A Lost Opportunity: Can the National Land Commission Reclaim Its Original Mandate and Regain the Public's Trust?

By Ambreena Manji and Smith Ouma

On 19th February 2019, the term of office of officials of the National Land Commission ended. A new set of Commissioners will have to be appointed. This seems like a good moment to reflect on the commission's record and to remind ourselves of how much hope we citizens had invested in this constitutionally mandated independent commission.

Let us begin by reminding ourselves of the origins of the commission and the mischiefs we had hoped it would address. Institutional change in the land arena was a key aim of the new Constitution when it was inaugurated in 2010. The hope was that a new architecture of land governance would solve Kenya's long-standing land problems, including massive and worsening inequalities in access to land, the concentration of land in a despotic executive, widespread land grabbing, the irregular and illegal use of land as a patronage resource, and continuing conflicts over who is and who is not entitled to occupy land.

The National Land Commission was envisaged as an independent constitutional commission that would stand apart from existing institutions associated with facilitating a multitude of wrongs, including corruption. The path to the creation of the National Land Commission was by no means

easy. Although there was powerful advocacy for it at the start of the constitutional review process, it also encountered its opponents. It was hoped that creating a strong land commission undergirded by constitutional guarantees of its independence would mark the beginning of a new land order for Kenya. It would put into effect Chapter Five of the Constitution that emphasises the importance of land being "held, used and managed in a manner that is equitable, efficient, productive and sustainable". And it would be guided by the principles of land policy inscribed in the new Constitution and by its national values, including those of participation, consultation and transparency, all of which had entered the Constitution after concerted debate and struggle.

In spite of these aspirations, what we have witnessed in the short life of the National Land Commission is concerted resistance to the changes it might have brought about. The national government has fought hard to retain its control over key land functions, including land registration. There has been a powerful centralising effort by a state determined not to lose control of management of and access to land, including regional and central land registries.

The Ministry of Lands, Housing and Urban Development has been the prime actor in this struggle for control. An incumbent institution with vast experience, it has worked hard to keep the new National Land Commission in check. The short life of the Commission has been riddled with infighting and uncertainty. Those who wished to maintain the status quo sought to make the commission an appendage of the executive. The land commission quickly assumed a subordinate role to the land ministry. It struggled to take on new and distinct responsibilities. It absorbed administrative officials from the ministry. Located in the Ministry of Lands, Housing and Urban Development's headquarters at Ardhi House, it was essentially a tenant at the will the ministry.

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The Supreme Court's Advisory Opinion

In 2014, with much of the business of county land administration at a standstill, the Supreme Court was asked to provide an Advisory Opinion on what should be the relationship between the two bodies in light of the Constitution and the relevant land laws. Advisory Opinions are a judicial mechanism that enable the Supreme Court to provide "authoritative and impartial interpretation of the Constitution" (s. 3 Supreme Court Act 2011). Resorting to the court for its guidance was a clear indication that two bodies with responsibilities on land had reached a stalemate. The country's highest court was being asked to rule on a key question: what are the responsibilities and duties of the institutions envisaged by Kenya's new legal framework for land governance?

The Supreme Court is charged by legislation with being a guardian of the Constitution and its values. Section 3 of the Supreme Court Act 2011 provides that the objectives of the court "enable important constitutional and other legal matters, especially matters on transition to the new Constitution be determined with due regard to the circumstances, history and cultures of the people". The Supreme Court's ruling in this matter is extremely detailed (it runs to sixty-two pages). It is perhaps one of the best considerations of Kenya's land history and of the connections between land reform and constitutional transformations currently in existence. But the Advisory Opinion fails to provide, as the amicus curiae submission of the Katiba Institute urged, detailed guidance on the

meaning of land administration and management. Despite its keen sense of the history of land in Kenya and its stated commitment to constitutional transformation, including the role of the land commission in this, the court did not provide the direct and forthright judicial support the commission needed at this critical stage of the commission's infancy.

Particularly in relation to titling responsibilities, the court failed to grasp how the case presented a unique jurisprudential opportunity. The court might have developed in its judgment reasoning that had the effect of "locking in" a public law perspective on land issues. What was being asked of it was an interpretation of public functions, essentially administrative law. It should have provided robust and detailed guidance on the powers and responsibilities of institutions and individuals in the land arena.

Instead, the court relied rather too much on a view of the case as predominantly based on land law, and specifically private law. This is evidenced by its reading of the function of registration of title. Its reasoning here was that the legislature cannot have envisaged a fragmentation of the role of land title issuance between the ministry and the commission because that would be bad for land markets and lead to uncertainty. This emphasis by the court on the need to avoid fragmentation in a key area of land dealings shows a private law interpretive inclination. The court prioritised a private law view of land as a tradeable asset. It failed to see that the task of breathing life into terms such as "land management" and "land administration" is essentially an elaboration of public law. Such a stance might have led the court to reason differently. Its own account of constitutional and land history in the judgment should have led it to that point. Aware of the mischief, which a new dispensation in land was developed to address, the court should instead have provided jurisprudential backing for a strongly protected constitutional commission rooted in administrative law.

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The Advisory Opinion falls short of issuing specific detail of how to resolve the problems between the land ministry and the land commission that had come to characterise the years since the new land laws were enacted. The judgment leaves this for the two bodies to work out. Given the strains of the past few years, and the impasse at which they found themselves on the eve of the Advisory Opinion, it is hard to see how this order could be an effective one. The judgment provides everything needed for a historically informed jurisprudence. The court knows why there is a need to guarantee the independence of the National Land Commission, but it does not build a sturdy and enduring architecture with detailed and carefully elaborated roles specifically set out.

The outcome of the judgment is that the role of the land commission is truncated. The roles it remains with are: the conduct of research on land issues and on natural resources; initiating inquiries into historical land grievances and recommending redress; and promoting traditional methods of resolving land conflict. The mandate of the commission is succinctly summed up by the court as "a brains-trust mandate in relation to land grievances, with functions that are in nature consultative, advisory, and safeguard-oriented". Thinker, but not doer, the resultant land commission is a far cry from that envisaged by the Constitution and the National Land Policy.

Successes and challenges

Despite the numerous challenges that it has been faced with, the commission has had some

successes. Staff at the commission have demonstrated an ability to make progress in spite of the difficult context. For instance, through its Research Directorate, the commission has partnered with civil society organisations, academics and practitioners. The commission has also undertaken the process of review of grants and dispositions on public land.

The *Shule Yangu* initiative represents an important success. The issuance of title deeds to public schools has guaranteed the protection of land owned by schools. The commission has worked hard to recover public land allocated to various state agencies, including the Water Ministry, the National Youth Service, the Kenya Prisons Department, Kenya Ports Authority and the Kenya Maritime Authority, which was subsequently grabbed by private developers. (See, for example, the Makupa Causeway and Kitale Museum cases.)

Although our focus in this article has not been on rehashing graft narratives, it is important to acknowledge how much harm has been done to the commission's independence and non-partisanship by recent scandals. Allegations of impropriety and of corruption have become commonplace. The commission's credibility has been called into question since the loss of data on compensation payments for land which it was holding on an internal computer. It has been embroiled in land compensation scandals. Serious doubts have been cast over the integrity of some commissioners.

The commission has not only lost the public's trust, it has also lost its status as an independent guardian of the Constitution in the land arena and has become associated instead with the sorts of land wrongs for which the land ministry is infamous. Most recently, by allowing the regularisation of title to the land on which Weston Hotel sits, the commission caused much upset. Why, asked Kenyans, did it not give the same opportunity to the many properties that were demolished after it was established that they were sitting on public or riparian land? Differential treatment of this sort casts doubt on the commission's independence in discharging its mandate.

The coming years

In discharging their responsibilities, the new land commissioners must have at the front of their minds the public and administrative law framework that should govern their work. Unlike other independent commissions, the land commission has a unique and symbiotic relationship with the executive in the form of the Ministry of Lands. Negotiating this relationship has not been easy but a renewed National Land Commission will reconnect with constitutional history and with the long-standing demands of Kenyans for an accountable and independent institution in charge of land.

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The public law model we have suggested emphasises administrative duties, restraint of public officials and accountability. These are the constitutional values with which the land commission was inaugurated. Since then, a private land law model has been allowed to predominate, including in the landmark Supreme Court ruling on the relationship between the land ministry and the land commission and in the analyses of most commentators on land matters. A public law model retrieves

Kenyans' hopes for a different and better way to manage and administer land as the commission enters its next phase.

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