TACKLING LAND RELATED CORRUPTION IN KENYA

By Paul N. Ndungu[1]

I would like to start my presentation by giving a brief historical perspective of the land law system of Kenya. This will greatly help all of us to follow the topic of **"Tackling land related corruption in Kenya".**

You will be aware that in 1885, several European imperial powers met in Berlin, Germany, to discuss the partition of the African Continent amongst themselves. The meeting led to the signing of the Treaty of Berlin, under which arbitrary boundary lines were drawn on a map Africa and territories thereby created allocated to the participating European powers. Under this arrangement, Kenya was allocated to Great Britain. The boundary lines were drawn without any consideration of the position on the ground, such that sections of people like the Masai of East Africa found themselves belonging to two different Countries namely Kenya and the then Tanganyika.

Following the partition, each European power sought to domesticate the Treaty of Berlin. In this regard, Great Britain's Attorney-General advised his Government that from then onwards, Kenya was part of the British Empire, and therefore part of the King's territories, and the Crown or King could deal with the land in the territory in such manner as he or she pleased.

This legal interpretation of the treaty assumed that there were no indigenous peoples in the territory, and if there were people, their rights were totally irrelevant to Great Britain's plans of expanding its empire.

For purposes of alienating or allocating individual pieces of land in the new territory, the Government enacted the East African (Lands) Orders in Council of 1895, 1897 and 1901. These orders in Council were later re-enacted in the form of the Crown Lands Ordinances of 1902 and 1915. The Ordinances dealt with, and governed the allocation of land for agricultural, residential, commercial and other purposes.

In these statutes **"Crown Land"** was defined to **mean "all public land within the East African Protectorate which for the time being are subject to the control of His Majesty".** In other words the entire territory known as Kenya was declared to be Crown Land.

The legislative measures thus put in place had the very far reaching effect of relocating the radical title to land in the British Crown, and thereby setting the stage for massive expropriation of lands, belonging to the indigenous peoples, to British settlers and other foreigners, who would otherwise never have qualified to own such lands under African customary laws. The best farmlands in Kenya were reserved and

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allocated to white settlers. Local communities who may have previously occupied such lands were forcibly moved to make room for white settlers. At the end of the first and second world wars any British ex-servicemen who wished to settle in Kenya were duly facilitated and allocated free land. The settlers established a vibrant agricultural economy that was assisted by the government in the form of subsidies, loans and marketing boards for virtually every crop grown by the white settlers. The locals were, by law, prohibited from growing any cash crops.

In a landmark court case[2] the then Chief Justice of Kenya delivered a ruling which extinguished whatever hopes indigenous peoples may have had to land ownership, by declaring such peoples to be **"mere tenants of the Crown of the land they occupy ……".**

By the early 1950's the British Empire had started to crumble. Earlier in 1947, the Indian Sub-continent had been partitioned to create the independent States of India and Pakistan. Resistance movements had cropped up in many parts of the Empire, including Kenya. In response to the violent uprising by the local people, the British Government declared a state of emergency in 1952 which lasted for close to 10 years. In 1961/62, constitutional talks took place in London, which led to internal self government in June 1963, and full independence in December of that year.

On attaining independence, Kenya inherited and adopted the entire set of colonial land laws that had been enacted to address the interests of the white settlers. The principal of these laws were the Crown Lands Ordinances of 1902 and 1915. I have already made reference to these statutes, under which the British Monarch was empowered to allocate land to whoever the Monarch wished, and on such terms and conditions as the Monarch pleased. As a result, depending on who the allotee was, land would be granted on freehold tenure, or leasehold term for periods ranging from 99 to 999 years.

The independent Government made superficial amendments to the laws inherited from the British, such that Ordinances were simply renamed **"Acts",** Crown was substituted with **"President",** Crown Land was renamed **"Government Land",** and where Crown referred to the British Monarch as an institution, it was substituted with **"Government".**

The net effect of adopting the colonial land laws, taken with the amendments, was that the powers of alienating and allocating land in Kenya, previously vested in the British Monarch, were transferred to the President of independent Kenya. The substantive law applicable remained English common law. Regrettably that remains the position to this day.

[2] Isaka Wainaina Gathomo & Another vs Morito Indagara & the A.G. of Kenya (1922-23)2 KLR 102.

During the colonial period running from the Treaty of Berlin in 1885 to 1963, the Monarch allocated the best farmlands in Kenya to British settlers. Natives were, by law, excluded from owning lands in those areas, which were commonly known as **"White Highlands".**

Large portions of the Country's forests were allocated for commercial exploitation, including timber harvesting, with the result that it is estimated that the Country's forest cover was reduced from about 30% in 1900 to 3% in 1963. the U.N. bodies specializing in environmental matters recommend that for a Country to be ecologically and environmentally sustainable, its minimum forest cover should be 10%. Brazil has the highest cover in the world at 57%.

During the constitutional negotiations for Kenya's independence held in 1960/62, stakeholders included the British Government, the nationalist movements, the British settler community and representatives of several minority groups. In relation to land, a few principal issues were negotiated and agreed upon.

- Firstly it was agreed that a provision would be entrenched in the new Constitution to protect private property such that the State would never expropriate or compulsorily acquire private property, unless such acquisition was in the interest of the public or the promotion of public benefit and, if acquisition took place, adequate and prompt compensation would be paid.
- A land re-settlement programme, mainly financed by the British Government, would be established whereby certain designated farms would be purchased from white settlers, and subdivided into small portions for settlement of landless indigenous peoples. It is estimated that under this scheme, close to one million people were provided with land during the first five years of independence.
- An agricultural land bank would be established, again with the assistance of the British, to provide credit on soft terms to the new settlers, to enable them to settle on their newly acquired lands and also to initiate and sustain profitable agricultural ventures.
- For those white settler farms that were not targeted for re-settlement, the same land bank would provide long-term loans to locals, to purchase the farms and operate them commercially as single large scale units.

It is perhaps because of these decisions that Kenya was spared the kind of land problems recently witnessed in Zimbabwe, and it is fair to say that in the first two decades of independence the Country went through a period of relative peace and consistent economic growth.

However, the Country was not to be immune to the problems that have tended to beset third world countries i.e. dictatorship coupled with poor governance, human rights abuses, corruption, e.t.c. The land

laws inherited from the British had literally vested the whole Country in the President, and he and his advisors naturally felt that, just as the British Monarch had the power to alienate land as he pleased, it was perfectly in order for the President to use the same powers in favour of whoever he wished.

There were certain important constitutional law principles, impacting on the powers of the President, that his advisors conveniently overlooked. There is a world of difference between a Monarch and a President. In general terms, a Monarch is the supreme ruler of a country with limitless powers over his subjects and assets of such country. A President is the elected head of a Republican State, where the supreme power is held by the people themselves. Therefore, when Kenya adopted a republican constitution in 1964, the President and his government became trustees of the people, with authority to run the Country on behalf of the people and to manage the Country's affairs including its assets and liabilities, only in the interests of the people. Further, the Presidential advisors failed to advise the President that the section of the law that purported to grant him unfettered power to allocate land was itself not only subject to the other provisions of the same statute, but was also subject to all other laws of the land, such as laws governing town and country planning, forests, environment, water, e.t.c. Regrettably, these noble legal constitutional principles were totally ignored. The President started to exercise his perceived powers of allocating land to his cronies.

It all started on a fairly small scale. As my Commission investigated illegal land grabbing in the 1960's and 1970's, we were only able to unearth a few cases where the President had ordered allocation of public properties to his ministers, members of his family and

even to himself. We came across cases where, even in those early days, the President had ordered the excision of portions of forests and allocated them to influential people for conversion into farmlands.

By the late 1980's and through the 1990's, what started on a small scale had become the norm. Public land available for allocation for whatever purpose would be granted by the President to people of his choice, and his choice always appeared to be found among his political supporters. As resources for political patronage declined with foreign aid freeze in the 1980's, the Government increasingly turned to public lands, which were less fettered by international scrutiny and donor conditionalities. We found that illegal land allocations picked pace around the time of elections. As stocks of available public lands diminished the Government turned its attention to properties that were reserved for public purposes such as roads and road reserves, public parks, playgrounds, game parks and reserves and forests. The Commission even came across cases of illegal allocations of old grave yards and public toilets. Some of these allocations led to public protestations and demonstrations by residents of the affected areas, but it was not uncommon for such demonstrations to be violently broken up by the police.

In 2002, the political party (KANU) that had ruled the Country since 1963 was defeated in the elections held in December of that year. The victorious party had anchored its campaign on an anti-corruption platform, and had undertaken to recover all public lands illegally allocated by the outgoing Government. On assuming power in 2003, the new President appointed a Commission to inquire into the illegal and irregular allocations of public lands. I was privileged to be appointed Chairman of the Commission, and hence the name **"Ndungu Land Commission".** I do not wish to bore you with a detailed analysis of the Commission's work, but let me mention jus a few of the main findings:

- Our conservative estimate was that some 200,000 illegal titles were created between 1962 and 2002. Close to 98% of these were issued between 1986 and 2002;
- Categories of public land affected included forests, settlement schemes established for the poor, national parks and game reserves, government civil service houses, government offices, roads and road reserves, wetlands, research farms, state Corporations' lands, trust lands, e.t.c. e.t.c;
- Illegal allocations were done on the orders of the President, other senior public officials and well-connected politicians or businessmen;
- Beneficiaries of grabbed land included ministers, senior civil servants, politicians, politically connected businessmen, and even churches and mosques
- On acquiring titles, most grabbers would very quickly sell the land to state corporations at hugely inflated values. The irony was that state corporations would lose their land to grabbers for free, and then be pressured to buy other lands for millions of shillings. The favourite **"cash cow"** seemed to be one workers' pension scheme known as the National Social Security Fund, which spent about KShs.30 billion (approximately USD.400m) between 1990 and 1995 purchasing illegally acquired properties.

A brief word on the Commission's recommendations. We made specific recommendations regarding each category of grabbed public land. However, we appreciated that there would be practical and legal difficulties in the recovery exercise where, for example, the land concerned had changed hands, or had been developed or charged to banks and other financiers. Most illegal titles would not only require to be revoked by a competent authority, but it was also important to operate within the confines of the Rule of law. The present law requires that revocation or validation of an illegal title can only be done by the High Court. Given the very large number of titles involved and the slow, expensive, complicated and bureaucratic processes of the conventional Courts, the Commission felt there was need to put in place a simple, cheap and accessible forum to deal with these problems. We therefore recommend that the law be amended to establish a Land Titles Tribunal, with a simplified

system of processing cases, such that it was possible to dispose of a case in a matter of one or two days. We drafted the suggested amendments to the current laws and incorporated them in the report.

We identified several public officials who, by processing these illegal titles, had actually committed criminal offences under our laws, and recommended their prosecution. We also identified some of the problems and weaknesses in the Country's land laws that led to this massive grabbing of public land. Firstly, the Country made a grave mistake when, at independence, we adopted colonial laws which had been enacted to govern and protect land rights of the white settlers. Those laws should have been reviewed to take into account the changed political and social equation. Secondly, the Country has never, to this day, had a national land policy. For a Country whose economy almost wholly depends on agriculture, it is almost criminal to operate all these years without a land policy. It is only recently, a few weeks ago to be exact, when a draft national land policy was published for public debate. Thirdly, I have already made reference to the deliberate mis-interpretation of the law by those in authority, by confusing the powers of an absolute Monarch with those of a President in a Republican State.

We submitted the report to the President in July 2004. Later that year, Government made the report public and undertook to implement all its recommendations. To my disappointment, the report has not been implemented in the structured manner we had recommended. Admittedly, Government has made a few high profile recoveries of public lands. For example, on one planned public road in Nairobi where grabbers had put up expensive houses, Government sent in bulldozers one morning and demolished the houses in the glare of TV cameras and other media. In a few locations across the country, people illegally settled in forests have been evicted by force. The Ministry in charge of lands claims that some grabbers have voluntarily surrendered land back to Government, but no names or particulars of such lands have been divulged.

Quite clearly, Government seems to have lost steam in its originally declared intention to recover all grabbed public lands, as part of its overall strategy on fighting corruption and correcting past wrongs. However, land is not the only victim of this lethargy, on the part of Government, in the fight against corruption. They appear to have slowed down all around and, although international and local pressure has led to some high profile sackings and resignations from Government, no successful prosecutions have yet taken place.

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