

Kenya's constitution 2010 established an advisory land commission

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The pitch on the new land laws is getting higher, increasingly drawing in even the political class. This is fine. Quite clearly, the Land Commission has done well in whipping up support to its course. Being a key player, this is in order. Indeed, it's a pity that the voice of the parent Ministry of Lands has been loudly missing in the discourse. It'd greatly help Kenyans who haven't had the benefit of reading the three proposed bills to strike some balance.

Need to read land laws against constitutional framework

Kenya needs good law; and it's our business to formulate it. So let's listen to each other, make inputs to each of the laws then leave parliament to debate and enact. Those of us who engage in the land sector, including practising land professionals, need to add their voices to this debate. For over two and half years now, we have witnessed conflicts between the Ministry of Lands and the Land Commission. Why so? Take time and do a careful reading of the national land policy, the Constitution and the first set of laws.....the Land Act, the Land Registration Act and the National Land Commission. You'll easily notice that the land policy proposed a Land Commission with broad technical roles including among others: holding title to land, managing public land on behalf of the State, maintaining a register of all categories of land and developing a land information management system.

An advisory land commission

But soon after we obtained our land policy, we went into reviewing our constitution. In the proposed constitution was a land chapter that proposed to anchor a Land Commission as envisaged under the policy. But the Parliamentary committee that sat in Naivasha in 2010 deleted the proposal to have a Land Commission from the constitutional proposals entirely. It took interventions by stakeholders and the Constitution of Kenya Review Committee to restore the Land Commission proposal. But the post-Naivasha Land Commission version was totally different from the pre-Naivasha one. Its functions and roles were no longer technical but advisory. This was to manage public land on behalf of both levels of government, to *recommend* a national land policy, to *advise* the national government on a programme of registration of title, to conduct research and make *recommendations* and to initiate investigations on historical land injustices and make *recommendations* for redress. The Commission was to *encourage* use of alternative dispute resolution, *assess* tax on land and *monitor* and have *oversight* on land use planning. Note the italicised key words which point to the spirit of the constitution.

First set of laws 'donated' implementation roles to land commission

But in shaping the first three laws, drafters used Sub-Article 67 (3) which provides that the Commission can undertake 'any other roles prescribed by national legislation' to add roles to the Commission. It's under this Sub-Article that critical technical roles such as constituting land registration units, determining the form of register in land registries, appointing dates to geo-reference plans and being a depository of cadastral maps under the Land Registration law were included. However, the same law gave the Cabinet Secretary immense powers to make regulations on the manner and form of registries, formats of register and procedures and working hours to be followed. It also gave the Cabinet Secretary powers to prescribe regulations to any other matter necessary to operationalize the registration Act. In doing so, the Cabinet Secretary would take into account the Commission's *advise*.

Under the Land Act, the Commission was given powers to manage Settlement programmes while the Land Adjudication Act, under which the Ministry's Land Adjudication and Settlement

Department undertakes similar roles, was left unrepealed. Then the National Land Commission Act gave the Commission the role of establishing a Land Information Management System which the Ministry had been progressively developing over time and which is best handled by whoever maintains the land registry.

Conflicting land administration roles can only be resolved through specific amendments to legislation

The above cocktail set up environment for endless turf wars. As a result, service consumers have suffered. This must be addressed. Question hence begs! If the constitution meant to give the Commission the various technical roles donated by statutes, why didn't it expressly state so? This is part of what should inform us to objectively examine the proposed amendments to existing laws.

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