After a protracted land policy formulation process stretching between February 2004 and December 2009, Kenya obtained a comprehensive national land policy. Key features of this policy were subsequently anchored in the Constitution of Kenya 2010 which was promulgated on 27th August 2010. For the first time in history, the policy and constitutional frameworks provided Kenya with a unique opportunity to undertake comprehensive land reforms to respond to contemporary land issues.

Kenya’s land policy and the subsequent anchor in the constitution did not come easy. In a country like Kenya where land distribution has been largely in favour of the executive and political leadership through history, land reforms are viewed as upsetting this status quo. Land reforms are also seen to threaten the interests of those who benefitted from irregular allocation of public land who, in a majority of cases, are citizens with reasonable political influence. Such forces placed overt and subtle roadblocks to the process of formulating the land policy and reviewing the constitution whose chapter on land enables the implementation of key proposals in the land policy. The delivery of Kenya’s national land policy and the embedding of its key features in the chapter on land in the constitutional must therefore be seen as the great epochal achievements they indeed are.

II. New land laws
However, it’s only the effective implementation of these documents that can cascade the intended benefits to the citizenry. It was therefore necessary to expeditiously develop enabling land laws resonant with the policy and the constitution. Subsequently, between August 2010 and April 2012, the land laws below have been developed:

1. **The Environment and Land Court Act, 2011**: This establishes a court of a similar jurisdiction to the High Court which will have jurisdiction over cases and disputes on matters relating to land and environment. It repealed The Land Disputes Tribunals Act No. 18 of 1990.

2. **The National Land Commission Act, 2012**: This law provides for the powers and functions of the National Land Commission established under Article 67 of the Constitution of Kenya 2010. It also provides for the qualifications and procedures for the appointment of the chair and members of the Land Commission. This Act received Presidential assent on 27th April 2012 with a commencement date of 2nd May 2012.

3. **The Land Act, 2012**: This provides the body of Kenya’s substantive law, earlier found scattered in different pieces of legislation like the Indian Transfer of Property Act 1882, The Government Lands Act and the Registered Land Act. It repeals the Wayleaves Act Cap 292 and the Land Acquisition Act Cap 295. The law has the effect of embodying Kenya’s substantive law in one statute which makes easy reference for scholars and practitioners. This Act received presidential assent on 27th April 2012 with a commencement date of 2nd May 2012.

4. **The Land Registration Act, 2012**: This law will be the singular law to guide the registration of title to land in Kenya, earlier done under various statutes like the Land Titles Act Cap 282 earlier applicable to properties within the ten mile Coastal strip and the Registration of Titles Act Cap 281 earlier operated under a Centralized Land Registry at Nairobi for properties surveyed under precise boundaries. It also repealed the Registered Land Act Cap 300 which applied to most rural properties surveyed under general boundaries and some few urban properties surveyed under the “fixed boundary” provisions of the Act. This Land Registration Act also repealed the Indian Transfer of Property Act 1882 and the Government Lands Act Cap 280. The application of this law will result in a uniform land registration system and uniform
registries countrywide. This will ease land transactions and land development in the country. This Act received presidential assent on 27th April 2012 with a commencement date of 2nd May 2012.

III. Need for regulations and practice guidelines
The effectiveness of the laws above will only be known through application. The stakeholder compromises made during the enactment process may have resulted in laws a little different from initially intended. It is expected that the laws will undergo a series of amendments in the first few years as defects and barriers to application are identified. The initial application of the above laws will however require that subsidiary legislation (i.e. regulations) to operate them is developed at an early moment. Institutions charged with operating them will also need to develop practice guidelines to guide transactions by the public and service provision by public officers and practicing professionals in the land sector. Rules, standard forms, procedures and fees applicable will also need to be developed.

IV. Transition and Implementation Challenges
In trying to operate the new land laws, the country will have to contend with the challenges of transition. These will be numerous and include resource mobilization, recruitment of officers and the retraining of the old staff. Establishing new systems and procedures for the new institutions (Environment and Land Court, National Land Commission (NLC), County Land Management Boards, agents of the NLC at County level, and the residual Ministry of Lands, among others) will require sufficient technical and human resources which must be supported through the line Ministry’s budget and/or Kenya’s development partners where applicable.

Commission viewed with hostility
But the greatest transition challenge will be in the effective assumption of office by the National Land Commission. First, officers in the current Ministry of Lands view the Commission with hostility, given that it will assume some of the powers earlier vested in some Departments of the Ministry such as the Lands Department and the Land and Adjudication Department. The vetting powers vested in the new Commission may not sit well with serving officers who may find it difficult to successfully undergo a public vetting exercise which the Commission is likely to adopt, given the provisions of the new constitution. Such serving officers may not provide expected guidance and goodwill during transition and this may compromise historical memory.

In addition, the powers vested in the Commission to review grants of public land allocated through the Lands Ministry stand like a “sword of Damocles” over the heads of desk officers earlier charged with the allocation and registration of such land. It is anyone’s guess what...
officers who oversee records pertinent to such allocations may do to pre-empt an effective audit through paper trail.

But the greatest challenge to effective transition lies in the application of powers and functions vested in the Commission under the National Land Commission Act and the Land Act against those vested in the Cabinet Secretary (currently exercised by the Minister for Lands). Drafters of the national land policy conceptualized a reasonably independent National Land Commission with, among others, powers to establish and maintain a register of all public, private and community land in Kenya. The residual Ministry of Lands was to be left in charge of political leadership, policy formulation, resource mobilization and monitoring. Technical service delivery was to be under the National Land Commission.

New land administration system is a “mongrel”

But the final text of the laws did not provide for this. A lot of technical service delivery functions, including the maintenance of the land register, hence the land registries, have been vested in the Cabinet Secretary. Besides overseeing the land registries, the Ministry also retained the broad functions of surveying and planning. The Commission will therefore only manage public land and is also charged with the duties of settlement of persons earlier undertaken by the Lands Ministry through the Department of Land Adjudication and Settlement.

This arrangement therefore bequeaths Kenya a land administration system which is like a “mongrel”, quite different from what was initially intended. The residual Ministry of Lands will pack enough technical staff and powers to undermine an effective assumption and discharge of functions by the Commission such as the audit of earlier grabbed public land which can only be effectively driven by whoever maintains the land registry and hence the pertinent old land records. This “blurred” separation of powers perhaps spells the greatest threat to an effective transition to the envisaged new institutional arrangement in Kenya's land administration system. The new Commission will therefore need to very carefully navigate some of the above challenges. It will need to continuously negotiate a warm and effective relationship with the residual Ministry of Lands and to cultivate confidence and goodwill in the serving officers in order to be able to discharge most of its mandate.

Ibrahim Mwathane, 3rd July 2012