THE NATIONAL ACTION PLAN ON BUSINESS AND HUMAN RIGHTS IN KENYA

Background Paper: Thematic Area Access to Land

Dr. Fibian Lukalo
National Land Commission
September 2017

- This paper does not represent the views of NLC, but rather is intended to stimulate discussion.
I. Introduction

The purpose of this background paper is to provide detailed guidance for lawmakers and policymakers, as well as civil society agencies and other stakeholders to support the adoption and effective implementation of laws, policies and programs to respect, protect and fulfill the national action plan on business and human rights. It is based on results from policy dialogue meetings\(^1\) with state actors, non-state actors and administration of justice players, regional consultations, and the *Guiding principles on business and human rights* (UN, 2011). During these meetings public participation, consultation, paper presentations and discussion from various sectors and regions\(^2\) were presented. These discussions and consultations, which informed this background paper, helped to bring to the surface many of the critical issues facing access to land in regards to business and human rights. This background paper also incorporates the key land access concern submitted by key experts, regional forums as well as extensive thematic research.

Land itself should be understood as defined by the Constitution (2010) Article 260, to include: The surface of the earth and subsurface rock; any body of water on or under the surface; marine waters in the territorial sea and exclusive economic zone; natural resources completely contained on or under the surface; and the airspace above the surface. The Constitution in Article 60 further lays down the principles of land management to be equitable, efficient, productive and sustainable. Specifically, these principles include; equitable access to land; security of land rights; sustainable and productive management of land resources; transparent and cost effective administration of land; sound conservation and protection of ecologically sensitive areas; elimination of gender discrimination in law, customs and practices related to land and property in land; and encouragement of communities to settle land disputes through recognized local community initiatives.

Consequently, throughout this background paper the phrase ‘access to land’ must be understood holistically within the Kenyan Constitutional requirements and legal frameworks in a manner that is grounded in the international business and human rights framework. These rights entail the ability of the Kenyan state to facilitate access to land. Access to land must be understood in the context of intersecting forms of discrimination since land is inextricably linked to individuals/communities access to, use of and control over other productive resources. For purposes of this paper land access is broadly defined as the processes by which people individually or collectively gain rights and opportunities to occupy and utilize land on a temporary or permanent basis. These processes include participation in both formal and informal markets, land access through kinship and social networks, including the transmission of land rights through inheritance and within families, land allocation by the state, county governments and other authorities with control over land and landowners. In this background tenure security remains an important

---

\(1\) Proposed membership of the Land thematic working group: National Land Commission; Land Development and Governance Institute (LDGI); National Construction Authority; Council of Governors; and Indigenous group Representatives.

\(2\) Refer to the regional consultation contributions from Turkana County (Rift Valley Region), Kakamega and Kisumu County (Western Region) and Coastal Region.
dimension of land access for business and human rights agenda. Therefore, as the National Action Plan is being modeled any interventions must defend the land rights and access opportunities for vulnerable groups (women, youth, indigenous peoples, pastoralists and other marginalized groups dependent on common resources).

II. Background: Linkages between Access to Land, Business and Human Rights Obligation

With regard to land access, there are several reasons why the Kenyan Government should initiate the process to put in place the NAP on Business and human Rights. Kenya has ratified a number of international human rights instruments that impose explicit or implicit obligations on the government to ensure business enterprises linked to land are operating within its jurisdiction do not violate human rights. If companies or agencies operating within Kenya violate land rights of the communities they will have committed human rights violations and subsequently receive resistance from the affected communities/individuals drastically slowing down development projects. Any land-based model for economic development should therefore be both sustainable and inclusive.

Land is intrinsically linked to the socio-economic politics and governance in Kenya in relation to access and the use of land as it has been controlled. Therefore, land will continue to contribute to the mainstream of the economy. This section summarizes the contextual background to the discussion through various international and legislative frameworks.

a. International Human Rights Law

The right to land is not expressly recognized but the right to property is recognized under numerous international human rights instruments including the Universal Declaration on Human Rights, ICCPR, ICESCR, OHCHR and the African Charter on Human and Peoples Rights. These instruments also protect communities/individuals from arbitrary deprivation with compulsory acquisition only being allowed in fulfillment of a public purpose and in accordance with the law. The UN Declaration on the Rights of Indigenous Peoples (2007) and the ILO Indigenous and Tribal Peoples Convention (1989) recognize the right to land for indigenous communities and offer guidelines on how to ensure that they are not unlawfully deprived of their land and resources. For example in Article 24 (UN declaration on the Rights of Indigenous Peoples:

‘Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services’.

3 The legacy of The 1984 Bophal Disaster looms heavily on transnational development schemes in India. It killed at least 3787 with over 16,000 deaths claimed and so far was the world’s worst industrial disaster.
In Kenya indigenous groups are two namely: the pastoralists include the Endorois, Borana, Gabra, Maasai, Pokot, Samburu, Turkana and Somali and the hunter-gatherer communities comprise the Awer (Boni), Ogiek, Sengwer or Yaaku. Many of these communities live in resource rich areas and experience gross land rights violations. Special attention must be paid to the unique land history and circumstances of these vulnerable and marginalized sections of society. Areas of conflict are alluded to in the following Article 26.

\[\text{Article 26}\]

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Understanding the impact violation of land rights for indigenous peoples is useful for investors and policymakers to decide where to invest and prioritize. A body of persuasive body of evidence (North and Central America; Namibia, Botswana) demonstrates that land access without the participation of communities or in areas of gross violations impede any development on land.

There is growing recognition that free prior and informed consent of the existing land rights holders so as to minimize governance and reputational risks, prevent land conflicts and secure a social license to operate. The Committee on Economic, Social

---


5 The Colombian Constitutional Court has ruled in favor of an indigenous peoples’ centuries old fight for their territory, granting the petition for the protection of constitutional rights requested by the Embera Chami people of the Indigenous Resguardo Cañamomo Lomaprieta, in Western Colombia.

and Cultural Rights (CESCR) has further expanded on free, prior and informed consent. In its interpretation of cultural rights, the Committee outlines that the right to participate in cultural life includes the right of indigenous peoples to restitution or return of lands, territories and resources traditionally used and enjoyed by indigenous communities if taken without the prior and informed consent of the affected peoples. It also calls on States parties to ‘respect the principle of free, prior, and informed consent of indigenous peoples in all matters covered by their specific rights’ and to ‘obtain their free and informed prior consent when the preservation of their cultural resources, especially those associated with their way of life and cultural expression, are at risk’.

It is rightly recognized that there is a link between how investments on land are carried and land access. Focusing on the international legislative space assumes that the countries have domesticated the requirements within their in-country legislation or statutory requirements. Box 1 below provides an overview of international conventions and instruments on the sustainable use of land and the protection of rights of women and other vulnerable groups in land matters.

**Box 1: International Key Guidelines and Principles**

2. Principles for Responsible Investment in Agriculture and Food Systems (RAI)-endorsed by the Committee on World Food Security (CFS-FAO) and United Nations agencies in 2014, following 2 years of global consultation.
3. Guiding Principles on Large Scale Land Based Investments in Africa- developed by the African Union (AU), Land Policy Initiative (LPI) applicable to all African Union member states.
4. International Finance Corporation (IFC) Performance Standards- define the red lines for private investments to do no harm and responsibilities for managing their environment and social risks.
7. OECD-FAO guidance for responsible Agricultural supply chains. Proposes a model enterprise policy outlining the company standards; a framework for risk based due diligence; a description of major risks faced by enterprises; guidance for engaging with indigenous peoples.
8. OECD – Policy Framework for Investment in Agriculture (PFIA). The PFIA has been used by Burkina Faso; Indonesia, Tanzania, and Myanmar improve their agricultural investment climate.
9. The International Treaty on Plant Genetic Resources for Food and Agriculture
10. SDG- Goal 1: Ending poverty in all its forms everywhere

---

Further the following ‘Principles for Responsible Agriculture Investment that respects Rights, Livelihoods and Resources’ (2010)\(^8\) notes the following principles as critical to the question of land access.

(i) Principle 1: Existing rights to land and associated natural resources are recognized and respected.
(ii) Principle 2: Investments do not jeopardize food security but rather strengthen it.
(iii) Principle 3: **Processes for accessing land** and other resources and then making associated investments are transparent, monitored, and ensure accountability by all stakeholders, within a proper business, legal and regulatory environment.
(iv) Principle 4: All those materially affected are consulted, and agreements from consultations are recorded and enforced.
(v) Principle 5: Investors ensure that projects respect the rule of law, reflect industry best practice, are viable economically and result in durable shared value.
(vi) Principle 6: Investments generate desirable social and distributional impacts and do not increase vulnerability.
(vii) Principle 7: Environmental impacts are quantified and measures taken to encourage sustainable resource use while minimizing the risk/magnitude of negative impacts and mitigating them.

**Governments have an important role to ensure that agreement on principles, guidelines, governance frameworks are practiced.**

**b. The Kenyan Context**

**Sessional Paper No. 3 of 2009 on National Land Policy**

The National Land Policy (NLP) was formulated with the aim of securing rights over land and provide for sustainable growth, investment and reduction of poverty in line with the African Union’s\(^9\) framework on Land Policy and the Government’s overall development objectives. The NLP captures the importance of land as:

> ‘Land is critical to the economic, social and cultural development of Kenya. Land was a key reason for the struggle of independence and land issues remain politically sensitive and culturally complex\(^{10}\),’ (2009:1).

The policy offers a framework of policies and laws designed to ensure the maintenance of a system of land administration and management that will provide:

(i) All citizens with opportunity to access and beneficially occupy and use land;

---

8 A discussion note prepared by FAO;IFAD;UNCTAD and the World Bank Group (Jan, 25-2010)


(ii) Economically viable, socially equitable and environmentally sustainable allocation and use of land;
(iii) Efficient, effective and economical operation of land markets;
(iv) Efficient and effective utilization of land and land-based resources; and
(v) Efficient and transparent land dispute resolution mechanisms.
(vi) Efficient and effective utilization of land and land-based resources; and
(vii) Efficient and transparent land dispute resolution mechanisms.

The National Land Policy is explicit that ‘…strategies for sharing benefits should be developed taking into account the nature of the resources involved and the contribution that diverse actors make to the management of resources’ (2009: 25)

The Constitution 2010

Land is defined under Article 260 of the Constitution of Kenya, 2010 as follows:
(i) The surface of the earth and the subsurface rock;
(ii) Any body of water on or under the surface;
(iii) Marine waters in the territorial sea and exclusive economic zone;
(iv) Natural Resources completely contained on or under the surface; and
(v) The air space above the surface.

Article 60 (1) of the Constitution provides the principles on land ownership and management. It is noted that, land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with the following principles -
(i) Equitable access to land;
(ii) Security of land rights;
(iii) Sustainable and productive management of land resources; (d) transparent and cost effective administration of land;
(iv) Sound conservation and protection of ecologically sensitive areas;
(v) Elimination of gender discrimination in law, customs and practices related to land and property in land; and
(vi) Encouragement of communities to settle land disputes through recognized local community initiatives consistent with this Constitution.

These principles are implemented through the NLP (2009) and reviewed regularly by the national government and through legislation. Article 66(2), expressly requires Parliament to enact legislation to ensure that investments in land benefit local communities.

The Bill of Rights contained in the Constitution also seeks to improve the governance conditions in the country by enhancing democracy, participation of the people and openness. Article 40 guarantees all Kenyans the right to property. Property is defined to include land, which can be viewed as a special category of property. Article 40 also grants security of rights to land. All land in Kenya it is

11 In a baseline study by the National Land Commission (2016) on ‘Principles of Land Administration’ it was noted that many land sector agencies do not prioritize these principles in their work. Hence marginalized groups, women, youth, PLWD continue to experience land right violations. Where or when an Investor is present the practices do not adhere to these principles hence many groups in Kenya continue to experience insecure land tenure.
noted belongs to the people of Kenya collectively as a nation, as communities or as individuals. Land is further classified as public, private or community. The land tenure system is important as it determines the terms and conditions under which land rights are acquired, retained, used or transferred.

a) **Private land** - land held by any person either as freehold or leasehold or land declared by law to be private;

b) **Community land** - held by communities or registered group representatives but administered under the right of commons and members cannot be excluded from the benefits of enjoying that land. Includes the most complex land tenure system by pastoralists.

c) **Public land** - other land that is neither private nor community held.

The distinction between public and community lands is not as clear-cut as the law attempts. Many overlaps and contrary claims to the same lands and resources. Investors should not take state assurance that the land is not owned/public land without grounded investigations as part of due diligence.12

Community land holds vast natural resources and is home to many pastoralists. There is also a high demand by investors, investment for community lands. Projects like wind, infrastructure, solar, oil, hydrocarbons, artesian water, tourist facilities and investment zones (e.g. Isiolo Resort city, Lake Turkana wind energy etc. The County forums reports noted that tensions already abound around land ownership and will almost always rise during investment proposals and community land identification. Reasons for this increase in tensions include:

(i) Threats to community secure land rights e.g. who makes the decisions, who represents the communities.

(ii) Lack of ‘land banks’ for investment by the County and National Governments. There are no clear and accountable guidelines.

(iii) High scope of state to claim parts of community lands as public property without clear guidelines.

Various land laws are in place to regulate the rights acquired by landowners or occupiers under each tenure. This includes the regulation of land use in the public interest, for example, through planning laws and compulsory acquisition of land where after due compensation is paid land is taken from private or community use for public benefit. Devolution is the mode of governance and is still evolving.

**The Land Act 2012**

The notion of compulsory acquisition is entrenched in the Constitution under Article 40(3). In summary, it provides that: the state shall not deprive any person of property or interest in property unless it is in accordance with the Constitution and established statutory law; the acquisition is for public interest or for a public purpose and; upon the prompt payment of full and just compensation. The acquiring national or county government institution must satisfy NLC that the land required for the

12 The examples of Kisumu airport, Dominion farms, Kanyakwar areas all exhibit contradictions of land tenure. See the County Forum reports.
fulfillment of a stated purpose\textsuperscript{13}. Moreover, a person whose land is subject to compulsory acquisition has the right to access a court of law. This Act consolidates the previous numerous land laws and seeks to provide for sustainable administration and management of land and land based resources. It comprehensively deals with administration and management of public and private land while community land issues are addressed under the Community Land Act.

The Land Act’s provisions on compulsory acquisition also apply to all categories of land, including community land. The compulsory acquisition procedure is set out in Part VIII. Any land can be subject to compulsory acquisition by either national or county government, which should make its requests to the NLC. The NLC is mandated to develop criteria and guidelines to be followed by the acquiring authority based on Article 40(3) of the Constitution. The only government agency with legal authority to allocate land out of public land for private investment purposes is the National Land Commission (section 12 of the Land Act). Section 12 of the Land Act of 2012 explicitly confers on the Commission power to allocate land for investment purposes. However, there are conditions to be met before and after the Commission sets aside land for investment purposes, namely:

(i) Section 65 of the Constitution, which limits acquisition of land by non-Kenyans to leases only, for a term not exceeding 99 years;\textsuperscript{14}

(ii) Section 12(2) of the Land Act which excludes certain types of land from allocation for investment purposes (land along water sheds, wildlife reserves, land prone to erosion, land already reserved for public purposes such as education and land comprising natural, historical and cultural features);

(iii) Section 12(4) which requires the Commission to first ensure that the proposed investments in the land benefits local communities and their economies;

(iv) Section 12(7) which requires that before land is allocated for investment, it must first be planned, surveyed and serviced and guidelines for its development prepared in accordance with section 16 of the Act; and

(v) Section 12(8) which enjoins the NLC to ensure that public land allocated for investment purposes is not sold, disposed off, sub-leased, or sub-divided unless it is developed for the purpose for which it was allocated.

(vi) Sections 38 (106) makes elaborate provisions regarding acquisition of land falling within the category of private land. Basically, land may be acquired for investment\textsuperscript{14} purposes by sale (only to Kenyans), lease (to Kenyans and non-Kenyans), gift (to Kenyans only) and other legally acceptable forms of disposition. Clearly, for non-Kenyan investors, leases arrived at by contract with private landowners, individuals, and companies are the only option. Needless to state, Article 65 on land holding by non-citizens applies - leases must not be for a term exceeding 99 years\textsuperscript{15}.

\textsuperscript{13} For further reading, Land Act 2012; Section 107(1); 108; 111; 112 and 114(2)

\textsuperscript{14} Alternatively, investors may approach land estate agents, to assist them in identifying suitable land for investment, depending on the kind of investment that they prefer.

\textsuperscript{15} A survey of leases so far obtained by foreign investors indicates general compliance with the limit (many are for 50-55 years).
Procedures for address and redress of historical land injustice complaints resulting from ‘development-induced displacement for which no adequate compensation or other form of remedy was provided, including conversion of non-public land into public land’ (Land Act, 15(4d))

The Community Land Act
This Act repealed the Land (Group Representatives) Act (Chapter 287 of the Laws of Kenya) and the Trust Lands Act (Chapter 288 of the Laws of Kenya). It requires registration of communities and provides for the creation of a community-level body charged with the responsibility of administering and managing land on members’ behalf. In most of these communities land is held as a trans-generational asset. This Act expands the definition of a community as a consciously distinct and organized group of users of community land who are citizens of Kenya and share the following attributes in relation to land:

(i) Geographic space
(ii) Ecological space
(iii) Similar culture or unique mode of livelihood

Consequently, access to land is seen to be related to the membership of a person in a given community or social group and thus the scope of the rights that can be enjoyed by a person is determined by the recognition of these rights by other members of the community or the society.16

The Act expands the definition of community from one that is focused on ethnic or tribal affiliation to one that focuses on regional community interests in land. Under the Act, the community acts through its representatives but decisions relating to land use, management or transfer are to be made by at least two-thirds of the registered community members. The county governments hold in trust unregistered community land and cannot deal with it unilaterally; for instance, they cannot issue it to investors. According to the NLC, counties are required to consult the Commission in such instances. Community land like any other land can be subject to compulsory acquisition in accordance with the procedure established in the Land Act 2012 - and for a public purpose. The Act favors alternative dispute resolution (ADR) for the resolution of grievances arising out of its application while maintaining the right to access the courts.

It is worth noting that thus far no community title has been issued. Therefore, any investor must deal with communities who do not fully define themselves as socio-spatial entities, nor the limits of their land areas and hence to build these costs into their proposals. Investors have to deal with County governments as trustees of the land and in ways that directly involve these communities.

Vision 2030
Kenya Vision 2030 is the national development blueprint for period 2008 to 2030 and was developed following on the successful implementation of the Economic

---

Recovery Strategy for Wealth and employment creation which saw the country’s economy back on the path to rapid growth since 2002. GDP growth rose from 0.6% to 7% in 2007, but dropped to between 1.7% and 1.8% in 2008 and 2009 respectively. The objective of the Vision 2030 is to transform Kenya into a middle-income country with a consistent annual growth of 10% by the year 2030. Vision 2030 demonstrates a strong commitment to investment including FDI.

The Second Medium Term Plan\(^{17}\) (MTP II- 2013-2017), is the second in the series of five year medium term plans of the *Kenya Vision 2030*. The MTP II aims to put economy on a high, broad base, inclusive and sustainable growth trajectory in order to attain Vision 2030 targeted annual growth of 10 per cent. The MTP II is also expected to create jobs; reduce poverty and integrate the Sustainable Development Goals (SDGs). Key priority areas under MTP II include the following areas highlighted in the table below.

### MTP II - Priority areas linked to Land Access

<table>
<thead>
<tr>
<th></th>
<th>National Cohesion- to build peace, reduce conflict and promote issues based politics</th>
</tr>
</thead>
<tbody>
<tr>
<td>2</td>
<td>Security- provide safety to individual Kenyans and investors</td>
</tr>
<tr>
<td>3</td>
<td>Drought, emergencies, mitigation and food security- implementation of ‘Ending drought Emergencies Programme’;</td>
</tr>
<tr>
<td>4</td>
<td>Equity and inclusivity in access to opportunities and a lower cost of living- through emphasis on addressing regional imbalance in employment and through initiatives aimed at lowering the cost of food while also mainstreaming gender, disability and environmental conservation. In this regard, emphasis was on addressing these issues in planning and budgeting in the two-tier system of governance.</td>
</tr>
<tr>
<td>5</td>
<td>Infrastructure- construction of local and regional rail and road networks that provide safe, efficient and cost effective transport</td>
</tr>
<tr>
<td>6</td>
<td>Industrialization – facilitating the growth of the manufacturing sector; making agriculture more competitive; diversifying the economy, and by supporting the growth and competitiveness of local entrepreneurs</td>
</tr>
<tr>
<td>7</td>
<td>Land Reforms- including the review of the National Land Policy (2009) and land adjudication and issue of title deeds to promote secure land ownership and boost investments</td>
</tr>
<tr>
<td>8</td>
<td>Investment to support growth – it was achieved by prudently investing in key sectors; land reforms to make land a productive asset; and new initiatives to encourage the financial sector to mobilize savings and improve resource allocation to key growth sectors.</td>
</tr>
<tr>
<td>10</td>
<td>Competitiveness and rebalancing growth- increase investment in expansion, development and modernization of roads, rail, ports and ICT in order to make Kenya a leading logistics hub. It entailed the development of the LAPSSET Corridor and the gas, oil and other mineral resources sector to spur higher economic growth. The PPP Act was to be operationalized in order to facilitate private sector investment in infrastructure.</td>
</tr>
<tr>
<td>11</td>
<td>Arts, Sports and Culture- providing necessary infrastructure to position creative arts, cultural heritage and sports as major sources of employment and income especially for the youth.</td>
</tr>
</tbody>
</table>

### The Mining Act 2016

This Act gives effect to Articles 60, 62, 66, 69 and 72 of the Constitution of Kenya. The Act applies to the minerals that are listed in the 1st Schedule. The Act’s provisions address critical aspects in the mining sector including but not limited to preemptory rights, mineral rights, environmental protection, artisanal miners

\(^{17}\) The Medium Term Plans linked to Vision 2030
operations, mineral agreements, benefits sharing, local content and dispute resolution.

**Petroleum (Exploration, Development and Production Bill) 2015**

The Bill’s provisions are geared towards promotion of investment, local content and training as well as payments and revenue management. The Bill provides for equitable sharing of benefits but currently there is no agreement on the sharing formula. In fact, ESF meeting participants were not clear on the agreed percentages for national and county governments and communities. This Bill provides for compulsory acquisition of land through an application by the Cabinet Secretary to the agency responsible for land management where the CS is satisfied that a license holder *(a) reasonably requires that land for purposes of constructing, modifying or operating any upstream petroleum infrastructure or for incidental purposes and (b) has failed to acquire the land by agreement after making reasonable attempts to do so* (108:1).

**Land Value Index Laws Amendment Bill (2016)**

An ACT of Parliament to amend the Land Act, the Land Registration Act and the Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act to provide for the assessment of Land value Index in respect of compulsory acquisition of land; and for connected purposes. The land value index will help determine compensation on government projects and aid is prompt and just compensation.

**The Investment Promotion Act (2004)**

The Investment Promotion Act, No. 6 of 2004, declares in its Preamble that it is the law intended to facilitate and promote investment, has no express provisions on identification and allocation of land for private investment. The only reference to land in this Act, which could be linked, to acquisition of land for investment is section 15 which states the functions of the Authority. At 15(d), the law states that one of the functions of the Authority is to ‘...facilitate and manage investment sites, estates or land together with associated facilities on the sites, estates and land.’

What has been done so far, is facilitate investor acquisition of land for investment by providing them with a list of privately held lands available for investment that has been prepared by the Authority based on land owner submission of information and, to a limited extent, by putting investors in touch with: the Ministry of Lands and Physical Planning (MoLPP), estate agents and local authorities. The Authority does not engage in negotiations for land on behalf of investors and its facilitative role with regard to acquisition of government land has diminished in light of a government moratorium on acquisition of government land. Section 15(d) of the Investment Promotion Act states that the Investment Authority shall manage

---

18 Procedures for access to community land, consent, liabilities of contractor..  
19 The ESG land risk and diligence tools indicate that money id rarely at the heart of the issue; compensation is a primary driver of disputes in just 4% of the cases.  
20 Cap 485b, first schedule for procedures for consideration of application for investment certificate. The other laws e.g. Natural Resources; Forest conservation and Management Act 2016; Wildlife Conservation Act 2016; Prevention, protection and assistance to internally displaced persons and affected communities Act 2012; The Protection of Traditional Knowledge and Cultural Expressions Act 2016, and Access to information Act, 2016.
investment sites, estate or land. However, it does not authorize the Authority to acquire land for the purpose of establishing investment sites or estates. The Authority has never held or owned any investment sites, estates or land.

**Konza Technology City Investment**
The development of Konza Technology City finds basis in Kenya’s Vision 2030, which has similar status of as a national development policy. The Ministry of Information and Communication provides a good example of a government ministry with power, parallel to those of the National Investment Authority, to undertake investment activities, especially in the information and communications technology as well as promote local and foreign investment in information and communication technology, as part of the fulfillment of Kenya’s Vision 2030, a blue print for Kenya’s attainment of industrial country status by the year 2030. The Ministry has set aside 5000 acres of land in Machakos, about 45 miles from the City of Nairobi, for the establishment of Konza Technology City, an ICT city that is expected to attain the status of Silicon Valley in the U.S.A. The 5000 acres of Konza City land has been declared by the Ministry to be a Special Economic Zone (SEZ) for establishment of public services. Konza can be closely compared to Cairo's Smart Village or Mauritius’ Ebene Cyber City, but it is expected to be bigger in scale.

The Ministry has already allocated some one billion shillings for its development, though the total cost thereof is expected to reach trillions of shillings. There have been indications that the International Finance Corporation (IFC) is spearheading the Konza City development process as the project adviser, in collaboration with numerous consultants and that the IFC has been looking for a master developer for the project, a search that has delayed ground breaking.

**III. Land Access Issues**
The rising demand for food and natural resources has caused a dramatic increase in land based investment across Africa. In Kenya this demand has raised a number of issues and challenges for the government, international agencies and civil society to explore and address. The following section addressed the concern of land access and how this plays out in the land sector.

The term ‘access to land’ refers to the right to use, manage and control land and the resources embedded thereupon (HEK, 2015:8). The de-facto rights determine the actual possibility of people’s access to land. The three main rights referred to her are:

---

21 The predecessor of the Investment Promotion Authority, the Investment Promotion Center (IPC), did own some land for investment, which had been allocated, to it by central government. By the year 1999, the IPC had alienated all of the land, some of it through the phenomenon of land grabbing in which powerful politicians and their cronies were allocated much of the land. About four investors were allocated investment land by the IPC, in major towns in Kenya, including Eldoret, Thika and Nairobi, mainly for establishment of industries. The IPC had no land in the countryside for cultivation of crops. Property of the kind the IPC owned for investment exist only in the form of buildings and spaces in what is known as Export Promotion Zone (EPZ) in Athi River – Machakos County. EPZ facilities are owned and leased by EPZ Authority, a separate agency from the National Investment Authority.
a. Use Rights: Refers to the right to use land for growing crops, passage, grazing animals and the utilization of natural and forest products.

b. Control Rights: The rights to make decisions about how the land should be used and how benefits should be allocated.

c. Transfer Rights: The right to sell or mortgage land, convey land to others, transmit the land through inheritance and reallocate use and control rights.

It has been noted that ‘access to land’ can be secured, threatened, lost or never provided for. Certain social, political economic, historical inequalities and environmental challenges many often going back to colonial rule are the early roots of structures that deny access to land for certain groups. Further, land governance and an enabling environment to guide governmental, juridical issues affect communities’ rights on access to land and resources.

In the varying debates ‘access to land’ can be measured through the benefits of the land, which are claimed to be direct or indirect benefits. For instance, rights to shelter, access to water, firewood, food, family inheritance, shares in land, access to financing and financial inputs, profits from sale of land produce, high social status in the community and the management and control of land can all be measured as benefits of ‘access to land’. Examining these benefits enables an examination of the relationship between land, business and human rights obligation. Therefore, land access demands particular attention and cannot be divorced from the broader context of macro-economic policy and the global economic system. This requires a departure from viewing land principally as property to accommodate collective and indigenous understanding of land rights, which view land as a life-sustaining resource to be shared and protected.

Restricted and endangered access to land and resources has proven to be one of the major obstacles to the development of communities in Kenya. The reasons why secure land tenure and access to land is crucial for the development of communities are manifold. Firstly, the reliance on agriculture as a primary source of income, hence secured access to land and resources is the basis for any agricultural production. Secondly, access to land is required for pasture and livelihood activities like collecting firewood, housing, and spiritual attachment. Therefore, access to land

---

22 The example of the San people of Botswana demonstrates clearly the linkages between access to land, business and human rights obligation. Since 1996, when the Government of Botswana (GOB) began its forced-removal campaign against the San living within the Central Kalahari Game Reserve, the San have been fighting to regain access to their land. At the same time, the Government has granted diamond-mining licenses in the Reserve on the condition that any water borehole to be utilized strictly to provide water for the mine. On July 28, 2010, the UN General Assembly adopted a resolution recognizing access to clean water and sanitation as a human right.

23 Investor acquisition of land through direct engagement with politicians: The Case of Dominion Farms Limited. Foreign investors who incorporated Dominion Farms did not seek the Investment Authority’s facilitation of, or assistance with, their acquisition of 17,000 hectares of land at the mouth of River Yala, where it emptied water into Lake Kanyaboli.

and the resources contained therein means that there is enjoyment of guaranteed land rights\textsuperscript{25}.

Therefore in many instances, there exists a complex interplay between access to land and development endeavors. This dynamic interplay hinders access to land and resources is often interwoven in a web of differing interests between great numbers of actors from the local to the very global level.

The initial 50,000 hectares Jatropha biofuels project in Dakatcha woodlands in Malindi, Kenya is one such clear example of differing, complex interests at various local and international contexts\textsuperscript{26}. Despite its rich bio-diversity and water catchment area, Dakatcha woodlands had no formal protection status as community land and remains home to over 20,000 Giriama and Watha Communities, who lived off their land as subsistence farmers. Key lessons noted in this project were namely: The project size was reduced from 50,000 hectares to 10,000 (pilot project) to 1,000 due to lack of clear environmental assessment; higher emissions of gases; physical and psychological violence and violations of human rights; increasing pressure on land and natural resources; insecurity and threat of individuals and communities in the struggle for their rights; no offers for compensation was followed up; women and children were left landless and destitute on their own land; no follow up to check whether the company with headquarters in Milan-Italy was implementing what it set out to do. Standards were vague with exploitative loopholes for the company; and community interests overlooked\textsuperscript{27}.

In this Jathropa example like many large scale land investment projects, women’s\textsuperscript{28} access to, use and control over land which is essential to ensuring their right to equality and to an adequate standard of living is often ignored. The market pressures

\textsuperscript{25} Bundle of rights refers to beneficial interests or rights attached to the ownership of real property. In reference to land it includes the right to sell, lease, encumber, use, enjoy, exclude, and to make will. A purchaser to a property while purchasing land/real estate, actually buys all the rights previously held by the seller, except those which are reserved or limited in the sale. The definitions of real property include all fixtures and rights and privileges appertaining thereto. In essence it is these rights and privileges that the assessor is valuing. These rights are called the bundle of rights and consist of use, possession, enjoyment, disposition, exclusion, or the right not to exercise any of these rights.

\textsuperscript{26} The Dakatcha woodlands are near the town of Malindi on the coast of Kenya. The forests, thickets and woodlands of Dakatcha woodland store water, protect the soil, shelter unique animals and plants including globally endangered birds and provide environmental services and direct benefits to the local people. Dakatcha woodland has been identified as an ‘Important Bird Area’ as it is home to a number of globally threatened birds such as the southern banded snake eagle, Fisher’s turaco, Sokoke scops owl, Sokoke pipit and Clarke’s weaver.

\textsuperscript{27} Two of the negative impacts that were considered in the EIA process were: (1) the likely creation of jatropha carcus monoculture, which might have negative impacts on biodiversity in the area and on biological components of the soil and (2) impacts of large-sale farming on flora and fauna in an area that has considerable wildlife on it. As a result of such considerations, NEMA limited the acreage to be planted with jatropha on the first phase of the project to only 10,000 hectares, out of the 219, 621 hectares of land that Bedford had acquired in Tana Delta area.

\textsuperscript{28} Barriers, which prevent women’s access to, control and use of land and other productive resources often include inadequate legal standards, and/or ineffective implementation at national and local levels, as well as discriminatory cultural attitudes and practices at the investment, institutional, and community level.
on land are rapidly increasing and these land markets tend to be exclusionary to
given investments and countries\textsuperscript{29}.

The foregoing discussion enables the argument to draw insights from the
international development discourse distinguishes three main approaches namely:
rural development; human rights and economic policies underlining the cross-
sectorial nature of land. Table 1 below summarizes this discussion.

Table 1.0 Varying Perspectives to Land Access

<table>
<thead>
<tr>
<th>Rural development</th>
<th>Human Rights</th>
<th>Economic Policies</th>
</tr>
</thead>
<tbody>
<tr>
<td>- Key to rural development and food security</td>
<td>- Access to land and security of tenure pivotal for the enjoyment and support of the right to food</td>
<td>- Structural Adjustment Programs (SAPs) for businesses</td>
</tr>
<tr>
<td>- Central to rural people’s livelihoods especially women, indigenous &amp; marginalized groups</td>
<td>- Improve security of tenure and linked to agrarian reform for groups like; small holders; indigenous people, pastoralists and other vulnerable groups.</td>
<td>- Large-scale land investments and acquisitions increased interest in global food production, energy and climate crisis.</td>
</tr>
<tr>
<td>- Essential to tackle hunger and poverty reduction</td>
<td>- Broadens entitlements for vulnerable groups</td>
<td>- In 2013 estimated 32.8 million hectares globally leased or purchased in Africa</td>
</tr>
<tr>
<td>- Critical to food sovereignty</td>
<td>- Ensures a more secure livelihood, recognizes the existence of commons and the community-based management of natural resources</td>
<td>- Widespread discussions, investments and policies of land grabbing for and its consequences for poor communities in developing countries</td>
</tr>
<tr>
<td>- Ensures a holistic relationship between people and their environment</td>
<td>- Rights of communities to food sovereignty</td>
<td>- 2012 adoption of the FAO guidelines\textsuperscript{30}</td>
</tr>
</tbody>
</table>

When land access is considered the following two aspects remain critical in the Kenyan context.

**Gender Dynamics: Understanding Gender and Vulnerability**

Land is a finite resource, often governed by insecure tenure regimes, which do not protect the rights of women, youth and many vulnerable groups\textsuperscript{31}. Because of this there will always be issues of access and control around land and the benefits derived form that land. Whilst investments/business on land connote elements of development, it’s important to note that in many cases certain groups will be excluded from either access or control of land and its benefits. Legal and policy frameworks may provide adequate protection for these groups but in many instances they are not enforced. Or land related procedures and processes of access may not be


\textsuperscript{30} Adoption of the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the context of national Food Security.

\textsuperscript{31} See Chapter 5 ‘LSLBI Respect and the rights of and benefit of women’ in, Guiding Principles on Large Scale Land Based Investments in Africa (2014)
participatory, involving all affected parties. Women’s land rights and their security have been greatly undermined despite the provision for non-discrimination in the Constitution. In many societies in Kenya, control, which entails the power to distribute and redistribute access rights to members of the society is usually vested on the male members of society. These issues of access, and control over land are laced with highly fundamental politics and often have dire consequences on the property regime.

Compulsory Acquisition, Fair compensation and Transparency in Land Acquisition

‘Compulsory acquisition’: means the power of the government to dispossess or acquire or transfer any title or other interest in land for a public purpose subject to prompt payment of compensation. Compulsory acquisition can only occur in situations where the state intends to use the land in question for a public purpose or in the public interest. Compulsory acquisition can only be effected upon:

(i) prompt payment in full, of just compensation to the person; and
(ii) allowing any person with an interest in, or right over, that property a right of access to court of law (Constitution of Kenya, Article 40 (3)).

The NLC is legally mandated to compulsorily acquire land on behalf of the national or county government. The NLC can only act upon request by the national or county government, by order in the government gazette, to reserve public land in question. It is also mandated to set aside land for investment purposes which may include land for oil, gas and mining projects.

Compulsory land acquisition in Kenya has an elaborate process that involves the following steps:

(i) Preliminary notice: the national or county government through the respective cabinet secretary or county executive member is required to submit a request to the Commission to acquire a particular land on its behalf. Such a request can only be made once the national or county government is satisfied that it may be necessary to acquire the particular land for a public purpose

(ii) Prescribe criteria for acquisition: the Commission develops/prescribes criteria and guidelines to be followed by the acquiring authorities e.g. Ministry of Mining, in the acquisition of the land.

(iii) Approval of the request: the Commission approves or rejects the request for compulsory land acquisition. It provides reasons and conditions to be met by the acquiring authority in case it rejects the request for compulsory acquisition.

(iv) Notice of acquisition: upon approval of the request, a notice of acquisition in the Kenya government gazette and the county gazette is published. A copy of the notice should be served to all interested persons in the land as well as the registrar of lands.

(v) Registration of the intended acquisition: once the registrar is served with the notice, the registrar registers the intended acquisition.

(vi) Surveying of the land: the land in this case is authenticated and its location defined by the responsible office at the national and county government (Land Act 2012 Part VIII, Articles 107-110)
Compulsory acquisition requires that the persons deprived of the land be paid a just compensation in full and promptly after their interests have been established. To arrive at a just compensation the Commission is required to do the following:

(i) Make rules to regulate the assessment of just compensation (on-going).
(ii) Hold a compensation inquiry at least thirty days after publishing the notice for acquisition to hear issues of property and claims for compensation by persons interested in the land.
(iii) Identify the persons interested in the land and receives written claims for compensation from those interested in the land.
(iv) Award compensation after inquiry by preparing a written award which contains separate awards of compensation for each entitled person. The final award stipulates the size of the land to be acquired, value in the opinion of the Commission and the amount of compensation payable.
(v) Serve each entitled person/s a notice of the award and offer of compensation. Prior to the offer of compensation, the Commission and the beneficiary can reach a written agreement to receive a grant of alternative land not exceeding in value the amount that would have been awarded.
(vi) After the notice of award has been served, the Commission promptly pays the award to the persons entitled (*Land Act 2012, Articles 111-115*)

IV. Recommendations

a. To include recommendations from the expert based on the issues raised

1. Recognize that the investment matters in relation land access, business and human rights obligation issues are substantial and can be a main trigger to adjudication and registration of peoples needs across public, private and community land.
2. Form consultative/participatory groups early with selected community representatives and other stakeholders.
3. The Ministry of Lands and Physical Planning (MoLPP) and the National Land Commission (NLC) should introduce procedural guidelines that can be used by businesses, individuals and communities negotiating land acquisition.
4. NLC in consultation with other relevant stakeholders should draft a resettlement policy and framework as well as a compensation policy and framework.
5. The Ministry of Lands and Physical Planning in consultation with other stakeholders should review the current land valuation with a view to establish one that is more acceptable to all stakeholders.
6. Expedite land adjudication and registration in the country but special focus should be given to areas where there is community land.
7. The Ministry of Lands and Physical Planning should partner with civil society organizations in the dissemination and education of communities on land laws and other regulatory frameworks important for the protection of their claims and rights to land.
8. The concerned Ministries and investment agencies to make public the contracts
9. Speedy investigation and prosecution of anyone found culpable in land related corruption to re-establish confidence in the system and its institutions.
10. Ministry of Lands and Housing and other relevant stakeholders to finalize the drafting and adoption of the Land Use Policy.
11. Investors to draw on geo-spatial data to enable identify and manage tenure risk, enhance environmental, social and governance (ESG) diligence and engage local people in land and natural resources deals.
12. Business interests on land must engage with heterogeneous interests of local people.
13. Communication and community engagement are critical, but often difficult for all stakeholders. Assessing what information to be transparent about, why and how this information based on business on land should be used.
14. Provide platforms for building Kenyan land policy community, meeting on regular basis to flag and discuss progress and share experiences and evidence.
15. Understanding the land elements of the investment is important since there is need to address procedural, distributive and restorative justice. This often involves a complex web of interest and highly contested responsibilities of various actors within the land sector e.g.
   - Governance (how land use is overseen, managed, taxed, defining property rights, exchange of property rights, nature quality of land information available to all)
   - Legal and Regulatory frameworks (statutes dealing with land ownership, use and property rights, informality and property rights in cases of eviction, formal and informal ways land conflicts are resolved)
   - Land Redistribution and Redistribution (resettlement, restitution, consolidation, readjustment, large scale land acquisition)
   - Land Administration (records of ownership, value and use of land, information on ownership, determination of land rights, determinations of land attributes, information for land markets and land use management)
   - Land use and Planning (assessments of land and water potential, land use patterns and other physical, social and economic conditions, selection and adoption of land use options, emergency planning)
   - Natural Resource Management (use and management of resources, conservation, environmental quality for present and future generations, biodiversity conservation, climate change mitigation or PES programs)
   - Land Tenure and Property Rights (relationship amongst people with respect to the land, ability of people to sell, buy, lease or inherit land, how property rights are allocated, how access to land is granted, controlled and transferred)
   - Land Markets (purchase, lease, mortgage, exchange and sale of land, land market distortions and informal land exchanges, financial and credit markets for land and housing)
   - Addressing intra-household issues within supply chains is difficult but

---

32 The Turkana Wind Project
33 Payment for environmental Services Payment (PES) is a tool used to promote production and maintenance of public benefits generated by the natural environment, such as clean air or clean water. PES involves compensating local populations in exchange for either not engaging in land management practices expected to result in environmental degradation or in exchange for adopting practices expected to generate environmental benefits and ecosystems services.
- Critically important.
- Investors must earn a social license to operate effectively with a community.
- Continuous M&E of impact