



## Support for policy action against Kenya's elite land grabs



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### Executive summary

Since the 1980s, land has become a currency of political patronage among Kenya's elites. By means of processes that abuse public office and existing legal mechanisms, large tracts of public land have been illegally or irregularly allocated. These allocations have serious impacts on public finances, development opportunities, land availability, and land pricing. Furthermore, given Kenya's political fragility following the 2007 post-election violence, the need to respond to land grabbing is all the more pressing, to restore confidence in the country's land allocation

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procedures, to regain the public land needed for development and bona fide investment, and to redress the grievances of segments of society who have been continuously denied access to land.

Despite the chronicling of land graft in Kenya since 2000 by academics (Klopp, Southall, etc.) and by the Ndung'u Commission (2004) and the Kenya Land Alliance (KLA) (2006), and despite legislative progress towards tackling the issue, a lack of political will and the existence of legal barriers have hindered progress. Although Parliament accepted the new National Land Policy in 2009, rectification of Kenya's public land allocations has been slow and the damage caused by illegal/irregular allocations is yet to be fully addressed. In this light, current recommendations include:

- Following the approval of a new Constitution by referendum vote on 4 August 2010 (66.9% of votes supported the Constitution), the necessary measures and structures should be thoughtfully and democratically developed to fully enact the National Land Policy to enable action on land grabbing.
- There should be measured responses to evictions that differentiate between bona fide beneficiaries and unscrupulous benefactors of grabbed land. These should include planning to restore protected areas and rightful land uses, while providing for proper resettlement planning to limit further victimisation.
- Companies suspected of benefiting from illegal/irregular land allocations should conduct a title deed search stretching to the instance of first registration. This should become common practice for all companies registering land, as part of their corporate responsibility.
- A thorough updating of Kenya's land administration and registration system should be carried out, including a large-scale resurvey of public land, an updated land inventory, legitimisation of title deeds, and digitisation of records.



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## Context and scale of the problem

The majority of Kenya's population can be classified as rural-dwelling (80%) and agriculturally dependent (85% of people derive their primary livelihoods from agriculture). Although it is recognised that access to land is central to fulfilling basic needs in Kenya (FIAN 2010), 88.4% of the population have access to less than 3 hectares of land per household; high annual population growth (2.9% per annum) further increases pressures on scarce land. Scarcity is exacerbated by the phenomenon of elite land grabbing which, since Independence, has enriched politically connected individuals and companies at the expense of the public. Through this practice, Kenyan elites receive public land as a form of political patronage; public officials (ranging from national to local offices) facilitate these transactions, which breach the doctrine of the "public interest", to secure political support.

The Kenyan government holds certain categories of land, namely public and community land, in trust on behalf of the public; such land is meant to be managed in the public interest (i.e. to serve the public's safety, health, development, and infrastructure needs).<sup>1</sup> Tellingly, this land bears the brunt of land grabbing practices, in particular:

- Resettlement and community land (urban and rural), which is generally uninhabited or is inhabited by marginalised communities, making it an easy target for illegal and/or irregular allocations;
- Land allocated to fulfil ministry and state corporation/parastatal functions;
- Protected land, particularly forests.

While these practices would be alarming in any context, they are particularly menacing given Kenya's fragile status following the 2007 post-election violence. The disparities in land ownership and the wealth derived from land are among the main sources of tension between Kenya's ethnic groups. There is a common perception within Kenyan society that the two ethnic groups that have ruled the country since Independence, the Kikuyu and the Kalenjin, have benefited disproportionately from their access to power and, consequently, to public resources. These perceptions

have fuelled periodic violence throughout Kenya's history. The threat of more land-related violence makes effective but measured action on the land-grabbing question all the more pressing.

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## Land-grabbing processes

In 2003 President Kibaki appointed the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (the Ndung'u Commission), which revealed shocking trends of illegal and irregular public land allocations, implicating prominent individuals, companies, foreign delegations, religious groups, and public entities that had benefited from large-scale land graft. The Commission also indicated several different methods and a number of public offices that had been abused to access public land. It called into question over 200,000 title deeds and recommended a tribunal to investigate these allocations, with those confirmed as illegal or irregular to be revoked.

The allocations in question involve processes that range from the questionable to the blatantly fraudulent or illegal (Bruce 2009). The most common processes involve:

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- **Letters of allotment treated as saleable interests in land:** In proper practice, the President or the Commissioner of Lands grants a letter of allotment, which is specific in terms of beneficiary, land, and land use; the offer is valid only for the addressee of the letter and all transactions should be in the public domain. In the case of land grabbing, the letter of allotment is sold to a third party, usually for enormous profits (up to 8.5 times the land's market value). In such cases, the third party purchaser of the letter is often a public institution; thus the Kenyan public is doubly cheated, through the initial loss of land followed by the use of public funds to repurchase it.
- **Illegal/irregular allocations/appropriations of alienated public land,** including abuses by the Commissioner of Lands, unauthorised public officials, and local leaders; allocation of high-value parastatal and ministry land to private interests, parastatals acting as land brokers, direct sale of land by ministries to private interests, and unpunished invasion and privatisation of public land.
- **Parastatals and ministries paying exorbitant prices to acquire land from private individuals:** The top ten sales noted by the KLA as being the "most outrageous" land purchases by the National Social Security Fund on behalf of the Kenyan public resulted in an estimated loss of Ksh 4.1 billion (KLA 2006a).
- **Illegal and/or irregular excisions of protected forestland** to private interests and for unauthorised uses (tea farms, community resettlement, etc.) have resulted in a loss of 1.3% of Kenya's total forest cover, leaving a dangerously low 1.7% of total landmass covered by forests (the standard recommendation is 10%) (KLA 2006b). These excisions include ill-informed

<sup>1</sup> The National Land Policy (2006) renamed these categories of land, which were previously known as government and trust land respectively, to more accurately state their ownership.

community resettlement schemes, where communities have been relocated to protected land because the land intended for their resettlement was allocated to another party. This process often concerns marginalised communities, and results in their further victimisation through later evictions.

### Impacts of land grabbing

The impacts of land grabbing by Kenya’s elite have yet to be fully assessed and quantified; however, to put the public losses incurred into context, the KLA has estimated the losses for parastatal land and protected forestland at Ksh 53 billion. However, the impacts of this phenomenon are long-term and go much deeper than finances. Significant impacts include degradation of protected national resources, speculation on land prices, increased rents, landlessness, missed development opportunities, and increased ethnic tensions.

These impacts are particularly dangerous given the fragile state of Kenya’s power-sharing government following the

2007 post-election violence – which itself was not unrelated to land. Land-related ethnic (and political) violence has a long history in Kenya, and the land-grabbing phenomenon exacerbates underlying tensions. Minority groups have been systematically denied access to land since Independence and have been pawns in land-grabbing schemes, where they are resettled on unsuitable public land and the land intended for their relocation is sold to undeserving third parties. Evictions of such groups are now underway as part of the revocation of illegal/irregular titles. Yet these groups were often bona fide beneficiaries of the land in question. They differ significantly from beneficiaries who have amassed wealth as a result of public land transactions.

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Table 1: Outcomes and impacts of land grabbing according to land type

Type of land	Outcomes (short term)	Impacts (long term)
Resettlement and community land (rural and urban development)	Evictions Cyclical poverty Unrest Speculation Undetected foreign ownership of high-value urban land	Unrest Violence High levels of internal displacement Urban sprawl Inflated land prices and ground rents
Parastatal/ministry	Loss of substantial funds Unplanned and unregulated development Loss of needed land	Loss of substantial funds Missed opportunities for research Missed opportunities for development
Protected land	Evictions Ethnic unease Unregulated use of natural resources and exploitation of wildlife Speculation Undetected foreign ownership of land and valuable resources	Reductions in water tables (with implications for downstream agriculture) Reduced forest cover Soil degradation Less productive land (with implications for agriculture and wildlife habitats) Inflation

### Critique of policy options

Since 2003, policy and political progress on the question of land grabbing has been noted; however, obstacles have also been encountered (see Table 2).

The highly centralised nature of Kenya's post-Independence land administration has allowed for the proliferation of land grabbing. This framework allowed the President and the Commissioner of Lands to act with little public accountability

Table 2: Major events related to land grabbing since 2003

2003–2004	Ndung'u Commission conducts inquiry into illegal/irregular public land allocations. Its recommendations are widely accepted, but not implemented.
2004	Formulation process of National Land Policy begins.
2005	Evictions of forest-dwelling communities in Mau Mau forest.
2006	Judge rules that the Ndung'u Commission's central recommendation – the establishment of a land tribunal to investigate illegal/irregular land allocations – is unconstitutional, thereby further delaying implementation of its recommendations.
2006	Draft National Land Policy submitted to stakeholders for comment.
2007	General election, followed by post-election violence.
2008	Power-sharing government formed.
2009	Eviction announced of former President Daniel arap Moi from improperly acquired land.
2009	National Land Policy accepted by Cabinet. Planning begins for implementation of Land Reform Support Programme and Land Information Management System Programme.
2010	Ministry of Lands announces revocation of 137 high-value title deeds in Nairobi valued at Ksh 1 billion, and announces similar initiatives nationwide.
2010	Proposed Constitution tabled.
2010	Major opposition from Kenyan elites (politicians, business interests, religious leaders) to Proposed Constitution's Land Chapter, with claims that it will promote nationalisation of land, evictions, and ethnic violence.
2010	4 August: in a national referendum the new Constitution is approved by 66.9% of Kenyan voters.

regarding public land allocations. It was also the basis for the Constitutional Court's ruling that the recommendation of the Ndung'u Commission for the establishment of tribunals to investigate questionable land titles was unconstitutional, as the previous Constitution vested land administration powers in the President and the Commissioner of Lands.

This left little legal room for manoeuvre for the creation of statutory bodies dealing with land administration; this restriction of power has been addressed in recent policies, including the National Land Policy and the new Constitution's Land Chapter, as discussed below.

### The highly centralised nature of Kenya's post-Independence land administration has allowed for the proliferation of land grabbing

The threats of this concentration of power were noted during the drafting of the National Land Policy, which decentralises these functions through a three-tiered system comprising a National Land Commission (with offices at District level) and District and Community Land Boards. In addition, it promotes alternative dispute resolution mechanisms at various levels (community, local, district) to deal with land

disputes, rather than relying on the over-burdened courts. Also related to land grabbing, the National Land Policy makes room for legal review of existing titles and permits revocation if they are found to be fraudulent, illegal, or irregular. As noted in Table 2, the Ministry of Lands is actively implementing this provision.

While these policy considerations address the core issues of land grabbing, they require constitutional reform to be fully implemented. In March 2010, the Proposed Constitution was tabled and in the referendum held on 4 August 2010 it was approved by 66.9% of Kenyan voters. The new Constitution's Land Chapter was hotly debated and met with strong opposition from elites – including many beneficiaries of questionable land allocations. The main points of contention concerned:

- Vesting radical title in the state. Opponents claim that this is a step towards nationalisation and that it threatens private land ownership. In reality the new Constitution safeguards legally acquired private ownership, insisting that any compulsory acquisition is subject to examination of the public interest and to compensation.

- References to “community” and “ancestral” land. Opponents claim that this will lead to forceful evictions of people from ancestral land and will increase ethnic land conflicts; however, these references are meant to protect existing alienated land and not to encourage segregated land administration. To assist legal interpretation, this terminology needs more precise legal definition.

The National Land Policy and the new Constitution address the main loopholes used to illegally acquire public land; however, there is opposition to the new Constitution for a number of reasons other than land. Also, the logistics of the National Land Policy’s implementation require considerable resources (financial, human, and land) for implementation, including a thoughtful resettlement plan for those who will be removed from land that they have acquired illegally or irregularly but unknowingly (as a result of fraudulent resettlement schemes). It is feared that these issues have not received adequate planning (Bruce 2009).

## Recommendations

Given the importance of the land question in Kenya, the following measures are proposed to mitigate and redress the impacts of land grabbing by elites:

- Following the approval of a new Constitution, the necessary measures and structures should be thoughtfully and democratically developed to fully enact the National Land Policy to enable action on land grabbing.
  - There should be measured responses to evictions that differentiate between bona fide beneficiaries and unscrupulous benefactors. These should include planning to restore protected areas and rightful land uses, while providing for proper resettlement planning to limit further victimisation of marginalised groups.
- Companies suspected of benefiting from illegal/irregular land allocations should conduct a title deed search stretching back to the instance of first registration. This should become common practice for all companies registering land, as part of their corporate responsibility.
  - A thorough updating of Kenya’s land administration and registration system should be carried out, including a large-scale resurvey of public land, an updated land inventory, legitimisation of title deeds, and digitisation of records.

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