

Ndung'u Report on Land Grabbing in Kenya: Legal and Economic Analysis

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Abstract

Land grabbing is one of the past injustices that the Constitution of Kenya 2010 and Sessional Paper No. 3 on National Land Policy of 2009 recommended for immediate attention. It is a post-independence phenomenon which intensified in the 1990s. The phenomenon has been driven by both external and domestic factors. Due to its intensity, there has been outcry from aggrieved communities and civil society groups challenging the illegal and irregular allocations, which largely fueled the ethnic clashes in 1992, 1997 and 2002. This outcry prompted the government to establish the Ndung'u Land Commission in 2002. The Commission identified the persons to whom land was allocated unlawfully or irregularly, and the officers involved in the allocations. It also recommended the legal and administrative measures to be taken. Though the report was completed in June 2004, it has not been implemented to date. The unresolved grievances may have contributed to the 2007 post-election clashes. This paper analyzes the recommendations of the Ndung'u report, and specifically the behaviour of the beneficiaries of illegally allocated public land, and assesses what hindered its implementation. The Commission recommended two general rules. Rule I proposed title revocation without compensation of illegally/irregularly allocated public land whose public interest outweighs private development. Rule II recommended that the land owner pays market value of the illegally/irregularly allocated land if private development outweighs public interest. This study found that implementation of both rules was not an easy task, since most of the illegally/irregularly acquired land had changed hands. It also noted that both rules were silent on how valuation between private versus public interest is determined. Implementation of recommendations was also hindered by several conflicting legislations that govern land ownership, and lack of political will because majority of the beneficiaries are still in power.

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1. Introduction

Since Kenya's independence, an estimated 200,000 land titles have been created through land grabbing. Land grabbing entails privatization of public land through illegal allocation of such lands to individuals and corporations, in total disregard of public interest (Government of Kenya, 2004). Public outcry against the practice precipitated the appointment of a commission to inquire into general allocation of public land. The commission catalogued illegal and irregular allocations of public land and its beneficiaries. It also offered legal remedies.

Land grabbing is a manifestation of institutional failure of the executive branch of government to manage public land. A method of direct grant that had operated successfully during the colonial period became the basis of massive illegal and irregular allocation of public land by post-independence governments. In the post-independence era, the executive arm of government became the custodian of public land. The President inherited enormous power to administer public land and entrenched some of this power in the Constitution. By the 1990s, this unbridled presidential power had frustrated the effort of parliament, aggrieved communities and civil society groups to challenge the illegal and irregular allocations (Government of Kenya, 2004).

The Ndung'u Land Commission¹ recommended two general rules based on the development status of the land in question. Rule I proposed title revocation without compensation for illegally/irregularly allocated public land, whose public interest outweighs private development. Such allocation includes public land without development. The rule covers land held by the original allottees as well as third parties. Rule II applied to illegal allocations that have been developed, with the value of the development outweighing public interest. Under the rule, the current landowner retains the title of land in question by paying the government the market value of the land. Both rules are silent on how

¹ Ndung'u Commission refers to a Commission of Inquiry into the Illegal/Irregular Allocation of Public land prepared under the chairmanship of Paul Ndung'u. The Commission was appointed by the President of Kenya 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 prosecution.

valuation between private versus public is determined.

The commission identified the persons to whom land was allocated unlawfully or irregularly, and the officers involved in the allocations. It also recommended the legal and administrative measures to be taken. Though the report was completed and submitted in June 2004, it has not been implemented.

This paper analyzes the behaviour of the beneficiaries of illegally allocated public land under the two proposed rules. First, the analysis focuses on investment choice of an owner of illegally allocated public land whose public value exceeds private value, while facing the threat of revocation without compensation of the land in question. Second, the analysis involves a case where the private value of the illegal allocation outweighs public interest, under which according to the second rule, the landowner retains the land at the cost of paying the government the market value of the land in question. Thirdly, the paper examines the legal and political barriers of implementing the Ndung'u report.

The rest of the paper is organized as follows: Section 2 provides the background information, including the synthesis of the legal framework of allocating public land, while Section 3 summarizes the findings of the Commission. Section 4 provides the conceptual framework and a simple economic model on land development. Section 5 provides the explanation on legal and political barriers that have impeded the implementation of the report. Section 6 concludes the analysis.

2. Background Information

2.1 Colonial Land Policy

Before Kenya became a British Protectorate in 1895, land tenure was governed through the African customary laws, which embodied usufructuary and communal ownership. As a protectorate, the British had no legal power to alienate land unless such power was granted through agreements. Thus, they could not claim title on land occupied by Africans.

To circumvent this constitutional impasse, the British invoked the Foreign Jurisdiction Act of 1890, which gave jurisdictional power over unoccupied land. They enacted new laws to acquire land occupied by the Africans. These laws denied Africans' occupancy rights by segregating them to the so-called Natives' Reserves. Africans, for the first time, became tenants at the will of the Crown.

With legal power to alienate land in native reserves, the Kenya colonial government adopted a policy that encouraged European settlement through freehold and leasehold estate, at the expense of African settlement. African land tenure system was seen as an impediment to proper land use practices. Consequently, the colonial government modified the policy and allowed replacement of customary system with English-style based on individual property rights.

However, replacement of Africa land tenure with private ownership stalled until the Mau Mau revolt demonstrated the urgency of land reform (Okoth-Ogendo, 1976). In the wake of the revolt, the British government established the Royal Commission to produce a blueprint of subsequent land reform policy (East African Royal Commission 1953-55). At the same time, Kenya's colonial government produced the so called Swynnerton Plan (Swynnerton, 1955). Both reports called for land reform based on formalization of property rights held under the customary law. The reform process entailed three steps: adjudication, consolidation and registration (Miceli and Kieyah, 2001).

Although the proposed land reform was mainly driven by economic factors, it had political overtones aimed at disinheriting Kenyans who had left their communities to join the Mau Mau revolt (Leo, 1989).

2.2 Post-Independence Land Policy

Instead of overhauling the colonial land policies to reflect the interests and aspirations of its citizens, the Kenya government pursued vigorously the inherited land reform with minor modifications in favour of political elites (Government of Kenya, 2009). The government re-entrenched the inherited land reform by enacting the Registered Land Act-RLA (Government of Kenya, 1963). Land distribution through settlement schemes also became part of the reform agenda to calm Kenyans' discontent over disinheritance of their land. Moreover, through government mortgages, Kenyans were allowed to purchase large farms outside the settlement areas (Leo, 1989).

The promulgation of the Registered Land Act (RLA), CAP 300 of 1963, had two objectives. First, the Act set to unify the multifarious systems of land registration in Kenya by bringing land registered under other laws in compliance with RLA (Kagagi, 1992; and Jackson, 1988). Second, the Act ensured that land held under African customary law was in compliance with the Act through enactment of several legislations. The Land Adjudication Act (LAA) ascertains ownership based on the African customary law (Government of Kenya, 1977). Whenever applicable, fragmented plots belonging to a single owner would be consolidated to a single plot with the same acreage under the Land Consolidation Act (Onalo, 1986). Rights or interests in land were finally recorded in a public register and title deeds issued under the RLA (Government of Kenya, 1963).

2.3 Legal Framework

2.3.1 Allocation of public land

The Ndung'u Commission traces the genesis of public land allocation through direct grant to the colonial era. To encourage urban development and curb land speculation, the colonial government adopted direct grant to allocate public land to replace the then existing system based on public auction. The direct grant method gave the Governor more latitude in allocating public land to individuals or corporations for developmental purposes (Government of Kenya, 2004).

Land grabbing is a post-independence phenomenon that intensified in the 1980s and 1990s. It was driven by both external and domestic factors. Externally, Kenya's foreign aid was suspended for the country's

failure to embrace the new wave of democratization that had engulfed developing countries. The suspension had the intended consequences of weakening political patronage networks (Klopp, 1997). Faced with intense political competition and dwindling resources to fund political patronage, the government increasingly turned to public land as an alternative. Allocation of public land became an attractive resource because it was less fettered by donor community scrutiny and conditionalities (Klopp, 1997). Moreover, allocation of public land was an attractive alternative because the beneficiaries were hedged from inflation and domestic scrutiny.

2.3.2 Statutory conversion of land ownership in Kenya

Government land to private land: Alienation

The Government Lands Act, CAP 280, empowers the executive arm of government to allocate un-alienated public land to individuals or corporations using public auction. However, public auction was abandoned and replaced with the current practice, which entails offers for sale to prospective buyers through advertising, after the land has been surveyed and necessary infrastructure put in place (Government of Kenya, 2004). The allocation of alienated government land is prohibited unless a “change of user” process has been legally implemented. However, this is not followed, and direct allocations have been applied, resulting to land grabbing.

Private land to government land: Compulsory acquisition

Private land may revert to government first through the doctrine of compulsory acquisition (Government of Kenya, 1983). Under this doctrine, the constitution empowers the state to acquire private land so long as the land acquired is for public purpose, and the owner is fully compensated. Second, if a private land holder died in state, and there is no next of kin, the land became un-alienated government land, which can be reallocated.

Trust land to private land: Adjudication

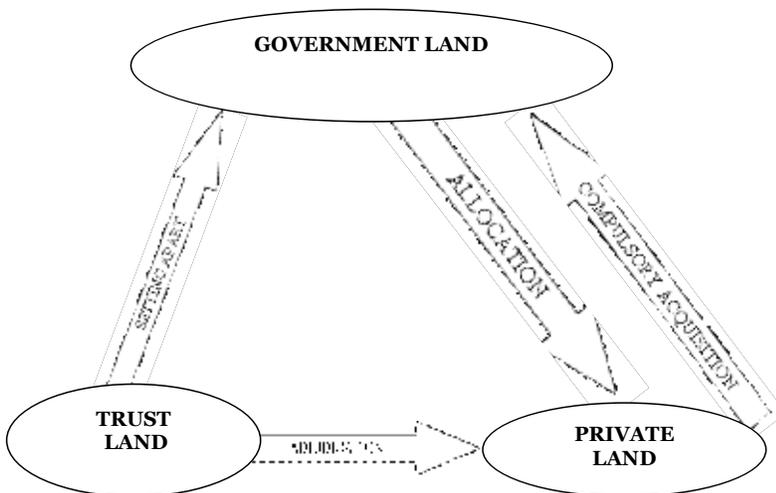
Trust land may be indirectly or directly allocated to private parties. Indirect allocation entails converting trust land to alienated government land and then allocating it to private parties. The Constitution grants the President and local government a modified compulsory acquisition power to set apart Trust Land for various purposes. Local authorities

may also set apart trust land for public purposes, and for minerals and oil extraction, or beneficial uses of land.

Direct conversion of un-adjudicated trust land to private land involves three steps: adjudication, consolidation and registration. Adjudication encompasses the ascertainment and recording of customary land rights in the Trust Land (Government of Kenya, 1968). Once the ownership is ascertained, consolidation of landholdings is allowed whenever appropriate. It entails owners giving up ownership of their adjudicated fragmented plots in exchange of a single plot with the same aggregate acreage of the fragmented plots (Government of Kenya, 1966 and Onalo, 1986). After everybody is satisfied with the adjudication process, then each person whose name is on the adjudication register is registered as a proprietor of his/her particular piece (Government of Kenya, 1989).

Figure 2.1 provides a synthesis showing conversion of land ownership of public land to private land. Public land consists of government and Trust land.

Figure 2.1: Synthesis on land allocation



3. Report of the Land Commission

In 2002, a new democratically elected government came into power in Kenya, with a platform to address the land grabbing problem in response to public outcry. It appointed a land commission, popularly known as the Ndung'u Land Commission to inquire into the unlawful allocations of public land. The government mandated the commission to ascertain the beneficiaries, identify public officials involved in illegal allocations, and recommend remedial measures, including prevention of future illegal allocations.

The Commission documented widespread illegal allocations of public land, which were manifested in various forms. The Commission categorized its findings into three broad typologies of public land: urban, state corporations and ministries lands; settlement schemes and trust land; and forest lands, national parks, game reserves, wetlands, riparian sites, protected areas, museums and historical monuments.

In urban areas, the Commission found that the Executive abused its powers by directly granting un-alienated and alienated public land to individuals and corporations for political patronage, contrary to the law. Similarly, the Commission found that the Land Commissioner violated the law by usurping presidential powers to grant public land. For example, the Commissioner, through forged letters, consented to illegal transfers of undeveloped government leasehold, contrary to the law. Furthermore, the Commissioner indiscriminately granted change of user for urban public land, which had been reserved for public purposes such as schools, hospitals, parks and others. The Commission listed 551 allocations of land reserved for purposes of which 92 per cent were used as residential. Only approximately 0.08 per cent of these allocations have changed ownership from the original allottee, which suggests that most of the allocations are held for speculative purposes (Government of Kenya, 2004). In addition, the Commission found that some local authorities illegally allocated reserved public land within their jurisdiction without following proper procedures. The Commission found complicity of professionals in the illegal practice.

State corporations are governmental entities whose land is considered public land. The Commission found that state corporations' land was subjected to illegal allocation through various methods. First, the Commissioner illegally allocated land that was reserved for the use of state corporations without the knowledge of the respective boards

of the state corporations. Second, public land that was irregularly surrendered by state corporations for reasons such as liquidation was later allocated without following proper procedures. Third, some state corporations were pressurized to purchase illegally allocated land at exorbitant prices. For example, the National Social Security Fund (NSSF) paid Ksh 30 billion for illegally acquired land from politically connected individuals (Government of Kenya, 2004). Fourth, some state corporations were compelled to sell their prime land to politically connected persons for scandalously low prices.

The wanton illegal allocation of public land adversely impacted the planning and administration in urban areas, giving rise to informal settlements. Equally, substantial taxpayer funds were lost by state corporations through land-related scams.

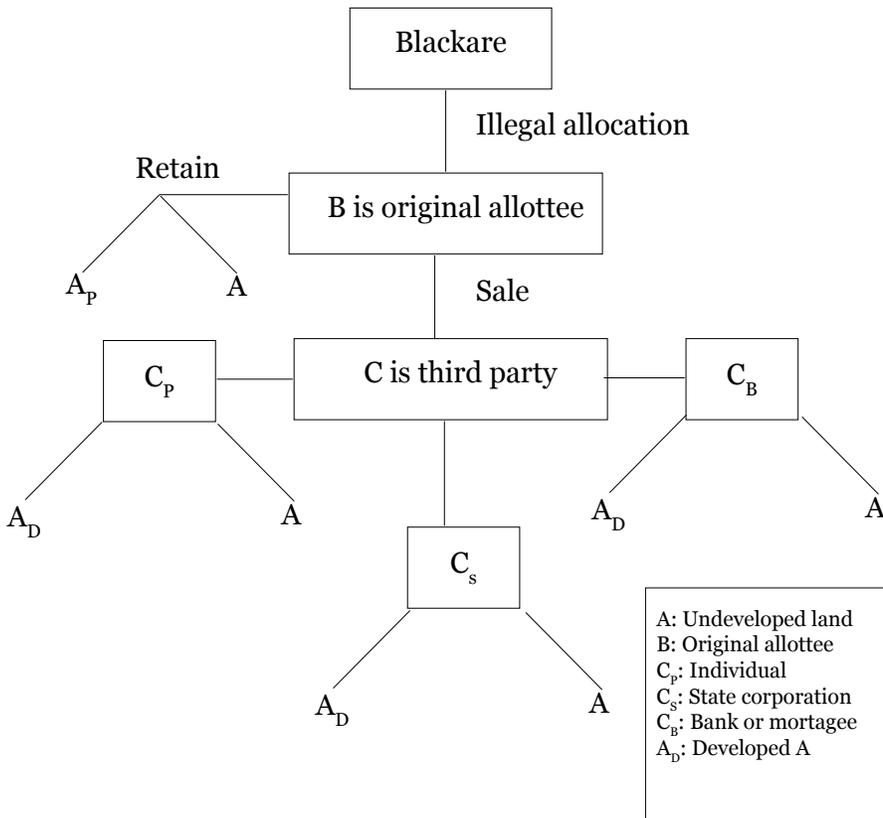
The second category of illegally/irregularly allocated public land was settlement schemes and trust lands. Through international financing, the post-independent Kenyan government initiated settlement schemes to redistribute land to landless Kenyans. The government established Settlement Fund Trustees and empowered them to purchase government land. The Commission found that unlike the early years of independence, the subsequent allocations of land settlement did not conform to the stated objectives (Government of Kenya, 2004). For example, at the Agricultural Development Corporation (ADC) Sirikwa settlement scheme, average allocation for the landless was five acres, while one politician was allocated 145 acres.

4. Analysis

4.1 Conceptual Framework

To simplify the problem and explain the Commission's recommendations, an analysis is presented in a flowchart diagram as shown in Figure 4.1. Assume Blackacre (A) is a public land that was illegally/irregularly allocated to an original allottee, B, for political patronage. Suppose the allottee registered the allocated land under the Registered Land Act (Cap 300). B has two options: first, retain the new registered land in its original state for speculation purposes or to develop it. Second, B could sell the land to a third party C, who could be an individual or government agency. C could also be a bank with overriding interest as chargee. As an individual, C could either retain A or develop it. As a government agency, C could similarly either retain A or develop it. As a bank or mortgagee, C has two options; first, accept the title of A as

Figure 4.1: Analysis of the commission's recommendations



collateral to advance a loan for purposes other than A 's development and, second, the borrowed loan could be used to develop A .

The Commission's remedial recommendations encompass two broad legal rules based on the development status of A . Under the first rule [Rule I hereinafter], the Commission recommends revocation of the title in all cases where A is not developed, without compensation (Government of Kenya, 2004). On the other hand, in cases where A has been developed beyond restoration to its original state, the Commission offers varying recommendations. First, if B has developed A such that it cannot be restored to its original purpose, the Commission recommends the government to consider issuing new titles based on new and reasonable conditions. Second, the Commission offers the same recommendations in cases where C is an individual. Third, if C is a government agency and has developed A , the Commission recommends the government to establish legal basis that would enable the corporation to retain the title of A so long as public interest is served. Fourth, if C is a bank or mortgagee whose loan has been used to develop A , the commission recommends revocation of the title.

4.1.1 Model

Suppose a government study reveals that m plots that had been reserved previously for public use have been illegally allocated to original allottees, who have in turn sold them to n identical individuals. Assume the government randomly chooses some plots to restore them to their original status and provide a public good valued at B per person. The government makes one-time decision whether or not to revoke the title. Let $V(x)$ be the value of plot if the landowner invests x to develop it. Note, $V(x)$ is increasing in x , but at a decreasing rate. Assume landowner's decision to invest precedes the government revocation decision and thus x is subsequently regarded as a sunk cost. There is a probability p that the title of a given plot will not be revoked, whereas $1-p$ is the probability of revoking the title of the plot. Let $C(x)$ be the compensation to be paid to landowners whose plot titles are revoked. The compensation is assumed to increase with the investment, x , at an increasing rate.

Given that the revoking decision is exogenously determined, the landowners' choice variable is x , which must be made before revocation. Following this assumption, the social problem is to chose x to maximize the landowners' expected return plus the value of the public good.

$$\text{Maximize } pV(x) + (1-p)B - x \quad (4.1)$$

Substitute $p = (n-m)/n$ and $(1-p) = m/n$, in Equation 4.1

$$\text{Maximize } (n-m)V(x) + mB - x \quad (4.2)$$

The social optimal condition will be:

$$(n-m)V'(x) - m = 0, \text{ or by simplification}$$

$$pV'(x) - 1 = 0 \quad (4.3)$$

Equation 4.3 states that the optimal level of investment, x , will occur at a point where expected additional value of investment in each plot equals the additional cost of the investment.

4.1.2 Rule I

Assuming that the landowner is risk-neutral, considering actual investment choice under rule 1 allows for title revocation without compensation, $B \geq V(x)$. The landowner chooses x to maximize the expected private value of the land given the risk revocation and the value of public good B . Thus, he or she chooses x to:

$$\text{Maximize } pV(x) + (1-p)[C(x) + B] - x \quad (4.4)$$

The landowner's optimal condition is:

$$pV'(x) + (1-p)C'(x) - 1 = 0 \quad (4.5)$$

Since the government pays on compensation, then $C'(x) = 0$. Thus, the landowner's optimal condition becomes:

$$pV'(x) - 1 = 0 \quad (4.6)$$

Note that the social optimal condition (Equation 4.3) corresponds to the landowner's optimal condition (Equation 4.6). This means that revocation without compensation will induce the landowner to choose x , which corresponds to a social optimal level of investment.

The rule induces the landowner to behave efficiently given the risk of revocation without compensation by choosing the level of investment that is socially optimal.

This rule is consistent with the Constitution of Kenya 2010; if the landowner happens to be the original allottee. However, the rule may be unconstitutional if the landowner is a third party without knowledge of illegality when the transfer was effected.

4.1.3 Rule II

If the private value outweighs the public benefits, $V(x) > B$, rule II applies. The rule II allows the landowner to retain the plot at the cost of paying the market value of the plot, $R(x)$, to the government. Granted that $V(x) > R(x)$, the landowner chooses x to maximize the expected private value of the land given the risk of revocation without compensation to the government.

$$\text{Maximize } pV(x) + (1-p)R(x) - x \quad (4.7)$$

The optimal condition:

$$pV'(x) - (1-p)R'(x) - 1 = 0 \quad (4.8)$$

Note that the landowner's optimal condition (Equation 4.8) is less than the social optimal condition (Equation 4.3). Consequently, rule II is inefficient because it induces the landowner to under-invest.

The above analysis can be replicated in cases where the third party is a bank. If the bank accepts the title of an illegally allocated public land without the knowledge of illegality, its interest is protected by the law.

Rule II is also inconsistent with the law. The existing national laws protect the interests of land title deed holders. The Constitution provides protection of property, including private property, against state expropriation without prompt payment of full or just compensation. The compulsory acquisition must be for a stated public purpose and interest. The revocation rule without compensation as proposed by the Commission would then be unconstitutional. The Commission claims that the Constitution protects legitimate holders of land. A third party who acquired the initially allocated public land without knowledge of illegality would be the legitimate owner, and thus its interest would be constitutionally protected.

The two major registration statutes are based on Torrens system. They protect the current title holder against future claimants as long as the "proprietor had no knowledge of the omission, fraud or mistake". Under the registration laws, the state guarantees the title, which becomes *prima facie* evidence of ownership.

On the other hand, Rule II is inequitable because it mandates the current holder to compensate the government in cases where restoration of illegally allocated public land is not feasible. According to the Commission, the current holder may, at her own cost, sue the seller

to recover his or her initial payment. This would trigger a chain of legal claims that would overload the judicial system.

5. Implementation of the Ndung'u Report

To date, the recommendations in the Ndung'u Report have not been implemented. The key hindrances as discussed above are legal and political barriers.

5.1 Legal Barriers

5.1.1 Statutory barrier

According to the Registered Land Act, Cap 300, section 143 (1) and (2), the first registration of title deed cannot be revoked. The subsequent registration can only be revoked if proved that it was obtained through fraud or mistake. According to the Constitution, however, the other reason that can allow first and subsequent registration of title deeds to be revoked is “overriding interest”, which allows the government to compulsorily acquire the land after proving that it is needed for public purpose. If the government opted for compulsory acquisition to restore illegally/irregularly allocated public land, the compensation budget would be astronomical.

5.1.2 Case law

In a recent case (2005),¹ the High Court denied an order of *Mandamus* sought to compel a government official to implement part of the Ndung'u report relating to the land in question. The applicants of the case are representative of a clan who brought Judicial Review Proceedings against the respondents, government officials and representatives of the Catholic church. The applicants' basic claim is that part of their land was unlawfully acquired by the Catholic church in conspiracy with named government officials.

The order of *Mandamus* is a judicial order to enforce a duty whose performance by government bodies is not optional or discretionary. Rejecting the order, the Court observed that the recommendations of the Ndung'u report do not constitute any statutory duty under the Commissioners of Inquiry Act, which established the Ndung'u

² John Peter Mureithi, Shadrack Muteru Gitonga, James Ndung'u Theuri v. The Hon. Attorney General, The Hon. Minister for Lands and Settlement, The Commissioner for Lands, The District Land Registrar, Catholic Archdiocese and the Archbishop of the Catholic Archdiocese of Nyeri, Kenya Law Reports, High Court at Nairobi, Misc Civ Application 158 of 2005.

Commission. Moreover, two of the respondents are juristic land owners but not public bodies.

Therefore, the Court held that it could not compel the respondent to implement the Ndung'u report in favour of the claimant for the following reasons. First, it was within presidential discretion to act or not act on the recommendations of the report. Moreover, the doctrine of separation of powers restricts the court from interfering with policy considerations. Second, the respondents, especially government officials, had no statutory duty imposed on them by the recommendation or any other law to implement the report.

5.1.3 New constitution

Section 40 of the Constitution of Kenya 2010 does not confer constitutional protection to any property that has been acquired unlawfully. The legal consequence of this provision is that illegally acquired public or private land is not constitutionally protected. Under this provision, the government may repossess all illegally/irregularly allocated public land without prompt payment in full or just compensation. However, the Constitution is silent on cases where the illegally allocated public land has been transferred to a third party who has no knowledge of illegality at the time of transfer.

5.2 Political Barrier

This section conjectures that lack of political will that emanates from weak vertical accountability has impeded the implementation of the recommendations of the report. Table 5.1 on selected illegal allocations of part of Mau forest supports this conjecture.

Accepting the inevitability of Kenya becoming an independent country, the colonial government included protection of property rights in land in the agenda of the Lancaster conference.³ To avoid political and economic disruption that the thorny land issues would have generated, the new independent government re-entrenched the colonial land policy with minor modification to appease vocal indigenous Kenyans.

Since independence to the late 1980s, the level of allocation of public land in exchange for political support was minimal. However, with the

³The Lancaster House conferences were three meetings (1960, 1962, and 1963) in which Kenya's constitutional framework and independence were negotiated.

introduction of multi-party elections in the 1990s, which was tied to the withdrawal of donor aid that had been used to fund political patronage, the political support of the then incumbent government was eroded. Pressured to restore its dwindling political support, the incumbent government intensified the illegal allocations that led to widespread land grabbing.

The Ndung'u Commission confirmed earlier findings of the Njonjo Commission⁴ that government officials conspired with well connected politicians and individuals to grab public land. The selected numbers as shown in Table 5.1 support this assertion. For example, 19.2 per cent, 38 per cent and 47 per cent consisted of government officials/politicians and their family members who were original allottees of Nakuru/Olenguruone/Kiptagich, Kitale II and Kitale III forests, respectively. Out of 2,591.57 hectares of Nakuru/Olenguruone/Kiptagich forest, 795.7 hectares were allocated to government officials/politicians and their families, which amounts to 31 per cent, while in Kitale forest II 154.6 hectares were allocated out of 379.7 hectares, which consisted of 41 per cent of the total land allocated.

Although these numbers come from selected cases, they support a general consensus that politicians/government officers and family members benefited as the original allottees. These are former and current politicians, and government officers who have strong vested interests to protect.

Further, evidence of political good will is lacking, given that besides *ad hoc* measures to identify those illegally/irregularly allocated land by the Ministry of Lands and the Kenya Anti-corruption Commission, there has not been a comprehensive legislative or executive order to implement the Ndungu report since 2004. We can only assume that with the government recommendation on repossession of illegally/irregularly allocated land in the new constitution, the implementation will be fast-tracked.

⁴ Njonjo Commission refers to Report of the Commission of Inquiry into the Land Law System of Kenya prepared under the chairmanship of a former Attorney General, Charles M. Njonjo. It was established in 1999 and focused on coming up with principles of a National Land Policy framework, the constitutional position of land and formulation of a new institutional framework for land administration.

**Table 5.1: Illegal/irregular land allocation to politicians/
government officers and family members**

	Nakuru/ Olenguruone/ Kiptagich forest	Kitalale II	Kitalale III
No. of irregular/illegal allocations	661	116	78
No. of politicians/government officers and family members allocated land	127	44	37
% of no. of allocations to politicians/government officers and family members	19.2	38	47.4
Total acreage	2591.57	379.7	-
Total acreage allocated to politicians/government officers and family members	795.7	154.6	-
% of acreage allocated to politicians/government officers and family members	31	41	-

Source: Authors computation from Annexes of the Ndung'u Report, Vol. II

6. Conclusion

The Ndung'u Commission's proposed general revocation without compensation rule partly addresses the land grabbing problem. It induces the landowner to effectively develop public land in question, given the revocation threat. However, by not compelling the government to internalize the cost of revocation, the rule would induce the government to behave inefficiently. The government will likely over-revoke titles even in cases where the social benefit outweighs the social cost. Moreover, the rule is consistent with the Constitution of Kenya 2010, which does not protect any property that has been unlawfully acquired. This applies to cases of land ownership vested in the original allottee. The rule may not apply to cases where land ownership has been transferred to a third party who had no prior knowledge of illegality at time of conveyance.

Rule II allows the landowner to retain the acquired land by paying the market value of the land in question to the government, if the private value exceeds public value. The rule is inefficient and inconsistent with national laws, including the Constitution. It is inefficient because it induces the landowner to under-invest. The rule is inconsistent with the registration law, which protects the current title holder against future claimants. Application of the rule would amount to taking which is unconstitutional.

Finally, implementation of the Ndung'u report has been hindered by lack of political will and support, because most of the beneficiaries of the allocation are politically connected.

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