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## RESEARCH PAPERS ON EAST AFRICA

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### THE FORA OF PUBLIC ACTION IN KENYA: FROM THE ORIGINS OF THE NATIONAL LAND POLICY TO ITS POLITICIZATION

FRANCESCA DI MATTEO

#### Introduction

“We want a fair system of access to land for the future and justice for the wrongs of the past”. This is one of thirteen verbatims quoted in the Constitution of Kenya Review Commission’s (CKRC) first published report in 2002. The Commission was appointed in 2000 by President Daniel arap Moi. The struggle for constitutional reform in Kenya had actually begun in the late 1980s, pulling together individuals and organizations from different sectors of Kenyan society in reaction to the authoritarian nature of Moi’s regime. Owing to patronage construct of state land allocations, the land sector was indeed instrumental in building Moi’s authoritative power. The pressure exerted from below ultimately forced the executive into discussing structural reforms. Non-state actors in Kenya therefore played a critical role in propelling the restructuring of the state.<sup>1</sup> In fact, without the determination of CSOs Kenya would probably have neither a National Land Policy (NLP) nor an entire chapter in the Constitution dedicated to land issues. The financial and moral support by international donors was, undeniably, a crucial factor in the scope and success of this mobilization.

Although they progressed at very different speeds, the reform of the land sector and the revision of the Constitution have been entangled. They occurred during the same period and, most importantly, land policies have substantially informed Kenya’s state building since colonialism. The path dependency of Kenyan property rights institutions is critical in understanding the Kenyan land struggle.<sup>2</sup>

1. Mutua, M. *Kenya’s Quest for Democracy. Taming Leviathan*. Lynne Rienner Publisher, 2008.

2. Onoma, A.K. *The Politics of Property Rights Institutions in Africa*. Cambridge Press, 2009.

The colonial strategy of domination through dispossession of communities’ land was somehow perpetuated by the postcolonial elite, which made of land a resource to build patronage networks. Kenya’s governments “have used their discretionary powers over land allocation [...] as an instrument of distributive politics”,<sup>3</sup> and the practice of “land grants from above”<sup>4</sup> constituted the basis of the ethnicization of politics until it reached a crisis point that made policy intervention almost inevitable.<sup>5</sup>

My three-month fieldwork in Kenya (mainly undertaken in Nairobi, with a few trips to Nakuru to visit some key CSOs’ headquarters) was aimed to shed light on the Formulation Process of the NLP (FPNLP). I investigated how the land policy was elaborated through a thoughtful and deliberative process that allowed grassroots actors to participate in the policy-making decisions. I also sought to understand why, at present, the reform process has reached a deadlock over the mandate of the newly appointed National Land Commission (NLC), which seems to conflict with the functions of the Ministry of Land.

#### The NLP formulation process

During his almost twenty-five-year long administration, President Moi built an oppressive and authoritative regime. Moreover, following in the footsteps of Jomo Kenyatta, Moi used the land resource to entrench his power. Beyond the

3. Boone, C. “Land Conflict and Distributive Politics in Kenya.” *African Studies Review* 55, no. 1 (2012).

4. Kanyinga, K. *Re-Distribution from Above. The Politics of Land Rights and Squatting in Coastal Kenya*. Research Report n° 115, Nordiska Afrikainstitutet, Uppsala, 2000.

5. Médard, C. “Quelques clés pour démêler la crise kenyane.” In *Les élections générales de 2007 au Kenya*, ed. J. Lafargue; 75-88. Nairobi: IFRA, Paris: Karthala, 2008.

land-related corruption phenomenon (or 'land grabbing'), Moi's political practices exacerbated the land problem by ethicizing the land question. After the introduction of multipartyism, interethnic violence increased. Some ethno-cultural groups were stigmatized and in the aftermath of the 1992 and 1997 elections, arbitrary evictions and mass executions were perpetrated. The toll of the violence was so heavy that the government had to provide an institutional response to calm public opinion. Moi set up a commission of inquiry to investigate into post-electoral 'tribal clashes'. This commission demonstrated the ethnicisation of land in Kenya.<sup>6</sup> Furthermore, in 1999, Moi also appointed a Commission of Inquiry into the Land Law System of Kenya (or the "Njonjo Commission", named after its Chairman Charles M. Njonjo). This Commission constituted a sort of jurisprudential precedent: for the first time, an official document issued from the circles of power stated the need for a revision of the land legislation and for its harmonization towards a comprehensive policy. Another promising development, contributing to the setting of land reform was the inclusion of land issues in the framework of the constitutional revision work of the CKRC.

Prof. Okoth-Ogendo is one of Kenya's most respected law scholars who served as land expert in the constitutional review process. He drove the process in institutional fora, and greatly contributed to generating the land reform momentum by propelling non-state actors involvement. In a review for DFID-Kenya, Okoth-Ogendo advocated for a radical transformation of land relations through comprehensive reforms.<sup>7</sup> DFID was the first donor to engage with the land sector from a governance perspective. Its objective of 'assuring the security of the access to land' was intended to be achieved 'by establishing an effective land advocacy network in Kenya to defend and uphold the land rights of the poor and other disadvantaged groups and to campaign for policy and legal reforms that meet their needs and interests'.<sup>8</sup> The land advocacy network is the Kenya Land Alliance (KLA), which has been the most engaged CSO within the FPNLP. The KLA was officially launched in May 1999, with the support and funding of Oxfam GB.

The reform momentum reached its climax in the first half of the 2000s. 2002 was the year of many turning points that catalyzed the reform process. In May 2002 the first Land Reform Conference, organized by the KLA, took place (officially called the National Civil Society Conference on Land Reform and the Land Question). The CKRC Report was published in September 2002. Chapter 11 of the Constitution Draft proposed far reaching changes to the current constitutional requirements on land

and property. In November 2002, the Njonjo Report was published and its recommendations somewhat convergent with the Constitution Draft. In October 2002, the National Rainbow Coalition (NARC) was set up out, bringing together the National Alliance Party (composed of various opposition parties and some of the most significant CSOs' exponents) and the Liberal Democratic Party of Raila Odinga, dissident of Moi's Kenya African Democratic Union (KANU). In December 2002, the NARC actually won the general elections, thus marking the end of the almost forty-year long KANU regime.

The NARC victory helped institutionalizing the land reform process. Not only had the land reform been an asset during the NARC electoral campaign, but the progressive and reformist wing of the NARC coalition prompted the new government to cooperate with donors and CSOs. Another important sign of commitment to reforms was the appointment of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land, or Ndung'u Commission (after its chairman Paul Ndung'u) by President Mwai Kibaki following the Njonjo Report recommendations. For donors, the shift in the government approach to land reform was palpable and encouraging.

In the meanwhile, non-state actors had started putting pressure on the political establishment to undertake the process of land reform. These actors were: the KLA, backed by DFID; the Swedish International Development Cooperation Agency (SIDA); and a few other development partners, alongside with professional bodies, such as the Law Society of Kenya (LSK), the Kenyan Institute of Planners (KIP) and the Institution of Surveyors of Kenya (ISK). The FPNLP was launched on February 2004 and was designed to include the civil society in the policy-making process. Land issues were divided and schematized in six broad themes. In 2005, 13 regional consultations were held countrywide, thus enabling citizens to participate in the process. In April 2007, the NLP Draft was adopted by a national stakeholders' symposium, where representatives of all social and cultural Kenyan constituencies endorsed the document.<sup>9</sup> The Final Draft of the NLP was finally produced by the NLP Secretariat in May 2007.

## Politicizing the Land Policy

From a legal standpoint, the Njonjo Report along with the 2002 CKRC Report and the Ndung'u Report reveal the foundations of the NLP's proposals for addressing land issues in Kenya. Among the most critical concerns of the land law system were the centralization of land transactions in the Ministry and Lands Departments and the concentration of power in the hands of the President and the Commissioner of Lands regarding allocations of public and trust land, which actually led to abuses. The Njonjo Commission recommended the establishment of

6. Kameri-Mbote, P. "Trouble in Eden. How and Why Unresolved Land Issues Landed 'Peace-Full Kenya.'" In *Trouble in 2008, Forum for Development Studies*. International Environmental Law Research Centre, 2008.

7. The Department For International Development (DFID) is UK's development agency. See DFID, *Project Completion Report & DFID Support to the Kenya Land Reform Process*. Nairobi, 2003.

8. Ibid.

9. Mwachane, I. *The Contribution of Land to the Recent Violence in Kenya: Implications For the Ongoing Land Policy Dialogue*. Land Development Governance Institute (LDGI), Nairobi, Kenya, 2010.

an independent body to take over some of the key functions of the Ministry of Lands and existing abuses. Furthermore, the Njonjo Report recommended that improper allocations be suppressed, and in some cases the land given back to its original owner. The Ndung'u Commission asserts that "sanctity of title depends on its legality and not otherwise. A title acquired illegally is not valid in the eyes of the law".<sup>10</sup> The Ndung'u Report was very documented, showing how Kenyan public officers had betrayed the Public Trust Doctrine in the allocation of public land. It recommends the establishment of a Land Titles Tribunal that would embark in the process of revocation of unlawful titles; it also suggested that a National Land Commission (NLC) be created and vested in the power of managing the allocation of public and trust land. Other crucial recommendations thereafter enshrined in the Policy were: the impediment for foreigners to own land, allowing only leasehold titles in urban areas and recommending the minimization of the delay in granting a renewal.



*Daily Nation*, 7th October 2004

When describing the Policy making process as consultative and inclusive of all Kenyan constituencies, this does not actually include the opinion of one lobby group called the Kenya Land Owners Association (KELA). The KELA was created by landowners who felt that the views of the "people who actually own the land other than communities" was not taken into consideration. It represented the interests of British farmers who opposed the Policy: they opposed the disposition reducing leases grant time from 999 years to 99 years (considered insufficient for investments), and also the creation of a too powerful NLC (not legitimized by electoral accountability). As a result of KELA's lobby activities, DFID exited the FP/NLP. When, in 2007, SIDA replaced DFID, the KELA sought its support to form

the Land Sector Non State Actors (LSNSAs) that united CSOs and professional bodies and was aimed at galvanizing non-state actors' action towards the approval of the NLP. SIDA put some fuel in the reform movement machine to help restart the engine and intensively advocate for the Policy to be endorsed. This actually worked out well.

The NLP Draft became Sessional Paper n°3 in 2009 after its endorsement by the Kenyan Cabinet Government and approval by Parliament. The two-year gap between the finalization (May 2007) and the approval of the Policy (December 2009) was principally caused by what many interviewees have identified as the "politics coming in" factor. First, given its opportunistic nature, the "marriage of convenience" between the two camps composing the NARC coalition did not last. Tensions became harsher during debates about Kenya's new constitution at the Bomas National Delegates Constitutional Conference in 2005 as each camp wanted to take control. The Draft Constitution was eventually rejected when submitted to Kenyans through the referendum of November 2005. Not only was the NARC government experiencing serious cracks, but "the rejection of the proposed draft constitution [...] meant that the land chapter which significantly contributed to the draft land policy reforms was not adopted".<sup>11</sup>

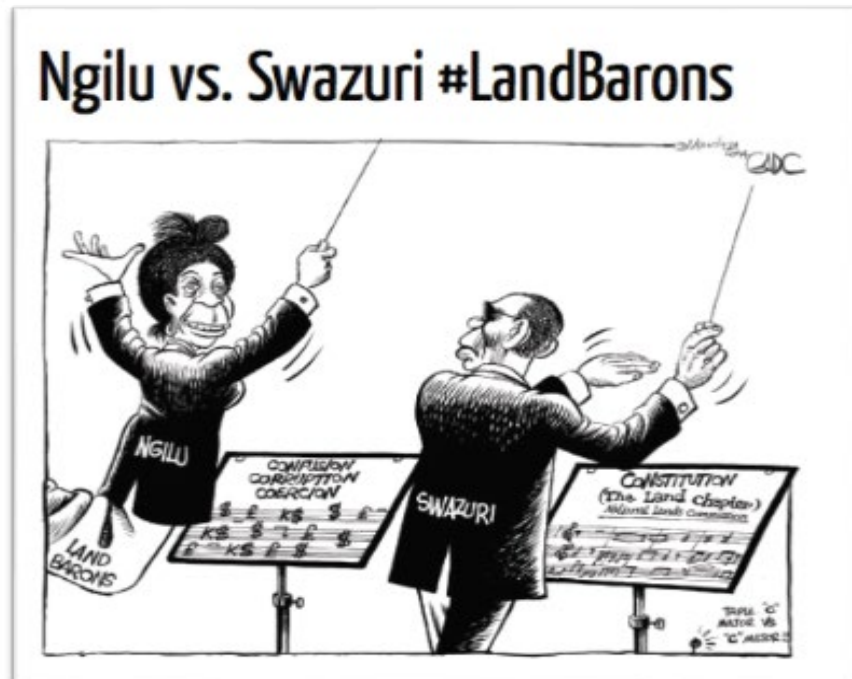
Paradoxically the 2007-2008 post-electoral violence boosted the reform process because issues related to land rights were perceived as the root causes of conflict in Kenya. As a result, the need to reform land institutions was mentioned in the Kenya National Dialogue Reconciliation Agreement of 2008. The post-crisis government of national unity NARC embarked in an ambitious course of reform: the NLP was approved in 2009, while the new Constitution was drafted in less than two years and adopted in August 2010.

The origins of the inter-institutional conflicts experienced at present between the recently established NLC (whose Chairman, Mohamed Swazuri, and other Commissioners assumed office in August, 2012), and the Ministry of Lands (represented by Charity Ngilu, Minister of the Jubilee government elected in 2013) lie in the period going from the Policy endorsement to the Constitution revision finalization. The post-crisis coalition of 2008 was composed, on the one hand, of a very progressive wing and, on the other, of a conservative wing which did not want to see the creation of a powerful NLC charged with operationalizing the Ndung'u Report recommendations. As a result of the hidden agenda of some coalesced interests, the powers of the NLC were consistently reduced in Chapter 5 of the 2010 Constitution, thus creating confusion in the functions and roles of both the institutions. The importance of NARC government in

10. Republic of Kenya (RoK). *Report into the Illegal/Irregular Allocation of Public Land (Chairman P. Ndung'u)*. Nairobi: Government Printer, 3 volumes, 2004.

11. Ministry of Land Settlement. *National Land Policy Formulation Process, Concept Paper*, Nairobi: Ardhi House, 2004.





Cartoon by Gado, 20th March 2014<sup>12</sup>

propelling the land reform has, therefore, to be nuanced: promise of democratizing the land sector had been, in 2002, an ‘easy’ campaign manifesto against Moi, but the Policy dispositions certainly scared state and non-state actors who wanted to maintain the status quo. The relative apathy of these actors during the FPNLP is due to the non-legislative nature of the NLP, which was only a comprehensive guide for the Kenyan legislator. When it came to the Constitution and legislation making process, interventions were made to reduce the hit of both the Constitutional Chapter on land and the laws supposed to enact the Policy .

## Conclusion

As Ambreena Manji stresses out in a recently published article, the land laws (namely, the Land Act, the Land Registration Act and the NLC Act of 2012) “seemed to be almost entirely disconnected from the NLP”.<sup>13</sup> Moreover, instead of clarifying the mandate of the NLC, the laws left the contentious issues unaddressed. This leaves a grey zone regarding the definition of whose institution holds the power to manage and allocate public land. Notwithstanding the irresistible grass-root reform movement, appealing many sectors of Kenyan society and almost unanimously supported by development partners, the landed oligarchy managed to hold a solid grip on the Kenyan political system, manifesting itself only when necessary to tilt the balance in its favor.

12. Charity Ngilu is the Minister of Lands, Housing and Urban Development in the Jubilee government elected in 2013 and Mohammed Swazuri the NLC Chairman. Cartoon available at <http://gadocartoons.com/ngilu-vs-swazuri-landbarons>

13. Manji, A. “The Politics of Land Reform in Kenya 2012.” *African Studies Review* 57, no. 1 (2014).

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