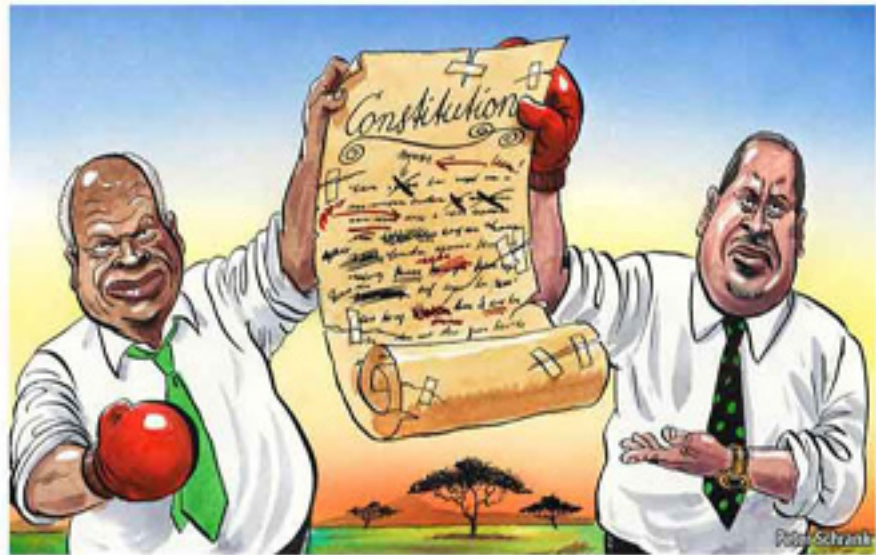


Focus on Africa Brief

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Kenya

Lesson 2:

Government Control of Private Land Use

Like other governments around the world, Kenya's government has the authority to extinguish or restrict property rights over land and natural resources, including the authority to restrict the use of privately-held land for national and public interest purposes. Private land use restrictions have been used for environmental management and are increasingly being considered for biodiversity conservation purposes. Such authorities must be carefully exercised because they can weaken land tenure, reduce investments in land, lower land values, and limit local livelihoods options. This lesson examines the law and practice of government authorities to restrict the use of private land in Kenya.

LAND TENURE REGIMES

Kenya has three distinct land tenure regimes: government-owned land, Trust Land and freehold land. Approximately 10% of Kenya's land is under government ownership and includes protected areas, rivers, and land occupied by government or quasi-governmental institutions. Government land is regulated by the Government Land Act of 1984 (revised 2009) and the Local Government Act of 1977. Trust Lands, about 70% of the land, derive from the 1915 amendment to the Crown Lands Ordinance of 1902, which converted all native reserve lands to Trust Lands. At independence in 1963, county councils were vested with the authorities to hold and alienate Trust Lands for the benefit of resident communities. Trust Lands are governed by the Registered Land Act of 1963, the Transfer of Property Act of 1882 and other legislation.

Private freehold land makes up about 20% of Kenya's land and is held by individuals, groups of individuals and private corporate persons. Most high-value agricultural land has been adjudicated and registered as freehold land. Private tenure is governed by the Registered Land Act, Transfer of Property Act and other legislation. Collective freehold includes group ranches established under the Land (Group Representatives) Act of 1968. Over the years, private land in rural and urban areas has been acquired by individuals or groups through inheritance and purchases of existing private land, and by grant and allotment of government land by central and local governments, such as the allocation of

Trust Land to group ranches (and the subsequent break-up of group ranches).

Freehold tenure is generally the most secure type of tenure in Kenya. Kenya's laws provide the holders of freehold land with full ownership rights, including rights of access, withdrawal, use, management, exclusion and alienation (e.g., hold, sell, rent, mortgage, transfer, exchange). Once registered, these rights are intended to be absolute in nature. Specifically, Section 28 of the Registered Land Act provides, "The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever..."

In Kenya, however, no property rights are absolute. The government has the authority to infringe on those rights, most often in support of national and public interests. Even land under freehold tenure is held on terms that are subordinate to certain powers of the state. Legislation provides the government with two sets of authorities to extinguish, restrict or limit private property rights: 1) eminent domain, the authority to acquire private property in a compulsory manner, and 2) police powers, the authority to limit personal rights including property rights.

EMINENT DOMAIN

The authority of eminent domain is derived from the feudal notion that as the sovereign, the state holds a radical title to all land within its territory. The exercise of eminent domain extinguishes all private property rights and forces involuntary transfers of property from private owners to the government or its designated agency. The government's power to compulsorily acquire land for public purposes is authorized by Article 40(3)(b) of the 2010 Constitution, while the procedures for compulsory acquisition are described in the Land Acquisition Act of 1968. The government can acquire private property for specific public purposes, subject to the prompt payment of compensation. While citizens can use the courts for redress, the law does not require the government to engage to public in the decision to acquire land, only for establishing who is eligible for compensation and for the proposed development on the acquired land through the Environmental Impact Assessment (EIA) process.

Police power, also an attribute of sovereignty, refers to the legal capacity of the state or its agents to limit personal rights in order to protect social interests including health, safety and public morality. Environmental protection and conservation are legally recognized and established justifications for the use of police powers. Police powers consist of authorities to limit or restrict any or all private property rights, including rights over land and natural resources. In many cases, public environmental interests are secured by restricting the use of private land, through various mechanisms such as land use plans, zoning

ordinances, easements and other mechanisms.

In Kenya, the government also has considerable authorities to restrict the use rights of landowners. These include: the imposition of restrictive covenants on private land titles (Government Land Act); direct statutory restrictions (e.g., land preservation orders) on use and development of agricultural land (Agriculture Act of 1955; Registered Land Act); restrictions on dealings with family land or customarily-held land (Registered Land Act, Land Control Act of 1989 (revised 2010)); chiefly directives to plant trees on private land (Chief's Authority Act of 1970 (Revised 1988)); restrictions of subdivision of land (Local Government Act); application of zoning regulations (Physical Planning Act of 1996 (revised 2009); Local Government Act); development and application of land use plans, application of EIAs, easements and other mechanisms (Environmental Management and Coordination Act of 1999); and common law restrictions of private land use (Judicature Act of 1967 (revised 2007)).

These laws provide the government ample authority to regulate land use. For example, the Agriculture Act authorizes the government to issue land preservation orders to: 1) prohibit or control clearing or breaking of land for cultivation; 2) prohibit grazing or watering livestock on land; 3) prohibit or control burning or destruction of vegetation for protection of land against storms, winds, rolling stones, floods and landslides, soil erosion and for maintaining water; 4) undertake afforestation and reforestation of land; 5) protect water catchment areas; 6) undertake drainage works; 7) destroy or uproot any vegetation planted on land (that contravenes land preservation order); and 8) prohibit the use of land for agricultural purposes altogether.

DEVELOPMENT POLICY

The Environmental Management and Coordination Act (EMCA) authorizes the government through the National Environment Management Authority (NEMA), Kenya's apex environmental regulatory body, to control public and private land use in the interest of environmental management and sustainable development. It authorizes NEMA to: 1) protect hill tops and sides, mountain areas, forests, coastal areas and environmentally-significant areas; 2) develop and implement environmental-quality and noise standards with restrictive implications for private land use; 3) issue environmental restoration and conservation orders as necessary; 4) impose environmental easements; and 5) apply Environmental Impact Assessments and reject, limit or approve specified development activities (together with the Environmental (Impact Assessment and Audit) Regulations of 2003).

The British colonial government in Kenya commonly exercised police powers to limit property rights and restrict land use (as well as



the authority to acquire privately-held land in a compulsory manner). In particular, the British used these authorities in an effort to protect arid and semi-arid lands (ASALS) from overgrazing, and to protect steep slopes and riverbanks from poor farming practices. Today, Kenya's government regularly uses certain authorities, such as EIAs and zoning ordinances, but many police powers to restrict private land use are not exercised to the full extent of the law. Some authorities, such as easements, are rarely, if ever, used.

Through the EIA process, the National Environmental Management Authority (NEMA) has restricted a wide variety of private land uses in the interest of protecting the environment. For example, when Phenom Limited sought to construct an eight-story building in Nairobi's Riverside Gardens, NEMA limited the height of the proposed building to a maximum of four floors. NEMA also mandated that the building occupy no more than 35% of the available land area. The government restrictions were upheld by the court in *Phenom Limited v. National Environment Management Authority & Riverside Gardens Residents' Association* (NE/04/06/2005).

NEMA also required a proposed development in Nairobi's suburbs to observe a six-meter riparian reserve off River Kirichwa Kubwa which, in effect, mandated the land owner to demolish a stone wall around the perimeter of the private property. The restrictions were upheld by the court in *A.T. Kaminchia v. National Environment Management Authority & M/S Bell Ways Garden Limited* (NET/05/2005). In another case, NEMA restrained a private land owner from constructing a commercial center located in a residential neighborhood. This order was upheld by the court in *New Muthaiga Residents' Association v. The Director General, National Environment Management Authority & Gemini Properties Limited* (NET/24/2007).

NEMA has also used the EIA process to restrict land use in rural settings, including the use of land by leaseholders. For example, NEMA stopped a leaseholder from constructing a tourist lodge and camp in an area outside Maasai Mara Game Reserve in an effort to preserve a cheetah breeding ground and to protect wildlife populations in the area. This order was upheld by the court in *Narok County Council & Kenya Tourism Federation v. National Environment Management Authority, Wasafiri Camp Limited & Ben Kipeno & Others* (NET/07/2006).

LAND USE QUANDRY

On one hand, developers have expressed concern over the exercise of private land use restrictions, arguing that it limits development and economic growth, and those who have been directly affected by such restrictions have called on the government to compensate them for their losses. On the other hand, environmentalists have pointed to widespread land and natural resource degradation, and criticized the government for not exercising its police powers or enforcing laws. The settlers

opposed demands for political representation by the Africans, Indians and Arabs. In the Devonshire Declaration of 1923, the Colonial Office declared that African interests (over 95% of the population) must be paramount. In 1924, a white clergy man was nominated to represent African interests in the LEGCO. In addition, five Indians and one Arab were elected into the LEGCO. The British brought indentured laborers from their Indian empire to construct the railway in Kenya, encouraging Indian traders from the East African coast into the interior. Africans were excluded from direct political participation until 1944, when the first Kenyan was admitted in the LEGCO.

Private land use restrictions have not been used to the full extent of the law for many reasons. In some cases, the responsible government agency lacks the capacity (e.g., resources and trained staff) to monitor land use and effectively implement and enforce its police powers. In other cases, the authorities have not been exercised because the responsible agency has come under intense political pressure to allow a development to proceed. In general, however, the government recognizes that the widespread use of these authorities, especially in rural areas, would significantly and adversely affect local livelihoods and would lead to community resistance and deep resentment. Citing a lack of public awareness, the government emphasizes voluntary compliance and self-regulation.

There are indications, however, that imposition of private land-use restrictions, including in rural regions, will increase in the future. Growing concerns over food insecurity, inefficient land use and the impacts of climate change are leading to calls for more government intervention. There are also calls by environmentalists for government regulations to ensure private land use is consistent with wildlife and biodiversity conservation. As it becomes more and more difficult for governments to justify the use of eminent domain to acquire land for new protected areas (and to pay compensation for the acquired land), many environmentalists are eyeing private land-use restrictions as the next frontier for biodiversity conservation in Kenya and other African nations.

In Kenya, as elsewhere, there is a need to strike a balance between protecting private property rights and meeting national public interests, including environmental interests. While the government has not exercised its authorities to restrict private land use to the full extent of the law, there is cause for concern with regard to the broad range of available authorities and the breadth of their possible use, the absence of a justification standard for exercising these police powers, and the discretion granted to many of the government agencies and officials empowered to exercise such authorities. Relying principally on government reluctance to limit the use of private land-use restrictions is an insufficient safeguard of private property rights. There is a need to put in place mechanisms to limit the use of these authorities to genuine public purposes.

CREATING BALANCE

One way to limit the use of these authorities to genuine public interests and to protect property rights is to establish high justification standards and develop robust and unqualified public purpose requirements for their use. Such limits would help ensure that the government exercises its police powers to restrict private land use only when necessary and appropriate, and that these powers are not used for ordinary government business. Some advocates have argued that instituting private land-use restrictions is justified only when the benefits to the public outweigh the costs to the affected landowners, and have called on government to conduct cost-benefit analysis of all proposed uses.

Other advocates have called for democratizing the procedures for exercising the authorities to restrict private land use. The use of most such authorities is an entirely administrative matter. The EIA process requires transparency and public participation, but the exercise of most other authorities does not engage the public or other branches of government (e.g., legislature). The procedures for exercising most authorities are not established in national laws or regulations and, as a result, are not well defined or consistently applied. In many cases, the responsible government agency (e.g., Minister of Agriculture) simply invokes its authority when it sees fit to do so.

Some private land-use restrictions can be initiated by private individuals and institutions, and authorized by the judiciary, rather than the executive branch of government. For example, under the Environmental Management and Coordination Act (EMCA), the easement process operates through the court and is non-voluntary. If a private person or body (e.g., conservationist or environmental NGO) considers a certain private property to be a critical wildlife habitat, s/he can file for an environmental easement in a court of law. If the court approves and imposes an easement, that individual will hold the easement. The landowner is entitled to compensation as determined by the court; the easement holder is responsible for compensating the landowner.

Advocates have argued for embedding fundamental democratic principles in the procedures for exercising authorities that restrict the use of private land. Principles may include access to information, public participation, parliamentary approval; Free, Prior and Informed Consent (FPIC), low-cost opportunities for redress; and other accountability measures. Regarding environmental easements, some advocates have called for new legislation that provides for voluntary easements and for financial or other incentives (e.g., tax breaks) to encourage landowners to conserve land through voluntary restrictions of property rights. Such mechanisms have been used in other countries with positive environment and development outcomes.

LOCAL IMPACT

Restricting private land use can have significant and adverse effects on local livelihoods and household well-being, as well as on land values and land markets. In some cases, the most significant or all land uses are restricted, rendering the land virtually valueless. The use of authorities that impose such restrictions can be particularly problematic for poor, rural people who make their living from smallholder farming or ranching. With the possible exception of easements, the exercise of these authorities does not obligate the state to compensate the landowner for his/her losses. Given the importance of land to poor, rural populations, some advocates in Kenya have called on the government to compensate affected landowners.

Recourse for landowners is available through the courts of law, but courts are not available to the majority of poor rural people. Many advocates have called on empowered government agencies to establish alternative dispute resolution procedures that are streamlined, inexpensive and available to the rural majority. Because the laws provide the government with such broad authorities, the courts have tended to uphold the government-imposed restrictions. Landowners who have challenged the government's power to restrict their property rights without providing compensation have failed. This would likely change if the laws were amended to provide high justification standards, democratize the procedures for exercising authorities, and require government to compensate landowners for their losses.

On 27 August 2010, Kenya adopted a new Constitution. Article 40(1) of the new Constitution establishes that "every person has the right, either individually or in association with others, to acquire and own property" (non-citizens can lease, but not own land in Kenya). Further, "(2) Parliament shall not enact a law that permits the State or any person—(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4)."

The new Constitution preserves the authority of compulsory land acquisition (eminent domain, Article 40(3)9b)) as well as government police powers to restrict private land use. Article 66 Regulation of Land Use and Property states "(1) The State may regulate the use of any land, or any interest in or right over any land, in the interest of defence, public safety, public order, public morality, public health, or land use planning. (2) Parliament shall enact legislation ensuring that investments in property benefit local communities and their economies."

In the coming years, Kenya's parliament is expected to pass new legislation and responsible government agencies will develop new regulations to implement these Constitutional provisions. To adequately protect private property rights, it is important that the enabling legislation establishes high standards and clear procedures for the exercise of these authorities that include fundamental democratic principles. While the Constitution is silent on the issue of compensation, the parliament should also consider obligating the government to provide fair and adequate compensation to landowners for losses from land-use restitutions.



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