

The grabbed state: lawyers, politics and public land in Kenya*

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ABSTRACT

In 2002, Kenya's new National Rainbow Coalition (NARC) undertook to investigate and ensure the recovery of all public lands illegally allocated by the outgoing government. A Commission of Inquiry into the Illegal and Irregular Allocation of Public Land, chaired by the lawyer Paul Ndung'u, was appointed. The commission's report sets out the illegal land awards made to powerful individuals and families, provides important information about the mechanisms by which public land was misallocated, and shows how the doctrine that public land should be administered and allocated 'in the public interest' was consistently perverted. This paper explores what the Ndung'u report tells us about the role of the legal profession in the illegal and irregular misallocation of public land. It makes clear that the legal profession, far from upholding the rule of law, has played a central role in land corruption, using its professional skills and networks to accumulate personal wealth for itself and others. This stands in contrast to the role of the legal profession in promoting good governance and the rule of law envisaged by donors of international development aid. This paper focuses on 'local' land grabbing, and argues that the 'global land grab' or 'investor rush' needs to be understood alongside local manifestations of land privatisation.

INTRODUCTION

In 2002, Kenya's ruling political party since independence in 1963, KANU, was defeated in the elections by the National Rainbow Coalition (NARC) headed by Mwai Kibaki. One of NARC's most important

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commitments, together with the replacement of Kenya's 1962 independence constitution, was to fight corruption (Branch *et al.* 2010; Wrong 2009). In particular the new government undertook to investigate and ensure the recovery of all public lands illegally allocated by the outgoing government (Kibaki 2003). In exercise of the powers conferred on the president by Section 3 of the Commissions of Inquiry Act 1962, a Commission of Inquiry into the Illegal and Irregular Allocation of Public Land chaired by the lawyer Paul Ndung'u was appointed to investigate this issue. The commission's report (RoK 2004, hereafter 'the Ndung'u report') was presented to President Kibaki in December 2004, and released six months later only after widespread accusations of government censorship in failing to make it public (Africog 2009: 11).¹ The 244-page report, supported by two annexes of 976 and 797 pages, sets out in forensic detail the illegal land awards made over the years to the families of Presidents Kenyatta and Moi, numerous former ministers, members of parliament and civil servants, as well as to individuals in the military and the judiciary. Despite the detail provided in the annexes, it is admitted that the report is incomplete because of the lack of cooperation with which the commission met (Ndung'u 2011 int.; Africog 2009). It provides a snapshot of only a proportion of the illegal/irregular land allocations that have taken place (Aronson 2011 int.; Lamba 2011 int.) The report recommended that a large majority of land titles acquired in this way should be revoked and recommended the rectification of others (RoK 2004: 83–5).

Although it has been widely discussed in the Kenyan media and its findings taken up by leading human rights groups (see Africog 2009; KNCHR & KLA 2006), the Ndung'u report has received less academic attention than it deserves (but see Boone 2012; Kanyinga 2005; Klopp 2008; Southall 2005). In addition, although the economic and social costs of widespread land corruption are likely to be far higher than the overall costs of better-known corruption scandals such as Anglo-Leasing and Goldenburg (Aronson 2011 int.; Wanguhu 2011 int.), the findings of the Ndung'u report have not been systematically studied by academic or other commentators. Discussions of the report have tended to focus on its 'juicy findings' (Southall 2005: 142), the 'what' and 'whom' of illegal or irregular land allocation – the forests, road reservations, school playgrounds and graveyards that have been misallocated and the individuals and families who acquired them (so far as this can be ascertained) – rather than the 'how' of land grabbing. Nonetheless, the report provides detailed information about the mechanisms by which public land was misallocated and the means by which the doctrine that

public land should be administered and allocated ‘in the public interest’ (RoK 2004: 8–9) was consistently perverted. This has been recognised by Southall (2005: 143), who noted that ‘it is the chapter and verse which the Report gives concerning the systematic way in which established procedures, designed to protect the public interest, were perverted to serve private and political ends which may well prove to be its most long lasting value’.

However, one of the most significant issues raised by the Ndung’u commission – the extent to which illegal or irregular transactions in public land in Kenya have been made possible through administrative and professional corruption – has been largely neglected. In his short assessment of the Ndung’u report, Southall (2005: 146) remarked that the ‘extensive complicity of professionals (lawyers, surveyors, valuers, physical planners, engineers, architects, land registrars, estate agents and bankers) in the land and property market was key to the process of land grabbing’, but did not explore the point in any detail. The Ndung’u commission, finding that ‘public land has been allocated contrary to the substantive and procedural provisions of the relevant laws’ (RoK 2004: 53), made three recommendations: that investigations be conducted and, if necessary, prosecutions brought against professionals involved in facilitating illegal or irregular allocation of public land; that professional bodies take disciplinary action under their Codes of Conduct; and that the government recover all money and other proceeds acquired as a result of professionals’ involvement (Recommendations 8–10, RoK 2004: 83–5). In so doing, the Ndung’u commission went further than the earlier Commission of Inquiry into the Land Law Systems of Kenya 2002 (RoK 2002, known as the ‘Njonjo commission’ after its chairperson) which strongly condemned professions for their role in the irregular allocation of public land (Mwathane 2009), but had to stop short of recommending disciplinary action because this was outside its terms of reference (Ndung’u 2011 int.). To date, despite the report’s recommendations, no investigations of professionals’ involvement in land corruption have been initiated (*ibid.*). Nor has legal or disciplinary action been taken by the police or by the Law Society of Kenya against lawyers involved in land grabbing (Lamba 2011 int.).

Arguably the most important contribution of the Ndung’u report has been to set out the detailed mechanisms by which public land was illegally or irregularly allocated not for the purposes of development but as political reward (see also Hunt 1984; Kanyinga 2000; Klopp 2001; Olima 1997; Onoma 2010). Importantly for our understanding of

Kenya's fraught electoral history (Anderson 2005; Throup & Hornsby 1998), the Commission found that illegal allocations of public land escalated significantly before or soon after the multiparty general elections of 1992, 1997 and 2002, evidence that public land was allocated 'as political reward or patronage' (RoK 2004: 83). For Southall (2005: 143), 'even a cursory analysis serves to confirm earlier analyses that corruption and patronage have become thoroughly embedded in Kenya's politics'. This is a critical issue as Kenya prepares for general elections in 2012. Recent press reports suggest that illegal and irregular allocation of public land to raise electoral finance and to shore up political support, as well as to consolidate personal gain before losing office, is indeed taking place in preparation for the coming contest (*The Standard* 6.7.2011; *The Star* 15.10.2011). Politicians continue to use public office to identify profitable land to be grabbed, and sell land they have grabbed in the past.

This paper first explores what the Ndung'u report tells us about the role of the legal profession in Kenya in the illegal and irregular misallocation of public land. The venality of the political and business elite has long been the focus of academic writing concerned with the nature and working of the African state (Bayart 1993). It is less common to find accounts of corruption amongst bureaucrats, administrators and professionals (Budlender 2004; Ghai & Cottrell 2010). The Ndung'u report is of particular interest in this regard. It makes clear that the legal profession, far from upholding the rule of law (Carothers 2006; Harrington & Manji 2003), has played a key role in land corruption in Kenya, using its professional skills and networks to accumulate personal wealth for itself and others. The report's findings on the complicity of professionals in land grabbing have important implications for our understanding of lawyers and lawyering in Kenya (Ghai 1981). Today, the centrality of the legal profession to the promotion of good governance and the rule of law is widely asserted in academic literature and by policy makers (see Carothers 2006; Faundez 2009; McAuslan 2003). 'Rule of law training', including the training of judges and magistrates, is now supported by significant international development aid (DfID 2009; Manji 2010). However, the failure of the Kenyan legal profession to take seriously the Ndung'u report's findings on its own participation in graft should give us pause about international programmes to promote the rule of law and good governance. In addition, I argue that the Law Society of Kenya's (LSK) recent efforts to ally itself with the Kenya Anti-Corruption Commission (KACC) in

campaigning against graft at the Ministry of Lands and Settlements (*Daily Nation* 1.7.2011) should be treated with scepticism, given its long-running failure to confront the complicity of some of its members in land corruption.

By attending to the phenomenon of 'local' land grabbing, this paper aims, secondly, to add to our understanding of land governance. Access to land was at the root of anti-colonial struggles in Kenya (Anderson 2005; Furedi 1989) and continues to be a significant source of conflict (Branch *et al.* 2010; Cheeseman 2008; Lynch 2008; Mueller 2008). I argue that the recent focus on the phenomenon of the 'global land grab' (Zagema 2011) or 'investor rush' (Hall 2011) takes place at the expense of understanding the role of in-country, local land grabbing, leading to simplistic analyses of Africa's land problems. Indeed Ruth Hall (*ibid.*) has recently questioned the usefulness of the term 'land grabbing', arguing that whilst it is helpful to activists framing land claims and fighting land deals made over a resource that is treated as both plentiful and idle, the phrase is of little academic merit because it obscures the intricacies of land deals and the complexity of the ways in which they are structured (see also Borrás & Franco 2010; Bush *et al.* 2011). Whilst wishing to retain the term 'land grabbing' for its power to draw attention to the widespread dispossession entailed in the practice, I show that richer understandings of the metaphor can be reached by attending to local manifestations of land privatisation. By exploring in-country land grabbing by Kenya's own elite, this paper aims to add to our understanding of struggles over land and the varied contexts in which they take place.

THE FINDINGS OF THE NDUNG'U COMMISSION ON ILLEGAL/IRREGULAR LAND ALLOCATION

According to the African Centre for Global Governance (Africog 2009: 11), the Ndung'u report established that 'illegal allocation of public land is one of the most pronounced manifestations of corruption and political patronage in our society'. On a conservative estimate, some 200,000 illegal titles were created between 1962 and 2002. Of these, 98% were issued between 1986 and 2002. The categories of public land affected include forests, settlement schemes, national parks and game reserves, civil service houses, government offices, roads and road reserves, wetlands, research farms, state corporation lands and trust lands. The report makes it clear that the illegal allocations took place either on the direct orders of the president or on the

orders of prominent senior public officials and well-connected business people and politicians. Those who benefited from the illegal or irregular allocations of grabbed land included ministers, senior civil servants, politicians, business people, churches, temples and mosques.

The report distinguishes between the illegal and the irregular allocation of public land (RoK 2004: 48–9). The first category of wrongful allocation, when land is *illegally* issued, occurs when the legal safeguards governing the allocation of land are ignored or subverted. For instance, where a title is issued for a piece of land which is not legally available for allocation, the title acquired is illegal. The report recommended that such titles should be revoked and stipulated that in certain instances, such as where the land had been sold on to a third party or is being held by a bank as security for a loan, decisions as to revocation should be made on a case-by-case basis by a Land Title Tribunal using clear criteria such as the number and classes of people financially affected and ‘the public interest’.² (The role of a Land Titles Tribunal is discussed below.)

The second category of wrongful allocation is *irregular* allocation of land. According to the Ndung’u report (RoK 2004: 136–7), this occurred when administrative procedures for dealing in land were not followed. Here, the land concerned was legally available for allocation, but the requisite legal standard was not met or the correct administrative procedure followed. For this second category of cases, the report recommended that irregular titles be rectified by following the administrative procedures that had been bypassed.

The Ndung’u report provides exhaustive details of the processes by which the wrongful allocation of public land was achieved. Although these processes have not been the subject of academic commentary or analysis to date (except Southall 2005), they are likely to make a lasting contribution to our understanding of how land law in Kenya has been subverted (and therefore potentially of how such laws might be reformed). According to the report (RoK 2004: 54), the abuse of the powers of allocation was central to the plundering of public land. It is therefore necessary to understand the allocation process. In order to do so, the report identified three categories of land in Kenya. The first was government land, which included both alienated land (that is, land which had been leased to a private individual or company or reserved for use by a government department or corporation or institution, or which has been set aside for another public purpose), and unalienated land (that is, land that had not yet been leased or allocated).

Second, trust land which was held by County Councils on behalf of local communities under African Customary Law. Once such land was registered according to any of the land registration statutes, it became private land and was then regarded as the sole property of the individual or group in whose name it is registered (RoK 2004: 45). Third, land which was registered in accordance with the land registration statutes in the name of an individual or a company was deemed to be private land.³ This category of land could be created from either government or trust land through registration after certain procedures had been adhered to (RoK 2004: 44–5; Southall 2005). The Ndung'u commission investigated the illegal and irregular allocation of government land and, when cases came to its notice, of trust land affected by fraudulent practices. Taken together, government land and some trust land made up the category of 'public land' into which the Ndung'u commission inquired.⁴

According to the commission's findings, it was the very individuals entrusted with being custodians of public land who were involved in 'pilfering the public' (Klopp 2000). They did so by subverting or ignoring the legal safeguards in place to protect public land (RoK 2004: 53). Thus, although the president has the right to allocate unalienated government lands (and can delegate limited powers to the Commissioner of Lands), he could not exercise his powers without taking into account the public interest. The report describes how in practice the Commissioner of Lands and his officials were given responsibility for public land: under the Government Lands Act 1963 they could allow township plots on unalienated land to be sold by auction if not required for public purposes. However, neither the president nor the Commissioner of Lands has the authority to allocate alienated government land, that is, land that has been earmarked for a public purpose (such as road reservations) (RoK 2004: 51).

As well as subjecting the president and the Commissioner of Lands to these legal safeguards, the law also controlled the process of allocation itself. A formal offer of sale had to be made to an approved purchaser by the Commissioner for Lands. Known as a letter of allotment, this was only made to the person to whom it was addressed, lapsed after thirty days, and had conditions attached. Significantly, a letter of allotment cannot be legally transferred to another person (RoK 2004: 48) (the use of letters of allotment is explored in greater detail below). Similarly, land categorised as trust land could only be removed from the communal ownership of local people by a process of adjudication in which local communities are given adequate notice and the

opportunity to claim their ownership in accordance with customary law (*ibid.*: 52).

The commission investigated the illegal allocation of different types of land, including urban land, ministry land, national parks and museums, to mention a few. To take urban land as an illustration, the commission found evidence of widespread abuse of presidential discretion with regard to unalienated urban land. Both Presidents Kenyatta and Moi were found to have made grants to individuals without any reference to the public interest. The allocation was therefore done without following the correct legal procedure (Ndung'u 2011 int.). Furthermore, both presidents also allocated alienated land despite the fact that this is not a category of land which they have any legal power to allocate. The Ndung'u report also found that a number of Commissioners of Lands had made direct grants of government land without any authority from the president. Often, land was quickly sold by grantees at very high prices to third parties without any adherence to the conditions laid down by letters of allotment, and despite the fact that such letters only have the status of letters of offer and cannot be sold (Aronson 2011 int.; RoK 2004: 13). Far from being restrained by the principle of public purpose, the Commissioner of Lands and many local authorities completely disregarded it, and sold land reserved exclusively for public purposes such as schools, playgrounds and hospitals. Forged letters and documents were commonly used to allocate land. Records at the Ministry of Lands and Settlements were found to have been deliberately destroyed (RoK 2004: 38).

The report also provides critical details of developments in the aftermath of illegal or irregular land allocations. It showed how those allocated land would move quickly to sell it, in many cases, to state corporations at hugely inflated prices. State corporations were in effect exploited as coerced buyers of grabbed land. Pressurised into making illegal purchases of public land, they become 'captive buyers of land from politically connected allottees' (RoK: 92). As the report makes clear, there is a further injustice in the fact that state corporations had sometimes also been the victims and not just the conduits of land grabbing. They could 'lose their land to grabbers for free, and then be pressured to buy other lands for millions of shillings' (Ndung'u 2006: 5). The primary state corporation targeted to purchase land was the Kenyan workers' pension scheme, the National Social Security Fund (NSSF). It spent about Ksh30 billion (about US\$400 million) between 1990 and 1995 on the purchase of illegally acquired property. The NSSF was set up in 1965 and is regulated by the Minister for Labour, to whom

a tripartite Advisory Council gives advice and assistance in connection with the implementation of the National Social Security Fund Act 1965 (Mullei 1988: 433). This legislation stipulates that the purpose of the NSSF is to provide for contributions to the payment of benefits out of the Fund and to provide ‘some form of social protection’ (*ibid.*) against old age, death and incapacitating physical or mental disability. Instead, the Ndung’u commission found that the NSSF and other state corporations were simply abused as a vehicle for off-loading grabbed land: ‘State corporations were used as conduits for land grabbing schemes through which the public lost colossal amounts of money’ (RoK 2004: 87). For example, the Ndung’u report found that a former chairman of the Cooperative Bank of Kenya was illegally allocated land in Ngong Forest which he then sold on to the NSSF (*ibid.*, Annexe 2: 673).

The human and social costs to the country of this plundering of the NSSF – ‘diverting resources away from public use’ (KNCHR & KLA 2006: 5) – have not been quantified. However, the NSSF continues to suffer losses even in the present day. As recently as September 2011, the auditors of the NSSF noted that the corporation’s legal bills were in excess of Ksh76 million (approximately \$US763,000), and were critical of the fact that significant amounts of money had been paid in legal fees (amounting to Ksh6 million) that had not been approved by its board (*Daily Nation* 25.9.2011). Most of the legal costs incurred involve disputes about the status of land that the NSSF still holds on its books. Long after the NSSF was used as a coerced buyer of land, it continues to lose money relating to activities outside its core remit to provide social security payments to Kenyans. The assets of the NSSF may also be overvalued as a result of its holding grabbed land, making it difficult to assess its financial health (Cottrell 2011 int.).

More broadly, the likely economic and social costs of widespread land corruption will be borne for many years to come. The misallocation of public land instigates a process by which land that should be available for the public good – for the building of medical clinics and schools, for public parks and public transport facilities such as railways – is transformed into private land. This privatisation deprives the public of significant social goods whilst generating large profits for the private consumption of well-connected individuals and families. Two examples of this process can be given. In one prominent case, a questionable change of use enabled 18 acres of land in a suburb of Nairobi that had been reserved to build two state schools to be sold to a diplomatic mission (Aronson 2011 int.; see more generally RoK 2004:

187). The schools were never built on this or any other site. In another case, land reserved for the development of a public medical clinic and day nursery was, again through a questionable change of use, instead given over to the building of a shopping centre in an exclusive suburb of Nairobi (Cottrell 2011 int.; *The Star* 9.11.09) (see below for an account of how changes of use were achieved).

THE ROLE OF THE LEGAL PROFESSION

The work of human rights lawyers in exposing abuse and opposing repression in Kenya has been well documented (Adar & Munyae 2001: 5; Mwangi 2001; Ross 1992; Throup & Hornsby 1998; Widner 1992). Lawyers are widely perceived as having spearheaded the democratisation movement (Kagwanja 2005: 55). Indeed, Kenya has recently appointed one such lawyer, Dr Willy Mutunga, as its new Chief Justice (*Daily Nation* 16.6.2011). Conversely, the role of the legal profession in bolstering authoritarian rule in Kenya has also been widely discussed (see Mwangi 2001). However, away from the human rights and civil liberties spheres, the work of the legal profession since independence has rarely been the subject of detailed study (but see Ghai 1981, 1987). The Ndung'u report provides important information about lawyers' centrality to the plunder of public land.⁵ Although the precise role played by lawyers was outside its terms of reference, it is alluded to throughout the report, enabling us to develop an account of how the illegal or irregular allocation of public land was achieved, usually under lawyers' professional guidance and with their collaboration.

The involvement of lawyers in land corruption can be categorised as having occurred either through omission or by commission (Lumumba 2011 int.). Lawyers often failed to advise their clients that the land transaction before them could not proceed because, for example, the land in question was not properly available for allocation (resulting in an illegal acquisition), or because correct administrative procedures had not been followed, for example where forest land was excised without have been properly gazetted (leading to an irregular allocation). At a minimum, by failing to deter their clients from becoming involved in improper land transactions lawyers failed in their professional duties of care (Dugdale & Stanton 1982).

The Ndung'u report also identified numerous instances in which lawyers actively assisted in the commission of fraud and knowingly abetted illegalities and irregularities (Lumumba 2011 int.). There are

at least five important ways in which lawyers used their professional skills actively to facilitate land corruption. First, their detailed knowledge of, and extensive networks within, the infamously chaotic Ministry of Lands and Settlement enabled them to identify suitable plots of public land to be targeted for illegal allocation. Second, with the help of lawyers familiar with Kenyan company law, those involved in land corruption were able to ensure that their identities were carefully concealed. The two annexes to the Ndung'u report are filled with the names of companies clearly set up in order to shield the names of those involved in land grabbing from public scrutiny. Third, lawyers oversaw and encouraged a thriving market in letters of allotment which came to be treated as tradable land documents, although lawyers knew they did not have this status in law. Fourth, members of the legal profession used their networks in the Ministry of Lands and Settlement improperly to acquire changes of use that allowed land that had been reserved for public purposes such as schools and medical clinics, and most commonly for roads, to be sold for residential or commercial use. Finally, lawyers often advised clients how to regularise land scams after the event. These five aspects of lawyers' work will be discussed in turn.

The Ministry of Lands and Settlement is widely known as one of Kenya's most inefficiently run public services. It is cited in Transparency International's Bribery Index 2011 (TI 2011) as Kenya's fifth most corrupt institution after the police, the Ministry of Defence, Nairobi City Council and the Immigration Department.⁶ The Ndung'u commission found that one of the main reasons for the illegal allocation of public land was the 'chaotic record keeping system' in the Ministry and in the district registries (RoK 2004: 188). In addition, it found that records were falsified or hidden in order to conceal the illegal allocation of land (*ibid.*: 188). In such an environment, the skills of lawyers accustomed to navigating their way through disorganised land records were invaluable (Mwathane 2011 int.). Lawyers also forged close links with surveyors in the Ministry (Aronson 2011 int.; Mwathane 2011 int.). Their involvement was important. The Ndung'u report found that surveyors employed by the Ministry would survey a piece of land 'from their desk' without ever visiting the site (RoK 2004: 80), and subsequently issue two title deeds to the same parcel of land, one under the Registered Land Act 1963, for example, and one under the Registration of Titles Act 1982: 'as part of an elaborate scheme of land grabbing and given the multiplicity of land registration laws, different titles would be issued to the same piece of land . . . The double issuance

of titles was meant to facilitate the illegal allocation of public land' (RoK 2004: 80). By enabling land to be dealt with under two systems simultaneously, a mechanism was created by which extensive land grabbing took place (Mwathane 2011 int.).

Second, lawyers used company law to assist in concealing the identity of land grabbers. The report sets out how the commissioners encountered severe difficulties in trying to ascertain the names of individuals involved in illegal or irregular land acquisition during searches carried out at the Registry of Companies (RoK 2004: 40):

The Commission discovered quite early in its work that many illegal allocations of public land were made not to individuals but companies. These companies were ostensibly registered at the Registry of Companies in conformity with the requirements of the Companies Act, Cap 486 of the Laws of Kenya. The Commission would not have fulfilled one of its Terms of Reference if it did not disclose the names of the people (either directors or share holders) behind these companies. This meant that in many instances, a single title of land required a double search at the Ministry of Lands and at the Registry of Companies.

Despite the cooperation of the Registrar of Companies, the commission encountered problems in identifying the individuals behind companies that had been allocated land. In some cases, the companies holding allocated land did not exist in law. In these cases, individuals had acquired blank Certificate of Incorporation forms which they submitted to acquire public land but which were not filed or reflected in the records of the Companies Register. In others, companies that had not been fully incorporated acquired land. The Ndung'u report shows that most high-profile allocations of public land were made to companies incorporated specifically for that purpose, largely to shield the directors and shareholders of such entities from easy public view (RoK 2004: 40). Company law was carefully used to achieve this. The commission gives a list of companies which acquired land but whose individual owners are not immediately evident (*ibid.*, Annexe I: 22–5).

The third questionable practice overseen by lawyers was the improper use of letters of allotment. Letters of allotment were widely used as land titles and changed hands quickly in sales of grabbed land, despite the fact that they cannot be properly used for this purpose. These documents confer no transferable interest or rights over land in favour of the person to whom they are addressed. Strictly, they only enable land to be allocated so long as the exact conditions set out on the face of the document are adhered to. These specify that the offer to allocate land is made only to the person named in the letter of

allotment, that it expires after thirty days, and that the land allocated must be developed within a given period. Despite the fact that letters of allotment cannot function as titles, the Ndung'u commission found that lawyers widely failed to advise their clients of this, either in pursuit of the legal fees earned, in order not to threaten their retainer, or because they themselves took a proportion of the proceeds of sale from allotted land (Aronson 2011 int.). Lawyers actively participated in the abuse of letters of allotment by presiding over the transformation from letters of offer into land instruments to be transacted (Lumumba 2011 int.).

The fourth and most widespread practice involved changes of use. Legal professionals abetted improper changes of use that enabled land reserved for public purposes to be privatised and developed or sold for large profits. In practice, this amounts to an illegal allocation of land reserved for public purposes by the Commissioner of Lands 'in total disregard of the law and the public interest for which they had been reserved' (RoK 2004: 77). These lands were allocated following the submission of Part Development Plans prepared by lawyers and surveyors to the Commissioner of Lands, who then issued consents for changes of use under the relevant law, such as the Physical Planning Act 1996 or the Forests Act 1982. Land was often then swiftly sold on to third parties by the original allottees. The most prominent category of land allocated in this manner was land reserved for the future development of roads. Changes of use enabled this category of land to be grabbed throughout the country. In Nairobi, the City Council approved development plans for areas that were clearly set aside for construction of roads. According to the report, it was not unusual for the commission to see a development plan for a residence being prepared for land that was supposed to be reserved for a road (*ibid.*: 55). In addition, officials in the Ministry of Roads, Public Works and Housing and the Nairobi City Council regularly wrote letters of no objection to problematic proposed developments (*ibid.*: 77). However the report notes that neither the approval for change of use given by the Commissioner of Lands, nor the letters expressing no objection could properly result in valid changes of use. As a result, allocations acquired in this way are not legal (see Annexe 1 Chapter 4 for a list of affected road reserves).

It is difficult to state with certainty how many lawyers were involved in illegal and irregular allocations of land in the ways set out above. Whilst many Kenyan lawyers participated in the struggle for democratic rights (Mutua 2008: 68), it is clear that a significant number of

them—both in private practice and public officers such as land registrars (Mwathane 2011 int.)—were at the very least complicit in land corruption (Ndung'u 2011 int.) and in some cases made themselves indispensable to its commission, reaping rich personal reward and sometimes political office as a result (Lumumba 2011 int.). For many prominent law firms it was the mainstay of their work (Lumumba 2011 int.). This is suggested by the report's estimate that over 200,000 illegal land titles have been created since independence, a figure widely thought to underestimate the scale of the problem (Mwathane 2011 int.; Ndung'u 2011 int.). So many titles could not have been created without the professional services rendered by lawyers working closely with other professionals, notably surveyors, with whom they shared 'an incestuous relationship' (Mwathane 2011 int.), and valuers.

Despite the scale of the problem, the complicity of lawyers in the illegal or irregular allocation of land in the ways set out above has been largely overlooked. Indeed, the Law Society of Kenya has recently played a prominent role in campaigning *against* corruption at the Ministry of Lands and Settlement, joining hands with the Kenya Anti-Corruption Commission in a high-profile demonstration outside the Ministry demanding that corrupt lands officials be named and prosecuted (*The Standard* 28.6.11). There is blatant bad faith by the legal profession in choosing to ignore the conduct of its members in 'solemnising' land corruption (*Capital FM* 14.07.11).

The Law Society of Kenya's objectives, as enshrined in its constitution, are to maintain and promote the rule of law in Kenya by ensuring that an independent and efficient legal profession serves the people of Kenya (Law Society of Kenya 2012). In asserting this, the Law Society is echoing the language of international rule of law programmes which hold legal professionals to be a bulwark against rule of law failures, and central to the promotion of good governance in the third world (World Justice Project 2011). However, the involvement of lawyers in land grabbing in the post-colonial era, and their failure to confront the extent of the profession's complicity in graft, call into doubt the policy attention and funding being directed to rule-of-law training. International programmes to promote the rule of law present the legal profession as standing apart from the murky business of day-to-day politics as custodians of good governance. Rule of law programmes function through a strict distinction between professionalism and politics. The Kenyan experience of lawyers' role in land corruption casts doubt on this distinction. Lawyers and politics have

been intricately and dangerously connected for personal, political and electoral gain.

IMPLEMENTING THE NDUNG'U REPORT

The Ndung'u report was met with enormous interest by the media and by civil society on its release in July 2005. For many, it confirmed much that had been known about land crimes and constituted an official record of widespread dispossession. Amidst rumours that the report had been doctored before its release to protect the names of prominent individuals (*The Standard* 14.12.2004), a claim denied by the commission's chairperson (*Daily Nation* 23.12.2007), the press reported extensively on those who had been involved in land grabbing and the land that they had acquired (*ibid.* 12.12.04).

Recognition of the difficulties of implementing the Ndung'u report's recommendations quickly followed the euphoria of its release. An early attempt to force implementation through the courts came in 2006 in the case of *Mureithi v Attorney General* (Kenya Law Reports 2006). The applicants, the Mbari ya Murathimi clan from Nyeri, brought an action for judicial review, arguing that the recommendations of the Ndung'u commission should be implemented in so far as they related to their land. They applied for orders of *mandamus* against the Attorney-General, the Minister for Lands and Settlement, the Commissioner for Lands, the Nyeri District Land Registrar, the Catholic Archdiocese of Nyeri and the Archbishop to implement the recommendations of the Ndung'u report in so far as it touched on Land Parcels LR 1356, 9464 Nyeri Municipality. The report identified the land as having been illegally acquired and recommended revocation of title. Rejecting the request, the Nairobi High Court agreed with the respondents that it was not under a statutory duty to implement the recommendations. Nyamu J. pointed out that it is a fundamental weakness of the Commission of Inquiry Act 1962 that once the president is presented with the report of a commission he has complete discretion on further action and is not under any obligation to respond to the findings. In dismissing the application, the court held that it is not its role but that of the executive and parliament to implement policy. As well as defeating an early attempt to implement the Ndung'u report, this finding has important implications for the findings of future commissions of inquiry (Africog 2008; see more generally Ashforth 1990).

Given the period over which the illegal allocation of public land had taken place, many of the land titles investigated by the

Ndung'u commission were held by third parties who were not involved in the original transactions, many of whom had not committed any legal wrong: they might have been offered and bought the land from the original allottee, been offered the title to land as security for a loan, have inherited the land from a deceased friend or relative, or received it as a gift. When considering the legal position of third parties the commission argued that such rights are extinguished since they were illegal from their inception. Third parties could be interpreted as being in the same position as the original allottee. However, it recognised the difficulties entailed in dealing with third parties who had acted innocently in acquiring land interests. They noted in particular the potential hardships endured by third parties who had made substantial developments, by state corporations which were coerced into buying land, and commercial lenders who had acquired the titles as security against loans. Although it was generally recommended that illegally issued titles that had been passed on to third parties should be revoked and the land repossessed, the commission recognised that where the land had been developed 'consideration should be given to all the circumstances of the case including the cost incurred in developing the land', the number of people involved financially, the economic value and the public interest (Africog 2009: 23).

The difficult questions raised by the widespread presence of illegally and irregularly held titles in Kenya are unlikely to be resolved for many years (Ndung'u 2011 int.). Following the release of the Ndung'u report, the KACC, itself mired in political difficulties (*The Standard* 29.8.11), has engaged in sporadic and high-profile repossessions of land, taking an approach very different from that recommended by Ndung'u: that a Land Titles Tribunal be created systematically and transparently to review land titles (RoK 2004: 188; Lamba 2011 int.). Indeed, the sporadic repossession of grabbed land has arguably distracted attention from the problems that continue to characterise the Ministry of Lands and Settlement (Ndung'u 2011 int.). Here the same administrators who facilitated years of land grabbing remain in office (Mwathane 2011 int.). Recently, following demonstrations by civil society groups such as the Kenya Non-State Actors Alliance, the Permanent Secretary in the ministry has undertaken to deal with corruption in it, and to prosecute corrupt officials (*Standard* 6.7.11; Lumumba 2011 int.). This leaves the very individuals known to have collaborated in land grabbing in charge of dealing with corruption (Mwathane 2011 int.).

Fundamental to the problems rehearsed in the Ndung'u report is the fact that the administration of land is intricately tied up with politics rather than sheltered from political interference (Lumumba 2011 int.; Ndung'u 2011 int.). The Njonjo commission sought to address this critical issue in 2002 when it recommended the creation of an independent National Land Commission (NLC). This recommendation, which would have stemmed the land grabbing reported by the Ndung'u commission, was never acted upon and was restated in the Ndung'u report (Aronson 2011 int.). A National Land Commission Bill 2012 was given its first reading in parliament on 9 February 2012. The bill which, together with the Land Bill 2012 and the Land Registration Bill 2012, is constitutionally mandated (RoK 2010, Chapter 5), is widely agreed to be poorly drafted and to fail to address the land issues facing Kenya. As a result of pressure from civil society groups, on 23 February parliament voted by the required two-thirds majority (*ibid.*, Article 261(2)) to extend the constitutional deadline of eighteen months for approval of the legislation (Fifth Schedule, RoK 2010), to allow for wider consultation and for thorough redrafting. Fresh drafts were expected at the time of writing. The failure of the drafts of the National Land Commission Bill seen so far explicitly to distribute powers of land allocation and management between the NLC and the Ministry of Lands and Settlement is a major concern (see Kituo cha Sheria *et al.* 2012). It constitutes an important sign of the difficulties of wresting control over land from those long accustomed to using it as a 'patronage resource' (Klopp 2000: 7; Ndung'u 2011 int.). Problems at the Ministry of Lands and Settlement include on-going corruption of its officials, the forging of titles, and the presence in files of invalid documents such as letters of allotment that have been treated as titles (Mwathane 2011 int.). These cannot be resolved simply by taking remedial actions such as funding the computerisation of land records, a process that is almost complete in Uganda and has been widely mooted in Kenya (*Daily Nation* 11.9.2009), 'the computerisation of corruption' as one commentator described it (*Capital FM* 14.7.2011). As Kenya reviews the legal framework governing land, the test to be applied should be whether the proposed changes would have prevented the illegal and irregular allocations of public land on the vast scale identified by the Ndung'u commission.

Two unintended outcomes of the Ndung'u report demonstrate that, despite the failure to implement its findings, it is of on-going political and economic relevance. First, the report has emerged as an important source of information during the vetting processes for public office

underway in Kenya since the inauguration of the new constitution in 2010. Two examples of the way in which the report has recently been cited illustrate its on-going relevance. During the vetting of the prospective Director of Public Prosecutions (DPP), Keriako Tobiko, by the Constitution Implementation Oversight Committee, his failure to prosecute individuals involved in land grabbing was raised (KHRC 2010). Despite protestations, Tobiko was confirmed as DPP on 15 June 2011 and, significantly for this paper, is widely expected to continue his previous stance of taking no action in relation to the Ndung'u report.⁷ The question of complicity in land grabbing as recorded by the Ndung'u commission was also raised against Bethuel Kiplagat, the chairman of Kenya's Truth, Justice and Reconciliation Commission (TJRC). Kiplagat was cited in the Ndung'u report as having acquired a number of government houses through illegal or irregular land awards (*Africa Confidential* 2010). References to the Ndung'u report in the process of assessing suitability for public office demonstrates that the commission's findings continue to be relevant to Kenyan politics, although their use in vetting candidates could not have been foreseen by the commissioners (Lamba 2011 int.).

Second, as well as functioning today as a detailed official record of the elaborate practices of land grabbing that have taken place in Kenya, the Ndung'u report has also become an important source of legal information on affected parcels of land. If the findings of the Ndung'u commission remain unheeded by the political system, they have been enthusiastically taken up by the financial and legal systems: bankers and lawyers regularly refer to the report to ascertain if particular parcels of land have appeared in it, for example as being recommended for title revocation (Wanguhu 2011 int.; Ubhi 2011 int.).

Since the publication of the Ndung'u report, it has become clear that undoing many years of illegal and irregular allocations of land will be both complex and costly. The commission itself cost Ksh75,399,768 (US\$839,030), and subsequent work by the Kenya Anti-Corruption Commission on land issues (including investigating cases, issuing revocation orders and bringing legal actions) has not been quantified. As well as the vast expense incurred in unravelling the mess in which Kenya's land system finds itself, the complex legal problems thrown up by Ndung'u commission's findings may mean that the recommendations for correcting the injustices of land grabbing will never be thoroughly implemented. In addition to widespread cynicism amongst members of the public about the 'eating' of land (Harrington & Manji 2011), there has also been a critical effect on the economy and on

politics (Berry 2004) from the lack of certainty in land matters (SID 2010).

THE GRABBED STATE

In a paper published before Kenya's change of government in 2002 and the commissioning of the Ndung'u report, Klopp (2000: 7) provided a perceptive account of the 'pilfering' of public land, focusing on the 1990s and the illegal allocations of public land that took place under the Moi regime. Her account of 'the irregular privatisation of public land' remains one of the few academic analyses to take seriously local or internal land grabbing. Of course, the extent and details of land grabbing were widely known amongst members of the public and civil society groups (Lamba 2011 int.). Many communities became victims of the predatory actions of land grabbers (Klopp 2001), and the land grabbing stories that regularly circulated in Kenya ensured that few people were ignorant of the scale of misallocation of public land. Indeed, a number of organisations vigorously resisted land grabbing, including through the courts, notably Kituo cha Sheria (Centre for Justice) (Weru 2012 int.). In October 1998, at the height of attempted land grabbing in Karura Forest, the Architectural Association of Kenya announced that it would take disciplinary action against any member found to be working with improperly acquired properties (Githongo 2000). Much of the analysis presented by Klopp is confirmed by the Ndung'u commission. Klopp (2000: 7) argued that as Kenya's powerful political elite confronted the reality of declining 'patronage resources', it sought alternative ways to finance its patrimonial control. She sees the growth in the illegal allocation of public land of the 1990s as a 'creative counter-strategy to change' (*ibid.*). These threats to patronage resources included the decline in aid as a source of patronage, the greater scrutiny of some forms of corruption by the international community and, in the context of the introduction of multi-party elections, the increased political contests they faced (*ibid.*: 8). Public land, less visible to international donors and therefore escaping their scrutiny, was transformed into a valuable 'patronage asset' (*ibid.*). Kenya's 'land grabbing mania' is for Klopp an unintended consequence of donors' periodic withdrawals of aid in the 1990s. The accuracy of this claim has subsequently been confirmed by the Ngung'u commission's finding that illegal and irregular allocations of land peaked at election times (RoK 2004: 2; Southall 2005: 146).

Klopp also argues that with the increased competition entailed in the liberalisation of the political system, administrative officials feared for the continued access to land that they exercised, and sought quickly to maximise the rent they extracted from its (mis)allocation, as well as adding to their personal stocks of land resources. Key to this was the allocation of land to property developers. For Klopp (2000: 8), 'the intensification of irregular allocations of public land to well-connected individuals and land-buying companies . . . is a particularly revealing and underscrutinised case of deepening corruption' which, despite being both widely discussed and resisted within Kenya, had 'largely failed to attract commensurate attention on the part of scholars'. Writers on developments in Kenya's political system in the 1990s and subsequent years privileged formal political practice over 'informal manoeuvring' (*ibid.*: 8). Citing the work of NGOs including Kituo cha Sheria and the KHRC Land Rights Programme in running Operation Firimbi ('whistle' in Kiswahili), which sought to document instances of land grabbing and to organise local resistance to these actions (Lamba 2011 int.), Klopp (2000: 23) argued that such work created a 'realm of public scrutiny'.⁸ Since Klopp's paper, the Ndung'u report, by creating a permanent official record of the phenomenon, has made a lasting contribution to this scrutiny.

The term 'land grabbing' is now widely used in the media and in academic writing, as well as by pressure groups. However, by far the greatest attention is paid to grabbing carried out by private companies and foreign buyers, intent on acquiring land as a way to guard against future fuel and food shortages (Akam 2010). The term is therefore associated primarily with the acquisition of land for the cultivation of biofuels, sugar, rice and other foods such as in the Tana Delta (Borras *et al.* 2010; Matondi *et al.* 2011). Much less attention has been paid to what might be called, echoing recent formulations such as the 'failed state' (Bates 2008) and the 'narco-state' (Kohnert 2010), 'the grabbed state'. In this scenario, well-connected politicians, their families and associates allocate state land to themselves in what amounts to widespread in-country land grabbing by the state's own nationals. As the Ndung'u report shows, the local land grabbing which was inaugurated by colonialism (Okoth-Ogendo 1991) and continues in the present day, has a much longer history than the global land grabbing of foreign investors (Cottrell 2011 int.). Indeed, this process of 'local land grabbing' is often intricately tied up with the more widely analysed global process: public land illegally or irregularly allocated to individual politicians, for example, may enable them to enter profitable

agreements with foreign investors, as recent legal action in the High Court at Nyeri for recovery of land grabbed by President Moi from the Samburu in Laikipia demonstrates (*The Star* 12.5.2011). In addition, widespread land grabbing and dispossession is sometimes associated with failed states: on this analysis, Somalia is both a grabbed and a failed state (Casanelli 1995; Cottrell 2011 int.; De Waal 1995).⁹

While some writers have recognised that governments have become key actors in the global land grab, they have tended to view them primarily as facilitators of land deals rather than as the principal party to such actions: as German *et al.* (2011: 29) put it:

We find a significant disconnect between the portrayal of large-scale ‘land grabs’ in the media, where the image of the greedy investor tends to be invoked, and the active role of government in Mozambique, Tanzania and Zambia in availing sizeable areas of land to investors. In each of these countries investment promotion and lands agencies, and in several cases local government, are amassing sizeable areas of land for transfer to the public domain in the name of investment promotion for economic development and poverty alleviation. In these countries, community consultations are overwhelmingly mediated by government actors, often with transactions that are not fully disclosed.

While this analysis recognises that a complex network of actors is involved in land grabbing, it presents governments and individuals within them as acting *qua* government: a well-known scenario entails members of local government dispossessing local people of land behind a thin veneer of consultation (Alden Wily 2011). I would go further than this in describing the process of local land grabbing in Kenya: here, a political elite has used its connections to acquire land and to amass huge private wealth by dealing in this land, whether by developing, selling or leasing it (Ghai 2011). They have acted in their individual rather than their official capacities, although of course their political and economic connections underpin their activities.

Writing recently of international land grabbing, Hall (2011: 2) has critiqued the language used to describe the phenomenon. She has argued that ‘the popular term “land grabbing”, while effective as activist terminology, obscures vast differences in the legality, structure and outcomes of commercial land deals and deflects attention from the roles of domestic elites and governments as partners, intermediaries and beneficiaries’. Her response has been to develop a typology of land grabbing, and to explore the ‘variegated and complex processes of agrarian change, some of which reflect historical continuity, while others may involve qualitative redirections in processes of agrarian

change or the intensification or speeding up of such processes – but may also involve countervailing trends’ (*ibid.*: 4). I share her concerns: that an oversimplification is taking place which obscures in particular the local workings of land grabbing. I suggest that recent developments in the governance of land grabbing, as evidenced by the World Bank’s attempts to develop a code of conduct for land deals which asserts the need, among other things, to respect existing land rights, the rule of law, and environmental sustainability and not to jeopardise food security,¹⁰ obscure the complex personal networks that undergird the practice. What is eliminated by the metaphor of land grabbing is the role of accomplices and the complex networks entailed in these transactions. The term ‘land grabbing’ as currently deployed may prevent us from thinking about the mechanisms by which the misallocation of public land takes place, transforming land reserved for the public good into private land. As the foregoing discussion shows, it is important to investigate how professional knowledge and skills are used to pervert the mechanisms of land law and administration.



More than six years after its publication, the Ndung’u report continues to provide important insights into the politics of land in Kenya. Whilst the findings of the Ndung’u commission and public awareness campaigns such as Operation Firimbi may have made it more difficult to act with outright impunity over land, the failure to implement its recommendations has ensured that land grabbing in Kenya continues to take place. Undeterred by disciplinary or criminal action brought against them, members of the legal profession continue to involve themselves in illegal or irregular activities relating to public land. The complex networks of personal and professional relationships that underpin and facilitate the grabbing of public land remain firmly in place (Ndung’u 2011 int.). Indeed the Permanent Secretary in the Ministry of Lands, Dorothy Angote, recently admitted at a press conference that two high-ranking ministry officials had gone missing after they were alleged to have been found working with a lawyer to forge land documents (*The Standard* 6.7.2011). The knowledge that corrupt professionals have been spared the legal and professional consequences of their actions – and in some cases actually rewarded for their complicity¹¹ – functions only to deepen Kenyans’ abiding distrust of administrative authorities and professionals, with far-reaching implications for the rule of law and access to justice.

NOTES

1. The government was widely held to be suppressing the report (Ghai 2011 int.). Members of Parliament repeatedly requested that it be released, but were told this would happen 'once the Cabinet peruses through the contents and deliberates on it' (Hansard 11.11.2004: 4265–6). In 2005 MPs expressed concern that the report had still not been released and was being ignored (Hansard 5.10.2005: 3500). Even after its release, MPs stated the report had not been circulated and was 'impossible' to find (Hansard 14.6.2006: 1322). For an account of the difficulties faced in getting a range of inquiry reports released, see KHRC 2011.

2. A Land Title Tribunal is one of four new institutions the Nding'u commission recommended be set up, the other three being a Lands Division of the High Court, a National Land Commission, and a Task Force on Land (RoK 2004: 67–70).

3. 'The categories of public land highlighted ... are subject to various laws which prescribe the legal procedures to be followed if they are to be allocated to private individuals or companies. There are several laws the provisions of which must be followed by the Government to create private title to public land. The main laws in this regard are: The Constitution of Kenya, 1963; The Government Lands Act, 1984 (Cap 280); The Registration of Titles Act, 1982 (Cap 281); The Trust Land Act, 1970 (Cap 288); The Land Adjudication Act, 1977 (Cap 284); The Registered Land Act, 1963 (Cap 300); The Forests Act, 1982 (Cap 385); The Physical Planning Act, 1996 (Cap 286); The Wildlife Management and Conservation Act, 1985 (Cap 376); and The Survey Act, 1989 (Cap 299). It is important to note that 'even after these actions have taken by the Minister ... the provisions of the Government Lands Act and other Planning and Environmental Legislation would have to be strictly followed before such lands can be legally allocated' (RoK 2004: 52).

4. Included in public land are: urban, state corporations' and ministries' lands; settlement schemes and trust land; and forest lands, national parks, game reserves, wetlands, riparian reserves, protected areas, museums and historical monuments.

5. Indeed, the Nding'u report identifies seven cases in which to recommend revocation in which the judiciary itself was illegally allocated land (RoK 2004: Annex I: 621; Southall 2005).

6. The aggregate index developed by Transparency International is derived from a combination of five individual indicators, which are: the likelihood of bribery, prevalence of bribery, average size of bribe, share of bribery, and scale of bribery.

7. The ICC Kenya Monitor website recently stated: 'Given the past practice of officials facing corruption allegations being appointed to sensitive positions, the current constitution now prohibits people who face such allegations from serving in public office. The allegations against Tobiko are certainly a test of this new constitutional standard and parliament, as well as Tobiko' (ICC Kenya Monitor 10.6.11).

8. Klopp (2000: 10–13) provides an important account of resistance to land grabbing in Kenya, notably in Westlands—a prime real-estate area. Market members were concerned when surveyors arrived in 1994 to measure out the 'undeveloped' land. Francis Karani, a former Nairobi commissioner, arrived with fraudulent documents and announced that he had been given the land. Acting on behalf of Salima enterprises, he quickly put the plot up for sale. After getting no response from their repeated pleas to the president and local politicians, market members chose to resist their eviction. Street children were recruited and trained to help fight off policemen and private security guards. However, stall-holders also associated their struggle with all Kenyans whose land had been taken.

9. A significant amount of land is affected by the phenomenon of the local land grabbing. On the global plane, the World Bank estimated in 2010 that 45 million hectares of land had been subject to land deals by 2009, with 70% of these deals taking place in Africa (Deininger & Byerlee 2010). Data on local land grabbing is harder to come by, in part because the assessment contained in the Nding'u report is incomplete. However, although the number of hectares will not be as great as that given for the global land grabbing, much of the land covered by Nding'u is of high value, particularly in Kenyan cities and towns where urban growth has caused land values to rise steeply.

10. In contrast, groups such as Via Campesina have stated that 'no principle in the world can justify land grabbing'. 'The World Bank's idealistic targets for donor responsibility (who could possibly be against them?) legitimise a process of commodification of African land, whether or not by Western interests' (Bush *et al.* 2011: 188).

11. Far from being punished for complicity in land grabbing, in one well-known instance a key professional implicated in assisting in land grabbing during the 1980s and named in the Nding'u report—in this case, a surveyor—has been rewarded with a seat in parliament.

REFERENCES

- Adar, K. & I. Munyae. 2001. 'Human rights abuse in Kenya under Daniel Arap Moi, 1978–2001', *African Studies Quarterly* 5, 1: 1–17.
- Africa Confidential. 2010. *Kiplagat's Truth*, available at: www.africa-confidential.com/article-preview/id/3483/Kiplagat%27s_truth, accessed 19.4.12.
- African Centre for Open Governance (Africog). 2008. *Postponing the Truth: how commissions of inquiry are used to circumvent justice in Kenya*. Nairobi: Africog.
- Africog. 2009. *Mission Impossible? Implementing the Ndung'u report*. Nairobi: Africog.
- Akam, S. 2010. 'Africa mulls biofuels as land grab fears grow', *Reuters* 30.11.2010, available at: www.reuters.com/article/2010/11/30/us-africa-biofuels-idUSTRE6AT3ZE20101130, accessed 15.10.11.
- Alden Wily, L. 2011. *The Tragedy of Public Lands: understanding the fate of the commons under global commercial pressure*. Rome: International Land Coalition.
- Anderson, D. 2005. *Histories of the Hanged: the dirty war in Kenya and the end of empire*. New York: W. W. Norton.
- Ashforth, A. 1990. 'Reckoning schemes of legitimation: on commissions of inquiry as power/knowledge forms', *Journal of Historical Sociology* 3, 1: 17–35.
- Bates, R. 2008. 'State Failure', *Annual Review of Political Science* 11: 1–12.
- Bayart, J. F. 1993. *The State in Africa: the politics of the belly*. London: Longman.
- Berry, S. 2004. 'Reinventing the local? Privatization, decentralization and the politics of resource management: examples from Africa', *African Study Monographs* 25, 2: 79–101.
- Boone, C. 2012. 'Land conflict and redistributive politics in Kenya', *African Studies Review*, forthcoming.
- Borras, S. & J. Franco. 2010. *Towards a Broader View of the Politics of Global Land Grab: rethinking land issues, reframing resistance*. Amsterdam: ICAS, LDPI & TI.
- Borras, S., P. McMichael & I. Scoones. 2010. 'The politics of biofuels, land and agrarian change: editors' introduction', *Journal of Peasant Studies* 37, 4: 575–95.
- Branch, D., N. Cheeseman & L. Gardner, eds. 2010. *Our Turn to Eat: politics in Kenya since 1950*. Berlin: LIT Verlag.
- Budlender, G. 2004. 'Access to courts', *South African Law Journal* 121: 339–58.
- Bush, R., J. Bujra & G. Littlejohn. 2011. 'The accumulation of dispossession', *Review of African Political Economy* 38, 127: 187–92.
- Capital FM. 2011. Available at: www.capitalfm.co.ke/eblog/2011/07/14/orengo-lumumba-graft-spat-healthy/, accessed 26.10.11.
- Carothers, T., ed. 2006. *Promoting the Rule of Law Abroad: in search of knowledge*. Washington, DC: Carnegie Endowment for International Peace.
- Casanelli, L. 1995. *Victims and vulnerable groups in southern Somalia*. Ottawa: Immigration and Refugee Board of Canada.
- Cheeseman, N. 2008. 'The Kenyan elections of 2007: an introduction', *Journal of Eastern African Studies* 2, 2: 166–84.
- De Waal, A. 1995. *Somalia: crimes and blunders*. Oxford: James Currey.
- Deiningner, K. & D. Byerlee. 2010. *Rising Global Interest in Farmland: can it yield sustainable and equitable benefits?* Washington, DC: World Bank.
- Department for International Development (DfID), UK. 2009. *Eliminating World Poverty: building our common future*, available at: www.official-documents.gov.uk/document/cm76/7656/7656.pdf.
- Dugdale, A. & K. Stanton. 1982. *Professional Negligence*. London: Butterworths.
- Faundez, J. 2009. 'Rule of law or Washington consensus: the evolution of the World Bank's approach to legal and judicial reform', in A. Parry-Kessaris, ed. *Law in the Pursuit of Development: principles into practice?* London: Routledge, 180–202.
- Furedi, F. 1989. *The Mau Mau war in perspective*. London: James Currey.
- German, L., E. Schoneveld & E. Mwangi. 2011. 'Processes of large scale land acquisition by investors: case studies from sub-Saharan Africa', occasional paper 68, Bogor, Indonesia: CIFOR.
- Ghai, Y. 1981. 'Law and lawyers in Kenya and Tanzania: some political economy considerations', in C. Dias, R. Luckham, D. Lynch & J. Paul, eds. *Lawyers in the Third World: comparative and developmental perspectives*. Uppsala: SIAS, 144–76.
- Ghai, Y. 1987. 'Law, development and African scholarship', *Modern Law Review* 50, 6: 750–76.
- Ghai, Y. 2011. 'Land and the criminalised state', *The Star*, Nairobi, 15.10.2011.
- Ghai, Y. & J. Cottrell, eds. 2010. *Marginalized Communities and Access to Justice*. Abingdon: Routledge.

- Githongo, J. 2000. 'Towards an anti-corruption strategy for Kenya: the private sector's role', presentation to the National Anti-Corruption Plan: Private Sector Stakeholder Consultation, Nairobi, 17.10.2000.
- Hall, R. 2011. 'The many faces of the investor rush in southern Africa: towards a typology of commercial land deals', ICAS Review Paper Series 2, ICAS & TNI.
- Harrington, J. & A. Manji. 2003. 'Mind with mind and spirit with spirit': Lord Denning and African legal education', *Journal of Law and Society* 30, 3: 376–99.
- Harrington, J. & A. Manji. 2011. 'Alimentary satire and the politics of corruption in Kenya', British Institute in Eastern Africa annual lecture, British Academy, London, November 2011.
- Hunt, D. 1984. *The Impending Crisis in Kenya: the case for land reform*. London: Ashgate.
- ICC Kenya Monitor. 2011. Available at: www.icckkenya.org/2011/06/for-all-to-see-and-hear-part-ii/, accessed 1.12.2011.
- Kagwanja, P. 2005. "Power to Uhuru": youth identity and generational politics in Kenya's 2002 elections', *African Affairs* 105, 418: 51–75.
- Kanyinga, K. 2000. *Redistribution from Above: the politics of land rights and squatting in coastal Kenya*. Uppsala: Nordiska Afrika Institutet.
- Kanyinga, K. 2005. 'Speaking to the past and the present: the land question in the draft constitution of Kenya', in K. Kindiki & A. Osogo, eds. *The Anatomy of Bomas: selected analysis of the 2004 draft constitution of Kenya*. Nairobi: ClariPress, 25–6.
- Kenya Human Rights Commission (KHRC). 2010. Available at: www.khrc.or.ke/media-centre/press-releases/89-kptj-press-statement-on-petition-to-parliament-on-keriako-tobikos-nomination.html, accessed 13.6.11.
- KHRC. 2011. *Lest We Forget: the faces of impunity in Kenya*. Nairobi: KHRC.
- Kenya Law Reports. 2006. *Mureithi & 2 others v Attorney General & 4 others*. High Court Miscellaneous Civil Application no. 158 of 2005: 707–38.
- Kenya National Commission on Human Rights (KNCHR) & Kenya Land Alliance (KLA). 2006. *Unjust Enrichment: the making of land grabbing millionaires*. Nairobi: KNCHR & KLA.
- Kibaki, M. 2003. 'President Mwai Kibaki's speech during the state opening of the 9th parliament, 18th February 2003', Nairobi: State House.
- Kituo, cha Sheria *et al.* 2012. 'The land bills 2012: proposals for a framework chapter and review of the published version of the bills', presented to the Parliamentary committee on land and natural resources and the technical drafting committee on the land bills, March 2012 (on file with the author).
- Klopp, J. 2000. 'Pilfering the public: the problem of land grabbing in contemporary Kenya', *Africa Today* 47, 1: 7–26.
- Klopp, J. 2001. 'Electoral despotism in Kenya: land patronage and resistance in the multi-party context', PhD thesis, McGill university.
- Klopp, J. 2008. 'Remembering the destruction of Muoroto: slum demolitions, land and democratisation in Kenya', *African Studies* 67, 3: 295–314.
- Kohnert, D. 2010. 'Democratization via elections in an African 'narco-state'? The case of Guinea-Bissau', working paper 3, German Institute of Global and Area Studies.
- Law Society of Kenya. 2012. 'Objectives', available at: www.lsk.or.ke/index.php/about-lsk, accessed 19.4.2012.
- Lynch, G. 2008. 'Histories of association and difference: the construction and negotiation of Kenya's conscious communities', in Branch *et al.* *Our Turn to Eat*, 177–97.
- Manji, A. 2010. 'Eliminating poverty? "Financial inclusion", access to land, and gender equality in international development', *Modern Law Review* 73, 6: 985–1025.
- Matondi, P, K. Havnevik & A. Beyene. 2011, *Biofuels, Land Grabbing and Food Security in Africa*. London: Zed books.
- McAuslan, P. 2003. *Bringing the Law back in: essays in land, law and development*. Aldershot: Ashgate.
- Mueller, S. 2008. 'The political economy of Kenya's crisis', *Journal of Eastern African Studies* 2, 2: 185–210.
- Mullei, P. 1988. 'Social security in Kenya', *International Social Security Review* 41, 4: 433–7.
- Mutua, M. 2008. *Kenya's Quest for Democracy: taming the leviathan*. London: L. Rienner.
- Mwangi, P. 2001. *The Black Bar: corruption and political intrigue within Kenya's legal fraternity*. Nairobi: Oakland Media Services.
- Mwathane, I. 2009. 'The role of professionals in the irregular/illegal allocations of public land: what professional associations can do!', unpublished speech to a public forum on implementing the recommendations of the Ndung'u report, delivered at the Hilton Hotel, Nairobi 14.7.2009.

- Ndung'u, P. 2006. 'Tackling land related corruption in Kenya', available at: http://siteresources.worldbank.org/RPDLPROGRAM/Resources/459596-1161903702549/S2_Ndung'u.pdf, accessed 10.10.2011.
- Okoth-Ogendo, W. H. O. 1991. *Tenants of the Crown: evolution of agrarian law and institutions in Kenya*. Nairobi: ACTS press.
- Olima, W. H. A. 1997. 'The conflicts, shortcomings, and implications of the urban land management system in Kenya', *Habitat International* 21, 3: 319–31.
- Onoma, A. 2010. *The Politics of Property Rights Institutions in Africa*. Oxford University Press.
- Republic of Kenya (RoK). 2002. *Report of the Commission of Inquiry into the Land Law Systems of Kenya*. Nairobi: Government Printers.
- RoK. 2004. *Report of the Commission of Inquiry into Illegal/Irregular Allocation of Land*. Nairobi: Government Printers.
- RoK. 2010. *Constitution of Kenya*. Nairobi: Government Printers.
- Ross, S. 1992. 'The rule of law and lawyers in Kenya', *Journal of Modern African Studies* 30, 3: 421–42.
- Society for International Development (SID). 2010. *Public Land, Historical Land Injustices and the New Constitution*. Nairobi: SID.
- Southall, R. 2005. 'The Ndung'u report: land & graft in Kenya', *Review of African Political Economy* 32, 103: 142–51.
- Thrupp, D. & C. Hornsby. 1998. *Multi-party Politics in Kenya: the Kenyatta and Moi states & the triumph of the system in the 1992 election*. Oxford: James Currey.
- Transparency International (TI). 2011. *Bribe Payers Index 2011*. Berlin: TI.
- Trubek, D. M. & A. Santos, eds. 2006. *The New Law and Economic Development: a critical appraisal*. Cambridge University Press.
- Widner, J. 1992. *The Rise of a Party-State in Kenya: from 'Harambee!' to 'Nyayo!'*. Berkeley, CA: University of California Press.
- World Justice Project. 2011. Available at: <http://worldjusticeproject.org/about>, accessed 1.12.11.
- Wrong, M. 2009. *It's Our Turn to Eat: the story of a Kenyan whistle-blower*. New York: Harper.
- Zagama, B. 2011. 'Land and power: the growing scandal surrounding the new wave of investments in land', Oxfam briefing paper 151. Oxford: Oxfam GB.

Newspapers (all published in Nairobi)

Daily Nation; The Standard; The Star.

Interviews

- Aronson, Michael, commissioner, Commission of Inquiry into the Illegal/Irregular Allocation of Land 2004; vice-chairman, Commission of Inquiry into the Land Law Systems of Kenya (1999–2002), Nairobi, 21.10.2011.
- Cottrell, Jill, academic; director, Katiba Institute, Nairobi, 26.10.2011.
- Ghai, Yash Pal, chairman, Kenya Constitutional Review Commission (2000–4); director, Katiba Institute, Nairobi, 26.10.2011.
- Lamba, Davinder, commissioner, Commission of Inquiry into the Illegal/Irregular Allocation of Land 2004; coordinator, Operation Firimbi campaign, Nairobi, 10.10.2011.
- Lumumba, Odenda, chairperson, Kenya Land Alliance, Nairobi, 31.10.2011.
- Mwathane, Ibrahim, former chairperson, Institution of Surveyors of Kenya; director, Land Development and Governance Institute, Kampala, 3.10.2011.
- Ndung'u, Paul, chairperson, Commission of Inquiry into the Illegal/Irregular Allocation of Land 2004, Nairobi 14.12.2011.
- Ubhi, Harpreet, partner, Daly and Figgs Advocates, Nairobi, 7.12.2011.
- Wanguhu, Charles, African Centre for Open Governance (Africog), Nairobi, 12.10.2011.
- Weru, Jane, executive director, Kituo cha Sheria (1993–2001); executive director, Akiba Mashinani Trust, Nairobi, 5.4.2012.