

Proposed Land Bills: The good features, gaps and concerns!

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Lessons on legislative process and application of existing laws

The proposed Land Laws (Amendment) Bill 2015, Community Land Bill 2015 and the Physical Planning Bill 2015 are the second tranche of land laws after the Land Act 2012, Land Registration Act 2012 and National Land Commission Act 2012, enacted in 2012.

It's now over three years since the enactment of the laws and stakeholders have had the benefit of understanding our national legislative process and testing the effectiveness of the laws. The general experience in applying these laws has been incessant institutional conflicts, inconsistencies in the land sector operation and loss of trust in the documents generated by the various authorities in the land sector. This has been occasioned by the failure of the statutes to comply with the Constitutional provisions on land.

Stakeholders now know that in discussing bills proposed for Parliament, it helps to avoid generalities and rhetoric and instead point out specific strengths and weaknesses in the respective bills. This makes it easier for Members of Parliament and legislative drafters to retain, amend or delete the proposed provisions. They also know that it's rather onerous to stop or rewind the parliamentary calendar. This experience should inform today's strategies.

Gaps, inconsistencies and contradictions

Having applied the first set of laws for over three years, land registrars, landowners, developers, bankers and practising land professionals will tell you that indeed we have a big problem. Under the Land Registration Act, we have burdened our titles with about thirteen (13) overriding interests (unregistered burdens on title) which grossly undermine the quality of land transactions in title. Furthermore, this law does not recognize titles earlier issued under the Land Titles Act and the Government Land Act unless they first undergo examination. In addition the Registration Act did not provide for the offices, duties and qualifications of Deputy Chief Land Registrar and County Land Registrars. These call for amendments.

It is in the public domain that the Lands Ministry and the Commission have had conflicts since the application of the laws. And, unlike what many have speculated, it is not about personalities at the top of the Lands Ministry but the inconsistency and contradictions in the laws. The Land Registration Act Sections 6, 7, 17, 108 and 110 give the National Land Commission roles directly in conflict with those of the Cabinet Secretary.

The National Land Commission Act Section a5 (1) reproduces the functions of NLC as assigned by Article 67(2) of the Constitution. However section 5 (2) and (3) of the same Act as read together with the Land Act Section 134 donates conflicting implementation powers to the National Land Commission contrary to the spirit and letter of the Constitution. A very careful reading of the Commission's roles under the Constitution Article 67 (2) reveals a general advisory, oversight and monitoring powers for the Commission. It is therefore not lost to any keen observer that Article 67 (3) was shrewdly used to assign unconstitutional implementation powers to the Commission.

Pundits have observed, which I agree with, that the creative use of Article 67(3) to assign additional functions was irregular. If the framers of the Constitution had intended to give additional powers to the Commission it would not have been so difficult to directly assign these additional functions to the Commission. It must be noted that without these proposed amendments, these jurisdictional conflicts cannot resolve themselves between the two key institutions and service delivery in the sector will forever remain problematic. Land registration; land information management systems, adjudication and settlement programmes are systematic technical processes that cannot be successfully driven under two separate command centres. Yet this is what the first set of statutes did.

Some good features

Besides resolving the institutional conflicts, what other good features does the Land Laws (Amendment) Bill, christened 'Omnibus', spell? Here are a few examples that I can quickly pull out:

- It establishes the offices of a Deputy Chief Land Registrar and County Chief Land Registrars and provides for their powers and qualifications.
- The Bill expressly recognizes titles earlier issued under the Government Lands Act and the Land Titles Act hence enabling lending transactions.
- The Bill further mainstreams the use of Alternative Dispute Resolution Mechanisms (ADRM) and provides for use of surveyors in resolving simple disputes like establishing boundary corner beacons and realigning boundaries.
- It provides a six-month timeline for the resolution of reported boundary and land disputes.
- The amendments also reduce the thirteen overriding interests to seven (still too many for transactions in title).
- Spouses, who have now been clearly defined under the proposed amendments, have been provided for in the respective clauses that enable them to intervene specifically before completion of a transaction. The problem with the earlier open ended overriding interest on spousal rights was that those with mischief or without legitimate interests could actually frustrate the legitimate spouses as has been evident in some of the rather publicised court cases.

Some areas for attention

Are there any downsides in the Omnibus Bill? I believe that the Bill can be further improved to give clarity in the compensation and appeal processes for complaints in historical injustices. Make provisions for the resettlement of vulnerable persons on private, public or community land during project implementation. There is need to take a second look at some of the clauses that may appear to encourage trespass and invasion of private property. The minimum and maximum land size provision, though well meant, might call for further clarification.

The Community Land Bill seeks to facilitate the unlocking of the potential in the over 60% of the country under communal land holding. It allows communities to be registered under the Societies Act, to make decisions, including rules and by-laws, over their land. Agreements on investments on community land will be shaped to benefit communities. County Governments will approve land use plans to communal land while the Cabinet Secretary will oversee registration processes where communities decide to convert ownership to private as provided

under the Bill. However, there is need to review and provide for a more effective mechanism for registering communities and coordination of decision making.

The Physical Planning Bill provides for the planning, use, development and regulation of land. It repeals the 1996 Physical Planning Act and will greatly improve the development and use of land. It provides for policy and regulation at National and County Government levels in line with the Constitution. This is the least contentious of the bills. There are however complaints of non-consultation. But Parliament should be able to take into account any helpful inputs even at this stage.

Let's read bills and contribute

Above all, let us take time to read each of the bills then provide input. This will help us to strengthen the proposed laws for the sake of this country.

Ibrahim Mwathane(Licensed Surveyor:mwathane@landsca.co.ke: Twitter: @mwathane)

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