The following summary of the Report of the Ndungu Commission on Illegal and Irregular allocation of public land provides an insight into a critical, recent episode in the struggles over 'land' and 'graft' in Kenya. To put it in the latest context, it is first worth noting that on the 'graft' front, the Commission can chalk up one partial victory in that its exposures have lead to the return of tracts of land to public action by politicians, including former President Moi. However, the limits of the larger fight against corruption was underlined when John Githong'o resigned his government position as Commissioner against Corruption. But the story the Ndungu Commission unfolded is also a chapter in another very broad issue in Kenya's political economy – land.

One of the few African countries to enact individual tenure of indigenous land, along with redistribution of chunks of the former 'white highlands', Kenya is faced with landlessness on a large scale and with recurrent land disputes among individuals and between communities. Government has just set in train a National Land Policy Formulation Process to try and sort out these underlying problems, including those thrown up by the Commission.

According to Transparency International (TI), things in contemporary Kenya have recently got better: corruption has improved from 'highly acute' to merely 'rampant'! Yet in commenting upon this, *The Economist* (18 December 2004) notes that Kenya remains one of the most corrupt countries in the world, and opines that following the example of former President Moi's cronies,

> *too many of the new ruling elite are out to get rich, rather than govern. Members of Parliament, in a country where the average annual income per head is a modest US $400 a year, have awarded themselves an annual salary and allowances of $169,625 and 'new patronage networks are replacing the old ones, as the well-connected appoint their chums and relatives to plum public posts.*

To be sure, *The Economist* continues, Kenya is probably somewhat better off than it was under Moi, but President Kibaki's economic and political reforms have stuttered, with progress towards a new constitution which would reduce the powers of the presidency and enhance democratic accountability presently on hold. Meanwhile, although the new government has promised an end to the culture of impunity for the powerful that developed under Moi, several ministers involved in corruption scandals both new and old are going unpunished. Whilst Moi's Kenya African National Union (KANU) was roundly trounced in the general election of December 2002, the new government of the National Rainbow Coalition (NARC) includes powerful figures who – like Kibaki himself – formerly served under Moi and who jumped ship when it was clear that the latter's craft was sinking, and landed squarely on their feet in the new cabinet. For all that the government has established various investigations into abuses committed by former KANU politicians who are still in office (having established, notably, hearings into the Goldenberg scandal of the early 1990s in which former Vice-President and current Minister of Education, George Saitoti, is heavily implicated), it is the decision to give Moi himself immunity from corruption charges, on the grounds that ultimately he opted to leave office peacefully, which seems more likely to set the key precedent (Brown, 2004:335).

Even if, as many observers suggest, the NARC government's commitment to a cleansing of the Augean stables is likely to be more rhetorical than real, its eagerness to convince both the international investment and creditor community, as well as its own (increasingly skeptical) supporters, that it is doing *something* is likely to prove more than a little interesting. This is demonstrated by the recent release (December, 2004) of the *Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land* (Government Printer, Nairobi), chaired by Paul Ndungu, presented to Kibaki six months previously, in which, inter alia, details are given concerning illegal land awards made to both the Kenyatta and Moi families, as well as to a raft of former ministers, MPs, judges, civil servants and military officers, with recommendations that the large majority of such awards should be revoked. However, whilst it is such juicy findings which have gained the headlines, 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.

The present brief piece seeks merely to highlight some of the Ndungu Report's findings. Such a review can only be preliminary, for at 244 pages with two annexures running to 976 (Appendix I) and 797 (Appendix II) pages, the prospect of analysing the mass of detailed evidence is as daunting as it could

be illuminating. Nonetheless, even a cursory analysis serves to confirm earlier analyses that corruption and patronage have become thoroughly embedded in Kenya's politics.

Land & Demography in Kenya

The Ndungu Commission, which was composed of 20 prominent citizens, lawyers and civil servants (drawn from ministries particularly concerned with the land issue) was appointed by President Kibaki in June 2003, and was charged with inquiring into the unlawful allocation of public lands, ascertaining the beneficiaries, identifying public officials involved in illegal allocations, and making recommendations for appropriate measures for the restoration of illegally allocated lands to their proper purpose, for prevention of future illegal allocations, and for appropriate criminal prosecutions. It was but one of a series of measures designed to tackle the issue of corruption and to realise the fruits of a newly democratic era. Yet it was perhaps one of the most emotive of the reform initiatives taken by the NARC government, for as noted by the Commission (p.xvii):

> *land retains a focal point in Kenya's history. It was the basis upon which the struggle for independence was waged. It has traditionally dictated the pulse of our nationhood. It continues to command a pivotal position in the country's social, economic, political and legal relations.*

Fundamental to the present importance of the land issue is the rapid growth in population. At the turn of the previous century, the colonial administration could justify its allocation of lands to European settlers by arguing that, with an African population of just some 4 million, there was plenty of space for all. By independence, the total population had grown to 8.2 million, and with one of the highest population growth rates in the world (around 2.9% per annum), reached some 30.7 million by 2001, of whom only around 1% were non-African ('Europeans', 'Indians' and 'Arabs'). Given the concentrations of population in the high rainfall areas of the Central Highlands and western Kenya (20% of Kenya's population lives in the drier 80% of the land in the north and east), the pressure upon land (not to mention the remaining wildlife) is increasingly evident, not least because of the scarcity of formal employment and the dependence of the overwhelming majority of the population upon peasant agriculture (which contributes some 50% of total agricultural production). In this context, access to land becomes critical to popular well-being, and the illegal appropriation of public land a peculiarly visible crime that has come to excite huge passion, not least because, as the Commission Report asserts, the practice of illegal allocations of land increased dramatically during the late 1980s and throughout the 1990s:

> *Land was no longer allocated for development purposes but as political reward and for speculation purposes … 'land grabbing' became part and parcel of official grand corruption through which land meant for public purposes … has been acquired by individuals and corporations* (p.8).

The Law Relating to the Allocation of Land

The Commission's review of the land system as it developed under colonialism (based upon the Crown Lands Ordinance of 1915), stresses how the authority to allocate Crown lands (as distinct from lands reserved for African Customary Tenure) was vested in the Governor, and under him, the Commissioner of Lands. Under their prerogative, grants of agricultural leases (initially for 99, later for 999 years) were made to settlers, whilst commercial plots in townships and urban centres were initially allocated through a system of public auction while residential plots within municipalities were allocated through public tender. However, by the 1940s, the system of public auction – which had become dominated by wealthy cartels – had fallen out of favour, resulting in a change whereby commercial plots would be allocated by means of direct grant by the Commissioner with the assistance of a local committee, a system which had already informally replaced the public tender system with regard to residential land.

The principles which decided such allocations included notions of the public interest, as well as the ability of selected allottees to pay for land (sold at 20% of its estimated value to encourage development) within 30 days and to carry out intended developments within a prescribed time limit. As the Committee notes, for all that such procedures may have worked to restrict African opportunities to purchase land in 'white' areas, they served to control the 'mischief of land speculation'. However, in what is one of the

greatest ironies in the history of land allocation in Kenya, what appears to have succeeded in the colonial period (i.e. allocation by direct grant) is what later facilitated the massive illegal and irregular abandonment of public land by the Government after independence,

for it was to be the very officials and institutions charged with being the custodians of public land who were to become the facilitators of illegal allocations (pp.6-7). The colonial Doctrine of Public Trust, whereby Kenya's rulers administer land in trust for the people of Kenya, dissolved under independence, and land was to become granted for political reasons, or simply subject to 'outright plunder' by 'a few people at the great expense … of the public' (pp.9-10).

What land has been involved? According to the Commission, all types. In Kenya, it explains, land is divided into the three categories of government land, trust land and private land. **Government land** comprises two sub-categories, unalienated (land which has not been leased or allocated) and alienated (land which has been leased to a private individual or body corporate, or which has been reserved for the use of a government department or corporation or institution, or which has been set aside for another public purpose). **Trust land** is held by County Councils on behalf of local communities, groups, families and individuals in accordance with applicable African Customary Law until it is registered under any land registration statutes, following which it is transformed into private land and becomes the sole property of the individual or group in favour of whom it is registered. Finally, **private land** is land which is registered in accordance with laws that provide for registration of title, and is registered in the name of an individual or a company, and may be created from either government land or trust land through registration after all legal procedures have been strictly followed (pp.44-45). According to these definitions, it is only government land which is public land, for trust land belongs to local communities. However, because trust land has long become victim to land grabbing, the Commission opted to regard all trust lands which had been illegally allocated as public land for its own investigative purposes (p. 46).

Under the law, it is only the President who has the right to allocate unalienated government lands, although he can delegate limited powers to the Commissioner of Lands. Yet even the President cannot exercise his powers without paying regard to the public interest. In practice, however, key responsibility falls upon the Commissioner of Lands and his officials, who under the Government Lands Act may cause township plots on unalienated land to be sold by auction (unless the President prescribes otherwise) for business or residential purposes (but only if it is not required for public purposes), whilst not even the President has the authority to allocate alienated government lands which have been set aside for a public purpose such as nature conservation, forests, play areas or by-passes.

In any process of allocation, a formal offer of sale is made to an approved purchaser by the Commissioner for Lands. Such a *letter of allotment* is only made to the person to whom it is addressed, lapses after 30 days, and has various conditions attached, and as such cannot be legally transferred to another person. Meanwhile, trust land can only be removed from the communal ownership of local people through legally prescribed adjudication processes, whereby local communities are given ample notice and opportunity to claim their ownership in accordance with their customary law. However, despite all these legally strict safeguards, 'it is in the allocation process that most of the corruption and fraudulent practices relating to land have occurred' (p.54).

The Commission's Findings

Upon the basis of detailed review of all laws relating to land, official reports concerning the land issue by government and non-government bodies, documents and records submitted by ministries and public bodies, and reports and memoranda by professional associations and members of the public, the Commission categorised its findings according to three broad types of public land: Urban, State Corporations' and Ministries' Lands; Settlement Schemes and Trust Land; and Forestlands, National Parks, Game Reserves, Wetlands, Riparian Reserves, Protected Areas, Museums and Historical Monuments.

I. Urban, State & Ministries' Land: The Commission indicated that numerous methods were used to grab land falling under this category.

There was found to have been widespread abuse of presidential discretion with regard to unalienated urban land, with 'in many instances' (both) Presidents Kenyatta and Moi making grants to land to individuals without any consideration to the public interest, for political reasons, and without proper pursuit of legal procedures, whilst there was also extensive illegal allocation by the presidents of alienated land (viz, land which they did not have legal power to allocate). Various Commissioners of Lands had made direct grants of government land without any authority from the President. Forged letters and documents were used to allocate land in numerous instances, with many records at the Ministry of Lands and Settlements having been deliberately destroyed. Often, land was sold by grantees without any adherence to the conditions laid down by letters of allotment, and many illegal titles to public land were transferred to third parties, often State Corporations, for massive sums of money. Land compulsorily acquired, like that for the proposed Nairobi by-pass, was illegally allocated to individuals and companies, and then often sold on to third parties, whilst land reserved for public purposes such as schools, playgrounds, and hospitals etc had been sold off in blatant disregard of the law by both the Commissioner of Lands and numerous local authorities. In broad summary, the Commission found that the powers vested in the President had been grossly abused by both the President and successive Commissioners of Lands and their deputies over the years, under both previous regimes; there had been 'unbridled plunder' (Commission: p.81) of public land by local councillors and officials; illegal transactions were hugely facilitated by the extensive complicity of professionals (lawyers, surveyors, valuers, physical planners, engineers, architects, land registrars, estate agents and bankers) in the land and property market; and 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. Finally, and interestingly, the Commission found that 'most illegal allocations of public land took place before or soon after the multiparty general elections of 1992, 1997 and 2002', reinforcing its view that public land was allocated 'as political reward or patronage' (p.83).

With regard to the over 140 state corporations (inclusive of such institutions as universities and the Central Bank) and the 113 odd companies in which the government holds shares, the Commission noted that although the purchase and disposition of land is incidental to their business, many such entities have acted as if they were set up to deal in land and have participated in land grabbing schemes through which the public has lost 'colossal amounts of money' (p.87). Land allocated to state corporations is 'alienated land', but has been illegally allocated to individuals or companies in total disregard of the law. Such land was customarily sold at less than market value to allottees, who often proceeded to sell it other state corporations at amounts far in excess of market value (p. 89). A usual procedure would be for the senior management of the corporations to address a letter of surrender of land to the Commissioner of Lands, who would in short order receive an application for purchase of the same land from an individual or company. At other times, corporation land might be allocated by the Commissioner of Land to individuals without any reference to corporate management whatsoever. Through such methods, 'a civil servant, a politician, a political operative etc would transform from an ordinary Kenyan … into a multi-millionaire' (p. 90).

Corporations which have lost large areas of land under such dubious circumstances include Kenya Railways, Kenya Agricultural Research Institute, the Power & Lighting Company, Kenya Airports Authority, and Kenya Industrial Estates, whilst other bodies such as the Kenya Food and Chemical Corporation which ended up in liquidation following mismanagement nonetheless proceeded to sell off their remaining assets, including land, at throw away prices (p.90). One such transaction can be cited by way of example. In January 1994, the Numerical Machining Complex Limited (owned wholly by Kenya Railways and the University of Nairobi (sic)) was allocated 840 hectares of land belonging to the Kenya Meat Commission for 'industrial purposes'. Within a few weeks, the then Head of the Public Service, Professor Philip Mbithi, who was a Director of the Company, wrote to the head of the National Social Security Fund (NSSF) informing him that the president had suggested that the NSSF purchase the land at market value. In February 1995, the NSSF proceeded to purchase 136 hectares of land at a cost of 268 million shillings, which was fully **8.5 times more than the professionally assessed value!** Today, the land purchased by the NSSF remains largely undeveloped, as does that remaining with Numerical Machining Complex (pp. 91-92).

This is illustrative of the further scam whereby state corporations were pressurised into making illegal purchases of public land, becoming 'captive buyers of land from politically connected allottees' (p. 92), the most abused corporation in this regard being the NSSF, which between 1990 and 1995 spent some 30 billion (n.b., not million!) shillings in buying both developed and undeveloped plots throughout the country. The Commission gives a full list of the transactions involved, many of the vendors being companies whose individual owners are not immediately evident.

The Commission made similar findings with regard to various government ministries which own large tracts of land, despite the fact that most of them claimed not to have lost land through illegal allocations. Again, loss of land might be triggered by a letter from an official of a ministry addressed to the Commissioner of Lands indicating that the ministry no longer required a certain tract of land, and the latter would in turn allot it to an applicant purchaser in excess of his authority. Prime offenders included the Ministry of Livestock and Fisheries Development which claimed only to have lost small fisheries land, while information provided by the public indicated that it has lost large tracts of its livestock holding grounds. Similarly, the National Youth Service is said to have lost thousands of acres of land in allocations to prominent politicians. Then, of course, there is the Kenyatta International Conference Centre (KICC). This was funded by the Ministry of Roads and Public Works between 1967 and 1974 for 79.7 million Kenya Shillings and subsequently managed by the Ministry of Tourism. In 1985, this was sold to KANU via a 99 year lease for just 1,680 shillings and a pepper corn rent, with the title being made out in favour of President Moi and Peter Oloo Aringo. Subsequently KANU took over the Centre, and assumed the role of landlord by collecting rent from tenants until February, 2003, when the new NARC administration took over the KICC on behalf of government. KICC now constitutes the subject of a court case concerning ownership between KANU and the government (pp.112-3).

Meanwhile, at a less exalted although far more pervasive level, the Commission found that many thousands of government houses and properties were illegally allocated to individuals and companies.

II. Settlement Schemes & Trust Lands: Trust land, including settlement scheme land purchased by government with international loans from European settlers for settlement by African smallholders or carved out of Trust land, has been similarly abused. The Commission found that, overall, whilst the establishment of settlement schemes and their subsequent allocation in the early years of independence generally conformed to the original objectives, in latter years there was extensive deviation, with much land having been allocated for purposes other than settlement and agricultural production.

Allocation of plots, formally conducted under Settlement Fund Trustees, devolves in practice upon District Plot Allocation Committees composed of the District Commissioner, District Settlement Officer, District Agricultural Officer, the area MP, the Chairman of the relevant County Council and the Clerk to Council. Settlement Fund Trustees appear to lack any supervisory powers over these committees, with the result that the local committees have been almost wholly unaccountable. The result has been predictable, with the interests of the landless having been ignored in favour of those of 'District officials, their relatives, members of parliament, councillors and prominent politicians from the area, Ministry of Lands and Settlement officials, other civil servants and … so called 'politically correct' individuals' (p.127). And whilst the majority of deserving allottees received smaller plots, the undeserving often received large ones. Meanwhile farms belonging to the Agricultural Development Corporation, designed to provide an the needs of the agricultural industry by developing high quality seeds or livestock or undertaking research etc, have been illegally established as settlement schemes and subsequently illegally allocated to individuals and companies, often as political reward or patronage (Commission: pp. 134-5).

In addition to the above, extensive tracts of Trust Land have been illegally allocated, with county councillors having been the main beneficiaries. Whilst the Commission was able to provide some glaring examples of such abuse, it was hampered in its work by the failure or refusal of councils to submit relevant information (p.140). It concludes:

Instead of playing their role as custodians of public resources including land, county and municipal councils have posed the greatest danger to these resources … the most pronounced land grabbers in these areas were the councillors them-selves…The corruption within central government has been replicated at the local level through the activities and omissions of county and municipal councillors (Commission: p.147).

III. Forestlands, National Parks, Game Reserves, Wetlands, Riparian Reserves & Protected Areas: After examination of the official reports and the 'scanty records' of responsible government departments and agencies (p.148), the Commission found that only 1.7% of the 3% of the country which was covered by gazetted forests at independence remains, most of the reduction having come about as a result of illegal and irregular excisions, usually made without any reference to scientific considerations or under the guise of settlement schemes. The beneficiaries of such excisions include (often private) schools, government institutions, and religious bodies as well as private individuals and companies. Similarly, many illegal allocations of land around riparian sites have been illegally allocated by the Kenya Wildlife Service, with many such allocations – such as those made since 1995 to some 14 beneficiaries around Lake Naivasha – being known to have severely affected the ecosystem. Fortunately, the Commission finds that the National Parks and Reserves have been more effectively protected, yet nonetheless it provides some ten cases of illegal allocations within KWS protected areas, and 15 cases in KWS alienated plots beside them. Furthermore, the Commission also records 26 instances of illegal allocations of land from Nature Reserves falling under the domain of local authorities, whilst there are some 8 known cases of land set aside for national museums and monuments having been illegally allocated to private individuals. The latter include the allocation of Kongo Mosque site at Kwale to former President Moi in 1986 (p. 169). It comes as no surprise that land belonging to the military, and even land portions belonging to State Houses and lodges, have also been sold off.

Against this catalogue of corruption, it is not surprising that the Commission concludes that their has been systematic and widespread abuse of public trust by public officials, to the extent that many officials now fail to see anything morally wrong with their allocating land illegally. There were many centres of power which were responsible for the illegal allocation of land, yet the Commission makes it clear that the lead in public plunder has consistently been given from the top. Kenya, it concludes, has fallen into a state of 'moral decadence', this epitomised no more clearly than by the extensive participation in land grabbing by churches, mosques, temples and other faith institutions, these including such venerable institutions as the Catholic Archdiocese of Nairobi, the Church Commission of Kenya, and the Anglican Church (pp.182-3).

The Commission's Recommendations

Whilst making a series of sensible recommendations concerning, inter alia, the need for an inventory of public land and the computerisation of land records, as well as for a comprehensive land policy, the Commission also urges the establishment of a Land Titles Tribunal charged with reviewing each and every case of suspected illegal or irregular allocation of land, and hence embarking upon the process of revocation and rectification of such titles.

Reference to the weighty Annexes indicate that revocation would be a formidable task. Its specific recommendations, by way of example, include the following: revocation of 105 plots allocated from land reserved for the Nairobi bypass (Annex 3); of 551 allocations made by the Nairobi City Council (Annex 5); 86 allocations by Meru, 449 by Nakuru, 270 by Eldoret, 100 by Nyeri, 186 by Kisumu, 407 by Mombasa, 56 by Nyahururu, 67 by Kiambu, 30 by Kisii, 17 by Kapsabet, 187 by Kerugoya/Kutus and 118 by Kitale Councils, with further dubious allocations by all these councils also to be investigated (Annexes 7-23). Numerous improperly documented allocations of land by Kenya Railways should also be examined, whilst 229 allocations made by the Kenya Agricultural Research Institute, 31 by Kenya Pipelines, 572 made by Kenya Industrial Estates, and 178 by the prison authorities should be revoked, as well as smaller numbers of plots illegally allocated by other state corporations. There should also be revocation of titles of some 7 illegal allocations made by the judiciary (!), 57 by the Ministry of Cooperative Development and Marketing, 47 by the Ministry of Agriculture, 289 by the Ministry of Education, 73 by the Ministry of Labour and 22 by the Ministry of Energy (Annexes 41-49). The Commission also provides lists of thousads of houses which have been illegally allocated throughout the country, implying that title to these, too, should be revoked, as

should those to hundreds of allocations of land made to individuals and companies from forests, game parks and reserves etc which are listed in Volume II of the Annexes.

Commentary

Some time ago, following Ajulu (1997) and Himbara (1994), I characterised Kenya as a kleptocracy characterised by a drive for primitive accumulation by those who controlled the post-colonial state, alongside the failure of an African business class to promote industrialisation and development. However, my primary emphasis was upon financial and commercial corruption, and whilst I recognised land-grabbing (especially by local councillors) as a phenomenon, I failed to appreciate how enormously extensive the illegal appropriation of public land was to the formation and consolidation of Kenya's political elite. In this regard, although less blinkered observers such as Jacqueline Klopp (2000) have written upon the issue, enormous credit is due to the Ndungu Commission for the compilation of a truly formidable body of documentation concerning land-grabbing. Yet what is lacking from its analysis, even if – strictly speaking – it may have gone beyond its terms of reference, is some assessment of what land grabbing may have had upon the economy, and whether, in particular, land which was illegally appropriated has been put to productive use. In this regard, no overall summary or analysis has been provided, even though, with regard to the majority of allocations, the Commission offers two columns which list, first, the officially intended use of the land, and in the second, its current use. Even so, even an unsystematic thumbing through the pages of the annexures suggests that the overwhelming majority of allocations have been utilised for residential, commercial, industrial or building purposes, even if the majority of the sites grabbed from the Kenya Agricultural Research Institute, whose present use is listed as 'private', may well have been transformed into private farms.

In this regard, the report has little to tell us about 'the land issue' in the sense of our acquiring greater knowledge about the overall distribution of land between government, ethnic groups, classes, and corporations, let alone the extent to which it has contributed to the eating away of Kenya's already diminishing supply of arable farming land. Furthermore, only more detailed analysis will be able to tell us how much land-grabbing has contributed to the unregulated and under-serviced peri-urban sprawl which is today such a visible feature of Kenya's unfortunate development path.

I have two further concerns. One is that, perhaps through lack of time (the report was compiled in just eighteen months), the Commission has left the slog of identifying the vast bulk of individual political beneficiaries to other analysts. Yes, it makes mention at times of particular allocations to key figures such as Moi and the Kenyattas, and it provides the names of individual and corporate beneficiaries in its detailed charts of allocations, whether by councils, corporations or other bodies. Of course, this offers a host of raw material for researchers to pursue, enabling them to identify, through detailed cross-referencing to known occupancies of political office, how particular MPs, councillors and civil servants have benefited. Yet an uneasy suspicion remains that the Commission may well have pulled its punches in this regard, and that it could have caused considerably greater embarrassment to present political incumbents than it has done.

The second worry, of course, is that little will come of the Commission's hard work. Even though the Commission has made recommendations that many hundreds of land allocations should be revoked and investigated, there are not so many that a Land Commission with the right political backing could not sit in judgement over process and appeals. However, given that NARC has absorbed so many members of the former KANU regime, it seems unlikely in the extreme that Kenya's avaricious politicians, however much formally committed to democracy, will be prepared to unscramble the egg. More probably – save perhaps for a few show case revocations - they will want to draw a line under the past, and simply ordain that no further transgressions should be permitted, although even that aspiration seems unlikely to be realised given the continuing nature of Kenyan politics as ethnically manipulated and patronage based, especially if the Commission is correct in identifying illegal land allocations as regularly increasing around the time of competitive elections.

Professor Wangari Maathai was recently awarded the Nobel Peace Prize for her contribution to sustainable development and democracy, notably out of respect for her work in mobilising local communities to defend Kenya's rapidly diminishing forests and to planting trees. The Ndungu

Commission's demonstration of the extent to which illegal land allocation is entangled with political office indicates that, without a doubt, the prime responsibility for defending remaining public land will continue to fall, willy nilly, upon the shoulders of civil society.

Roger Southall, Democracy and Governance, Human Sciences Research Council, South Africa; e-mail: RSouthall @HSRC.ac.za

Bibliographic Note

Ajulu R. (1998), 'Kenya's Democratic Ex-perience: the 1997 Elections', *Review of African Political Economy*, no. 76.

Brown, S. (2004), 'Theorising Kenya's Protracted Transition to Democracy', *Journal of Contemporary African Studies*, 22, 3.

Himbara, D. (1994), *Kenyan Capitalists, the State and Development*, Nairobi: East African Edu-cational Publishers.

Klopp, J. (2000), 'Pilfering the Pubic: The Problem of Land Grabbing in Contemporary Kenya', *Africa Today*, 47, 1.

Southall, R. (1999), 'Re-forming the State? Kleptocracy & the Political Transition in Kenya', *Review of African Political Economy*, 79.

ISSUES PAPER
NO. 2/2004

THE NATIONAL LAND POLICY IN KENYA

Addressing Historical Injustices

PREFACE

The Historical Injustices Issues Paper seeks to present the various historical land claims issues and
perspective related to them and consequently proffer policy statements for their redress. In this Issues
Paper, Kenya Land Alliance (KLA) has tried to integrate information, issues and perspectives in relation
to what was presented to the Constitution of Kenya Review Commission (CKRC), the Presidential
Commission of Inquiry into the Land Law System of Kenya and at the Civil Society National Conference
on Land Reform together with the ongoing debate on historical injustices.
Cases of historical injustices now manifest themselves in the form of squatters, absentee landlordism,
land clashes and lingering land claims. We therefore hope that this Issues Paper will be able to initiate a
well-informed discourse and public debate on the need for policy statement(s) on the historical injustices
particularly in relation to the hue and cry over historical land dispossession. We further hope that this

initiative of KLA will strengthen the campaign for fair and just National Land Policy championed by
various social change Civil Society Organizations and peoples'movements.
We have drawn information on historical injustices from various sources to provide a relatively better
information base on the topic. We present this Issues Paper with the hope that all of us would be able to
take the responsibility to build up a people-centred advocacy for advancing the land rights of the
marginalized sections of our society.
KLA would like to record its warm appreciation for the effort of our partners and members for their
creative contributions to this Issues Paper. Dr. Smokin Wanjala pulled out all stops to putting together
this Issues Paper and we extend our gratitude to him for his continued cooperation.
The continued strong support received from the Department for International Development (DFID) ,
Danish International Development Agency (DANIDA)/ Danish Association for International Cooperation-
Kenya (MS-Kenya), Oxfam, and other partners who contribute to the sustenance of KLA land reform
efforts is much appreciated. The views expressed in the Issues Paper, however, are not necessarily
those of our partners.

Odenda Lumumba

National Co-ordinator, KLA

RATIONALE FOR ADDRESSING HISTORICAL INJUSTICES IN A NATIONAL LAND POLICY

The National Land Policy Formulation process like other review processes on the constitution and land
law system of Kenya before it has stimulated the urge to address the crisis of legitimacy of land rights
occasioned by historical injustices in matters of land acquisition and ownership in the country. Indeed the
history of Kenya, like that of any colonized territory, is fundamentally one of land dispossession and
subsequent staking out of individual claims of title to property that legitimately belongs to others through a
mechanism of land registration . For this reason it is important that the National Land Policy Formulation
process addresses historical injustices.
True, from the first settlers at the Coast of Kenya to the formalized annexation of the Kenyan hinterland by
the British Colonial government to the myth of the sanctity of title at independence, when it was argued that

once a person acquires title to land, it can not be questioned even in a court of law! Customary Land
Tenure holders inexorably lost their land to Individual or Private registered land holders. The result of
which is that Kenya at independence inherited one of the most skewed patterns of land distribution in the
world compared only to Brazil, South Africa, Zimbabwe and Namibia, where equally crisis of legitimacy of
land rights/titling system and security of tenure is a bewildering variety of tenure arrangements befitting
redress. Equally important to note is that the National Land Policy Formulation process like the Constitution
of Kenya Review Commission (CKRC) and the Presidential Commission of Inquiry into the Land Law
System of Kenya has the redress of historical injustices as one of its terms of reference. And indeed the
two Review Commissions (the CKRC and the'Njonjo'Commission) came up with the conclusion that
historical land claims be redressed as historical injustices as a sure means of dealing with insecurity,
landlessness and poverty among the majority of citizens.
In line with the provisions of the Draft Constitution of Kenya 2004, that guarantee existing property rights;
but simultaneously places the state under a constitutional duty to take reasonable steps to enable citizens to
gain equitable access to land, to promote security of tenure, and provide redress to those who were
disposessed of property since colonial time to the present as a result of past discriminatory laws or corrupt
practices, the historical injustices indeed deserve to be addressed.
Since in the world over the process of democratization often involves the redress of historical injustices
through clear land reform programmes the National Land Policy Formulation process presents the best
opportunity to our country to follow suit. This is the only sure way our land policy development process
shall ensure establishment of credible basic legal and institutional frameworks that would improve secure
property rights as a means to protect environmental and cultural resources to facilitate productivity.

INTRODUCTION

The National Land Policy, which is being developed through a variety of consultative processes, is expected
to provide a broad framework for the ownership, access,use and management of land in Kenya. The task

entails a re-thinking of land relations in the country since independence to the present with a view to laying
a firm foundation for the future on the basis of which land as a resource and national heritage may be used
in a productive, efficient, equitable and sustainable manner. It is the heritage value of the land which gives
the state and the citizens as a whole the right and the duty to ensure that no one individual or community can
use the land in a manner that is detrimental to the present and future generations.
The general thrust of the policy formulation exercise will be forward looking in that it shall aim at systematizing
and modernizing the laws, policies, and institutions that have hitherto regulated dealings in land. Archaic
laws and systems will have to be discarded while new and more relevant ones will be formulated. The
National Land Policy will therefore be responding to the social, economic, ecological and political challenges
facing the country as it seeks to harness its scarce resources for development needs in a rapidly globalizing
world.
Thus stated, some would be tempted to question whether addressing land related historical injustices
would be a preoccupation worthy of a policy formulation exercise. Forty years of independence is a long
time during which any historical injustices regarding land should have been resolved. The fact of the matter
however is that there are certain deep rooted injustices which still rankle whole communities in Kenya.
The Government's post independence land policies have not resolved or fundamentally addressed these
injustices. The politically ignited land clashes of the1990s are a manifestation of deep rooted grievances
which cannot be glossed over in a reform process. The Draft Constitution of Kenya 2004 recognizes this
fact and requires the Government to embark upon the task of redressing historical injustices. What is not
clear or agreed upon is the nature and extent of these grievances and their possible long term solutions .

1. THE PROBLEM

The issue of what constitutes a historical injustice or grievance must be resolved at the outset. The debate
as to what is a historical land grievance is not new. A number of forums have been held at which this issue
was a subject of protracted discussion. Within the context of this paper, and drawing from some of the

basic agreements at the symposia referred to, a historical injustice is a land grievance which stretches back
to the colonial land policies and laws that resulted in the disinheritance of communities from their land. Such
grievances were not resolved upon the attainment of independence. They have persisted through out the
Kenyatta and Moi regimes. They remain sticking points in the efforts to development and nation building.
What is however not agreed upon is the cut off date for a problem to be considered a historical grievance.
This is not surprising since the issue is not really the period when a problem started manifesting itself.
Rather, the historicity of the problem in question lies in its widespread and resilient nature; calling for a
comprehensive and long-term solution, which is all-inclusive. The grievances have served as rallying and
reference points for political agitation by various communities in the country. Demands for redress have
been voiced during various phases of national discourse as the country seeks a new political dispensation.
This became more evident during the constitutional reform hearings conducted by the Constitution of
Kenya Review Commission, the Presidential Commission of Inquiry into the Land Law System of Kenya
and various Non-Governmental Organizations. Calls for state intervention in the injustices again resurfaced
after the historic 2002 general elections.
The grievances remain unresolved because successive post independence governments have failed to
address the land problem in a wholistic manner. In fact, the land policies pursued after independence either
exacerbated the problems or only offered artificial and temporary solutions to them. The consequence of
this approach by the Government is that there are a number of land problems in the country, which have
refused to go away. What this also means is that there cannot be a comprehensive land policy which does
not offer practical ways of achieving long term solutions to the historical injustices. Arising from this reality,
the land policy must deliberately acknowledge the existence of these injustices and declare the Government's
intent and commitment to resolve them once and for all.

2. The Squatter Problem

The Squatter problem is a direct consequence of the colonial land policy and law. Ever since the Supreme

Court declared Africans as Tenants at Will of the Crown following the promulgation of the Crown Lands
Ordinance of 1915, the problem of landlessness has never really been resolved. The dispossession of
many Africans from their lands meant that only a massive resettlement programme could provide a solution
to the problem of landlessness. However, the negotiations for independence extracted guarantees from the
6
Given this country's colonial legacy of land alienation and dispossession of entire local communities from
their land, it was incumbent upon the post-independence governments to resettle all the displaced people
and restore their rights over land. The political realities at the time however meant that a radical one track
land restitution and redistribution programme could not be undertaken without upsetting the platform upon
which independence had been negotiated. A cautious, land market- based and hybrid system of resettlement
was preferred to a wholesale and massive land restitution programme. This meant that lands which had
been lost to white and other settlers could not be entirely repossessed for restitution by the Government.
In addition, the Government adopted certain policies and laws that had been introduced into the colony by
the colonial government. These policies and laws had fundamentally affected the land rights of certain
communities in many parts of the country in a variety of ways. The decision by successive governments to
continue with this colonial legacy has meant the intensification of these problems over the years.

Policy Statement

The National Land Policy should state that:
The Government shall in consultation with local communities, civil society, religious sector and
Parliament embark upon an all inclusive, comprehensive, consultative and realistic programme of
resolving historical injustices on a long term and permanent basis. In so doing, the Government
shall pay due regard to the rights of other communities which have been acquired over the years.
The main objective will be to devise mechanisms of responding to the historical wrongs through
any available forms of redress.
7
nationalist political leadership whereby white settler farmers who had opted to remain in the country could

retain their lands. The consequence was that many displaced peasants never got back their land.
The Kenyatta Government opted to resettle the displaced peasants through the settlement scheme
programme. Many of the peasants were resettled outside the settler zones. But the settlement scheme
programme had its own limitations. It was based on free market principle of 'willing buyer- willing seller'.
Market- based processes of resettlement have never given back land to the displaced. Many people were
left out of the resettlement programme as middle class elites took advantage to acquire land at the expense
of the peasantry. The latter day resettlement programmes were seriously abused by the political elite.
Instead of resettling the poor and landless, the schemes were used by the political class and the provincial
administration to accumulate large parcels of land. The genuine landless people were again left out. The
squatter problem therefore persists to this day.
The squatter problem must be addressed by the National Land Policy since it has political connotations.
People should never be squatters in their own country. The struggle for independence was inspired by the
deep sense of injustice occasioned by the alienation of land by the colonial government. The grievances
which led to the war of liberation still manifest themselves in the demands for land from the Government by
the landless all over the country. While it may not be realistic for the Government to avail land to all the
landless, a clear policy statement on the squatter problem is required.

Policy Statement

The National Land Policy should state that:

- The Government will undertake a comprehensive audit of the resettlement programme which has been actualized through the settlement schemes with a view to determining whether and to what extent it has availed land to the genuinely landless people. All schemes especially those undertaken during the 1980s to the present will be forensically audited.

Questions may arise as to how the Government would fund such a costly process of repossession given the
fact that compensation would have to be paid to those who stand to lose their land. In most cases however,
there would be no need for compensation where it is shown that the land was acquired illegally. The
constitution of the Republic only protects property which was lawfully acquired.

3. The Coastal Land Problem

The colonial government introduced a system whereby those claiming ownership rights within the Ten Mile
Coastal Strip could get titles under the Land Titles Ordinance. This process gave undue advantage to the
few who were aware of the office of the Recorder of Titles. The majority of the local inhabitants at the
Coast were ignorant of this procedure. They could therefore not lay any claims of ownership as envisaged
in the Ordinance. All land inhabited by them was consequently declared Crown Land. Such land became
Trust land at independence. Many people of Arab origin had acquired titles to vast parcels of land within
the Ten-Mile Coastal Strip. To this day, they continue to collect rent from the local inhabitants. There is
thus a twin problem of absentee landlordism and landlessness. During the constitutional reform hearings
conducted by the Constitution of Kenya Review Commission, it emerged that this twin problem is a deeply
felt grievance by the local coastal people. Many of the people are technically squatters on their own land.
Land titles have been issued to people who are not ordinarily resident in the coastal area contrary to the
provisions of the constitution regarding the privatization of Trustland. Such titleholders are viewed as aliens
who have cheated the locals out of their land. It is a problem which must be comprehensively addressed.

- Land, which may have been acquired by undeserving personalities, will be repossessed for the
purposes of re-settling the landless. In the long run however, given the fact that land is a scarce
resource, innovative ways of utilizing land by the landless shall be designed.
- Forms of transitory tenure, which can avail land to the landless on a temporary and needs basis
shall be designed and given legal form.

Policy Statement

The National Land Policy should state that:

- The Government will embark upon a programme to address the twin problem of absentee
landlordism and landlessness within the Ten-Mile Coastal Strip. The rights of the local inhabitants to their land shall be legally recognized.
- All idle land shall be accounted for with a view to establishing the legal ownership thereof.

Where the ownership is not established, the land in question shall revert to the state for purposes of resettling the landless. Where the identity of the owner of the land is established

he/she shall be called upon to justify such ownership in the face of rising landlessness.
 The local inhabitants and wider public shall be guaranteed access to the ocean for purposes
of economic activity and recreation. This will be done through conditional public easements
to the ocean.

4. Displacement Occasioned by Land Clashes

In the 1990s politically instigated land clashes led to the displacement of many people from their lands in
the Rift Valley. Those displaced had acquired title to the land either through the resettlement programme or
through outright purchase. They had been long viewed as foreigners by the original inhabitants of the area.
The political leadership at the time whipped up emotions against the title holders and instigated the clashes.
No serious efforts aimed at resettling the displaced have been made by the Government. Failure to resettle
the displaced will send a dangerous message to the people regarding the sanctity of title in the country. It
could also serve as a precedent for politically instigated ethnic evictions in other parts of the country. The
potential for civil war cannot be ruled out if such phenomena were to spread countrywide.
It should be further noted that although the Rift valley was the most affected by the clashes, other parts of
the country were also affected. In this regard, the clashes spread to all areas that were perceived by the
ruling political elite as not being supportive ofKenya African National Union (KANU). Thus, the clashes
affected large areas of Western, Nyanza provinces and later the Coast.

5. Lingering Claims to Land by Certain Communities

The acquisition of land by white settlers meant the displacement of entire communities from their ancestral
land. Upon independence, the lands in question either remained in the hands of the settlers or were acquired
by other communities through purchase. The most pronounced of this scenario is the land which had been
occupied by the Pokot and which now forms Trans- Nzoia District in the Western Rift. The other is the
land which was formerly inhabited by the Maasai community and which now forms Laikipia District. In
both cases the communities were pushed into marginal areas which have not adequately catered for their
pastoral needs. The Pokot claim that the British government did pay compensation to the Kenyatta

Government for onward transmission to the community. They have frequently agitated for compensation or
resettlement. On occasions, they have threatened to re-enact the land clashes of the 1990s so as to reclaim
land that historically belongs to them. The Maasai on the other hand claim they were cheated out of their
land through the Maasai Agreements of 1904 and 1911 respectively. They have also threatened and
indeed invaded some white owned farms and ranches in Laikipia District. Again, these grievances were
expressed during the constitutional review hearings.In both instances, the threatened invasions could lead
to serious disruptions of peace and actual civil war not to mention the harm to the country's economy. The
problem is more complex in that it cannot be resolved without hurting the rights of other communities.

10

Policy Statement

The National Land Policy should state that:

 The Government shall immediately embark upon the process of resettling all those people
who were displaced from their lands due tothe land clashes. The identity of all those who were displaced will be proven through the production of the relevant ownership documents.
Where for any reason it is not possible to resettle the displaced on their lands, alternative land shall be found for that purpose.

 The Government may also consider claims for compensation of the land clashes victims.

 National civic education programmes on peaceful coexistence will be mounted so as to heal the wounds inflicted during the land clashes and restore confidence in inter and intraethnic
ownership of land in the settlement areas.

11

Trans-Nzoia District is one of the most fertile agricultural areas, which produces more than half of the
country's maize needs. The farmers are non-Pokot who acquired title to their lands and who have lived
there since independence. To restore the land to the Pokot people would mean the dislocation of hundreds
of thousands of the communities who now inhabit the area. Equally, to compulsorily acquire the white
owned farms for the purposes of handing the land back to the Maasai would be politically explosive since
such an action would expose the Government of the day to international sanction.
Yet amidst all these, the land policy must address this issue in a manner that satisfies the aggrieved communities.

One way would be to seek solutions through organizing and holding a land conference to discuss the historical claims to land by the Masaai and the Pokot people with all the other communities concerned. The conference will address all the claims and grievances raised by all affected parties in a manner that maintains national unity and harmony. The needs of these communities shall be addressed on a long-term basis. The conference would provide the government with an opportunity to devise ways whereby economic incentives are offered to the communities in lieu of the land they lost to other communities. In return the affected communities shall undertake to recognize and respect the rights of title holders to the land. The agreements struck at the conference shall form a binding declaration to be honoured by the present and the future generations. The Government shall also develop capacity building strategies for alternative land based and off-land economic incentives to the affected communities.

However**,** questions may arise as to why these particular communities have been singled for special treatment if any. This is due to the fact that all communities in Kenya were dispossessed in one way or another. The answer is that these are the most glaring of the injustices meted against a community as a whole. Theirs is a grievance that refuses to recede. They also remain largely dependent on land resources for day-to-day survival.

Questions may also be raised as to what value such a conference would add to a long term problem given the fact that conferences are held in Kenya on a daily basis. This however would be no ordinary conference. It would give Kenyans an opportunity to sit together and peacefully search for long-term solutions to a

6. Minority communities and their claims to land

Certain communities are culturally and economically dependent on specific geographical areas and habitats. The Ogiek people are one such community that is dependent on forest habitats. Over the years, they have lost their forest land through governmental action. Either the Government has gazetted certain forest areas thus making them public land or the areas have been allocated to individuals not ordinarily resident in the area. Such individuals have acquired title to the lands in question. Sometimes the land has been occupied by other communities who are not necessarily forest dependent.

Minorities such as the Ogiek are now recognized internationally as deserving special protection by the
state so that their rights over forest land are not compromised. The cultural practices of the minority groups
are protective of the environment and should be encouraged. Forests are habitats to some rare flora and
fauna which are important components of the country's biological diversity. Some of these flora and fauna
are foreign exchange earners. The minority communities have conserved these species for centuries yet
have not benefited from them financially. The Convention on Biological Diversity does recognize the rights
of such people over the genetic resources found in their habitats.Apart from the Ogiek, there are other

Policy Statement

The National Land Policy statement should state that:

 The government shall always provide broad based land claims mechanism for mediating any
future land related disputes.

 The government shall establish a National Land Claims and Restitution structure to handle
land claims within a set period.

 The Restitution of Land Rights Act should be drafted to enforce redress of historical land
claims/restitution.

recurrent problem. Perhaps this is the way Kenya and other African countries should go in resolving their
problems.

Policy Statement

The National Land Policy should state that:

 The Government shall enact laws that recognize and protect the rights of forest dependent
peoples in the country. Such rights shall not be defeated by the claims of private ownership
derived from the acquisition of title.

 State -sponsored conservation policies will be implemented in a manner that does not infringe
upon the rights of forest dependent people. To this extent, the government shall enter into appropriate partnerships with the local communities aimed at conserving the country's forests.

The minority groups will be encouraged to use forest products in a manner that protects the
forest.

 Where the minority communities have lost their land, the Government will take appropriate

measures to restore such land in a manner that does not infringe upon the rights genuinely acquired by others over such land.

 The Government will enact laws to protect the intellectual property rights of indigenous people
over the genetic resources found in the forest habitats in accordance with the provisions of the
Convention on Biological Diversity. Any wealth generated from the forest resources will be
equitably shared so that actual benefits trickle down to minority communities.

habitat dependent communities in Kenya whose interests have been as adversely affected as the Ogiek.
These communities have not voiced their grievances as forcefully as the Ogiek. Their legitimate claims
cannot be ignored simply because they have not been voiced. Examples of such "silent but suffering
communities are the Sengwer, the El Molo, among others.

7. Neighbouring Communities

The wholesale alienation of land and the displacement of the African population created a situation in
certain areas of the country that has led to incessant conflict between neighbouring communities. The
communities usually clash over scarce resources such as water and pasture. Some of the conflicts arise
from different land uses. The conflicts have not been resolved permanently. The potential for armed conflict
between communities has remained. Thus armed conflict does erupt between the Marakwet, Pokot and
Turkana in the north rift, Pokomo and Somali in the Tana Delta, Kisii and Maasai in Transmara border and
also between the various Somali clans in the northeastern part of the country.

Policy Statement

The National Land Policy should state that:

 The Government will in consultation with neighbouring communities devise land use programmes
that minimize conflict between them. In addition, all the root causes of armed conflict between
communities will be identified with a view to reaching long-term solutions through an all-embracing
consultative process.

8. The Nubian Question

The Nubian community moved and settled in Kenya from the Sudan as part of the Kings African Rifles(KAR)
during the First World War. They were moved and settled in the Kibera area of Nairobi by the colonial

government. They were reputed loyalists to the British during the two world wars. After the Second World
War, they made demands for land given the fact that their counterparts were being settled in what became
known as the “White Highlands”. The Nubians have lived in Kibera since then to the present time.
There are Nubian generations who know Kenya as their only home. However, Government policy has
treated the Nubians as second-class citizens especially regarding their rights to the land they occupy. They
have been denied title deeds to the land they inhabit. Other communities have since moved into the area
and acquired titles to parts of the land. They have held demonstrations in the streets of Nairobi demanding
their rights just as other citizens. The Nubians also inhabit other areas apart from Kibera. For example,
there is a large Nubian community in parts of Kisumu and other parts of the country. A long-term solution
to the Nubian question must be part of the National Land Policy.
Although these conflicts may appear to be largely ethnic in character, they are in fact disputes over scarce
land resources. Some of them are a consequence of conflicting land uses and practices. It is important that
long- term programmes of harnessing harmonious existence between neighbouring communities be evolved
and implemented on a sustainable basis.

CONCLUSION

The issue of historical injustices in regards to land rights is complex, manifesting itself in numerous forms
and magnitude, and affecting different communities across the country. Different communities have responded
to these injustices in varying degrees, but fundamentally, very little, if anything, has been done to address
them. While processes that led to community dispossession may have emanated from the colonization and
colonial policies, the present generations continue to witness and experience its manifestations and impacts.
Taking this into account, the process of formulating the National Land policy must bring out well thoughtout
strategies, which will address these historical injustices, all of which must be dealt with individually and
collectively. Since the persistence of the injustices has also proved that they cannot be wished away, the
strategies must be credible enough to deal with them in a holistic and comprehensive manner, once and for

all.

Policy Statement

The National Land Policy should state that:

 The Government shall officially recognize the rights of the Nubian community over the land they have traditionally occupied since they moved into the country. To this extent, the Government will conduct a comprehensive adjudication to establish the nature and extent of these rights. The rights so established will consequently be registered and titles thereto issued.

 In issuing titles, the Government shall emphasize the rights of the community as opposed to individual exclusive rights. Other communities who may have acquired rights in the area will also have their claims adjudicated upon for purposes of verification.

Published by

THE KENYA LAND ALLIANCE
C.K Patel Building, 6th Floor, Kenyatta Avenue, Nakuru.
P.O Box 2177–20100, Nakuru**,** Kenya.
Tel: 254–51–210398,
Telefax: 254–51–215982
Email: klal@africaonline.co.ke

Most of the violence in Koibatek was concentrated on the border with Uasin Gishu, Kericho, Kipkelion and Molo where non Kalenjins were attacked and killed, their properties burned and/ or they were forcefully evicted. On 26th January 2008, a catholic priest Father Peter Kamau, a Kikluyu, who was coming from Nandi going to Nakuru was stopped at Muserechi Trading centre where a gang of youth killed him, in an incident that was widely reported by the mainstream media.

She Is Raped While Husband Is Being Killed

On 1 January 2008, 36 years old Elizabeth W. and her husband were attacked in their house in Eldama Ravine by a group of Kalenjin, some of whom she knew. She was gang raped while her husband was being hacked to death and her shop looted. Following is an extract of her testimony:

On 1 January 2008 we were still fearful. We didn't open our business. I worked at the Eldama Ravine shopping centre at Mama Faith's Shop. We owned the shop. It was just next to my house – they are joined together. But I stayed at home that day because I was scared. We left the shop locked up.

At about 3pm that day, people came to my home. At the time there was only my husband and me at home. My children had gone to visit their grandparents in Nyandarua. There were more than ten people who came. They were all men. They were dressed in coats and they had smeared mud on their faces so you could not recognize them. The mud was different colors on their faces – white back and red in spots -- patches all over their faces. They were armed. They had arrows, pangas and rungus. The first I knew they were there was when I heard talking and noises outside. They were speaking in Kalenjin. They said "we have come to finish you". The door was not locked so they just came inside. My husband and I were in the sitting room. We were sitting down but stood up when the men came in.

When they came in I started pleading with them because of what I had heard them saying outside. I told them why were they doing this when we had lived with them.

They ordered me to shut up and said that the Kikuyu had migrated to the area and taken up their (the Kalenjin's) property. They said I should keep quiet or they were going to kill me. So I just kept quiet then.

95

That is when they started attacking my husband. They were cutting him with pangas and piercing him with arrows. They were struggling with my husband and trying to get him to the ground. The men were crowding on him – it might have been most of them attacking my husband. I was scared. They cut my husband on the neck with a panga and that made him fall to the ground. It was a serious blow. After that they were cutting every part of his body.

After my husband was cut, but before he died, one of the men came towards me and asked me what I wanted to be done to me. I asked them not to kill me. One said we need to know what she is like, now that she never talks to us.

There was another group of men who were looting my shop. I could see them from the door – it was still open. They were going past carrying property from my shop, such as sugar, cooking fat and other goods.

I was wearing trousers with buttons at the waist. The men tore at my trousers trying to get them open and the buttons came off. There were about four of them there doing this to me at that time. They lifted me up and put me on the ground. They were arguing among themselves who was going to be first. Then one said that if I escaped from the knife and arrows, I would die of AIDS. Some of them held my legs and some held my hands while they raped me. When this was happening my husband and I were both still in the sitting room, but by now I was not watching my husband but pleading my own case. The last time I had looked, it was like he was dead. He wasn't moving.

One man raped me and then the second one and the third. They put their penises in my vagina. It was either the second or the third man who said they were not able to get in me properly so they cut me. I think it was the panga they were carrying that they used. They cut my vagina. When I had my children, the Doctor told me I had a narrow opening. Both my children were born by caesarean.

They continued raping me. It was when the fourth man was raping me that I went unconscious…I next remember – and it is vague – that a Kalenjin friend of ours called Joseph was there and he was pleading with the men. He was asking them for him to be allowed to take the body of my husband and take me to hospital. The men started quarrelling with him and told him that he was in partnership with us. They threatened to kill him.[…]

Response by Police and Provincial Administration

The NSIS had in their election Security Situation paper noted that the ratio of the police officers to the population which was already inadequate nationally

96

would pose potential problems since the police would be over-stretched by election related duties such as escort and guarding of polling stations. With such demands being exerted on the police, NSIS was of the view that if there were to be an outbreak of violence such as had been witnessed in 1992 and 1997, the police would be unable to cope in responding to such emergencies.[63]

It is therefore not surprising that violence continued in the district until around 15th February 2008 before the provincial administration was able to assemble some of the area leaders to discuss with them the need for the violence to stop. This finding is supported by the DSIC Minutes dated 9th February 2008 which noted that violence was far from ending and that 2 people were killed with arrows at Makutano. The DSIC observed that the Kalenjin appeared determined to displace the Kikuyu from their farms and that both communities reportedly were arming quietly.

Notwithstanding that the PSIC had mobilized all serviceable public vehicles which were handed over to the OCPD to facilitate deployment of security officers to the affected areas and also along the highway to ensure the smooth flow of traffic, we found the acknowledgement by the DSIC that some chiefs, security personnel and other public servants were biased to be a matter of serious concern. A Kikuyu lady recorded a statement with the Commission stating that she was assaulted by two Kalenjin attackers on 31st December 2007 in Timboroa Trading Center sustaining serious head injuries from which she fell unconscious and was taken by good Samaritans to Timboroa Dispensary. She was then referred to Eldama Ravine Hospital on account of the seriousness of those injuries but, she says, the Kalenjin staff at Ravine Hospital refused to attend to her because she was Kikuyu and she had to be taken to the Nakuru Provincial General Hospital in critical condition where she was operated on and remained in hospital for 3 months.

[63] Exhibit 19A

Similarly a statement by Mr. Nyaga stated that he reported the theft of goods from his house to Eldama Ravine Police Station but the officers refused to help him in tracing his property. He further stated without providing the source of his information that out of 126 Administration Police Officers, only 3 were Kikuyu. Further evidence of partisanship and criminal conduct by the police was provided by John Mwangi who testified in Naivasha stating that he and his family had been displaced from Timboroa after being attacked by a group of about 600 Kalenjin warriors-who had smeared their faces with mud and were armed with bows, arrows, spears and pangas. The attackers appeared coordinated and communicated through signals sent by blowing a horn and carried petrol in small bottles which they used to torch houses belonging to Kikuyu families. He alleged that they were assisted by a police officer who was in charge of Timboroa Police Station whose name the witness was unable to provide.

Thus it would appear that partisanship on the part of public service and law enforcement agencies strained coordination efforts.[64] Indeed, the provincial administration recommended an effort to balance the ethnic composition of security personnel.

Nakuru District: Organized

Goldenberg possible

[B] TERMS OF REFERENCE

3. In exercise of the powers conferred upon the President by **Section 3** of the Commissions of Inquiry Act, we were particularly directed in the citation as our Terms of Reference:

"(a) to inquire into the origins of, the acceptance and the implementation by the Government of the proposal to award export compensation in respect of exports of gold and diamond jewellery under the Local

Manufactures (Export Compensation)Act (Chapter 485 of Laws of Kenya;

(b) **to inquire into allegations of irregular payments of export compensation under the Local Manufactures ((Export Compensation) Act to Goldenberg International Limited, being a percentage of the value of gold and diamond jewellery allegedly exported from Kenya by the said company, with a view to establishing -**

(i) whether in fact any gold or diamond jewellery was exported from Kenya and if so, how much and to whom;

(ii) whether the amount of gold of diamond jewellery export was processed through Customs as required;

(iii) **whether there was a declaration and remittance of the alleged foreign currency earnings;**

(iv) whether the alleged foreign currency earned was cleared and remitted to the Central Bank of Kenya and if so, how much;

(v) **the circumstances and grounds upon which the compensation was claimed and paid to Goldenberg International Limited;**

(vi) **the actual amount of export compensation paid to Goldenberg International Limited, including but not limited to Kshs 5.8 Billion, and whether any of the said amount was paid to third parties and if so, the identity of such third parties and the amount paid to them;**

(c) **to inquire into the alleged payment of US$210 (Ksh.13.5 billion) by the Central Bank of Kenya to the Exchange Bank Limited in respect of fictitious foreign exchange claims with a view to establishing –**

(i) whether the equivalent in Kenya shillings was paid to Exchange Bank Limited and/or Goldenberg International Limited and if so, how the money was utilised; and

(ii) **whether any or all the money was paid to third parties and if so, the identity of such parties and the amounts paid to them;**

(d) **to establish all persons, public or private, involved in the alleged irregular claims and payments to Goldenberg International Limited and/or Exchange Bank Limited and the extend of their responsibility**;

These terms of reference were later expanded under **Gazette Notice No 5134** of 29th July, 2003 to include the following:

(e) **to inquire into the origins of, acceptance and implementation by the Central Bank of Kenya of the Rediscounting Facility for Pre-Export Bills of Exchange**;

(f) to inquire into allegations that under the Central Bank of Kenya Rediscounting Facility for Pre-Export Bills of Exchange, various amounts were fraudulently paid out of the Central Bank of Kenya, through the Exchange Bank Limited, Kenya Commercial Bank Limited, National Bank of Kenya Limited , Delphis Bank Limited, Trust Bank Limited, Trade Bank Limited and any other commercial bank, to Goldenberg International Limited, Siro Voulla Rousalis and any other party, occasioning loss to the Central Bank of Kenya;

(g) to inquire into allegations that a the moneys fraudulently paid to Goldenberg International Limited, Exchange Bank Limited and other companies as export compensation under paragraphs (b) and (c), and under the Rediscounting Facility for Pre-Export Bills of Exchange under paragraph (f), were allegedly used by those companies, their shareholders or directors to fraudulently earn profits by speculating in convertible foreign exchange bearer certificates;

(h) **to inquire into allegations that the Exchange Bank Limited, Goldenberg International Limited, their shareholders and directors, used the moneys paid to them under paragraphs (b), (c) and (f), jointly with Pan African Bank Limited, Delphis Bank Limited, Transnational Bank Limited and Post Credit Bank Limited to defraud the Central Bank of Kenya through a fraudulent scheme of cheque kiting**;

(i) to inquire into origins of, acceptance and implementation of the special issue of Treasury Bills by the Central Bank of Kenya during the years 1992 and 1993, in relation to the moneys obtained under paragraphs (b), (c) and (f) and establish the further loss, if any, occasioned to the Central Bank of Kenya;

(j) to inquire whether the moneys illegally obtained from the Central Bank of Kenya, the Customs Department and the Treasury were utilized, in part or at all, to fund the campaigns of any political parties, and if so, which parties and to what extent;

(k) to inquire into the effect the Goldenberg-related civil and criminal litigation had on the administration of justice in Kenya;

(l) to inquire into and establish the identities of the shareholders, directors and beneficial owners of all companies, partnerships and other business entities involved in the transactions in question;

(m) to inquire into, establish and trace, locally and internationally, all assets acquired directly or indirectly with moneys illegally obtained from the Central Bank of Kenya, the Customs Department and Treasury through the transactions under inquiry;

(n) to inquire into and establish the identities of the parties involved in the illegal destruction of documents and other materials in a scheme to cover up the colossal loss to the Government occasioned by the "Goldenberg Affair"in order to avoid detection, investigation and prosecution or otherwise obstruct the course of justice;

(o) to inquire into allegations that the disputed acquisition of the asset in Kenya, of World Duty Free Company Limited, incorporated in the Isle of Man, by Kamlesh Pattni vide a court order in Kenya was in pursuance of the cover-up of the irregularities in the Goldenberg Affair";

(p) **to inquire into and establish the identities of all persons adversely affected, or who sustained any loss or damage as a result of the aforesaid illegal attempt to cover up the irregularities in the "Goldenberg Affair**";

(q) to inquire into the overall detrimental effect on the Kenyan economy following the irregular payments and to inquire into the extent of the damage, if any, the foregoing transactions had on the economy, and may continue to have in future;

(r) to inquire into and investigate any other matter that is incidental to or connected with the foregoing terms of reference;

(s) **to recommend** –

(i) the prosecution or further criminal investigations against

any person or persons who may have committed offences related to such claims or payments
(ii) ways, means and measures that must be taken to prevent, control or eradicate such schemes or frauds in the future;
(iii) any reimbursement and/or compensation to the Government by any person and the extent of such reimbursement or compensation; and
(iv) any other policy or action that may conclusively deal with the "Goldenberg Affair."