

**AN EVALUATION OF THE EFFICACY OF THE CURRENT  
LAND LAWS IN RESOLVING PUBLIC LAND GRABBING IN  
KENYA**

Submitted in partial fulfilment of the requirements of the Bachelor of Laws Degree, Strathmore  
University Law School

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**DECLARATION**

I, MBURU IVY NYAMBURA, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

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This dissertation has been submitted for examination with my approval as University Supervisor.

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Date: .....

**DEDICATION**

This work is dedicated to my dear parents Mr and Mrs. Mburu and my siblings Dr. Diana Mburu

and Adelaide Mburu for their love and support that has brought me this far.

### **ACKNOWLEDGEMENT**

I am highly indebted to my supervisor Smith Ouma for his assistance, effort, time, patience and guidance during the entire study period.

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**TABLE OF CONTENTS**

<b>DECLARATION</b>	<b>ii</b>
<b>DEDICATION</b>	<b>iii</b>
<b>ACKNOWLEDGEMENT</b>	<b>iv</b>
<b>List Of Cases</b>	<b>Viii</b>
<b>List Of Statutes</b>	<b>Ix</b>

<b>Abbreviations</b>	<b>X</b>
<b>Abstract</b>	<b>xi</b>
<b>CHAPTER 1: INTRODUCTION</b>	<b>1</b>
1.1    BACKGROUND OF THE STUDY	1
1.2    STATEMENT OF THE PROBLEM	5
1.3    JUSTIFICATION OF STUDY	6
1.5    RESEARCH QUESTIONS	6
1.6    ASSUMPTIONS/ HYPOTHESIS	7
1.7    THEORETICAL FRAMEWORK	7
1.8    LITERATURE REVIEW	8
1.10   CHAPTER OVERVIEW	11
<b>CHAPTER 2: CAUSES AND IMPACTS OF THE GRABBING OF PUBLIC LAND IN KENYA</b>	<b>13</b>
2.1    INTRODUCTION	13
2.2    CAUSES OF PUBLIC LAND GRABBING	14
2.3    IMPACT OF PUBLIC LAND GRABBING	21
2.4    CONCLUSION	28
<b>CHAPTER 3: ASSESSING THE ADEQUACY OF THE NEW LAND LAWS IN ADDRESSING PUBLIC LAND GRABBING</b>	<b>29</b>
3.1    INTRODUCTION	29
3.2    THE 2010 KENYA CONSTITUTION	30
3.3    THE LAND REGISTRATION ACT 2012	33
3.4    THE LAND ACT 2012	36
3.5    THE NATIONAL LAND COMMISSION ACT	39
3.6    THE ENVIRONMENT AND LAND COURT ACT	40
3.7    CONCLUSION	40

<b>CHAPTER 4: EFFICACY OF THE LAND INSTITUTIONS IN TACKLING PUBLIC LAND GRABBING</b>	<b>42</b>
4.1 INTRODUCTION	42
4.2 THE NATIONAL LAND COMMISSION	4
4.3 THE MINISTRY OF LANDS, URBAN HOUSING AND DEVELOPMENT	46
4.4 THE JUDICIARY: THE ENVIRONMENT AND LAND COURT	49
4.5 CONCLUSION	52
<b>CHAPTER 5: CONCLUSION AND RECOMMENDATIONS</b>	<b>53</b>
5.1 INTRODUCTION	53
5.2 FINDINGS	53
5.3 RECOMMENDATIONS	55
5.4 CONCLUSION	56
<b>BIBLIOGRAPHY</b>	<b>lviii</b>

## **LIST OF CASES**

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2. Constitution of Kenya (2010).
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4. Environment and Land Court Act, 2011 (Chapter 12A, Laws of Kenya).
5. Environment Management and Coordination Act, 2011 (Chapter 12A, Laws of Kenya).
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11. Land Registration Act (Act No. 3 of 2012).
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19. Registered Land Act (Chapter 300, Laws of Kenya) (*Repealed*).
20. Registration of Titles Act (Chapter 281, Laws of Kenya) (*Repealed*).
21. Sessional Paper No. 3 of 2009 on National Land Policy
22. Wayleaves Act (Chapter 292, Laws of Kenya) (*Repealed*).

## **ABBREVIATIONS**

ADC	Agricultural Development Corporation
CLMBs	County Land Management Boards
CS	Cabinet Secretary
EACC	Ethics and Anti- Corruption Commission
ELC	Environment and Land Court
GLA	Government Lands Act
ICDC	Industrial & Commercial Development Corporation
IDPs	Internally Displaced Persons
KACA	Kenya Anti-Corruption Authority
KIST	Kiambu Institute of Science and Technology Institute
KLA	Kenya Land Alliance

KNCHR	Kenya National Commission on Human Rights
LRA	Land Registration Act
LTA	Land Titles Act
MCAs	Members of County Assemblies
NEMA	National Environment Management Authority (Kenya)
NLC	National Land Commission
NLP	National Land Policy
TJRC	Truth, Justice and Reconciliation Commission

## **ABSTRACT**

Public land grabbing in Kenya traces its roots to the post-colonial era when the government of Kenya began buying back Kenyan land from the colonialists so as to settle the landless natives. However, this process was marred with irregularities which saw politicians, the elite and their associates benefit and amass large tracts of land. Over time, by different governments, various land reforms have been put in place to address the issue. When the new Constitution of Kenya was promulgated in 2010, it in turn led to an overhaul of the land laws in Kenya. Resultantly, three new Acts: the Land Act, the National Land Commission Act and the Land Registration Act were enacted in 2012. This study explores the causes and impacts of public land grabbing and evaluates the efficacy of the new land laws in addressing the problem of public land grabbing in Kenya. It explores the limitations of the legal framework in solving public land grabbing. The study also evaluates the institutions mandated with land administration and management and their ability to deal with the public land grabbing problem.

## CHAPTER 1: INTRODUCTION

### 1. BACKGROUND OF THE STUDY

#### 1.1. LAND IN PRE-COLONIAL KENYA

In pre-colonial Kenya, land was owned communally in Kenya.<sup>1</sup> Individuals could not own land as is the case now.<sup>2</sup> Instead, a whole community owned the land with each individual having a right to use it in a manner acceptable to the others.<sup>3</sup> For most Kenyans, land was not just an asset but carried some spiritual significance with it.<sup>4</sup> The report of the Commission of inquiry into the land law system of Kenya stated that: “For indigenous Kenyans, land also has an important spiritual value. For land is not merely a factor of production; it is; first and foremost, the medium which defines and binds together social and spiritual relations within and across generations.”<sup>5</sup>

The elders and chiefs or other authorities were in-charge of the community land and would deal with any matters arising out of land ownership.<sup>6</sup>

#### 1.2. LAND IN COLONIAL KENYA

The scramble and partition of Africa, Kenya included, began after the Berlin conference in 1885<sup>7</sup> after which the colonialists began to settle in the country.

After the Berlin conference (1885), when the scramble and partition of Africa began, white settlers invaded the country and occupied land belonging to communities.<sup>8</sup> This led to the displacement of Natives who were pushed into native reserves. This interrupted the community land tenure system

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<sup>1</sup> Wakoko V, ‘The evolution of Land Law in Kenya’, 1.

<sup>2</sup> Article 61(2), *Constitution of Kenya* (2010)

<sup>3</sup> Njuguna HK and Baya MM, ‘Land reforms in Kenya: An Institution of Surveyors of Kenya (ISK) Initiative,’ FIG Working Week, Seoul, 6–11 May 2001.

<sup>4</sup> *Report of the commission of inquiry into the land law system of Kenya on the principles of a national land policy framework, constitutional provision of land and new institutional framework for land administration*, Government Printer, Nairobi, November 2002, (hereafter, The Njonjo Commission Report)

<sup>5</sup> The Njonjo Commission Report, 2002.

<sup>6</sup> Kanyinga K, ‘Re-distribution from above: The Politics of Land Rights and Squatting in Coastal Kenya’ *Nordiska Afrikainsitutet*, 115 (2000), 33.

<sup>7</sup> <https://brainmass.com/earth-sciences/environmental-policy/berlin-conference-negative-impact-on-africa-320757>> on 28 January 2017.

<sup>8</sup> Juhani Koponen, ‘The Partition of Africa: A Scramble for a Mirage?’ *Nordic Journal of African Studies*, University of Helsinki, 131.

that existed because the colonialists introduced the concept individual land ownership.<sup>9</sup> They considered the communal land ownership system inconsistent with modernization and development.<sup>10</sup>

Consequently, in 1899, the British colonial power declared that all land, irrespective of whether it was occupied or unoccupied, had accrued to the imperial power simply by reason of assumption of jurisdiction, making all land available for alienation to white settlers.<sup>11</sup> The British government considered Africans to be “tenants at the will of the Crown.”<sup>12</sup>

When Kenya was declared a colony in 1920, all land in Kenya was under the colonial powers who were now in charge of land administration in the country.<sup>13</sup>

Land then became one of the major contributors to the struggle for independence because as stated earlier, it had more than just material value to the then natives. After the attainment of independence in 1963, the people were optimistic they would acquire their land back.<sup>14</sup> However, this did not happen and became the onset of land issues in the country as described below.

### **1.3. LAND IN POST- COLONIAL KENYA**

#### **1.3.1. DURING THE INDEPENDENCE CONSTITUTION**

After independence, a Jomo Kenyatta led faction was of the idea to buy out the white farms while the other, led by Oginga Odinga argued for re-appropriation of the white settlers’ farms to settle the landless.<sup>15</sup> After the first national election, the late Jomo Kenyatta won and this would mean that his government was in charge of all land allocation and administration just as the former colonial government.<sup>16</sup> Settlement Transfer Fund Schemes were formed through which the

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<sup>9</sup> Veit P, ‘History of land conflicts in Kenya’ *Focus of Land in Africa*, 3  
<http://www.focusonland.com/countries/kenya-history-of-conflicts-/> on 28 January 2017.

<sup>10</sup> Veit P, ‘History of land conflicts in Kenya’, 3.

<sup>11</sup> Veit P, ‘History of land conflicts in Kenya’, 3.

<sup>12</sup> Veit P, ‘History of land conflicts in Kenya’, 3.

<sup>13</sup> <[http://www.kenyarep-jp.com/kenya/history\\_e.html](http://www.kenyarep-jp.com/kenya/history_e.html)> on 30 January 2017.

<sup>14</sup> Bauke Betzema, ‘An analysis of social mobilization in slum areas of Nairobi: Fighting against urban land grabbing’, University of Amsterdam, 16 August 2013, 37.

<sup>15</sup> Jacqueline MK and Odenda L, ‘The State of Kenya’s Land Policy and Law Reform: A political institutional analysis’, World Bank Conference On Land And Poverty, Washington DC, 18 March 2016, 3.

<sup>16</sup> Mulemi B, ‘Putting land grievances behind us in Kenya’, August 2011, 5.

Kenyatta government sought loans to buy back land from the colonialists.<sup>17</sup>

After acquisition of these pieces of land from the settlers,<sup>18</sup> Kenyatta's government would sell it of cheaply to political allies, elites and their families.<sup>19</sup> Through this process, government officials swindled communities that were supposed to benefit from the settlement schemes, after being displaced by the British.<sup>20</sup> It is this way that political figures and the elites were able to grab large tracts of land because of the power they had in its administration by turning the foreign-funded settlement schemes into cartels for their own benefit, and bought land in the Rift Valley, among other parts of the white highlands.<sup>21</sup> As a result, squatters increased around the country.

After the death of Hon. Kenyatta, a new government, under his Excellency Hon. Daniel Arap Moi, came into power in 1978 whereby land grabbing continued rising.<sup>22</sup> Moi used land to reward his political allies with huge chunks of land without documentation or regard to its effect on Kenyans who were still displaced.<sup>23</sup> This made it very easy for powerful politicians to acquire land illegally, thus exacerbating land grabbing. Political power was therefore, a means of acquiring wealth in land.<sup>24</sup> As a result, many Kenyans were left landless and without compensation due to the loss of their land from the colonial era.<sup>25</sup>

In fact, land conflict was a major factor in the 1992 and 1997 clashes in the country that resulted in homeless, landless, destitute, injured, dead, abused, to mention but a few of the atrocities resulting from the menace.<sup>26</sup> These violent phases provided gaps in which those that that were

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<sup>17</sup> Kipnyango, 'Who owns the Land: Blood and Soil issue', *The University of Warwick blog*, March 2010 <[https://blogs.warwick.ac.uk/kseroney/entry/who\\_owns\\_the/](https://blogs.warwick.ac.uk/kseroney/entry/who_owns_the/)> on 30 January 2017.

<sup>18</sup> Kamau J, 'How Independence era Leaders laid their hands on lands of quitting Whites', November 2009.

<sup>19</sup> Kamau J, 'How Independence era leaders laid their hands on lands of quitting Whites'.

<sup>20</sup> Kenya National Human Rights Commission, 'Redress for Historical Injustices in Kenya: A brief on proposed legislation for Historical Injustices in Kenya', 5.

<sup>21</sup> Kipnyango, 'Who owns the Land: Blood and soil issue'.

<sup>22</sup> Kipnyango, 'Who owns the Land: Blood and soil issue'.

<sup>23</sup> Owino H, 'Land Grabbing impunity', *New Internationalist Blog: People, Ideas and Action for Global Justice*, February 2015.

<sup>24</sup> Veit P, 'History of land conflicts in Kenya'.

<sup>25</sup> *Report of the Truth, Justice and Reconciliation Commission. Kenya*, Truth Justice and Reconciliation Commission (TJRC), (hereafter *TJRC Report*), 2013.

<sup>26</sup> Kenya Environmental and Political News Weblog, *1992 Tribal Clashes*, September 2007 <<https://kenvironews.wordpress.com/2007/09/04/1992-tribal-clashes-were-instigated-by-biwott-%E2%80%98business-associate%E2%80%99/>> on 28 January 2017.

politically connected could irregularly acquire land.<sup>27</sup>

In 1999, the Commission of Inquiry into Land Law Systems (the Njonjo Commission), was formed to come up with principles of a National Land Policy framework and a new institutional framework for land registration.<sup>28</sup>

In 2003, the former president, Hon. Mwai Kibaki, took office in 2003 was tasked with cleaning up the mess left behind by his predecessors, Jomo Kenyatta and Daniel Moi, under whose terms the Ministry of Lands became the most corrupt institution in the country.<sup>29</sup> The uproar against land grabbing prompted Hon. Kibaki to appoint the Commission of inquiry into the illegal/ irregular allocation of public land which although faced with many challenges whilst in operation, its report revealed a massive loss of public land in the country often by politicians and the elite.<sup>30</sup>

### 1.3.2. THE 2010 CONSTITUTION

On 27<sup>th</sup> August 2010, the new Kenya Constitution was promulgated. The constitution sent an optimistic feeling that there would be a new dawn and land grabbing would be put to rest.

The Constitution introduced a whole new chapter on land<sup>31</sup> which was did not exist in the independence constitution.

Some of the greatest provisions include: the requirement for Parliament to consolidate and rationalize existing land laws and also revise sectoral land use laws,<sup>32</sup> the establishment of a NLC<sup>33</sup> among others.

Distinctly, through history, land grabbing has been a prevalent issue. It was and remains a source of conflict and as such, been the reason behind several disputes and unfortunately deaths,

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<sup>27</sup> Jacqueline MK and Odenda L, 'The State of Kenya's Land Policy and Law Reform', 4.

<sup>28</sup> '1992 Tribal Clashes', *Kenya Environmental and Political News Weblog*, September 2007 <<https://kenvironews.wordpress.com/2007/09/04/1992-tribal-clashes-were-instigated-by-biwott-%E2%80%98business-associate%E2%80%99/>> on 28 January 2017.

<sup>29</sup> Mutambo A, 'How Kibaki Kept Grabbers at Bay', January 2015, <<http://www.nation.co.ke/news/politics/How-Kibaki-kept-grabbers-at-bay/1064-2602214-9ckm49z/index.html>> on 30 January 2017.

<sup>30</sup> Jacqueline Klopp, 'The state of Kenya's land policy and law reform: A political institutional analysis paper', *2016 World Bank Conference on Land and Poverty*, (Washington DC, 2016).

<sup>31</sup> Chapter IX, *Constitution of Kenya* (2010).

<sup>32</sup> Article 68(a), (b), *Constitution of Kenya* (2010).

<sup>33</sup> Article 67, *Constitution of Kenya* (2010).

displacement, destruction of property and tribal wars since independence.<sup>34</sup> Such unfortunate events are the 1992, 1997 and the most recent 2007-08 ethnic clashes in which land conflicts played a major role.

There have been efforts to clean up the mess through introduction of major reforms, in the land allocation sector. As listed above, they date back to the Njonjo Land Commission (1999), the Ndung'u Commission, The Kenya National Dialogue and Reconciliation which sought to address the land question and established the Truth Justice and Reconciliation Commission (TJRC) that was to investigate historical injustices among others,<sup>35</sup> and the promulgation of a new Constitution among others.

Some of the prominent cases are: the Ngong and Karura forests saga, Bellevue land case,<sup>36</sup> Karen Land Saga (2014), the Langata Primary School land scandal (2015), Moi Teaching & Referral Hospital expansion land, Waitiki land saga among many others.<sup>37</sup>

By March 2016, the Ethics and Anti- Corruption Commission ranked the Ministry of Lands, Housing and Urban Development as the third most corrupt in the country<sup>38</sup>. In 46 counties of the 47, the registrar of land was found to be among the most corrupt.<sup>39</sup>

Lots of large tracts of public land in Kenya have been illegally or irregularly acquired and corruption has played a great role and despite reforms to curb the vice in the land allocation systems, the cases of public land grabbing prevails.<sup>40</sup>

This trend opens up a need for national dialogue on how to address the glaring issue of land management and administration in the country.

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<sup>34</sup> *TJRC Report*, 2013.

<sup>35</sup> Kenya National Human Rights Commission (KNHCR), 'Redress for Historical Injustices in Kenya: A brief on proposed legislation for Historical Injustices in Kenya', 4.

<sup>36</sup> *TJRC Report*, 2013, 280.

<sup>37</sup> <<http://www.kenya-today.com/politics/list-20-corruption-scandals-uhuru-watch-billions-stolen>> on January 19 2017.

<sup>38</sup> 'Karanja S: Interior, health ministries most corrupt, EACC survey shows' *Daily Nation* 16 March 2016 <<http://www.nation.co.ke/news/Nkaiisery-ministry-the-most-corrupt-says-EACC-survey/1056-3118708-8687ea/index.html>> on 19 January 2017.

<sup>39</sup> 'Karanja S: Interior and health ministries most corrupt, EACC survey shows'.

<sup>40</sup> *TJRC Report* 2013, 165-168.

## **2. STATEMENT OF THE PROBLEM**

Land allocation matters are controversial in Kenya and the current and previous governments' efforts in reforming the land administration system seem futile. Public land grabbing continues despite express and strict regulations on the matter, seeing as such scandals have not decreased. High levels of corruption in the land administration system have almost diminished the capability of land reforms. It has made it possible for unscrupulous individuals to allow the acquisition of public land illegally. Therefore, it is necessary to examine the efficacy of the land law reforms in eradicating illegal allocations of public land. Elimination of corruption in the land administration system would be key to achieve this and needs to be done sooner if not now lest public land grabbing shall advance further.

## **3. JUSTIFICATION OF STUDY**

The passing, enactment and implementation of the current land laws in 2012 was aimed at addressing many land problems among them, public land grabbing which has persisted since independence. However, the current land legislation has not succeeded in dealing with public land grabbing in Kenya. Continued public land grabbing practice has been illustrated throughout the paper. The research seeks to identify the gaps existing in the current land laws and the means in which those gaps can be tackled. This study's significance rests on the need to present solutions to the issue of public land grabbing in Kenya by analysing the efficacy of the new land laws and that of land administration institutions and how inefficiencies, if any, can be corrected.

Furthermore, the Constitution of Kenya protects the right of Kenyans to own property<sup>41</sup> and tasks the legislature to protect public land from illegal acquisitions.<sup>42</sup> With heightened illegal allocations of land, the provisions of the Constitution are being infringed on.

## **4. RESEARCH OBJECTIVES**

1. To investigate the causes of the rise of public land grabbing cases in the country.
2. To assess the efficacy of the new land laws in addressing land grabbing.
3. To determine the progress of the extent to which the NLC has dealt with public land grabbing and implemented the new land laws.

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<sup>41</sup> Article 40, *Constitution of Kenya* (2010).

<sup>42</sup> Article 62 (4), *Constitution of Kenya* (2010).

4. To discover available remedies to curb land administration issues in Kenya including the efficacy of the existing land laws

## 5. RESEARCH QUESTIONS

1. What are the causes and impacts of public land grabbing cases in Kenya?
2. Are the new land laws efficient in addressing public land grabbing?
3. What is the role of the National Land Commission in ensuring an efficient land allocation system?
4. What can be done to ensure an efficient public land management system?

## 6. ASSUMPTIONS/ HYPOTHESIS

1. Since independence a lot has been done to curb public land grabbing.
2. Public land grabbing is on the rise in Kenya.
3. Graft is the main reason public land grabbing is escalating.
4. Political figures and elites have contributed majorly to land- related graft.

## 7. THEORETICAL FRAMEWORK

This research is based on the following theories;

### 7.1. SOCIAL CONTRACT THEORY

The government has the responsibility to ensure the protection of the people's rights including rights to property. When it fails to do so then it is failing as a whole. Thomas Hobbes, a proponent of the social contract theory,<sup>43</sup> supposes that in the state of nature man is violent and cruel. Through a social contract, between man and the government, the government is to protect the rights of man and man is supposed to obey the rule of the government so to escape the state of nature.<sup>44</sup>

When the government fails to protect the land rights of Kenyans, it has breached the social contract and as such the state of nature creeps in allowing people to become violent in a struggle to fight for their property (self- preservation).<sup>45</sup> An examples of clashes where land disputes have

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<sup>43</sup> [http://oregonstate.edu/instruct/phl201/modules/Philosophers/Hobbes/hobbes\\_social\\_contract.html](http://oregonstate.edu/instruct/phl201/modules/Philosophers/Hobbes/hobbes_social_contract.html)> on 8 January 2017.

<sup>44</sup> Thomas Hobbes, '*The Leviathan*', Part XIII, 1651.

<sup>45</sup> John Locke, *Two Treatises of Government*, Cambridge University Press, 1960.

contributed is the 2007-08 Post Election violence.

## **7.2. LABOUR THEORY**

Proposed by John Locke, the labour theory of property provides that each worker has the right to have and to save the produce of his work.<sup>46</sup> He adds that goods of the earth are common to all, in the first instance, but become the private property of one who has “mixed” his labour with them, if there is enough and as good left in common for others.<sup>47</sup>

Land grabbing is undoubtedly a case of harvest where one did not sow. Based on this theory, everyone should acquire property, in this case, land, after working for it. However, he insists that the property acquired should be reasonable and not excess to avoid waste.<sup>48</sup> Those involved in land grabbing can only acquire so much without leaving some to waste. Land allocation should be reasonable and avoid wastage.

## **8. LITERATURE REVIEW**

A Charles Njonjo led commission created in 1999, aimed to undertake a broad review of land issues in Kenya and to recommend the main principles of a land policy framework which would foster an economically efficient, socially equitable and environmentally sustainable land tenure and land use system.<sup>49</sup> This report is key because it was among the first steps towards a land reform that would seek to ensure an effective and reliable national land policy framework. Such a framework would include the values and principles, relevant ones being integrity and transparency<sup>50</sup> among others, that would be depended on in land allocation in land administration institutions.

The Truth Justice and Reconciliation Commission led by the late Bethwel Kiplagat presented a report which analysed historical injustices, their causes, effect and make appropriate reforms. The report alluded to the fact that minority and indigenous communities had lost their lands, because the government had failed to solve the historical injustices of colonialism and the trust land system

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<sup>46</sup> John Locke, *Two Treatises of Government*.

<sup>47</sup> John Locke, *Two Treatises of Government*.

<sup>48</sup> John Locke, *Two Treatises of Government*.

<sup>49</sup> Njonjo Commission Report, 2002.

<sup>50</sup> *Report of the Commission of Inquiry into the Land Law System of Kenya on Principles of a National Land Policy Framework, Constitutional Position of Land and New Institutional framework for Land Administration*, 2002.

which allowed local governments to give away their land.<sup>51</sup> This report is key to the study given that it focused on historical land injustices of which land grabbing is one of them. It discusses the background of the problem<sup>52</sup> and puts forth some recommendations to resolve land grabbing among other historical injustices.<sup>53</sup>

The Ndung'u Commission created in 2003, presented a report that discussed the extent of irregular land allocation in the country, what land is irregularly allocated, by whom, to whom and most important the means used to acquire these pieces of public land.<sup>54</sup> The main focus of this study is irregular land allocation in the face of land reforms, and this report provides information and justifies the large tracts of land that have been taken away from Kenyans in illegal and irregular purposes.

Peter Veit looks into the history of land conflicts in Kenya, their causes and impact. The paper also looks at the extent of irregular land allocations from the governments of former presidents Hon. Jomo Kenyatta and Hon. Daniel Moi and some of the reforms introduced to cure the issue within these eras.<sup>55</sup> This ties to the topic as it provides a history and background to irregular acquisition of land in Kenya.

Erin O'Brien, a South Africa -based sociologist and rural development consultant, looks into the controversial issue of land ownership in Kenya.<sup>56</sup> The paper focuses on public land which is irregularly allocated, by whom, to whom and its impact on the nation as a whole which is forms part of the main focus of this study.

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<sup>51</sup> *TJRC Report*, 2013.

<sup>52</sup> *TJRC Report*, 2013, Chapter 2.

<sup>53</sup> *TJRC Report*, 2013, Chapter 2,

<sup>54</sup> *Report of the Commission of Inquiry into the Illegal and Irregular Allocation of Public Land*, Republic of Kenya, 2004 (the 'Ndung'u Commission Report').

<sup>55</sup> Veit P, 'History of Land Conflicts in Kenya'.

<sup>56</sup> O' Brien E and the Kenya Land Alliance, 'Irregular and illegal land acquisition by Kenya's elites: trends, processes, and impacts of Kenya's land-grabbing phenomenon', *International Land Coalition*, 2011, <<http://www.kenyalandalliance.or.ke/wp-content/uploads/2015/03/KLA-commercial-pressure.pdf>> on 31 January 2017.

Kenya National Human Rights Commission are of the opinion that land grabbing is characterized by indications of a breakdown in land administration, disparities in land ownership, tenure insecurity and conflict. They analysed the impact of the legislative obligation on historical land injustices, the progress of the implementation of reforms relating to land related historical injustices and states options on the way forward in reform implementation.<sup>57</sup>

The Minister of Lands in 2009, Mr James Orengo, presented to parliament a Sessional Paper<sup>58</sup> setting the foundation of the formulation process of a national land policy. The paper presented the issues and policy recommendations that had been identified, analysed and agreed upon by all those involved. It provided a base upon which the administrative and legislative framework would be built. This framework aimed at driving the critically required land reforms in the country and recognizing that land is an emotive and culturally sensitive issue in Kenya.<sup>59</sup> A National Land Policy formulation was one of the major reforms in the land sector in the country and with an effective one, public land grabbing would be on the decrease.

The 15<sup>th</sup> Land Development and Governance Institute watch note, highlights the gains in land law reform and the challenges that have been faced by the Ministry of Lands and the NLC in their implementation.<sup>60</sup> To this date some of the reforms introduced years ago are yet to be fully implemented and those already implemented their effect seen.

The Constitution of Kenya, provides for equality among all Kenyans as one of the nation's values. It provides that land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with the following principles: equitable access to land, transparent and cost effective administration of land among others.<sup>61</sup> It also expressly states that public land shall not be disposed of or otherwise used except in terms of an Act of Parliament specifying the nature and terms of that disposal or use.<sup>62</sup>

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<sup>57</sup> KNHCR, 'Redress for Historical Injustices in Kenya'.

<sup>58</sup> Ministry of Lands, 'Sessional Paper No. 3 of 2009'.

<sup>59</sup> Ministry of Lands, 'Sessional Paper no. 3 of 2009'.

<sup>60</sup> Kenya Land Development and Governance Institute, *Land reforms in Kenya: Gains and Challenges Four Years into Implementation*, October 2014, [www.ldgi.org/home/item/download/4.html](http://www.ldgi.org/home/item/download/4.html) > on 31 January 2017.

<sup>61</sup> Article 60, *Constitution of Kenya* (2010).

<sup>62</sup> Article 62 (4), *Constitution of Kenya* (2010).

Ambreena Manji is of the view that land law reforms have failed to result positively as intended. She is of the view that new laws have not been redistributive or transformative in a positive way. Long standing grievances and injustices have not been addressed. Legislation has failed to curtail predatory bureaucracies which in turn have stymied reform through delaying tactics and sabotage. After adopting a progressive National Land Policy and new constitution, Kenya missed a real opportunity to enshrine in law their radical principles for land reform. Some of the principles lacking include transparency, integrity and honesty in land administration making it hard for the effect of land reforms to be positive.

The Land Act provides that the Act is to revise, consolidate and rationalize land laws; to provide for the sustainable administration and management of land and land based resources, and for connected purposes.<sup>63</sup> This research focuses on the extent to which the stakeholders expected to ensure a sustainable land administration have achieved this aim and if not why they have not.

## **9. RESEARCH METHODOLOGY**

The research methodology applied in this study is mainly library based with reported facts used. It involves the use of historical analysis of records, documents and accounts of what transpired in the Kenya's past. Historical analysis has been used to justify the need for changes in land laws.

The study also depends on secondary sources and internet sources including books, journals, articles and other information concerning the land issue addressed herein.

## **10. CHAPTER OVERVIEW**

This research is subdivided into five chapters:

### **CHAPTER ONE**

Chapter one is the introductory chapter which outlines what the paper is about. It provides background information to the problem, the problem statement, justification of the study and the objectives of the study.

### **CHAPTER TWO**

Chapter two seeks to address the causes and impacts of public land grabbing including how the

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<sup>63</sup> Preamble, *Land Act* (2012).

problem has persisted over time. It evaluates the factors that have contributed to the problem of public land grabbing. It endeavours to pave the way to address the statement of problem.

### **CHAPTER THREE**

Chapter three constitutes an extensive study into Kenya's post-independence land law with particular focus on the new land laws. It addresses the existing gaps in the present day statutes which ought to be addressed to come up with a more comprehensive legal framework that will eradicate land grabbing.

### **CHAPTER FOUR**

Chapter four explores the institutional framework of Kenya's land administration and the role these institutions play in addressing public land grabbing. It also analyses their efficiency and ability to implement and comply with the laws discussed in Chapter three.

### **CHAPTER FIVE**

Chapter five contains the conclusions of the study and the recommendations that would extinguish future public land grabbing while seeking to resolve ongoing and past illegalities.

## **CHAPTER 2: CAUSES AND IMPACTS OF THE GRABBING OF PUBLIC LAND IN KENYA**

### **1. INTRODUCTION**

In the previous Chapter, the history of land ownership in Kenya from colonial times to the current 2010 Constitution regime was described. After independence, the elite took it upon themselves to enrich themselves in ways described in the previous chapter.

Land is a major cause of conflict among the people of Kenya<sup>64</sup> and even other places in the world.<sup>65</sup> For most Kenyans, land is not a mere asset, it carries some spiritual significance with it.<sup>66</sup> It is, therefore very important that it is well administered to prevent and even avoid such conflicts which may be fatal.

Land administration by a state may be a cumbersome task due to poor coordination in the land administration institutions, a well-entrenched corruption system and human greed.<sup>67</sup> As a result, land grabbing is made possible. The 2010 Constitution of Kenya classified land into three: private land, public land and community land.<sup>68</sup>

For the purposes of this study, public land includes: “(a) land which at the effective date was unalienated government land as defined by an Act of Parliament in force at the effective date; land lawfully held, used or occupied by any State organ, except any such land that is occupied by the State organ as lessee under a private lease; land transferred to the State by way of sale, reversion or surrender; land in respect of which no individual or community ownership can be established by any legal process; land in respect of which no heir can be identified by any legal process; (f) all minerals and mineral oils as defined by law; (g) government forests other than forests to which Article 63 (2) (d) (i) applies, government game reserves, water catchment areas, national parks, government animal sanctuaries, and specially protected areas; (h) all roads and thoroughfares provided for by an Act of Parliament...”<sup>69</sup>

Public land grabbing may therefore, be defined as: the acquisition of public land through illegal and irregular means. The problem of public land grabbing remains a nuisance in the country because despite the introduction of very optimistic reforms and solutions, the implementation process is marred by irregularities and lack of an integrated approach to correct the problem. This Chapter looks into the causes and impacts of public land grabbing in general.

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<sup>64</sup> Kenya Environmental and Political News Weblog, *1992 Tribal Clashes*, September 2007.

<sup>65</sup> Lewis S & Jonathan B (ed), ‘Land a major source of conflict in Liberia’, *The New Dawn Liberia* October 2016, <http://www.thenewdawnliberia.com/news/4107-land-a-major-source-of-conflict> on 26 July 2017.

<sup>66</sup> The Njonjo Commission Report, 2002.

<sup>67</sup> The Ndung’u Commission Report, 2004.

<sup>68</sup> Article 61(2), *Constitution of Kenya* (2012).

<sup>69</sup> Article 62, *Constitution of Kenya* (2010).

## 2. CAUSES OF PUBLIC LAND GRABBING

### 2.1. CORRUPTION

Many scholars have attempted to define the term corruption which has proved to be a difficult task and continues to be so.<sup>70</sup> This is because the way it is defined determines largely what gets measured as an act of corruption.<sup>71</sup> However, there appears to be accord that it involves an act in which the power of a public office for personal gain in an illegal manner<sup>72</sup> and for the purposes of this paper, shall be defined as such. It often involves public officials, legislators, ministers, politicians and other officials in public offices.

Since independence, corruption in Kenya has continued exist even after numerous efforts to eradicate it especially in the public sector.<sup>73</sup> These efforts include legislations, establishment of an anti- corruption commission, and establishment of a corruption court among others. In 1956, 7 years before independence, the first corruption law, Prevention of Corruption Act<sup>74</sup> was introduced. It was later amended in 1997 to provide for the Kenya Anti-Corruption Authority (KACA) an anti- corruption agency that was the first of its kind in the country. However, it was later disbanded on the grounds of unconstitutionality.<sup>75</sup> In 2003 in an effort to continue the fight against corruption, two statutes were enacted Anti-Corruption and Economic Crimes Act<sup>76</sup> and the Public Officers Ethics Act.<sup>77</sup> Kenya also signified its commitment in this fight by ratifying the UN Convention against Corruption<sup>78</sup> in 2003.

On the contrary, a report published in 2016 by Price Waterhouse Coopers, a famous global audit firm, Kenya ranked as third most corrupt country in the entire world.<sup>79</sup> This means that it has hit a whole new level in corruption levels given that in 2011 it was ranked position 154 out of 182

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<sup>70</sup>Jain A, 'Economics of Corruption', 1998, 13-19.

<sup>71</sup>Jain A, 'Corruption: A Review', Concordia University, 73.

<sup>72</sup>Jain A, 'Corruption: A Review', 73-74.

<sup>73</sup> Kempe Ronald, 'Tackling the Corruption Epidemic in Kenya: Toward a Policy of More Effective Control', *The Journal of Social, Political, and Economic Studies* 2013.

<sup>74</sup> CAP 65, 1956 (repealed).

<sup>75</sup> *Gachiengo v Republic*, [2000] eKLR.

<sup>76</sup> Act No 3 of 2003, Section 70 of this Act repealed the existing *Prevention of Corruption Act* of 1956 (CAP 65)

<sup>77</sup> Act No 4 of 2003.

<sup>78</sup> UN General Assembly, United Nations Convention Against Corruption, 31 October 2003, A/58/422.

<sup>79</sup> PricewaterHouse Coopers (PwC), 'Adjusting the Lens on Economic Crime', *Global Economic Crime Survey: Kenya*, 2016.

countries.<sup>80</sup>

Corruption takes many forms and according to the Anti-Corruption and Economic Crimes Act<sup>81</sup> includes bribery, abuse of office and embezzlement of funds, fraud, conspiracies and breach of trust among others.<sup>82</sup>

Further, corruption in itself is a human rights issue.<sup>83</sup> When someone takes away land meant for public services such as hospitals and schools, it is denying the citizens their rights to health, education, cultural rights among others. In the same way, public land belongs to all Kenyans and exists for their benefit. When given or taken illegally by individuals it is as good as discriminating against the rest of the citizens.<sup>84</sup>

It may also be said to be an abuse of public trust. The public trust doctrine requires government safeguarding of the natural resources upon which society, the economy and government depend for continued existence.<sup>85</sup> According to Sax, a major advocate of the doctrine, public trust covers waterways, beaches, water policy, public lands management, wildlife and other ecological resources in general,<sup>86</sup> while recognizing private property ownership and the possibility of conversion of public land into private hands when done correctly.<sup>87</sup> The common instances of illegal allocation of public land in Kenya as described herein manifests a breach of public trust by the government especially as most illegal allocations involve government and public officials directly or indirectly.<sup>88</sup> Therefore when government therefore fails to protect the public land, necessary for public utility, it amounts to abuse of public trust.

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<sup>80</sup> Transparency International, 'Corruption Perception Index', 2011.

<sup>81</sup> Act No 3 of 2003.

<sup>82</sup> Section 2, *Anti-Corruption and Economic Crimes Act* (2003).

<sup>83</sup> Kenya National Commission on Human Rights and Kenya Land Alliance, 'Unjust Enrichment: The Making of land Grabbing Millionaires- The Plunder of Kenya's State Corporations and Protected Lands' Vol 2, 5.

<sup>84</sup> KNCHR and KLA, 'Unjust Enrichment: The Making of land Grabbing Millionaires', 5.

<sup>85</sup> Douglas Quirke, 'The Public Trust Doctrine: A Primer', *University of Oregon School of Law Environmental and Natural Resources Law Centre*, 1.

<sup>86</sup> Carol Rose, 'Joseph Sax and the Idea of the Public Trust', *Faculty Scholarship Series*, 1998, 355-356.

<sup>87</sup> Sax J, 'The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention', *Michigan Law Review*, Vol 68, 478-479.

<sup>88</sup> KNCHR and KLA, 'Unjust Enrichment: The Making of land Grabbing Millionaires', 8.

### 2.1.1. BRIBERY

To begin with, bribery is offering, giving, receiving, or soliciting of any item of value to influence the actions of an official or other person in charge of a public or legal duty.<sup>89</sup> Public officers at the land registries, land ministry and other land related or land administrative institutions are easily manipulated by unscrupulous individuals to offer them certain services some of which include duplicating title deeds, assigning public lands with title to them in promise of pay or other advantage.<sup>90</sup> This form of corruption can easily be manipulated by unscrupulous individuals to have their way which is grab public land.<sup>91</sup>

As stated in the previous chapter, the political class is well known for using public land as a tool for their political play; some politicians reward those that support their politics with public land.<sup>92</sup> For example, Moi used land to reward his political allies with huge chunks of land without documentation or regard to its effect on Kenyans who were still displaced.<sup>93</sup> This, although not in pecuniary form is bribery and a form of corruption.<sup>94</sup>

According to the TJRC report, local authority officials involved in illegally allocating public land to private individuals would allocate such lands to themselves, their families or associates without following the full legal procedure involved in conversion.<sup>95</sup> Often, land would be surrendered to a developer who is supposed to construct public facilities. However, once surrendered, private companies, mostly associated with top government officials and individuals, would be allocated the surrendered land.<sup>96</sup> The officers involved at the lands ministry would in turn be offered gifts in kind or money for conducting such illegalities.<sup>97</sup> Such example is the Woodley Estate which was planned to be a housing facility but was later allocated to individuals and companies related to the

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<sup>89</sup> Black's Law Dictionary.

<sup>90</sup> Eric O' Brien and Kenya Land Alliance, 'Irregular and illegal land acquisition by Kenya's elites: Trends, processes, and impacts of Kenya's land-grabbing phenomenon', 2011, 17.

<sup>91</sup> Kenya National Commission on Human Rights and Kenya Land Alliance, 'Unjust Enrichment: The Making of land Grabbing Millionaires'.

<sup>92</sup> Owino H, 'Land Grabbing impunity', *New Internationalist Blog: People, Ideas and Action for Global Justice*, February 2015.

<sup>93</sup> Owino H, 'Land Grabbing impunity', *New Internationalist Blog*.

<sup>94</sup> Owino H, 'Land Grabbing impunity', *New Internationalist Blog: People, Ideas and Action for Global Justice*

<sup>95</sup> *TJRC Report*, 2013, 281-284.

<sup>96</sup> *TJRC Report*, 2013, 281-284.

<sup>97</sup> *TJRC Report*, 2013, 281-284.

then Commissioner of Lands.<sup>98</sup> Another is the illegal allocation of Kenya Industrial Estates meant to facilitate development of micro, small and medium enterprises countrywide by establishing industrial parks, providing credit and business development services in a sustainable manner.<sup>99</sup> Later, more than 361 of its plots in 19 towns were illegally and irregularly allocated to private individuals and companies.<sup>100</sup>

In a statement released by the current Nairobi County Governor, he stated how the officials at the land registries are used to illegally allocate land to undeserving people.<sup>101</sup> He stated that the county staff at the lands department intentionally tamper with records of prime properties by deleting records and illegally obtaining new ones which are then handed out to the land grabbers.<sup>102</sup>

### **2.1.2. ABUSE OF OFFICE**

According to the Ndung'u report, many parastatals suffered widespread abuse of office through schemes aimed at illegally and irregularly allocating vast amounts of public land to the political elite and individuals.<sup>103</sup> Public officials such as ministers, former provincial administration officials and other high ranking officers, used their positions and connections within their workplaces to manipulate things and the legal process which allowed them to have their way.<sup>104</sup> As such, they can easily acquire documents relating to land which they wish to acquire some of which may be public land. The report also names several politicians, public officials and large companies whose directors are political allies as major role players in land grabbing corruption scams.<sup>105</sup> Some of the scams highlighted included the Agricultural Development Corporation

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<sup>98</sup> *Ndung'u Commission Report*, 2002, 25-39.

<sup>99</sup> Kenya National Commission on Human Rights and Kenya Land Alliance, 'Unjust Enrichment: The Making of land Grabbing Millionaires', 16.

<sup>100</sup> Kenya National Commission on Human Rights and Kenya Land Alliance, 'Unjust Enrichment: The Making of land Grabbing Millionaires', 17.

<sup>101</sup> Statement by Governor Gideon Mbuvi, Nairobi County, 30 September 2017.

<sup>102</sup> Statement by Governor Gideon Mbuvi, Nairobi County, 30 September 2017.

<sup>103</sup> Kenya National Commission on Human Rights and Kenya Land Alliance, 'Unjust Enrichment: The Making of land Grabbing Millionaires', 4.

<sup>104</sup> *Ndung'u Commission Report*, 2004.

<sup>105</sup> Among those named were top officials in the previous and even current governments. They include: the Late Njenga Karume (former Minister of lands), Kipkalia Kones (former Minister), William Tuiyot (Former Judge), D N Gichuru (Retired Major General), just to name a few. Similarly, some of the companies named were: Signon Freight, Total (K) Ltd, Berke Company Ltd among many others.

Farms. Agricultural Development Corporation Farms, Kenya Industrial Estates<sup>106</sup> among other state corporations, all of whose land has been grabbed significantly.

## 2.2. INTERNAL WRANGLES WITHIN LAND ADMINISTRATION INSTITUTIONS

Registries within the ministry were used as a means of facilitating public land grabbing. As such, several records of public land were inaccessible and some remain inaccessible to date.<sup>107</sup> According to the Ndung'u Report one of the main reasons resulting in illegal allocation of public land was the 'chaotic record keeping system' in the Ministry and in the district registries.<sup>108</sup> Most records were found to be fabricated or hidden in order to conceal the illegal allocation of land and this flawed for the manual record keeping adopted.<sup>109</sup>

The institutions mandated to run land administration issues in Kenya include the Ministry of Lands, Housing and Urban Development, the NLC within which there exists land registries. Additionally, it was found that surveyors employed by the Ministry would survey a piece of land without ever visiting the site and would subsequently issue two title deeds to the same parcel of land.<sup>110</sup> It is on record that public land which has been grabbed or attempts have been made to grab have double titles. Some of these include the Langata Primary School land, Lavington Primary School land<sup>111</sup> and Kilifi town council land in *Prof. Samson Kagengo Ogeri vs. Greenbays Holdings & 2 Others*<sup>112</sup> among many others. As regards public schools, the NLC following directives from the President, ordered all public school heads to apply for ownership documents as most of them were at risk of being grabbed.<sup>113</sup> In 2016, according to the

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<sup>106</sup> Ndung'u Commission Report, 2004.

<sup>107</sup> Agatha Wanyonyi, Monica Obongo, Peter Mburu and Jane Ndiba, 'Land for Infrastructure Development: Compulsory Acquisition and Compensation of Unregistered/Undocumented Land in Kenya, *World Bank Conference on Land and Poverty*, (Washington DC, 2017).

<sup>108</sup> Ndung'u Commission Report, 2004.

<sup>109</sup> Manji A, 'The grabbed state: Lawyers, politics and public land in Kenya', *The Journal of Modern African Studies*, 2012, 477.

<sup>110</sup> Ndung'u Commission Report, 2004.

<sup>111</sup> 'Wekesa C: 2 primary schools' land grabbed by developers' *The Star* 23 December 2015 [https://www.the-star.co.ke/news/2015/12/23/2-primary-schools-land-grabbed-by-developers\\_c1264921](https://www.the-star.co.ke/news/2015/12/23/2-primary-schools-land-grabbed-by-developers_c1264921) on 5 September 2017.

<sup>112</sup> [2011] eKLR.

<sup>113</sup> 'Land belonging to 158 schools grabbed and illegal owners acquire title deeds' *Daily Nation* 11 August 2016 <http://www.nation.co.ke/news/land-schools-grabbed-illegal-owners-acquire-title-deeds/1056-3341696-mw6xafz/index.html> on 5 September 2017.

Commission's Chair only slightly above 10,000 schools out of the 24,000 directed to apply for documents had done so.<sup>114</sup> Double issuance easily facilitates the illegal allocation of public land as it enables land to be dealt with under two different systems or titles simultaneously.<sup>115</sup>

The 2010 Constitution provided for the establishment of a National Land Commission whose roles include to manage public land on behalf of the national and county governments, to recommend a national land policy to the national government, to advise the national government on a comprehensive programme for the registration of title in land throughout Kenya<sup>116</sup> among many others. In tandem with this requirement, the Commission was established under the National Land Commission Act.<sup>117</sup> It was not long after that the functions of the NLC and those of the Ministry of Lands began to clash leading to wrangles between the two. This eventually led to the issuance of an advisory opinion by the Supreme Court<sup>118</sup> where the court had to clearly define the roles of the two. Among the issues discussed were: to whom are Land Registrars accountable- the NLC or the Ministry, is land registration a function of the NLC, or the Ministry; which functions that were previously performed by the Ministry, before the creation of the NLC, were transferred to the NLC; when Article 62(2) and (3) of the Constitution, and Section 5(2)(b) of the NLC Act provide that the NLC is to administer public land "on behalf of" the National and County Governments, do these provisions envisage an agency relationship between the National and County Governments, the latter being the principals among other issues.<sup>119</sup>

Prior to the case, the NLC Vice Chairperson had claimed that the ministry was performing functions that were to be performed by the NLC constitutionally.<sup>120</sup> The wrangles between the two slowed down the property market between 2013 and 2014 as it meant that most of the functions that clashed between the two were crippled before the determination of the case.<sup>121</sup>

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<sup>114</sup> 'Land belonging to 158 schools grabbed and illegal owners acquire title deeds' *Daily Nation* 11 August 2016.

<sup>115</sup> Ambreena Manji, 'The grabbed state: Lawyers, politics and public land in Kenya', 477-478.

<sup>116</sup> Article 67, *Constitution of Kenya* (2012).

<sup>117</sup> Section 3, *National Land Commission Act* (2012).

<sup>118</sup> *NLC v Ministry of Lands* [2014] eKLR.

<sup>119</sup> *NLC v Ministry Of Lands*.

<sup>120</sup> *NLC v Ministry Of Lands*.

<sup>121</sup> 'Court clarifies roles of lands ministry and NLC' *Daily Nation* 28 January 2016

<http://www.nation.co.ke/lifestyle/DN2/Court-clarifies-roles-of-lands-ministry-and-NLC/957860-3051986->

The lack of coherence between the two also came to light in 2015 after the Langata Primary School land scandal.<sup>122</sup> Airport View Housing, were evicted from the premises that were allegedly the school's playground. The Cabinet Secretary of Lands and the NLC originally declared the land as rightfully owned by the school.<sup>123</sup> Contradictorily, in a suit that followed,<sup>124</sup> the NLC filed court papers that claimed that Airport View Housing held valid title was therefore the rightful owner whereas the Ministry of Lands held their earlier position.

Early 2017, NLC Chairman Prof. Muhammad Swazuri admitted that previous wrangles with the Ministry of Lands enabled cartels and rogue officials to profit from falsified land deals.<sup>125</sup> Rogue dealers took advantage of the situation and forcefully ceased and destroyed property on account of expired land leases.<sup>126</sup>

Moreover, the Ministry has been keen to amend the laws in order to strip the NLC of certain powers and reverting them to the ministry. In 2015, the then Cabinet Secretary of Lands, stated that there was need to amend the laws to remove the ambiguity that seems to give NLC the authority to sign titles and establish registration units as the NLC is to operate at the policy advisory level, research and investigatory level, perform an oversight and monitoring functions.<sup>127</sup> If this was to be it would leave the NLC almost powerless and allowing the Ministry to conduct all land related functions.<sup>128</sup> The continued wrangles between the two institutions as described above highly contributes to their inefficiency.

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[6s8anb/index.html](#)> on 5 September 2017.

<sup>122</sup> 'Wasuna B: Swazuri team changes position on Langata school land' *Business Daily Africa* 21 April 2015 <http://www.businessdailyafrica.com/news/Swazuri-says-Langata-school-land-developer-has-valid-title/539546-2691968-vpnsy4/index.html>> on 8 August 2017.

<sup>123</sup> 'Wasuna B: Swazuri team changes position on Lang'ata school land' *Business Daily Africa* 21 April 2015.

<sup>124</sup> 'Wasuna B: Langata School Land Developer sues Minister, Commission' *Business Daily Africa* 3 March 2015 <http://www.businessdailyafrica.com/news/Langata-school-land-developer-sues-Ngilu/539546-2640524-pnij27/index.html>> on 8 August 2017.

<sup>125</sup> 'Igunza P: NLC moves to clean land lease registry' *Citizen Digital* 13 January 2017 <https://citizentv.co.ke/business/nlc-moves-to-clean-land-lease-registry-154571-2-154571/>> on 16 September 2017.

<sup>126</sup> 'Patrick Igunza, NLC moves to clean land lease registry' *Citizen Digital* 13 January 2017.

<sup>127</sup> 'Ombati C: CS Matiang'i wants land laws amended to cut NLC powers' *Standard Digital*, 14 April 2015 <https://www.standardmedia.co.ke/article/2000158285/cs-matiang-i-wants-land-laws-amended-to-cut-nlc-powers> > on 3 October 2017.

<sup>128</sup> 'Ombati C: CS Matiang'i wants land laws amended to cut NLC powers' *Standard Digital*, 14 April 2015.

Such lack of congruence and admission of wrangles by those in charge of the institutions that are to manage land administration in the country creates gaps in the system thus allowing occurrences of more land grabbing instances.

### 2.3. LACK OF POLITICAL GOODWILL

Article 1(3) of the 2010 Kenya Constitution delegates the peoples' sovereign power to state organs which exercise it on their behalf.<sup>129</sup> Kenyans therefore entrust their elected leaders to represent them, legislate and implement legislation. Evidently, Kenya has come up with many land reforms which shall be discussed extensively in the next chapter, to curb land issues among them irregular allocation of public land.

However, there lacks political goodwill to implement these reforms. Some are delayed, others ignored and funds to implement them embezzled. For example, the establishment of the NLC<sup>130</sup> which was met with major challenges such as clash of functions with the Ministry. The NLC was formed to pave the way for proper public land governance. The Commission's functions are therefore crippled and this led to a situation where the Supreme Court had to define the functions of the two.<sup>131</sup>

Other reforms, such as the maximum and minimum acreage law for private land face unnecessary delays in implementation.<sup>132</sup> Such a reform, would not only prevent people from owning large tracts of land which are insufficiently utilised but also promote equal distribution in the country. Predictably, the largest landowners in Kenya belong to the political elite, their families and affiliates.<sup>133</sup> As such, they would rather delay the implementation of such a reform to protect their

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<sup>129</sup> The State organs mandated with the duty to exercise the peoples' sovereign power are Parliament and the legislative assemblies in the county governments, the national executive and the executive structures in the county government and the Judiciary and independent tribunals.

<sup>130</sup> Article 67, *Constitution of Kenya* (2012).

<sup>131</sup> *NLC v Ministry Of Lands*

<sup>132</sup> Kariuki F, Ouma S, Ng'etich R, *Property Law*, Strathmore University Press, 2016, 428.

<sup>133</sup> 'Namunane B and Nzioka P: Political Families Own Half of Private Wealth' *Daily Nation* 20 February 2014, <http://mobile.nation.co.ke/news/Kenyans-Wealth-Families-Politicians/1950946-2215578-format-xhtml-rdamn6/index.html>> on 17 August 2017.

interests, leaving those at the mercy of such positive efforts with bare hands.<sup>134</sup>

### 3. IMPACT OF PUBLIC LAND GRABBING

#### 3.1. LOSS OF PUBLIC LAND

The first and most obvious impact of land grabbing is the loss of public land which is to be used for public services such as building of schools, hospitals, sewer systems, agriculture, establishment of government institutions and environmental conservation<sup>135</sup> among other uses.

Grabbing of public land therefore has an effect on most of the public services intended for those pieces of land. Though some of the land has been reclaimed<sup>136</sup> other huge tracts of land remain in the hands of private owners who acquired it under mysterious circumstances.

In 2015, following a certificate of urgency presented by the Late Jacob Juma in court,<sup>137</sup> the Nairobi County government was put on the spot after a piece of land in Ruai, reserved for public purposes of developing a sewer system mysteriously changed ownership from public to private.<sup>138</sup>

In 2016, environmental activists from the Green Belt Movement protested the alleged scheme to sell of some parts of the Karura forest and turn into private ownership.<sup>139</sup> According to reports, some of the land was grabbed during the KANU regime between the years of 1994 and 1999.<sup>140</sup> Recently however, 151 titles, covering approximately 2000 acres of the forest and most of them belonging to the elite and political class were revoked by the NLC for repossession to the government.<sup>141</sup> This is a positive stride in curbing land grabbing and sends a warning message to

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<sup>134</sup> Kariuki F, Ouma S and Ng'etich R, 'Property Law', 428.

<sup>135</sup> Article 62, *Constitution of Kenya* (2010).

<sup>136</sup> 'Kamau J; Karura Forest's grabbed 2,000 acres revert to State' *Daily Nation* 27 July 2017 <http://www.nation.co.ke/news/Karura-Forest-s-grabbed-2-000-acres-revert-to-State--/1056-4033502-802y0w/index.html> on 17 August 2017.

<sup>137</sup> 'Agoya V, Nairobi County Govt told to explain 'irregular' allocation of public land in Ruai' *Daily Nation* 23 February 2015 <http://mobile.nation.co.ke/counties/nairobi/Nairobi-County-Ruai-land/3112260-2632930-format-xhtml-k4ntrdz/index.html> on 9 August 2017.

<sup>138</sup> 'Agoya V, Nairobi County Govt told to explain 'irregular' allocation of public land in Ruai'.

<sup>139</sup> 'Psirmoi D: Karura Forest has been grabbed, says environmental agency' *Standard Digital Media* 24 February 2016 <https://www.standardmedia.co.ke/lifestyle/article/2000192778/karura-forest-has-been-grabbed-says-environmental-agency> on 9 August 2017.

<sup>140</sup> 'Kamau J: Karura Forest's grabbed 2,000 acres revert to State' *Daily Nation* 27 July 2017.

<sup>141</sup> 'Kamau J: Karura Forest's grabbed 2,000 acres revert to State' *Daily Nation* 27 July 2017.

all other land grabbers.

Other titles revoked include Tassia Estate, Woodley Estate, the Kenya Agriculture Research and Livestock Organisation land in Kisii, the ICDC land and others in Eldoret, Kilifi, Mombasa, Thika and Malindi.<sup>142</sup>

Recently, a new saga involving the Kiambu Institute of Science and Technology Institute (KIST) came to the limelight after it was established that the land in question was taken over by the Registered Trustees of Kiambu Institute.<sup>143</sup> The Registered Trustees led by businessman Allan Ngugi and the former Commissioner of Lands James Njenga insists that the college never at any one point own the land in question.<sup>144</sup> As it is a developing story, it will most likely find itself in the corridors of court.<sup>145</sup>

### 3.2. LANDLESSNESS

Landlessness in Kenya dates back to colonial times.<sup>146</sup> Colonialists occupied the country with a mission to acquire economic resources for their own industries.<sup>147</sup> As such, they occupied the most productive parts of the country to serve these needs especially Central and Western Kenya then known as the 'White Highlands'.<sup>148</sup> They pushed the natives in such areas into native reserves which were mostly unproductive areas.<sup>149</sup> This set forth the problem of landlessness in the country.

Upon independence, the Kenyan government and the British agreed on a program that involved buying back the land that had been taken away during the colonial times and distributing it to the

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<sup>142</sup> 'Kamau J: Karura Forest's grabbed 2,000 acres revert to State' *Daily Nation* 27 July 2017.

<sup>143</sup> 'Maichuhie K: KIST students protest alleged grabbing of college land' *Standard Digital Media* 26 July 2017 <https://www.standardmedia.co.ke/article/2001249168/kist-students-protest-alleged-grabbing-of-college-land> on 11 August 2017.

<sup>144</sup> 'Maichuhie K: KIST students protest alleged grabbing of college land' *Standard Digital* 26 July 2017.

<sup>145</sup> 'Kamau J: Battle for Kiambu Institute land could end up in court' *Daily Nation* 28 July 2017 <http://www.nation.co.ke/news/Battle-for-Kiambu-Institute-land-could-end-up-in-court/1056-4036610-13yemrz/index.html> on 11 August 2017.

<sup>146</sup> Karuti Kanyinga, 'Kenya experience in Land Reform: the 'million-acre settlement scheme', 4.

<sup>147</sup> Veit P, 'History of Land Conflicts in Kenya', *Focus on Land in Africa*, 2.

<sup>148</sup> Veit P, 'History of Land Conflicts in Kenya', 2.

<sup>149</sup> Kenya Land Alliance and Kenya Human Rights Commission, Righting the wrongs: Historical injustices and Land Reforms in Kenya [http://www.mokoro.co.uk/files/13/file/lria/kla\\_historical\\_injustices\\_brief.pdf](http://www.mokoro.co.uk/files/13/file/lria/kla_historical_injustices_brief.pdf) on 17 August 2017, 1.

landless.<sup>150</sup> Some of the settlement schemes included the Million Acre Settlements Scheme<sup>151</sup> through which millions of people would be resettled on land holdings varying between twenty five to forty acres and the ‘The Squatter Settlement schemes’<sup>152</sup> through which the government sought to settle squatters on farms mismanaged or abandoned by the Europeans.

Although, there was proper intention, the process was marred by political interference and greed as the government would sell it of cheaply to political allies, elites and their families.<sup>153</sup> Through this process, government officials swindled communities that were supposed to benefit from the settlement schemes. In addition, the independence government shortly after embarked on a “willing buyer- willing seller” system instead of direct resettlement.<sup>154</sup> This opened doors for the then politicians and elite to acquire large pieces of land as the displaced people were poor and could not afford to purchase the land.<sup>155</sup> Consequently, displaced natives never got back their land. This exacerbated the squatter problem which to date is yet to be solved.<sup>156</sup>

The coastal land problem and the Nubian land question are examples of landlessness caused by land grabbing.<sup>157</sup> The Nubians for instance, are a community that moved and settled in Kenya’s Kibera area from South Sudan by the colonial government.<sup>158</sup> They therefore believed that they should be able to hold title as that is what they have come to identify with as their home.<sup>159</sup> Efforts to award title to them by President Uhuru Kenyatta has been met by protests by other Kenyans opposed to the idea.<sup>160</sup> Resultantly, their land has been occupied by other people including the

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<sup>150</sup> Kenya Land Alliance and Kenya Human Rights Commission, *Righting the wrongs: Historical injustices and Land Reforms in Kenya*, 32.

<sup>151</sup> Kanyinga K, ‘Kenya experience in Land Reform: the ‘million-acre settlement scheme’, 6-10.

<sup>152</sup> Kenya Land Alliance and Kenya Human Rights Commission, *Righting the wrongs: Historical injustices and Land Reforms in Kenya*, 33.

<sup>153</sup> Kamau J, ‘How Independence era leaders laid their hands on lands of quitting Whites’.

<sup>154</sup> Kariuki S, ‘Can Negotiated Land Reforms Deliver? A Case Of Kenya’s, South Africa’s And Zimbabwe’s Land Reform Policy Debates’ ASC Working Paper 59/2004, 11.

<sup>155</sup> Kamau J, ‘How Independence era Leaders laid their hands on lands of quitting Whites’, November 2009.

<sup>156</sup> *TJRC Report*, 2013.

<sup>157</sup> Kenya Land Alliance, ‘The National Land Policy in Kenya: Addressing Historical Injustices’, Issues Paper No 2/2004, 14.

<sup>158</sup> Kenya Land Alliance, ‘Addressing Historical Injustices’, 14.

<sup>159</sup> Kenya Land Alliance, ‘Addressing Historical Injustices’, 14.

<sup>160</sup> ‘Bocha G: Muslims urge Uhuru to give Nubians titles’ *Daily Nation*, 23 December 2013, <http://mobile.nation.co.ke/counties/Muslims-urge-Uhuru-to-give-Nubians-titles/1950480-2122402-format-xhtml-13vedkvz/index.html>> on 17 August 2017.

elite, political class, their affiliates and other communities.<sup>161</sup>

Land grabbing of IDP land has also been witnessed and those involved have been ordered to return such pieces of land. In 2013, Mr William Ruto was ordered by the High Court to pay to a post-election violence victim, a sum of 5 million Kenya shillings for illegally occupying his land.<sup>162</sup> The alleged seller in the case, later cleared by the Court, stated that her signatures were forged to facilitate the subdivision and transfer the property to Mr Ruto.<sup>163</sup> It is clear that acquisition of such lands is done illegally and irregularly.

### 3.3. CONFLICT AND VIOLENCE

Land conflict and land related violence has occurred a couple of times in Kenya. Grabbing of public land especially belonging to government schools, forests and other pieces of public land has in the past sparked violence.<sup>164</sup>

Interestingly, in 2015, the Kenya National Union of Teachers Keiyo branch, heavily protested the plans of the expansion of the Moi Teaching and Referral Hospital on land which they claimed to own.<sup>165</sup> It brewed a lot of conflict as the land commission alleged that the teachers had been conned into purchasing the land and had no reason to lay claim on it. According to the commission, the land was gazetted forest land belonging to Kenya Prisons.<sup>166</sup> To the extent that various providers of essential services are in conflict over land is worrying of the land allocation and administration system in the country.

Most recently the Langata Primary School playground saga sparked international concern after pupils from the school, who were protesting the land grab by an alleged private developer were

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<sup>161</sup> 'Bocha G: Muslims urge Uhuru to give Nubians titles' *Daily Nation*.

<sup>162</sup> *Adrian Gilbert Muteshi v William Samoei Ruto & 4 Others*, [2013] eKLR.

<sup>163</sup> 'Ruto to pay Sh 5m in Land Case', *Daily Nation*, 28 June 2013 <http://www.nation.co.ke/news/politics/Ruto-to-pay-Sh5m-in-land-case/1064-1898406-701k6yz/index.html>> on 14 November 2017.

<sup>164</sup> Manji A, 'Whose Land is it anyway? The Failure of Land Law Reform in Kenya' *Africa Research Institute* 2015.

<sup>165</sup> 'Suter P, Teachers oppose Moi referral hospital upgrade in land row' *Business Daily Africa* 10 April 2017 <http://www.businessdailyafrica.com/corporate/Teachers-oppose-Moi-referral-hospital-upgrade/539550-3885130-nt4vkz/index.html>> on 7 August 2017.

<sup>166</sup> 'Kibor F and Ng'etich J: Land for Sh28b Ruto hospital in court dispute' *Standard Digital Media* 28 May 2015 <https://www.standardmedia.co.ke/article/2000163819/land-for-sh28b-ruto-hospital-in-court-dispute>> on 7 August 2017.

tear gassed by the police.<sup>167</sup> This raised a lot of questions especially on the acquisition of title to the school's land which is used as a playground and secondly the brutality and force used on children who hold a right to peaceful demonstration just as any other Kenyan.

Former Lands Ministry Cabinet Secretary Charity Ngilu declared the Langata Primary School as the rightful owner of the land in question- a position supported by the NLC.<sup>168</sup> However, in court papers in reply to a suit filed by Airport View Housing, the NLC changed its position and claimed that the private developer who had been evicted from the premises owned a valid title.<sup>169</sup> This case brought out the lack of consistency and coherence between the Lands Ministry and the NLC.

These and many others, some listed in the Ndung'u Report, are examples of public land grabbing that has led to major conflicts and very unfortunately, violence. As long as public land grabbing continues to occur, it shall be hard to completely avoid conflict and violence as illustrated above.

### **3.4. DESTRUCTION OF PROPERTY**

Often, where violence occurs, it is likely that property is destroyed. This mainly happens when grabbed land is being reclaimed and those already settled there have to be evicted. Unfortunately sometimes it is the poor who were resettled on the grabbed land that suffer the most.<sup>170</sup> Such example is the infamous Mau evictions which mainly affect the Ogiek Community.<sup>171</sup> The Ogiek are an indigenous minority group in Kenya whose ancestral land is believed to be in Mau Forest.<sup>172</sup> For hundreds of years they have constantly been evicted from the area and their shelters destroyed forcing to seek refuge in nearby places such as churches.<sup>173</sup> The eviction of the Ogiek community from the Mau Forest has become a topic of political play whereby politicians promise to prevent

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<sup>167</sup> 'King J and Mullen J: Kenyan schoolchildren tear-gassed at protest over playground' *CNN* 20 January 2015 <http://edition.cnn.com/2015/01/20/africa/kenya-playground-children-tear-gassed/index.html> on 7 August 2017.

<sup>168</sup> 'Wasuna B: Langata school land developer sues minister, commission' *Business Daily Africa* 21 April 2015 <http://www.businessdailyafrica.com/news/Langata-school-land-developer-sues-Ngilu/539546-2640524-pnij27/index.html> on 19 August 2017.

<sup>169</sup> 'Brian Wasuna: Langata school land developer sues minister, commission' *Business Daily Africa* 3 March 2015.

<sup>170</sup> Kariuki F, Ouma S and Ng'etich R, *Property Law*, 418.

<sup>171</sup> <http://minorityrights.org/2017/04/25/preventing-evictions-mau-forest-kenya/> on 6 August 2017.

<sup>172</sup> <http://www.ogiek.org/report/ogiek-ch1.html> on 6 August 2017.

<sup>173</sup> <http://minorityrights.org/2017/04/25/preventing-evictions-mau-forest-kenya/> on 6 August 2017.

these evictions once elected.<sup>174</sup>

In addition, destruction of homes,<sup>175</sup> businesses and other sources of income for people normally leads to more socio-economic problems such as homelessness, loss of sources of livelihoods and violations of human rights- right to adequate housing, water and food.<sup>176</sup>

### 3.5. ENVIRONMENTAL DEGRADATION

The Constitution of Kenya provides that the State shall ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits and that it shall work to achieve;<sup>177</sup> maintain a tree cover of at least ten per cent of the land area of Kenya<sup>178</sup> and eliminate processes and activities that are likely to endanger the environment.<sup>179</sup> This expresses Kenya's commitment to protect and conserve the environment while avoiding or disregarding any activities that may hamper those efforts.

Despite these commitments, public land grabbing of areas such as forests, game reserves and wetland areas is not a rare occurrence. Public land consists of government forests, government game reserves, water catchment areas, national parks, government animal sanctuaries and specially protected areas.<sup>180</sup>

The Ndung'u Report of 2002 highlighted some of the largest forest land grabs which included the Karura, Ngong and Kiptagich forests among others.<sup>181</sup>

The grab of most of Karura Forest, first gazetted as forest land in 1932,<sup>182</sup> is reported to have

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<sup>174</sup> 'Mwakwale S and Gachuhi K: Raila promises to protect settlers on Mau forest land' *Standard Digital Media* 31 July 2017 <https://www.standardmedia.co.ke/article/2001249791/raila-promises-to-protect-settlers-on-mau-forest-land>> on 9 August 2017; see also 'Kerich A: Ruto worse than Raila: Mau forest IDPs refuse to vote for Jubilee' 28 June 2017 [http://www.the-star.co.ke/news/2017/06/28/ruto-worse-than-raila-mau-forest-idps-refuse-to-vote-for-jubilee\\_c1587245](http://www.the-star.co.ke/news/2017/06/28/ruto-worse-than-raila-mau-forest-idps-refuse-to-vote-for-jubilee_c1587245)> on 9 August 2017.

<sup>175</sup> 'Rono G: 23 houses burnt in fresh Mau evictions' *Daily Nation* 6 August 2015 <http://www.nation.co.ke/news/1056-74636-11b08rm/index.html>> on 6 August 2017.

<sup>176</sup> Kariuki F, Ouma S and Ng'etich R, *Property Law*, 418.

<sup>177</sup> Article 69(1) (a), *Constitution of Kenya* (2010).

<sup>178</sup> Article 69(1) (b), *Constitution of Kenya* (2010).

<sup>179</sup> Article 69(1) (g), *Constitution of Kenya* (2010).

<sup>180</sup> Article 62(1) (9), *Constitution of Kenya* (2010).

<sup>181</sup> *Ndung'u Commission Report*, 2004.

<sup>182</sup> *Ndung'u Commission Report*, 2004.

happened during the KANU regime between the years of 1994 and 1999.<sup>183</sup> Private owners are therefore able to do as they wish on such land even if it involves re- selling it. As such the forest land is reduced and the environment protection is compromised. However, recently the government reclaimed some of the land in Karura forest after the NLC revoked 151 titles, covering approximately 2000 acres of the forest.<sup>184</sup> Undeniably, this is a major step in condemning and beginning the process of reclaiming lost public land.

Ngong Forest is also reported to have been grabbed shortly after it was first gazetted as a forest. By 2001, half of the original size (2,926.6 ha) of the forest had already been grabbed.<sup>185</sup> Interestingly, state corporations were among those who purchased the land and did so at exorbitant prices.<sup>186</sup> The loss of such great forest cover, which served as a source of indigenous plants, medicinal plants and all other flora and fauna, is worrying.

In Kericho County, the former governor declared that he would wage war on those who illegally occupied public land within the county.<sup>187</sup> Part of this public land was 1,017 acres in Samburet situated in Mau Forest.<sup>188</sup>

The allocation of wetland areas has also been witnessed and despite court orders and NEMA warnings, allottees continue to develop on such lands. Recently, there was uproar over a 5 storey building constructed on a riparian reserve along Mbagathi way.<sup>189</sup> Despite orders by the member in charge of Urban Development and Planning, the construction of the building continued and operations by businesses already began. NEMA has noted the rise in illegal allocation of wetlands and has reiterated that failure to comply with the Environment Management and Coordination Act, will on conviction lead to imprisonment for a term of 24 months or a fine of Ksh. 2 million or

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<sup>183</sup> *Ndung'u Commission Report*, 2004.

<sup>184</sup> 'John Kamau; Karura Forest's grabbed 2,000 acres revert to State' *Daily Nation* 27 July 2017.

<sup>185</sup> *Ndung'u Commission Report*, 2004.

<sup>186</sup> *Ndung'u Commission Report*, 2004.

<sup>187</sup> 'Tanui N; Kericho County to reclaim grabbed land' *Daily Nation*, 20 July 2017

<https://www.standardmedia.co.ke/business/article/2001248322/kericho-county-to-reclaim-grabbed-land>, on 14 November 2017.

<sup>188</sup> 'Tanui N; Kericho County to reclaim grabbed land' *Daily Nation*, 20 July 2017.

<sup>189</sup> 'Kaberia J; MP's building faces demolition near T-Mall' *Capital News*, 26 May 2015

<https://www.capitalfm.co.ke/news/2015/05/mps-building-faces-demolition-near-t-mall/>> on 14 November 2017.

both.<sup>190</sup>

Conclusively, the pledges by Kenya in its Constitution to protect and conserve the environment as well as increase its forest cover among others, may remain a dream if nothing is done to halt land grabbing in areas that further advance environmental protection.

#### **4. CONCLUSION**

From the aforementioned, it is clear that public land grabbing continues to advance in the face of corruption, wrangles within the land administration system, lack of political goodwill and bribery which then precipitates into destruction of the environment, landlessness, property destruction and conflict to mention but a few.

It is then paramount that a permanent solution to the vice of public land grabbing be found. It is on this backdrop that the next chapter will entail examining the land law reforms put in place, their progress and the current land administration legal framework in solving the grave problem of public land grabbing.

### **CHAPTER 3: ASSESSING THE ADEQUACY OF THE NEW LAND LAWS IN ADDRESSING PUBLIC LAND GRABBING**

#### **1. INTRODUCTION**

In pre-colonial Kenya, land was largely communally owned and there lacked comprehensive legislation on land.<sup>191</sup> However, this changed in the colonial era as the Europeans settled in the country and introduced land title deeds. Consequently, private ownership of property began to replace the traditional communal land ownership system.<sup>192</sup>

Once it was declared a protectorate, Kenya borrowed land laws directly from Britain and its colonies.<sup>193</sup> The first ever conveyancing law to be adopted in Kenya was the Indian Transfer of

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<sup>190</sup> Dr Ayub Macharia, 'Nema Orders those Encroaching into Wetlands and Adjacent Riparian Land to Vacate', *NEMA Press Release* 2011.

<sup>191</sup> [http://clip.msu.edu/Kenya\\_E-Book/Chapter%203.pdf](http://clip.msu.edu/Kenya_E-Book/Chapter%203.pdf)> on 2 January 2018.

<sup>192</sup> [http://clip.msu.edu/Kenya\\_E-Book/Chapter%203.pdf](http://clip.msu.edu/Kenya_E-Book/Chapter%203.pdf)> on 2 January 2018.

<sup>193</sup> Dr Onyango P, 'Balancing of Rights in Land Law: A Key Challenge in Kenya', *University of Nairobi, Kisumu*

Property Act (1882).<sup>194</sup> This allowed the entry of settlers who were supposed to oversee the implementation of these laws.<sup>195</sup> Several laws were later enacted including the East Africa Lands Ordinance (1901) which marked the beginning of individual ownership of land, and others which were later, the Registration of Documents Act,<sup>196</sup> Land Titles Act,<sup>197</sup> Government Land Act<sup>198</sup> Registration of Titles Act,<sup>199</sup> Registered Land Act,<sup>200</sup> Wayleaves Act<sup>201</sup> and Land Acquisition Act<sup>202</sup> all repealed. The existence of many land laws, some, which were incompatible, resulted in a complex land management and administration system.<sup>203</sup>

According to the Ndung'u Commission, the GLA played a major role in advancing illegal and irregular allocation of public land.<sup>204</sup> The GLA, under Section 3, vested powers in the President to issue direct grants and the Commissioner of Lands was in charge of exercising these powers pursuant to Section 7 of the Act. The Ndung'u Commission noted that the abandonment of public auction system accorded the President and the Commissioner of Lands the power and opportunity to allocate land in a manner that was amounted to illegal and irregular allocations.<sup>205</sup>

The position has changed in the land reforms process as land management is now enshrined in the Constitution as well as the enactment of new statutes. This chapter rigorously analyses the new land legislation, a major step in Kenya's land reform process. The new land legislation is a major step in implementing the Constitution's directive and the provisions contained in the 2009 National Land Policy.

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*Campus*, 9.

<sup>194</sup> Group 8, *Transfer of Property Act*, (1882)

<sup>195</sup> Mwikya B, 'Addressing Past and Historical Land Injustice in Kenya: Article 67(2) (e) of the Constitution and Section 5(1) (e) of the National Land Commission Act' Unpublished LLM Thesis, University of Nairobi, 11 November 2016, 1.

<sup>196</sup> CAP 285 (1980).

<sup>197</sup> CAP 282 (1982).

<sup>198</sup> CAP 280 (1984).

<sup>199</sup> CAP 281 (1982).

<sup>200</sup> CAP 200 (1989).

<sup>201</sup> CAP 292 (1989).

<sup>202</sup> CAP 295 (1983).

<sup>203</sup> Ministry of Lands, Sessional Paper No 3 of 2009, ix.

<sup>204</sup> Southall R, 'The Ndung'u Report: Land and graft in Kenya' *Review of African Political Economy*, 103, March 2005, 142-151.

<sup>205</sup> *Ndung'u Commission Report*, 2004, 48-53.

On public land, the NLP recommended the following: repealing the GLA (Cap 280); identifying and keeping an inventory of all public land and placing it under the NLC to hold and manage in trust for the people of Kenya; rationalizing public land holding and use; establishing an appropriate fiscal management system to discourage land speculation and mobilise revenue; establishing mechanisms for the repossession of any public land acquired illegally or irregularly; establishing participatory and accountable mechanisms for the allocation, development and disposal of public land by the NLC; and establishing an appropriate system for registering public institutional land.<sup>206</sup>

The various laws and their provisions will be examined with regards to their address of the issue of public land grabbing.

## **2. THE 2010 KENYA CONSTITUTION**

Chapter 5 of the 2010 Constitution contains provisions on land and the environment. In addition, Article 40 of the Constitution grants every individual or association the right to acquire property of any description in Kenya,<sup>207</sup> which may include land.

The Constitution states that land in Kenya is to be held and used in an equitable, efficient, productive and sustainable manner and in accordance with the principles contained therein and developed through a national land policy developed by the national government.<sup>208</sup>

Secondly, the Constitution vests all land in the people of Kenya as a nation, as communities and individuals.<sup>209</sup> The provision further classifies land into three: - private, public and community land.<sup>210</sup> This was one of the major changes in land law as the previous constitution only recognized trust land which was mainly adjudicated in favour of the ethnic residents of a particular area<sup>211</sup> while government land was recognised under the GLA. Most importantly, the Constitution specifies what public land, private land and communal land constitutes.<sup>212</sup> The acknowledgement and definition of public land is important to the issue of public land grabbing as it maps out that

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<sup>206</sup> Chapter 3, Sessional Paper No 3 of 2009, 14.

<sup>207</sup> Article 40, *Constitution of Kenya* (2010).

<sup>208</sup> Article 60 (1), *Constitution of Kenya* (2010).

<sup>209</sup> Article 61 (1), *Constitution of Kenya* (2010).

<sup>210</sup> Article 61 (2), *Constitution of Kenya* (2010).

<sup>211</sup> Chapter IX, *Constitution of Kenya* (1963) (repealed).

<sup>212</sup> Article 61 (2), *Constitution of Kenya* (2010).

which should be held in trust for the people of Kenya by the government and to which no individual can claim. Often, public land grabbed has no title to it and such lack of title propels grabbing.<sup>213</sup> Indicatively, many public schools have been reported to lack title to their land portions and as stated by Dr Mohammed Swazuri makes them vulnerable to land grabbers.<sup>214</sup> According to Prof. Kaimenyi, Lands CS, over 20,000 public schools out of the approximately 24,500 lacked title as of May 2017 while another 16,000 were unsurveyed.<sup>215</sup> Resultantly, the government has since requested that school heads apply for title deeds to secure their land and avoid falling prey to land grabbers.<sup>216</sup> In May 2017, the Ministry of Lands issued 1000 title deeds to schools.<sup>217</sup>

Additionally, the Constitution established a National Land Commission<sup>218</sup> which among other things, is to manage public land on behalf of both county and national governments, to recommend a national land policy and to advise the national government on a comprehensive program for the registration of title in land throughout Kenya.<sup>219</sup> The Constitution therefore recognises the need for a proper public land management and registration system which may be used to address the nuisance that is land grabbing.

Another hallmark provision of the Constitution is the requirement for Parliament to consolidate and rationalize existing land law.<sup>220</sup> As stated earlier, there existed multiple legislations on land that were largely inconsistent. Consequently, harmonisation of these laws was necessary to achieve uniformity as they provide clearer procedures to deal with land issues.

After the 2010 Constitution was passed, it provided for the consolidation of all these laws into the three main acts enacted in 2012: the Land Act, Land Registration Act and the National Land Commission Act. The consolidation of land laws was a great step in providing clear procedures

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<sup>213</sup> Kenya National Assembly Official Record (Hansard), 25 April 2007, 919.

<sup>214</sup> ‘Ayodo H: Title Deeds: Chance for Schools to Get it Right’, *Standard Media* 23 March 2017 <https://www.standardmedia.co.ke/business/article/2001233692/title-deeds-chance-for-schools-in-kenya-to-get-it-right>> on 2 January 2018.

<sup>215</sup> ‘Nyataya J: Ministry issues Deeds to insulate Schools from Land Grabbers’ *Daily Nation* 12 May 2017 <http://www.nation.co.ke/news/Ministry-issues-deeds-to-insulate-schools-from-land-grabbers/1056-3924454-kb87az/index.html>> on 3 January 2018.

<sup>216</sup> ‘Ayodo H: Title Deeds: Chance for Schools to get it Right’.

<sup>217</sup> ‘Nyataya J: Ministry issues Deeds to insulate Schools from Land Grabbers’.

<sup>218</sup> Article 67 (1), *Constitution of Kenya* (2010).

<sup>219</sup> Article 67 (2), *Constitution of Kenya* (2010).

<sup>220</sup> Article 68(a), *Constitution of Kenya* (2010).

thus eases the work for all stakeholders.<sup>221</sup> However these Acts still had contradictory provisions which led to the enactment of the Land Laws (Amendment) Act<sup>222</sup> of 2016 sought to address these contradictions.<sup>223</sup>

Parliament is also required to enact legislation to prescribe minimum and maximum acreage with regards to private land.<sup>224</sup> This would necessarily be important in reducing the instances of grabbing of public land and converting into private land. Often, public land that has been grabbed is converted into private land.<sup>225</sup> As such, land grabbers amass large tracts of land, some of which remains underutilized.<sup>226</sup> Given that there would be the maximum acreage requirement, amassing such large tracts would not be possible and would also promote equal distribution of land.

Unfortunately, enactment of a minimum and maximum acreages legislation has failed to take off for reasons not clear to the public.<sup>227</sup> Predictably, the largest landowners in Kenya belong to the political elite, their families and affiliates.<sup>228</sup> As such, they would rather delay the implementation of such a reform to protect their interests, leaving those at the mercy of such positive efforts with bare hands.<sup>229</sup>

Notably, the Constitution also provides that parliament shall enact legislation to enable the review of all grants or dispositions of public land to establish their propriety or legality.<sup>230</sup> This is a positive step towards the curbing of illegal and irregular allocation of land presuming that such legislation is aimed at establishing legality of dispositions of public land. This provision is reiterated in the National Land Commission Act that gives the Commission the duty to review

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<sup>221</sup> Sessional Paper No 3 of 2009, 35.

<sup>222</sup> Act No 28 of 2016.

<sup>223</sup> <http://www.dalyinamdar.com/kenyan-land-laws-amendment-act-2016/>> on 19 January 2018.

<sup>224</sup> Article 68 (c) (i), *Constitution of Kenya* (2010).

<sup>225</sup> ‘Ambeje P: Public Land, buildings lost in Nakuru grabbing spree’ *Business Daily Africa* 31 October 2017 <https://www.pressreader.com/kenya/business-daily-kenya/20171031/281831463992050>> on 15 January 2017.

<sup>226</sup> Sessional Paper No 3 of 2009, 28.

<sup>227</sup> Kariuki F, Ouma S and Ng’etich R, *Property Law*, 428.

<sup>228</sup> ‘Namunane B and Nzioka P: Political Families Own Half of Private Wealth’ *Daily Nation* 20 February 2014, <http://mobile.nation.co.ke/news/Kenyans-Wealth-Families-Politicians/1950946-2215578-format-xhtml-rdamn6/index.html>> on 19 September 2017.

<sup>229</sup> Kariuki F, Ouma S and Ng’etich R, *Property Law*, 428.

<sup>230</sup> Article 68(c) (v), *Constitution of Kenya* (2010).

grants and take further action as to their legality or lack thereof.<sup>231</sup>

### 3. THE LAND REGISTRATION ACT 2012

Prior to enactment of the Land Registration Act,<sup>232</sup> registration of title to land was designated to multiple statutes resulting into a complex registration system whose outcomes were illicit dealings, problematic practices and multiplicity and duplicity of titles. In an effort to tackle these problems, the LRA was enacted. It is the procedural law pertaining to interests in all private, public and community land.<sup>233</sup> As such it paves way for a more uniform and organised land registration system which in turn eases the processes of registration of land titles.<sup>234</sup>

It repealed the Indian Transfer of Property Act, the Registration of Titles Act, the LTA, the RLA and the GLA.

The Act provides for the establishment of registration units by the Cabinet Secretary in consultation with NLC and county governments.<sup>235</sup> The registration units are to be established at county level and at any other levels to ensure access to land registration services.<sup>236</sup> Moreover, a land registry is to be maintained in each unit guided by the devolution principles contained in the Constitution.<sup>237</sup> The Cabinet Secretary is tasked with making regulations for the implementation of the Act. Previously, the NLC was tasked with the role of creating registration units but this created conflict between the Cabinet Secretary and NLC which saw the CS bid for amendments in the law to strip the NLC of these powers.<sup>238</sup> Consequentially, the Land Laws Amendment Act stripped the NLC of this power. As mentioned in the previous chapter, wrangles between these two institutions pose a great threat to effective land administration and management.

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<sup>231</sup> Section 14, *National Land Commission Act* (2012).

<sup>232</sup> Act No 3 of 2012, *Laws of Kenya*.

<sup>233</sup> Section 3, *Land Registration Act (LRA)* (2012).

<sup>234</sup> Mwathane I, 'Kenya's Land Reforms on Course: New Land Laws Now in Place' 2012

<http://ibrahimmwathane.com/index.php/frontpage/entry/kenyas-land-reforms-on-course-new-land-laws-now-in-place>> on 19 September 2017.

<sup>235</sup> Section 6, *LRA* (2012).

<sup>236</sup> Section 6 (6), *LRA* (2012).

<sup>237</sup> Articles 174- 175, *Constitution of Kenya* (2010).

<sup>238</sup> 'Ombati C: CS Matiang'i wants Land Laws Amended to Cut NLC Powers' *Standard Digital* 14 April 2015, <https://www.standardmedia.co.ke/article/2000158285/cs-matiang-i-wants-land-laws-amended-to-cut-nlc-powers>> on 4 January 2018.

The Act requires the Registrar to maintain a register which is to be made accessible to the public through electronic means or any other means suitable.<sup>239</sup> Digitization of land registers, with regard to public land is a major step in curbing the vice as the system creates flexible, reliable and secure databases catering for land administration and management.<sup>240</sup> The system can prevent further interference with paper records and secure land records from unauthorised access<sup>241</sup> preventing officers who can be bribed or manipulated to alter documents as illustrated in the previous chapter. The system is also to ensure timely access and retrieval of land records. For instance, in the Langata Primary School saga, both the school and the alleged grabber had title deeds and it was not clear to both the Ministry of Lands and the NLC the legal owner of the land.<sup>242</sup> With such a system it would be easy to identify land allocations and eradicate fake documents acquired fraudulently.<sup>243</sup> Additionally, the system is meant to capture, all transactions undertaken by the Commission and the Ministry in line with the various statutes forming the body of Land Law in Kenya.<sup>244</sup>

As of March 2017, the Lands CS confirmed that 18 out of the 57 land registries in the country had been digitized and that the remaining 39 would be done once funds are availed.<sup>245</sup>

There remains no time limit to full realization of the project and this may drag on indefinitely. Although, the process is faced with challenges including inadequate funding to complete it, it is a great step towards curbing public land grabbing and would greatly assist Kenya in tackling issues such as multiplicity of titles and inefficient access to land registration information.

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<sup>239</sup> Sections 9 & 10, *LRA* (2012).

<sup>240</sup> Mariamu el-Maawy (Principal Secretary, State Department of Land), 'The E-Migration: Progress on automation and Land Systems for better governance in Kenya' Land Governance and Poverty Conference, Washington, March 2016.

<sup>241</sup> Mariamu el-Maawy, 'The E-Migration: Progress on automation and Land Systems for better governance in Kenya'.

<sup>242</sup> 'Wasuna B: Langata school land developer sues minister, commission' *Business Daily Africa* 21 April 2015 <http://www.businessdailyafrica.com/news/Langata-school-land-developer-sues-Ngilu/539546-2640524-pnij27/index.html> on 19 September 2017.

<sup>243</sup> 'Muhindi S: Lands ministry will spend 17 billion to digitize land registration system- CS' *The Star* 17 November 2017 [https://www.the-star.co.ke/news/2017/11/17/lands-ministry-will-spend-sh17-billion-to-digitise-land-registration\\_c1670885](https://www.the-star.co.ke/news/2017/11/17/lands-ministry-will-spend-sh17-billion-to-digitise-land-registration_c1670885) on 18 January 2018.

<sup>244</sup> Kuria D, Kasaine Amos, Khalif A and Kinoti S, 'Developing a National Land Information Management System- The Kenyan Strategy', *World Bank Annual Conference on Land and Poverty* (Washington DC, 2016), 6.

<sup>245</sup> 'Ndonga S: Biometric access system to tame Ardhi House cartels' *Capital FM News* March 22 2017 <http://www.capitalfm.co.ke/news/2017/03/biometric-access-system-tame-ardhi-house-cartels/> on 19 September 2017.

Additionally, the Act provides for the transition of title documents which were under the repealed Acts. For example, in the case of an interest in land previously under the repealed GLA and the LTA, the register maintained under the repealed Acts shall be deemed to be the register under the LRA.<sup>246</sup> While this ensures continuity of land transactions, there is no time limit for this transition. As such, the registers may operate simultaneously which gives room for confusion.

However, prior to the Land Laws Amendment Act, titles under the GLA and LTA were to be examined and registered afresh under the new legislation.<sup>247</sup> Questions arise as to why the Amendment Act provided for the change from examination to automatic changes yet the examination would allow for proper scrutiny of the registers under the repealed acts. The automatic conversion accorded to all registers under the current laws,<sup>248</sup> especially with regards to the RLA and RTA, is a matter of concern. It assumes that all private land previously held under the RLA and RTA was obtained legally. Considering most public lands grabbed in the years preceding and succeeding the new legislation was converted into private land, examination ought to be done before considering all such private lands as legally acquired. Conversion of illegally acquired public land into private land would then be difficult to regain by the State as Section 26(1) LRA states that a certificate of title is prima facie evidence of absolute and indefeasible ownership of land except where it can be proven that the certificate was obtained fraudulently.<sup>249</sup>

#### **4. THE LAND ACT 2012**

The Land Act,<sup>250</sup> provides the substantive land law in Kenya which was previously contained in the India Transfer Property Act, the Registered Land Act and the GLA. It repealed the Land Acquisition Act and the Wayleaves Act. It was enacted to give effect to Article 68 of the Constitution on revising and rationalizing land laws. With regards to public land, the Act provides for the management, conversion, allocation<sup>251</sup> and administration of public land including the leases, licenses and agreements<sup>252</sup> for public land. With proper procedures laid out in the Act, it eases the work and understanding of the law by advocates, land officers, the court and the public

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<sup>246</sup> Section 105(c) (i), *LRA* (2012).

<sup>247</sup> Section 105(c), *LRA* (amended).

<sup>248</sup> Section 105, *LRA* (2012).

<sup>249</sup> Section 26(1), *LRA* (2012).

<sup>250</sup> Act No 6 of 2012.

<sup>251</sup> Part II, *Land Act* (2012).

<sup>252</sup> Part III, *Land Act* (2012).

in general.

Section 8 of the Act tasks the NLC to identify public land, prepare and keep a database of all public land and share the data with the public and relevant institutions. The creation of such a database would be advantageous as it would identify and prevent fraud and illegal transactions, prevent and reduce irregular transactions, forgeries and corruption and provide efficient and speedy registration of transactions.<sup>253</sup> The NLC has since developed a three year program for the development of a database of all public land.<sup>254</sup>

The Act provides that any conversion of public land into private land must be approved by the national assembly or county assembly whichever is relevant.<sup>255</sup> Prior to this, the GLA empowered the Commissioner of Lands to dispose of public land not required for public purposes to be divided into plots suitable for the erection of buildings for business or residential purposes.<sup>256</sup> This accorded the Commissioners a lot of powers which were often abused as some Commissioners engaged in graft involving land grabbing.<sup>257</sup> In March of 2010, the Kenya Anti-Corruption Commission had already filed 322 cases involving corrupt Commissioners who had irregularly apportioned government land to individuals contrary to the GLA.<sup>258</sup> The requirement by the Lands Act to require approval before conversion may not be as effective given that government officials, lands officials and their associates have been major players in public land grabbing scams. In a report by the Ethics and Anti-Corruption Commission (EACC), Members of County Assemblies (MCAs) and land officials at both county and national levels were greatly involved in corrupt land dealings including allocating themselves public lands which are then converted into private land.<sup>259</sup> This provision thus paves way for corrupt officials to acquire lands as they bribe to receive

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<sup>253</sup> Nyawira C, 'Kenya to Automate Land Records', *National Land Commission 2016 Newsletter*, April 2016, 17.

<sup>254</sup> NLC, *Devolving Land Governance: 2015/2016 Annual Report*, 9.

<sup>255</sup> Section 9(3), *Land Act* (2012).

<sup>256</sup> Section 9, *Government Lands Act* (repealed).

<sup>257</sup> O'Brien E, 'Irregular and illegal land acquisition by Kenya's Elites: Trends, processes, and impacts of Kenya's land grabbing phenomenon' *International Land Coalition: Kenya National Alliance*, 18.

<sup>258</sup> 'Kiplagat S: 300 suits and counting for former Lands bosses' *Daily Nation* 27 March 2010 <http://www.nation.co.ke/news/300-suits-and-counting-for-former-Lands-bosses--/1056-888178-8o9phlz/index.html> on 15 January 2018.

<sup>259</sup> Ethics and Anti-Corruption Commission, *Corruption and Ethics in Devolved Services: County Public Officers' Experiences*, 2015, 8-16.

approvals or are misuse their powers to give approvals.

The NLC is also mandated to come up with guidelines on the management of public land by all public agencies, statutory bodies and state corporations in actual occupation or use of public land.<sup>260</sup> NLC has since come up these Land Regulations.<sup>261</sup> The Commission may also vest the care, control and management of any reserved land with a statutory body, public corporation or a public agency for the same purpose as that for which the relevant public land is reserved.<sup>262</sup> The effectiveness of these provisions is questionable given the continued irregular allocation of land belonging to state corporations and bodies. Lands vested in various parastatals and state bodies has been grabbed under peculiar circumstances. These include lands belonging to the Kenya Meat Commission,<sup>263</sup> Kenya Maritime and Fisheries Research Institute,<sup>264</sup> State House land,<sup>265</sup> Kenya Wildlife Services, multiple public schools and prisons<sup>266</sup> among others. Considering the continued irregular allocation of land belonging to state bodies, which also stood out in the Ndung'u Report,<sup>267</sup> the provisions of the Land Act and the NLC guidelines have not been adequate in tackling land grabbing.

The Act also stipulates that where public land is allocated in contravention of the guidelines, those involved shall have committed an offence.<sup>268</sup> It is striking however that even with these guidelines laid out, public land grabbing continues to occur. For example, conflict continues to ensue over the ownership of a ranch in Laikipia leased out to a government official yet it belongs to the

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<sup>260</sup> Section 10, *Land Act* (2012).

<sup>261</sup> The Land Regulations, 2017.

<sup>262</sup> Section 16(1) (a), *Land Act* (2012).

<sup>263</sup> 'Mutai E: KMC land lost to grabbers, Orengo tells Parliament' *Business Daily Africa* 7 June 2012 <https://www.businessdailyafrica.com/KMC-land-lost-to-grabbers-Orengo-tells-Parliament-/539546-1423092-13du0igz/index.html> on 15 January 2018.

<sup>264</sup> 'Mwahanga S: Public Investment Committee grills parastatal bosses over irregular sale of State assets' *Standard Media* 11 July 2014 <https://www.standardmedia.co.ke/article/2000127783/public-investment-committee-grills-parastatal-bosses-over-irregular-sale-of-state-assets> on 15 January 2018.

<sup>265</sup> 'Nyassy D: Coast State House land grabbed' *Daily Nation* 31 August 2014 <http://www.nation.co.ke/news/Coast-State-House-land-grabbed/1056-2436770-bncxthz/index.html> on 15 January 2018.

<sup>266</sup> 'Leftie P: Power brokers targeted schools, prisons, local authorities land' *Daily Nation* 27 July 2017 <http://www.nation.co.ke/news/Schools--prisons-fall-prey-to-land-grabbers-/1056-4033498-h8hidf/index.html> on 15 January 2018.

<sup>267</sup> KNCHR and KLA, 'Unjust Enrichment: The Making of land Grabbing Millionaires', 6-26.

<sup>268</sup> Section 157, *Land Act* (2012).

ADC.<sup>269</sup> Peculiarly, efforts by the media to source how the land was leased out to a private individual by ADC were futile as the corporation's officials declined to discuss the matter.<sup>270</sup> The land was previously used by herders to feed their animals but since it was leased out, they have been cordoned off the area<sup>271</sup>

Pursuant to Article 68(c) of the Constitution, Parliament shall enact legislation to prescribe minimum and maximum acreage with regards to private land.<sup>272</sup> The Land Act requires the CS to commission a scientific study to determine the economic viability of minimum and maximum acreages in respect of private land for various land zones in the country within one year of coming into force of the Act.<sup>273</sup> The findings of the study were to be made available for the public to make observations after which they were to be modified based on valid representations.<sup>274</sup> Within three months after the publication of the final report of the scientific study commissioned Section 159(1), the CS ought to have tabled the report to Parliament for debate and adoption.<sup>275</sup> Thereafter, the CS is required prescribe the rules and regulations for determining the minimum and maximum acreages in respect of private land solely based on the recommendations in the report.<sup>276</sup> The Minimum and Maximum Acreages Bill 2015 has to date never been passed by parliament. The proposed bill was met with great opposition as many were of the view that it had glaring loopholes and did not in any way promote equity in landholding.<sup>277</sup>

## 5. THE NATIONAL LAND COMMISSION ACT

The National Land Commission Act<sup>278</sup> provides for the functions and powers of the NLC established under the Constitution.<sup>279</sup> Key to this chapter, the NLC is mandated with managing

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<sup>269</sup> 'Francis Ngige: Puzzle of Heavily Guarded Ranch deep Inside Laikipia 'war zone'' *The Standard Newspaper* 11 February 2017, 6.

<sup>270</sup> 'Francis Ngige: Puzzle of Heavily Guarded Ranch deep Inside Laikipia 'war zone''.

<sup>271</sup> 'Francis Ngige: Puzzle of Heavily Guarded Ranch deep Inside Laikipia 'war zone''.

<sup>272</sup> Article 68 (c) (i), *Constitution of Kenya* (2010).

<sup>273</sup> Section 159(1), *Land Act* (2012).

<sup>274</sup> Section 159(2), *Land Act* (2012).

<sup>275</sup> Section 159(3), *Land Act* (2012).

<sup>276</sup> Section 159(4), *Land Act* (2012).

<sup>277</sup> 'Ayodo H: The problem with Minimum and Maximum Land Holding Acreage Bill 2015 on land sizes' *Standard Digital* 16 July 2015 <https://www.standardmedia.co.ke/business/article/2000169397/the-problem-with-bill-on-land-sizes>> on 5 January 2018.

<sup>278</sup> Act No 5 of 2012.

<sup>279</sup> Article 67, *Constitution of Kenya* (2010).

public land on behalf of the national and county governments; recommending a national land policy to the national government; advising the national government on a comprehensive programme for the registration of title in land throughout Kenya; alienation of public land; and ensuring that public land under the management of the designated state agencies is sustainably managed for the intended purposes<sup>280</sup> among others.

The NLC Act does not expound on the functions of the NLC. It lists the functions and powers of the NLC, its composition and administration.

However, under Section 14, the Act tasks the NLC with the review of grants and dispositions of all public land within 5 years of the commencement of the Act. By 2017, the Commission had started reviewing grants in 17 counties.<sup>281</sup> As a result, NLC has been able to resolve over 3000 cases and recovered previously grabbed public land such as revoking titles covering over 500,000 acres in Lamu County following a president's directive.<sup>282</sup> NLC has not completed this process with less than five months left since the Act commenced in May of 2012.<sup>283</sup>

Although the NLC has been met with challenges especially regarding their clashing roles with the Ministry of Lands which might have seen some of its operations crippled,<sup>284</sup> it is expected that after the distinction of the roles of each of the two in the Lands Law (Amendment) Act and in the *NLC v Ministry of Lands*<sup>285</sup> ruling, the Commission will be able to conduct its operations easily for the benefit of the Kenyan population.

## 6. THE ENVIRONMENT AND LAND COURT ACT

This Act<sup>286</sup> which repealed The Land Disputes Tribunals,<sup>287</sup> establishes a court of a similar

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<sup>280</sup> Section 5, *National Land Commission Act* (2012).

<sup>281</sup> Kinyanjui A and Owuor, 'Review of Grants and Dispositions of Public Land by the National Land Commission' *IKM Advocates* 25 August 2017 <http://www.ikm.co.ke/news/articles/2017/REVIEW-OF-GRANTS-AND-DISPOSITIONS-OF-PUBLIC-LAND-BY-THE-NATIONAL-LAND-COMMISSION.html>> on 11 January 2018.

<sup>282</sup> 'PSCU: Titles of 350,000 acres in Lamu revoked' *Daily Nation* 6 January 2016 <http://www.nation.co.ke/news/Titles-Lamu-land-revoked/1056-3022818-kh7qh6z/index.html>> on 15 January 2018.

<sup>283</sup> NLC, *Devolving Land Governance: 2015/2016 Annual Report*, XIV.

<sup>284</sup> 'Court clarifies roles of lands ministry and NLC' *Daily Nation* 28 January 2016 <http://www.nation.co.ke/lifestyle/DN2/Court-clarifies-roles-of-lands-ministry-and-NLC/957860-3051986-6s8anb/index.html>> on 19 September 2017.

<sup>285</sup> [2014] eKLR.

<sup>286</sup> Act No 19 of 2011.

<sup>287</sup> Act No 18 of 1990.

jurisdiction to the High Court which has jurisdiction over cases and disputes on matters relating to land and environment pursuant to Article 162(2) (b) of the Constitution. This was a positive move, as it allows for the prioritization of land matters and in easing the handling of land cases.

The Act does not contain any express provisions on the resolution of public land grabbing cases. It contains provisions on the constitution of the court, jurisdiction of the court and the conduct of proceedings in the court.

Section 26 of the Act states that the Court shall ensure reasonable and equitable access to its services in all Counties. However, 5 years into the commencement of the Act, this is yet to be achieved. According to the 2016/17 report of the Judiciary, there are only 22 ELC stations across the country.<sup>288</sup> As such not all counties have access to these courts yet in an EACC report, land grabbing was one of the most corrupt activities in many counties.<sup>289</sup>

The ELC Act provides that appeals from the Court shall lie to the Court of Appeal against any judgment, award, order or decree issued by the Court in accordance with Article 164(3) of the Constitution.<sup>290</sup> This implies that the ELC has no power to conclusively solve land related issues. In addition, an ELC judge ought to be experienced in matters relating to land and the environment.<sup>291</sup> Consequently, the objective to have the ELC provide specialised resolution of land related disputes fails as the Court of Appeal judges do not necessarily have experience in land matters as those in the ELC and this raises questions on the efficiency of the court.

## 7. CONCLUSION

This chapter has assessed the current land laws in various statutes and their shortcomings in solving the problem of public land grabbing in Kenya. It has shown that land law in Kenya has gone through major law reforms whose effect should be great in eradicating the nuisance of public land grabbing. The laws provide a backdrop of a reliable, secure and convenient land administration system. They have provided hope that with time public land grabbing shall be solved.

However, it is misguided to think that based on the changes in land laws the problem will be wholly

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<sup>288</sup> Judiciary of Kenya, *State of the Judiciary and the Administration of Justice Annual Report, 2016-2017*, 44-48.

<sup>289</sup> Ethics and Anti-Corruption Commission, *Corruption and Ethics in Devolved Services: County Public Officers' Experiences*, 2015, 20-29.

<sup>290</sup> Section 16, *Environment and Land Court Act* (2012).

<sup>291</sup> Article 166, *Constitution of Kenya* (2010); Section 7, *ELC Act* (2011).

eradicated especially because the problem is recurrent. In addition, there lacks sustained political goodwill seeing as the elite and political class are the beneficiaries of this problem and would rather unnecessarily delay the implementation of some of these reforms such as the minimum and maximum acreage legislation in order to protect their own selfish interests. There remains the problem of lack of enough funds to fully implement these laws which is very limiting when there are no funds to effect implementation.

Finally, the transition from the old and manual way of keeping land records and the old institutional setup may be cumbersome. Digitization of the land records system requires a lot of funding, technical skill and time which may stall achieving the aims of these new laws such as curbing multiplicity of titles and fake title deeds.

Some law reforms have been implemented and it is a question of time on whether their operation, supported by the relevant institutions, will solve public land grabbing and other land issues facing the country. In this interest, Chapter 4 addresses the institutional perspective in combating public land grabbing based on the existing laws under which such institutions operate.

## **CHAPTER 4: EFFICACY OF THE LAND INSTITUTIONS IN TACKLING PUBLIC LAND GRABBING**

### **1. INTRODUCTION**

The previous section in this study has addressed the limitations of the current land laws in addressing public land grabbing in Kenya. This chapter reviews the land management and administration institutional framework in Kenya. These are: the National Land Commission, the Ministry of Lands, Housing and Urban Development and the Judiciary. This chapter analyses their vivacity in dealing with public land grabbing.

These institutions play a major role in the implementation of land legislation including public land management. Having established that the problem actually exists, it is important to evaluate the capacity of the institutions in pursuing the fight against land grabbing. This chapter includes reviewing the progress of various programs and projects established to manage and administer public land in the country.

### **2. THE NATIONAL LAND COMMISSION**

The National Land Commission was established under Article 67 of the 2010 Constitution and mandated to perform certain roles which will be discussed herein. Among the new land laws enacted, was the National Land Commission Act<sup>292</sup> which makes further provisions as to the functions and powers of the NLC and gives effect to the objects and principles of devolved governments in land management and administration.

Article 67(2) (a) of the Constitution and Section 5(1) of the NLC Act mandates the NLC to manage public land on behalf of the national and county governments. In its 2015/2016 report, the NLC reported some form of progress regarding this function.<sup>293</sup> The NLC has developed a three year program for the development of a database of all public land.<sup>294</sup> Some of the databases to be created include: a database of all Public land per county, of allocations of public land, of all public land reserved for a public interest and of an evaluation of all parcels of Public Land based on land

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<sup>292</sup> Act No 5 of 2012.

<sup>293</sup> National Land Commission (NLC), *Devolving Land Governance: 2015/2016 Annual Report*, 2016, Nairobi.

<sup>294</sup> NLC, *Devolving Land Governance: 2015/2016 Annual Report*, 9.

capabilities among many others.<sup>295</sup> It also noted that the Commission only held full data on public land for four counties out of the total 47, which is a matter of concern that over 40 counties have no comprehensive data on public land within their boundaries.<sup>296</sup> While this is a positive step to curb public land grabbing, the program is yet to come to a close yet the 3 year period is running out with just a year or so left.

The NLC has also embarked on the Public School Titling Support System (PSTSS) which is to facilitate the automation of the titling processes for public schools.<sup>297</sup> Grabbing of public schools' land has been a matter of concern, with Mohammed Swazuri, NLC Chairman, reporting that over 4000 schools had reported attempted grabbing of their land.<sup>298</sup> Undertaking this project presented a new hope to the fight against public land grabbing which and is quite impressive. As of May 2017, the Commission had also issued title deeds to 1000 schools across 13 counties.<sup>299</sup> However, if this process is not sped up, the 41% of schools facing the threat of grabbing<sup>300</sup> may fall victim to unscrupulous individuals. Issuance of titles is just but one of the steps of curbing land grabbing, more ought to be done to ensure that these titles are preserved accordingly thereafter.

In addition to the task of managing land, the Land Act states that the Commission should ensure access to its services in all parts of the Republic pursuant to Article 6(3) of the Constitution.<sup>301</sup> As of August 2016 the Commission had established 42 County Land Management Boards with the main aim of devolving the public land management function to counties.<sup>302</sup> However, following the enactment of the Land Laws (Amendment Act), CLMBs were abolished.<sup>303</sup> Abolition of CLMBs affects the NLC's capacity to ensure access to its services countrywide and to directly manage public land.<sup>304</sup>

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<sup>295</sup> NLC, *Devolving Land Governance: 2015/2016 Annual Report*, 12.

<sup>296</sup> NLC, *Devolving Land Governance: 2015/2016 Annual Report*, 9.

<sup>297</sup> NLC, *Devolving Land Governance: 2015/2016 Annual Report*, 9.

<sup>298</sup> 'Nyataya J: Ministry issues deeds to insulate schools from land grabbers' *Daily Nation* 12 May 2017 <http://www.nation.co.ke/news/Ministry-issues-deeds-to-insulate-schools-from-land-grabbers/1056-3924454-kb87az/index.html>> on 11 January 2018.

<sup>299</sup> 'Nyataya J: Ministry issues deeds to insulate schools from land grabbers'.

<sup>300</sup> 'Nyataya J: Ministry issues deeds to insulate schools from land grabbers'.

<sup>301</sup> Section 4(2), *Land Act*.

<sup>302</sup> NLC, *Devolving Land Governance: 2015/2016 Annual Report*, 22.

<sup>303</sup> Section 16, *Land Laws (Amendment) Act*.

<sup>304</sup> Muwonge A, Kamunyori S, Choi N, Kahindo L, *In Search of Land: Public Land Management, Compulsory*

The NLC Act mandates the Commission to review all grants and dispositions of public land to review all grants and dispositions of public property to establish their legality or propriety within five years of the commencement of the Act.<sup>305</sup> To this effect, the NLC submitted a draft of the Review of Grants and Dispositions Regulations which have since been approved by Parliament. By 2017, the NLC had started reviewing public land grants in 17 counties.<sup>306</sup> Through the process, the NLC has been able to resolve over 3000 cases and recovered previously grabbed public land.<sup>307</sup> For example, the Commission recovered a 12 acre piece of land belonging to Kakamega Primary School,<sup>308</sup> revoked titles covering over 500,000 acres in Lamu County following a president's directive, revoked over 100 titles of land later reverted back to Nairobi County and revoked titles allocating land belonging Changanwe Secondary School.<sup>309</sup> Other revocations and recoveries have been of government housing quarters, forests and road reserves among many others.<sup>310</sup> The results of these reviews have been fruitful and are commendable. However, five years have elapsed since the commencement of the NLC Act and the NLC has not completed the process as contemplated in the Act. The NLC ought to complete process of reviews in the remaining counties as it advances the fight against public land grabbing.

The NLC is also tasked with initiating investigations on its own initiative or on a complaint into present or historical land injustices and to recommend appropriate redress.<sup>311</sup> The Commission has since established an Investigations and Forensic services to exercise this investigative power amid rising cases of public land grabbing.<sup>312</sup> In its 2015/2016 report, NLC stated that it had launched

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*Land Acquisition and Resettlement in Kenya*, 2016, at 19-20.

<sup>305</sup> Section 14, *National Land Commission (NLC) Act*.

<sup>306</sup> Kinyanjui A and Owuor, 'Review of Grants and Dispositions of Public Land by the National Land Commission' *IKM Advocates* 25 August 2017 <http://www.ikm.co.ke/news/articles/2017/REVIEW-OF-GRANTS-AND-DISPOSITIONS-OF-PUBLIC-LAND-BY-THE-NATIONAL-LAND-COMMISSION.html>> on 11 January 2018.

<sup>307</sup> NLC, *Devolving Land Governance: 2015/2016 Annual Report*, 34.

<sup>308</sup> 'Wakhisi A: School in Kakamega gets back grabbed playground' *Daily Nation* 26 October 2015 <https://www.standardmedia.co.ke/article/2000180715/school-in-kakamega-gets-back-grabbed-playground>> on 11 January 2018.

<sup>309</sup> NLC, *Devolving Land Governance: 2015/2016 Annual Report*, 36.

<sup>310</sup> NLC, *Devolving Land Governance: 2015/2016 Annual Report*, 36-37.

<sup>311</sup> Article 67(2) (e), *Constitution of Kenya*; Section 5(1) (e), *NLC Act*.

<sup>312</sup> 'Mutai E: Swazuri sets up probe unit as land fraud cases increase' *Business Daily Africa* 4 June 2017 <https://www.businessdailyafrica.com/economy/Swazuri-sets-up-probe-unit-as-land-fraud-cases-increase/3946234-3955608-tx9xbtz/index.html>> on 11 January 2018.

investigations in a total of 191 cases countrywide.<sup>313</sup> Notwithstanding, the Commission raised concern over the high number of public land grabbing and fraudulent land transactions cases that were coming up for investigations<sup>314</sup> which demonstrates NLC's recognition of the menace.

Article 67(2) (d) mandates the NLC to conduct research related to land and the use of natural resources, and make recommendations to appropriate authorities. The NLC has partnered with various research centres such as Transparency International, Institute Surveyors of Kenya and Egerton University among others to fulfil this function.<sup>315</sup> However, it is not clear which relevant authorities the NLC ought to make recommendations.

From the foregoing discussion on the role of the NLC in public land administration and management, the NLC has undeniably committed itself to the fight against public land grabbing since its establishment. The completed and ongoing programs by the Commission present hope for a new dawn in the handling of public land. However, in its operations, the NLC has been faced with various challenges that have caused a retardation in its operations. These challenges shall briefly be discussed below.

## **2.1. CHALLENGES THREATENING THE EFFICACY OF THE NLC IN CURBING PUBLIC LAND GRABBING**

### **1. Inadequate Funds**

In order for the Commission to fully commit itself to the programs it has put in place to fight public land grabbing, it requires adequate financing. Low budgetary allocations by the national government bar the Commission from fully implementing its programs and policies.<sup>316</sup> In the 2015/2016 financial year, the NLC reportedly had a budgetary deficit of Ksh. 162.5 million.<sup>317</sup> With expenses such as the registry and public land record digitization running up to Ksh. 350 million, it would be difficult for the NLC to sufficiently fund all its projects.<sup>318</sup>

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<sup>313</sup> NLC, *Devolving Land Governance: 2015/2016 Annual Report*, 39.

<sup>314</sup> NLC, *Devolving Land Governance: 2015/2016 Annual Report*, 39.

<sup>315</sup> NLC, *Devolving Land Governance: 2015/2016 Annual Report*, 44-49.

<sup>316</sup> Wangechi E, 'The challenges of budget implementation in Public Institutions: A case study of University Of Nairobi' Unpublished LLM Thesis, University of Nairobi, October 2010, 21-23.

<sup>317</sup> NLC, *Devolving Land Governance: 2015/2016 Annual Report*, 56.

<sup>318</sup> 'Odiwuor M: National Land Commission (NLC) in Sh350m drive to end corruption' *Standard Media* 5 October 2016 <https://www.standardmedia.co.ke/article/2000218445/national-land-commission-nlc-in-sh350m-drive-to-end->

## 2. Lack of Political Goodwill

For the NLC programs and policies to have full effect, it would require the goodwill of the legislative, executive and judicial arms of government. As described in previous chapters, wrangles between the NLC and Ministry of Lands have often slowed down operations in both institutions.<sup>319</sup> Moreover, the delays encountered in the approval or enactment of laws that would enhance the work of the NLC affect its operations as it requires the necessary legislative frameworks to carry out some of its functions.<sup>320</sup> Such is the delay by parliament in legislating on minimum and maximum acreage limits for private land.<sup>321</sup> Illegally and irregularly acquired public land is often converted into private land and the delay by Parliament only boosts the problem.<sup>322</sup>

## 3. Inadequate Capacity

In its 2015/2016 report, the NLC admitted to a shortage of staff and technical skill to perform its operations at both its headquarters and in the CLMBs.<sup>323</sup> Without adequate staff and skill, implementation of NLC's programs is slowed down thus threatening its efficiency in public land management.

## 3. THE MINISTRY OF LANDS, URBAN HOUSING AND DEVELOPMENT

The Ministry of Lands is a representation of the executive arm of government tasked with policy formulation within the land sector, land registration, survey and mapping, land adjudication, land reclamation and land and property valuation services administration.<sup>324</sup>

The Ministry was involved in the development of the National Land Policy in 2009 which presented the land issues and policy recommendations that had been identified, analysed and

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[corruption](#)> on 11 January 2018.

<sup>319</sup> *NLC V Ministry Of Lands*, Advisory Opinion Reference No 2 Of 2014; 'Ombati C: CS Matiang'i wants land laws amended to cut NLC powers' *Standard Digital*, 14 April 2015 <https://www.standardmedia.co.ke/article/2000158285/cs-matiang-i-wants-land-laws-amended-to-cut-nlc-powers> > on 11 January 2018.

<sup>320</sup> 'Mwathane I: Beware minimum-maximum sizes of private land' *Daily Nation* 4 July 2015 <https://www.nation.co.ke/oped/opinion/Land-Sizes-Limits-Legislation/440808-2775192-gp0wccz/index.html>> on 31 January 2018.

<sup>321</sup> Kariuki F, Ouma S, Ng'etich R, *Property Law*, 428.

<sup>322</sup> Manji A, 'Kenya: Whose Land Is It Anyway? The Failure of Land Law Reform in Kenya' *Africa Research Institute*, 2015 <https://www.africaresearchinstitute.org/publications/whose-land-is-it-anyway/>> on 29 January 2018.

<sup>323</sup> NLC, *Devolving Land Governance: 2015/2016 Annual Report*, 54.

<sup>324</sup> Government of Kenya, *Executive Order No 1/2016*, 44.

agreed upon by various stakeholders in the land sector.<sup>325</sup> Sessional Paper No. 3 of 2009 presented by the Ministry to Parliament showed recognition of the problem of public land grabbing.<sup>326</sup> The paper stated that the failure to establish an accountable and efficient institutional framework had led to lack of government accountability in land governance leading to irregular allocations of public land.<sup>327</sup> This particular Sessional Paper informed most of the provisions that currently exist in the Constitution and the existing land statutes. These include: the categorization of land into private, public and community land, repealing of old statutes, establishment of an NLC in charge of public land management and establishment of an appropriate system for registering public land.<sup>328</sup>

The Ministry has three departments: the Department of Lands, Department of Physical Planning and the Department of Survey.<sup>329</sup> This classification of departments ensures efficiency owing to the specialization of roles for each department. The Department of Lands is tasked with processing of ownership documents such as titles/grants for both public and community land, setting apart land for public use, preservation of fragile ecosystems, marine reserves, national parks, wetlands and water catchment areas for purposes of conservation.<sup>330</sup> The Ministry therefore has a role in the management of public land.

Taking this into account, the Ministry has been involved in the issuance of title deeds to various public institutions whose land has been grabbed or is under threat to be grabbed.<sup>331</sup> In collaboration with the NLC, the Ministry is working on titling various lands belonging to public schools.<sup>332</sup> The Ministry, through the former CS Kaimenyi has encouraged public schools' head-teachers to secure title deeds for their schools after reporting that 41% of public schools were at risk of being

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<sup>325</sup> Ministry of Lands, *Sessional Paper No 3 of 2009*, viii.

<sup>326</sup> Ministry of Lands, *Sessional Paper No 3 of 2009*, 14.

<sup>327</sup> Ministry of Lands, *Sessional Paper No 3 of 2009*, 10.

<sup>328</sup> Ministry of Lands, *Sessional Paper No 3 of 2009*, 14.

<sup>329</sup> <http://www.ardhi.go.ke/>> on 17 January 2018.

<sup>330</sup> <http://www.ardhi.go.ke/>> on 17 January 2018.

<sup>331</sup> <http://www.president.go.ke/2016/11/14/government-to-revoke-all-title-deeds-of-irregularly-acquired-land/>> on 29 January 2018.

<sup>332</sup> 'Lubanga D: State issues titles to public schools amid from land grabbing menace' *Business Daily Africa* 12 May 2017 <https://www.businessdailyafrica.com/economy/Govt-issues-1000-title-deeds-to-public-schools/3946234-3924464-126fidv/index.html>> on 17 January 2018.

grabbed.<sup>333</sup>

Following an advisory opinion by the Supreme Court, the Ministry is mainly tasked with administration of private land, mandated to provide policy direction and issue titles in all classes of land to which the NLC as an oversight role.<sup>334</sup> The NLC oversight role creates a sense of accountability within the Ministry during the process of title issuing which in turn enhances efficiency. It also takes away the power of the President to issue grants as was the case before the enactment of new land laws.<sup>335</sup> However, in the recent past, the President has issued directives on titles issuance and participated in the process of issuance,<sup>336</sup> creating a possibility of influence from the presidency on the titles issuance process which is practically resembles the provisions of the GLA as mentioned above.

The Ministry has also embarked on a digitization process of registries across the country. According to the Lands CS, digitization will boost services and reduce face to face contact in land transactions which will aid in fighting corruption in registries.<sup>337</sup> He further insisted that the ministry will also introduce a Biometric Access Control Card to confine registry staff at their workstations and restrain them from interfering with operations of other departments.<sup>338</sup> As such, digitization of land records would also allow for tracking of any illegal dealings which is a great step in eradicating public land grabbing.<sup>339</sup> As of 2017, 18 registries across the country had been digitized.<sup>340</sup> The Ministry ought to hasten the process to avoid giving more time to grabbers who continue to engage in fraudulent dealings.

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<sup>333</sup> 'Nyataya J: Ministry issues deeds to insulate schools from land grabbers'.

<sup>334</sup> Advisory Opinion Reference No 2 Of 2014.

<sup>335</sup> Section 3, *Government Land Act* (repealed).

<sup>336</sup> 'Mungai A: Controversy hits Uhuru's directive on issuance of titles for colonial villages' *Standard Media* 24 July 2017 <https://www.standardmedia.co.ke/business/article/2001248956/controversy-hits-uhuru-s-directive-on-issuance-of-titles-for-colonial-villages>> on 1 February 2018.

<sup>337</sup> Muhindi S: Lands ministry will spend 17 billion to digitize land registration system- CS' *The Star* 17 November 2017 [https://www.the-star.co.ke/news/2017/11/17/lands-ministry-will-spend-sh17-billion-to-digitise-land-registration\\_c1670885](https://www.the-star.co.ke/news/2017/11/17/lands-ministry-will-spend-sh17-billion-to-digitise-land-registration_c1670885)> on 18 January 2018.

<sup>338</sup> Muhindi S: Lands ministry will spend 17 billion to digitize land registration system- CS'.

<sup>339</sup> Kameri M, Muriungi M, 'Capitalizing on the Digital Dividend to secure Land Rights in Kenya' *University of Nairobi*, 24.

<sup>340</sup> 'Wanyoro C: CS Jacob Kaimenyi orders transfer of Lands registry staff' *Daily Nation* 26 May 2017 <https://www.nation.co.ke/news/Kaimenyi-orders-transfer-Lands-registry-staff/1056-3943136-niyb36/index.html>> on 19 January 2018.

While the Ministry's role with regards to public land management exists but is limited, its operations are hindered by various factors. To begin with, the Ministry's officials have constantly been involved in corrupt dealings resulting in public land grabbing.<sup>341</sup> According to a survey by the Land Development and Governance Institute, the Ministry's headquarters were ranked at 12<sup>th</sup> position in corruption levels among the 40 registries that were surveyed.<sup>342</sup> In 2015, the then Lands Cabinet Secretary was suspended after being named by the EACC as having been engaged in corrupt dealings while in office.<sup>343</sup> The Institute of Surveyors of Kenya, observed the existence of corrupt officials at the Lands ministry who work with powerful and influential politicians and elite to illegally and irregularly acquire public land.<sup>344</sup> As demonstrated above, the fight against public land grabbing is futile if the officials in the Ministry tasked with title registration are involved in corrupt dealings which advance public land grabbing.

Secondly, inadequate funding to complete the process of digitization limits the Ministry's efforts to curb land grabbing.<sup>345</sup> The digitization of the first 13 registries cost the Ministry Ksh. 800 million and after completing 18 of them in May 2017, the Ministry stated that it would require approximately Ksh. 17 billion to complete the process.<sup>346</sup> With a minimal budget allocation (Ksh. 29 billion in the 2016/2017 financial year),<sup>347</sup> which also funds other operations in the sector, allocating more than half of the funds to a single project is not feasible. Resultantly, completion of the digitisation process is slowed down.

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<sup>341</sup> Nyandia J, 'Impact of corruption on service delivery in the Ministry Of Lands (2005 -2012)' Unpublished MPA Dissertation, University of Nairobi, 5.

<sup>342</sup> 'Jamah A: Survey unearths most corrupt land registries in Kenya' *Standard Digital* 15 October 2014 <https://www.standardmedia.co.ke/article/2000138262/survey-unearths-most-corrupt-land-registries-in-kenya>> on 18 January 2018.

<sup>343</sup> 'Ndegwa A and Shiundu A: Five Cabinet Secretaries axed in reshuffle as two MPs nominated' *Standard Digital* 25 November 2015 <https://www.standardmedia.co.ke/article/2000183491/five-cabinet-secretaries-axed-in-reshuffle-as-two-mps-nominated>> on 18 January 2018.

<sup>344</sup> 'Onyango P: Surveyors condemn increase in land grabbing cases in Kenya' *Standard Digital* 9 December 2016 <https://www.standardmedia.co.ke/article/2000226230/surveyors-condemn-increase-in-land-grabbing-cases-in-kenya>> on 18 January 2018.

<sup>345</sup> 'Muhindi S: Lands ministry will spend 17 billion to digitize land registration system- CS'.

<sup>346</sup> 'Muhindi S: Lands ministry will spend 17 billion to digitize land registration system- CS'.

<sup>347</sup> <http://www.mygov.go.ke/key-highlights-of-ksh2-3-trillion-20162017-budget/>> on 18 January 2018  
2018. <file:///C:/Users/user/Desktop/SLS%20YEAR%204%20SEM%20/Highlights%20of%20the%202016-2017.pdf>> on 18 January 2018.

#### 4. THE JUDICIARY: THE ENVIRONMENT AND LAND COURT

The Environment and Land Court (ELC) was established pursuant to Article 162(2) (b) of the Constitution and Section 4 of the ELC Act. The ELC replaced the Land Dispute Tribunals which existed prior to the 2010 Constitution and is mandated to hear and determine disputes relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, etc.; relating to compulsory acquisition of land; relating to land administration and management; and relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land.<sup>348</sup>

Since the establishment of the Court, 22 stations countrywide have been established with 34 sitting judges across the stations.<sup>349</sup> Between 2016 and 2017, 9,770 cases were filed indicating an increase in land and environment disputes as compared to the 5329 cases filed between 2015 and 2016.<sup>350</sup> As regards the number of cases resolved, 6,307 cases were solved in the 2016/2017 period as compared to 2,403 in 2015/2016 and 2,156 in 2014/2015.<sup>351</sup> The increase in the number of cases resolved represents a steady improvement in the resolution of land disputes. However, a large number of cases remain pending for determination by the court. As of June 2017, over 27,242 cases were pending a great increase from the 20,875 in 2015/16 and 20,560 in 2014/15.<sup>352</sup>

During its existence, the Court has decided on a number of cases which contribute to Kenya's evolving jurisprudence. In the case of *The County Government of Migori v The Registered Trustees of Catholic Diocese of Homa Bay & Others*,<sup>353</sup> the petitioner brought a constitutional petition to challenge allocation of public land in South Nyanza County Council to the respondent in an irregular, fraudulent and illegal manner. The respondents challenged the petition on various grounds including the petitioner's lack of standing to bring the action. The Court held that pursuant to Article 22(1) of the Constitution, every citizen has a right to institute court proceedings claiming that a right or fundamental freedom in the Constitution has been violated, infringed on or threatened for relief and that they may do so acting on behalf of others in public interest. As such,

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<sup>348</sup> Section 13(2), *Environment and Land Court Act (ELC Act)* (2012).

<sup>349</sup> Judiciary of Kenya, *State of the Judiciary & the Administration of Justice Annual Report*, 2016/2017, 293-301.

<sup>350</sup> Judiciary of Kenya, *State of the Judiciary & the Administration of Justice Annual Report*, 44.

<sup>351</sup> Judiciary of Kenya, *State of the Judiciary & the Administration of Justice Annual Report*, 44.

<sup>352</sup> Judiciary of Kenya, *State of the Judiciary & the Administration of Justice Annual Report*, 46.

<sup>353</sup> [2016] eKLR.

the Court grants citizens access to justice even in matter that concern public resources.

In *Christopher Ngusu Mulwa & 28 others v County Government of Kitui & 2 others*, the Court held that under Article 62(2) of the Constitution, the Respondents hold public land in trust for the residents in the County, and as such the Respondents cannot legally use public land in any manner they deem fit before consulting the residents of the area or their elected representatives.<sup>354</sup> The land in question was public land and the Court ruled that the construction of a Ward office on the land does not constitute equitable, efficient, productive and sustainable use of the land and as the said office was to be built in the middle of a field used by the community for meetings and social events.<sup>355</sup> The Court therefore affirms the importance of public participation, a national value and principle of governance,<sup>356</sup> in the management of public land. Nevertheless, the ELC has been faced with a number of challenges as discussed below, in its few years of operation.

#### **4.1. CHALLENGES THREATENING THE EFFICACY OF THE ELC IN CURBING PUBLIC LAND GRABBING**

##### **1. Jurisdictional Issues/Questions**

Neither the Constitution nor the ELC Act place any limitation on the ELC concerning land and environment disputes. Questions therefore arise on ELC's jurisdiction with regards to constitutional interpretations, applications for judicial review and criminal matters which involve land and the environment. For example, public land grabbing is often accomplished through irregular and fraudulent means, involving corruption which is a crime according to the Anti-corruption and Economic Crimes Act,<sup>357</sup> none of the relevant laws govern ELC's jurisdiction on such matters.

##### **2. Inconsistent Appeal and Judge Recruitment Provisions**

According to the ELC Act, appeals from the ELC shall lie to the Court of Appeal against any judgment, award, order or decree issued by the Court in accordance with Article 164(3) of the Constitution. This implies that the ELC has no power to conclusively solve land related issues despite being the specialised court in land matters. While parties have the right of appeal, the ELC

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<sup>354</sup> ELC Case No 63 of 2017, eKLR.

<sup>355</sup> ELC Case No 63 of 2017, eKLR.

<sup>356</sup> Article 10, *Constitution of Kenya* (2010).

<sup>357</sup> Act No 3 of 2003.

ought to have its own Appellate Division to which appeals should lie.

Additionally, an ELC judge ought to be experienced in matters relating to land and the environment.<sup>358</sup> Consequently, the objective to have the ELC provide specialised resolution of land related disputes fails as the judges and magistrates in the Court of Appeal and Magistrates' Courts do not necessarily have experience in land matters as those in the ELC and this raises questions on the efficiency of the court. Magistrates' Courts were granted jurisdiction in land and environment matters in a recent decision by the Court of Appeal.<sup>359</sup>

### 3. Shortage of Judges

As noted earlier, the ELC has 22 stations countrywide with only 34 judges. Land issues in Kenya constitute 65% of the civil cases filed in Kenyan courts.<sup>360</sup> As such, the number of judges are insufficient to deal with the workload. Following a Court of Appeal decision,<sup>361</sup> Magistrates' Courts have jurisdiction in land dispute matters since their reach to the citizenry is much wider than that of specialised courts.<sup>362</sup> However, appeals from the Magistrates' Courts lie in the ELC and the shortage of judges delays the dispensation of justice.

## 5. CONCLUSION

This chapter has analysed the existing land management institutions their involvement and limitations in the fight to eradicate public land grabbing in Kenya. It has shown that while institutions such as the NLC and Ministry have raised concern on the increasing number of public land grabbing cases and developed means of curbing it, for example, through creating a public lands database, digitizing land records and establishing a school titling system among others, their efforts are limited by a number of factors. Inadequate funds, corrupt officials, shortage of staff and lack of political goodwill continue to frustrate any efforts to do away with public land grabbing.

Similarly, the establishment of a specialized court to deal with land and environment disputes is a

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<sup>358</sup> Article 166, *Constitution of Kenya* (2010); Section 7, *ELC Act*.

<sup>359</sup> *Law Society of Kenya Nairobi Branch v Malindi Law Society & 6 others* [2017] eKLR.

<sup>360</sup> Justice Okong'o S, "Environmental Adjudication in Kenya: A reflection on the jurisdiction of the Environment and Land Court" Symposium on Environmental Adjudication in the 21st Century, Auckland, 11 April 2017.

<sup>361</sup> *Law Society of Kenya Nairobi Branch v Malindi Law Society & 6 others* [2017] eKLR.

<sup>362</sup> 'Kiplagat S: Appeals court allows magistrates to handle land, jobs cases' *Business Daily Africa* 19 October 2017 <https://www.businessdailyafrica.com/economy/Appeals-court-allows-magistrates-to-handle-land-jobs-cases/3946234-4147614-x1ssh7/index.html> on 22 January 2018.

major land law reform especially because land has been a major cause of conflicts in Kenya.<sup>363</sup> However, the court's operations are limited by a shortage of staff, jurisdictional challenges and various inconsistent provisions in the relevant statutes that govern the Court's operations.

## **CHAPTER 5: CONCLUSION AND RECOMMENDATIONS**

### **1. INTRODUCTION**

This chapter summarizes the findings, conclusions and recommendations of the study. The study was undertaken to show the limitations of the new land laws and land administration institutions in dealing with public land grabbing in Kenya.

### **2. FINDINGS**

The research has established that there exists gaps in the current land laws in as far as public land grabbing is concerned. The institutions mandated with public land management and administration, that is, the NLC, the Ministry of Lands and the ELC, are also faced with a number of challenges which limit their capability to effectively tackle public land grabbing in Kenya.

The study was premised on four hypotheses. The first was that a lot has been done since independence to curb public land grabbing. Secondly, public land grabbing is on the rise in Kenya. Thirdly, graft is the main reason public land grabbing is escalating and finally, that political figures, and elites have contributed majorly to land- related graft. Accordingly, the foregoing chapters sought to prove the correctness of the aforementioned hypotheses.

The earlier part of this study focused on a background to the problem of land grabbing. The

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<sup>363</sup> Justice Okong'o S, "Environmental Adjudication in Kenya".

problem dates back to the post-colonial era when the government purchased back land from the colonialists for the purposes of resettling natives and later resold these pieces of land cheaply to politicians, the elite and their families while others were rewarded with land for their allegiance to the ruling government.<sup>364</sup> The problem of public land grabbing has persisted in the previous and current governments and often involves high ranking government officials, their associates, families and other elite.<sup>365</sup>

Backed by reports of the Njonjo, Ndung'u and TJRC reports, the study established that their recommendations were key in resolving the problem. Their recommendations informed various aspects of the new land laws and the land provisions in the 2010 Constitution. The Ndung'u Commission for example, recommended the digitization of land records and creation of a public land database,<sup>366</sup> which are now projects in progress.

It delved into the causes of public land grabbing and the effects and impacts resulting from it and observed that corruption was a leading cause. As such, strict measures ought to be put in place to rid the public land management system of corruption. Specifically, the study established that the Lands Ministry is one of the most corrupt ministries in the country<sup>367</sup> and so are land registries across the country.<sup>368</sup>

The study also reviewed the new land laws which have several provisions that direct how public land ought to be managed. However, there still exists deficiencies within the law limiting the eradication of public land grabbing. Some provisions are contradictory while others overlook possible ways in which land grabbers may get away with illegally acquiring public land meant for public purposes. For example, the LRA accords automatic conversion to all registers including the RLA and RTA.<sup>369</sup> As such, it assumes that all private land previously held under the RLA and RTA was obtained legally. Considering most public lands grabbed in has converted into private

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<sup>364</sup> Kamau J, 'How Independence era Leaders laid their hands on lands of quitting Whites', November 2009.

<sup>365</sup> Ndung'u Commission Report, 2004.

<sup>366</sup> Southall R, 'The Ndung'u Report: Land and graft in Kenya' *Review of African Political Economy*, 2005, 142-51.

<sup>367</sup> 'Karanja S: Interior, health ministries most corrupt, EACC survey shows' *Daily Nation* 16 March 2016 <<http://www.nation.co.ke/news/Nkaissery-ministry-the-most-corrupt-says-EACC-survey/1056-3118708-8687ea/index.html>> on 25 January 2018.

<sup>368</sup> Ethics and Anti-Corruption Commission, *Corruption and Ethics in Devolved Services: County Public Officers' Experiences*, 2015, 8-16.

<sup>369</sup> Section 105, *LRA* (2012).

land, examination ought to be done before considering all such private lands as legally acquired.

The study did not only assess the new land laws in addressing public land grabbing but also examined the limitations of land management institutions in implementing laws on public land management. It reviewed the role of the NLC, Ministry of Lands and the ELC. Most importantly, constant wrangles between the NLC and the Ministry and the ELC and other courts have slowed down the process of land reform including those suppressing public land grabbing. It was noted that these institutions lack adequate funding to fully implement various projects devised to curb land grabbing<sup>370</sup> and that corruption limits their capability to advance the fight against public land grabbing.<sup>371</sup>

### **3. RECOMMENDATIONS**

#### **1. Finalize the Land Record Digitization Process**

Until recently, land records including public land records, have been handled through a manual system which is very exposed to manipulation, wear and tear and loss.<sup>372</sup> This among others contributed to the inefficiency and unreliability of the land administration process.

To address these challenges, NLC has embarked on an automation process of all public land by creating a database holding all public land records and all other relevant information. Furthermore, the Ministry began a digitization process of all land records across registries in the country.

The automation process increases efficiency, limits corruption due to reduced human contact and would be easily accessible to the public for scrutiny. Access to information increases the responsiveness of government bodies and encourages public participation in public resource management.

The digitisation process is currently underway and ought to be finalised to create a complete digital record management system.

#### **2. Finalize the Public Schools Titling Support System (PSTSS)**

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<sup>370</sup> NLC, *Devolving Land Governance: 2015/2016 Annual Report*, 56.

<sup>371</sup> Ethics and Anti- Corruption Commission, *Corruption and Ethics in Devolved Services*, 8-16.

<sup>372</sup> Kwanya T, 'Big Data in Lands Records Management in Kenya: A fit and viability analysis' *University of KwaZulu-Natal*, 1.

As illustrated in the preceding chapters, public schools in Kenya are under threat due to rampant land grabbing of their land. Finalizing the PSTSS program ensures that all schools have valid titles to their land. This in turn reduces the chances of public school land grabbing as the schools hold indefeasible and valid titles to their land . Creation of a database for the same provides reliable information on the boundaries of public schools thus preventing conflict and hindering land grabbing.

### **3. Enhance Capacity of the NLC.**

The study has established that both the NLC and ELC lack requisite capacity in terms of funding, workforce and technical skill. The roles played by these institutions is crucial to the management of public land and lack of capacity impedes their capabilities to operate efficiently.

Creation of a fund for the NLC increases the Commission's ability to perform its operations in diverse ways. The main perpetrators of public land grabbing are government officials and other elite who are in positions that allow them to frustrate the NLC's work and one way they can achieve that is by devoting minimal funds to the Commission. To promote financial autonomy of the NLC, a distinct fund can be created from which it can finance its programs and expenses.<sup>373</sup>

The NLC also ought to increase its workforce particularly to assist in the public land database set-up. The Commission should also conduct training on its workforce to equip them with the necessary skills and increase their efficiency.

### **4. Increase the number and capacity of ELC Courts**

To achieve the requirements of Section 4 of the ELC Act, more courts ought to be established so as to expand the court's services to all counties. Increased courts would widen the reach of these specialised courts to the public. While undertaking such expansion, public awareness programs should be carried out to inform of them of the existence and functions of the Courts.

Additionally, more judges satisfying the stipulated requirements ought to be recruited into the ELC courts to increase efficiency and reduce the workload that currently exists.

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<sup>373</sup> Atieno B, 'Assessing the effectiveness of the National Land Commission in addressing irregular and illegal allocation of land in Kenya' Unpublished LLM Thesis, University of Nairobi, 2016.

#### **4. CONCLUSION**

The objectives of this study were:

1. To investigate the causes of the rise of public land grabbing cases in the country.
2. To assess the efficacy of the new land laws in addressing land grabbing.
3. To determine the progress of the extent to which the NLC has dealt with public land grabbing and implemented the new land laws.
4. To discover available remedies to curb land administration issues in Kenya including the efficacy of the existing land laws

##### **Objective 1**

The study in Chapter two has elaborated various causes of public land grabbing and shown its effects on the people of Kenya, the environment and property in Kenya. It has also proved the existence of the rot of corruption among government officials, ministry of lands officials and registry staff.

##### **Objective 2**

Chapter three of this study has examined the provisions of the new land laws relating to public land management and brought out the limitations of the new legal framework in dealing with the problem. While examining this new framework, the study outlined the reasons that necessitated the enactment of the current laws over the repealed laws.

##### **Objective 3**

In Chapter four of the study, the NLC was examined with. The progress of the projects and programs formulated by the NLC to curb public land grabbing was also noted. The role of Ministry of Lands and the ELC in eradicating public land grabbing was also assessed. The challenges faced by these institutions have also been brought out in Chapter four.

##### **Objective 4**

The study has put forth recommendations on how the public land grabbing issue can be resolved in Kenya.



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