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The challenge of reforming land governance in Kenya under the 2010 Constitution*

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ABSTRACT

In August 2010, Kenya's citizens adopted a new Constitution. Intended to rein in an imperial presidency, the Constitution initiated one of the most ambitious governance reforms seen in Sub-Saharan Africa. 'Devolution' establishes 47 counties with extensive powers led by a directly elected governor and legislative assembly. The transition has exposed fault lines as actors struggle over the delineation of power. This paper presents the fight between the National Land Commission and the Ministry of Lands over the right to manage public land in the period 2013–2016. The paper argues that the difficulties associated with land reform arise because of the centrality of land allocation to the maintenance of power in the country. NLC's potential to transform land relations – by addressing land grabbing, effecting land redistribution, and ensuring land access by marginalised groups – is limited. This is due to the paucity of unallocated public land and the continued strength of Kenya's statist land tenure regime.

INTRODUCTION

In August 2010, Kenyan voters went to the polls to cast their vote in a widely anticipated national referendum. The subject of the vote, a proposed Constitution, had been a very long time in coming. Officially initiated in 2000 with the establishment of the Constitution of Kenya Review Commission, Kenya's constitutional process had proceeded in

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fits and starts with several competing versions of a new constitution debated and rejected before Parliament set this draft before the voters for approval (Ghai & Cottrell Ghai 2011; Kanyinga & Long 2012; Lumumba 2013).[1] This time Kenya's voters did not disappoint constitutional drafters. With a record turnout at 70% of 12·6 million registered voters, Kenyans voted overwhelmingly to adopt the new constitutional framework with 69% of the electorate casting affirmative votes and only 31% rejecting the proposal (Kramon & Posner 2011).

Voting for the new Constitution, however, appears to have been the smoothest part of Kenya's constitutional implementation process. The 2010 Constitution lays out a radical restructuring of governance institutions that the drafters clearly knew would take many years of concerted effort to bring into fruition.[2] Among the Constitution's most important provisions is a far-reaching decentralisation reform – referred to as devolution – which has established 47 independent governments called counties headed by elected executives known as governors. Moreover, the Constitution creates several new independent bodies with mandates to protect human rights, manage public land, vet members of the judiciary and deal with the details of governance (e.g. salaries and budgets.) Although there was a planned transition period between the passage of the Constitution in 2010 and the election of new leadership for counties and the Presidency in March 2013, the respective roles of many of the new political bodies have been insufficiently delineated with the net effect that the country is experiencing significant political jockeying and in-fighting amongst the various actors. Numerous fault lines have emerged – counties versus the national government, ministries against ministries, governors versus governors, governors versus senators, and even county assemblies against their own speakers and governors.

One of the most visible points of contestation arising with Kenya's 2010 Constitution is associated with the governance of land. Land – who owns it, how it is utilised, and how it is distributed across society – historically has been and continues to be a politically and emotionally divisive topic. Access to productive agricultural land and to valuable urban land in the country is highly unequal. The World Bank estimates the Gini coefficient for land inequality for all Kenyan households to be 0·832 as of 2005/2006, an increase of some 36% since 1997 (World Bank 2008: 109). In Nairobi province (now city-county), the Gini coefficient for land was even higher, an astonishing 0·993.[3] Highly inequitable land distribution is the result of many factors, including years of corrupt public land management by the central government, enabled

by the extraordinary concentration of power in the office of the President.

This paper presents a case study focused on institutional change and political contestation over the right to manage public land. Specifically, the paper looks at an independent body established by the Constitution, the National Land Commission, and its attempts to assume the mantle of public land management, a role formerly under the purview of the Ministry of Lands. Despite a strong legal basis for its power, the NLC has been effectively stymied by ministerial officials with the net effect that long-sought after land reforms are at risk. Building on the scholarly work on land governance and politics by Boone and MacAuslan, the paper argues that the difficulties associated with the reform were foreseeable given the role that the power to allocate public land has played in Kenya's political life. Moreover, the potential of the NLC to transform land relations in the country – by addressing historic injustices and grabbed land, effecting land redistribution to the landless, and ensuring access to land by historically marginalised groups, is limited. There are two main reasons for this: first, there is a paucity of unallocated public land remaining in the country. One cannot distribute what one does not have. Second, although the Constitution has altered elements of the legal framework on land, Kenya's primary land tenure regime is still 'statist' in intention and effect (Boone 2007, 2014). The national government remains the locus of control over land as it is firmly in control of land registration, regulation, and definition and enforcement of property rights and contracts. Devolved governance has some potential to be a counterweight here – but only if provisions for public participation, transparent communication, and citizen consultation are embraced in accordance with constitutional provisions.

The data used in the case study were gathered by two primary methods: key informant interviews and document analysis. Data were analysed using content analysis procedures in which interview notes and legal documents were transcribed and coded to undercover major themes and track changing legal provisions. Key informant interviews were conducted from September–December 2013, with four additional two-week visits in July and October 2014, March 2015 and May 2016. Approximately 60 interviews were conducted over the course of the fieldwork with national level elites, county government leaders, advocacy organisations active in the land sector, donor representatives, and members of professional organisations. Interview questions focused on the challenges facing Kenya's cities, past problems with land law and urban planning, and opportunities and challenges of the new

institutional framework. Due to the sensitivity of the topic, interviews were not recorded but extensive notes capturing short verbatim quotes were taken and transcribed by the researcher. This paper draws heavily from an examination of myriad governmental documents, including the suite of land laws passed in 2012 and amendments passed in 2016.

The paper is organised as follows. In the next section, I briefly review the 'land question' and its importance in the Kenyan political context in order to provide background for the land-related provisions of the 2010 Constitution. In the third section, I place the difficulties encountered in Kenya's land governance reform into the broader theoretical literature on land reform and land tenure reform in Sub-Saharan Africa. The fourth section draws from an analysis of legal documents, the popular press, and key informant interviews to provide an overview and analysis of the contestation between actors in the land. The final section discusses the potential future path for Kenya's contentious land reform and the implications of continued contestation over land institutions from the perspective of political theory and public policy.

KENYA'S 'LAND QUESTION' AND LEGAL PROVISIONS FOR LAND SECTOR REFORM

The history of Kenya and its political and economic trajectory is intimately tied to the issue of land and land rights, a subject that has garnered much scholarly attention (e.g. Harbeson 1973; Hunt 1984; Shipton *et al.* 1988; Okoth-Ogendo 1991; Kanyinga 2000; Boone 2012). Kenya was a settler colony and the Kenyan struggle for independence from Great Britain was largely fuelled by the injustice of extensive land acquisition by white settlers at the expense of indigenous peoples. The post-Independence period, however, left in place the colonial administrative apparatus over land; the institutions that so aided British settlers to avail themselves to the land of others worked equally well for the new Kenyan elite, particularly the leadership of the long-term ruling party, the Kenyan African National Union (KANU), and the country's first two presidents, Kenyatta and Moi. While some land redistribution did take place in the early years of independence, including large settlement schemes that moved groups such as the Kikuyu to the Rift Valley and Coast Provinces, many large former white farms were transferred intact to Kenya's new political class (Boone 2012). Equally divisive, claims to ancestral lands within the former reserves were also undermined and

reallocated to powerful local elites, often local government councillors and members of the Provincial Administration (Harbeson 2012).

The failure to redistribute land and address landlessness in the decades after Independence was exacerbated by the well-documented phenomenon of 'land grabbing' which reached its height in the 1990s under the Moi administration (KNCHR/KLA, no date; Klopp 2000; Southall 2005; Onoma 2008; Manji 2012). Public land under the purview of the Ministry of Lands (hereafter the Ministry), as well as trust land under the county councils, was handed out as a form of political patronage without following legally mandated procedures for publicly advertising plots and making allocations. Illegal land transactions were facilitated by a host of professionals, civil servants and parastatal employees as ministerial documents had to be forged, part development plans prepared, land physically surveyed, dubious legal titles registered, and pre-existing ownership claims in both national and local registries expunged. The breadth and depth of the corruption was extensively detailed in the Ndung'u Report, which estimated that 200,000 illegal land titles were issued overall in the decades after Independence with the majority of the illegal activity occurring from 1986 to 2002 (Ndung'u Commission 2004).

In 2009 a landmark document, the National Land Policy was produced by the Ministry (Republic of Kenya 2009). This policy had been under consideration for some time, but came to fruition due to the efforts of the Government of National Unity formed to unite a Kenya fractured by the 2007 election and subsequent ethnic violence (Cheeseman 2008). The document was praised for its in-depth analysis of the land question, particularly in rural settings, and the ambitious range of solutions identified to strengthen and reform land administration, security of tenure, land utilisation, land use planning, and the performance of the land market, to name a few (Bruce 2008; World Bank 2016).[4] The policy identified eight areas for special intervention such as historic injustices, land rights of various groups (e.g. pastoralists, women, internally displaced persons), and issues associated with particular geographic locales (i.e. Coast province, urban informal settlements). Proposed remedies ranged from soft (land inventories, review of extant laws) to hard (land restitution, resettlement).

The 2010 Constitution reflected many – *but not all* – of the objectives and recommendations of the National Land Policy. The Constitution effected three critical changes with great relevance to land management and resolving the land question. These were: (1) the introduction of devolved governance; (2) the creation of the National Land

Commission; and (3) the reformulation of land tenures and the mandate to rationalise land laws including those governing land titling and registration.

Devolution

Kenya's governance reform simplifies Kenya's governmental system into two tiers: the national government and the counties. While Kenya had previously adopted policies to decentralise functions to the district level, such as its District Focus for Rural Development, these policies had done little to shift power away from Nairobi. Devolution is decidedly different. It is expressly intended to foster local democracy and participatory self-governance; it was meant to be a counterweight to the 'imperial presidency and dominant central government fostered by the previous heavily amended constitution' (Lumumba 2013). Forty-seven county governments have been established using district boundaries from the 1990s. At least on paper, counties are strongly independent. They have a legislative branch (the County Assembly), an executive branch (the Governor, his deputy and an appointed cabinet), and a public service board charged with recruiting and overseeing county personnel. Counties have a wide range of functions and powers, including powers to raise revenues beyond their share of the national budget.

The National Land Commission

The second major change relates to the administration of land. To address endemic corruption and enhance transparency in land matters, the Constitution creates a new nine-member independent body to oversee public land management called the National Land Commission (NLC). This commission, which was originally proposed in the NLP, has multiple functions explicitly identified for it in law, including the National Land Commission Act.[5] The NLC is responsible for public land allocation and registration functions as well as oversight of land use planning throughout the country.[6] The body is tasked with developing and maintaining an effective land information system and facilitating property taxation. The NLC has been charged with addressing the historic land injustices identified in the Ndung'u Report. Finally, in keeping with devolved government, the NLC is charged with decentralising land administration by establishing county-level land management boards. These boards are responsible for processing

key land transactions such as allocation of public land, change of user, and land subdivision. Figure 1 illustrates the NLC's broad mandate and its multiple and rather ill-defined roles as delineated in the 2012 land laws.[7]

The establishment of county governments and the NLC has radically altered the terrain for the Ministry. This is not accidental – a primary objective of both the National Land Policy and the Constitution was to foster more efficient, effective and fair land administration, create transparency in public land management, and eliminate rampant corruption in the land sector. This was done by an intentional reduction of the power of the Ministry of Lands and the movement of the land oversight function to the local level. In the National Land Policy, the role of the ministry was clearly residual. The NLC was to have operational autonomy, decentralised offices, and critical titling and registration functions. The Ministry was identified as a 'supporting agency' charged with giving policy direction, mobilising resources, facilitating implementation of land reforms, and monitoring land sector performance including oversight of professional bodies in the land sector. The Ministry was charged with 'rationalising its functions' and investigating privatisation of services like survey, valuation and physical planning (Republic of Kenya 2009: 58). In contrast with the detail of the NLP, the Constitution makes no reference at all to specific ministries, rather it leaves the composition of ministries up to the President but does limit the number to a minimum of 14 and no more than 22.[8]

Changes in land law

The National Land Policy also called for the rationalisation of laws for land titling and registration and a restructuring of land classifications. This was reflected in the 2010 Constitution. Pursuant to its adoption, seven extant land acts were repealed and two replacement acts – the 2012 Land Act and the 2012 Land Registration Act – were passed.[9] These two laws require the development of just one registration system and one land registry. The Land Act changed the terminology related to titling to make tenure clearer: titles are to be called certificates of lease or certificates of title. Under the new laws, land is now in three classifications: (1) Public Land (e.g. unalienated land, forests, tidal lands); (2) Private Land (includes all land held privately under freehold or leasehold tenure); and (3) Community Land (e.g. former group ranches, remaining trust land). Policymakers hoped that a streamlined,

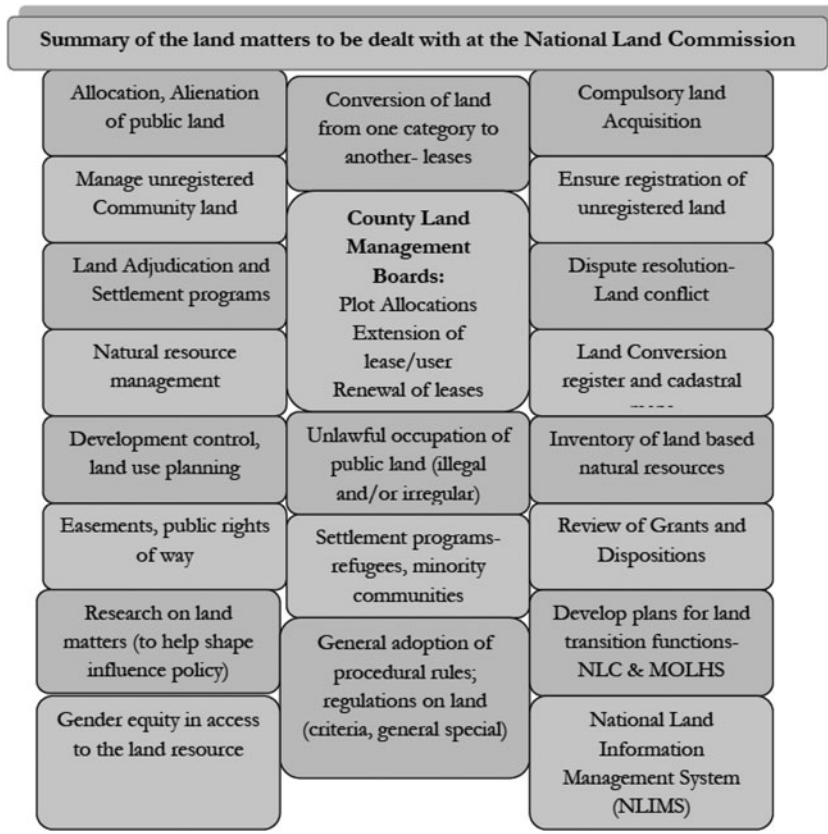

Figure 1 Source: National Land Commission, *Final progress report, 2014*. National Land Commission, Nairobi, Kenya (2014).

coherent land registration system would enhance tenure security, land market performance, and private sector investor confidence – all of these had been negatively impacted by the opaque, unreliable, and inefficient land administration by the Ministry (Kenya Property Developers Association 2010).

THE DIFFICULTY OF REFORMING LAND INSTITUTIONS

While devolution and the establishment of county governments is an unusual reform, the land sector reform introduced by the 2010 Constitution is hardly an isolated event in Sub-Saharan Africa. Over the last four decades, numerous countries have instituted legal reforms affecting land. The most ambitious and difficult land reform

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programme was that adopted by the African National Congress (ANC) upon assuming power in 1994 which sought to heal the wounds and injustices of Apartheid though a complex programme of land redistribution, restitution and tenure reform (Walker 2005). In East Africa, both Uganda and Tanzania passed land laws in the 1990s aimed at reformulating land relations and enhancing security of tenure. Uganda boldly exclaimed in its 1995 Constitution that 'the land belongs to the citizens of Uganda', a provision meant to indicate the end of *de jure* nationalisation decreed by President Idi Amin (Green 2006; Alden Wily 2011). Likewise, Tanzania passed two land laws in 1999 instigating a 'radical transformation of land rights in the country' which altered tenure institutions and land administration (McAuslan 1998; Pallotti 2008).

In his analysis of the new land laws in Eastern Africa, McAuslan (2013) identifies two major categories of land reform: 'traditional approaches' and 'transformative approaches'. The traditional approach maintains the imprint of colonialism – vesting land in the state, maintaining a dual structure of recognised rights for a few and tenancy at will for the majority, and promoting private tenures that help commodify land to fit market objectives. In contrast, the transformative approach has social and spatial justice at its core and seeks to redistribute rights and opportunities to those who have been discriminated against. Most transformative approaches have created or maintained legal space for community-based property. He finds, however, that most reforms are really a mix of traditional and transformational with some countries doing both in tandem or favouring first one policy then the other over time. Kenya's NLP, Constitution, and the subsequent land acts are illustrative – the NLP was clearly transformational in intent. It laid out objectives for more transparent land management and defensible community land rights, but the execution of its spatial justice/redistributive components are not reflected in the Constitution, subsequent legislation, or implementation activities to date (Manji 2015).

The difficulties encountered in effecting transformational land law arise from the fact that such reforms threaten to alter the balance of power between the state and society (Alden Wily 2000; Boone 2007, 2014; Onoma 2008; Manji 2014). In her multi-country study of land tenure and its central role in rural African political outcomes, Boone (2014) identifies two main types of land tenure regimes: neo-customary regimes and statist land tenure regimes. As the name implies, neo-customary regimes have some limited resemblance to customary rules – most particularly that the right to access land is generally linked to belonging to a place or ethnic grouping. Land access is controlled by

local elites, whose powers generally arise from lineage but can also derive from state sanction (e.g. administrative chiefs). In contrast, in statist land tenure regimes allocation of land is done directly by agents representing the state, usually the national government. State agents confer land rights through multiple processes including direct allocation of public land, establishment of settlement schemes, and implementation of adjudication processes, as well as through general powers over land regulation and contracts. Statist regimes purport to extinguish customary or ancestral claims to land – the right to access land is open to all in all locales and is based upon national citizenship. Most countries have a mix of both regimes in their land governance – in Kenya, for instance, the categories of public and private land fall under the statist land tenure regime, whereas community land – mainly former trust land – represents a neo-customary regime.

Boone argues that these two broad land tenure regimes have different implications for power, social stability and notions of citizenship. Statist regimes foster a dependency on the state – in-migrants to new settlement areas such as agricultural settlement schemes or designated urban areas, for instance, are beholden to the central state for access. They are in effect 'national citizens'. The state legitimises their rights as 'strangers' to access and stay on land that historically may have been or is currently viewed as belonging to a particular ethnic group. Importantly, she notes that private property tenures are a variant of a statist regime as market-based allocations of land take place under the rules and regulations established and enforced by the state. Neo-customary regimes with their element of local or familial control, in contrast, foster allegiances to local level elites outside the national government. In this regime, citizenship is sub-national and often ethnically defined. Conflict may arise in either type of regime: the state may signal a withdrawal of support for the resident stranger enabling land-based violence along ethnic lines or family members deny land claims to the less powerful, particularly in situations of land scarcity. Difficulties in land reform processes then should clearly be expected as they not only challenge the status quo relative to power over and distribution of land, but they necessitate the reformulation of citizenship and governance structures.

Dissected using this lens, Kenya's on-going land reform is complicated and perhaps even contradictory in its objectives. The Constitution recognises that land in Kenya belongs to all citizens (hence underlining national citizenship), but it also recognises community interests in land and mandates appropriate supportive legislation for awarding land to communities identified by ethnicity, culture or other interests.

The reform argues for *de jure* recognition of user rights, but faces the challenge that many users occupy land that certain communities claim as their own, asserting it was lost through unjust or corrupt practices (Anderson & Lochery 2008; Syagga & Mwenda 2010). The reform bridles against the power of the central state and the President over land and aims to break that patronage link and its corrupt consequences. But the reform does not eliminate the importance of the central state – instead it substitutes a new, unelected powerful central administrator, the NLC. In establishing the NLC, the reform relies upon safeguards against continued corruption that are mainly structural and procedural, namely the establishment of a large autonomous commission of professionals (presumably too large for collusion), sunshine provisions requiring open meetings and citizen participation, and a devolved structure of land boards accountable to the NLC but scrutinised by county governors and their constituencies. Finally, the reform represents a challenge to existing local level elites with power over land by establishing devolved governance with powerful governors and county land management boards.[10]

Given these tensions and complexities, what are the prospects for success in land reform in Kenya?

CONTESTATION IN KENYA'S LAND GOVERNANCE REFORMS

It perhaps does not come as a surprise that implementation of Kenya's land sector reforms has been difficult. One critical dimension, of course, is that it is taking place within the context of devolution – itself a complex, ambitious and transformational governance project. In this section I provide an overview of one critical point of contestation, namely the fight over the power to allocate and register public land.

The Land Registration Function (1): Ministry of Lands and Physical Planning[11] vs the NLC

The National Land Commission was put in place to address the over-centralisation of land power in the central government and the Presidency that culminated in unabated corruption and poor land management at the Ministry of Lands. Not surprisingly, the NLC has faced considerable challenges since its inception. The NLC was only sworn into office following a High Court decision in February 2013 forcing President Kibaki to gazette the names of the nine-member commission, which

had been approved by Parliament in August 2012 (Fayo 2013). While not publicly disparaging the commission, the Kenyatta administration has tried to starve the NLC and obstruct its activity since assuming power in 2013. The commission did not get budgetary support for office space, equipment and operating expenses until several months into its existence; the United States government through USAID provided funding for its initial start-up costs, including paying rent for its first offices and providing funding for computers (USAID 2014).[12] The commission has continued to be grossly underfunded by the national government with its 2013–2014 budgetary allocation being only 6% of its request; the 2014–2015 allocation was even lower at 3% (National Land Commission 2014). The commission's establishment has been haltingly filled with new recruits as well as officers seconded from the Ministry. These officers, however, were threatened with recall in March 2014 as the 'war' between the Ministry and the NLC began to heat up (Oruko 2014). The Ministry also threatened to evict the NLC from Ardhi House (the Ministry's building) (Njagi 2015).

The most acrimonious face off, however, came over access to the land registry and the power to allocate public land. NLC argued that it has the power to prepare and execute leases on public land. It needs access to the registry for that and to work on myriad tasks associated with land claims and historic injustices. The Ministry, led until April 2015 by Cabinet Secretary Charity Ngilu, argued that the NLC is only an advisory body that serves to make recommendations to the Ministry. Using the powers identified for the Ministry in Executive Order Number 2 of 2013, which detailed the organisation of the GOK under Kenyatta 'in line with the Constitution of Kenya', the Secretary adroitly stonewalled the NLC while continuing to use the allocation of public land as a way to cultivate political allegiance for the majority party, Jubilee (Republic of Kenya 2013).

To give an idea of some of the initial chaos in the land sector reform: In August 2013, the President made a public spectacle of issuing 60,000 title deeds to the landless in the Coast region (Ringa 2013). Muhammad Swazuri, the chair of the NLC, later declared these deeds null and void as it was not the constitutional mandate of the Ministry to allocate land. (The NLC later issued some 10,000 title deeds in the same area in May 2014 without ministerial consultation.) In November 2013 Ngilu created a new position of Director General of Lands – an illegal ministerial appointment that got her called in front of the National Assembly to defend. (The position was rescinded.) In May 2014, Ngilu announced the ministry would conduct an 'audit' of the central land

registries in order to reorganise them so as to 'ensure efficient administration and management of land resources' (quoted in Guguyu 2014). As part of this, the Ministry suspended all land transactions and placed police on the floors housing the NLC, reportedly not allowing them to move from office to office without showing identification. The NLC publicly expressed fear that the records or registers might be tampered with thus affecting NLC operations. When the audit discovered some 10,000 files that Ngilu had previously identified as missing – allegedly at the hands of members of so-called 'corruption cartels' within the Ministry – observers of Kenya's land sector were understandably sceptical (Mbaka 2014a, 2014b).[13] In the meantime, illegal allocations and cases of land grabbing continued – including a much-publicised grab of 134 acres of land in the posh Nairobi suburb of Karen (*Kenya Confidential* 2015). Ngilu was suspended and charged with obstructing justice in relation to this case (Leftie 2015). She was officially removed from office in November 2015.

The battle between NLC and the Ministry proved delicious fodder for editorialists, bloggers and commentators. Gado, Kenya's leading political cartoonist, depicted this contestation as taking place between an assertive Ngilu and a hapless Swazuri.[14] Four of his cartoons exemplify the contestation (Figures 2–5). In one, the crippling minefield of the land question is acknowledged as is its British origin; in a second, Ngilu is depicted as the Pied Piper leading entranced citizens to some questionable destiny by strewing a trail of title deeds.[15] More provocatively, Ngilu is shown employing her feminine wiles. She is the centre of much attention as a scantily clad pole dancer, surrounded by various representatives of the land oligarchy including speculators, energy barons, and the Chinese, while Swazuri is the low status servant. Finally, dancing and singing, she is shown wiggling to a tune with a message ('make sure you control the National Land Commission'). Wanjiku, Gado's longstanding character representing an archetypal rural woman, advises Swazuri that he needs to 'go to the guy paying for the tune' in order to deal with her.[16] The implication, of course, is 'the guy' is the President.

The Land Registration Function (2): MLPP vs NLC and the Counties

As per the Constitution, oversight over land must be harmonised with devolved governance. In the NLC Act of 2012, the Commission was charged with setting up county land management boards (CLMBs) in

Figure 2 50 Years On … #Land; Date: 11 August 2014. Publication: *The Daily Nation*. Source: <http://gadocartoons.com>.

each of the 47 counties, as well as county-level offices for the NLC and the Land Registrar.[17] The specific responsibilities and composition of the CLMBs, however, were not fully spelled out in the acts (Korir Sing'Oei, No Date). The NLC, in consultation with land sector actors, drafted regulations for CLMBs and moved forward to advertise and fill CLMBs. County governors were not given direct powers to appoint, but NLC instituted a consultative process that brought most governors along. County land management board responsibilities included processing applications for allocation of land, changing and extension of user, subdivision of public land and renewal of leases; as such they are subject to and an integral part of the implementation of county level plans (Mwathane 2013). As of early 2016, most county land boards have been formed and their membership confirmed by County Assemblies. Establishing these bodies under the NLC was an especially unwelcome development for the Ministry which saw these functions as properly belonging to trained professionals and a further erosion of its power.

The Supreme Court weighs in

To clarify roles between the NLC and the Ministry, the NLC appealed to the country's Supreme Court in 2014. Two opinions resulted. In its first

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Figure 3 Ngilu & the National Land Commission; Date: 24 July 2014. Publication: *The Daily Nation*. Source: <http://gadocartoons.com>.

advisory opinion issued in October 2014 the substantive issues were not decided. Rather the court spent the majority of its 64-page opinion weighing whether or not it had jurisdiction. Under the Constitution, advisory opinions by the Supreme Court can be done only for the national government, any State organ, or any county government with 'respect to any matter concerning county government' (Kenya Supreme Court (KSC) 2014). While it decided it did have such power (as the NLC is a state organ and the laws affected county government), the Court declined to decide on specific claims and instead gave the two bodies a 90-day period for 'reconciliation and harmonious division of responsibility' (KSC 2014: 61). Mediation, however, failed and the NLC returned to the Court in June of 2015.

In its second substantive ruling issued in December 2015 the Court clarified and narrowed the powers of the NLC. The Constitution, it noted, gave the NLC jurisdiction just over *public* land, not all the land of Kenya (Kenya Supreme Court (KSC) 2015). Accordingly, a number of functions claimed by the NLC by virtue of the 2012 Acts could not be its alone. Relative to revised land categories, the Court ruled that 'the Commission has not special claim to the remit of administering

Figure 4 Land Reforms, so far. Date: 11 October 2014. Publication: *The Daily Nation*. Source: <http://gadocartoons.com>.

or managing community land' (KSC 2015: 94). It found that the power to register land and maintain the registry belonged to the Ministry because:

> It is clear to us that the function of 'registration of title' is not with reference specifically to 'public land'. Registration is conceived to entail all categories of land; and in our view, fragmenting title issuance – such a crucial indicia of the fundamental right of property – could not possibly have been in contemplation during the legislative process. For such would not only negate constitutional principle, but would probably breed such anarchy and abuse, as would certainly harm the public interest. *Land title, the symbol of a vital asset, requires the effectual and conclusive mechanisms of the State's most central agency.* (Italics in original.) (KSC 2015: 123)

In the ruling the Court actively acknowledged the necessity of better land governance. The NLC was cast as the pivotal body in devolved land management, which must work both with the counties and the Ministry. Stressing that 'neither the Ministry nor the NLC is in a position to perform its task in isolation' the court's opinion contained a consistent appeal for collaboration, cooperation, and communication amongst land actors (KSC 2015: 98). In his concurrence, the Chief Justice, Willy Mutunga, emphasised the need for 'significant mental shifts' about

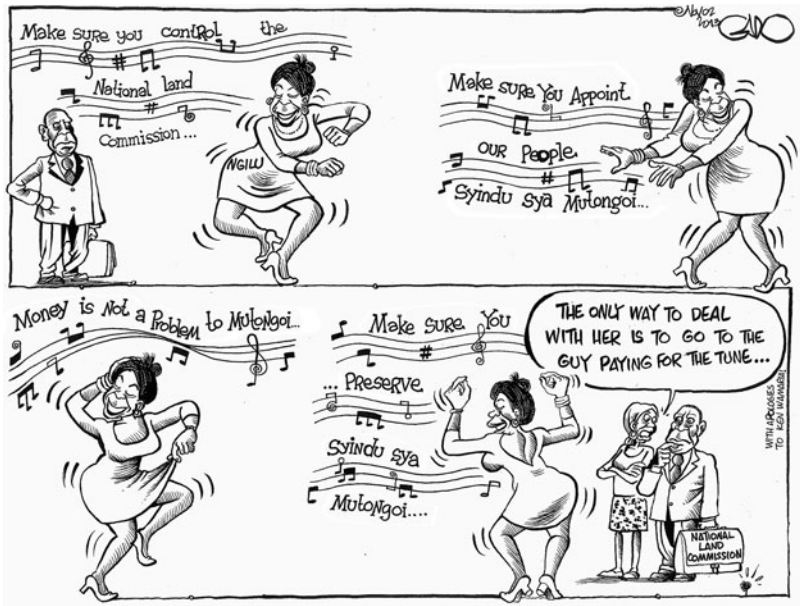

Figure 5 National Land Commission; Date: 3 November 2013; Publication: *The Daily Nation*. Source: <http://gadocartoons.com>.

public participation amongst the country's leaders and observing that 'without massive participation of the people, the realisation of these pillars of good governance could become weak and subject to manipulation by the forces of the *status quo*' (KSC 2015: 154).

Land advocates argue that the court ruling, while disappointing, is not a lethal blow. They note that on balance the NLC has not fared too badly. It has had its role as the lead actor in public land management affirmed even though the breadth of its powers (and ambitions) has been curtailed.[18]

The Land Law (Amendments) Act of 2016

In August 2015, while NLC's appeal to the Supreme Court was still in process, the Kenyan Parliament stepped into the fray. Omnibus legislation known as the Land Law (Amendments) Bill was introduced in Parliament by the majority party, Jubilee (Republic of Kenya 2015). It amended the three main land laws from 2012: The Land Act, the Land Registration Act and the National Land Commission Act. In its initial draft form of some 92 pages, the objective of reducing the

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power of the NLC and counties over land was clear with the myriad roles identified for the Commission in these laws transferred to the Cabinet Secretary by what appeared to be a simple search and replace function.

Reaction to the initial draft of the land amendments was swift and unequivocal – at least from the counties and the NLC. The head of the Council of Governors (COG), Peter Munya, was quoted as suspecting 'some people must be engineering … legislation to snatch away powers of the lands commission' (*Daily Nation*, Nov. 2015). Isaak Ruto, the Governor of Bomet and former head of the COG renowned for tangling with the national government over county powers, mused that returning the power of land management to the ministry might increase 'corruption opportunities' (*Daily Nation*, Oct. 2015). At a public symposium on land issues in the coastal region, NLC Commissioner Khalif asserted that the amendment bill would 'not only erode [or] render the Commission powerless but it [is] also a recipe for land conflicts' (National Land Commission 2015).

The version enacted in September 2016, however, is more restrained. In the amended Land Registration Act, the power to register land and maintain the registry is now firmly the remit of the Ministry (in keeping with the Supreme Court decision above). The act designates a hierarchy of registrars – including county level registrars – and their requisite credentials. The Commission and the counties have rights of access to the records and the Commission gets to keep copies of cadastral maps relating to public land. Notably in this act and in the NLC Act, the main body for devolved land governance and greater accountability in land decision making, the county land management board, is completely eliminated. Its functions apparently are picked up by the county executive in charge of land and the county registrar.

The amended Land Act, similarly, effects limitations on the Commission's powers. While the Commission still has the power to establish and maintain the public land register, its leading role in land allocation is weaken as the new language casts the Commission as a passive actor. The language of the 2012 statute read 'The Commission may, on behalf of the National or county governments, allocate public land.' The amended language shifts the power to initiate the allocation of public land to the national or county government:

> Whenever the national or county government is satisfied that it may be necessary to allocate the whole or part of a specific public land, the Cabinet Secretary or the County Executive Committee member for matters relating to land shall submit a request to the Commission for the necessary action. (Land Law Amendments, 2016: 579)

The Commission's right to reserve public land for future purposes is also now only in response to a request by the national or county governments. Finally, the amendments strip the NLC of power over settlement programmes that work to grant land to squatters or persons displaced by conservation actions, development projects and/or internal conflicts. The original law indicated the Commission 'shall, on behalf of the national and county governments, implement settlement programmes' whereas it now grants that power to the national government 'in consultation with the Commission and the respective county governments'. This change presumably is necessary as resettlement programmes involve all categories of land, not just public land.

Not unexpectedly, the NLC Act of 2012 underwent extensive changes. Section 5 of this law lays out the Commission's functions with the first part of the section reiterating the NLC's constitutional mandate and the second part detailing additional legislatively granted powers. As such the 2016 Amendments only affect the additional powers and requirements conveyed by the NLC Act. Four notable changes were made. The mandate to provide an effective land information management system is softened – the NCL 'may' develop one instead. In keeping with the Supreme Court's decision NLC's power to manage trust and community land is removed as these categories of land are not public land. The NLC also loses the mandate to develop and encourage alternative dispute resolution processes and mechanism. Its mandate to register all land within 10 years is also eliminated, again because that requirement encompasses private and community land.

The most substantive changes relate to the NLC's uncontested constitutional role to investigate historic injustices. Whereas the 2012 NLC Act granted the NLC the power to recommend to Parliament appropriate legislation to facilitate this work, the 2016 Amendments are proscriptive. They lay out just what constitutes a historical land injustice, under what circumstances the NLC can investigate, and how quickly a claim must be lodged. Historic injustices have five basic criteria – in terms of time they must have occurred between the time of the British East African Protectorate and 27 August 2010 when the Constitution came into effect. (Thus, presumably instances of corruption and land grabbing after that date are not appealable to the NLC.) Although the language that the NLC may initiate investigations remains in Section 5(1)(e), the amendments describe a more passive role by indicating that the 'Commission shall receive, admit and investigate all historical land injustice complaints' (Land Law (Amendment) Act, 38. 15·1). The Commission can only act, however, on a claim that 'has not or is not

capable of being addressed through the ordinary court system'. Finally, the claims must be brought quickly – within five years of the passage of these amendments. Taken together these changes appear to weaken the NLC's powers and undermine the prospect for land justice. There is one notable exception: the 2016 Act does not give government officers indemnity – whereas the first draft included a paragraph declaring that government officers 'shall not be compelled to produce any document or object which could be used against him or her in criminal trial' (Land Laws (Amendment Bill) 2015).

Finally, the independence of the NLC remains. Under the original amendments submitted to Parliament in 2015, the committee to select NLC commissioners – comprised of the office of the President, the Cabinet Secretary for Lands, civil society organisations, professional societies and the National Gender and Equality Commission – had been replaced by the Public Service Commission, a move that threatened to undermine the independence of the body (Klopp & Lumumba 2016). In the final act, the original committee membership detailed in the 2012 law remains. The President, moreover, loses his power to stonewall appointments – they become automatic 21 days after approval by Parliament.

Land Reform: Insights from Key Informants

The difficulty of implementing constitutional reforms for land management, while a disappointment, has not come as a surprise for non-government land sector actors and other key informants interviewed over the last three years. But opinions as to why land reform was faltering varied across interviews with the attribution of blame being widely distributed. For some informants, contestation between the NLC and the Ministry was just part of the larger political struggle associated with constitutional reform – it was just another tactic to undermine devolution by the national government. According to this perspective, the key villain is the Jubilee Government which several informants averred was 'against devolution' or trying to 'kill devolution' by ensuring the failure of hotly desired land reforms.[19] Deputy President William Ruto was identified by several as chief culprit as 'he was the leader of the No campaign' in the 2010 constitutional referendum. One key informant pointed to the appointment of Ngilu to the Ministry as a sure sign of ill intent – '[under the Constitution] CSs are supposed to be technocrats, she's a politician just like Balala'.[20] Another indicated that she

was a member of the land cartel and while she might publicly talk about reforming the ministry 'her boyfriend is a big land grabber'.[21] One informant reflected that land reform could 'never be Uhuru's issue – they say he owns a third of the country'.[22]

For others, the lack of progress in effecting the institutional changes around land was a secondary effect – the consequence of a poorly planned and executed transition to devolved governance. For these observers, the performance of the Transition Authority (TA) was a critical element affecting land reform. Created by Parliament to facilitate the transition to devolved government, the TA had a large mandate including creating the framework for the transfer of functions and resources (including staff) for each devolved function and assessing capacity and resource needs of both national and county government. The leadership of the TA was appointed on 19 June 2012 almost two years after the constitutional referendum; it had a mere nine months to work before the March 2013 elections that ushered in county government (Wanambisi 2012). A shortage of time was not its only challenge as it was thinly staffed and under-resourced (Andae 2015).

Informants asserted various opinions about the TA. The TA 'could have done a better job' since 'many things were not given high attention'.[23] 'The Transition authority did not do what was envisioned, [but] it had a huge mandate and little time.'[24] A critical task for the TA was to inventory public assets – including public land – and in many counties this did not get completed in a comprehensive manner. As a result, counties and their CLMBs are disadvantaged – they don't know their public land base and they don't know if it is allocated and/or titled.[25] This is affecting progress at the county level as 'governors are waking up to the fact that they have no land'.[26] Informants differed in their explanations of the TA's performance. For some, the TA's performance was because it 'was designed to fail' due to a lack of budgetary, personnel and material support; this was just part of a broader strategy by President Kibaki and then later Jubilee leaders to undermine independent commissions important to the constitutional transformation.[27] TA 'never had enough time or resources and that was intentional just like NLC'.[28] For others the TA knew it had 'critical technical work but important decisions [to act] were not taken'.[29] As a result, several informants observed that devolution came fast: 'We prepared for it but really it just hit us in the face.' 'Despite the fact that we had a lot of commissions and authorities that sat – the change came too quickly.' 'Elections came in March, then the governors. We weren't ready.'[30]

Other informants distinguished between the difficulties facing devolution and those affecting land reform. Several informants lay the blame for land reform difficulties on land sector reformers themselves. A member of the donor community commented that 'a lot of the detail of the NLP failed to get into the Constitution' and that 'drafting of the 2012 legislation was done by a buddy of [then Minister] Orengo'. He noted that 'there was a lot of friction over those laws' and 'granting powers that way was is not a good strategy as laws can change'.[31] Another non-governmental land sector actor underlined the disappointment with the laws saying 'they were given to a consultant to draft in order to make deadlines. There was little participation and … so much has been left to be done by regulation.'[32] Commissioners themselves came up for scrutiny with the leader of the NLC being variously described as 'weak', 'not forceful enough' or 'not the personality we need, we need a Ruto!'[33] (The Ruto being referenced is Isaac Ruto, the Bomet Governor and forceful first term leader of the Council of Governors.) 'NLC is disappointing. For me, they've not gone forward with a 'big bang.' They've not rolled out their programme and power.'[34]

In contrast, others felt the crux of the problem was that the Commission was too ambitious and its supporters politically naïve: 'We must respect the ministry; it has a role in land. We are giving a bad impression in fighting them.'[35] NLC leaders, in this narrative, interpreted its responsibilities (captured in Figure 1) by looking to the NLP and not relying on the Constitution. A land advocate explained that the chapter on land in Constitution was inserted late, noting that at one point in the constitutional negotiations '(at Naivasha) they [Parliamentary Select Committee on the Constitution] deleted provisions on land'.[36] As a result, the Constitution created a less powerful NLC than what was intended by the NLP. Similarly, 'ODM failed us in Naivasha.'[37] Similarly, another member of the donor community commented that 'civil society got out manoeuvred' on land reform. He noted that a lot of the 'noisy NGOs are really small outfits' and they lack capacity to keep track of all the complexities of the transition.[38]

A final perspective shared by a handful of informants lays the blame for problems with the land reform process on a complacent Kenyan society. Respondents here cited unchanged attitudes toward corruption and patronage using the country's land resources. A university faculty member observed that 'we need to change our mind set – people want land and expect government will still give it, look at the coast.'[39] An NGO employee working on peacebuilding in ethnically divided slums noted that slum dwellers 'still believe the central government is

in charge'. Their expectations of benefits are high but their lives are still the same, 'I always ask them now that Uhuru is president, do we find the tables filled with tea? No!'[40] Compared with other countries, one international donor observed, 'community has eroded so much'. In Kenya, 'everyone wants an individual title' and they expect titles from the Ministry 'even if they are cheated like the demolitions at the airport, those titles looked genuine and people paid'.[41] More gently, a former land professional felt the underlying issue was legal ignorance: 'people are not conscious about the changes, they are not well equipped with information; there's been only minimal work to raise awareness'.[42]

In the face of all this uncertainty over its role and future, the NLC for its part is soldiering on by completing critical tasks such as undertaking a comprehensive inventory of all land for the National Land Information Management System (NLIMS), building capacity in counties related to planning, and tackling historic injustices, including drafting enabling legislation in 2015 to support that work. (Not surprisingly this legislation has languished in Parliament.[43]) Despite the calls for greater cooperation and new leadership at the Ministry, informants note that there is still evident deep seated resistance to change at the Ministry.[44] The old system has not been fully dismantled and the continued allocations of public land by the Ministry constitute an illegitimate parallel system. NLC leadership characterises their relationship with the Ministry as a 'marriage in need of repair'.[45] Accordingly, an avowed goal for this first group of Commissioners is fixing the marital institution and establishing the functional independence of the NLC.

CONCLUSION

What does the contestation between the NLC and the Ministry mean for our understanding of land reform and politics, both theoretically and in application to Kenya? Returning to Boone's insights, given Kenya's statist land tenure regime and the importance of land to systems of political patronage and the maintenance of power at the centre, the active obstruction of the work of the NLC and undermining of devolved land institutions could have been foreseen. The pre-devolution administrative apparatus for land allocation and management, while dysfunctional for the majority, has been so lucrative for so long for so few – and those few, a very powerful political and economic elite, do not want to see that change. Undoing the land legislation from 2012 and maintaining a grip over functions of land allocation, registration and survey are central to maintaining the status quo for the land oligarchy.

It is questionable, moreover, whether the NLC with its powers constitutionally limited to public land can achieve the transformational intent of the 2009 National Land Policy, particularly its redistributive and economic justice objectives. There are two reasons for this. First, there is virtually no unallocated public land left.[46] While good data on Kenya's land ownership are notoriously hard to obtain, UN-Habitat (2010) estimated in 2010 that public land within urban areas was almost entirely privatised following illegal allocations in the 1980s and 1990s. In its Nairobi Master Plan, the Japanese International Cooperation Agency (JICA) estimated that only 2·3% of the city/county's land area was unalienated public land (JICA 2014: 2–26).[47] Untitled land exists but it is primarily in rural areas and constitutes community land outside of NLC's jurisdiction.[48] Public land is simply not an available resource to meet pent up hunger for land and redistributing land from large-scale land owners appears politically untenable.

A second reason relates to the relatively intact character of Kenya's statist land tenure regime. Even without full control of public land, the Ministry is inherently powerful due to its control of the registry and its power to regulate private land and structure the land market. Access to and control of the land registry is a critical factor in corrupt land dealings. Relatively recent scandals, such as the attempted grabbing of land at a Nairobi primary school in Langata and the allocation of 134 acres in Karen, suggest that the thirst for more land on the part of the country's elite is unquenched (*Daily Nation* 2014; Gayle 2015). While it is possible that some of the redistributional/land justice objectives of the reform can be realised through the process of resolving historic injustices identified in the Ndung'u Report, the amended language in the NLC Act raises serious concerns about the ability of the Commission to move forward aggressively with a task that had already been dubbed as potentially 'mission impossible' (African Center for Open Governance 2009).

Pushing the land reform agenda forward will require reinvigorated effort and cooperation between land activists, county governments and the donor community. Most particularly it will require greater participation and vigilance by a broader base of Kenyan society. Land activists admit they cannot do this alone.[49] The active undermining of the NLC detailed above was to some measure assisted by the relative quiescence of land sector actors in the immediate aftermath of the 2013 election, when outspoken advocates for land justice who had played such an instrumental role in drafting the land policy and constitutional provisions were less publicly visible and vocal about land sector wrangling

than in the past. This was reportedly due to fatigue after so many years of advocacy, compounded by the intimidation of civil society actors that followed the levying of charges of crimes against humanity against the President and Deputy President at the International Criminal Court in 2013.[50]

There are signs of reinvigoration. County governors realise they need public land to accomplish their development agenda and some are openly wrangling with the Ministry about past land allocations. Various counties are inventorying and mapping public land. Before their dissolution, these inventories had been spearheaded by county CLMBs with assistance from NLC.[51] The NLIMS, which is producing land data (records, scanned plans and survey documents) never publicly availed by the Ministry, appears a critical shared resource and potential opportunity for inter-agency cooperation. The donor community is working in the background to support devolution and strengthen public land management. Land advocates and community members are mobilising to identify and protect public land. Initiatives such as GROOTS-Kenya (Grassroots Organisations Operating Together in Sisterhood) offer an inspiring example. GROOTs is training rural women to inventory and map public land using GPS units. Their work, which began in Lari sub-county in Kiambu, is now spreading to neighbouring Muranga County (Mwaura-Muiru & Githuku 2016). The widespread adoption of such a participatory approach to public land inventories would greatly aid counties and the NLC.[52]

The on-going fight over the land function and its lack of resolution reflects a broader challenge affecting Kenya's new devolved governance framework: how to empower local citizens and facilitate meaningful civic participation. The competition between these national level actors has resulted in great confusion amongst ordinary Kenyans about the country's land reforms. A survey by the Land Development and Governance Institute showed that 68% of respondents did not know the mandate and functions of the NLC and could not differentiate between the functions of the Ministry and the NLC (Land Development and Governance Institute 2014). It is hard to effectively participate in democratic processes and demand transparency and accountability if you can't figure out who has power and responsibility and who does not. The dramas of the land sector struggle bring to mind an oft used Swahili proverb – 'when elephants fight, the grass suffers'. Clearly the losers in this power struggle are the masses of Kenyans who had hoped that after all this time and effort land reform and land justice would finally prevail. They are still waiting.

NOTES

1. Ethnically targeted post-election violence following the 2007 Presidential election played an important role in the eventual formulation of a constitution acceptable to the electorate in 2010.

2. The Constitution includes a commission to provide oversight on the implementation process, namely the Commission to Implement the Constitution. This Commission was put in place to ensure that the legislation required in Schedule 5 was completed. The body was dissolved at the end of December 2015 at which time 12 laws necessary for the constitutional reform had yet to be enacted. CIC's oversight functions have been taken up by the Kenya Law Reform Commission.

3. Gini coefficients are interpreted on a scale of 0 to 1. The closer the score is to 1, the higher the level of inequality. Kenya's scores place its overall land inequality on par with Latin American societies.

4. Not all analysts agreed that the policy was on track. See the critique on pastoral communities in Norton-Griffiths *et al.* (2008).

5. The Constitution identifies nine functions for the NLC; the National Land Commission Act of 2012 identifies 12 functions; the Land Registration Act, 2012 identifies six functions.

6. The NLC's enabling legislation requires that it completes the registration of all unregistered land in the country within 10 years of the commencement of the act.

7. A quick illustration of how confused the mandate was might be useful here. Amongst the responsibilities given to the NLC was development control and land use planning. This task, however, also was the responsibility of county government; oversight and planning has been the long-time preserve of the Department of Physical Planning. This role, thus, set the NLC up for conflict both at the local and national level. A good critique of the 2012 land laws is contained in Manji (2015).

8. Until November 2015 the Kenyatta administration had 19 Cabinet Secretaries. On 25 November, President Kenyatta announced a cabinet reshuffle. He replaced five cabinet secretaries who had been suspended pending various corruption changes, including the CS for Land, Housing and Urban Development. An additional cabinet member was added; the current cabinet does not meet constitutional provisions for gender distribution of these offices.

9. Repealed: The Indian Transfer of Property Act, 1882; The Government Lands Act, The Registration of Titles Act, The Land Titles Act, The Registered Lands Act, The Wayleaves Act, and The Land Acquisition Act.

10. After six years of drafting and debate, the Community Land Act for the management of the new category of community land was passed in August 2016, just 10 days before the required constitutional deadline. The intent of the law is to provide equal recognition of customary land rights and to enable their registration under customary as well as freehold and leasehold title following adjudication proceedings. As with trust land (the preceding tenure form), community land is held in trust for communities by county governments. Communities wishing to hold land together must have their land put in the government's registrar (under the Land Registration Act of 2012) and become 'registered communities'. The law lays out how communities will democratically control their land and its development through community land management committees. Section V of the law enables community land to be converted to public land through processes that include compulsory acquisition. The law also lays out provisions for equal rights of land access regardless of gender and managing conflict through mediation. It also establishes standards for sustainable land and natural resource management. Reaction to the CLA has been muted, with little discussion in the press or by key land advocacy groups. Liz Alden Wily (2016), a long-time analyst of Kenyan land politics, argues that formalisation of land rights remains very urgent particularly for pastoral communities and she see little commitment coming from the Ministry of Lands. Other analysts, such as Reconcile (a lands rights organisation), identify weaknesses in the law including the need for clear rules, regulations and guidelines for important tasks such as creating community registers; they also expressed concern over the lack of a clear definition of what a public purpose is for the conversion of communal land. Education regarding the law and its provisions is also needed for customary communities. (See <http://www.kas.de/kenia/en/events/72630/>).

11. At the beginning of the Uhuru Administration the Ministry was also comprised of two directorates: Urban Development and Housing; the name was thus Ministry of Lands, Housing and Urban Development. In May 2016, the latter two departments were transferred to the Ministry of Public Works. The ministry with the lands portfolio is now called the Ministry of Lands and Physical Planning. It has three departments: the State Department of Land, Department of Physical Planning and Department of Survey.

12. Key Informant 23, 2013.
13. At the end of the audit, reportedly one million files were found that had been missing or misplaced (Nduryu & Merab 2014).
14. Cartoons are a central part of the Kenyan political discourse. The Land Development and Governance Institute has recently started a new programme called Cartoonists for Land Reform. See: <http://www.ldgi.org/index.php/what-we-do/news-and-events/item/87-cartoonists-for-land-reforms>.
15. Interestingly the Pied Piper of Hamelin was charged with ridding the village of rats before he took the children for non-payment. In this depiction, Ngilu looks strangely like a rodent.
16. Wanjiku has a longer political pedigree. She is associated with President Moi and constitutional review. He dismissed calls for citizen participation in the constitution arguing that 'Wanjiku' could not be involved because she was just an ignorant peasant. See Mwangi (2013).
17. The National Land Policy pre-dated devolution but did call for the decentralisation of functions to district land boards.
18. Key Informants 7, 13, 2016.
19. Key Informants 8, 10, 19, 2013.
20. Key informant 23, 2013. Najib Balala is the current Cabinet Secretary in the Ministry of Tourism. He started his political career as the Mayor of Mombasa, Kenya's second largest city.
21. Key Informant 25, 2013.
22. Key Informant 10, 2013.
23. Key Informant 13, 2013.
24. Key Informant 5a, 5b, 2013.
25. Key Informant 19, 2013; Key Informants 1, 4b, 12d, 2016.
26. Key Informant 4, 2013. Many governors hosted investor forums for their counties in the initial months after taking office. Promises of land for investment were critical. Governor Matua of Machakos who has an ambitious plan to build a new city in his county has recently been accused of grabbing land for projects by external investors (Oga 2015).
27. Key Informant 13, 2013.
28. Key Informant 13, 2014.
29. Key Informant 5a, 2013.
30. Key Informant 1, 4, 13, 2013.
31. Key Informant 12, 2013.
32. Key Informant, 26, 2013.
33. Key Informant 17, 25, 29, 2013.
34. Key Informant 10, 2013.
35. Key Informant 25, 2013.
36. Key Informant 26, 2013.
37. Key Informant 4, 2013.
38. Key Informant 12, 2103.
39. Key Informant 4, 2013.
40. Key Informant 9, 2013.
41. Key Informant 20, 2013.
42. Key Informant 23, 2013.
43. The Bill is named 'The Investigation and Adjudication of Historical Land Injustices Bill' 2015.
44. Key Informants 6, 9, 11a, 11b, 2016.
45. Key Informant 11a, 2016.
46. In 1996, the Central Bureau of Statistics estimated that 20% of the country's land base was government land. That included forest reserves, national parks, military facilities, educational institutions, etc.
47. Key informants at the county level despair their lack of public land; they have plans for land swaps and community to public land conversion to meet growth needs, particularly in cities.
48. The pending Senate Bill establishes community land management committees and recognises a role for the NLC, in contradiction to the 2015 Court ruling. Potentially, this element of the land reform will witness similar contestation as it presents challenges to existing Neo-Customary Tenure Regimes.
49. Key Informants 26, 29, 2013; 14, 2014; 10, 14, 2016.
50. Key Informants 10, 12, 19, 29, 2013.
51. Key Informants 2, 3a, 4a, 4b, 11c, 2015.

52. The potential for corruption in land management by county government is certainly high (and outside the purview of this paper). As such community-led methods may also assist with oversight and accountability at that level of government.

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