

14 March 2018

Submissions on the *Land Value Index Laws (Amendment) Bill, 2018*

Kindly note that the proposed additions to the Bill are underlined.

1. Specificity required in the definition of “prompt” compensation: *Clause 2, Definitions, Land Act No. 6 of 2012.*

The proposed definition of prompt provides that compensation must be paid within “reasonable time of taking possession of land” *or* within one year of the date of a written undertaking.

This gives a significant degree of discretion to the National Land Commission to determine “reasonable time” but may include any time within a year of the undertaking. For displaced groups that are dependent on the land for livelihoods and have no other means of income generation, such a time-frame would not constitute prompt. Prompt payment should include payment, or portion of payment, at the time of acquisition and a total payment within a defined period, but not exceeding 3 months.

2. Incorporating the National Land Commission in the development of the Land Value Index: *Clause 6, inserting Section 107 A to Land Act No.6 of 2012*

The proposed addition to Section 107A (1) outlines that the land value index be developed by national and county governments. However, the National Land Commission (NLC) is omitted from this process. The National Land Commission is the body responsible for the management of public land on behalf of the national and county government and advising the government on land policy¹. This responsibility gives the NLC a legal mandate and a technical capacity to deal with land policy issues. Omitting the NLC could undermine its mandate.

In line with our reasons above we thus propose the following addition to section 107A (1):

Valuation of freehold land and community land for purposes of compensation under this Act shall be based on the land value index developed jointly by the national government and county government in conjunction with the National Land Commission for that purpose and provisions of this part.

¹ Constitution of Kenya 2010, Article 67

3. Assessing the value of land: Clause 6, inserting Section 107 A (4) (a) to Land Act No.6 of 2012

Compensatory regimes must contend with the issue of how land is valued when an intended development may increase the value of land. The proposed amendment proposes to disregard such an increase in land value. Compensation at the current value of, for instance farming or pastoralist land, will in most cases not restore and improve displaced people's livelihoods, particularly for more vulnerable groups. In the overwhelming majority of cases, particularly from Asia, displacement with compensation at the current rate of farming or pastoralist lands have not been sufficient to stop an increase in vulnerability of affected peoples. In other words, the amounts of compensation have not help displaced people get back on their feet.

Though, prima facie, there is an understandable concern that government and investors will pay more in compensation, there is a cogent alternative view that promotes compensation as part of the market economy, thus, taking into account what the value of the land would have been had it been freely available to industry. Such competition amongst industry for land would increase the potential financing of compensation to a more satisfactory amount.²

(6) Despite subsections (1) and (2) the following matters may be taken into consideration in assessing the value of land-

c) if, in the consequence of the acquisition any of the persons interested in the land is or will be compelled to change residences or place of business, the payment of reasonable expenses to be determined by the Commission.

There is a great deal left to the discretion of the NLC in the above provisions and, therefore, open to contestation. Best practice dictates that this should be pegged, as a percentage, to the compensation award. In Uganda, for example, a disturbance allowance is paid, not exceeding 15 percent of the sum awarded to the person from whom the land is to be acquired, where that person was using the land as his or her home.

(7) In determining the damage resulting from diminution of the profits of the land, the Commission shall require proof of existence of the profits including evidence of tax returns

In assessing land value, the NLC will consider diminution of profits and will require proof of existence of profits including evidence of tax returns. This would be difficult for communities who derive profit from land. The provision should provide exception for rural communities who produce and trade goods from their land.

² Michael M. Cernea. Water Science and Engineering, *'Compensation and benefit sharing: Why resettlement policies and practices must be reformed,'* Mar. 2008, Vol. 1, No. 1, 89–120, page 92

4. Responsibility to explain the various forms of compensation: *Clause 7, amendment to Section 111 of Land Act No. 6 of 2012*

We note that this clause provides for various types of compensation to be given to a landowner. This is a progressive section as it allows a landowner to decide the form of compensation. At the same time, we would caution against providing a number of different forms of compensation without adequate explanations to marginalized and vulnerable groups.

We contend that the National Land Commission and the County Government should share information to those whose land is being acquired in relation to the merits and challenges with each form of compensation. In cases where large amounts (relatively) of monetary compensation is paid to communities, guidance could be offered on how money can be invested and saved. The process of compulsory acquisition is very disruptive to the lives of the project affected persons and this should not unnecessarily result in a curse to them. When people lack a proper understanding of the best mode of compensation they are likely to become even poorer and more marginalized.

Further, in relation to monetary compensation, the Bill states that monetary payment either in lump sum or in instalments spread over a period of not more than one year. This again should be at the choosing of the person whose land is being acquired. Alternatively, the payment should just be a lump sum.

5. Risks associated with acquisition of land before making the first payment: *Clause 13, Amendment to Section 120 of the Land Act; Clause 16, Amendment to Section 124; Clause 17, amendment to Section 125*

The proposed amendment to Section 120 (1) of the Land Act allows the NLC to formally take land once an award has been made rather than first requiring a compensation payment.

Major infrastructure or development projects will often take place in the areas occupied or held by marginalized and poorer groups. Though development projects have the potential to offer opportunities to local groups, history has demonstrated that displacement often results in the further entrenchment and, even, heightening of impoverishment and marginalization.

Particularly when one considers the risks of climate change, which can exacerbate droughts and food insecurity, loss of livelihoods due to development induced displacement can lead to extremely serious consequences for those groups. It is therefore critical that an alternative livelihood source be established immediately through, for example, a cash payment or alternative land.

Compensation measures should be seeking livelihood restoration and improvement³ rather than further hardships, particularly when the development projects are associated with sustainable development and moving Kenya towards a middle-income country.⁴

There is much to learn from other countries, particularly in Asia, which are dealing with the impacts of development induced displacement. For example, to correct its past errors China has now had to adopt policy measures to increase compensation payments and financial investments in resettlement due to development projects.

The provision of compensation prior to the allocation of land, should not produce delays that would jeopardize the advancement of a project. One must also consider that there are also a number of legal processes to follow prior to the commencement of any development project. For example, all projects will require an environment impact assessment⁵ license prior to commencement and in many cases a strategic environmental assessment also. There may also be other licenses or permits required at both national and county levels prior to project commencement.

Therefore, it is unreasonable to expect this amendment to automatically increase the likelihood of investment in projects and/or speed at which projects will commence. In actual fact, the likely result will be the further marginalization of already vulnerable groups.

We, therefore, respectfully submit that this amendment be deleted.

6. Further clarity required in cases of urgent necessity: *Clause 13, amendment to Section 120 (2) of the Land Act No. 6 of 2012*

The amendment to section 120 (2) allows for the NLC to take possession of *any* land needed for urgent necessity after 15 days of the publication of the intent to acquire land. We note that the proposed deletion of the phrase “uncultivated or pasture or arable” will result in all areas in Kenya being subject to this power. We submit that the subsection would be further strengthened by providing clarity on the situations requiring urgent necessity. This would also assist to ensure the provision is not misused. For example, we suggest that criteria for *urgent necessity* might include:

- *Public Safety*
- *Public Order*
- *Public Health*

³ Michael M. Cernea. Water Science and Engineering, ‘*Compensation and benefit sharing: Why resettlement policies and practices must be reformed,*’ Mar. 2008, Vol. 1, No. 1, 89–120.

⁴ Vision 2030

⁵ Environmental Management and Co-ordination Act, 1999

7. Concerns regarding constitutionality and impact of preventing court orders: *Clause 14, Amendment to Section 121 of the Land Act No. 6 of 2012*

The proposed amendment seeks to prevent a court stopping any development in the land, once the NLC has taken possession and public funds have been committed. We assume that the motivation driving this amendment is to prevent the loss of public funds should a project be delayed. However, the amendment raises significant issues, which we ask the Committee on Land, Environment and Natural Resources to consider.

1. Unconstitutionality

The proposed amendment is in direct conflict with the Constitution of Kenya 2010.

The amendment prevents any person, not solely a landowner or occupier, seeking the enforcement of a right. Therefore, this has the effect, of completely removing the Bill of Rights in relation to developments in land when public funds have been committed.

Article 160 (1) of the Constitution states that the Judiciary “shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority.”

Further, Article 165 of the Constitution grants the High Court original unlimited jurisdiction and allows the High Court to determine “whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.”

Article 23 grants the High Court the power “to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.”⁶

2. Beyond the Scope

Prima facie, it appears that the amendment seeks to stop *any* court order with respect to development in land. In effect, this would render ineffectual any of the legal processes required for a development project, such as environmental licenses, water licenses, energy licenses, mining licenses etc. These processes are incredibly important to ensure that projects are planned, constructed and operationalized in ways commensurate with law and regulation.

3. Weakening of the Judiciary

The judiciary plays a fundamental role in Kenya’s democracy and is one of the three critical institutions of the state. Under the country’s Constitution, the judiciary ensures that justice is available and that the Constitution is observed by all, including the executive. If the executive is allowed to make decisions without adequate checks and balances from the judiciary and legislature, the government machinery risks not working all together.

⁶ Constitution of Kenya 2010 Article 23 (3) (a)

Additionally, it is unclear whether Clause 18 would also curtail the power of the Land Acquisition Tribunal in the cases where public funds have been committed.

4. Inadequate protection for private citizens and businesses:

The Land Value Index Laws (Amendment) Bill, 2018, proposes two significant amendments that could significantly impact land owners and occupiers, namely the NLCs ability to: a) take possession of the land once an award has been made but not necessarily paid out and b) take possession of any type of land where there is an urgent necessity within 15 days.

If these provisions, which are potentially detrimental to people's wellbeing, are passed into law then it is incredibly important for people to have appropriate measures for redress. By withholding or removing such measures, peoples' wellbeing could be negatively impacted *and* have the result of impacting business through continued complaints.

As a result, we submit that Section 121 subsection 3A (a) be deleted.

**8. Reduction to 30 days for NLC decisions will negatively affect process:
*Clause 19, amendment to Section 146 of the Land Act, 2012***

This amendment seeks to reduce the number of days within which the NLC shall make a decision on an application for a public right of way from ninety days to thirty days. A public right of way may be used in a number of circumstances, including roads, walkways, railways, transmission lines and oil or gas pipelines.

In order to make a sound decision on an application for a public right of way, the NLC is currently afforded *at least* ninety days. Within this period, the NLC must:

1. Consider all relevant information, which includes assessing any possible impacts on ecological sensitive land;
2. All representations and objections made by any person served with a notice; and
3. Make a recommendation to the Cabinet Secretary whether to:
 - a. Appoint a public inquiry to give further representations on the matter;
 - b. Refer the matter to the County Government; and/or
 - c. Initiate and facilitate negotiations between those who have made representations.

We submit that a reduction to 30 days would place the NLC in an extremely difficult position and result in weak processes leading to poor determinations. Many examples have shown that where processes are weak, poor, mostly illiterate and vulnerable groups will undoubtedly suffer. If applied in this instance, it will be extremely difficult for such groups to understand the legal process, collect information and make adequate submissions to the NLC during the inquiry phase.

This would then raise questions of fairness, satisfactory public participation and rights listed under Chapter 4 of the Constitution.

9. Registrar's powers to limit fraud and improper use: *Clause 21, amendment to Section 76 of the Land Registration Act No. 3 of 2012*

In light of the proposed amendment, we submit that the registrar should have the power to make restrictions on dealings in land or land rights for the purposes of:

- i. Compulsory acquisition (as the amendment rightfully states)
- ii. Prevention of fraud
- iii. Prevention of improper dealing or any sufficient cause

The wording of the amendment can be read to mean that the registrar lacks the power to make restrictions on the dealings in land to prevent fraud and improper use if it does not relate to compulsory acquisition.

In light of the above facts, we propose that the amendment should include a comma at the end of the phrase, 'for the purpose of compulsory acquisition.'

10. Free, prior and informed consent supports the intention of the Bill: *Clause 22, amendment to Section 22 of the Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act No. 56 of 2012*

Clause 22 of the Bill seeks to delete Section 22 of the Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act No. 56 of 2012.

Section 22 of the said Act outlines the procedures for displacement induced by development projects. The section is detailed and requires, amongst other things, the free prior and informed consent (FPIC) of affected persons.

Given land is such an emotive issue in Kenya, ignoring the will of local people could result in the significant and costly delays of projects, social and monetary costs through protests and police response.

FPIC is important to ensure that Article 35 (access to information, Article 40 (right to property) and Article 43 (economic and social rights). It is also extremely important to actualise our national values and principles specifically in public participation (Article 10).

Aside from its links to constitutionality, FPIC makes business sense. When communities allow investors and/ or the government to have projects on their land, they will be cooperative and unlikely to hamper the project through demonstrations and other civil actions.

A poignant example of this is the Kinangop Wind Farm case, where communities were not involved or lacked the opportunity to give their free prior and informed consent. This case is a perfect example of how the lack of FPIC can even lead to projects worth millions of dollars being shut down.

We thus submit that FPIC is vital, especially when dealing with community land and/or marginalised and impoverished groups. In this way, it is more likely that people will support the project and this, in the long run, benefits the proponent, the government and the local community. In order to meet the goals of this Bill, Section 21 of the Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act, 2012, and specifically section 21 (2) will enable the Land Value Index (Amendment) Act, 2018 to achieve its goals.

We therefore submit that the proposed amendment be deleted.

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