



**A POSITION PAPER ON
ENGENDERED AND RIGHTS-
BASED LAND REFORMS IN
KENYA**

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Abstract

Land and the land-based resources form the basis for the realization of human security, human rights and human development in the society. However, the schewed governance of land-based resources has occasioned unprecedented conflicts, violations and afflictions in the society. It is on that basis that the quest for equitable and secure land rights forms one of the major areas of focus in the struggles for justice and reforms in Kenya from 1895 to date.

This struggle has been catalyzed or exacerbated by injustices and maladministration on land matters ranging from the outdated and conflicting land laws, long and cumbersome process of planning, surveying, adjudication, settlement and registration of land; to unmanageable manual land records accumulated over many years leading to poor service delivery; numerous disputes over boundaries and land-based resources among other factors.

It is on this basis that the Kenya Human Rights Commission (KHRC) is presenting this ***Position Paper on Engendered and Rights-Based Land Reforms in Kenya.***

This paper applies the rights-based and gender justice frameworks to analyze the different governance frameworks from land rights and reform perspectives.

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DEDICATION

This paper is dedicated to Kenyan women and other vulnerable groups who for the last 100 years have faced and survived systemic land injustices; and organized for action.



Women activists who spearheaded the April 2011 demo on land injustices in Kwale

ACRONYMS

AG	Attorney General
AIDS	Acquired Immune Deficiency Syndrome
CIC	Constitutional Implementation Commission
CoK 2010	Constitution of Kenya 2010
HIV	Human Immuno Virus
IDPs	Internally displaced Persons (IDPs)
JSC	Judicial Service Commission
KHRC	Kenya Human Rights Commission
KLA	Kenya Land Alliance
KLRC	Kenya Law Reform Commission
KNHREC	Kenya National Human Rights and Equality Commission
LRTU	Land Reform Transformation Unit
LSNSA	Land Sector Non State Actor
NLC	National Land Commission
NLP	National Land Policy
TJRC	Truth, Justice and Reconciliation Commission
UNWOMEN	United Nations Entity for Gender Equality and the Empowerment of Women

A POSITION PAPER ON ENGENDERED AND RIGHTS- BASED LAND REFORMS IN KENYA

EXECUTIVE SUMMARY

Overview

Land and the land-based resources form the basis for the realization of human security, human rights and human development in the society. However, the skewed governance of land-based resources has occasioned unprecedented conflicts, violations and afflictions in the society. It is on that basis that the quest for equitable and secure land rights forms one of the major areas of focus in the struggles for justice and reforms in Kenya since 1895 to date.

This struggle has been catalyzed or acerbated by the following injustices and maladministration on land matters: the outdated and conflicting land laws, long and cumbersome process of planning, surveying, adjudication, settlement and registration of land; unmanageable manual land records accumulated over many years leading to poor service delivery; numerous disputes over boundaries and land-based resources.

Others factors are the illegal and irregular allocation of public land; tenure insecurity leading to proliferation of slums, squatting and landlessness; unsustainable use of land and environmental degradation; inequitable access to land especially for women, children and minority groups; underutilization of agricultural land; historical land injustices; regional imbalances; urbanization challenges, population pressure among others.

In regards to addressing these issues, the government in partnership with the civil society organizations has initiated different legal, policy and institutional measures where the Constitution of Kenya, the National Land Policy and the Ministry of Lands among others form the core governance and operational frameworks.

It is on this basis that the Kenya Human Rights Commission (KHRC) is presenting this ***“Position Paper on Engendered and Rights-Based Land Reforms in Kenya.”*** The KHRC is a non-governmental organization (NGO) whose mission is to entrench human rights and democratic values in the society.

The KHRC believes that securing equitable land rights and effective reforms in the land sector are integral to the realization of a just and human rights state in Kenya. The KHRC is a member of the Land Sector Non State Actors (LS-NSA)-a network of civil society and professional organizations spearheading comprehensive land reforms in Kenya.

The paper aims to inter alia: *create a human rights and gender based framework/s for analysis, understanding and engagement with the gains, gaps and opportunities on the major land reform processes in Kenya.*

... there is a wide range of legal, policy and institutional frameworks which have both direct and indirect implications to reforms and governance in the land sector. The CoK 2010 and the NLP remain the key blue prints

Towards this, the KHRC has reviewed the following frameworks: The Constitution of Kenya (CoK 2010); National Land Policy (NLP-2009); National Land Commission Bill; Draft Land Bill; Draft Land Registration Bill; Draft Community Land Bill; Devolved Government Bill; Matrimonial Property Bill; Family Protection Bill; The Marriage Bill, Urban Areas and Cities Act, Environment and Court Act; Draft Evictions Guidelines; Draft National Policy on IDPs; Draft National Policy on Human Rights; Legal, policy and administration actions by the Lands Ministry; Truth, Justice and Reconciliation Commission Act (TJRC Act 2009); and, other governance frameworks relevant to land reforms and anti-corruption issues in Kenya.

Key Findings

- As indicated above, there is a wide range of legal, policy and institutional frameworks

which have both direct and indirect implications to reforms and governance in the land sector. The CoK 2010 and the NLP remain the key blue prints.

The major challenges are the lack of coordination and prioritization within the different sectors and actors involved in land reforms; and the fact that some of the frameworks are in draft forms and the lack of the political goodwill to fast track the implementation of these frameworks.

- The human rights, gender equity, social justice and other values and principles on good governance are spread out in the CoK 2010, NLP and other instruments that have processes governing land reforms in Kenya.

These if framed within the Rights Based Approach(RBA) will ensure the protection of the most vulnerable groups, respond to the root causes of violations and deprivations; more claims and empowerment to rights holders (those violated) and accountability to duty bearers (those to address the violations) in the governance and administration of land and land-based resources in Kenya. However, there is lack of consistency and clarity in some of the provisions.

- There has been some partnership between the different state and non-actors involved in advancing these agendas at the national levels, for instance between the Lands Ministry's Land Reform Transformation Unit (LRTU) and the Land Sector-Non State Actors (LN-NSA). The challenge is that at times, these partnerships are schewed, unstructured and episodic.

Key Recommendations to:

i. State Actors¹

- Strengthen the application of human rights, gender equity, social justice and other good governance values and principles both in the formulation and implementation of legal, policy and administrative frameworks in the land and other sectors;
- Create mechanisms for the prioritization and harmonization of the different frameworks critical in the governance of land and land based resources in Kenya. The processes which are not dependent on laws and policies should be initiated and enforced administratively.

- This also entails fast tracking the formulation of the pending Bills and policies expected; amending or repealing the requisite legislations, and the implementing finalized frameworks.
- Finally, foster platforms for qualitative, effective and timely participation of the civil society and citizens on different land reform processes in Kenya at all levels in the society.

ii. Non-State Actors (Civil Society Organisations, Professional Organisations, Media Organisations and the General Public)

Use this document for continuous advocacy, awareness creation, monitoring and evaluation with a view to ensure that the governance processes in the land sector at all levels in the society are timely, effective, rights and integrity based, engendered, accountable, participatory, complimentary, sustainable among other thresholds set in the CoK 2010, NLP, among others.

iii. Development Partners

- Provide more resources and in a flexible manner, and create accountability mechanisms against the interventions proposed by or expected by the above mentioned state and non-state actors. The resources entail providing financial, technical, political and moral support for sector-wide land reforms in Kenya.

¹The State in this context is defined as in Article 260 of the Constitution of Kenya i.e. means the collectivity of offices, organs and other entities comprising the government of the Republic under the Constitution. This therefore entails the state offices and organs as defined in the said article. The key state actors here are the Executive through the President and the Prime Minister, Ministry for Lands (MOL), Kenya Law Reform Commission (KLRC), Commission for the Implementation of the Constitution (CIC), Attorney General (AG) and the Task Force on Devolved Government (TFDG); and Parliament via the Speaker, Constitutional Oversight Implementation Committee (COIC), Select Committee on Legal Affairs and Administration of Justice (CLAAJ) and thematic committees on land and land based resources.

HUMAN RIGHTS AND GENDER-BASED FRAMEWORKS OF ANALYSIS OF LAND REFORMS PROCESSES IN KENYA

a. Introduction

“The history of land relations in Kenya is one characterised by, firstly, foreign subjugation and occupation, and secondly, by wanton abuse of legal trust vested in the Government in relation to land as well as in the failure to redress the colonial legacy of injustice by post-colonial Governments.”²

Land according to Article 260 of the *Constitution of Kenya (CoK 2010)* includes but not limited to the surface of the earth and the subsurface rock; any body of water on or under the surface; marine waters in the territorial sea and exclusive economic zone; natural resources completely contained on or under the surface; and the air space above the surface.

Land is the basis of livelihoods for billions of people in the world. Housing is inextricably linked to availability of land. Availability of adequate food and shelter, in third world countries and other agriculture-based economies especially, depends on the size and tenure of land that is available to an individual. It follows therefore that land is important and essential to the realization of many economic, social and cultural rights.

Thus the rights to own, control, access and use land and other land-based resources are critical for both human and national development. It is because of this critical role that land has been captured in the major international human rights instruments, and national reforms

and development processes. *The Kenya Vision 2030*³ and the *Agenda No. 4*⁴ for instance identify land reforms as one of the key pillars for development and national reconstruction.

The Kenya Vision 2030 contends that the economic, social and political pillars of Kenya are anchored on macroeconomic stability; continuity in governance reforms; enhanced equity and wealth creation opportunities for the poor; infrastructure; energy; science technology and innovation; land reform; human resources; development; security as well as public sector reforms.⁵

Second, the *Preamble to the Agenda 4 Matrix and the Statement of Principles on Long-term issues and solutions* posits thus:

We recognize that the issue of land has been a source of economic, social, political and environmental problems in Kenya for many years. We agree that land reform is a fundamental need in Kenya and that the issue must be addressed comprehensively and with the seriousness it deserves. Towards this end, we agree to fully support efforts to establish the factors responsible for conflicts over land and to formulate and implement actionable short, medium and long-term recommendations on the issue.⁶

Finally, there are other reform processes, which form the basis for this document.

²See Peter Omuodho in “Legal Framework to Deal with Past Misdeeds Related to Land in Kenya. *KatibaNews Issue* No. 08.08, August ’06 Newsletter; Media Development Association.

³Vision 2030 is Kenya’s Strategic Plan which is based on the Social, Political and Economic pillars of development.

⁴This agenda item of the National Accord to the National Dialogue and Reconciliation process which ended the post-election violence in February 2008 under the leadership of H.E Kofi Annan dealt with dealing with the long term underlying issues to the violence. Agendas 1, 2 and 3 focused on ending the violence, providing humanitarian assistance to IDPs and ending the political crisis respectively.

⁵

<http://www.kenyaengineer.or.ke/index.php/kenyaengineer/article/viewFile/217/216>

⁶See The Kenya National Dialogue and Reconciliation; “Statement of Principles on Long-term issues and solutions: Preamble”; http://www.google.co.ke/search?hl=en&source=hp&q=agenda+4+of+the+national+accord&rlz=1W1ADBS_en&aq=f&aq=g10&aql=&oq=&gs_rfai=

b) The Frameworks of Analysis of the Land Reform Processes in Kenya

First, human rights are the entitlements and obligations meant to preserve human dignity and development. Freeman argues that human rights may not be rights one has simply because one is human being “but they are rights of exceptional importance, designed to protect morally valid and fundamental human interests, in particular against the abuse of political power.”⁷

Second, the Rights Based Approach (RBA) is a framework that integrates the norms, principles, standards and goals of the international human rights system into the plans and processes of development. It is characterized by methods and activities that link the human rights system and its inherent notion of power and struggle with development. RBA is able to recognize poverty as injustice and include marginalization, discrimination, and exploitation as central causes of poverty.

Third, Gender refers to the socially constructed roles played by women and men that are ascribed to them on the basis of their sex. These roles are usually specific to a given area and time that is, since gender roles are contingent on the social and economic context, they can vary according to the specific context and can change over time. In terms of the use of language the word ‘sex’ is used to refer to physical and biological characteristics of women and men, while gender is used to refer to the explanations for observed differences between women and men based on socially assigned roles.⁸

Fourth, Gender justice is defined as the protection and promotion of civil, political, economic and social rights on the basis of gender equality. It necessitates taking a gender perspective on the rights themselves, as well as the assessment of access and obstacles to the enjoyment of these rights for both women, men, girls and boys and adopting gender-sensitive strategies for protecting and promoting them.⁹ Based on the above definition of RBA and gender justice,

gender will then be treated as a component of human rights which aims at ensuring fairness and equality of treatment and

Land is the basis of livelihoods for billions of people in the world. It follows therefore that land is an important essential for the realization of many economic, social and cultural rights

opportunities among men and women in the society.

Fifth, the following gender and human rights principles and values are critical either in formulating or analyzing any policy, legislative and administrative framework on the governance of the land-based resources among other public affairs:

- Sovereignty of the people and the supremacy of the Constitution;
 - Patriotism, national unity, sharing and devolution of power, the rule of law, access to justice, democracy and participation of people;
 - Human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination, and protection of the disadvantaged and marginalized groups;
- Equitable access to land, security of land rights and elimination of gender discrimination in the governance of land and land-based resources;
- Integrity, competence, impartiality, transparency, accountability, fair administrative action, cost effectiveness, and sustainable development;
- Compliance with the timeframes and processes set within the fifth schedule of the Constitution of Kenya which ranges from one to five years from the effective date.
- The “effective date” according to the interpretation section means the date this Constitution came into the force, which for practical purposes was the day it was promulgated in August 27, 2010.

⁷ Freeman Michael. *Human Rights: An Interdisciplinary Approach* (Cambridge: Polity Press, 2002), p 61.

⁸ (Report of UN Secretary General 1996 on the Implementation of the Outcome of the Fourth World Conference on Women, September 3, 1996, U.N. Doc. A/51/322).

⁹ World Bank (2006) *Gender, Justice, and Truth Commissions*; Pam Spees (2004) *Gender justice and accountability in peace support operations closing the gaps*. A Policy Briefing Paper by International Alert.

⁹ Pam Spees (2004) *Gender justice and accountability in peace support operations closing the gaps*. A Policy Briefing Paper by International Alert.

GAINS, GAPS AND RECOMMENDATIONS AGAINST THE MAJOR LAND REFORM PROCESSES IN KENYA

a) The Constitution of Kenya 2010 (CoK 2010)

i. Progress and Gains Realized

The CoK 2010 provides very progressive human rights and gender gains, both on a broad spectrum and, specifically, on land reform. The most critical ones in the context of this enterprise will suffice.

The *Preamble* acknowledges those who heroically struggled to bring freedom and justice to our land (the struggle which was dubbed or organized around *Uhuru na Mashamba*-freedom and land); applauds our environment as the basis for our heritage and posterity; and embraces the essential principles of human rights, equality, freedom, democracy, social justice and the rule of law.

Chapters One and Two on the Sovereignty of the People and Supremacy of this Constitution; and The Republic respectively provide for the supremacy of the people of Kenya and such values and principles as patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of people; human dignity, equity and social justice.

Other principles entail, inclusiveness, equality, human rights, non-discrimination, and protection of the marginalized group; good governance, integrity, transparency, accountability; and sustainable development.¹⁰

These provisions are critical for better governance of national affairs-including the management and distribution of the land-based among other national resources.

Chapter Four on The Bill of Rights enshrines human rights and gender provisions which have both broad and specific applications in the management of the land-based resources. Broadly, the key provisions are on the application, implementation and enforcement of the Bill of Rights; equality and non-discrimination; human dignity, freedom and security of the human person.

Others are the provisions on the freedom of expression, access to information and freedom of association; freedom to assemble, picket and demonstrate;

freedom of movement and residence; right to fair administrative action and access to justice; rights for the children, persons with disabilities, youth, minorities, marginalized groups and older members of society.

All these would apply well in seeking justice and equity in the governance of the land sector and management of the land based resources.

Specifically, the economic and social rights (health, housing, food, water, security and education); right to a clean and healthy environment; protection of the right to property among others depends more on the access to land and land based resources.

Moreover, Article 40(2-3) provides that parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage. This is critical especially in the management of land as a matrimonial property.

The proposed Kenya National Human Rights Commission will be critical in ensuring

the promotion and protection of these rights. There is a need to ensure the collaboration between this Commission and the National Land Commission (NLC) in Article 67 below. All these provisions will also apply in the governance of the land sector and resources from human rights and development

dimensions.

Chapter Five on Land and Environment captures the most substantive provisions on

Chapter Four on The Bill of Rights enshrines human rights and gender provisions which have both the broad and specific applications in the management of the land based resources. ... The proposed Kenya National Human Rights and Equality Commission will be critical in ensuring the promotion and protection of these rights.

¹⁰ See Article 10 of the COK

land rights. Article 60 provides that land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable.

The following principles have been set out in land governance:

- equitable access to land and security of land rights;
- sustainable and productive management of land resources,
- transparent and cost effective administration of land;
- sound conservation and protection of economically sensitive areas;
- elimination of gender discrimination in law, customs and practices related to land and property in land; and,
- Encouragement of communities to settle disputes through recognized local community initiatives consistent with the Constitution.

Article 61 clarifies that land belongs to the people of Kenya collectively as a nation, as communities and as individuals. It is on this basis that land is classified as public, community or private respectively.¹¹ Article 65 provides that non-citizens will only hold land on leasehold basis and for a period not exceeding ninety-nine years.

Article 67 establishes the NLC with the mandate to among others:

- manage public land for the national and county governments;
- recommend a national land policy to the national government;
- advise the national government on a comprehensive programme for the registration of title in land throughout Kenya;
- conduct research related to land and use of natural resources;
- investigate the present and historical land injustices,
- encourage the application of traditional dispute resolution mechanisms in land conflicts;
- assess tax on land and premiums on immovable property;
- monitor and oversee responsibilities over land use planning

¹¹ Articles 62, 63 and 64 provide on what constitutes the Public, Community and Private lands respectively.

throughout the problem among others.

Articles 69 captures the *State's and citizens' obligations* towards ensuring sustainable exploitation, utilization, management and conservation of the environment and natural resources, and fostering the equitable sharing of the accruing benefits. Article 71 provides that agreements relating to the granting of a right or concessions for the exploitation of any natural resource of Kenya shall be subject to ratification of Parliament. This is critical in safeguarding both the national and citizens' interests in the management and exploitation of land-based resources.

Finally, the following *legislations* on land matters are expected-Land Act-Article 60(2), Public Land Act-Article 62(4), Community Land Act-Article 63(5), Private Land Act-Article 64(c),¹² Regulation of Land Use and Property Act-Article 66(2) and National Land Commission Act-Article 67(3). Article 68 proposes for the revision, consolidation and rationalization of existing land laws; and the revision of sectoral land use laws in accordance with the principles set out in Article 60(1).

The said Article also provides for a legislation to: prescribe minimum and maximum holdings acreages in respect of private land;¹³ regulate the manner in which any land may be converted from one category to another; regulate the recognition and protection of matrimonial property and in particular the matrimonial home during and on the termination of marriage;¹⁴ and; to protect, conserve and provide access to public

¹² This may include the legislation proposed in Article 65(4) on Landholding by non-citizens

¹³ The proposed Private Land Act should be able to address this.

¹⁴ The draft Matrimonial Property Bill should address this. Article 45(4) also provides for a related legislation that recognizes marriages concluded under any tradition, or system of religion, person or family law; and any system of personal and family law under any tradition, or adhered to any persons professing a particular religion, to the extent that any such marriages or systems of law are consistent with the Constitution.

land.¹⁵ Finally, while Article 71(2) proposes legislation on Agreements relating to Natural Resources, Article 72 envisages a law relating to the environment.¹⁶

Finally, the *Fifth Schedule* provides the following timelines for some of these piece of legislation: Community Land (five years), Regulation of Land Use and Property (five years), Legislation on Land (18 months),

Chapter Eleven on the Devolved Government is critical for it provides a platform for the people to manage their resources at the local levels... Moreover, the Fourth Schedule on the distribution of functions clarifies the roles between the national and county governments.

Agreements Relating to Natural Resources (five years) and Legislation regarding environment (four years). These timelines begins from the effective date.¹⁷

Chapter Six on Leadership and

Integrity provides for principles which will ensure ethics, integrity, competence, suitability, objectivity, impartiality and honesty in the establishment and operations of state institutions and officers. This is critical especially in the formation and functioning of the state institutions within the land sector which currently characterized by impunity, ineptitude, incompetence and ineffectiveness.

Chapter Eleven on Devolved Government is critical for it provides a platform for the people to manage their resources at the local levels. On Land, this is important in relation to Article 62(2) which provides that public land shall vest in and be held by a county government in trust for the people resident in the county, and shall be administered on their behalf by the NLC, if it is classified under: land which at the effective date was unalienated government land as defined by an Act of Parliament; land transferred by the State by way of sale, reversion or surrender; land in respect of which no individual or community ownership can be established by any legal means;¹⁸ land in which no heir can be identified by any legal process; and, other than land held, used or occupied by a state organ in 60(1)(b).

Moreover, the *Fourth Schedule* on the distribution of functions clarifies the roles between the national and county governments. On land management, the national government will among others be responsible for the use of international waters and water resources; national economic policy and planning; national statistics and

data on population, the economy and society generally; intellectual property rights; transport and communications; national public works; housing policy; general principles of land planning and the coordination of planning of counties.

The national government will also be in charge of protection of the environment with a view to establishing a durable and sustainable system of development, including, in particular-fishing, hunting and gathering; protection of animals and wildlife, water protection, securing sufficient residue water, hydraulic engineering and the safety of dams; energy policy; disaster managements; agricultural policy; energy policy including electricity and gas reticulation and energy regulation; capacity building and technical assistance to the counties; public investment; tourism policy and development.

The county government will from a land management perspective be responsible for-agriculture including-crop and animal husbandry, livestock sale and yards; county abattoirs, plant and disease control and fisheries; county health services, including cemeteries, funeral parlours and crematoria, refuse removal, refuse dumps and solid waste disposal; control of air pollution, noise pollution, and other public nuisances and outdoor advertising; such activities and amenities as museums, county parks, beaches and recreational facilities; county transport including-country roads, street lighting, traffic and parking, public road transport, ferries and harbours(excluding the regulation of international and national shipping and related matters).

Others roles include animal control and welfare including-facilities for the accommodation, care and burial of animals; trade development and regulation including-markets, local tourism and cooperative societies' county planning and development, including-statistics, land survey and mapping, boundaries and fencing, housing, and electricity and gas reticulation and energy regulation; pre-primary education,

¹⁵ The Public Land Act proposed above can adequately deal with this issue.

¹⁶ Both issues can be managed by expanding the proposed Land Act and the amending the National Environment Management Authority (NEMA) act respectively.

¹⁷ "Effective date" according to the interpretation clause means the date this Constitution came into the force, which for practical purposes was the day it was promulgated in August 27, 2010.

¹⁸ As respectively provided for in 62(1) (a), (c), (d) or (e).

village polytechnics, home craft centres and childcare facilities; implementation of specific national government policies on natural resources and environmental conservation, including-soil and water conservation, and forestry; fire fighting and disaster management.

Chapters Ten and Twelve on Judiciary and Public Finance are important for effective resolution of land disputes in courts through the Land and Environmental Court bill;¹⁹ and the collection and management of the land based revenues at all levels, respectively.

Chapter Thirteen on the Public Service sets out such principles as high standards of professional ethics; effective and economic use of resources; responsive, prompt, effective, impartial and equitable provision of services; involvement of the people; accountability for administrative acts; transparency and access to information; representation of Kenya' diverse communities; and according adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of-men and women, the members of all ethnic groups; and persons with disabilities. This will be instrumental for accountability to the state officers and institutions within the land sector at both the county and national governments.

Chapter Seventeen on Constitutional Commission and Independent Offices establishes the NLC as one of the ten Commissions and two independent offices.²⁰ Articles 249-254 provides for the objects, authority and funding of commissions and independent offices; composition, appointment and terms of office for the commissions; removal from office of a member of a commission; general functions and powers, incorporation of commissions and independent office; and the reporting of commissions and independent offices respectively.

These provisions are instrumental in safeguarding the independence and accountability of the NLC (and other commissions) and pointers to the NLC legislation (in reference to other relevant Sections above).

Finally, Article 252(3) provides the NLC together with the Kenya National Human Rights and Equality Commission (KNHEC), Judicial Service Commission (JSC) and the Attorney General (AG) with the powers to issue summons to a witness to assist for the purpose of investigations. This is essential especially with the specific mandate of the NLC to initiate investigations, on its own initiative or on a complaint into present and historical land

Chapter Seventeen on General Provisions captures definitions which enable one to interpret or understand the key words and concepts used in the Constitution.

injustices, and recommend appropriate redress.²¹

Chapter Sixteen on the Amendment of this Constitution provides that some of the Sections referred to above are safeguarded against arbitrary reviews and therefore subjects such review to a referendum. The most relevant provisions are the Supremacy of the Constitution, Sovereignty of the People, the National Values and Principles of Governance, the Bill of Rights, the Independence of the Judiciary and the Commissions and Independent Offices above, the Objects, Principles and Structure of Devolved Government.

Chapter Seventeen on General Provisions captures definitions which enable one to interpret or understand the key words and concepts used in the Constitution. The following are the most relevant ones on gender, human rights and land issues:

- “Adult” means any individual who has attained the age of eighteen years;
- “Affirmative action” which includes any measure designed to overcome or ameliorate an inequity or systemic denial or infringement of a right or fundamental freedom;
- “Child” means any individual who has not attained the age of eighteen years;
- “Disability” includes any physical, sensory, mental, psychological or other impairment, condition or illness that has, or is perceived by significant sectors of the community to have, a substantial or long term effect on an individual’s ability to carry out ordinary day-day activities;
- “Land” as defined under introduction above;
- “Natural resources” means the physical non-human factors and components,

¹⁹ Elsewhere, find the analysis of the Environment and Land Court Act

²⁰ Article 248(2). Other Commissions are the Kenya National Human Rights and Equality Commission (KNHEC), Judicial Service Commission (JSC); Independent and Electoral Boundaries Commission (IEBC); Parliamentary Service Commission, Commission on Revenue Allocation (CRA), Salaries and Remuneration Commission (SRC), Teachers Service Commission (TSC) and Police Service Commission. The independent offices are Auditor General; and the Controller of Budget.

²¹ Article 67(2)(e)

whether renewable or non-renewable including-sunlight, surface and ground water, forests, biodiversity and genetic resources; and rocks, minerals, fossil fuels and other sources of energy;

- “Property” includes any vested or contingent right to, or interest arising from-land, or permanent fixtures on, or improvements to, land; goods or personal property; intellectual property; or money, choses in action or negotiable instruments;
- “Older member of society” means a person who has attained the age of sixty years;
- “Youth” means the collectivity of all individuals in the republic who-have attained the age of eighteen years, but have not attained the age of thirty five years;
- Others interpretations include-“public office”, “public service”, “state,” “state officer” and “state organ” among others vital in understanding the public officials and institutions expected to spearhead the implementation of the above provisions. Finally, the terms “marginalized community” and “marginalized groups” have also been accorded comprehensive interpretations.

i. Gaps and Recommendations

The fifth schedule spreads the various land bills from 18 months to 5 years giving the government some leeway to either delay or derail the crucial land reforms.

While the constitution prescribes for legislation that addresses private and public land (& community land for that matter) it does not necessarily require stand-alone legislation for each; hence the language on consolidation under Art.68.

b) The National Land Policy (NLP)

ii. Gains and Progress Realised

The formulation of the National Land policy (NLP) was initiated in February 2004 as the National Constitutional Conference at the Bomas of Kenya was about to finalize with its final session in March of the same year. The first draft of the policy was produced in December 2005 and was approved by the Cabinet for public dissemination and debate in September 2006.

Following the debates, the emerging concerns and comments were incorporated to produce a revised draft in March 2007. This was presented and considered by over 600 participants during the National Stakeholders Conference at Kenya International

Conference Centre (K.I.C.C-Nairobi) in April 2007.

It was finally adopted by stakeholders during the second forum held at the Safaripark Hotel in May 2007 and presented to Cabinet for deliberation and approval through a cabinet memorandum in October of the same year. However, due to the impending elections and subsequent post-elections violence and national reconstruction efforts, its adoption by the Cabinet was delayed up to June 25 2009. The policy was passed by Parliament as Sessional Paper No. 3 in December 3, 2009 and stakeholders are currently working on the implementation frameworks.

The National Land Policy Formulation Process was guided by such gender and rights-based principles as equitable access to land, intra- and inter-generational equity, gender equity, secure land rights, transparent and good democratic governance among others.²² This was complimented by such values²³ as consultative, participatory, interactive, and inclusive, consensus based, transparent and gender sensitive-implying that all groups in the society and across the two genders were adequately involved and their issues considered and addressed.

The Vision of the policy is to guide the country towards efficient, sustainable and equitable use of land for prosperity and posterity. Its *mission* is to promote land reforms for the improvement of the livelihoods of Kenyans through the

establishment of accountable and transparent laws, institutions and systems dealing with land.²⁴ This vision and mission will be instrumental in providing durable solutions to all the

These manifestations have led to such impacts as disinheritance of women and vulnerable members of society, and biased decisions by land management and dispute resolution institutions; landlessness and the squatter phenomena.

²² Section 1.5.1, Para 7.

²³ Section 1.5.2, Para 8.

²⁴ Section 1.2, Para 3 and Section 1.3 Para 4 respectively.

land and related livelihood concerns for both men and women in the society.

*The Objectives of the Policy*²⁵ provide for a framework that will design and maintain a system of land administration and management that ensures among others that all citizens (irrespective of their social and material conditions and situations such as gender) have an opportunity to access and beneficially occupy and use land. This allocation and use land by all citizens should be economically viable, socially equitable and environmentally sustainable.

Within the *Contemporary Manifestations and Impacts of the Land Question*, the policy identifies four manifestations of land injustices: gross disparities in land ownership, gender and trans-generational discrimination in succession, transfer of land and the exclusion of women in land decision making processes; and lack of capacity to gain access to clearly defined, enforceable and transferable property rights.²⁶ These manifestations have led to such impacts as disinheritance of women and vulnerable members of society, in addition to biased decisions by land management and dispute resolution institutions; landlessness and the squatter phenomena.²⁷

Critical to gender and human rights dimensions within the *Philosophy of the National Land Policy* is the recognition that land is a significant resource to which members of the society should have equitable access for livelihood; and that the existing policies and laws on land in Kenya have pursued economic productivity which has neglected the need to ensure equity, sustainability and preservation of culture in the utilization of land. These have been recognized and protected in the policy.²⁸

Under *Constitutional Issues*, the Policy identifies the major problems of the previous Constitution as the failure to establish frameworks for efficient, accountable and equitable administration and management of land and land based resources; the centralized systems which are not responsive to the demands of the citizenry; lack of accountability in land governance leading to irregular allocation of public land; constitutional protection of private property rights even where they are acquired in an illegitimate manner; mass disinheritance of communities and individuals of their land, inequitable access to land particularly for women, children, minority groups and persons with disabilities among others.²⁹

To deal with these issues, the policy recommends a Constitution³⁰ that provides for rational allocation of powers and responsibilities to State

institutions, transparency and accountability of State institutions; participation of the citizens in decision-making processes on land matters; security of legitimate land rights, equitable access to land in the interests of social justice; resolution of genuine historical and current land injustices; protection of human rights for all, especially the rights of women, minorities, children and persons with disabilities, with respect to access to and ownership of land rights.³¹

Section 3.3 on *Land Tenure Issues* captures progressive provisions on land rights for both men and women and other landless communities. Under the *Public Land Tenure*,³² the Government is obligated to *inter alia* establish mechanisms for the repossession and management of any public land acquired illegally or irregularly, which is hoped to resolve some of the historical injustices captured in the policy.

Under the *Community Land Tenure*,³³ the Government is mandated to lay out in the Land Act, a clear framework and procedures for the recognition, protection and registration of community land rights taking into account multiple interests of all land users, including women; resolving the problem of illegally acquired trust land; governing the grant to, and regulation of, rights of use to members; governing community land transactions using participatory processes among others.

Under the *Private Land tenure*,³⁴ the Government is expected to among others ensure that the alienation of private rights to land takes into account legitimate rights, such as the rights of spouses and children; and ensure that private land is held, alienable and transmissible without discrimination on grounds of sex, ethnicity or geographical origin.

²⁵ Section 1.4, Para 5(a-b). See also Para 5(c,d and e).

²⁶ Section 2.3, Para 24(c and d). For other manifestations, see 24(a, b,e and f).

²⁷ Section 2.3, Para 25(f and g). For other impacts see Para 25(a-k).

²⁸ Section 3.1, Paras 28-33.

²⁹ Section 3.2, Para 37(a-f).

³⁰ These have been entrenched into the Constitution of Kenya 2010

³¹ Section 3.2 Para 39.

³² Sub-Section 3.3.1.1, Para 61(e and f).

³³ Sub-Section 3.3.1.2, Para 66(d)i, ii, iii and v.

³⁴ Sub-Section 3.3.1.3, Para 68(b and e).

On *Overall Tenure Principles*,³⁵ the policy provides that the principles guiding the acquisition, use and disposal of land rights shall include among others, the equal recognition and enforcement of land rights arising under all the tenure systems; and non-discrimination in ownership of, and access to land under all tenure systems.

Moreover, to streamline the *Freehold Tenure*, the Government is tasked to among other things review and rationalize existing laws on freehold tenure including protection of land rights that have been acquired in a legal and legitimate manner; and regulate the power of primary rights holder to dispose of land in order to ensure that such disposals take into account legitimate rights such as family rights.³⁶

On *Leasehold Tenure and Access to Rights of Ownership*, the duration of all leases is limited to 99 years and the Government is expected to assess the state of landlessness and develop a suitable programme to address it.³⁷

Concerning the *Inheritance of Land*, the policy recognizes that land rights can be acquired through inheritance, which entails testate or intestate

Concerning *historical land injustices*, the Government shall establish mechanisms to resolve land claims arising in 1895 or thereafter. On *Pastoral land tenure*, the policy recognizes that all the previous land regimes have deprived pastoralists land management rights from traditional institutions; and that women who play diverse roles in pastoral systems face special problems such as lack of access to land use rights.

succession; and that the Law of Succession Act was supposed to harmonize succession systems but in practice the transmission of land rights is largely done with customary and religious systems, which discriminate against women and children.

To deal with the emerging issues, the Government

shall sensitize and educate Kenyans on the provisions of the Law of Succession Act; expedite the application of the Law of Succession Act; and require that all Kenya Gazette notices pertaining to succession cases be posted at the lowest local administrative level and at market centres.³⁸

On *Benefit-Sharing from Land-Based Natural Resources*, the policy recognizes it as a right for communities and individuals to access, use and participate in the conservation and management of these resources. The Government is obligated to establish legal frameworks

for ensuring effective participation, benefit sharing and compensation for all the stakeholders involved or affected.³⁹

Over the *Settlement Land Allocation Principles*, the Government is tasked to *inter alia* set out in the proposed Land Act a clear framework for verifying and recording of genuine landless people; acquisition of land for establishment of settlement schemes; equitable and accountable allocation of settlement scheme land.⁴⁰

Section 3.6, Para 171, provides for a number of *Land Issues Requiring Special Intervention*. These include historical land injustices; pastoral land issues, Coastal region land issues, land rights for minority and marginalized groups; land rights for women; land rights in informal settlements and for informal activities; land rights of children; and the impact of the HIV/AIDS pandemic on agricultural production and access to land rights.

Concerning *historical land injustices*, the Government shall establish mechanisms to resolve land claims arising in 1895 or thereafter.⁴¹ On *Pastoral land tenure*, the policy recognizes that all the previous land regimes have deprived pastoralists land management rights from traditional institutions; and that women who play diverse roles in pastoral systems face special problems such as lack of access to land use rights.

To secure pastoralists' livelihoods and land rights, the Government shall *inter alia* recognize pastoralism as a legitimate land use and production system; establish a legislative framework to regulate transactions in land in pastoral areas; and ensure that the rights of women in pastoral areas are recognized and protected.⁴²

³⁵ Sub-Section 3.3.2, Para 69(a and b).

³⁶ Sub-Section 3.3.3.1, Para 78(a and b)

³⁷ Sub-Section 3.3.3.2, Para 80(c and d) and Sub-Section 3.3.3.3(Para 84(a) respectively.

³⁸ Sub-Section 3.3.3.3, Para 89-91).

³⁹ Sub-Section 3.3.4.1, Paras 97-100.

⁴⁰ Section 3.5.3, Paras 151-152.

⁴¹ Sub-Section 3.6.2 Paras 178-179.

⁴² Sub-Section 3.6.3, Paras 180-183.

In other Sub-Sections, the policy obligates the government to develop elaborate frameworks to address the *Land Issues Peculiar to Coast Region, Land Rights of Vulnerable Groups*,⁴³ *Land Rights of Minority Communities, Land Rights for Refugees and Internally Displaced Persons (IDPs); Land Rights in Informal Settlements; and, Cross-Cutting Issues Requiring Special Intervention*.⁴⁴

Under Sub-Section 3.6.10 on *Cross-Cutting Issues Requiring Special Intervention*, the policy recognizes the following as cross cutting issues: poverty, HIV and AIDS, youth and gender issues, and corruption. The Government proposes to deal with these issues by adhering to and enforcing the principle of non-discrimination; facilitating the channeling of resources to address poverty-related and HIV and AIDS occasioned problems; facilitating the empowerment of youth and women; mainstreaming youth and gender concerns in anti-poverty programmes; and mainstreaming anti-corruption measures and facilitate public education and awareness creation programmes for all stakeholders.

On the *HIV and AIDs*, the policy notes that the pandemic has had significant adverse impacts on among other things, utilization and production from land based resources; land rights of widows and orphans, who are invariably disinherited of their family land whenever male house heads succumb to illnesses occasioned by the pandemic.

Further, the policy notes that the HIV and AIDS pandemic underscores an urgent need to reform cultural and legal practices that discriminate against women and children with respect to access to and ownership of land. Towards this, the Government proposes to protect the land rights of people living with HIV and AIDS and ensure that their rights are not unfairly expropriated by others; and facilitate public awareness campaigns on the need to write wills to protect land rights of dependants.⁴⁵

Moreover, Section 3.6.10.2 notes the violation of *The Rights of Children and Youth* and underscores the need to enforce the Childrens' Act and initiate other mechanisms for safeguarding their land rights. This will be critical in conferring ownership rights of both the youth and minors across the genders.⁴⁶

In regards to *Gender and Equity Principles*, the policy notes the causes

To secure the rights of spouses to matrimonial property, the Government commits to review succession, matrimonial property and other related laws to ensure that they conform to the principle of gender equity; enact specific legislation governing division of matrimonial property to replace the Married Women's Property Act of 1882 of England; protect the rights of widows, widowers and divorcees through the enactment of a law on co-ownership of matrimonial property...

and manifestations of gender-based land injustices such as culture and traditions which continues to support the male inheritance of family land; lack of gender sensitive family laws; conflict between the constitutional provisions and international treaties on gender equality vis-à-vis customary practices that discriminate against women in relation to land ownership and inheritance; failure to sufficiently represent women in institutions that deal with land; and; non-definition of women rights under communal ownership and group ranches which allows men to dispose of family land without consulting them.⁴⁷

To protect the rights of women, the Government commits to enact appropriate legislation to ensure effective protection of women's rights to land and related resources; repeal existing laws and outlaw regulations, customs and practices that discriminate against women in relation to land; enforce existing laws and establish a clear legislative framework to protect the rights of women in issues of inheritance to land and land-based resources ;make provision for joint spousal registration and documentation of land rights, and for joint spousal consent to land disposals, applicable for all forms of tenure.⁴⁸

The policy has progressive provisions on *Matrimonial Property*. It notes that the existing laws and practices governing matrimonial property discriminate

against spouses whose contribution to the acquisition of such property is indirect and not capable of valuation in monetary terms. Further, the courts are also exposed for

⁴³ Vulnerability according to the policy is a manifestation of poverty and deprivation. It takes forms such as lack of adequate shelter, illiteracy, exposure to ill treatment, lack of power to influence decisions affecting one's life, and disabilities. The most vulnerable persons in Kenya include; subsistence farmers, pastoralists, hunters and gatherers, agricultural labourers, unskilled and low-skilled workers, unemployed youth, persons with disabilities, persons living with HIV and AIDS, orphans, slum and street dwellers, and the aged.

⁴⁴ See Sub-Sections 3.6.4, 3.6.5, 3.6.6, 3.6.8, 3.6.9, 3.6.10 respectively.

⁴⁵ Sub-Section 3.6.10.1, Paras 214-216

⁴⁶ See Paras 217-219.

⁴⁷ Sub-Section 3.6.10.3, Paras 220-222

⁴⁸ Sub-Section 3.6.10.3, Paras 223.

being inconsistent in determining what amounts to such contribution, with the result that some spouses have been unfairly denied of their rights to land.⁴⁹

To secure the rights of spouses to matrimonial property, the Government commits to review succession, matrimonial property and other related laws to ensure that they conform to the principle of gender equity; enact specific legislation governing division of matrimonial property to replace the Married Women's Property Act of 1882 of England; protect the rights of widows, widowers and divorcees through the enactment of a law on co-ownership of matrimonial property; establish appropriate legal measures to ensure that men and women are entitled to equal rights to matrimonial property; and establish mechanisms to curb selling and mortgaging of family land without the involvement of spouses.⁵⁰

The following four *Mechanisms for Resolving Special Land Issues* will be applied in resolving all the injustices above:⁵¹

- *Redistribution* whose purpose is to facilitate equitable access to land for residential, commercial and other productive purposes. There is a need to establish a clear legal and planning framework for identifying, verifying and recording genuine land use needs, and to establish clear and equitable criteria for redistribution;⁵²
- *Restitution* whose purpose is to restore land rights to those that have unjustly been deprived of such rights. It underscores the need to address circumstances which give rise to such lack of access, including historical injustices. The Government shall develop a legal and institutional framework for handling land restitution;⁵³
- *Resettlement* which seeks to procure adequate land for the reorganization of both rural and urban settlements in light of expanding populations, conflicts, historical injustices and disasters;⁵⁴
- *Land Banking* which entails setting land aside for redistribution, restitution and resettlement; investment and development. This land will be procured via a government buy-back policy; purchase and donations; repossession of grabbed land and the programme for land reclamation.⁵⁵

To realize all the above provisions and gains, the policy provides for an elaborate *Institutional Framework* guided by such principles as devolution of power and authority; stakeholder participation; operational autonomy; effective surveillance and performance

⁴⁹ Sub-Section 3.6.10.4, paras 224

⁵⁰ Sub-Section 3.6.10.4, Paras 225

⁵¹ Section 3.6.1

⁵² Section 3.6.1.1 Para 173

⁵³ Section 3.6.1.2 Para 174

⁵⁴ Section 3.6.1.3 Para 175

⁵⁵ Sub-Section 3.6.1.4 Para 176

monitoring systems; access to justice; gender and inter-generational equity; appropriate enforcement mechanisms; environmental sustainability; and smooth transition from the current to the proposed arrangements.

The key institutions proposed are the National Land Commission which will be devolved into District⁵⁶ and Community Land Boards; such supporting agencies as the Ministry in Charge of Lands, Local Authorities, Property Tribunals, Land Acquisition Compensation/ Land Arbitration Tribunals, Land Disputes Tribunals, and Land Courts.⁵⁷

ii. *Gaps and recommendations*

From the analysis above, it is very clear that the policy recognizes and proposes to redress virtually all the land injustices faced by the Kenyan society from 1895 to date and the need to address them.

The major challenges will be technical and financial capacity and goodwill of the Government and the society in general to initiate, synchronize and coordinate a plethora of policy, legal, constitutional, institutional frameworks and other commitments to make the enforcement of the policy a reality.

c) **The National Land Commission Bill (September 2011)**

i. *Gains and Progress Realised*

This is a Bill for an Act of Parliament to provide for the functions and powers of the National Land Commission; the qualifications and procedures for appointment; and for connected purposes. This Bill was developed pursuant to Chapters 5 (especially Section 67) and 15 of the Constitution providing for both the National Land Commission and Constitutional Commissions respectively.

The first draft Bill was circulated in March 2011 and the revised Bill launched by the Ministry

⁵⁶ Since the New Constitution replaces Districts with Counties, then this will be changed to County Land Boards.

⁵⁷ Section 3.0, Paras 228-263.

of Lands in May 19 2011. The CIC finalized the Bill in August 12. 2011. However, the final Bill could not be prioritized or passed into law by August 27, 2011 because it was not part of the legislation expected in 12 months within the Fifth Schedule of the Constitution. The Bill is a product of a consultative process especially between the civil society and the CIC.

The Commission shall in accordance with the Constitution, be a body corporate with perpetual succession and a common seal and shall in its corporate name, be capable of suing and being sued; acquiring, holding, charging and disposing of movable and immovable property; and doing or performing all such other things or acts for the proper discharge of its functions under the Constitution and this Act. The headquarters of the Commission shall be in Nairobi, but the Commission may establish branches at any place in Kenya.

The Commission shall consist of a chairperson and eight other members appointed in accordance with the Constitution and the provisions of this Act and shall serve on a full time basis for a term of six years non-renewable. Qualifications include being a citizen of Kenya; possessing a degree from a recognized university; knowledge and experience of at least ten years in matters relating to either public administration; Land management and administration; Natural science; Land law, land survey, physical planning or land economics; or social science.

Other qualifications are being conversant with land management and administration issues in Kenya; meets the requirements of leadership and integrity set out in Chapter Six of the Constitution; and has had a distinguished career in their respective fields. No person is qualified for appointment as a chairperson or member if the person is a Member of Parliament or County Assembly.

Other disqualification criteria include if a person is; a member of a governing body of a political party; has at any time within the preceding five years, held or stood for election as a member of Parliament or of a County Assembly (ceases to apply to a person after two general elections for Parliament have been held since the person ceased to be such a candidate or office holder); or is a member of a local authority; is an undischarged bankrupt; or has benefitted or facilitated any unlawful or irregular allocation or acquisition of land; or has been removed from office for contravening the provisions of the Constitution or any other law.

The chairperson and members of the Commission shall be appointed in accordance with the procedure provided for in the First Schedule. The Chairperson and members shall each make and subscribe before the Chief Justice to

the oath or affirmation set out in the Second Schedule. The office of the chairperson or member shall become vacant if the holder dies; by a notice in writing addressed to the President resigns from office; is convicted of

The Commission shall develop and operate an effective digital Land Information Management System (L.I.M.S) at national and county levels

an offence and sentenced to imprisonment of more than six months without the option of a fine; or is absent from three consecutive meetings of the Commission without good cause. The President shall notify every resignation, vacancy or termination in the Gazette within seven days. The chairperson or a member of the Commission may be removed from office on the ground of, and in accordance with the procedure for removal provided in Article 251 of the Constitution.

In addition to the functions stipulated by Article 67(2) of the Constitution, the Commission shall administer and manage public land on behalf of the national and the county governments as provided for under Article 62 of the Constitution, including land covered by legislation relating to planning matters and gazetted as urban areas under

existing law; register title to all categories of land in Kenya.

The Commission shall ensure the realization of the multiple values of land, namely: economic productivity, equity, environmental sustainability and conservation of national heritage; exercise the powers of compulsory

acquisition and development control on behalf of the national and county

The Constitution also provides for equality of rights of rights for parties to the marriage and proposes for legislation to regulation matrimonial property during, and after the termination of marriage;

governments; establish county offices, county land boards and community land boards and; any other devolved units as may be necessary.

Also, the Commission shall develop and operate an effective digital Land Information Management System (L.I.M.S) at national and county levels; establish and manage a National Land Trust Fund (NLTF), as provided for under Article 206 of the Constitution, to mobilize and pool financial resources for implementing policy reforms; and, harmonize national and county spatial planning. The Commission shall have the power to review all grants or dispositions of public land to establish their propriety or legality.

The Commission shall have all powers generally necessary for the execution of its functions under the Constitution and this Act, and without prejudice to the generality of the foregoing, the Commission shall have powers to gather, by means it considers appropriate, any relevant information including requisition of reports, records, documents or any information from any source, including any State organ, and to compel the production of such information as and when necessary.

Also, the Commission shall have all powers to hold inquiries for the purposes of performing its functions under this Act; take any measures it considers necessary to ensure equitable access to land; security of land rights; sustainable and productive management of land; transparency and cost effectiveness of administration of land; sound conservation; and protection of ecologically sensitive areas and elimination of all types of discrimination in customs and practices relating to land.

In the exercise of its functions, the Commission may inform itself in such manner as it thinks fit; may receive written or oral statements; and is not bound by the strict rules of evidence. The Commission shall also within one year of its appointment recommend to Parliament the passing of any appropriate legislation to provide for the framework for investigation and adjudication of claims arising out of historical land injustices.

The Commission may from time to time establish committees for the better carrying out of its functions. The Commission may co-opt into the membership of committees, persons whose knowledge and skills are found necessary for the functions of the Commission. On the same vein, the business and affairs of the Commission shall be conducted in accordance with such rules and procedures as the Commission may prescribe.

There shall be a Secretary of the Commission appointed in accordance with the Constitution and shall hold office for a term of five years

renewable once. The Secretary is the Chief Executive Officer; Accounting Officer; and head of the Secretariat of the Commission. She/he shall be appointed by the Commission through a competitive recruitment process. He/she is accountable to the Commission and may be removed by the Commission only for inability to perform the functions of the office arising out of physical or mental incapacity; gross misconduct or misbehavior; or incompetence.

Before the Secretary is removed he/she must be given an opportunity to defend himself or herself against any allegations against him or her. The Commission may appoint such officers and other staff as are necessary for the proper discharge of its functions under the Constitution and this Act, upon such terms and conditions of service as may be determined by the Commission in consultation with the Salaries and Remuneration Commission.

ii. Gaps and Recommendations

- Replace the term “undischarged” on Section 5(3)(e) with the term declared since undischarged is an ambiguous term
- Remove/delete the word “not” in Section 5(3)(f) so that the clause reads “has benefitted or facilitated in any unlawful or irregular allocation or acquisition of land”

The Commission may appoint such officers and other staff as are necessary for the proper discharge of its functions under the Constitution and this Act

- Emphasize on the non renewability of the term after filling of a vacancy in Section 10(2)
- The bill does not contain provisions that expressly accord

autonomy and independence of the commission. The bill should have a provision that expressly accords autonomy and independence to the commission, in spirit with the

constitution Article 237 so that it can meet the requirements of the constitution.

- There is need for the commission to have powers to conduct periodic inspection to determine any encroachment of public land and take action against the same.

d) The Draft Community Land Bill (September 2011)

This is a draft Bill for an Act of Parliament to give effect to Article 63 of the Constitution; to provide for the allocation, management and administration of community land; to establish Community Land Boards, to define functions and powers of Community Land Boards; to provide for the powers of County Governments in relation to unregistered community land; and to make provision of incidental matters.

e) The Draft Land Registration Bill (September 2011)

This is a draft Bill for an Act of Parliament to revise, consolidate and rationalize the law governing the registration of title to land, and for the regulation of dealings in land so registered, and for connected purposes.

The proposed Act shall apply to registration of interests to all public land declared by Article 62 of the Constitution; and registration of interests to all private land declared by Article 64 of the Constitution.

The Bill as currently drafted does not apply to the registration of rights over public land in respect of minerals, petroleum, geothermal energy or geothermal energy resources; or prevent or otherwise affect the system of registration under other Acts of mining, petroleum, or geothermal energy rights in respect to public land.

Complainants of domestic violence have a right to be informed of their right to apply for relief under this Act

f) The Draft Land Bill (September 2011)

This is a Bill for an Act of Parliament to provide for the sustainable administration and management of land and land-based resources and for connected purposes. The proposed Act shall apply to all the land declared as public land in Article 62 of the Constitution; and all private land as declared by Article 64 of the Constitution.

Critique of the Draft Community Land Bill, Draft Land Registration Bill and Draft Land Bill

- These are raw drafts and still being subjected to stakeholder consultations. We need to have concrete and genuine stakeholder engagements before the Bills are passed into legislation. There is a rush by the Ministry of Lands to have these

passed without adequate stakeholder consultations;⁵⁸

- There still a need to have the National Land Commission Bill passed and the National Land Commission formed in order to help in the finalization and harmonization of the three bills;
- Stakeholders need to agree whether the 3 bills could be harmonized into one legal framework that will guide the management and administration of land in Kenya.

g) The Family Protection Bill (September 2011)

i. Gains and Progress Realized

This is part of the three family bills. The bills are relevant to gender and land rights due to their implications to family relations in the management of land. This bill if passed will be critical in guiding the administration of matrimonial property within the context of domestic violence. Thus the Bill seeks to make provision for the protection and relief of victims of domestic violence.

Section 3 of the Bill defines, “domestic violence”, in relation to any person, to mean violence against that person, or threat of violence or of imminent danger to that person by any other person with whom that person is, or has been, in a domestic relationship.

And “violence” is defined in Section 3 (2) to include economic abuse. Section 2 then defines ‘economic

⁵⁸ This follows the October 18, 2011 deadline given to the Lands Ministry by the other organs of the implementation of the Constitution. This rush led to the disengagement by the Land Sector Non-State Actors (LS-NSA) from this process in September 30, 2011. LS-NSA refused to attend the stakeholders’ retreat slotted for September 27-30, 2011 at the Kenya School of Monetary Studies due to the Ministry’s failure to consult widely and genuinely; and the attempts to impose its will on the stakeholders.

abuse' to include the unreasonable deprivation of economic or financial resources to which an applicant is entitled under the law or which the applicant requires out of necessity, including household necessities, medical expenses, school fees, rent, mortgage expenses or other like expenses;

Complainants of domestic violence have a right to be informed of their right to apply for relief under this Act and the right to lodge a criminal complaint by the police officer to whom a complaint of domestic violence is made or who investigates any such complaint as per the provisions of Section 33 (2).

The process of applying for a protection order is provided for under Section 7 and the contents of such protection order are stated in Section 19 to include an order that the respondent shall not damage, or threaten to damage any property of the protected person. Subsection 2 of this section then provides that the respondent shall not, without the protected person's express consent, enter or remain on any land or building occupied by the protected person or where the protected person is present on any land or building, enter or remain on that land or building, in circumstances that constitute a trespass.

Further Section 19 (3) provides that the court may make an order granting to any protected person the right of exclusive occupation of the shared residence or a specified part thereof by excluding the respondent from the shared residence or the specified part, regardless of whether the shared residence is solely owned or leased by the respondent or jointly owned or leased by the parties.

Therefore a spouse who was perpetuating domestic violence against the other may be directed to vacate the land or home they were living in during the existence of their domestic relationship and leave the residence to be occupied by the protected person. Protection Orders under this Bill may remain in force for such period, not exceeding five years, as specified by the court as per the provisions of Section 22.

Section 53 (1) then provides that where a victim of domestic violence suffers personal injuries or damage to property or financial loss as a result of the domestic violence, the court hearing a claim for compensation may award such compensation in respect of the injury or damage or loss as it deems just and reasonable. The court hearing a claim for such compensation may take into account the amount or value of the property taken or destroyed or damaged as per the provisions of subsection 2 of this section.

ii. Gaps and Recommendations

The main shortcoming of the Bill is that other than the

comprehensive definition of "economic abuse" contained in Section 2 of the Bill, and the provision for compensation in Section 53, detailed provisions relating to the process of getting interim orders / injunctions to prevent the continued alienation or economic abuse of matrimonial property, including land, while the application for protective orders is ongoing, are not adequately addressed.

h) The Marriage Bill (September 2011)

i. Gains and Progress Realized

The Bill seeks to amend and consolidate the various laws relating to marriage and divorce. Great strides have been made toward the attainment of equality within a marriage. For instance, Section 3(2) states that parties to a marriage are entitled to equal rights at the time of marriage, during the marriage and at the dissolution of the marriage.

The Bill in Section 7 also provides for presumption of marriage where it is proved that a man and a woman have openly lived together for at least two years in such circumstances as to have acquired the reputation of husband and wife. Section 4(4) then provides that all marriages recognized under this Act shall have the same legal status. This therefore protects parties under all systems of marriage including those to whom the presumption of marriage applies.

Children and their rights are also protected by Section 14 (1) which states that where a child is born to persons who are parties to a purported ceremony of marriage which is a nullity under the Act, such child shall not be affected by such nullity for any legal purpose.

Widows are also protected under Section 52 which provides that no law or custom shall operate so as to restrict the freedom of a widow to reside wherever she pleases or to marry a man of her choice. Therefore any custom that attempts to disinherit the widow of matrimonial property shall not be allowed to stand if this Bill becomes law.

Any property, including land, held separately by one spouse is protected from unreasonable interference by the other by virtue of Section 50. It states that notwithstanding the provisions of any other written law spouses shall have the same liability in tort towards each other as if they were unmarried. Thus if a spouse tries to interfere with the others property they will still be liable in tort.

Any property, including land, held separately by one spouse is protected from unreasonable interference by the other by virtue of Section 50.

Part VI of the Act deals with Marital disputes and Matrimonial Proceedings. Section 72(1) states that a petition for a decree of separation or for divorce shall contain, inter alia, particulars of the terms of any agreement or arrangement made regarding maintenance or the division of any assets acquired through the joint efforts of the parties or, where no agreement or arrangement has been reached, the petitioner's proposals in that regard. Thus it gives recognition and protection to any assets including land that the parties had acquired through joint efforts.

Section 80 states that subject to any law on matrimonial property, a court, when or after granting a decree of annulment, divorce or separation, may order a division between the parties of any assets acquired by them during the marriage by their joint efforts, or may order the sale of any of those assets and a division between the parties of the proceeds of the sale. Thus, land and any other joint assets of the spouses will be divided between them upon divorce – one spouse shall not be allowed to dispossess the other of any interest the other had in the property.

Section 90 (1) provides that where matrimonial proceedings are pending; or maintenance is payable under an agreement for the benefit of a spouse or former spouse or child, the court may, if it is satisfied that a disposition of property has been made by the spouse or former spouse of the person by or on whose behalf the application is made, within the preceding three years, with the object on the part of the person making the disposition of reducing the means to pay maintenance or of depriving a spouse of any rights in relation to that property, set aside the disposition or grant an injunction prohibiting that disposition, as the case may be.

This provision thereby protects a spouse from another's fraudulent sale or other disposal of land intended to deprive the first spouse of

property in which they had an interest in.

The institution of marriage as it currently exists is protected even with the coming into effect as law of this Bill as per Section 108 of the Bill. This Section states that a subsisting union between a man and a woman which under any written or customary law hitherto in force constituted a valid marriage immediately before the date of commencement of Part II shall be deemed to be a valid subsisting marriage for the purposes of this Act. Therefore any property rights that spouses may have accrued under existing marriage laws will not be negated upon the coming into force of the Bill.

ii. *Gaps and Recommendations*

- Some elements of inequality are retained by the Bill. For instance whereas men are in some instances allowed to contract polygamous marriages, the bill is very categorical in Section 10 (2) that no married woman shall, while her marriage subsists, contract another marriage. This unequal treatment between men and women is something that might need to be rectified.
- Section 80 states that subject to any law on matrimonial property, a court, when or after granting a decree of annulment, divorce or separation, may order a division between the parties of any assets acquired by them during the marriage by their joint efforts, or may order the

A married woman and man have the same right to acquire, hold and dispose property; to contract; to sue, and to be sued

sale of any of those assets and a division between the parties of the proceeds of

the sale. However, for the avoidance of doubt, this section should clearly state that such division of property should be subject to the Matrimonial Property Act as the Matrimonial Property Bill, which is currently being deliberated concurrently with the Marriage Bill, is the one that contains most substantive and procedural provisions relating to matrimonial property.

- Section 106 (1) provides that costs in matrimonial proceedings shall be in the discretion of the court. This waters down the common law position whereby a wife was entitled to have her husband foot the costs of matrimonial / divorce proceedings.
- In Part IV of the Bill which deals with matrimonial rights, liabilities and status, Section 49 provides that subject to the provisions of the Act, either spouse is presumed to have authority to pledge the other spouse's credit, or to borrow money in his or her name, or to use any of his or her money which is in his or her possession or under his or her control, or to convert his or her movable property into money, and use it, so far as that credit or money is required or used for the purchase of necessaries for himself or herself and any children of the marriage, and so far as is reasonable having regard to the other spouse's means and way of life. This section limits what can be pledged or converted to money to only moveable assets. A spouse who is left with only land or other immovable property of the other can thus not rely on the provisions of this section to do all that is necessary to purchase necessaries for the family.

i) Matrimonial Property Bill 2011

i. Gains and Progress Realised

This is one of the so called Family Bills which have been pending in Parliament since 2007.⁵⁹ Once passed, the proposed Bill will be instrumental for realization of the related constitutional, land and engendered reforms in a number of ways:

- First, the Bill makes provisions for the rights of spouses in relation to matrimonial property and for the connected purposes;
- The Constitutional provisions above define property to include interests arising from land among others sources. Land remains one of the most contentious and coveted properties within a family set up;
- The Constitution also provides for equality of rights of rights for parties to the marriage and proposes for a legislation to regulate matrimonial property during, and after the termination of marriage;

- The National Land Policy has substantive provisions on property including the obligation by the government to review the laws on succession and matrimonial property; enact a specific legislation to govern matrimonial property and; replace the Married Women's Property Act of 1882 of England among others. The Bill therefore proposes to amend the Married Women Property Act.⁶⁰

Towards this, the Draft Bill provides for the following:

First are the following definitions among others:

- "Matrimonial home" to mean any property that is owned or leased by one or both spouses and occupied by the spouses as their family home;⁶¹
- "Spouse" to mean a person to whom a person is married or is presumed to be married under a system of law recognized in Kenya;⁶²
- "Contribution" to mean monetary and non-monetary contribution and includes-domestic work and management of the matrimonial home; child care; and companionship;⁶³
- "Matrimonial property" is defined as the matrimonial home or homes; household goods and effects in the matrimonial home or homes; immovable property, owned by either spouse which provides the basic income for the sustenance of the family; any other property acquired during the subsistence of a marriage, which the spouses expressly or impliedly agree to be matrimonial property;⁶⁴
- This definition does not include

⁵⁹ The one 2 Bills are Family Protection Bill and The Marriage Bill. The former is An Act of Parliament to make provision for the protection and relief of victims of domestic violence and to provide for matters connected therewith or incidental thereto. The later is a proposed Act of Parliament to amend and consolidate the various laws relating to marriage and divorce and for connected purpose.

⁶⁰ Clause 19 of the Bill.

⁶¹ Clause 1 on "Interpretation". Section 2

⁶² ibid

⁶³ ibid

⁶⁴ Clause 7(1) of the Bill on "Meaning of Matrimonial Property".

Marriage shall not affect the ownership of any property to which either the husband or the wife may be entitled or affect the right of either spouse to acquire, hold or dispose of any such property;

property held by a spouse as trust property whether acquired by way of inheritance or otherwise; or situations where spouses

have by agreement entered into before marriage or during marriage to determine their property rights.⁶⁵

Moreover, the Bill provides that:

- A married woman and man have the same right to acquire, hold and dispose property; to contract; to sue, and to be sued;⁶⁶
- A spouse in any marriage has the capacity to acquire his or her own separate property during the subsistence of marriage;⁶⁷
- Where a man has two or more wives, each wife shall enjoy equal rights, be subject to equal liabilities and have equal status in law;⁶⁸
- The interest of any person in any immovable or movable property acquired before a marriage shall not be affected by the marriage;⁶⁹
- Spouses shall have equal shares in matrimonial property irrespective of the contribution of either of them towards its acquisition, and shall be divided accordingly and appropriately upon divorce or dissolution of marriage;⁷⁰
- Any liability incurred by a spouse before marriage relating to property shall after marriage remain the liability of the spouse who incurred it, except that if the property becomes matrimonial property under section 7, the liability shall be equally shared by the spouses, unless they agree otherwise;⁷¹
- A spouse may claim a beneficial interest equivalent to the contribution made to the improvement of the property acquired by one spouse before or during marriage(which property did not become matrimonial property);⁷²
- Matrimonial property acquired by a man and the first wife shall be owned equally by the two partners if the property was acquired

before the man acquired the second wife;⁷³

- Matrimonial property acquired by the man after the second or subsequent wives shall be owned equally by the man and all the two wives-including the subsequent wives from the first to the last;⁷⁴
- However, the above provision may not apply where there is a clear agreement or conduct of parties that any wife has her separate matrimonial property with the husband;⁷⁵
- During the subsistence of marriage, matrimonial property shall not be alienated without the consent of both parties; a spouse shall not be evicted from matrimonial home by any of the other spouse or other persons except with a court order; or on the sale of any estate or interest in the matrimonial home in execution of a decree; by a trustee in bankruptcy; or by a mortgage or chargee in exercise of a power or other remedy given under any law;⁷⁶
- Marriage shall not affect the ownership of any property to which either the husband or the wife may be entitled or affect the right of either spouse to acquire, hold or dispose of any such property;⁷⁷
- During the subsistence of marriage, there shall be a rebuttable presumption that property acquired in the name of one spouse belongs absolutely to that spouse absolutely; irrebuttable is the presumption that property acquired in the names of the spouses jointly has equal beneficial interests to all;⁷⁸

⁶⁵ Clause Section 7(2-3) of the Bill on "Meaning of Matrimonial Property".

⁶⁶ Clause 3 of the Bill on "Equal status of married women and men".

⁶⁷ Clause 4 on "Capacity of a spouse to acquire separate property".

⁶⁸ Clause 5 of the Bill on "Equal status of wives".

⁶⁹ Clause 6 of the Bill on "Rights and liabilities of a married woman".

⁷⁰ Clause 8 on "Ownership of matrimonial property".

⁷¹ Clause 9 on "Liability on the property acquired before marriage".

⁷² Clause 10 on "Acquisition of interest in property by contribution".

⁷³ Clause 11(1) (a) on "Property Rights in Polygamous marriages".

⁷⁴ Clause 11(1) (b) on "Property Rights in Polygamous marriages".

⁷⁵ Clause 11(2) on "Property Rights in Polygamous marriages".

⁷⁶ Clause 12 on "Special provisions relating to matrimonial property".

⁷⁷ Clause 13 on "Separate property of husband and wife".

⁷⁸ Clause 14 on "Presumptions as to property acquired during marriage".

- Gifts given by either spouse to the other shall be assumed to belong absolutely to the donee;⁷⁹
- Spouses shall not be liable by reason of marriage for any debt contracted by the other spouse prior to their marriage;⁸⁰
- A person may apply to a court for a declaration of rights to any property that is contested as between that person and a spouse or former spouse of the person;⁸¹
- Finally, it is expected that the Rules Committee established under section 81 of the Civil Procedure Act shall make rules of the court regulating any matter of practice or procedure under this Act.⁸²

ii. Gaps and Recommendations

- The Bill needs to either define or cross reference the definition of “property” with the Constitution of Kenya under the interpretation section;
- The reference to the words “immovable or movable” in Section 6 of the Draft Bill should be deleted for these aspects will be subsumed under the definition of property with the Constitution of Kenya;
- The title for the same Section should be amended from “ Rights and liabilities of a married woman” to Rights and liabilities of a married woman and man” for the main Section addresses the property rights for all before marriage;
- There is a need to take the definition of the “matrimonial property” from Section 7 of the Bill to the Interpretation Section;
- It is also important to define such concepts or words as “beneficial interest in property”, “subsistence of marriage”, “rebuttal and irrefutable assumptions” among others for the current framework of legal drafting goes with simplified versions and/or interpretation clauses;
- Section 16 on “No liability for antecedent debts of a spouse” should go with the rider that “unless the spouses or parties to marriage agrees otherwise” for this is still possible;
- Finally, there is a need to ensure synergies between this Bill and the Family Protection Bill and The Marriage Bill for they are all geared towards

This Bill also seeks to provide for the appropriate framework and transition mechanism to ensure smooth and seamless transfer from centralized to devolved government.

protecting the rights and interests of the spouses and other parties to a family relationship.

j) The Devolved Government Bill, 2011

i. Gains and Progress Realised

The Bill seeks to give effect to Chapter Eleven of the Constitution by providing for the establishment of county governments and decentralized units; powers, functions and responsibilities of county governments to deliver services in the new governance structure. This Bill also seeks to provide for the appropriate framework and transition mechanism to ensure smooth and seamless transfer from centralized to devolved government.

The major interest on land reforms in the Bill is on the provisions dealing with County Planning (Part XI) , Delivery of County Public Services (Part XII) and Citizenship Participation (VIII). Part XI of the Draft Bill provides that the County Government is obligated to plan for the county and that no public funds shall be appropriated outside a planning framework that shall be developed by the County Executive Committee and approved by the County Assembly.

The Bill provides that one of the principles of planning and development facilitation in a county shall be to “protect and develop natural resources in a manner that aligns national and devolved government policies.”⁸³

It further provides that protection of the historical and cultural heritage, artifacts and

sites within the county shall be one of the objectives of county planning.

The Bill provides that there shall be four types of plans which shall guide, harmonize and facilitate development within each county. The plans are:⁸⁴

⁷⁹ Clause 15 on “Gifts between spouses”.

⁸⁰ Clause 16 on “No liability for antecedent debts of a spouse”.

⁸¹ Clause 17 on “Action for declaration of rights to property”.

⁸² Clause 18 of the Bill. Rules Cap 21

⁸³ See Sec 113 of the Draft Devolved Government Bill, 2011

⁸⁴ See Sec 118 of the Draft Devolved Government Bill, 2011

- a. County Integrated development plan;
- b. County Sectoral Plans;
- c. County Spatial Plan; or
- d. Cities and Urban Areas Plans

This kind of progressive provision is in line with the NLP which recognizes that land use planning is essential to the efficient and sustainable utilization and management of land and land based resources. The NLP further identifies that little effort has been made to ensure that such plans are effectively prepared and implemented.⁸⁵ It is positive that the draft Devolved Government Bill has substantive provisions that will cater for land use planning especially at the County level.

However, it will be important that public participation in the planning

It will be important that citizens are involved in decision making or policy formulation with regards to county planning and those aspects that deal with land rights, land acquisition, land administration etc

process is provided and safeguarded in the legislative framework to ensure that citizens are involved at every stage of the planning since they are the beneficiaries of the county plans. It will be also critical to ensure that in the county planning on land-use, citizens' land

rights are protected and engendered in the planning.

The Bill further provides that in the endeavor to promote public participation, non-state actors shall be incorporated in the planning processes by all authorities. It will be critical for non-state actors such as KHRC to be actively involved in the planning frameworks especially within the frameworks or platforms (such as the County Citizens Forums) that deal with land and land-based resources. The impact that this will have is that non-state actors will be able to bring in their technical capacity and other resources in facilitating and informing the planning processes.

The NLP identifies preparation of land use plans at the national, regional and local levels as one of the important issues that need to be addressed in land use planning. This planning will be particularly important to ensure that county plans are designed on the basis of predetermined goals and integrating rural and urban development. It will also be important to ensure that there is a linkage between the provisions in the Devolved Government Bill and the Urban Areas and Cities Bill in order to provide proper synchronized legal frameworks that will safeguard efficient and sustainable utilization and management of land and land based resources.

One of the positive aspects provided for in this Bill is on the issue of citizen

participation, which is an aspect borrowed from our Constitution.⁸⁶ The NLP emphasizes on the establishment of an appropriate framework for public participation in the development of land use and spatial plans as one of the key issues that need to be addressed in land use planning.⁸⁷ Therefore, it will be important that citizens are involved in decision making or policy formulation with regards to county planning and those aspects that deal with land rights, land acquisition, land administration and mechanisms/institutions for seeking redress on land disputes etc.

k) Urban Areas and Cities Act (September 2011)

i. Gains and Progress Realised

This Act seeks to give effect to Article 184 of the Constitution that obligates the enactment of a national legislation that shall provide for the governance and management of urban areas and cities. In particular, this Bill seeks to provide for the criteria for classifying areas as urban areas and cities; establishing the principles of governance and management of urban areas and cities; and provide for participation by residents in the governance of urban areas and cities.

The Act provides for an ad hoc committee which shall assess and recommend to the County Governor (who in turn shall transmit the recommendations to the county assembly for approval), the suitability of an area to be classified as either an urban area or a city and also for the criteria to be followed while classifying an area as a City, a Municipality or a Town in Sections 5, 9, 10 respectively. From the list of factors to be considered in determining the status of an area, it is evident that land and land-based resources available in a particular area will be a central determining factor. Other than the size of the Population, the

⁸⁵ Sec 3.4.1 of the National Land Policy

⁸⁶ Public participation is now enshrined in our Constitution as national value and principle of good governance. See Art. 10(2)(a)

⁸⁷ Sec 3.4.1 of the National Land Policy

Act also requires that for an urban area to be considered a City, a Municipality or a Town, it must have an integrated development plan in accordance with this Act; has demonstrable revenue collection or revenue collection potential; has demonstrable capacity to generate sufficient revenue to sustain its operations; has the capacity to effectively and efficiently deliver essential services to its residents as provided in the First Schedule; has institutionalized active participation by its residents in the management of its affairs; has sufficient space for expansion; has infrastructural facilities, including but not limited to street lighting, markets and fire stations; and has a capacity for functional and effective waste disposal

This kind of determination of the status of an area could have positive or negative implications on a particular area. Hence it will be important to ensure that there is a clear policy framework that will ensure that certain areas are not prejudiced against other areas on the basis of availability or non-availability of land-based

resources as this has been the case with areas such as northern Kenya where for many years the government has isolated them in terms of furthering development in the area or providing funds for the development of infrastructure and service provision based on the fact that the area has no “useful” land-based resources or economic viability for the nation.

The Act provides that the management of a city and municipality shall be vested in the county government and administered on its behalf by a board constituted in accordance with section 13 or 14 of the Act; a manager appointed pursuant to section 28; and such other staff or officers as the county public service may determine.

Subject to the provisions of this Act a board of a city or municipality shall oversee the affairs of the city or municipality; develop and adopt policies, plans, strategies and programmes, and may set targets for delivery of services; formulate and implement an integrated development plan; control land use, land sub-division, land development and zoning by public and private sectors for any purpose, including industry, commerce, markets, shopping and other employment centres, residential areas, recreational areas, parks, entertainment, passenger transport, agriculture, and freight and transit stations within the framework of the spatial and master plans for the city or municipality as may be delegated by the county government.

Also, the Act requires the Board to carry out functions as may be delegated by the county government, promote and undertake infrastructural development and services within the city or municipality; develop and manage schemes, including site development in

collaboration with the relevant national and county agencies; maintain a comprehensive database and information system of the administration and provide public access thereto upon payment of a nominal fee to be determined by the board; administer and regulate its internal affairs; implement applicable national and county legislation; enter into such contracts, partnerships or joint ventures as it may consider necessary for the discharge of its functions under this Act or other written law.

The NLP identifies that the current system of land rights delivery has not supplied adequate serviced land for development and the system has not achieved equitable distribution of the limited land.

Others include to monitor and, where appropriate, regulate city and municipal services where those services are provided by service providers other than the board of the city or municipality; prepare its budget for approval by the county executive committee and administer the

budget as approved; as may be delegated by the county government, collect rates, taxes levies, duties, fees and surcharges on fees; settle and implement tariff, rates and tax and debt collection policies as delegated by the county government, monitor the impact and effectiveness of any services, policies, programmes or plans; establish, implement and monitor performance management systems; promote a safe and healthy environment; facilitate and regulate public transport; and perform such other functions as may be delegated to it by the county government or as may be provided for by any written law.

The NLP identifies that the current system of land rights delivery has not supplied adequate serviced land for development and the system has not achieved equitable distribution of the limited land resources.⁸⁸ It will be very important to monitor how the allocation of tenders for such companies will be carried out by the board of a city or municipality at the counties. It will also be important to ensure that such companies safeguard the land rights of the people living in the counties and that they are able to deliver services promptly to the citizens.

ii. Gaps and Recommendations

- There is need to emphasize the need for public participation, especially the local populace in the ad hoc committee constituted by the county governor to consider the elevation of an urban area to either a town, a municipality or a city. As such, Section 8(3) of the Act should have a provision for the representative of the populace/residents. This would then be in line with the section 11(d) that provides for institutionalized active participation by the residents in the management of the urban areas and city affairs.
- Section 15 of the Act does not specify whether the tenure of the members is renewable after the expiry of the first term of five years.
- Section 16 of the Act is repetitive on sub sections (c) and (h), there is no need to specify an offence since both offences, whether criminal or not, in case they carry a sentence of an imprisonment for a term of six months or more will lead to the member ceasing to hold office.
- It is not clear in Section 17(4) whether the tenures of both the Chairperson and the Vice Chair are renewable or not.
- Delete the term “bye-laws” and replace with “by-laws” in Section 21(t) of the Act. On the same vein rectify the alphabetical errors on Section 21 paragraphs (a) – (g).

The Act establishes the Environment and Land Court, which according to Section 4 (2) and (3), is a court with the status of the High Court.

I) Environment and Land Court Act (2001)

i. Gains and Progress Realised

An Act of Parliament to give effect to Article 162(2)(b) of the Constitution; to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land, and to make provision for its jurisdiction functions and powers, and for connected purposes. The principal objective of this Act is to enable the Court to facilitate the just, expeditious, proportionate and accessible resolution of disputes governed by this Act.

The Act establishes the Environment and Land Court, which according to Section 4 (2) and (3), is a court with the status of the High Court. It exercises jurisdiction throughout Kenya and pursuant to section 26, ensures reasonable and equitable access to its services in every county. According to Section (5) and (6), the Court consists of a Principal Judge, elected in accordance with Article 165(2) of the Constitution, and a number of Judges as may be necessary for the efficient and effective

discharge of the functions of the court appointed in line with the provisions of the Constitution. The Principal Judge shall have supervisory powers over the Court and shall report to the Chief Justice (Section 6 (3)). Section 6 (2) provides that the Principal Judge shall hold office for a non-renewable term of five years.

On qualifications and appointment of Judges, the act in Section 7 (1) says that a person shall be qualified if he/she meets the requirements of Article 166 (2) (a) and (5) of the Constitution, has at least ten years’ experience as a distinguished academic or legal practitioner with knowledge and experience in matters relating to environment or land, has held the qualifications specified above for a period amounting in the aggregate, to ten

years, and meets the requirements of Chapter Six of the Constitution. On the same vein, the Chief Justice may on the recommendation of the Judicial Service Commission, transfer a

judge who meets the above qualifications to serve in the Court.

From the provisions of Section 8, a Judge of the Court shall hold office until he/she retires from office in accordance with Article 167(1) of the Constitution, resigns from office in accordance with Article 167(5) or is removed from office in accordance with Article 168 of the Constitution. The Act in Section 9 (1) provides for the appointment of a Registrar of the Court by the Judicial Service Commission while Section 9 (2) stipulates that any administrative function of the Registrar may in the Registrar’s absence, be performed by any member of staff of the Court authorized by the Principal Judge.

Qualifications for appointment of the Registrar are spelt out in Section 10 of

the Act whereby a person should be an advocate of the High Court of Kenya and has, since admission to the Roll of Advocates, become eligible for appointment as a Judge of the High Court, served for at least eight years as a professionally qualified magistrate or has attained at least eight years' experience as a distinguished academic or legal practitioner or such experience in other relevant legal field. Also the individual should have demonstrated competence in the performance of administrative duties for not less than three years and meets the requirements of Chapter Six of the Constitution.

Section 11 gives the functions of the Registrar and points out that he/she shall perform the duties assigned to him/her under this Act and such other duties as the Chief Registrar may direct and in particular be responsible for: the establishment and maintenance of the Registry of the Court; the acceptance, transmission, service and custody of documents in accordance with the Rules; facilitate the enforcement of decisions of the Court, certify that any order, direction or decision is an order, direction or decision of the Court; the Chief justice or a Judge, as the case may be; the maintenance of the Register of the Court; enable keeping of records of the proceedings and minutes of the meetings of the Court and such other records as the Court may direct; manage and supervise the staff of the Court; the day to day administration of the Court; managing the library of the Court; facilitating access to judgments and records of the Court; and undertaking any other duties as assigned by Chief Registrar.

Any person aggrieved by a decision of the Registrar on matters relating to judicial functions of the Court may apply for review by a Judge of the Court in accordance with the Rules, and the Judge may confirm, modify or reverse the decision of the Registrar, according to Section 12 of the Act. The Court has supervisory jurisdiction over the subordinate courts, local tribunals, persons or authorities in accordance with Article 165(6) of the Constitution and thus can take over any case relating to environment and land from the subordinate courts and tribunals. Proceedings before the court unless provided for in Article 50(8) of the Constitution, shall be in public, according to section 17 of the Act.

In the exercise of its jurisdiction under this Act, the Court shall be guided by the following main principles as outlined in Section 18:

- The principles of sustainable development, including the principle of public participation in the development of policies, plans and processes for the management of the environment and land;
- The cultural and social principles traditionally applied by any community in Kenya for the management of the environment or natural resources in so far as the same are relevant and not inconsistent with any written law;
- The principle of international co-operation in the

management of environmental resources shared by two or more states, the principles of inter-generational equity, the polluter-pays principle; and the precautionary principle.

Other principles include that of land policy under Article 60(1); the principles of judicial authority under Articles 159(2), the national values and principles of governance under Article 10(2) and the values and principles of public service under Article 232(1) of the Constitution. Section 13 (1) of the Act stipulates that the Court has original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution and with the provisions of this Act or any other written law relating to environment and land.

Section 13 (2) gives the Court powers in exercise of its jurisdiction under Article 162 (2) (b) of the Constitution, to hear and determine disputes relating to environment and land, including disputes relating to environmental planning and protection, trade, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources, those relating to compulsory acquisition of land, land administration and management in addition to those relating to public, private and community land and contracts, chooses in action or other instruments granting any enforceable interests in land and any other dispute relating to environment and land.

In any proceedings to which this Act applies, the Court shall act expeditiously, without undue regard to technicalities of procedure and shall not be strictly bound by rules of evidence, provided that the Court may inform itself on any matter as it thinks just and may take into account opinion evidence and such facts as it considers relevant and material, this has been outlined in Section 19 (1). Section 19 (2) says the Court shall not be bound by the procedure laid down by the Civil Procedure Act and shall be guided by the principles of natural justice.

Section 19 (3) bestows upon the Court the power to require any person who appears to it to have special knowledge of any relevant matter, or of any of the matters to which this Act applies or any written law to which it relates, to furnish in writing or otherwise, and to confirm on oath or affirmation, such expert opinion as may be relevant to any of the issues in the proceedings.

Section 20 (1) of the Act provides mechanisms for alternative dispute resolution mechanisms and points out that nothing in this Act may be construed as precluding the Court from adopting and implementing, on its own motion, with the agreement of or at the request of the parties, any other appropriate means of alternative dispute resolution including conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159(2) (c) of the Constitution. This gives room for the court to deviate from the norm of following rigid and often time consuming legal proceedings in situations where an alternative dispute

resolution mechanism is available.

Section 23 (2) acknowledges the need for the people with communication disabilities to access justice by giving a that “in all appropriate cases, the Court shall facilitate the use by parties of indigenous languages, Kenyan Sign language, Braille and other communication formats and technologies accessible to persons with disabilities.”

Section 23 (2) acknowledges the need for the people with communication disabilities to access justice by providing that “in all appropriate cases, the Court shall facilitate the use by parties of indigenous languages, Kenyan Sign language, Braille

and other communication formats and technologies accessible to persons with disabilities.” The Chief Justice shall, in consultation with the Court, make rules to regulate the practice and procedure of the Court. He/she shall make rules to regulate the practice and procedure, in tribunals and subordinate courts, for matters relating to land and the environment. In consultation with the Court, he/she shall make rules for the determination of admissibility by the Court of proceedings pending before any court or local tribunal. In the absence of the rules above, the Court shall regulate its own procedure.

On Gender Equality and equal opportunities, appointments in the Environment and Land Court are in accordance with the Article 27 of the Constitution which provides provisions for Equality and Freedom from discrimination. The Act also stipulates that appointments in the Court shall meet the requirements of Chapter Six of the Constitution, which is on Leadership and Integrity.

ii. Gaps and Recommendations

- There is need to spell out the Independence of the Court as stipulated in Article 160 of the Constitution to ensure that the

Court is Independent and not under controlled from other authorities with vested interests.

- The term “restitution” should be added and defined in Part 1(Preliminary) according to the provisions of either the National Land Policy (NLP) or the Basic Principles on the Right to Remedy. Under the Glossary of Terms, restitution refers to the restoration of the individual or communities to areas which they are unfairly removed from,⁸⁹ on the other hand the Basic Principles on the Rights to Remedy⁹⁰ provides that Restitution should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred.
- Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one’s place of residence, restoration of employment and return of property.
- Section 11 on the Functions of the Registrar of the Court. Either delete provisions of the Section and/ or instead refer to the respective provisions of the Civil Procedure Rules or confirm if two provisions correlate
- Section 13(2) on the Jurisdiction of the Court; there is need to amend Sub-Section 2(a) to replace reference to “mining, minerals and other natural resources” with the word “land-based resources.”
- Section 24(2) of the Bill should be reworked to provide that the Court will be guided by the provisions of the

⁸⁹ National Land Policy which was passed by Parliament as Sessional Paper No. 3 of 2009. See page 68

⁹⁰ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law adopted and proclaimed by General Assembly Resolution 60/147 of 16 December 2005.

Civil Procedure Act and Rules in civil proceedings pending the enactment of rules to guide the procedure of the Court as opposed to the current provisions

- Section 25 on Gender and Equal Opportunities should be framed in a language that shows continuity from the previous provisions by adding the word “also” between the words “shall” and “be.”
- Section 26 on Access to Justice should be cross referenced with Articles 47 and 48 of the Constitution. The aforementioned articles enshrine more progressive provisions in regards to fair administrative action and access to justice. These can be either referenced or added to strengthen the Section.
- Clarification on where to place Commissioners and other specialists who may be required to support and advise the Judges on land and environment issues and their mode of appointment should be spelt out.

m) Draft Eviction Guidelines (March 2011)

i. Gains and Progress Realised

The drafting of these guidelines was initiated by the Ministry for Lands through its Land Reforms Transformation Unit (LRTU) in 2009 as a compliment to the land policy formulation process. The February 2011 version of the guidelines if adopted will go a long way in the implementation of the National Land Policy, the Constitution of Kenya, some provisions of the draft IDPs, disaster and human rights policies and the government’s international obligations on evictions.⁹¹ The following are the core provisions of the draft guidelines.

First, the guidelines note the following as the root causes of evictions on a global scale: illegal/irregular allocation of public land; tenure insecurity; development and infrastructure projects, environmental concerns; large international events, e.g. Olympic Games or World Cup or international conference; urban redevelopment and beautification initiatives; property market forces and gentrification; absence of state support for the poor; political conflict, ethnic cleansing and war; planning initiatives; and discovery and extraction of natural resources.⁹²

At the national level, evictions takes place both in the urban and rural areas. In the urban areas, the Kenyan Government is blamed for carrying out large-scale forced evictions especially in informal settlements.

At the national level, evictions takes place both in the urban and

⁹¹ See Basic Principles and Guidelines on Development Based Evictions and Displacements

⁹² See sub- Clause 1.1 on the Overview.

rural areas. In the urban areas, the Kenyan Government is blamed for carrying out large-scale forced evictions especially in informal settlements. In the rural areas, squatters and former labour tenants face evictions from the land owners.

These according to the guidelines leads to disposessions without any compensation or alternative housing. This is contrary to international human rights law which describes the practice of forced evictions as illegal, unjust and counterproductive to the goal of human development. These problems justify the call for a legislative framework and guidelines to direct evictions, especially for “development-based” evictions.⁹³

The guidelines also reveal the international and regional instruments⁹⁴ on evictions especially the protections identified by the UN Committee on Economic, Social and Cultural Rights, in paragraph 15 of General Comment No.7. The key ones are ensuring:

- An opportunity for genuine consultation with those affected;
- Adequate and reasonable notice for affected people prior to the eviction;
- Information on the proposed evictions and, where applicable, on the alternative purpose for which the land or housing is to be used, be made available in reasonable time to all those affected;

Governments must also ensure that no one is rendered homeless or vulnerable to the violation of other human rights as a consequence of eviction.

- Government officials or their representatives are present during an eviction;

⁹³ Sub- Clause 1.2 on the Problem

⁹⁴ Sub-Clause 2.1.2 on International Conventions on Eviction and the Kenyan situation (UN Principles/Protocols/Conventions on Evictions)

- Anyone carrying out the eviction is properly identified;
- Evictions do not take place in particularly bad weather or at night unless the affected people consent;
- Provision of legal remedies and where possible, of legal aid to people who are in need of it to seek redress from the courts.

Moreover, Governments must also ensure that no one is rendered homeless or vulnerable to the violation of other human rights as a consequence of eviction.

Finally, adequate alternative housing and compensation for all losses must be made available to those affected prior to eviction, regardless of whether they rent, own, occupy or lease the land or housing in question (General Comment No.7, paragraph 16). Housing involves more than having a roof over one's head. It includes the need for minimum levels of security of tenure.

Article 11(1) of the International Covenant on Economic, Social and Cultural Rights, provides for the right to adequate housing, the right to protection from arbitrary or unlawful interference with privacy, family or home and to legal security of tenure. Article 17 of the International Covenant on Civil and Political Rights provides for the right to protection of the law against arbitrary or unlawful interference with a person's privacy, family or home.

Section 2 of the Guidelines captures the following national legal and policy frameworks which could be applied to either ameliorate or exacerbate evictions in Kenya: The Constitution of Kenya (2010), the National Land Policy(2009), National Housing Policy(2004), The Governments Land Act(Cap 280), The Physical Planning Act(CAP 286), The Public Health Act(CAP 242), The Land Acquisition Act(CAP 295), The Kenya Airports Authority Act(CAP 395), Kenya Ports Authority(CAP 391), Kenya Railways Corporation Act(CAP 397) and The Kenya Roads Act.

Others are The Landlord and Tenant Act (CAP 301), The Rent Restrictions Act (CAP 296), The Trespass Act (CAP 294), The Environmental Management and Coordination Act (EMCA 1999). These also include the recent and retrogressive practices as the Mau Forest evictions and the Railway Relocation Action Plan.

Section 4 on the General Legal Principles for the Guidelines provides that:

- Forced evictions constitute human rights violations and no legislation may permit arbitrary evictions. Such violations includes the confiscation or destruction of productive land, the destruction of property, schools, health care, water and sanitation facilities and cultural property and

the dislocation of social networks;⁹⁵

- The government has obligations to take all appropriate steps to prohibit, prevent and provide remedies in all cases of forced evictions whether carried out or threatened by State or non-State actors;⁹⁶
- The obligation to prohibit entails taking all necessary steps to legally prohibit forced evictions and ensure non-discrimination and equality. The latter entails ensuring that protections against forced evictions, the right to secure tenure and the right to adequate housing shall be guaranteed without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status; guarantee the equal right of women and men to the enjoyment of the rights articulated within the present Guidelines; and taking special action to provide sufficient protection to vulnerable groups such as women, people living HIV/AIDS, children, and people with disabilities, the sick and the elderly;⁹⁷
- The obligation to prevent forced evictions entails securing, by all appropriate means including the provision of security of tenure, the maximum degree of effective protection against the practice of forced evictions for all persons.⁹⁸ The government is also expected to ensure the monitoring, evaluation and follow-up on the status

⁹⁵ Sub- Clause 4.2.2.1 of the Guidelines

⁹⁶ Sub- Clause 5.0 of the Guidelines

⁹⁷ Sub- Clause 5.2 of the Guidelines

⁹⁸ Sub- Clause 5.1 of the Guidelines

of forced evictions and compliance through the Kenya National Commission on Human Rights. Such should form regular governmental presentations at international forums on economic, social and cultural rights and be used as an evaluation and monitoring tool for the Eviction and Resettlement Guidelines.⁹⁹

This obligation entails also guaranteeing the rights to housing, adequate standard of living and secure land tenure; review of the national legislation to ensure compliance with the Guidelines; development of a legislations and policies to ensure the effective protection of individuals, groups and communities from forced eviction; abolition of the existing forced eviction plans; refrain from introducing any retrogressive measures with respect to de jure or de facto protection against forced evictions.¹⁰⁰

The government is also expected to ensure that environmental and eviction impact assessments are carried out prior to the initiation of any project which could result in development-based displacement; review the operation and regulation of the housing and tenancy markets to ensure that market forces do not increase the vulnerability of low-income and other marginalised and vulnerable groups to eviction; and take steps to minimise the occurrence of natural disasters and environmental degradation, which create the conditions for displacement;¹⁰¹

The obligation to protect against evictions by ensuring that evictions only occur in exceptional circumstances justifiable on the basis of 'interest of society' or 'public interest'.

From the women's land rights perspective, this obligation entails ensuring the equal rights of men and women to legal security of tenure; property ownership; equal access to inheritance; the control of and access housing, land and property restitution; taking all necessary steps to ensure that affected women are adequately represented and included in relevant consultation and decision-making processes; taking specific and comprehensive preventive measures to ensure that private actors do not forcibly or violently evict women from their homes.¹⁰²

The obligation to protect against evictions by ensuring that evictions only occur in exceptional circumstances justifiable on the basis of 'interest of society' or 'public interest'. However, this should be read restrictively and only be carried out in accordance with the Guidelines

and international human rights and humanitarian law.¹⁰³ The Government shall also explore all possible alternatives to eviction and ensure all affected persons, including women, children, people with disability, people living with HIV and AIDS the elderly, and illiterate persons shall have the right to all relevant information and the right to full participation and consultation throughout the entire process and to propose any alternatives.¹⁰⁴

The obligation to provide remedies entails ensuring due diligence during evictions; a court order where no agreement is reached between the affected persons and the entity intending to carry out an eviction; provide alternative land and housing in order to reduce vulnerability; ensure legal remedies to the affected (including the right to appeal against any decisions); compensation; resettlement and the monitoring, evaluation and follow-ups similar to those captured above.¹⁰⁵

The guidelines also assigns role for both the national and international state and non-state actors to ensure compliance. At the national state level, it provides that the Government shall designate specific public agencies to be entrusted with monitoring forced evictions and reviewing the enforcement for the prohibition on forced evictions.¹⁰⁶ At the international non-state actors level, it provides that all international financial, trade, development and other related institutions and agencies, including member or donor States that have voting rights within such bodies, working in the country and /or with the Government shall be subject to these guidelines.¹⁰⁷ Transnational corporations and other business enterprises working in the country shall respect the right to housing, including the prohibition on forced evictions.¹⁰⁸

⁹⁹ Sub- Clause.17 of the Guidelines

¹⁰⁰ Sub- Clauses 5.3 to 5.8 of the Guidelines

¹⁰¹ Sub- Clauses 5.9 to 5.12 of the Guidelines

¹⁰² Sub- Clause 5.12 of the Guidelines

¹⁰³ Sub- Clause 5.13.1 of the Guidelines

¹⁰⁴ Sub- Clause 5.13.2 of the Guidelines

¹⁰⁵ See Sub- Clauses 5.13.2 to 5.17 of the Guidelines

¹⁰⁶ Sub- Clause 6.1 of the Guidelines

¹⁰⁷ Sub- Clause 6.2 of the Guidelines

¹⁰⁸ Sub- Clause 6.2 of the Guidelines

- Finally, the Guidelines have an Appendix of the draft Legal Framework. The proposed framework is supposed to ensure that evictions conform to the Constitution of Kenya, the set Guidelines and internationally acceptable standards; to provide for appropriate procedures for carrying out all forms of evictions; to provide protection, prevention and redress against eviction for all occupiers of land including but not limited to unlawful occupiers; to provide standards for all actors involved in the practice of evictions; and to provide for matters incidental thereto.

The draft legislation is organized around the following sections: Preamble; Definitions; Application of the Guidelines, Protection of the Right to Property and Prohibition against Forced or Arbitrary Evictions; Procedures to be followed in relation to Eviction Principles; Procedures for carrying out Evictions, Dispute Resolution Mechanism especially through the Special Mediation Committee; Urgent Proceedings for Evictions; Evictions at the instance of Organs of State; Mandatory provisions during Evictions; Immediate Relief and Resettlement; Monitoring, Evaluations and Follow-ups; Role of Stakeholders; and, finally, Interpretations.

IDPs in particular the most disadvantaged among them are placed at the centre of all support accorded to them; all actors must be accountable to IDPs; IDPs are consulted and supported so that they are able to actively participate in all interventions affecting them;

on Internal Displacement and also reflected in the African Union Convention for the Protection and Assistance to Internally Displaced Persons in Africa (Kampala Convention).

ii. Gaps and Recommendations

First the guidelines need to incorporate the relevant principles and provisions in the Constitution of Kenya, National Land Policy, IDPs, and Human Rights policies among others.

Finally, we need to clarify the areas of convergence between this policy and the draft IDPs policy for what is defined as displacement as a result of develop programmes or arbitrary evictions may either imply or lead to evictions.

n) The Draft National IDPs Policy¹⁰⁹

i. Gains and Progress Realised

The draft National Policy on IDPs was adopted by stakeholders at Holiday Inn in March 2010. The policy responds to the provision in Section 203 of the NLP which obligates the government to establish policy and institutional measures for protection of and assistance to IDPs. The draft policy was amended in November 2010 in order to ensure compliance with the provisions of the CoK 2010 which was promulgated in August 2010.

The vision of the policy is to find sustainable and durable solutions for all the IDPs and prevent any future displacement from occurring so that Kenya becomes a nation free from internal displacement. The mission of the policy is to provide an institutional framework for addressing

internal displacement in Kenya and to guide the country in preventing future displacement from emerging by: eradicating root causes of displacement, mitigating its consequences, strengthening the response to internally displaced persons, and providing IDPs with a durable solution.

The Policy is an important first step of the Government to implement its human rights obligations assumed with the ratification of the Great Lakes Protocol on the Protection and Assistance of Internally Displaced Persons, including the adoption and implementation of the UN Guiding Principles

The policy is grounded on the following principles of human rights and gender justice:

- Human dignity and inclusion of IDPs. This means that human dignity for all IDPs including their families and communities is respected in recognition of our shared humanity; Equality and non-discrimination meaning that IDPs should not be discriminated against; they shall enjoy the same rights as any other person in Kenya; all IDPs are equally and fully supported without discrimination; and, special consideration shall be made for groups like the elderly, children, women, and person with disabilities among IDPs.

The policy is also progressive in that it provides for a clear and modern definition of IDPs as persons or groups of persons who have been forced or obliged to flee or

¹⁰⁹ For details find the January 2011 formatted version of the policy and the simpler version of the policy co-published by the Kenya National Commission on Human Rights, Kenya Human Rights Commission and the Refugee Consortium of Kenya in April 2011.

to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.¹¹⁰

This definition includes: persons internally displaced by politically instigated violence or inter-communal hostilities such as competition over lands or other resources; Persons internally displaced by natural disasters, whether or not triggered by the change of climate; and; Persons internally displaced by development projects or projects on the preservation of the environment, including those forcibly evicted, who remain without proper relocation and sustainable re-integration. Finally, the definition according to the policy, includes internally displaced persons irrespective of the location they have been displaced to, including camps, transit sites, settlements or host families in rural and in urban areas.

The policy also provides for an institutional framework and obligations for all stakeholders;¹¹¹ principles and mechanisms for preventing internal displacement; protecting from arbitrary displacement (including conditions and procedures on evacuation, evictions and relocations); preparedness and mitigation; response measures in all phases of displacement up to durable solutions; and finally, the implementation framework to ensure that the policy is enforced.

- The enforcement or implementation of the policy will be guided by the principles of:
- Good partnership between all the different actors engaged in addressing internal displacement in Kenya;
- Cooperation, collaboration and complementarity to ensure efficient use of capacities and avoid duplication;
- Transparency and predictability in all actions and activities among the different actors and towards beneficiaries;
- Accountability for all action and activities undertaken under this Policy.

To guide the adoption and implementation of the policy, the stakeholders through the Protection Working Group on Internal Displacement (PWGID) and its Legal Steering Committee have audited all the existing and envisaged policies and legal frameworks; developed dissemination and lobbying strategies; and prepared and submitted a cabinet memo to the Minister of State for Special Programmes (MoSSP) for presentation and adoption by the cabinet, and final approval by Parliament.¹¹²

¹¹⁰ In line with the UN Guiding Principles and the AU Convention on IDPs

¹¹¹ The Ministry of State currently responsible for Special Programmes has been mandated to coordinate this through the National Consultative Coordination Committee on internal displacement (NCCC). NCC shall bring together focal points from relevant Ministries, other national actors, IDP representatives, civil society and the international community both at the national and county levels.

¹¹² The cabinet memo was presented during a meeting held between the Minister and PWGID in March 16, 2011.

ii. Gaps and Recommendations

The policy has three major gaps:

- First, the policy is still in draft form and therefore not enforceable;
- Second, the provisions on the principles guiding the policy needs to be harmonized so to ensure more consistent and complimentary application both on the provisions and implementation;
- Third, it needs to be reformatted to ensure that sections flow in a more orderly and organized manner for easier referencing. Currently, the formatting is done by Chapter and the labeling is quite inadequate and confusing;
- Finally, the policy need to be finalized and implemented in collaboration of other related frameworks captured elsewhere in this paper.

0) The Draft National Human Rights Policy (NHRP-May 2011)

i. Gains and Progress

The draft National Human Rights Policy will be integral in the realization of the above gains gender and human rights gains safeguarded in the Constitution of Kenya. The proposed policy underscores improving access to land as one of the major interventions for citizens.

The policy notes that Kenyans seem to have a low awareness about the National Land Policy, and more specifically, how it might interact with the proposed human rights policy. Therefore the NHRP proposes the following:

- The need for it to support measures to delink land adjudication from politics.
- The need for it to complement the existing and proposed land policies to protect the rights of young people to inherit land from their parents and families.
- The need to strengthen and streamline the land office functions in order to end mismanagement, corruption and non-responsiveness.
- The need for the policy to

complement other policy measures that aim to increase the participation of women in land control boards as well as granting greater authority to officers in land boards.

- The need for the policy to also complement other responsive policy measures that address the use of public land as well as regulate the buying of land by foreign companies.

The policy also captures other land related issues such as women rights;¹¹³ housing and environmental rights; and rights of the minority groups and indigenous communities. Concerning the

The need for the policy to also complement other responsive policy measures that address the use of public land as well as regulate the buying of land by foreign companies.

latter and in the context of land rights and reforms, the policy notes as follows:

Historical injustices' against these groups and communities relating to land must be addressed if resettlement away from forests and wetlands is

to be successful. Similarly, the generalized violence they sometimes experience in the forms of communal wars and cattle rustling attacks should be combated more vigorously. The policy should seek complementarity with other policy initiatives like the recently initiated policy framework on small arms and light weapons.¹¹⁴

ii. Gaps and Challenges Realised

The major challenge is based on the fact this policy is still in a draft form and a great deal dissemination is required.

p) Legal, Institutional and Administrative Land reforms

i. Introduction

The belief that we must wait until the implementing legislation of the new Constitution is passed before any actions can be taken is erroneous. In the Sixth Schedule, Section 7(1) provides that all laws in force immediately before the effective date continue in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution.

Section 7. (2) adds thus:

If, with respect to any particular matter-

(a) a law that was in effect immediately before the effective date assigns responsibility for that matter to a particular State organ or public officer; and

(b) a provision of this Constitution that is in effect assigns responsibility for that matter to a different State organ or public officer;

the provisions of this Constitution prevail to the extent of the conflict.

More fundamentally, Section 8 provides that :

8. (1) On the effective date, any freehold interest in land in

Kenya held by a person who is not a citizen shall revert to the Republic of Kenya to be held on behalf of the people of Kenya, and the State shall grant to the person a ninety-nine year lease at a peppercorn rent.

(2) On the effective date, any other interest in land in Kenya greater than a ninety-nine year lease held by a person who is not a citizen shall be converted to a ninety-nine year lease.

ii. Major Gains and Processes

The Government is strengthening institutional reforms in complementation or preparation of NLP implementation. The following initiatives have been reported by the Lands Ministry:¹¹⁵

- Draft National Land Commission Bill: This Bill when enacted will operationalize the NLC established by Article 67 of the Constitution and Section 4.2.1 of the NLP;
- Draft Land Bill which will provide the legislation to manage the public and private lands as envisaged in the Constitution and NLP;
- Simplification of land transactions and processes through the Business Re-Engineering aimed at simplifying land transaction processes:¹¹⁶ and, development and implementation of an integrated Land Rent Database System in which owners of leasehold properties in Kenya can

¹¹⁵ See James Orenge, Minister for Lands Statements entitled "Minister for Lands' Response to issues raised in the Standard and Nation newspapers of 23rd March 2011" in Sunday Nation, March 27, 2011. See also "Overview of Land Reforms in the Ministry of Lands", a presentation by Mr Luyai from the Ministry during a Land Sector Non-State Actors (LS-NSA) meeting at Panorama Park, Naivasha in April 8, 2011; and For details see the paid up advert by the Land Ministry in Daily Nation, Tuesday May 18 2010, "Commissioning of the New Banking Hall: Reforms in the Lands Sector". p. 34.

¹¹⁶ Among the re-engineering proposals, the Ministry plans to reduce the steps for the preparation of a physical development plan from the current 33 procedures which take 2 years to 7 steps and 3 months respectively.

¹¹³ Section 6.2

¹¹⁴ Section 6.16

access their land rent information through the short message services (SMS) through their mobile phones.

This also entails the initiation of the National Land Information Management System (LSIMS) that safeguards paper records and converts the same to digital format for easier retrieval, access, display and use of land information. This process has commenced in Nairobi registry, Mombasa, Nakuru and Thika. In Nairobi, the Ministry avers that it has safeguarded and captured in the database 400,000 records;

There is also the file tracking and queue system for monitoring the movement of files and electronic queuing system in the banking hall in Nairobi;

Finally, it includes the development of a single parcel identifier system for the country for a harmonized numbering and reference system; and the development and implementation of a modern geodetic reference network for accurate geo-referencing of features, locations and uniform parcel numbering system for the whole country;

Preparation of the National Spatial Plan which will guide and facilitate optimal use of Kenya's national space and resources and enhance global and regional competitiveness. So far, the Ministry has developed and shared a concept paper in a national platform of other ministries, experts and stakeholders where the plan formulation process was launched;

- Formulation of National Land Use Policy: This will provide the basis for sustainable use and proper management of land resources, land use planning and environmental conservation. A concept paper has been developed and is yet to be shared with stakeholders;

Development of a National Spatial Data Infrastructure: This is a tool that will facilitate the documentation of land and other statistical information in the country.

- Development of a National Spatial Data Infrastructure: This is a tool that will facilitate the documentation of land and other statistical information in the

country. The instrument will facilitate the integration of information and data required for development planning and decision making.¹¹⁷ The Ministry in consultation with stakeholders has prepared a draft policy on this infrastructure.

- Revocation of illegally acquired public land: This process has

according to the Ministry led to the revocation of over 500 titles in the past one year;

- Public education and awareness: The Ministry has designed a sensitization programme to sensitize the public on land reforms;
- Capacity Building and change management of ministry staff to embrace and handle Information and Communication Technology (ICT): These are meant to enable the staff to handle land reforms both at the ministry and at the district levels. District offices have also been given computers to facilitate land reforms. The ministry posits that it is constructing new Ardhi houses in the districts with complete ones being at Kericho, Siaya, Eldoret and Thika
- **Public complaints resolution** committee hosted at **Ardhi** house to handle appeal cases country wide.¹¹⁸

iii. Gaps and Recommendations¹¹⁹

It is clear from the foregoing that changes ought to have begun in the land holding realm from August 27th 2010 when the Constitution was promulgated. There is however concern that the failure to move with alacrity to implement this provision may render it nugatory. The following additional administrative actions need to be enforced:

- Conversion of all freehold land holdings by non-Kenyans as of 27th August 2010 into 99 year leaseholds;
- Conversion of 999 year leases held by non-Kenyans as of 27th August 2010 into 99 year leases. This also entails aligning all future leases

¹¹⁷ These are envisaged in the Kenya Vision 2030, the Medium Term Plan 2008-2012 and the National Land Policy.

¹¹⁸ "Ardhi" means land thus it is applied in this context to mean the national and local offices by the Lands Ministry.

¹¹⁹ These are captured in the Legislative Advisory on the Critique of the National Land Commission Bill and the Framework for the Formulation of the Land Act and Administrative Land Reforms

to the National Land Policy¹²⁰– no leases to exceed 99 years;¹²¹

- Alignment of transactions in land with the spirit and letter of the Constitution;
- Commissioning studies on historical injustices and on existing forms of customary tenure;¹²²
- Implementing the non-contentious aspects of the Ndung'u report with respect to illegally and irregularly acquired public land and establishing mechanisms for repossessing illegally

The TJRC is mandated under the TJRC Act 2008 to establish truth, foster justice and reconciliation over the past human rights violations and economic crimes committed between December 13, 1963 to February 28 2008.

or irregularly acquired public land;¹²³

- Preparation of an inventory of public land¹²⁴ informed by the Constitutions Section 62;

- Taking an inventory of

government land along the 10 Mile Coastal strip and other parts of the coast;¹²⁵

- Subjecting adjudication and consolidation processes to the Policy;¹²⁶
- Streamlining land transaction procedures to make them less arduous;¹²⁷
- Liaising with Ministries that have a bearing on land in view of expected rationalization of government to fewer ministries – Forestry, Water, Environment, Agriculture etc;
- Determining economically viable land sizes for various zones;¹²⁸
- Aligning land rights delivery processes with Policy and the Constitution – participation, access to information, fair administrative action etc;
- Creating a comprehensive, efficient, user friendly, accessible, affordable, transparent and gender sensitive land information management system;¹²⁹
- Investment in necessary infrastructural resources (hardware and software) to ensure effective reform;
- Capacity building for more efficient land administration and delivery using new technology; and

- Implementation of a policy on non-discrimination¹³⁰

The ministry needs to fast track and harmonize some of these processes; allocate more resources and involve all the stakeholders for effective implementation of the reform agenda in the Lands ministry and sector.

q) The Truth, Justice and Reconciliation Commission (TJRC Act 2008)

i. Progress and Gains Realised

The TJRC is mandated under the TJRC Act 2008 to establish truth, foster justice and reconciliation over the past human rights violations and economic crimes committed between December 13, 1963 to February 28 2008.

The functions of the TJRC provide the following opportunities for complementarity from the land reform perspective:

- Dealing with historical land injustices as part of the gross human rights violations crimes of sexual nature and economic injustices against the victims;
- Dealing with illegal and irregular allocation of public land as part of the economic crimes and abuse of public offices committed during the period under review.
- Dealing with disputes over land based resources part of the basis and manifestations of the causes of ethnic tension and civil strife the TJRC mandate.
- Considering and providing recommendations on the implementation of the relevant official reports such as the Ndung'u report.

The TJRC is said to have collected more than 20,000 statements most of which are related to historical land injustices in Kenya.

ii. Gaps and Recommendations

The major challenge with this mandate is the possibility of overlap with the NLC especially if the Commission is institutionalized while the

¹²⁰ Ibid. at Paragraph 80 a

¹²¹ Ibid. at Paragraph 80 c; Note that the Constitution's Section 65 seems to imply that Kenyans can have leases exceeding 99 years

¹²² The National Land Policy, supra note Section 3.6.6 at Paragraph 199a

¹²³ Ibid. at Paragraph 61 e

¹²⁴ Ibid. at Paragraph 61 b

¹²⁵ Ibid. at Paragraph 193 b

¹²⁶ Ibid. at Paragraph 86 b

¹²⁷ Ibid. at Paragraph 88 b

¹²⁸ Ibid. at Paragraph 122 a

¹²⁹ Ibid. at Paragraph 163 a

¹³⁰ Ibid. at Paragraph 213 a

TJRC is yet to start or complete its work. Given its financial constraints, time lapse and credibility crisis, the TJRC lacks the muscle and capacity to deal with a plethora of land problems. This should be left to the NLC whose final legislation is likely to be in place before the TJRC concludes its mandate.

r) Other Governance Frameworks relevant to land reforms

These are the Draft Mining Policy and Act; The Draft Housing Bill; the Draft Peace and Conflict Policy; Draft Disaster Policy; and Draft Environment Policy. The Water Act (2002) and the Environment Management and Conservation Act (EMCA) will be also critical in the governance of both water and the environmental resources respectively.

These laws and policies within their objectives and functions respond to land related issues as management of minerals (part of the land based resources); housing concerns (sometimes caused by landlessness); conflicts (sometimes caused by disputes over land and land based resources); disaster management (where most of the natural ones are land based); and sustainable environmental management.

While the draft policies and bills need to be passed, some of the existing legislations should be reviewed or repealed so as to be in line with the Constitution of Kenya, the National Land Policy among other new developments in the land sector.

The Public Officers Ethics Act, 2003(Chapter 183, Laws of Kenya) provides for a Code of Conduct and Ethics for public officers and requirement for financial declarations from certain public officers. This entails declaration of land acquired as ones wealth. The Anti-Corruption and Economic Crimes Act 2003(Chapter 65, Laws of Kenya) captures the legal and institutional mechanism for the prevention, investigation and punishment of corruption, economic crime and related offences. Thus this enables the Kenya Anti-Corruption Commission (KAAC) to pursue the culprits involved in illegal and irregular acquisition of public, from the anti-corruption and economic crimes perspectives.

ABOUT THE KHRC

The Kenya Human Rights Commission (KHRC) is a non-governmental organization (NGO) which was founded in 1992 and registered in Kenya in 1994. The Commission is has observer status with the African Commission on Human and People's Rights, is a member of, and a partner with governance organizations and coalitions in the society; and a winner of several human rights awards from 1998-2011. Our **mandate** is to entrench human rights and democratic values in the society.

Our Vision

Our vision is a Kenya that respects, protects and promotes human rights and democratic values.

Our Mission

Our mission is to work towards the respect, protection and promotion of all human rights for all individuals and groups. This will be achieved through multiple strategies and actions aimed at entrenching human rights and democratic values in Kenya by facilitating and supporting individuals, communities and groups to claim and defend their rights and holding state and non-state actors accountable for the protection and respect of all human rights for all Kenyans.

