



## Reassessing Kenya's Land Reform

Recently, land reform issues have gained prominence together with much controversy. Events in places such as Zimbabwe led Kenyans to re-examine more closely land reform and the institutions involved in the matter in Kenya. The Institute of Economic Affairs held a forum to examine some of these issues and invited *Mr. Gem Argwings Kodhek* of Tegemeo Institute and *Mr. Wachira Maina*, a constitutional lawyer to discuss various perspectives of the land issues and land reform in Kenya. The Point captures some of the issues herein.

### INSIDE THIS ISSUE

Land ownership ceilings	1
Interrogating common assumptions	3
Agriculture and land tenure	4
Failure of land reforms	5
Conclusion	8

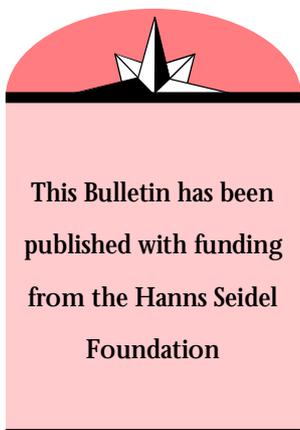
**D**espite the existence of the Land Reform and Land Law Commissions, Kenyans have not favourably impacted on the confusion in land tenure. As a predominantly agricultural country, the citizens of Kenya are concerned about land reforms. The nature of the reforms have not been decided upon despite disparate suggestions on the issues to be considered. The main proposals that have featured are:

### Land Ownership Ceilings

**D**ue to the fact that the largest consolidated quantities of land in Kenya are either in the hands of non-indigenous Kenyans or the corporations that are not significantly owned by Kenyans, it might be in the national interest for the government to set limits above which no individuals may own land. Essentially, the argument is that it is inequitable for some to own land in the thousands of acres while the rest are squatters. The colonial matter only gets to be

related to the problem of land because colonialism involved appropriation of significant quantities of land that were never returned by the government to the original owners upon independence.

Because of the social fact of differences in the quantities owned, the proponents think that there should be a policy explicitly setting a limit to the quantity that an individual may own. This argument states further that if there were limits, then most people who wanted to would be able to find adequate quantities. The whole argument is also buttressed by the fact that on some occasions, the owners of large quantities of land merely leave them fallow without putting it to good use. If the limit were set, then by the redistribution, the land would fall into the hands of those who wish to use it well in agriculture and thereby increase production and perhaps solve the abiding problem of food insecurity.



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To the proponents of this idea, land distribution is crucial for poverty alleviation.

Among the principal reasons cited against setting such limits is that it will necessarily be an interference with individual property rights. Unless there is proof that there are people who acquired the land through fraud or other illegal means, there is at present no legally defensible reason for setting these limits.

### Limit to Subdivision

It has been raised as a concern that in the agriculturally productive areas of Kenya, land units tend to be getting smaller and smaller due to increased subdivision. As a consequence of the continued division of pieces of land, the units that are in use are proving agriculturally unviable. It is thought that public policy should be initiated and backed by legislation to restrict the division of such land beyond some limits because agricultural productivity stands to suffer if the trend is not stopped. The point here is that land subdivision in Kenya has advanced to such extents that most of the portions presently held are uneconomical units with diminishing returns and overall declining value.

In dealing with the problem of declining productivity due to increased fragmentation, it must be repeated that all land is neither necessarily meant nor suitable for agriculture. So, whereas subdivision may affect the productivity of land intended for agriculture, other portions of land are not similarly affected. Indeed, it is possible that for non-agricultural land, the subdivision may be fuelled by the fact that the value of the land has risen. Meaning that land must be distinguished between agricultural and non-agricultural land because the reason for setting limits on subdivision would only hold for agricultural land.

Still, the property rights of individuals may be severely interfered with if such restrictions on subdivision of personal land were enforced. Ideally, it ought to be left to the individual to contemplate the consequences of his action as represented by that subdivision. On the other hand, it should also be upon the purchaser of land to determine the reason for the purchase of land and whether in their judgement, the intended size is appropriate and worth the price.

Thus, while it is true that both the value and productivity of agricultural land is often compromised by increased subdivision, the attempt to dictate what are the appropriate sizes is inconsistent with the principle of property rights and freedom of use. The acceptable alternative is then to encourage land consolidation.

### Unrestricted Freedom of Ownership

Despite the affinity for land, the preferable attitude ought to be the regard for land merely as a resource hence a commodity tradable like any other. Contrary to this view, there are groups of people who claim that land is a cultural asset that may not be acquired by others who do not belong to that group. On account of the feelings of cultural entitlement to land, there have been attempts to restrict some people from the acquisition of land on this ground alone. This point has been expressed by various prominent political personalities in defence of ethnic land rights.

The counterargument is that land is principally a factor of production hence is subject to sale just as much as any other commodity would be. Naturally therefore, it would be a breach of property rights to bar individuals from purchasing and selling it as they wished. The restrictions on the ownership of land on account of factors such as race, ethnicity and region of birth are political considerations that are in fundamental conflict with the rights of citizens. On the whole, it would interfere with the economic structure of regions to insist that land in specific districts for instance be preserved exclusively for given ethnic or racial communities. It also would certainly be imprudent to attempt the imposition of regional monoculture since such action will delay the rise of a real market in land.

### Goals of Redistribution

While the debates on land reform have identified the appropriation of land from foreigners and other Kenyans with the large tracts of unused land as a solution, a consensus on the goals of such redistribution has not been reached. It is therefore not clear what will be the primary purpose of the redistribution, should it be attempted. Among the options would be that the overriding goal should be for resettlement as opposed to agricultural use.

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One finds fault with the thinking that the solution to landlessness lies in the forceful appropriation of land from private owners and redistributing the same among the landless. In addition, there may be the real problem of squatters but this does not mean that they will necessarily use the land any more productively because it is lying idle. The dilemmas provided by the need to determine the goals of redistribution have to be accorded thorough consideration if redistribution will necessarily achieve the expected results.

### Control of Public Land

**T**here have been increased incidents of irregular allocation of public land. This has not been helped by the revelations that government officials have often not only assisted but also actively participated in some of the cases in which fraud has taken place. As a result, it is evident that the government is abusing its powers of trusteeship over the public asset of land. Most people have therefore argued that the government should cede control of public land to a custodian of public assets answerable to parliament. It is thought that the institution of such an office will lead to the better management of public land.

This suggestion reflects to a large extent the crisis of confidence in governance with the result that most Kenyans do not trust that the corruption involving public land allocations can be resolved without the creation of a seemingly independent institution. The suggested solution betrays the fact that the problem is diagnosed as political.

### Conflicts in Land Law

**T**here is little consensus on all the matters raised above regarding country's land tenure system and the route towards reforms. However, virtually all Kenyans are agreed that the land law regime in Kenya is inordinately complex and addresses the land issues from different perspectives. It is argued that this complexity leads to inconsistencies in law. If land reform is to take place, then the land law regime must be aligned and accordingly simplified. Some way must be found within the new architecture to resolve the problems between statute law and cultural rights to land that are accommodated by the law.

### Interrogating Common Assumptions

**A**ll the arguments in the land reform discussions in Kenya bear within them fundamental assumptions that require closer examination for validity.

The most common assumption is that agriculture will remain as the dominant sector of the Kenyan economy. While this is not always explicitly mentioned, the underlies comes to the fore in the arguments for land reform in the sense that all Kenyans are entitled to some land. More specifically, this emerges because of the fact that agriculture is responsible for about 25% of the GDP and is Kenya's leading industry. Kenyans do argue as if the situation will remain as it is and that there are no options for Kenya's long-term development beyond agriculture. This common assumption is overwhelmingly responsible for the inability of Kenyans to distinguish land issues from agriculture.

Unless it is intended for Kenya to remain agricultural for the foreseeable future, there is no reason to assume that land will continue to be of as much importance as it does now. The problems expected on the basis of this assumption will probably not be the same two decades hence. For illustrative purposes, during the copper boom in Zambia, up to 65% of the population lived off the land and in urban areas. So it is possible for such factors to shift the development paradigms decisively. In Kenya's case, it is probable that any modest rise in industrial structure may as well cause a fundamental shift by reducing the proportion of Kenyans who will depend directly on agriculture for employment.

Second, it is important to interrogate the assumption that production technologies will remain the same. The potential of changes occurring in production technologies are very high and these would as well affect factors such as the capacity of land, cultivable sizes and pricing. For instance, horticulture has risen as a competitive industry on account of the production technology used by the industry and has in a few years become one of Kenya's leading agricultural exports.

The third assumption arises from the most common solution suggested for land problems in Kenya. This assumption is that the prescription

of land ceilings is a means towards ensuring equity. This assumption cannot be right because it cannot work where land is a commodity. Unless it is intended that once land is redistributed, then the recipients are altogether forbidden from selling that land, this prescription cannot ensure equity. At the same time, the law establishing the ceilings would have to forbid not only the recipients of redistributed land, but also those who wish to increase their land holdings from making independent transactions. The obvious result would be that the government would distort the market on land and increase the transaction costs that go with it. This prescription would also be subject to the assumption that the recipients of the redistributed land must use the same for agricultural purposes and should they not be agreeable to such conditions, then they cannot convert the same for money.

A fourth common assumption that requires re-examination is that land should be reserved for particular communities. Once again, the assumption is that once the land is reserved, then individuals within the community may not willingly lease out or even enter into transactions of sale to other people who are not members of that community. This prescription can only work in an ideal environment where the members of the subject community will hold on to the land and not sell it out. Quite apart from the fact that the legal enforcement of such a prescription would be impossible, this prescription necessarily contradicts individual rights of freedom of choice in the use and acquisition of property.

The penultimate assumption is that the problem in Kenya is one of getting people to settle on land as a way of dealing with landlessness. As a matter of fact, the overriding concern should be about getting people out of fragile land in some ecological zones. In the Mount Kenya and Aberdare region, the immediate problem is to get people out of the foothills in order to preserve that ecological structure.

This example amply serves to communicate the

fact that very densely populated places need to be decongested because the intense cultivation and deforestation in those places leads to erosion and other forms of environmental degradation. It is obvious therefore that on occasion, it would be more prudent to prohibit settlement and cultivation on land that would otherwise be suitable for agricultural purposes in order to moderate the effects that may be contingent to that activity.

Finally, there is the enduring assumption that landlessness is a land problem. This is not factual because the real problem is that of economic opportunity. Since most indigent people often have only manual labour as a basic skill, it thus appears that the popular diagnosis of the problem is often that they lack land on which to settle and practise agriculture. Poverty is foremost an indication of lack of economic opportunity that is not always resolved by the

**“It may therefore be more prudent, less expensive and less politically destabilising to institute solutions that provide economic opportunity to people who are poor instead of insisting on the provision of land, which may be unavailable for all of them”**

provision of land because the sub-optimal use of land can itself be the product of poverty as is common in Kenya. It may therefore be more prudent, less expensive and less politically destabilising to institute solutions that provide economic

opportunity to people who are poor instead of insisting on the provision of land, which may be unavailable for all of them.

Whereas the above assumptions are common, it is demonstrable that they are not entirely right, if subjected to critical examination. If the reason for the suggested land reforms is really to tackle poverty, then it should be taken to mind that the mere provision of land would not guarantee a substantial reduction in poverty prevalence levels in Kenya. This is especially true since it is clear that for most small scale land holders, the greater portion of incomes are from off-farm activities. Essentially therefore, land reform in Kenya must necessarily proceed with caution and the underlying assumptions must be critically considered for their potential effects. On the whole, some of the prescriptions for the land tenure are not only legally unenforceable but also incompatible with others.

**Agriculture and Land Tenure**

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**O**ver the last forty years, the amount of agricultural land available per capita has declined by almost 50% and it translates into the pressure that Kenyans feel about land and the acute perception of landlessness. The common perception however is that the problem of squatters arises because of the patterns of ownership where a minority owns inordinately large portions of land while the rest of Kenyans have very little or no land. This partial description of the problem is largely responsible for the feeling that the solution lies in the redistribution of land by the confiscation of land from the large-scale landowners and allocation to the squatters.

In reality, the largest landholders in Kenya are white Kenyan farmers, foreign corporations and a substantial local population most of whom qualify as the political elite. Where the land is legally acquired, there can be no legally defensible mechanism for forcible confiscation. Of more importance would be the need to address the cases where land was acquired fraudulently.

While it is true that there are glaring differentials in the land sizes owned by different Kenyans, a closer look reveals that the inequality of distribution is very great even among small-scale holders. For figures of 5 hectares and below, it is found the majority of the population still own fractions of a hectare. It is therefore noteworthy that the land problem is not entirely one between the large-scale owners and the landless but more complex with differences even among those who are classified as small-scale landholders.

### **Failure of Land Reforms**

**I**t is not accurate to state that land reform in Kenya has failed in entirety. Many Kenyans have acquired land by the organisation into large land buying companies that acquire land in various places in the former white highlands. The acquired land is then sub-divided between the shareholders in accordance with their contributions. Such acquisitions frequently occurred on a more or less willing buyer and seller basis and thereby created a fairly fluid market for land. As a result, some foreigners and people from other parts of Kenya own a lot of land that is not always intensively used. However, most of this land belonged to some of

Kenya's pastoralist groups like the Maasai who feel entitled to it and assert that land reform has failed entirely. Conversely, the issuing of titles to land in the non-white highland areas of Kenya has proceeded with less controversy because there were fewer claimants contending for the land in these areas.

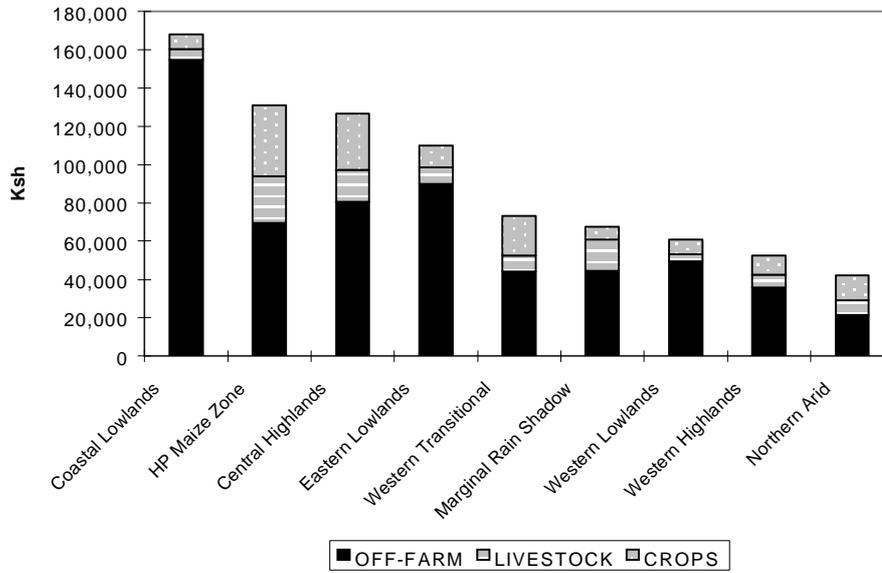
In looking at specific parts of western Kenya such as Kisumu, Siaya and other parts of eastern Kenya, it is found that almost 50% or higher of the monthly income of the households is derived from non-farm activities. So, while these people own some portions of land, they are not assured of sufficient returns from it to meet their immediate needs. For this category of peasants, their lifestyles already show that farming activities do not ensure that they transcend poverty and deprivation. Off-farm activities are required to supplement the earnings from agriculture. In short, agriculture is increasingly being relegated as the main income source. The very nature and size of the portions of land makes it impossible to introduce forms of mechanization that would translate into higher yield.

### **Off-Farm Incomes**

**M**onthly incomes from the off-farm sources are substantial and this implies that opportunities may exist for expansion. About 50% of rural farming households in Kenya are involved in off-farm income earning activities and up to 36% have at least a single salaried member living away from the farm. In addition, 33% receive remittances from members working away from the farm. Most of the wealthier rural dwellers earn their incomes from activities other than agriculture and often hold teaching or civil service jobs.

Still, there is some stratification even among those who hold the non-farm jobs and the critical factor is that of education or the lack of it. The incomes for those employed correlates highly with their levels of education. It is also apparent that the relatively affluent rural dwellers are less dependent on agriculture. Such people are able to engage in small enterprises that provide higher incomes than agriculture alone. The implication here is that it is plausible to venture that it is only the lack of economic opportunity that compels farmers to retain agriculture as an occupation. Impliedly therefore, the rural

**Figure 1: Composition of Household Income**



**Table 1: Monthly incomes from off-farm sources**

	Salary	Cases (%)	Off-farm	Cases (%)	Remittances	Cases (%)
Northern Arid	4,433	15	1,771	38	938	10
Coastal lowlands	7,448	59	9,136	84	2,248	49
Eastern lowlands	6,445	63	3,232	58	2,765	56
Western lowlands	5,406	25	3,752	63	963	42
Western Transitional	5,194	23	4,192	53	1,442	20
High potential maize zones	6,564	32	6,890	42	3,413	22
Western highlands	4,183	26	3,827	40	1,164	32
Central highlands	7,723	44	6,472	40	1,911	
Marginal rain shadow	6,775	34	1,467	53	2,938	29
Kenya		36		50		33

*Source: Argwings Kodhek, G. 1998. Monitoring for Improved Agricultural Sector Policy Making. Tegemeo Institute Conference working paper, Nairobi.*

dweller who is predominantly or exclusively engaged in agriculture often lacks other opportunities and is comparatively poorer. In short, agriculture in rural Kenya is an occupation for the indigent.

If this is taken to mind, then it should be clear to all Kenyans that if land reform is exclusively or largely intended to provide land to the landless, then it may achieve nothing and actually lead to the impoverishment of the beneficiaries relative to non-farm workers. From the above, policy makers must be made to understand that while Kenyans are still predominantly rural dwellers, for small scale farmers in the rural areas, agriculture is becoming increasingly less important as a source of livelihood.

### Specific Land Reform

The government cannot take a high moral ground in Kenya's land reform issues because the government is itself responsible for some irregular allocation of public land to reward its political supporters. Poor management of land has included the allocation of forest and fragile ecological areas to individuals without regard to either conservation or the law.

### Economic Reform

If it were deemed necessary to settle the landless in Kenya, there would be no guarantee that the process would run transparently hence little would be solved. At an objective level, settling the landless should not be the government's policy priority since it will almost certainly generate a lot of political heat. Land reform targeted exclusively towards redistribution would take a lot of years without necessarily bringing forth an acceptable outcome. Since the goal is to impact on poverty, comprehensive economic reforms would guarantee more benefits to the poor than any programme of land redistribution on its own.

At the same time, it has been demonstrated that agriculture is increasingly being relegated as the foremost source of income for rural farmers in Kenya. While the level to which this replacement has occurred is greater in some regions than others, off-farm economic opportunities are increasingly supplementing agricultural income. Full dependence on agricultural incomes is often

an index of the inability to find a supplementary source of income and means that these farmers remain poor. Policy makers should note this state of affairs and direct land reform towards expanding the landscape for the off-farm economic activities. Any insistence that land reform be directed at redistribution will impact marginally on poverty and inequality because the distribution of unviable units of land would have no economic consequence. Economic reality should prevail over the political considerations of redistribution.

### Land Consolidation

Since many portions of land are economically unviable, if the economic opportunities were expanded sufficiently, then the affinity for land could be substantially reduced to allow for the consolidation of these units into viable and competitive units. Whereas land consolidation had been tried out and has since been abandoned, it is imperative to reconsider the initiation of a new programme that may consolidate new areas so as to boost agricultural productivity and provide meaningful employment. It is only when land is sufficiently consolidated that cost-cutting measures and mechanization can be realistically pursued.

**“comprehensive economic reforms would guarantee more benefits to the poor than any programme of land redistribution on its own”**

On the other hand, because of the fact that agricultural land is still not optimally utilised, there should be attempts made to restrict activities

whose effects exclude the use of land for agriculture or other economic purpose. For instance, rural areas in Kenya have no specifically designated interment grounds and this leads to the use of agriculturally viable land for interment. If a consensus could be built to allow interment to take place on designated cemeteries, then agricultural land use would be transformed by at least a generation. Land use could be intensified and the quantities of land available for agriculture would not be steadily declining on account of interment on land that is otherwise ideal for farming.

### Statute Law

Regularising the different statutes and removing the contradictions inherent in them could resolve complexities in Kenya's land law regime. It could also help if the government

interfered less and let judgements regarding land matters to stand. If the laws retained stability, then a real market for land in Kenya will begin to emerge and grow. The creation of a rational and an efficiently working market is hindered by the government's interference in land matters through proclamations and other policy shifts that are contradictory. If a market were created, then proclamations about exclusive entitlement to land in regions of Kenya would cease to worry people with an inclination to place huge investments on land.

### Ecological Preservation

Since certain ecological zones in Kenya are fragile, the government should not hesitate to place restrictions on the manner and extent of activities that are permissible. Areas such as the Mount Kenya and Aberdare ranges should receive protection when unanticipated danger to the ecosystem arises. In other words, the government must take the lead to disabuse Kenyans from thinking that all available land must be put to agricultural use. This goes back to strengthening the environmental laws. Connected to this is the finding that where irregular allocation of public land has been proven, then the restoration of that land should be a priority. Given the serious levels of

fraudulent acquisition that has occurred, the idea of a custodian of public land and other assets should be considered. This office should be answerable to the legislature because most of the frauds occur within the executive arm of government. The office should put in place a database of public assets that is available for public scrutiny.

### Conclusion

Land reform issues in Kenya remain complicated by reasons ranging from legal complexities, political involvement, corruption and the extreme poverty prevalent in the country. In order to ensure that solutions applied actually impact upon problems, it is advisable that the genesis of the specific problems be examined separately so that fitting solutions are put in place for individual problems.

It must be noted that given the present circumstances, the arguments proposing the restriction on land ownership with regard to sizes ethnicity a race are guaranteed to bring about unacceptable and retrogressive social and economic outcomes. To conclude, while meaningful land reform is necessary, it can only be meaningful as component of wider economic reform.

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