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Kenya Land Policy Making, Implementation and Outcomes this far

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ABSTRACT

Ten years ago, Kenya made a land policy¹ to secure land rights, promote economic growth, investment and reduction of poverty. This paper seeks to examine how the policy has fared towards improvement of livelihoods, establishment of an accountable and transparent institutional system. The paper looks at three processes of making, implementation and outcomes of the Policy that are interlinked, yet requires to be separated so as to come to terms with what has happened to the land sector in Kenya. Land policies are shaped by stakeholders, but the implementation is through political and administration mechanism of the governments, whose agencies coordinate their activities towards a common end. Thus, there is a need to build bridges between the three processes as a social engineering exercise towards a transformative sustainable pathway.

Keywords (Cambria 10pt bold) :

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Introduction

Kenya, like most African countries, undertook the development of its National Land Policy, NLP, since 2004, with the purpose of securing land rights as a means of promoting economic growth, investment and reduction of poverty. This paper seeks to explore how the NLP was formulated to guide land reforms for the improvement of the livelihoods of Kenyans, through establishment of an accountable and transparent institutional system dealing with land has fared this far. This comes at a time when the country is preparing to review the policy directions after 10 years since the NLP was adopted and endorsed by the Parliament in December 2009². The paper shall look at three processes of the making, implementation and outcomes of the NLP that are interlinked, yet requires to be separated so as to come to terms with what has happened to the land sector in Kenya. The making of policies is shaped by wishes of all stakeholders, but the implementation is through political and administration mechanism of the governments of the day, whose agencies are supposed to coordinate their activities towards a common end. Thus, there is a need to build bridges between the three processes as an exercise of social engineering to avoid taking anything for granted and ensuring that those responsible across the board make better judgements as to which course of action to follow.

The main objective of this paper is to answer the following pertinent questions: How do we explain the consultative and participatory development of the land policies, their implementation and their outcomes? Why are outcomes of land policies at variance with the intentions of the policy makers? How do we account for the continuities in policies from past regimes contrary to the endorsed policy document? The development of the Kenya National Land Policy like many policy-making processes started with identification of the intentions of different stakeholders involved in the process. They were conceptualized in what needed to be achieved, as having land in Kenya held, used and managed in a manner that is equitable, efficient, productive and sustainable in accordance with the following land policy principles set out at Article 60 (1) of the Constitution of Kenya, 2010: equitable access to land; security of land rights; sustainable and productive management of land resources; transparent and cost effective administration of land; sound conservation and protection of ecologically sensitive areas; elimination of gender discrimination in law, customs and practices related to land and property in land; and the encouragement of communities to settle land disputes through recognized local community initiatives consistent with the Constitution.

Methodological Note

Undertaking a study of the political economy of the Kenyan land governance can be challenging, because reliable data and information are often deliberately made scarce. The National Land Policy Formulation Process, was opened up by participation of varied stakeholders due to

² Republic of Kenya Ministry of Lands (2009), *Sessional Paper No. 3. Of 2009 on National Land Policy*, Nairobi, Government Printer.

concerted pressure on the government to address the land question candidly. This provided me the opportunity as an active participant in the process, including other related land reform processes: : the Commission of Inquiry into the Land Law System of Kenya ('Njonjo Commission'), 1999-2002; the Constitution of Kenya Review Commission (CKRC), 2000-2005 and the Committee of Experts (CoE), February 2009-August 2010; the Commission of Inquiry into the Illegal and/or Irregular Allocation of Public Land ('Ndung'u Commission'), 2004-2006; the National Land Policy Formulation Process (NLPFP), 2004-2009; the Kenya National Dialogue and Reconciliation Process/The National Peace Accord Process brokered by Kofi Annan 2008-2012.

This paper is anchored on parliamentary records, legal cases records and a review of published and unpublished literature in addition to ethnographic observation as a land reform advocate who has watched the internal working of the processes and was able to have the off the record conversations with a number of key actors on different sides of the entire processes from 2004 to 2019.

This paper draws on conversations with peers³ and my personal embedded participant observations of the entire process of development and implementation from 2004 to 2019⁴, which has provided me with an opportunity of taking an 'extended case study approach (Buroway 2009). The ethnographic observation and conversation with key state⁵ and non-state actors⁶, methodologically assuage the concern raised by earlier studies that land issues in Kenya are subject to rumours (Osborn 2008). Furthermore, I have had access to varied official

³ The conversations with peers have been on at every Annual World Land Reform Conferences at World Bank Headquarters, Washington DC during the months of March and April since 2013- 2019. These involved scholars: Prof. Patricia Kameri Mbote, Dr. Collins Odotte; Ministers of Lands – Ms. Charity Ngilu and Prof. Jacob Kaimenyi, Departmental heads Mr. Augustine Masinde and Mr. C. Mbaria in-charge of Physical Planning and Directorate of Survey respectively. Land Sector Non-State Actors: Teresa Omondi of Fida-Kenya, Mwathane and Dr. Makathimo of Land Development and Governance Institute (LDGI), Dr. Steve Ouma of Pamoja Trust; Pauline Vatta of Hakijamii, Hersi Amina of Private Law firm specialized in community land matters. Several other conversations have been at National Engagement Strategy (NES) meetings, informal roundtable meetings at several offices including at Mokoro Office at Oxford, United Kingdom with key informants that supported Kenya land policy process (Robin Palmer and Martin Adams), at International Land Coalition meetings. Other conversations with Kenya Land Alliance Board and Members meetings, with staff of Development Partners Group on Land Sector (DPGL). The list of conversations with CSOs and CBOs around Kenya are quite a number to be captured all here.

⁴ These are forums, workshops and varied events convening starting with numerous National Land Policy Formulation Processes at national and regional level throughout the Country (February 2004 to December 2006), the National Symposium that adopted the national land policy in April 2007, Constitution of Kenya Delegates Conference where I was a delegate No. 458 at Bomas of Kenya (2003-2005), Conferences and Parliamentary Land Committee forums and meetings (2008-2012), National Debate Forums on radio and National T.V. including the Presidential Debate in 2013.

⁵ At state level I have been to National Accord meetings of Kofi Annan (2008-2010), Forums hosted by former President Kibaki and former Prime Minister Raila Odinga (2008-2012), Ministers in-charge of Lands: Amos Kimunya, James Orengo, Prof. Kivutha Kibwana, Charity Ngilu, Prof. Jacob Kaimenyi (2003-2018).

⁶ I served the Secretariat of Land Sector Non-State Actors, which provided me with the opportunity to engage with land professionals from Institution of Surveyors of Kenya, prime civil society organizations in land sector such as Land Development & Governance Institute, Kituo Cha Sheria, Fida-Kenya, Groots-Kenya, Pamoja Trust, Hakijamii, among others (2009-2012).

literature⁷ and media records⁸ that has informed this paper. Whereas it has been argued that the KNLP making process was wide ranging and consultative (McAuslan, 2013:138), this paper separates the policy making, implementation and outcomes processes for better understanding of the competition between ideas and the interests of many actors. In this paper, I argue that while land policy development emanates from the intentions of policy-makers as varied stakeholders, the implementation is through the political and government administrative mechanism, which is constrained by the lack of budget, capacity and a failure of involved agencies and institutions charged with land and natural resources sector to co-ordinate their activities towards a common end. If the policy process was a social engineering exercise, I would argue that it lacks bridges to ensure the realization of its goals which as a necessity require the connection between the policy making and the implementation up to the outcome level. Thus, the paper examines the relations within and among them as monitored in the Kenyan case.

The paper proceeds from the premise that the NLP making process was quite ambitious and covered everything that required to be reformed ranging from the concerns of local, national and global interests without minding the capacity requirement to manage diverse and dialectically opposed situations. The implementation phase, which is governed by pre-existing institutions and new inexperienced agencies mirror both the institutional continuities and unintended consequences reflecting the way things work in practice. The paper shows that from the Kenyan experience the more things change, the more they remain the same. Thus, the expected outcomes do not turn out as expected, because policy makers write policies for implementers without shaping their actions accordingly. The paper concludes with a discussion on challenges of the quest to review the KNLP, which has been on the cards since its development and endorsement by the Parliament on December 3, 2009.

While addressing the challenge of competing interests, I point out that the KNLP was developed in tandem with the Framework and Guidelines on Land Policy in Africa (F & G), which spells out a comprehensive process of restructuring three major components of the land system, namely its structure of land ownership (property system), land use and production structures, and the support services infrastructure for land delivery. The F & G was declared by the Heads of States and Governments in July 2009 as their commitment to the shared vision, objectives and principles on land policy matters in Africa. Despite, the challenge of lack of commitment in the implementation of the KNLP, its principles are anchored in the Constitution of Kenya, 2010. Thus, I further argue that the KNLP was made one of the most important policies when a whole

⁷ These range from process reports of making the National Land Policy from the designated secretariat, Land Reform Transformation Unit (LRTU); NGOs reports of their experiences and score cards available on various websites including KLA, LDGI, Mokoro, Oxfam UK website among others.

⁸ Media newspaper cuttings at KLA, Full newspaper filings of all leading newspapers in Kenya at ICJ-Kenya, plus TV and radio footages at KLA.

chapter five of the Constitution of Kenya, 2010 was dedicated to the land policy principles that are in line with the government's development blue-print, the Kenya Vision 2030.

Finally, the paper utilizes the political economy theoretical analysis approach, because the policy despite attracting varied donor support through a wide ranging participatory process during its formulation, the United States Agency for International Development (USAID), criticized it for its overly agrarian thrust and suggested the need to effect changes before it was endorsed by the Parliament⁹.

The paper is divided into five parts. Part I is the introduction while Part II looks at the process of the land policy formulation in Kenya. Part III looks at the implementation process in Kenya while Part IV looks at the outcomes this far. Part V concludes.

The Process of Formulating the Kenya National Land Policy

In February 2004 Kenya embarked on the process of formulating the NLP, which was initiated and directed by the Ministry of Lands through stakeholders, who prepared a draft that was adopted at a National Symposium in April, 2007. The quest for the first ever single policy document attracted a wide-ranging stakeholders drawn from public, private and civil society organizations. All with a vision of producing a policy with a vision to 'guide the country towards efficient, sustainable and equitable use of land for prosperity and posterity' (Republic of Kenya, 2009: ix). The policy making process was pluralistic in that various sectoral policies that had been developed by other government ministries and agencies were consulted, thus, the NLP benefited from the reports of: the Commission of Inquiry into the Land Law System of Kenya ('Njonjo Commission'), the Constitution of Kenya Review Commission (CKRC), the Commission of Inquiry into the Illegal and/or Irregular Allocation of Public Land ('Ndung'u'), plus other reports on poverty reduction, the economic growth and recovery blueprints and the environment management policy document.

Despite, the stated goal of the policy making process of seeking to anchor land reforms for improvement of livelihoods of Kenyans through establishment of the system dealing with land administration and management, I would argue that it was a response to the global promotion of land markets¹⁰, and the urge for the government to intervene in the growing concerns about

⁹ USAID (2009), *Kenya Land Policy, Analysis and Recommendation*, Nairobi. The publication was produced by the United States Agency for International Development by ARD, INC. under authorship of John Bruce, an ex-Senior Counsel in the Environment and Social Sustainable Development and International Law Unit of the Legal Vice-President of the World Bank.

¹⁰ The market-based land reforms while aiming at establishing a property rights system anchored on freehold individual ownership; recognition, protection and registration of customary rights to land and establishing formal and robust land markets as a means of stimulating domestic and foreign investments in land. They have ended up

land tenure security (Okoth-Ogendo 2000, Deininger, 2003). From a political economy analysis of the Kenyan and external situation at the time of formulating the NLP, the government embarked on the policy making process as a political and bureaucratic considerations spiced by economic reasons. This is reflected by the fact that after the NLP was adopted at the National Stakeholders Symposium in April 2007, the process of finalizing it through endorsement by Parliament was delayed until December 3, 2009, when it happened as part of the National Accord, after the turmoil that followed 2007 Kenyan general elections.

The KNLP formulation process accomplished its mission that delivered the Policy document, which exists as a framework of a set of land policy principles¹¹ to guide the sectoral, legislative and institutional reforms in land administration and management. Given that the NLP is in place it is important to point out that despite the process that generated the policy being elaborate, comprising state and non-state actors, with support of many donors, the USAID, reviewed the draft policy¹² that was adopted by the National Stakeholders Symposium in 2007 and pointed out that it was overly biased towards agrarian thrust with scanty provisions on urban land issues. Hence, USAID made frantic efforts to try and effect changes, but no significant changes were made on final National Land Policy that was endorsed by Parliament as Sessional Paper No. 3 of 2009 (McAuslan 2013: 141). The intentions of USAID were at variance with civil society and academia group of the stakeholders of policy-making process. The main concern of USAID was that the policy would interfere with operation of the land market. This emphasis of operation of land market is exemplified in the remarks of the former American Assistant Secretary of State, Hank Cohen who is quoted in Mullins, C (2011), *Decline and Fall*, London, Profile Books as saying of US Policy in Africa: “*We want to see human rights, democracy and free markets. But if you get the last one right, we give you a discount on the other two (2011:269)*”. This was contrary to the philosophy behind the KNLP, which saw land not just as a commodity to be traded in the market, for it represented multiple values, which required to be protected in the land policy. Looking behind to see forward, this explains why the ubiquitous continuities in the policies from the past persists. When land policy-making process is shaped by powerful vested interests, the implementation process requires officials to work with all established stakeholders. As a consequence, the policy process which is conceived as a social engineering, but lacks bridges to connect its main aspects stand to fail in the realization of its goals.

facilitating Large-Scale-Land Acquisitions referred to as ‘global land grabs (Klopp and Lumumba, 2014; Akram-Lodhi, 2012).

¹¹ The principles are anchored in the Constitution of Kenya, 2010 at Article 60 (1) (a-g) and states that land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable in accordance with specified principles of land policy.

¹² USAID (2009) *Kenya Land Policy: Analysis and Recommendation*, Nairobi. The publication was produced for review by the United States Agency for International Development. It was prepared by ARD, INC. The principal author was Jon Bruce, an ex-senior Counsel in the environmentally and Socially Sustainable Development and International Law Unit of the Legal Vice- President of the World Bank.

The Kenya policy-making process shows that it was a discursive effort, which embraced local, national and international interests all competing to enlist political support. During the Kenyan process there emerged a group known as Kenya Landowners Association (KELA), which was ill-equipped to mobilize diverse interests, but kept persuading the Development Partners Group on Land Sector (DPGL) not to fund the civil society land network, Kenya Land Alliance, KLA, by purporting that the Alliance was tending in the direction of the Zimbabwe land reform scenario of land invasions. This was meant to shape the interpretation of policy-making process, even when evidence was suggesting to the contrary. The main funder of the land policy making process the Department for International Development (DFID) not only halted the Kenya Country Land Reform Programme, but also withdrew its financial support to KLA by end of 2007. KLA shifted its network approach and sought strategic partners with the professional body of surveyors, the Institution of Surveyors of Kenya (ISK) that resulted in the Land Sector Non-State Actors (LSNSA) initiative, which attracted the support of the Swedish International Development Agency (SIDA) that funded the civil society effort in completion of the NLP development process¹³. Thus, skilful policy-making process requires strategic reconciling of positions according to changing requirements.

The Implementation Process

The land policy document provided an outline of steps to be followed in setting up an implementation framework, through a consultative process of sectoral agencies and development partners under the auspices of the Ministry of Lands. Pending the establishment of the National Land Commission (NLC) as a constitutional organ envisaged to oversight the implementation process, the Land Reform Transformation Unit (LRTU) was put in place to facilitate the following: drafting of necessary legislations for the implementation of the land policy; establishment of relevant institutions, recruitment and training of required personnel; mobilization of financial and other resources; organization of civic education on land reform; and nurture a smooth transition to the land policy implementation. The implementation of the KNLP was envisaged to cost approximately Kenya Shillings 9.6 billion over the first six-year period (ROK, 2009:66). It is important to point out that policies are implemented through political and administrative mechanisms, yet the implementation is expected to conform to the plans set out in the policy document. To that extent the LRTU was a government agency set up to reach out and mobilize other relevant agencies to coordinate their activities towards the implementation of the land policy, but it was constrained by lack of fiscal and administrative capacity to oversee the preparatory period to the implementation process. Despite, the change of the regime in 2002, the land bureaucracy still consisted of people who had benefited from the past and still had interests to protect¹⁴. The LRTU was strictly under the Ministry of Lands,

¹³ Land policy development processes in most African countries, relied on donor support. As most governments were under external pressure to facilitate market-based rather than state-based land reforms as a best practice [rather than a best fit] (Geisler, 2015).

¹⁴ Land reforms [land policy] implementation process is never a linear and consensus-based process, it is complex, ambiguous, contradictory and involve a myriad of actors each with their views, strategies and interests...(Hebinck 2008:24).

which ensured that it was provided with very little resources, which perpetuated the continuities in form of institutional inertia in the way things worked. It majorly depended on donor funding, and without the Ministry's support, irrespective of the seconded staff, it was unable to realize the NLP provisions, which were to affect vested interests.

The LRTU, simply perpetuated the institutional continuities of its parent Ministry of Lands, with a lot of unforeseen and unintended consequences. It was ill-equipped, irrespective of who seconded staff to it who totally failed to turn themselves around to realize the policy implementation framework as designed within the policy document. The civil society network initiative, the LSNSA found out that LRTU was doing many things contrary to the policy document and thus incapable of effecting desired reforms, as things were not turning out as expected.

The first task of implementation of the NLP, which involved anchoring fundamental issues of the policy into the Constitution took place in form of chapter five of the Constitution of Kenya, 2010. This was followed by a legislative programme, which was set to take 18 months to three years according to Article 261(1 and 2), but it started in 2011 through enactment of the Environment and Land Act, 2011, followed by the National Land Commission Act, the Land Act and the Land Registration Act, all of 2012. The other provisions of the NLP anchored in the Constitution, which required legislation such as Community Land category, prescribing minimum and maximum land holding acreage in respect of private land, provision on historical land injustices among other matters that were to give effect to provisions of chapter five were neglected and left unimplemented until 2016. However, one observation about this particular aspect of implementation was a deliberate mismatch between what NLP and the provisions of the Constitution at chapter five and the successive laws. Worse still, even before the laws were implemented the Land Laws (Amendment) Act, 2016 was enacted to slow down and obstruct the implementation of NLP, without stating what mischief that the amendment intended to address.

While there is no ideal policy implementation process in reality (Jenkins-Smith, 1990), due to unequal distribution of power between stakeholders and the government of the day that dominates the process (Brams, 1968:461), the Kenyan process turned out as a major disappointment. Whereas there could be other convincing arguments about land policy implementation outcomes to which the next part turns to, I argue that the main outcomes are traceable to vested interests that existed at the stage of policy formulation process.

The Outcomes of the Kenya National Land Policy

This section focuses on the question of why are the outcomes of the land policies so often at variance with the provisions of the land policy documents. First, outcomes depend on different

groups seeking to shape or defend their interests guided by imperfect knowledge and uncertain expectations. A number of outcomes of the NLP suffice to illustrate the point.

The first NLP outcome resulted from the anchoring of the constitutional issues in the Constitution of Kenya, 2010, which was done through Chapter Five (5) on Land and Environment at Articles 60 to 72. The expected lasting outcome was implementation of the NLP anchored in the Constitution, but the reality-check shows the mismatch between the NLP document directions and guidelines and the provisions of the Constitution. This has made the operationalization of the successive laws difficult. For instance, the successive laws: the National Land Commission Act, the Land Act, and the Land Registration Act, were enacted and commenced in 2012. However, the newly established independent constitutional organ, the NLC and the Presidential appointed Cabinet Secretary in-charge of land matters, their mandates and responsibilities were set on a collision course. While the NLP broadly directed the removal of the presidency in land matters, it came back through the Cabinet Secretary in-charge of Lands. The administration and management of the three categories of land (community, public, and private) in respect to the control of the land registry, renewal of leases and compulsory land acquisition, land use planning were made unnecessarily difficult to deal with (McAuslan 2013:147). For instance, the management of public land on behalf of the national and county governments is vested in the NLC, yet very extensive functions are left with the Cabinet Secretary such as: development of land policies on land, upon recommendation of NLC; coordination of County physical planning, yet NLC is charged to monitor and oversight responsibilities over land use planning throughout the country; coordinate and oversee the statutory bodies under the land sector, yet most of the statutory bodies in-charge of managing specific aspects of public land are under NLC; regulate service providers and professionals in charge of different aspects of land registration, yet the NLC is mandated to advise on a comprehensive programme for registration of title in land throughout Kenya.

Consequently, in 2014 the Supreme Court was asked to provide an Advisory Opinion on the relationship between the NLC and Cabinet Secretary in-charge of Lands and Physical Planning in light of the Constitution and the successive land laws. The Court recognized the stalemate, yet advised for an out of court agreement on mandates between the NLC and Ministry of Lands. This further point to an outcome of a Commission envisaged as an independent constitutional commission turn out as a Semi-Autonomous Government Agency (SAGAs) linked to Ministry of Lands. Thus, the mischief of fixing the land governance has not materialized pointing to deficiencies in the implementation of the NLP and the provisions of the Constitution.

The second outcome worth noting comes out of the Kenya's government failure in handling land issues requiring special intervention and here two cases of land rights of minority communities are best pointers. In March 2010 the decision of the African Commission on Human and Peoples Right's in the *Endorois case*¹⁵, which fits within the provisions of NLP on

¹⁵ Williams, B. C.2011. The African Commission "Endorois Case" – 'Towards a Global Doctrine of Customary Tenure?' "Terra Nullius website posted on 17th February 2010.

community and indigenous peoples' land rights was made. Among the five decisions to the Kenya government were: recognize rights of ownership of the Endorois and restate their ancestral land; allow unrestricted access to Lake Bogoria and surrounding religious and cultural sites and their grazing rights; pay compensation to the community for their loss; pay royalties from existing economic activities and continuously report progress of implementation. The decision of African Commission on Human and Peoples Rights (ACHPR) is comfortably implementable¹⁶ with the NLP guidelines, yet the government continues to apply cavalier delaying tactics.

As the government was still grappling with the implementation of the ACHPR decision, in May 2017 in a landmark case of the Ogiek community over Mau Forest Complex in African Court of Human and Peoples Rights in Arusha found the Kenya government to have violated the Ogiek land rights. The outcome here compounds the failure to put in place mechanisms for resolving special land issues as provided in the NLP (ROK, 2009:47-48).

The third outcome is the continued failure to implement the NLP directions and the Constitutional provisions on community land tenure regime. This outcome has translated into anxiety about legal recognition, protection and registration of community land. Against the backdrop of community land being targeted for mega-projects, the government has come up with a Land Value Index law, providing for compulsory acquisition of community land without adequate, just, fair and prompt payment of compensation.

Conclusion

The challenge to the land reformers is to overcome powerful interests that are against making, and implementation of the land policies whose outcomes are for the good of all Kenyans especially the marginalized, disadvantaged and vulnerable groups, however, difficult the transformative change will be. Given that the NLP is due for review, creative mobilization efforts are required like yesterday. Having examined the processes that have shaped the KNLNLP making, implementation and outcomes, my final argument is that land policies must not become convenient tools for self-interest or pursuit of the parochial interest of those in-charge.

My analysis of the Kenya scenario as the country prepares for the review of the land policy after 10 years of slow and sloppy implementation, shows that there is another chance that require

<https://www.iwgia.org/en/kenya/1197-kenya-ruling-in-the-endorois-case>

¹⁶ In 2010, the ACHPR issued a judgment stating that the Kenyan government had violated the African Charter on Human and Peoples' Rights, specifically the rights to religious practice, to property, to culture, to the free disposition of natural resources, and to development. While certain aspects of the Commission decision have been realized, the Kenyan government has mostly not complied with the recommendations yet. The case represents the first legal recognition of an African indigenous peoples' rights over traditionally owned land and is also the first case globally which found a violation of the right to development

to be engaged with, monitored and evaluated all along to ensure delivery of the desired outcomes. Critical theorization of policy choices is required to ensure that even within the global neoliberal policy direction, the best fit for Kenya is attained. The key challenge will be how to involve social movements on equal terms with Non-Governmental Organizations dependent on dwindling donor funding for land reforms.

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