

# KENYA'S LAND COMMISSION WADES INTO TWO MOST CONTENTIOUS ISSUES

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## Public notices

Kenya's national land commission on Wednesday 10th July 2013 issued a notice on local dailies on what *'it views to be grants and dispositions relating to parcels of land obtained in an illegal and/or irregular manner'*. The notice went on to list down 29 properties in various parts of the country, complete with a remarks column indicating whether the title is 'illegal', 'duplicated' or 'encroaching' on public land.

This notice was followed by another issued on Friday 12th July 2013 *'suspending evictions of illegal occupiers of land'*.

here is little doubt that the notices have been issued in good faith. But there will be concerns and consequences.

## Most controversial issues

The above two are among the most controversial issues of the land reforms Kenya has embarked on. The journey to implement will most likely be quite arduous. Unfortunately, the commission has waded into the two issues without having fully bonds with the line Ministry of Lands which has the records and historical memory, obtained sufficient technical capacity and funding. Parliament voted a paltry 209 million for the commissions work in the 2012/13 financial year. This money is grossly insufficient to support the recruitment of the technical officers the commission wished to and, other than meeting the salaries and allowances of the commissioners and the CEO, may not be able to support much technical activity.

## Politically influential drivers and owners

The allocation of public land was ordinarily moved by fairly influential forces within the executive and the political classes. It is likely that some of these drivers sit right in Ardhi House, Parliament or in other offices in government. Those outside are in most cases fairly influential business people. They will be watching the commission quite closely and are likely to subtly undermine its efforts towards any recovery. The national land policy, and even the Ndung'u report, had envisaged such opposition and had hence proposed the formation of a quasi-judicial land titles tribunal to rigorously review all the suspect titles then come up with a due process, which would be predictable and not prejudicial to any title holder. Depending on the tribunal's verdict, such titles would then be cancelled if illegal or regularized at a cost if irregular. This process was supposed to disperse political pressure and leave no legal gaps which could be exploited by title holders. But owing to the sensitivity of this matter, such a tribunal has never been established. For reasons of political self-preservation, the Moi and Kibaki governments kept clear of the matter. Though the land commission too has quasi-judicial powers, its wide mandate, lack of technical capacity and funding, may undermine its ability to focus on and effectively deliver on this notice. One wonders too if the commission has courted sufficient political goodwill before daring the matter.

But in its way forward on the issue, the commission will need to take into account the provisions of section 14 of the national land commission Act which require in (14) (2) that in carrying out the function of reviewing grants or dispositions of public land it shall make rules subject to articles 40, 47 and 60 of the constitution. Section 40 is on *protection of rights to property*, 47 is on *fair and administrative action* and article 60 is on *principles of the national land policy*.

If not well addressed, Article 47 can be particularly obstructive to the commission work in this regard. One hopes that the commission had developed the necessary rules in accordance with the indicated constitutional articles before filing the recent notice.

### **Evictions notice could encourage needless squatting and the erosion of private land rights.**

The notice on evictions decries a perceived wave of eviction notices based on court orders. Indeed, there has been a recent and most regrettable trend where registered proprietors have been to evicting vulnerable people, particularly within informal settlements, from their private land on which the affected have set up shelter and business. The livelihoods of such people are subsequently shattered.

However, in the absence of a legal framework, the commission's notice will be questioned. Whereas it is aimed at protecting the vulnerable people who have squatted on some parcels of land for long, it leaves owners of private land open to callous intruders and squatters. It could fuel speculative squatting which the commission has no capacity to prevent. This has security implications too. Moreover, the commission seeks that evictions are not undertaken 'until a proposed law on "evictions and settlement" is enacted. But this leaves the timeline very 'open ended' since the task force working on an evictions and resettlement bill is far from completing its work. The public validation of the subject draft bill, approval by cabinet and then parliament may not be completed for the next one year. This is long for land owners who find themselves restrained from enjoying their full land rights as a result of this notice.

The commission may also be challenged that the notice is in conflict with the constitutional provisions of article 40 which protects legitimate rights to property. In addition, the commission may find itself accused of encroaching on the domain of the judiciary in so far as the implementation of court orders is concerned. It would perhaps have been wiser for the commission to take note of the court orders that may occasion wanton suffering then proceed and move to convince the courts to vacate such orders. As things now stand, the affected land owners, who may have spent much time and costs to obtain necessary orders, are likely to challenge the commissions notice and may even seek compensation for any damage perceived to have been occasioned by the 'spirit' of the notice.

In sum, the two notices by the land commission, which have been issued in good faith, have severe consequences to private land rights. Anyone who had for instance taken collateral on account of a property whose title has now been listed as illegally or irregularly allocated will have the lending institutions seek alternative collateral. Those who were in the process of using such properties for collateral may also feel equally injured. Such persons, like those who have suffered land invasions and squatting, may move to seek redress in court. The land commission will need to carefully mull over these and other consequential concerns.

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