

## **The Ndungu Report: Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land**

Released in December, 2004 the Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (Government Printer, Nairobi), was chaired by Paul Ndungu, inter alia, details illegal land awards made in a systematic way in which established procedures, designed to protect the public interest, were perverted by, *among other professionals lawyers*, 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.

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).

Kenya, the Commission 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).
- II. 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.
- III. 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.
- IV. 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 Ndungu 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. Indeed, 4,000 acres of Maasai Mara Forest Title Narok/CIS/Mara/Ololulunga/9470 Parcel 9470 in 1999 was allocated to Ilinga Construction Company and then transferred to Mr Tobiko's client Livingstone Kunini ole Ntutu who owned the said company.*



## Republic of Kenya

### Report of the Commission of Inquiry of the Illegualar Allocation of Public Land

Presented to

**His Excellency**  
**Hon Mwai Kibaki cGN MP**  
President and Chief of Armed Forces of the  
Republic of Kenya

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