waiting investors (examples include the Kenya Food and Chemical Corporation Limited);
- Several parastatals have been used as land brokering entities, though this was not in any way related to their legal function. In these cases, as soon as land was allocated to the parastatal to execute its mandate, it was sold or transferred to private individuals or companies;
- Direct sales of land by ministries and parastatals of land they have been allocated to fulfil an official mandate to private individuals or companies (when it is required to be returned to the state if not required for the mandate);
- Misappropriation of alienated public land by private individuals upon the legal split of a ministry or parastatal, where the land should rightfully have been transferred to the newly formed entity(ies); and
- Invasion and fencing off of alienated public land by private cartels, which have then made an uncontested claim to the land.

These processes often constitute an abuse of public office and the perversion of legal processes to facilitate private gain and to promote political patronage, often at great expense to the Kenyan public, as noted in Box 2.

[21] The Ndung'u Commission summonsed the records of 140 state corporations in the course of its nine-month investigation. Of the 140 corporations, 95 provided information, albeit often incomplete and/or irrelevant (KLA 2006).

Box 2: The irregular allocation of Agricultural Development Corporation farmland

The Agricultural Development Corporation (ADC) is a parastatal established in 1965 for the purpose of supporting and developing agricultural enterprises in Kenya. For 26 years, the ADC fulfilled its mandate of providing high-quality inputs and produce (animal and crop) for Kenya's agricultural sector. In 2006 it was still the country's most significant maize seed producer, providing approximately 40% of all seeds.

In 1985, the Office of the President assumed authority over the ADC; authority was previously vested in the Ministry of Agriculture. In 1991, the ADC Act was amended, broadening the mandate of the corporation and making it more general (less production-oriented), thereby decreasing its need for land. This was followed by questionable "sales" of over 58,000 hectares of ADC land to private individuals, companies, religious groups, and politicians (lists of beneficiaries can be found in the Ndung'u Commission Report (2004) and the KLA reports (2006a and b)). The following table provides examples of these transactions, in which only a fraction of the estimated market value was paid for land.

Farm	Locality	Hectares	Sold for (Ksh)	Est. market value (Ksh)
Astra	Machakos	2,233	3,310,920	1,103,600,000
Astra	Machakos	2,232	3,309,720	1,103,200,000
Edge	Trans Nzola	1,008	286,000	498,000
Edge	Usain Gishu	361	240,000	178,600,000
Edge	Nakuru	937	526,290	463,000,000
Lusiru	Nakuru	1,141	405,000	564,000,000
Lusiru	Usain Gishu	405	324,400	200,000,000
Waterfalls	Trans Nzola	322	96,000	159,000,000
S&B	Nakuru	389	290,770	192,200,000
S&B	Trans Nzola	711	620,800	351,200,000
Quintin	Trans Nzola	318	866,800	157,400,000
Quintin	Nakuru	456	248,683	225,200,000
Avondale	Nakuru	1,502	2,655,320	742,400,000
Avondale	Nakuru	60	397,000	29,866,000
Fensbo	Nakuru	494	401,841	2,442,000
Tarkwet	Nakuru	501	1,700,000	247,600,000
Kiboko	Nakuru	324	188,680	160,000,000
Lelechwet	Nakuru	767	516,286	379,000,000
Pele	Nakuru	145	125,000	71,600,000
Murten	Nakuru	98	142,000	48,400,000
High Over	Nakuru	300	500,000	148,200,000

Garbutt	Nakuru	298	310,000	147,400,000
Baraka	Nakuru	421	13,000	208,000,000
Broatich	Nkuru	450	640,000	222,400,000
Broatich	Trans Nzola	2,792	340,000	1,397,800,000
Broatich	Trans Nzola	559	310,000	276,000,000
Kibomet	Trans Nzola	2,045	2,451,000	1,010,600,000
Kaboya	Trans Nzola	500	327,000	247,000,000
Kaboya	Usain Gishu	417	300,000	206,000,000

Estimated total losses Ksh 10,220,763,490

Later, in 1994 and 1996, 15 additional ADC farms were earmarked for settlement schemes; however, it was discovered that this "settlement" land had been allocated largely to private individuals, companies, and politicians who were not, of course, the intended beneficiaries of the settlement schemes. The estimated value of these farms was Ksh 6.8 billion, bringing the estimated value of lost ADC land to Ksh 18.5 billion (estimated market value calculated by KLA, based on average land prices in the areas of the farms sold, based on real estate announcements and newspaper adverts).

Source: summarised from KLA report 'The Plunder of Kenya's State Corporations and Protected Land, Vol. 2' (2006, 9-10). Table reproduced

Purchase of illegally acquired public land by state corporations/parastatals

This is the process by which many of the members of Kenyan elites involved in land grabbing have made exorbitant profits at the expense of the state. In this process, "state corporations became captive buyers of land from politically connected allottees" (Ndung'u, in KLA 2006a, 19). The state entity most implicated in this process is the National Social Security Fund (NSSF), which spent Ksh 30 billion within a period of five years (1990–1995) on "both developed and undeveloped plots and other land of little value in various parts of the country" (KLA 2006a, 19).

In this process, alienated government land is divested through a letter of allotment to an individual, on the pretext that it is no longer required for the mandate of the ministry or parastatal. A notification is then issued by an official in another department or parastatal, suggesting that additional land, often the land recently allotted, should be acquired for the fulfilment of this organisation's mandate. The land is then purchased from the allottee at an exorbitant price. Thus the Kenyan public is being doubly defrauded through the loss of land and the wanton waste of public funds in reacquiring the same land. This process, outlined in Figure 2, has been used repeatedly to transfer ownership of both alienated and unalienated public land, in particular in cases concerning land owned by the Kenya Railways Corporation, the Kenya Veterinary Vaccines Production Institute, the Kenya Pipeline Company, and the Kenya Port Authority. The KLA report compiled a list of

what it deemed to be the "ten most outrageous purchases" using this land grabbing and enrichment process; these transactions are summarised in Table 1.

Table 1: Ten "most outrageous" land purchases made by the National Social Security Fund (NSSF)

Reacquisition price paid by NSSF (Ksh)	Acres	Location	NSSF's purchase price per acre (Ksh)	Estimated market price (Ksh)	Estimated market value (Ksh)	Loss (Ksh)
975,275,000	224.91	Nairobi	4,336,282	1,000,000	224,910,420	750,364,580
752,000,000	40.05	Nairobi	18,774,228	1,000,000	40,054,910	711,945, 090
576,028,000	49.42	Athi River	11,655,767	300,000	14,826,000	561,202,000
382,385,133	20.26	Nairobi	18,871,847	4,000,000	81,048,800	301,336,333
320,000,000	120.72	Mavoko	2,650,747	300,000	36,216,212	283,783,789
543,492,466	2.96	Nairobi	183,749,697	100,000,000	295,778,700	247,713,766
233,000,000	9.86	Mavoko	22,612,594	200,000	1,972,352	221,027,648
225,518,937	1.99	Nairobi	113,149,347	4,000,000	7,972,434	217,546,503
272,909,235	336.06	Mavoko	812,095	300,000	100,816,800	172,092,453
229,248,176	21.64	Mombasa	10,593,225	3,000,000	64,923,054	164,325,122
219,444,836	21.63	Mombasa	10,144,860	3,000,000	64,893,402	154,551,434
150,000,000	15.00	Nairobi	10,000,687	2,500,000	37,497,425	112,502,575
91,410,000	9.88	Mavoko	200,000	200,000	1,976,800	89,433,200
126,949,750	11.12	Nairobi	3,500,000	3,500,000	38,918,250	88,031,500
79,000,000	3.80	Mombasa	3,000,000	3,000,000	11,401,194	67,598,806
Total						
5,166,661,533	**889**	**-**	**448,803,810**	**-**	**1,023,206,753**	**4,143,454,780**

Source: adapted from KLA (2006a)

Figure 2 below outlines the process of divesting public land, in which irregularities commonly occur.

Figure 2: State purchase of illegally/irregularly allocated public land

Source: author 2010, after KLA (2006a and b) and Ndung'u Commission Report (2004)

Allocation of land by unauthorised persons

Investigations into land grabbing indicate that civil servants, ranging from national- to local-level government, have exercised extensive improper influence over the allocation of land. Chiefs, District Officers, District Commissioners, Provincial Commissioners, and Members of Parliament, none of whom have powers of allocation, are among those implicated. Examples of abuses of office include situations where:

- Chiefs and local authorities meant to manage trust land on behalf of their communities have dealt with land as though it was their own private property, by selling, leasing, and/or allocating it to individuals, with no regard for the public interest (Ndung'u Commission Report 2004);
- The sale or transfer of township lands has been undertaken by Local and District Officers and Commissioners. Township and other forms of urban land held by the state can be sold only through public auction, unless specifically designated for sale or transfer (under special circumstances) by the President or the Commissioner of Lands. Transfers, sales, and letters of allotment for township or urban land reserved for the public interest and for uses that have been approved by any other public official are irregular and/or illegal.

The allocation of land by unauthorised parties also concerns the Commissioner of Lands in the allocation of unalienated public land. The Ndung'u Commission Report states that "…often the Commissioner of Lands made direct transfers of land to individuals or companies without … written authority from the President". This is a significant overstepping of responsibility, as the Commissioner only has the authority to allocate land with Presidential instruction or in the circumstances explained earlier, which mainly concern development in the public interest (see section "Who can allocate Kenya's public land?").

Where unauthorised (as well as authorised) persons have gone beyond their jurisdiction regarding land allocations, it often emerges that land has also been allocated to "undeserving individuals", i.e. persons not eligible for allocation of the land in question, or access to it. Box 3 outlines an example of such abuses experienced at the hands of local chiefs and district officers by the community of Kiambiu in Nairobi.

Box 3: A lonely community battle against land grabbing and harassment – Kiambiu

Located in the Eastleigh South suburb of Nairobi, the Kiambiu settlement has been inhabited since the 1950s. In 1994, the Commissioner of Lands authorised the upgrading of the settlement as the population continued to increase (population estimated at 65,000 by 2002). Both alienated and unalienated public land was made available for the upgrading process. In July 2001, the community lodged a first formal complaint with the Minister of Local Government concerning the tilling and illegal use of the land set aside for upgrading purposes; this land included a local sports

field.

Later in 2001, the community lodged another complaint against the local chief and a local councillor, who were issuing "letters of allotment" only upon payment of Ksh 5,000. When clarification was sought, the area's MP confirmed the fraudulent sale of land, rightfully belonging to the community, by the chief and the councillor. It was later discovered that these individuals were also selling letters of allotment to non-residents.

It emerged only in 2003 that, when Nairobi City Council approved the upgrading plan, community involvement had been requested in formulating the draft development plans. However, when trying to implement this partnership and plan the upgrading work, community members have faced harassment and even arrest by the local traditional authorities. Despite formal complaints between 2001 and 2005 to the City Council, the Ministry of Public Works, Roads and Housing, and the Ministry of Lands and Settlement regarding this interference, and an appeal to the Ndung'u Commission, Kiambiu has seen little action on its grievances and little development in the community.

Source: summarised from the Centre on Housing Rights and Evictions (COHRE) publication "Listening to the Poor? Housing Rights in Nairobi, Kenya"' (2006)

Unjustified excisions of protected areas

This process is well explained and highlighted in the KLA publication on state corporations and protected lands (2006b). As explained earlier, protected areas are essential for the well-being of all Kenyans, as they play a major role in ecological balance, water provision, and prevention of soil degradation. Their legislated protection has not, however, protected these areas from the people meant to safeguard them. Both the KLA report and the Ndung'u Commission Report outline the excision of extensive tracts of Kenya's protected forestland. The latter report also highlights the illegal/irregular allocations of wetlands and game reserves.

The way in which forestland has been illegally and irregularly excised from protection and later allocated to private beneficiaries is explained by Southall as having taken place "without any reference to scientific considerations or under the guise of settlement schemes" (2005, 146). The KLA report builds on this analysis, citing the disregard of such activities for social, ecological, and economic implications.

At the peak of forestland grabbing in Kenya (before 2007, when the Forest Act 2005 was finally enacted),[22] the Forest Act (Cap 385) along with the Government Lands Act dictated the management of Kenya's protected forestland. Under these laws, the Minister of Forests and Wildlife was permitted to alter forest boundaries through "de-gazettement" in the national gazette. The notice needed to be in the public domain for 28 days prior to any formal alteration; this was meant to allow concerned parties to voice opinions on the proposition. The KLA report on forests explains the proper procedures for excisions: "The area intended for excision must be surveyed and a boundary plan drawn and approved by the Chief Conservator of Forests before it is excised. The forest is deemed excised after the expiry of the 28 days notice through the issuance of a legal notice by the Minister" (KLA 2006b, 7).

Table 2: Kenya's forestland excisions, 1963–2004

Category of excision	Area (ha)
Excisions after boundary plans, gazette notices, and legal notices	141,703.6
Excisions by way of exchanges	911.4
Excisions before finalising the de-gazettement process	76,612.2
Provisional excisions challenged in court	67,724.6
Excisions to create Nyayo Tea Zones	11,000
Excisions from Ngong and Karura Forests	1,125.5
Total	**299,077.5**

Source: Ndung'u Commission Report (2004), 151-152

[22] The Forest Act (2005), notes the KLA, "... makes the process of conversion of a forest area into alternative use more stringent" (2006, 6).

In 1999 the Environmental Management and Coordination Act made environmental impact assessments obligatory for any major changes in land use (Ibid.). Despite the processes and protective legislation in place, significant tracts of protected forestland were excised – much of it controversially. Table 2 outlines the excisions of protected forestland from 1963 to 2004: these clearly demonstrate that the processes and legislation to protect forestland have been breached through blatant disregard or manipulation of these safeguards, as is outlined in further detail below.

- When land grabbing was at its peak (the 1980s to early 2000s), excisions executed "under the guise of settlement schemes in circumstances which constitute illegal allocations" were relatively common (Ndung'u Commission Report 2004, 153). These included exchanges of land between the Forest Department and individuals, which were not scientifically justified and which involved transfers of large tracts of forestland in exchange for significantly smaller and less valuable pieces of land. In many cases, the Forest Department never actually acquired the land it was supposed to get from the exchange. Further, these forestlands turned settlement schemes, in many cases, were still gazetted forestlands, which "amounts to an outright illegality" (Ibid.).
- Also of significant concern is the disinheritance and displacement of forest-dependent minorities as the result of illegal/irregular allocations through misguided resettlement schemes. This process is inextricably linked to the process of excisions under the guise of settlement schemes described above. However, it warrants separate mention, as the impact on both the land and communities in question has been devastating, as can be seen in the ongoing eviction of forest-dwelling communities. The restoration of forest cover through the cancellation of all irregular/illegal titles is a recommendation of the Ndung'u Commission Report, but questions have been raised "as to whether the evictions were being carried out as recommended by the Ndung'u Commission" (KLA 2006b, 4). The historical neglect of Kenya's forest-dwelling communities makes them a highly vulnerable segment of the population. As apparent compensation, settlement schemes have been implemented in excised forest areas. In several of these settlement schemes, the excision was not published in the gazette as required by law, illegal surveys took place, and title deeds were drafted. However, it has emerged that very few of the intended beneficiaries from forest-dwelling communities actually received title deeds – rather these were given to "politically correct" individuals for development purposes. Thus in this process several laws were broken, including the then current Forest Lands Act and the Government Lands Act, along with the environmental protection legislation, which stipulates that protected land can be allocated only to landless settlers (KLA 2006b). Box 4 outlines one such example concerning the Ogiek people and their supposed resettlement in the Nakuru/Olenguruone/Kiptagich forest extension in southwest Kenya.
- Another way in which protected land is illegally excised is through the creation of deliberate inconsistencies between the boundaries of the survey and boundary plan and the title issued. This is used to give the impression that the proper

process has been followed, while reserving the omitted land for allocation/sale to "private developers". The KLA posits that the "belated issuance of selective title deeds to Karura and Ngong forests … deliberately excluded a total area of 1125.5 ha from titled areas" (KLA 2006).

Box 4: The "resettlement" of the forest-dwelling Ogiek community

Kenya's forest-dwelling population is defined as those groups whose livelihoods and ways of life depend on forest habitat. In the country's ethnic mosaic, the Ogiek forest-dwelling community is one such minority group that has been disadvantaged throughout colonial and post-Independence history.

In 1997 a resettlement scheme to benefit the Ogiek was established in the Nakuru/Olenguruone/Kiptagich Forest Extension, comprising 1,812 hectares of forestland in the Mau Forest Complex in southwest Kenya. However, few landless Ogiek, the intended beneficiaries, received titles to the excised land. Rather, at the time of the resettlement scheme prominent individuals and companies (including a few prominent Ogieks) were provided with titles to an outgrower tea zone, which extended to 937.7 hectares – half of the land allegedly set aside for resettlement of the Ogiek community.

The Ndung'u Commission Report later established that titles issued under this settlement scheme were invalid, as the land was never gazetted for excision, thus breaching both the Forest Lands Act and the Government Lands Act. The Ndung'u Report recommends the revocation of titles and land allocated illegally.

In 2005, evictions commenced of the Ogiek and other beneficiaries from this and other settlement schemes that were used to disguise land grabbing. It is estimated that 10,000 households (approximately 50,000 people) were affected by these evictions – the majority of whom were unaware of any irregularities at the time of resettlement. The KLA, along with human rights and civil society organisations, has issued a handbook containing guidelines for evictions.

Source: summarised from the Ndung'u Commission Report (2004), 154-155; "Nowhere to go: Forced evictions in Mau Forest, Kenya" (2007)

Illegal excisions of protected forestland also took place during the process of adjudication of trust land throughout the country. In this process, trust land (i.e. community) land was allocated to individuals and become private land. However, irregularities were detected concerning areas of protected land, including forests and wetlands – particularly water catchment areas, steep slopes, hills, and marshes. This was land that was not eligible for the process of adjudication, but was bundled with the land adjudicated to the private ownership of individuals or companies – who were often not eligible to receive parcels of trust land as they were not community members. Furthermore, according to the Report

of the Inter-Ministerial Committee on Forest Excisions, 16% of any adjudicated section of forest area should be retained as forests, and this has not been the case. The Ndung'u Commission Report estimates that, had the legal procedures been followed and enforced, 119,493 hectares of gazetted forestland could have been conserved between 1963 and 2005.

Who is implicated in Kenya's land-grabbing schemes?

There are two types of party implicated in Kenya's land-grabbing schemes:

- Those facilitating land grabbing by virtue of their elite status in Kenya's private or public sectors;
- Those benefiting from the schemes through the accumulation of land and monetary wealth through the illegal sale of land.

Those implicated in the land-grabbing phenomenon in post-Independence Kenya range from the highest levels of national public office to local-level leaders, "politically correct" (i.e. politically connected) individuals and companies, parastatals, state-owned corporations, wealthy Kenyan and international "developers", and various Ministries.

Beneficiaries of land grabbing are highly embedded in Kenya's political structures and in the highest echelons of its socio-economic classes. However, the ways in which they benefit vary, involving either accumulation of land for their own use, the sale of land for the accumulation of wealth, or – in the current global context of foreign land acquisition, perhaps most alarmingly – through the brokering of land acquisition on behalf of foreign investors. For example, as noted above, the individual who received the letter of allotment for the Westlands Market in Nairobi was actually acting on behalf of foreign investors.

Tables 3 and 4 give an indication of how embedded Kenya's political, business, and social elites have become in the land-grabbing phenomenon. Table 3 addresses allocations of land of the Kenya Agricultural Research Institute (KARI), and Table 4 the allocations of land of the Agricultural Development Corporation (ADC).

Table 3: Positions of recipients benefiting from the irregular allocation of KARI land

Position of allottee	Allocation reference	Hectares	Value (Ksh)
Former Director of Land Adjudication	LR.10/94/42/13	20.2	15,003,912.00
Former Director of Agriculture	LR.10/94/42/12	20.2	15,003,912
Former District Commissioner	LR.10/94/42/10	8	6,004,530
CEO, Export Processing Zones	LR.10/94/42/9	8	6,004,530
Former Officer in Charge of Police Division, Kitale	LR.10/94/42/8	8	6,004,530
Former MP	LR.10/94/42/7	8	6,004,530
Former Provincial Commissioner	LR.10/94/42/6	8	6,004,530
Former Ambassador	LR.10/94/42/5	8	6,004,530
Former MP	LR.10/94/42/4	8	6,004,530
Bishop, Africa Inland Church	LR.10/94/42/3	8	6,004,530
Former MP	LR.10/94/42/2	8	6,004,530
Former MP	LR.10/94/42/1	8	6,004,530

Source: adapted from KLA (2006b), 15

Table 4: Positions of recipients benefiting from the irregular allocation of ADC farmland

Position of allottee	Farm	Allocation reference	Hectares	Value (Ksh)
Not specified	Nyota	Various	98.6	48,720,000
Vice President	Nyota	Various	97.5	48,200,000
Not specified	Jabali	L.R.No.118/1/21	52.6	45,500,000
Not specified	Zea	L.R.No.118/1/21	50.6	43,750,000
Not specified	Zea/Jabali	Various	37.6	32,550,000
Commissioner of Prisons	Zea	L.R.No.118/1/21	36.4	31,500,000
District Commissioner	Jabali	L.R.No.118/1/20	36.4	31,500,000
Minister	Nyota	LR327/139	63.5	31,400,000
Minister	Sirikwa	L.R.No.118/1/21	58.7	29,000,000
Permanent Secretary	Jabali	L.R.No.118/1/21	32.4	28,000,000
Judge	Tall Trees	L.R.No.118/1/20	34.4	25,500,000
Minister	Jabali	L.R.No.118/1/21	29.3	25,375,000
Not specified	Jabali	L.R.No.118/1/20	23.5	20,300,000
Not specified	Milimani	L.R.No.118/1/20	20.2	20,000,000
MP	Milimani	L.R.No.118/1/20	20.2	20,000,000
TOTAL (Ksh) 481,295,000				

Source: adapted from KLA (2006b)

The Ndung'u Commission Report names 726 registered companies that have benefited from land allocations that are either irregular or illegal. A further 95 companies, which have received land on paper, are named, but records of these companies' directors could not be found at the Registrar of Companies.

A number of companies, foreign governments, and religious organisations (for example, embassies and churches have been found to be located on illegally/irregularly allocated land), as well as individuals (particularly citizens involved in resettlement schemes) have contested their responsibility for holding a title that was irregularly issued, as they claim to have been the victims of the unscrupulous practices of others, including public officials. There is, indeed, often a fine line between voluntarily turning a blind eye to illegal/irregular practices and innocently falling victim to unscrupulous actors in the land "market".

However, it does emerge from the investigations conducted by the Ndung'u Commission Report (2004) and particularly by the KLA reports (2006a and b) that many of the companies and individuals benefiting on a large scale from these transactions are politically well connected, and are therefore unlikely victims, as Tables 3 and 4 demonstrate. There are important and difficult distinctions to be made, however, between the types of large-scale beneficiary listed here and those who believed they were bona fide beneficiaries of government mandates such as community resettlement schemes, and who are thus actually victims of these unscrupulous practices and their perpetrators.

5 Identifying the impacts and victims of the land-grabbing phenomenon

Impacts

The human rights NGO Foodfirst Information and Action Network (FIAN, 2010) explains that land grabbing is a long-term activity with long-term impacts. These long-term impacts are currently emerging, as land grabbing has increased in intensity through the 1980s and 1990s to the present. Because the land involved is often uninhabited and (at the time of the initial transaction) public land, the impacts of the phenomenon often go undetected for long periods of time – but this is not to say that its impacts and victims are negligible or non-existent. This is particularly true of the following types of land, which are often subject to grabbing, probably because transactions can be conducted without direct reaction from the public:

- Parastatal/state corporation and ministry land;
- Uninhabited protected areas (riparian and forest reserves, wetlands, game reserves, and nature parks);
- Unalienated public land meant for future development and services in the public interest.

However, on land such as:

- Alienated urban/township land;
- Trust (now community) land (whether adjudicated or not); and
- Settlement scheme land,

the impacts of land grabbing are often felt immediately because they have impacts on citizens' homes and livelihoods – including scarcity of land, evictions, speculation, and increased ground rents. These often generate more of a coordinated reaction from the public compared with other, less direct impacts (e.g. environmental degradation).

For example, grabs of urban, township, trust, or resettlement land frequently result in evictions of residential and commercial occupants, as demonstrated by the example of the Westlands Market and the plight of the Ogiek people in the Maasai Mau forest. Because evictions directly affect people's homes and livelihoods, victims are vocal and awareness is raised. However, because much of the land concerned is unalienated public land or public land that has been "made available" and reallocated from parastatals or ministries to private individuals or companies, the grab often goes unnoticed in the short term.

Nevertheless, this practice has long-term impacts no matter what category of land is involved – including land scarcity (particularly of productive land), the development of land cartels in urban and rural areas, landlessness for poor people, cyclical poverty, skewed land ownership patterns (among ethnic groups, socio-economic classes, etc.), violence, prohibitive land prices due to speculation, undetected foreign ownership of land, mistrust of public officials and the system of land allocation itself, and threats to overall security of tenure as title deeds are called into question. Table 5 outlines the impacts and outcomes related to each of the types of land that are vulnerable to land grabbing.

Table 5: Outcomes and impacts of land grabbing

Type of land	Outcomes (short-term implications)	Impacts (long-term implications)
Urban, township, trust, and resettlement land	Evictions Cyclical poverty Unrest Speculation Undetected foreign ownership of high-value urban land	Unrest Violence High levels of internal displacement Urban sprawl Inflated land prices and ground rents
Parastatal/ministry land	Loss of substantial funds Unplanned and unregulated development Loss of needed land Speculation	Loss of substantial funds Missed opportunities for research Missed opportunities for development Inflation
Protected forests, riparian reserves, game reserves, and nature reserves	Evictions Ethnic unease Unregulated use of natural resources and exploitation of wildlife Speculation Undetected foreign ownership of land and valuable resources	Falls in water tables (with implications for downstream agriculture) Reductions in forest cover Soil degradation Less productive land (with implications for agriculture and wildlife habitats) Inflation

Source: author after KLA (2006a and b) and diverse sources

In addition, there are very significant economic impacts related to land grabbing. The KLA reports put a monetary value on the phenomenon (for parastatal and protected lands, including forests, up to 2006) of approximately Ksh 53 billion (KLA 2006b, 4). To provide some perspective, this figure represents approximately 6% of the national budget for the financial year 2009/2010 and 20% of the national budget for development spending.

Further, it is Ksh 11.2 billion more than the total aid contributions made to Kenya for the same year (Money Biz 2009). Thus the impacts of land grabbing are broadly felt in terms of direct impact on people (evictions, landlessness, and poverty), and indirect impacts on society as a whole (missed development opportunities, significant losses of economic and natural resources).

Who are the victims of land grabs?

There are different levels of loss linked to land grabbing. The KLA and the Ndung'u Commission reports suggest that the grabbing of land disadvantages the Kenyan public as a whole. This is based on the fact that the majority of the land affected is public land reserved for environmental and ecological reasons, development purposes, fulfilment of state entity mandates, or the provision of services – all of which are central to the public interest. Nevertheless, some Kenyans are more vulnerable to the direct and immediate impacts of land grabbing.

Land grabbing disproportionately victimises Kenya's poor. Because of the skewed land ownership patterns described in the introduction, many poor people in both rural and urban areas rent land, and the impacts of speculation on land values and subsequently on ground rents make them vulnerable to this trend. Further, because of the informal nature of many settlements – which offer little security of tenure – it becomes easy to evict people occupying what can be seen as high-value land in urban and peri-urban areas, where many poor Kenyans have their homes and livelihoods.

As discussed earlier, minority groups in Kenya experience negative impacts as a result of land grabbing. These communities have been "landless" (in the previously defined sense of the term) because of a lack of understanding of their needs and a lack of consideration given to them by successive land policies. Ethnic groups who rely on land and natural resources for their livelihoods are subject to heightened vulnerability to climactic and material shocks due to large-scale privatisation and fencing off of public or trust land – particularly semi-nomadic ethnic groups such as the Maasai, who rely on access to grazing land for their livelihoods, or forest-dwelling communities like the Ogiek.

In addition, Kenya has many internally displaced persons (IDPs), estimated to number approximately 650,000. There are several reasons for this situation, and land grabbing impacts on it in various ways. First, because of landlessness (which is exacerbated by land grabbing) people are unable to maintain secure living/tenure arrangements in their homelands. Second, many people are driven out of townships and trust areas because of ethnic tensions that relate to the distribution of both land and wealth among Kenya's various ethnic groups. Perceptions of favouritism along ethnic lines for political posts and business dealings, both of which have proved to be highly beneficial for some in terms of economic and other resources (including land), have led to violence.

The roles of land allocation and land grabbing in the 2007 post-election violence, which drastically increased the number of IDPs in Kenya, have not been fully explored, but they have been discussed as contributing factors in various publications and commentaries (Wiley 2009). The current rhetoric surrounding the new Constitution's land chapter; and the threats of reclamation of ancestral land by force – due to a misreading of the provision – demonstrate the volatility of the land question and its potential to lead to violence once again.

6 Policy developments and current debates on Kenya's land question

Since the publication of the Ndung'u Commission Report in 2004, the Kenyan public and many politicians have pushed for answers to the plethora of lingering questions it raised. While after the publication of the Commission's findings the Government's response hinted at immediate action, six years after its publication little progress has been made towards implementing its recommendations. The role of the 2007 post-election violence in delaying the enactment of policies cannot be overlooked, as the new power-sharing government that resulted has necessitated many changes in negotiating the roles of the respective parties and in its policy directions.

Nevertheless, the implementation of the recommendations of the Ndung'u Commission Report has been glacial in its pace, and has encountered many obstacles along the way. In June 2006, the Kenyan High Court ruled that the main recommendation, the establishment of a tribunal to examine the legality of allocations of public land, was unconstitutional (Nyamboga 2006). It was the position of the court that the powers required by the tribunal to undertake the necessary actions and investigations would require constitutional amendments to give this body a legal status. This step is ultimately proposed in the National Land Policy and the new Constitution, which open up statutory space for the creation of a National Lands Commission, the objective of which is the devolution of power over land administration to promote the participatory management of land resources, in contrast with the highly centralised powers currently vested in the President (Kariuki 2010).

With reference to the pace of implementation of the Commission's recommendations, at a 2009 event Mr. Ndung'u himself noted that, without the establishment of statutory bodies such as the National Lands Commission and a Land Titles Tribunal to deal with them, implementation would not be possible. He noted that it would take "centuries" to process the hundreds of cases in question, due to the protracted processes involved in challenging title deeds in the High Court (Njoroge 2009). The past inaction of the government in formulating these statutory bodies thus raises serious questions about the government's resolve to actually implement the Commission's recommendations.

However, as touched on above and developed below, these bodies are closer to becoming a reality through the new National Land Policy and the new Constitution.

Kenya's National Land Policy

The development of Kenya's National Land Policy has been a lengthy and difficult process, spanning five years from commencement to approval, and was severely hampered by the post-election violence of 2007. Consultation on the National Land Policy Formulation Process began in 2004, with the first National Stakeholders Workshop. In 2004 significant strides were made towards the conceptualisation of the National Land Policy, including the delivery of:

- Concept Paper, National Land Policy Formulation Process (March 2004);
- Summary of Land Policy Principles from the Report of the Njonjo Commission, Constitution of Kenya Review Commission, and National Civil Society Conference on Land Reform and the Land Question, National Land Policy Secretariat (April 2004);
- Inception Report, National Land Policy Formulation Process, Office of the Coordinator, National Land Policy Secretariat (October 2004); and
- National Land Policy Issues and Recommendations Report, Kenya Ministry of Lands and Housing, National Land Policy Secretariat (August 2005).

In June 2006, the Draft National Land Policy was approved in principle by the Cabinet, but was only scheduled to be presented to Parliament after the December 2007 elections (Adams and Palmer 2007); this was, of course, delayed by the violence that followed the elections. Finally, in December 2009 Parliament endorsed to the National Land Policy.

In terms of its impact on the ability of elites to acquire public land illegally and irregularly, the National Land Policy includes several important features, but these – in order to be effective in curbing land grabbing – must be accompanied and supported by the balanced and democratic development of institutional frameworks.

The first feature of the National Land Policy that addresses the issue of land grabbing is the provision for the devolution of the power of land allocation to land administration bodies at three levels – the National Land Commission, the District Land Boards, and Local Land Boards. This decentralisation (which removes sole decision-making power from the Presidential or Land Commissioner's office) should, in principle, strengthen the checks and balances on land allocations. In addition, these bodies will increase stakeholder participation in decisions regarding land use and allocation, a central objective of the policy.

Another feature of importance for land grabbing is the insistence that, while private property is to be respected under the policy (and the anticipated supporting policies), illegally or irregularly allocated private rights, particularly concerning government (public)

and trust (community) land, should not be protected under the National Land Policy or the Constitution. The National Land Policy states in Paragraph 61(e) that the Government will repossess any public land acquired illegally, which gives a statutory vehicle for the implementation of the Ndung'u Commission Report's recommendations. Of further importance to the land-grabbing issue, Paragraph 77 proposes repealing the notion of "absolute sanctity of first registration", which provides space to re-examine the previously unquestionable title deed documents that have protected illegal or irregular land allocations.

To limit the practice of elites brokering public land acquisitions for foreign interests (as noted in the example of Westlands Market), the National Land Policy limits foreign land access to leasehold arrangements, which (as with all leases under the policy) are not to exceed 99 years. While this practice is not unusual, the long-term implications of this provision, in terms of bona fide foreign investment and the potential need to compensate the holders of previous 999-year leases (if the 99-year leases are non-renewable) must be considered (Bruce 2009).

Finally, under Section 3.6, the policy makes provisions for "land issues requiring special intervention" to protect vulnerable groups, minority communities, pastoralists, IDPs, and refugees in terms of land access. This section allows for the sustainable use by minority groups of their traditional environments (e.g. forest-dwelling communities) and provides for the restitution of lost rights.

These are examples of the significant changes that the Kenyan government has committed itself to undertaking in order to tackle the phenomenon of land grabbing and to provide redress to the victims. However, several of these recommendations require constitutional amendments, some of which are included in the new Constitution, which is discussed below.

Kenya's new Constitution

As noted in the introduction to this paper, feverish debate surrounded the referendum held on 4 August 2010 that resulted in the passing of the new Constitution, with 66.9% of voters supporting the document. A central issue identified by opponents – many from among elite Kenyan society, church groups, and parliamentarians – to the new Constitution is its land chapter. Their opposition stems, they claim, from fears about the nationalisation of land and expropriation of foreign land in a land reform effort similar to that in Zimbabwe, the loss of ownership of private land, and the promotion of ethnically based land claims (which opponents of the Constitution insist will provoke further ethnic violence).[23]

In reality, the new Constitution is quite clear on most of these issues. The concerns over nationalisation emerge from the notion of "radical title", i.e. that all land is ultimately vested collectively in the people of Kenya as communities and individuals. It is true that both the Constitution and the National Land Policy could be more precise as to when radical title is vested in each of these entities, so as to guide the Courts when they are required to interpret this provision (Bruce 2009). However, radical title is something of a norm in Common Law (e.g. Crown Land in English Common Law), and is not akin to nationalisation.

On the contrary, the right to private property is enshrined in the Constitution. It is clearly stated in Chapter One Part 2 of the Constitution, Rights and Fundamental Freedoms, in Article 40, which, in summary, states that all persons are permitted to acquire and own land; that Parliament cannot enact any law that allows the State or any person to arbitrarily deprive a person of the right to property; and that deprivation or repossession of property (e.g. compulsory acquisition) is only to be done with justification of the public interest, and will be compensated.

It is important to note that these protections of the right to property are not applicable, under Article 40 Section 6 of the Constitution, if the land in question is found to have been unlawfully acquired (which would be determined through a free and fair hearing in which the owner could defend his/her ownership). Therefore, the protection of the right to own private property is not jeopardised for Kenyans, unless they cannot prove the legitimacy of their ownership – which surely raises concerns for those who have benefited from irregular or illegal allocations of public land.

Finally, concerns about the promotion of ethnically based land claims directly arising from the new Constitution, although overstated by the current opposition, are not without foundation. Because the term "community" used in the new Constitution and the National Land Policy is not clearly defined in either document, it is not entirely clear what constitutes a community for their purposes. This is also true of the reference to

[23] Agence France-Presse, 4 July 2010.

"ancestral land" in Article 63 of the Constitution, which deals with the classification of community land. However, the definitions of community land in the Constitution and the National Land Policy have the objective of protecting existing community land, and does not arbitrarily apply to land that is now either (legally) publicly or privately owned, as suggested by the opposition's claims about reclamation of land by force and eviction (see reference to Minister Machage in the introduction).

In the framework of the old Constitution, important provisions of the National Land Policy (decentralised land administration and dispute resolution; establishment of the National Land Commission; enquiries into the sanctity of first registration, etc.) could not be implemented. The provisions of the Constitution of Kenya, 2010 robustly anchor the National Land Policy and facilitate the redressing of the impacts of land graft; however, until necessary legislations are enacted to effect the provisions of the new constitution the country will remain vulnerable to large-scale illegal or irregular land acquisitions.

7 Recommendations and conclusions

Given the analysis of the trends, processes, stakeholders, and impacts of Kenya's land-grabbing phenomenon, and taking into consideration the recommendations advanced by both the KLA reports (2006a and b) and the Ndung'u Commission Report (2004), as well as the new land policy developments in Kenya since the publication of these reports, recommendations and conclusions are offered below.

Recommendations

The Kenyan Government has taken the important step of documenting the occurrence of public land grabs among the nation's elite through the Ndung'u Commission Report (2004); however, translation of this recognition into concrete action to rectify the land situation is long overdue. The efforts made by the Government to date to implement the necessary actions and changes should not be overlooked, yet the manner in which they are being implemented – without the full implementation of the National Land Policy as a guiding principle – leaves room for significant improvement.

Thus, the first recommendation is the full implementation of the National Land Policy and its required structures as soon as possible through the enactment of enforcement legislative framework – bearing in mind the necessary legislative changes required for this to be realised. The Ministry of Lands should begin drafting implementation plans, including filling positions and drafting complementary strategies for the implementation of the changes brought to land administration through the passing of the Constitution on 4 August 2010. Further delaying the implementation of the land policy will lead to stagnation of the inquiries into illegal and irregular land acquisitions that fuel tensions in the country, and could lead to continued land grabs through the existing legal loopholes that facilitate the processes described in this report, particularly in the absence of a land administration body (the National Land Commission) in addition to the heavily burdened Ministry of Land.

As recently as April 2010, the Minister of Lands announced the revocation of title deeds illegally/irregularly acquired through land grabbing. As the Ndung'u Commission Report suggests in its findings of as many as 200,000 illegal/irregular titles, this will be a difficult and protracted process. Insofar as the Ministry of Lands is able to implement the National

Land Policy and the recommendations of the Commission, distinct approaches should be established for the handling of irregular and/or illegal allocations that deal with opportunism versus bona fide or unknowing beneficiaries of these allocations (this calls into need the opportunity for a free and fair hearing into ownership, as provided for in the new Constitution). The implementation of the recommendations of the Ndung'u Commission Report, within the context of the National Land Policy, is fully supported; however, the further penalising of individuals or groups who have been drawn unwillingly into this process should be mitigated.

There is, admittedly, a fine line to be drawn in separating the illegitimate from the bona fide beneficiaries of land grabbing, yet it is a very important distinction to make. For example, in cases like that of the Ogiek community, where people have been resettled in improper areas by unscrupulous officials, there is room for the application of the compulsory acquisition provision contained in the National Land Policy that would compensate these communities (either financially or through redistribution of more appropriate land). However, the burden of proof to ensure the bona fide nature of the acquisition would have to be very strong by those claiming to be unknowing beneficiaries of illegal or irregular land allocations.

In addition, oversight of evictions and repossessions of land from vulnerable groups should be closely monitored by the Ministry of Lands and by civil society to ensure compliance with human rights standards and the applicable laws of the country. The KLA and other civil society organisations, for example, have contributed to guidelines for forest evictions that can be used as a measure to ensure the lawful and responsible treatment of these communities or individuals. In addition, the National Land Policy must be supported by thorough resettlement planning for such communities to ensure that they are acknowledged as respected groups within Kenyan society, to allay perceptions of preferential treatment on ethnic lines.

Linked to the above, but on the opposite end of the spectrum, it is recommended that the individuals and entities (companies, religious organisations, foreign delegations, etc.) named in the Ndung'u Commission Report who are suspected of benefiting illegally or irregularly from the allocation of public land using the processes described in this report (or similar) be required to commission a full title deed search (back to first registration) to show the process of ownership of the land and to trace its allocation.

Companies, whether genuine enterprises or fronts for land acquisition schemes, should be held accountable for their role in land grabbing on the grounds of corporate responsibility. Full title deed searches for new land allocations to entities, commissioned by these entities, could become a regular practice to promote corporate responsibility and good corporate governance with regards to land administration and public/private transparency. This recommendation is made in light of the significant role that entities (public, private, diplomatic, religious, etc.) appear to have played and the extent to which they have benefited from the land-grabbing processes outlined here. This would also assist with the final recommendation.

The final recommendation of the present report is the restoration of Kenya's land registration system. This must go beyond the digitising of the existing system, as proposed in the National Land Policy, and will involve extensive investigation into the title deeds that are currently registered. Part of this process might require a large-scale survey of Kenya's current public land resources to ascertain more precise and updated figures, and to allow comparison with pre-land grabbing figures and make solid justification for the repossession of land illegally or irregularly acquired. This survey should be conducted within the framework laid out in the National Land Policy.

The importance of this action derives from two polarised aspects of the land-grabbing phenomenon: first, the sanctity of first registration and the previously indisputable nature of a title deed, which facilitated land grabbing in the first place; and second, the instability that has been infused into Kenya's land administration system through land grabbing and illegal/irregular allocation. Overall security of tenure is inevitably weakened by false documents (titles, gazettes, and company registrations, as were noted in the Ndung'u Commission Report (2004) and KLA (2006a and b) reports) and by abuses of the highest offices in the country responsible for land management. This activity will assist in re-establishing the integrity and reliability of land tenure among Kenyans.

Conclusions

The Kenyan land-grabbing phenomenon differs in important respects from the land grabs currently attracting international attention (for example, the Daewoo affair in Madagascar), in that it has been Kenya's elites, as well as international interests, amassing land, and doing so at great public expense. The focus on publicly held land as a form of patronage for politically connected individuals from within both the public and private sectors – and from local to national levels – is largely due to an exhaustion of traditional forms of patronage in light of increased international monitoring of donor funds.

Public land, including state corporation/parastatal and ministry land, trust (community) land, and protected areas (including forests, wetlands, and game and nature reserves) that are meant to be held in trust by the Government under the principle of the public interest have been parcelled out indiscriminately to members of Kenyan elites, who have benefited through the accumulation of land and wealth and through relationships with foreign interests on whose behalf they have covertly acquired land. They have done this by systematically circumventing or distorting the processes and laws in place to protect these lands – notably letters of allotment and excisions of protected lands – and by abusing public offices and positions to illegally/irregularly allocate or acquire land for personal gain or patronage, without consideration of the public interest.

While the National Land Policy and the new Constitution will introduce stronger safeguards, i.e. removing the President's ability to directly allocate land and introducing a

National Land Commission through which allocations must pass, and action has been taken recently by the Ministry of Lands to recover illegally/irregularly allocated lands, the road to recovery will be long. Those involved in this process will have to be fastidious in implementing the recommendations of the Ndung'u Commission Report, as public scrutiny will be immense and opposition within the government itself (as many civil servants and officials have been beneficiaries of land through this process) has already proved to be a challenge. The role of the new Constitution in the implementation of the National Land Policy is central; as the Ministry of Lands must now develop implementation plans and accompanying strategies and policies to enable the roll-out of the National Land Policy in a timely manner.

The damage done to the credibility of Kenya's land tenure system, and the insecurity created by acts of large-scale land grabbing, will be felt long into the future. The impacts of speculation and related inflation, landlessness, tension between socio-economic classes and ethnic groups due to increasing inequality, and the significant environmental impacts already affecting Kenya's vital ecosystems, are issues that will require appropriate policies and government intervention, as well as bona fide actions, to rectify.

Nevertheless, a number of actions could assist in rebuilding confidence in Kenya's tenure system and in those responsible for safeguarding it, including:

- Reasoned, consistent and mindful implementation of the Ndung'u Commission Report's recommendations and the new National Land Policy, taking into account the distinctions between the victims and benefactors of land grabbing;
- Efficient and democratic establishment of the structures required by the National Land Policy and now supported by the new Constitution to ensure the representation of all stakeholders and their interests in redressing Kenya's currently skewed land ownership patterns;
- The introduction of corporate responsibility for national and international companies involved in illegal/irregular land acquisition through mandatory title deed searches back to the instance of first registration, and stronger checks and balances on corporate land acquisition; and
- The reconciliation of the National Land Registry through investigation into and validation or revocation of existing documentation and an extensive surveying of public lands within the framework of the National Land Policy, as recommended in the present report.

Kenya's political balance under the new power-sharing government is fragile with regards to many issues. The violence following the 2007 elections was indicative of the smouldering tensions among Kenyans, in factions divided along political and/or ethnic lines. Land is the fuel that has the potential to set this conflict alight once again.

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This report is part of a wider initiative on Commercial Pressures on Land (CPL). If you would like further information on the initiative and on the collaborating partners, please contact the Secretariat of the International Land Coalition or visit *www.landcoalition.org/cpl*

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