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Report of the Commission of Inquiry
into the
Illegal/Irregular Allocation
of
Public Land

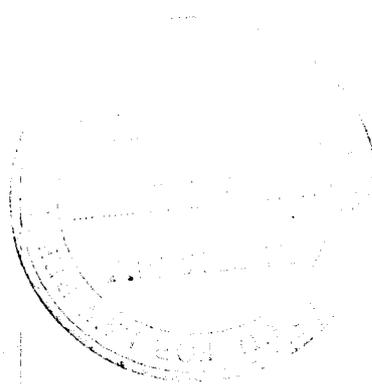


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ANNEXES

(Two Separate Bound Volumes)



**COMMISSION OF INQUIRY
INTO
ILLEGAL/IRREGULAR ALLOCATION OF PUBLIC LAND**

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Date:

HIS EXCELLENCY, HON. MWAI KIBAKI, C.G.H., M.P.
PRESIDENT AND COMMANDER-IN-CHIEF OF THE
ARMED FORCES OF THE REPUBLIC OF KENYA,
STATE HOUSE,
NAIROBI

YOUR EXCELLENCY,

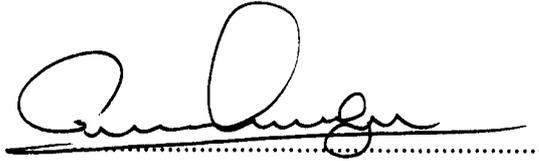
**RE: REPORT OF THE COMMISSION OF INQUIRY INTO
ILLEGAL/IRREGULAR ALLOCATION OF PUBLIC LAND**

Your Excellency appointed this Commission by Gazette Notice No.4559 dated 30th June, 2003 and published on 4th July, 2003 as read together with Gazette Notice No.6724 dated 22nd September, 2003 published on 22nd September, 2003; and Gazette Notice No.711 dated 3rd February, 2004 published on 6th February, 2004 to inquire into illegal/irregular allocation of public land and set out in our Terms of Reference.

Following that commission we have completed the inquiry and accordingly we submit this Report.

We remain,
Your Excellency's most obedient servants,

Paul Ndiritu Ndungu
Chairman



Michael Aronson
Vice-Chairman



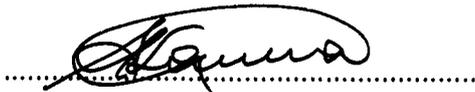
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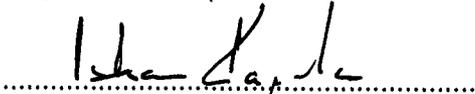
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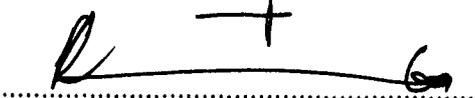
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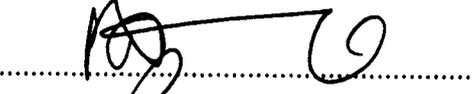
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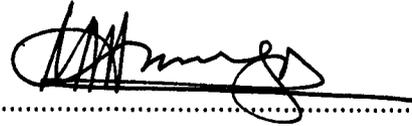


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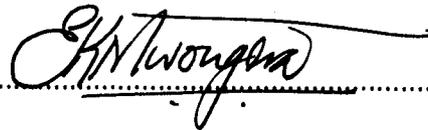
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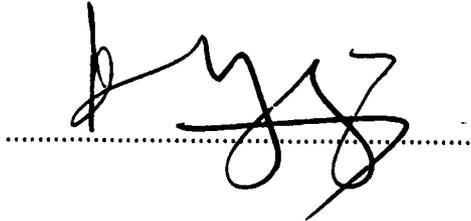
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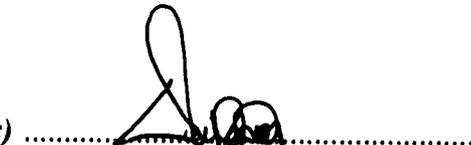
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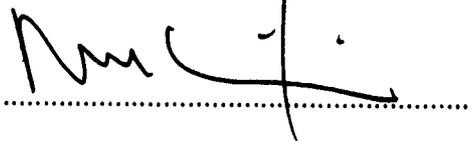
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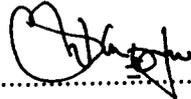
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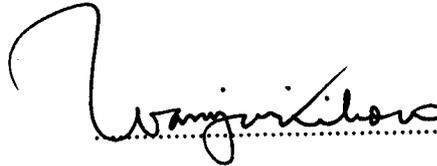
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Counsel to the Commission

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.....

ACKNOWLEDGEMENTS

This Report is the result of hard work support and commitment by many individuals. We are deeply indebted to all those who supported and facilitated our work and wish to acknowledge them.

We wish to express our gratitude to His Excellency the President and Commander-in-Chief of the Armed Forces of the Republic of Kenya for his wisdom in establishing this Commission to inquire into illegal and irregular allocation of public land. We thank him for appointing us and thereby giving us the opportunity and privilege of serving our nation in a special way.

In addition the Commission wishes to extend its appreciation to Hon. Amos Kimunya, M.P., Minister for Lands and Settlement, the Permanent Secretary Mr. Kiriinya Mukiira, the Heads of Department in the Ministry as well as their staff who participated in our meetings and facilitated our investigations.

We are also grateful for the support we received from the Office of the President and in particular from Permanent Secretary, the Secretary to the Cabinet and Head of Civil Service (Ambassador Francis K. Muthaura) who ensured that the Commission was provided with material, financial and human resources. We wish to single out several officers in his office for special mention; namely: Mr. Hyslop Ipu (Principal Administrative Secretary), Mrs Rosemarie Kigame (Deputy Secretary/Administration) who served as the Commission's Co-ordinator, Mr. Francis K. Musyimi (Deputy Secretary/Administration), Mr. Mwarapayo A. M. Wa-Mwachai (Undersecretary/Finance), Mr. Isaiah O. Nyaribo (Undersecretary/Administration), Mr. Tom. P. O. Odhiambo (Senior Assistant Secretary/Finance), Ms. Margaret Wairimu (Transport Officer) and Mr. Dishon I. Saunya (Supplies Assistant).

We are also grateful to the Hon. Chief Justice Evans Gicheru who met us and discussed many legal issues pertaining to our work.

We also express deep appreciation to the contributions of Ms. Raychelle Omamo and Mr. Thuita Mwangi who briefly served as Assisting Counsel

and Joint Secretary respectively but left the Commission to serve in other official capacities.

The officers of the Standing Committee on Human Rights served in the Interim Secretariat and assisted in laying down the foundation of our work. We are thankful to those officers and especially to Mr. Felix Kombo, Alice Nderitu, Jane Mulwa, Edmud Kamu, Ezekiel Obanda and Lawrence Ilua.

Several Ministries, various Government Institutions, including Parastatals, Municipalities and County Councils responded to the Commission's requests for information and thereby enriched our findings. We are deeply indebted to all those who helped us in this way. We are particularly grateful to the representatives of Ministries, Government Departments and Institutions who attended our Workshops and other meetings, and representatives of Government agencies who helped us in various ways. We wish to single out for special mention the Ministries which sent representatives to our workshop at the Kenya School of Monetary Studies in November, 2003 namely: Office of the President (Provincial Administration and National Security), Ministry of Lands and Settlement, Ministry of Roads, Public Works and Housing, Ministry of Water Resources, Management and Development, Ministry of Environment, Natural Resources and Wildlife, Office of the Vice-President and Home Affairs, Ministry of Livestock & Fisheries Development, Ministry of Local Government and the Ministry of Agriculture.

The Principal, Kenya Institute of Mass Communication and Mr. Charles Manyara (Lecturer) , Kenya Institute of Mass Communication helped us with recording facilities which we used at our workshops. The Officer Commanding, Kilimani Police Station assisted us with service of summons to several witnesses. We thank them sincerely for their support.

A number of Professional Organizations namely: The Law Society of Kenya, the Institution of Surveyors of Kenya, the Kenya Institute of Planners, and Kenya Bankers Association held discussions with us and gave us memoranda that helped us shape some of our findings and recommendations. We deeply appreciate their contribution.

Members of the public also sent memoranda and complaints which provided insight into the magnitude of illegal and irregular allocation of

public land. Many of their contributions were used to enrich our report and we therefore thank all those who wrote to us or visited our offices.

The Media Houses also contributed in various ways. They, among other things, kept the debate on 'land grabbing' alive and helped us with important perspectives on the problem. We thank all of them for their contribution.

We would like to pay special tribute to the Commission Staff who worked tirelessly and efficiently to make our work successful. Their dedication and commitment went beyond the call of duty. We are particularly indebted to Mr. Alfred Muthee (Data Analyst); Mrs. Dorothy Kaari Mwanzile (Editor); Ms. Juliet Wanjiru Mwaniki (Personal Secretary) and Robert Ochung'a Amutabi (Typesetter) who worked tirelessly on the final report to ensure that all the relevant information was included. The names of all the members of staff appear on *Appendix 11* of this Report.

Lastly we are very grateful to all those who contributed to our work in one way or another but have not been specifically mentioned.

INTRODUCTION

Land retains a focal point in Kenya's history. It was the basis upon which the struggle for independence was waged. It has traditionally dictated the pulse of our nationhood. It continues to command a pivotal position in the country's social, economic, political and legal relations. It is not surprising therefore that land has since the colonial times to-date, been the subject of myriad state managed policy and legal interventions. Neither is it surprising that it has been the subject of many Commissions of Inquiry. At every epoch, the need to address systemic land related grievances has forced successive regimes to make adjustments to the policy, institutional and legal arrangements in the country's land relations.

This Report is a product of an Inquiry by a Commission appointed by His Excellency the President, Hon. Mwai Kibaki, *vide* Gazette Notice No. 4559 dated 30th June 2003 and published on 4th July, 2003. The Commission was appointed to inquire generally into the allocation of lands, and in particular,

- (a) (i) to inquire into the allocation, to private individuals or corporations, of public lands or lands dedicated or reserved for a public purpose;
 - (ii) to collect and collate all evidence and information available, whether from ministry-based committees or from any other source, relating to the nature and extent of unlawful or irregular allocations of such lands; and
 - (iii) to prepare a list of all lands unlawfully or irregularly allocated, specifying particulars of the lands and of the persons to whom they were allocated, the date of allocation, particulars of all subsequent dealings in the lands concerned and their current ownership and development status;
- (b) to inquire into and ascertain-
- (i) the identity of any persons, whether individuals or bodies corporate, to whom any such lands were allocated by unlawful or irregular means; and
 - (ii) the identity of any public officials involved in such allocations;

INTRODUCTION

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- (i) the identity of any persons, whether individuals or bodies corporate, to whom any such lands were allocated by unlawful or irregular means; and
 - (ii) the identity of any public officials involved in such allocations;

- (c) to carry out such other investigations into any matters incidental to the foregoing as, in the opinion of the commissioners, will be beneficial to a better and fuller discharge of their commission;
- (d) to carry out such other investigations as may be directed by the President or the Minister for Lands and Settlement;
- (e) to recommend-
 - (i) legal and administrative measures for the restoration of such lands to their proper title or purpose, having due regard to the rights of any private person having any *bona fide* entitlement to or claim of right over the lands concerned;
 - (ii) legal and administrative measures to be taken in the event that such lands are for any reason unable to be restored to their proper title or purpose;
 - (iii) criminal investigation or prosecution of, and any other measures to be taken against, persons involved in the unlawful or irregular allocation of such lands; and
 - (iv) legal and administrative measures for the prevention of unlawful or irregular allocations of such land in the future;¹

The appointment of this Commission was an indication that the law and practice of allocating public land in the country had led to a crisis in the country's land relations warranting state intervention. The detailed context of the Commission's appointment is discussed in PART ONE of this Report.

The Commission undertook the inquiry as directed by the President within a cumulative period of nine (9) months. The resultant Report as presented is summarized the Executive Summary, which follows.

¹ For the Full Terms of Reference issued to the Commission, and other Instruments of Appointment see APPENDICES 1-4

EXECUTIVE SUMMARY

This Report comprises Six main PARTS which are organized in logical sequence. **Part One** discusses the *context* in which this Commission was appointed in historical perspective. The main question answered in this part therefore is, why this Commission? In the process of answering the question, this part of the report provides detailed and critical background information about the phenomenon of illegal allocations of public land (land grabbing) in Kenya.

Part Two discusses the *methodology*, that is the approach adopted and used by the Commission in conducting the inquiry. The problem under inquiry as understood by the Commission is defined. The sources and methods of acquiring, storing and analyzing information are adequately highlighted. This part also discusses the main challenges and constraints the Commission faced during the inquiry. The manner in which these constraints and challenges were surmounted so as not to seriously impact upon the integrity of the inquiry is explained in the last section of this part.

Part Three contains a *restatement of the law* relating to the allocation of public land in Kenya. An important aspect of this restatement is what constitutes public land in the context of this inquiry. The relevant legal provisions in various statutes which stipulate the manner in which public land is to be allocated are briefly explained. The allocations of public land contrary to the provisions of law which have resulted in illegal titles are extensively discussed in this part. Finally, the effect of an illegal title and its impact on third party or "innocent" purchasers is critically analyzed.

Part Four of this Report contains the key *findings* of the inquiry. It is a situational analysis of how public land was illegally allocated to individuals and companies. It provides an insight into what actually took place. Examples of how public land was grabbed and even sold are given. This part also contains the key *specific* and *general recommendations* made by the Commission as to what action should be taken by the Government with regard to illegal titles to land.

Part Five of the Report contains the key proposals by the Commission on how the recommendations in this Report can be implemented. It discusses

the *framework, strategy and programme of implementation* as proposed by the Commission.

The **ANNEXES** to the Report contain among other particulars, *lists of land and names of individuals and corporations* to whom public land was illegally allocated. These lists appear in separate bound volumes (Vol. I and II) which are part of this Report.

PART ONE
THE CONTEXT

1. Introduction

This Commission of Inquiry was appointed by His Excellency the President to examine in detail, the phenomenon of illegal and irregular allocation of public land in Kenya. The phrase "public land" is used in this report to mean all that land in which, given its nature, and strategic location, the public retains an interest. At the time of the Commission's appointment, the country was already experiencing a major crisis in its Public land tenure. Land meant for public purposes had over the years been wantonly and illegally allocated to private individuals and corporations in total disregard of the public interest. The privatization of public land in this manner is commonly referred to as "Land Grabbing".

So pervasive was this practice that by the turn of the Century, there was real danger that Kenya could be without a public land tenure system. There is no legal or political system in the world which condones the extinction of its public land tenure. A country's physical development planning depends largely on the manner in which it balances private and public land rights. Kenya has two options of recreating its public land tenure system. Either, the system can be recreated through massive and large scale compulsory acquisitions of private lands by the Government (this would have to be undertaken at a considerable cost to an already burdened and impoverished tax payer), or, the Government can embark on the process of tracing illegally allocated public land with a view to repossessing and restoring the same to the public for its original purpose. The reasons for the emergence and intensification of illegal and irregular allocations of public land are to be found in the country's historical, legal and political dispensation (In part, unbridled greed and complicity of Government officials thus fuelling illicit land markets throughout the Country.)

2. A BRIEF HISTORICAL BACKGROUND

(a) The Pre-colonial Period

Land in pre-colonial Kenya was owned and held under a complex system of customary tenure in which rights of access to and use of land were regulated by intricate rules, usages and practices. These were often based on communal solidarity such as clan, and other lineal heritages. In the

multiplicity of customary tenures, a number of salient features have been recorded by writers in this field.¹ These are as follows:

- Under African Customary land law, there was a distinction between rights of access to land and control of those rights.
- The power of control was vested in a recognized political authority or entity within a specific community.
- The political entity exercised these powers to allocate rights of access to individuals depending on the needs and status of the individual in question.
- Rights of access were guaranteed by the political authority on the basis of reciprocal duties performed by the rights holder to the community.
- Rights to land were determined on a continuum of flexibility; always adjusting and changing as circumstances demanded.
- There was no element of exclusivity to land under African Customary Law as found within English Property Jurisprudence.

(b) Public Land under African Customary Tenure

It must be appreciated that notwithstanding the apparently complex tenurial arrangements in the African customary system, the concept of "Public Land" as used in this Report was not alien to it. Public land fell under what are usually referred to as "Commons", thus there was territory which served the interests of the Community in its corporate status. In this category were found lands such as common pathways, watering points, grazing fields, recreational areas/grounds, meeting venues, ancestral and cultural grounds, and many others. No individual or group could be allocated rights of access to such public lands other than for purposes for which they had been set aside and recognized. The community's needs could not yield to private interests.

¹ See for example, M.P.K Sorrenson, *The Origins of European Settlement in Kenya*, Nairobi, O.U.P 1968.

Y.P GHAI and J.P.W.B MacAuslan, *Public Law and Political Change in Kenya*, O.U.P 1970.

H.W.O Okoth Ogendo, *Tenants of the Crown: The Evolution of Agrarian Law and Institutions in Kenya*, ACTS PRESS 1995.

(c) The Colonial Period

The British conquest, the declaration of a Protectorate and later a Colony fundamentally altered the African land relations in Kenya.

The promulgation of the Crown Lands Ordinance of 1902 and later the Crown Lands Ordinance of 1915 conferred enormous powers on the colonial government to deal with what had been declared Crown land. In effect, the Governor could make grants of freehold and leasehold in favour of individuals and corporate bodies on behalf of the Crown. After 1915, the Governor could make grants of agricultural leases of up to 999 years and of Town plots of up to 99 years on behalf of His Majesty. By 1949, those settlers who had acquired 99 year agricultural leases were allowed to convert them, at a price, into 999 year leases. Commercial Plots in townships and urban centers were allocated through a system of public auction while residential plots within municipalities were allocated through a public tender system.

(d) Policy and Administrative Changes After 1948

In September, 1939, a Committee under the Chairmanship of Mr. C.E. Mortimer, then Commissioner of Lands, was appointed to make recommendations regarding certain aspects of Land Tenure Policy. Among the matters to be reviewed was the system of allocation of commercial plots of a general nature in Townships and Municipalities and the method of allocating residential plots. The report of this Committee was published in 1941 and became the subject matter of intermittent discussion and debate in the Legislative Council and correspondence with the Secretary of State for the Colonies.²

With regard to the allocation of commercial plots of a general nature in the Townships and Municipalities, it was decided that for a trial period of two years, the previously existing system of auctioning such plots be abandoned. In future, such plots in Townships would be allocated by means of direct grant with the assistance of a local committee. The allocation would have to be subject to precise development conditions. In municipalities, it was decided that for a trial period of two years, commercial plots of a general nature would be disposed of by tender

² This information was embodied in a *COMMUNIQUE* issued by the Governor in 1951

instead of by auction, in cases where the Government considered such a course desirable in the public interest.

As for residential plots the practice of allocation by direct grant with the assistance of a local committee which had informally replaced the public tender system would continue. As shall become apparent, these administrative changes in the method of allocating these types of public land would have profound and far reaching effect on how successive regimes were going to deal with land in general and public land in particular in independent Kenya.

There is a difference of opinion as to the real reasons for such a change of policy and practice in the manner of land allocation by the Colonial Authorities. There are those who argue that by 1948/49, the public auction system had fallen into disrepute as wealthy syndicates and individuals often outbid the not so wealthy for all prime plots available. This created a land speculation Cartel leading to serious discontent within the entire settler community. More critically, the speculative activities threatened to distort the agricultural development agenda which had been the prime factor for the colonization of Kenya.

It was therefore imperative that the Governor be given more latitude in controlling the manner in which land could pass to individuals and Corporations. The selection of allottees from the list of all applicants who had responded to the advertisement of the plots would be done after interview by a Selection Board established by the Provincial Administration under the direction of the Provincial Commissioner or District Commissioner as the latter's representative. The guiding principles to be followed included the ability of the selected allottee to pay for land and carry out the intended developments within the prescribed time limits. Another consideration was whether the prospective allottee already owned plots of a similar nature elsewhere. These policy and administrative changes were formalized through the Circular issued by the Governor in 1951. The trials proved successful and it would appear, were adopted permanently.

On the other hand, there are those who argue that the policy and administrative changes outlined above were meant to further crowd out the natives (as Africans were officially referred to) and other Non White communities from the land market by tightening the Governor's control on the land allocation process. The Natives had already been declared Tenants

at the Will of the Crown by the Crown Lands Ordinance of 1915 (as affirmed by a judicial interpretation of the relevant Provision in the Ordinance). The Circular therefore is seen by those who belong to this School of Thought as a further subversion of the Rule of Law by the colonial government if there was any. Be that as it may, for the purposes of this Report, there are two inescapable conclusions that can be made about the main objective of the Circular of 1951:

- The Policy and Administrative changes embodied in the Circular were meant to streamline the allocation of Crown Land so as to prevent speculative accumulation of land by the wealthy. Speculation had become rife through the public auction system sanctioned by the Crown Lands Ordinance (and later carried over into the Government Lands Act (Cap 280)).
- These changes were exclusively meant to enhance the development paradigm of the Colonial Economy. The land rights and interests of the Natives were not part of this development agenda.

(e) The Practice of Land Allocation After 1951

The Applicant would be selected for allocation following an Advertisement. The Applicant would be required to sign a Letter of Allotment signifying his acceptance of the Terms and Conditions of the Offer. He would then be required to pay the recommended price within 30 days failing which the Offer would lapse making the plot available for offer to someone else. A Letter of Allotment was a temporary expedient and allottees were permitted to develop the plot in question at their own risk before the completion of survey of the plot. A Letter of Allotment was an offer and not a contract and as such, it could not be sold or otherwise transferred to a third party. It conferred no transferable interest or rights over land in favour of the person to whom it was addressed. Therefore, Letters of Allotment were never sold to third parties. They served the purpose they were intended for as stated above.

Because the main objective of allocating land in those days was (and still is today) to encourage development, the land was sold at 20% of its estimated market value. For this reason, the Special Conditions in the Title provided for development of the allocated land within a specified period (six months to submit Development Plans and twenty four months to complete the

development). During this period, the Grantee could not be allowed to sell, sub divide or otherwise deal with the land. The Grantee was only allowed to mortgage or charge the land to finance the said development. This remains the position as of today.

(f) The Legal Position Regarding the Allocation of Public Land Before and After Independence

As already indicated in the foregoing discussion, the legal position regarding land allocation during the colonial era in Kenya is embodied in the Crown Lands Ordinance of 1915, which was later retitled the Government Lands Act, Cap 280 of the Laws of Kenya (the Ordinance and the Government Lands Act are actually the same in substance). Section 15 of the Crown Lands Ordinance provided that the Commissioner of Lands could cause any portion of a township plot which was not required for public purposes to be divided into plots suitable for the erection of buildings for business or residential purposes. Such plots could from time to time be disposed of in the prescribed manner; that is by Public Auction unless the Governor directed otherwise. The substance of this Provision is repeated in Section 12 of the Government Lands Act which superceded the Crown Lands Ordinance of 1915 at independence.

The only significant difference is that the word "Governor" is substituted by the word "President." The Commissioner was also *vide* Section 25 of the Ordinance empowered to cause land available for leasing for agricultural purposes to be surveyed and divided into farms not exceeding 5000 acres, unless the Governor consented to the leasing of farms exceeding that acreage but only up to 7500 acres. Any lease of more than this acreage would require the Consent of the Secretary of State. Again, just as in the case of Town Plots, such leases were to be granted through Public Auction. These Provisions are also substantially replicated in the Government Lands Act save that sections 19 and 20 of the latter Act do not limit the acreage to be leased by the Commissioner.

The effect of the Circular of 1951 was to formalize the allocation of Crown land by direct grant. It would appear that this method of allocating land became permanent. The colonial Government must have found it successful in controlling the mischief of land speculation. It is however one of the greatest ironies in the history of land allocation in Kenya that what

appears to have succeeded in the colonial period (i.e. allocation by direct grant) is what later facilitated the massive illegal and irregular allocation of public land by the Government after independence. The abandonment of the Public Auction system gave the President and the Commissioner of Lands the opportunity to allocate land in ways that amounted to abuse of office. Thus the very Officials and Institutions that were supposed to be the custodians of public land became the facilitators of illegal and irregular allocations of the same.

The District and Provincial Plot Allocation Committees became powers unto themselves exercising the authority to allocate public land on behalf of the President without reference to the public interest. These Committees were supposed to allocate land which had been duly advertised by the Commissioner of Lands in accordance with the relevant provisions of the Government Lands Act. In other words, the Committees were to simply act as Agents of the Commissioner of Lands.

Apart from virtually embracing the allocation of land through direct grants, successive Commissioners of Lands have allocated and administered public land in ways that contravene certain provisions of the Government Lands Act. Section 18 for example forbids the sale, change, lease, subdivision of land or other dealing prior to completion of the development conditions in the Grant. The Commissioner is also empowered to re-enter the land and thus terminate the title if the grantee fails to develop the land within the time limits set out in the Title. These provisions and practices established by the Government Lands Act also apply to the allocation of land by Local Authorities for whom the Commissioner of Lands acts as an Agent as they themselves although having the power to make allotments; do not have the capacity to do so. The Commissioner must still bear in mind the principle of public interest.

3. THE LAND GRABBING PHENOMENON

A combination of legal and political factors discussed above have over the years conspired to facilitate illegal and irregular allocations of public land. The Government Lands Act (vide Section 3) confers powers upon the President to make Grants of Freehold or Leasehold of un-alienated government land to individuals or Corporations. Certain Presidential powers are delegated to the Commissioner of Lands as provided by Section

3 of the Act. Section 7 is however categorical that the Commissioner is not authorized to make grants of land under section 3 on behalf of the President. It is instructive that the Commissioner has over the years exercised powers under Section 3. A strict reading of Section 7 indicates that the powers conferred upon the President under section 3 cannot be delegated (except in the specified circumstances discussed later in this Chapter).

While Section 7 of the Government Lands Act permits the Commissioner of Lands to execute for and on behalf of the President any Conveyance, lease or licence of or for the occupation of Government Lands, only the President has power to make Grants or dispositions of any Estates, Interests or Rights in or over unalienated Government Lands. The President would have to notify the Commissioner of Lands in writing that he intends to make a grant of unalienated Government Land to whoever has been selected as a grantee. Only then, can a Commissioner legally proceed to formalize and sign the Grant of Title. It would appear that on the whole, in the early years of independence; public land was administered and allocated in the public interest and in accordance with the legal provisions.

But with the passage of time, these substantive and procedural safeguards have been blatantly disregarded in the allocation exercise. Public land has been allocated in total disregard of the public interest and in circumstances that fly in the face of the law. The practice of illegal and irregular allocations intensified in the late 1980s and throughout the 1990s. Land was no longer allocated for development purposes but as political reward and for speculation purposes. This practice which is usually referred to as "land grabbing" became part and parcel of official grand corruption through which land meant for public purposes (including land specifically reserved for public purposes) has been acquired by individuals and corporations.

(a) The Disappearance of the Public Trust Doctrine in the Allocation of Public Land

It must be emphasized at the outset that the powers vested in the President to make grants of Freehold and Leasehold of unalienated Government Land to individuals and bodies corporate; are not absolute or unfettered. These powers are supposed to be exercised strictly in the public interest. In other words, the President "administers" the land in Trust for the people of

Kenya. Any allocation of public land is therefore meant to enhance the public interest. The Doctrine of "Public Interest" is itself not a theoretical one. A critical reading of the Constitution of the Republic of Kenya reveals that the doctrine revolves around matters touching upon public safety, security, health, defence, morality, town and country planning, infrastructure, and general development imperatives. The doctrine is therefore a very broad one.³

The circumstances under which a public officer must exercise statutory powers have been the subject matter of much judicial discourse. In this regard, a long line of authorities⁴ from Commonwealth and other jurisdictions lays down the Principle to the effect that discretionary powers deriving from statute must be exercised reasonably. They are not absolute. The exercise of such discretion must be a real exercise of discretion. If, in the statute conferring the discretion, there is to be found, expressly or by implication, matters to which the authority exercising the discretion ought to have regard, then, in exercising the discretion, they must have regard to those matters. Conversely, if the nature of the subject matter and the general interpretation of an Act make it clear that certain matters would not be germane to the matter in question, they must disregard those matters. The word "unreasonable" is used as a general description of the things that must not be done. Powers of this nature must be exercised in conformity with the legitimate expectations of the public.

The bottom line is that public land cannot be allocated to individuals by the President without reference to the foregoing imperatives. He cannot dish away land to people at his personal whim or caprice. Yet, this is what has happened over the years since independence. (It must however be noted that abuses were also not uncommon during the colonial times but this Commission's inquiry does not extend to that period). Public land has been variously allocated for political patronage purposes. Land has been given out either as political reward, or in return for political loyalty. In extreme situations, public land has been the subject of outright plunder through

³ The salient elements of the Public Interest Doctrine are used in Section 75 of the Constitution although the doctrine itself is nowhere defined.

⁴ See for example, *Associated Provincial Picture Houses Ltd. V. Wednesbury Corporation* 1947 2 ALL ER 680. See also, *R v Secretary of State for the Home Department and Another, ex parte Hargreaves and Others* 1997 1 ALL ER 397.

speculation. This latter phenomenon has resulted in the unjust enrichment of a few people at great expense of the general welfare of the public.

The power given to the President to allocate public land directly was intended to enable him deal with the few cases where such direct allotments were necessary in the national interest. In such situations, public auctions or allocation through selection committees, would be considered long drawn and cumbersome. The power to allocate land directly could not have been intended to cover each and every plot available for allotment. It is however a fact that not much public land has been allocated by advertisement and auction or selection by Plot Allocation Committees in Kenya for the last 20 years or so. We have already observed that this was a carry over from the colonial period; only that this time around, it was for the wrong reasons.

Even where the President has delegated his powers of making direct allocations of public land to the Commissioner of Lands, this is severely restricted in the public interest. The Public Trust Doctrine is not lost. In this regard, the President has delegated the powers vested in him under Section 3 of the Government Lands Act to the Commissioner to make direct allocations of public land in the following circumstances only.

1. For religious, charitable, educational or sports purposes on the terms and conditions in accordance with the general policy of the Government and the terms prescribed for such purpose by the President;
2. For Town Planning exchanges on the Recommendation of the Town Planning Authority, Nairobi, within the total value, and subject to the conditions, laid down by the President;
3. The sale of small remnants of land in the City of Nairobi and Mombasa Municipality acquired for town planning purposes and left over after those town planning needs have been met;
4. For the use of local authorities for municipal or district purposes, viz; office accommodation, town halls, public parks, native locations, fire stations, slaughter houses, ponds, incinerators, mortuaries, crematoria, stock sale yards, libraries, hospitals, child welfare institutions, garages, housing schemes, markets and public cemeteries;
5. The extension of existing township leases on the fulfillment of the conditions specified therein as precedent to such extensions;

6. The temporary occupation of farmlands on grazing licenses terminable at short notice;
7. The sale of farms and plots which have been offered for auction and remain unsold, such grants being subject to the general terms and conditions for the advertised auction sale and the application therefore being submitted within six months of the date of the auction in the case of farms, except that in the case of godown plots, the power to sell shall not be limited to six months from the date of sale.

It is therefore clear from the foregoing specifications, that the legislature did not intend to de-emphasize the public interest while vesting the power to make direct allocations of public land in the President or allowing such powers to be delegated to the Commissioner of Lands. The problem however lies in the fact that both the policy makers and legislators could not have imagined that the very officers and persons who were supposed to act as the custodians of public land would be the same people who would facilitate the illegal and irregular allocations of the same.

(b) Powers of the Commissioner of Lands to Dispose of Land within Townships

Section 9 of the Government Lands Act provides that the Commissioner may cause any portion of a township which is not required for public purposes to be divided into plots suitable for the erection of buildings for business or residential purposes, and such plots may from time to time be disposed of in the prescribed manner. The Commissioner then causes the plots to be valued to determine the selling price, taking into account the basic cost of the land and infrastructure. The Commissioner is further required to determine the land rent, building conditions, special covenants e.t.c in respect of each plot. *Section 12 of the Act provides that the town plots shall, unless the President otherwise orders in any particular case or cases be sold by auction.* It has already been observed that no plots have been sold by auction for more than 50 years. It can only be assumed that the plots have been sold by direct allotment pursuant to Presidential order; otherwise, they would have been illegally allocated. But even where such order is given in respect of a certain plot, the inherent restrictions based on the public trust doctrine still stand. (Besides, common prudence requires that such order be given in writing by the President personally)

The wording of the Act leaves no doubt that the powers of the Commissioner of Lands to allocate plots in this category are not without limitations. First and foremost, the Commissioner can only dispose of a township plot in the prescribed manner **if the plot is not required for public purposes**. Secondly, the township portions must be sub divided into plots **suitable for business or residential purposes**. Thirdly, the plots should be sold **subject to specified building conditions**. Fourthly, the plots must be **advertised followed by actual balloting**. Every title requires the allottee of the plot to develop it within 24 months of being issued with the title. In addition to such conditions, section 18(1) of the Act provides that there shall be implied in every title a covenant by the allottee not to sell, lease, charge or otherwise dispose of the plot without the previous written consent of the Commissioner. With a view to prohibiting speculation in land acquired from the Government, Section 18(1) (i) provides that no application for the Commissioner's consent "*shall be entertained unless the building conditions have been complied with*". The clear meaning of this section is that the allottee of a Government plot must develop it himself, within the **period** stipulated in the title, before he can be permitted to sell it. If he is **unable to undertake** the development, his only option is to surrender the plot to the **Government**; failure to which, the Commissioner of Lands may take steps to repossess the land through a forfeiture action or by re-entry.

(c) The Letter of Allotment as an Instrument of Land Grabbing

It should be noted at the outset that most of the unalienated Government Land within urban areas and townships in the Country has been allocated by the Commissioner of Lands pursuant to the exercise of powers conferred upon the President by the Government Lands Act. It should also be restated that the town plots in question are supposed to be sold by auction unless the President otherwise orders. It is to be assumed that all these allocations have been made by public auction or pursuant to Presidential orders for direct grants. Even where either of the two conditions has been met in the allocation process by the Commissioner of Lands, the public interest limitations still remain. Until June 2003, notwithstanding the absolute prohibition of sales of undeveloped land, there was a vibrant land market in such lands. The selling and buying of undeveloped leaseholds took place pursuant to consents illegally given by the Commissioner of Lands. The sales were often actualized through the

informal transfers of Letters of Allotment. (This practice could be in fact criminal)

As already pointed out, a Letter of Allotment was not transferable to a third party during the colonial times and in the early years of Independence. This was due to the fact that such a letter is not in itself an interest in land which is capable of being transferred. (This fact is made clear in the "definitions" section of Part Three of this Report). It is however clear that a letter of allotment has been institutionalized as representing an interest in land capable of being bought and sold. Through such letters, individuals and bodies corporate are able to get titles to land illegally or irregularly and sell the same to third parties at exorbitant prices. On obtaining a letter of allotment from the Commissioner of Lands, the prospective allottee would sell it to a purchaser as if the letter were land itself at a premium. The purchaser then would assume the responsibility of paying the Government levies and charges, and obtain the title in his/her name. Thus, the original allottee would not feature anywhere in the title deeds that are open to examination by the public. It is the existence of this illicit market that fuelled the land grabbing mania in the Country.

The original allottee was able to transfer the letter of allotment by paying a consent fee equivalent to 2% of the selling price or the capital value of the plot whichever was higher. The authority for this fee was contained in Legal Notice No. 305 of 1994 published by the Minister for Lands and Settlement titled the Government Lands (Consents) (Fees) Amendment Rules. This notice was itself illegal since it was contrary to Section (18) (1) of the Government Lands Act. A Minister's Legal Notice cannot purport to amend the said Section. Only Parliament can amend an Act. Indeed, Section 31 (b) of the Interpretation and General Provisions Act (Cap 2 of the Laws of Kenya) provides that no subsidiary legislation shall be inconsistent with the Provisions of an Act under which such subsidiary legislation is made. The informal transfers of Letters of Allotment had however been going on long before the publication of this Legal Notice. (The worst period being the years between 1992 and 2002). The Notice was revoked by the current Minister in June 2003.

By charging Consent Fees for the informal transfers, the Government had recognized this is Illicit Land Market and the Government had ignored the illegitimate dealing with land matters. This meant that the Government had in effect abdicated its role to speculators, thus distorting the economic

value of land. The Government has over the years acted in a dual capacity of supplier and buyer of public land. Over time, with the collusion of speculators and public officials, there arose the syndrome of the “Captive Buyer” of public land. The “politically correct” individuals at the time would acquire public land in the manner described above and dispose of it to target State Corporations at exorbitant prices. The resultant emergence of land buying syndicates and cartels crowded out any legitimate purchasers of land for development. Even the so called “private developers” simply bought such land for construction and disposal to the public without any regard to planning imperatives since Planning Legislation (the Physical Planning Act 1996) was equally circumvented or totally ignored.

(d) Allocations of Public Land by Unauthorized Persons

Information available suggests that public land has been allocated by Officers and other personalities who have no legal authority to allocate it. Thus, there are situations where land has been allocated by Chiefs, District Officers, District Commissioners, Provincial Commissioners and even Members of Parliament. The activities of these personalities signify the complete breakdown of the Rule of Law in land allocations over the years. With the entry of these Officers in the public land allocation process, impunity set in thus complicating the problem further. But perhaps the most disquieting aspect of the activities of the Provincial Administration in the realm of public land tenure was the brazen politicization of the same. Land was no longer viewed as belonging to the Kenyan people in their sovereign and corporate entity; but as vacant space to be dished out to “politically correct” individuals for personal enrichment. The wider social, economic, ecological and developmental interests of the Country were never considered. Because of the confusion introduced into land allocations through the involvement of entities other than the ones with legal authority, there have been cases of double and even triple allocations; with many involving forgery, thus giving rise to intricate legal issues which could interfere with planning in the future.

(e) Land within the Jurisdiction of Local Authorities

At Independence, all that land which was formerly referred to as “Native Reserves” or “Native Lands” and to which the Land Adjudication and Land Consolidation Acts had not been applied became vested in the

County Councils of the areas in which they were situated. The lands became known as Trust Lands. According to the Constitution, the County Council is to hold such land on Trust for the people ordinarily resident in the area in accordance with the applicable Customary Law. Thus, even in the case of Trust land, the trust doctrine as the name suggests, is firmly embodied. The local authorities are not supposed to deal with the land as if it is theirs to own and dispose of as they wish. Yet over the years, the county councils have dealt with Trust land in ways that defeat the interests of local residents. To the extent that Trust land remains un-adjudicated, it must be considered Community Land whose interest is of a public nature requiring state protection against illegal and irregular allocations.

(f) Special Lands and Land Territories

There are certain lands which, given their *ecological integrity, cultural relevance* or *strategic location*, cannot be allocated to private individuals unless public interest dictates that they should. Even where such lands have to be alienated for private use, certain special procedures must be followed over and above those provided for in the Government Lands Act or the Trust lands Act. These lands are considered so important that they must remain in the public domain. The Government has a sacred duty to protect and conserve such lands from alienation or improper use by individuals or corporate bodies. This explains why Parliament has enacted specific laws meant to protect the lands in question. They include forests, wetlands, riparian reserves, the foreshore, historical sites and monuments, museums, military and other security installations and many others.

These lands were not spared the illegal and irregular allocations either. Many such territories were either allocated in total disregard of the special procedures under the specific laws, or contrary to their ecological, cultural and strategic significance.

4. THE MYTH OF THE SANCTITY OF TITLE

The final stage in the process of land allocation is achieved by the acquisition of a Title Deed issued by the Commissioner of Lands to the Registered Proprietor. Some of the land registration statutes in Kenya declare that the registration of a person as the proprietor of land or lease confers upon the person *a title not capable of being defeated by any other*

claim(**unless such a claim be a fraud or an overriding interest in the case of the Registered Land Act**). The title deed operates as evidence of registration. Section 75 of the Constitution provides that no property of whatever description shall be compulsorily acquired by the Government unless:

- It is needed for a public purpose
- The proprietor is fully and promptly compensated
- Parliament has enacted a law to specifically provide for and regulate such acquisition (The Land Acquisition Act, Cap 295)

It has been argued that a combination of these provisions clothes Title to land with legal sanctity which must remain untouched by the State unless and until the same has been extinguished through compulsory acquisition as laid out above. In other words, once a person acquires title to land, it cannot be questioned even in a court of law. Lawyers are wont to argue on behalf of their clients whose titles to land are sought to be impeached that such titles are sacrosanct. This type of jurisprudential logic has over the years given the title deed an imprimatur of legal invincibility. In certain situations, the law seeks to protect such titles even if they were fraudulently acquired as long as they are a first registration. We use the term *seek* here because the Commission has serious doubts as to whether such a provision in law can stand a constitutional challenge.

On the face of it, this reasoning is legally sound taking into account the utility of the institution of property in a capitalist society. Not only must an individual feel secure in his possessions, he must also be able to transfer the same for a fair return. The free transfer of property, especially land (Economists will argue), encourages and in fact, leads to its efficient use for the larger good of society.

This legal reasoning has led to the perception in the mind of the public (including lawyers, and other professionals), hitherto unchallenged, that all that matters for a person to be cushioned against any investigation or challenge is to get registered as a proprietor of land or lease and to be issued with a title deed. The manner in which such title is acquired is irrelevant. The title deed is an end in itself. It is this extreme notion of the sanctity of title which has fuelled the illegal and irregular allocations of public land in the country. This view of the title deed must have also been embraced by Officials at the Ministry of Lands and Settlement since they

facilitated the wanton issuance of title deeds over public lands as illustrated in Part Three of this Report. Thus, this *legal lawlessness* has provided the twisted rationale of public land grabbing in Kenya. This Commission holds the view that *sanctity of title depends on its legality and not otherwise*. A title acquired illegally is not valid in the eyes of the law.

In fact, there is no such concept at common law as “absolute” title.⁵ The availability of rectification and revocation (in both the Registration of Titles Act and the Registered Land Act) emphasizes the principle that titles are relative, not absolute, and that no title is completely free from the danger that some better right to land may be established. Unfortunately, a large section of the judiciary has interpreted the law of title to land in absolutist terms. They have failed to adequately appreciate the fact that certain categories of land cannot be privatized in disregard of the public interest.

5. PAST EFFORTS AT RECLAIMING PUBLIC LAND

The intensification of public land grabbing in most parts of the Country, gave rise to public resistance of the practice. As communities and neighbourhoods lost land meant for their use as playgrounds, recreational areas, hospitals, schools and other social amenities to the so called “private developers”, public resentment set in, leading to organized protests against the now almost daily spectre of land grabbing. The protests at first took the form of appeals and petitions to the President or Senior Government Officials seeking intervention on their behalf. But given the fact that hardly any remedial action was taken following these protests, the resistance became more belligerent and pronounced. Organized groups could be seen tearing down walls and fences erected by the private developers in desperate efforts to safeguard their land.

Eventually, however, such actions were defeated by the resort to the use of force by the grabbers. Often, they would enlist the support of law enforcement agencies to protect them as they went on with their “development activities”. Soon, the land in question would cease to be public land and become private property. Some public spirited litigants

⁵ See the discussion on *Indefeasibility of Title* in MEGARRY AND WADE, *The Law of Real Property*, London, Sweet and Maxwell 6th Edition at pp 278-290.

went to Court in a bid to protect public land. This took the form of Residents Associations filing representative suits. The Courts could in certain cases rule for the community while in others they ruled in favour of private developers whose title they held sacrosanct. As it is to be expected, Courts of law took too long to deliver their verdicts, thus rendering action by citizens obsolete. With the problem becoming national, civil society groups joined in the struggle against land grabbing. They adopted a strategy of internationalizing the problem using human rights and ecological parameters.

The problem of illegal and irregular allocations of public land also attracted the attention of Parliamentary watch dog Committees such as the Public Accounts Committee, the Parliamentary Investments Committee and the Parliamentary Select Committee on Corruption. The Committees in their Reports acknowledged the existence of the problem and suggested certain prescriptions to address it. No official action has been taken to address the problem on the basis of such recommendations. The President on his part issued a Directive banning the allocations of public land in 1999. However, apart from the fact that the legality of this Presidential directive is doubtful, it is common knowledge that it was largely ignored. The practice of backdating Letters of Allotment (which is a fraudulent act and therefore illegal) continued.

Efforts by the aggrieved Public and Civil Society groups to challenge the allocations have therefore proved largely futile or not so effective. The past Government had no political will to stamp out this practice. The reasons for this official reluctance to address a problem that had become so rampant notwithstanding persistent public outcry will become apparent in Part Three of this Report.

6. THE COMMISSION OF INQUIRY INTO ILLEGAL/IRREGULAR ALLOCATION OF PUBLIC LAND

After the defeat of the then Ruling Party KANU in the 2002 General Elections, the People of Kenya expected the new Government to address past wrong doings of the former regimes. The victorious party had anchored its campaign on an anti- corruption platform. One of the wrongs the electorate wanted corrected was the widespread and massive land grabbing which in their perception had either been condoned or perpetrated

by the past regimes. There had been past demonstrations against land grabbing by residents of affected areas and other interested parties. Writings and Policy Reports on the land problem in Kenya have recommended the need to rationalize the public tenure system in the country. Among the common suggestions is the need to protect public land from being allocated by the ruling elite for political reasons. Such land should only be allocated to individuals or corporations for development purposes and in the public interest. Historically, land matters in general have elicited intense and emotive national debates.

Given this scenario therefore, it did not come as a surprise when the President appointed this Commission just six months after taking over the reigns of power. Although the practice of land grabbing was known to the public in general, its extent and actual manifestation was not clear. A number of Official Reports had established that illegal and irregular allocations of public land had been taking place. However, without a systematic and thorough probe of the situation, it would not be possible to determine how extensive and deep rooted the problem had become. It would also be difficult to unearth the types of illegality and irregularity that had characterized land allocations. Critically also, the harm done to the Country's economy and general welfare had not been clearly brought to the fore. The general operational spirit of the Commission is best captured by the Preamble to the Terms of Reference as follows:

WHEREAS it appears that lands vested in the Republic or dedicated or reserved for public purposes may have been allocated, by corrupt or fraudulent practices or other unlawful means, to private persons, and that such lands continue to be occupied contrary to the good title of the Republic or in a manner inconsistent with the purposes for which such lands were respectively dedicated or reserved.....

The complex political and legal web in which land grabbing schemes had been operationalized required an Inquiry of this kind. At the time this Commission was appointed, there were other Ministerial based Committees, Task Forces and at least, one other Commission (commonly referred to as the "Goldenberg Commission of Inquiry") that had been set

up to probe various malpractices (including the allocation of Government properties such as Houses) which had resulted in the plunder of public property and massive violations of Human Rights by the former regime. This Commission therefore fitted into an elaborate Transitional Justice Strategy that the Narc Government was putting in place. The Commission's findings and recommendations are supposed to provide a solid foundation for the recovery of illegally or irregularly allocated public lands. This would ensure that the Government pursues a coherent and uniform strategy which would guarantee equal treatment for all.

The Remit of the Commission

From the Terms of Reference as set out in Part One of this Report, it can generally be inferred that this Commission was expected to answer a number of distinct questions. These can be simply stated thus:

1. What is the extent of illegal and irregular allocation of public land (otherwise known as land grabbing) in the Country?
2. In which areas have these allocations taken place?
3. To which Individuals and Corporations were these allocations made?
4. What is the identity of the Officials who made or facilitated these allocations?
5. How or through which procedures did these unlawful allocations take place?
6. What measures can be taken to remedy the situation?
7. What measures can be put in place to prevent future unlawful allocations of public land?
8. What action (legal or otherwise) should be taken against the Officials who were involved in these unlawful practices?

In answering the questions detailed above, the Commission was to undertake the following Tasks:

The *First Task* would be to prepare a detailed list of all illegal and irregular allocations of public land; the areas where such lands are situated; the identity of all the allottees (Beneficiaries) and the identity of all the Officials involved in such unlawful allocations.

The *Second Task* would be to detail the current status of each of such lands. Under this, the Commission would have to determine whether the land is undeveloped, partially developed, or fully developed. A correlative duty to this task would be the determination of whether the said land had been transferred or in any other manner disposed of to third parties in subsequent transactions. The question as to whether the Third Party was innocent or otherwise would also have to be determined at this stage.

The *Third Task* would be to recommend to the Government what measures (legal and administrative) to be taken to recover such illegally or irregularly allocated lands and to restore them to their proper title or purpose. In the event that recovery or restoration is not possible, the Commission was to recommend alternative measures to the Government.

The *Fourth Task* was for the Commission to recommend Short-Term, Mid-Term and Long-Term legal and administrative measures necessary to prevent future illegal and irregular allocations of public land. To this end, the Commission was to suggest legal and institutional reforms for the prevention of future land grabbing.

The *Fifth Task* was for the Commission to recommend a range of punitive actions to be taken against the Officials who were involved in one way or another in these unlawful allocations.

In making these recommendations, the Commission was to bear in mind the interests of innocent Third Parties. In other words, it was to be sensitive to the fact that somewhere along the line, land which had been grabbed did change hands and ended in the name of an innocent purchaser for value without Notice of such illegality. The Commission was to critically address this problem and determine whether an illegal title **ab initio** could confer legal title to a third party however innocent. It was to recommend what action to be taken in the event that a third party could not acquire legal title from an illegal one. The fundamental challenge faced by the Commission was how to do justice but within the strict confines of the law of the land.

Although the Commission was given a wide evidence gathering mandate, it is implicit in the Terms of Reference that its principal sources of information would be official Government Records and Reports of past Commissions and Committees. The bulk of its work therefore would entail collecting and collating all written evidence and material that already exists. This should not however be construed to mean that the

Commission's work would only be restricted to the collection and collation of evidence. As it later became clear, the Commission was forced to seek information from the public and other sources. It also became necessary to carry out further investigations to verify the information contained in the official documents. In many instances, the records available were incomplete, forcing the Commission to consult secondary sources. In yet many other instances, there was no correlation between the information on record and the situation on the ground. This necessitated some field visits to verify the development status of the land in question. The Commission had to conduct interviews with selected past and present public officials to determine the social, economic and political factors that fuelled the illegal and irregular allocations of public land.

PART TWO
THE APPROACH

In this part of the Report, we discuss the process which the Commission went through in conducting this Inquiry. In view of the fact that the subject matter of the Inquiry (the illegal and irregular allocation of public land) is a complex social problem, the investigation was multifaceted and not necessarily sequential. Thus the Inquiry went through various stages until the submission of this Report.

1. Stage One: Formation

This stage entailed the appointment of the Commission. The formal aspects of this stage consisted of the gazetteement and swearing in of the Commissioners. This was followed by the practical steps of establishing the Commission's Secretariat. Before the setting up of a fully functional Secretariat, the Commission had an interim arrangement with the then Standing Committee on Human Rights by which it was permitted limited use of the latter's facilities. The Commission used this opportunity to address critical conceptual and procedural issues which would enable it carry out its work well. In this regard, the Commission constituted a planning Committee to devise a number of strategies through which it would execute its mandate.

The Planning Committee first devised a tentative Work Programme or Plan and an Information Acquisition Schedule. The Plan laid out the overall Time Table indicating the various targets and milestones to be met by the Commission within the time stated in the Gazette Notice appointing the Commission. The Information Schedule laid out the manner of acquiring relevant information and the Sources from which such information would be retrieved. These two documents prepared by the Planning Committee were then tabled at successive Full Commission Meetings for critical discussion and eventual adoption. While adopting the two documents, it was the understanding of the Commission that the envisaged work schedules would change with the dictates of time.

2. Stage Two: Definition of the Problem

Having adopted the general framework, within which it would proceed to execute its mandate, the next challenge for the Commission was to define

the nature and scope of the Problem under Inquiry. Although the Terms of Reference were stated in fairly specific and clear wording, the exact nature of the Problem was not immediately apparent. A number of fundamental questions had to be answered before the Commission could embark on the substantive Inquiry. The following questions were of immediate interest to the Commission:

1. What is Land?
2. What constitutes "Public Land?"
3. What are the various categories of Public Land?
4. What is an "Allocation" and how does it differ from an "Allotment" if it does?
5. What constitutes an "Illegal Allocation" of Public Land?
6. What Constitutes an "Irregular Allocation" of Public Land?
7. Who has the legal authority to allocate Public Land?
8. Under what circumstances and pursuant to what conditions should Public Land be allocated to an individual or body corporate?
9. What legal procedures should be followed in the allocation of Public Land?

To answer these questions, the Commission decided to organize a one day Workshop at which elaborate presentations would be made by experts drawn from the Commission, relevant Government Ministries and other Sectors. Various presentations addressing aspects of the questions were made at the Workshop. From the Workshop findings, the Commission was able to clarify the operational concepts and formulate working definitions of the same. These concepts and definitions would guide the Commission in its Inquiry. The definitions derived from the inquiry exercise are elaborated in part three of this Report. The bottom line is that the Commission was able to approach its task with a very clear notion of what constitutes public land and how the same may be the subject matter of illegal and irregular allocations.

3. Stage Three: Acquiring, Storing and Structuring Information.

The Commission had then to decide on the most appropriate method of acquiring the information necessary to enable it analyze the Problem and respond specifically to the Terms of Reference. The initial tasks in this regard entailed the determination of the Sources of Information, the manner of collecting or acquiring such information, and the way of structuring and storing the same. This stage was considered crucial given the fact that the sources of information would be diverse and the amount massive. The success of the task of synthesizing and analyzing such information would to a very large extent depend on how it was received, collated and stored. In this regard, the Commission determined the following to be Sources from which it would collect and collate information.

(a) Sources of Information

1. Land Records stored in the various Files at the Ministry of Lands Registry at Nairobi
2. Land Records stored in the various District Registries in the Country
3. Official Reports of Standing and Select Parliamentary Committees
4. Official Reports by Commissions of Inquiry, Committees, Task Forces and Ministries
5. Reports by Non Governmental Organizations and other Civil Society groups working on land issues
6. Reports and Memoranda by Professional Associations
7. Reports and Memoranda by Individuals
8. Public Complaints received from members of the Public
9. Statements recorded from past and present Officials during private interviews with the Commission
10. Documents and Records submitted by Ministries, Departments, State Corporations, Local Authorities and other institutions in response to Summons for their production by the Commission
11. Media Reports

(b) Instruments for Acquiring Information

The required information was produced by gathering data from these multiple sources as well as interpreting and organizing it for each class of land. The variables identified for the data set included: land reference number, title number, reserved or intended use, current use, area in hectares, original allottee, current registered owner, date of allocation, allocating authority, developments status etc.

The Commission then developed Instruments for the Acquisition of information from these Sources. Towards this end, a number of Source specific documents in the form of Summons and Notices were developed. These included:-

1. A Summons for Production of Records. This document was directed at sources of information described in 10 above. (*See Appendix 5*)
2. A Notice to the Public published in the Media for submission of complaints, information and memoranda by members of the Public. This document was directed at the sources of information described in 9 above. (*See Appendix 6 also translated into Kiswahili*)
3. A Summons for the Production of Documents for Examination. This document was directed at those public officials who had failed or neglected to respond to the Summons in 1 above. (*See Appendix 7*)

(c) Receipt, Classification and Storage of Information

The Instruments for acquiring information were dispatched to the various destinations. In response to the Summons and Public Notice, the Commission Secretariat started receiving information on the illegal and irregular allocation of public land from official, professional and public sources. The information so received was registered and receipt acknowledged. The initial registration of information was simply meant to serve as a record of all information coming in and to provide an information movement tracking system. From this Record, it would be

possible for the Commission to determine at a glance the amount of information coming in. An individual Commissioner could also be able to track a specific document required for examination.

The documents, and other information received were classified according to the cluster or type of land to which they related. The Commission had developed a matrix of categories of public land at the definitional stage of its Inquiry. This exercise enabled the Commission to focus its inquiry on the specific types of public land and by so doing come to terms from the outset with the relevant laws and procedures which would determine its conclusions as to whether an illegal or irregular allocation had taken place. The classification exercise also enabled the Commission to identify "Inquiry Relevant Information". Because of the magnitude of the "Land Problem" in Kenya, many respondents sent information and complaints which were clearly beyond its mandate. Most of the complaints in this category dealt with private land disputes; some of which were before Courts of Law. It was therefore necessary that this type of information be sorted out and the respondents informed accordingly. General Files were then opened for each category of land in respect of which information and documentation had been received. Individual Files were also opened for each specific case. This raw data was then made available to the Commission's working Teams for analysis.

(d) Methods of Analysis

Based on the statement of the Problem, definition of Public Land and the classification of public lands, the Commission developed a Checklist of items relating to illegal and irregular allocations of public land. The Checklist was used by each Working Team in analyzing the information to determine the trends and patterns of illegality and irregularity. Towards this end, the Commission had established three working teams; i.e. a team on Urban, Ministries and State Corporations Land, a team on Trust lands and Settlement Schemes, and the third one on Forests, Wetlands and Riparian Sites, Protected Areas, Museums, Historical Monuments and Sites.

The analysis entailed the identification of cases which disclosed either an illegality or irregularity on their face i.e. non-compliance with the applicable rules and standards. The case so chosen was then subjected to a

thorough scrutiny by the particular land working team. Once it was determined that an allocation actually disclosed an illegality or irregularity, it was taken up for audit and verification at the Ministry of Lands and Settlement. One member of the particular Working Team would then call for the relevant files relating to the case under scrutiny for verification of the disclosed illegality. With the help of technical Assistants from the Ministry attached to the Commission, a conclusion would be made based on the contents of the files.

This initial analysis of specific cases was meant to achieve two main purposes namely, to identify cases with the appropriate ingredients to mount thematic public hearings and to establish a model for analyzing all the cases and information that had come to the Commission for the purposes of this Report. While the Commission had realized very early in its work that it would not be able to deal with each and every case of illegal and irregular allocation of public land, it decided to adopt this approach to ensure that whichever case was identified had to be as rigorously scrutinized as possible.

The above method of analysis was used to process the information received from the determined sources.

(e) Information Received in Response to Summons

The information received from Ministries, State Corporations, Local Authorities and other Government Institutions was of a diverse nature in terms of quality, complexity and relevance. It was subjected to the analytical process described above. The analysis revealed that some of the information was totally inadequate in terms of content; some was partially adequate while some was quite detailed and went a long way in facilitating the Inquiry. Where the information was either inadequate or partially adequate, Summons for better particulars, were sent to those responsible.

The detailed information was put through an inventory exercise. This entailed the preparation of Lists detailing the Land reference number, the name of the allottee, the allocating authority, and the year of allocation. A tentative conclusion as to whether the allocation was illegal or irregular was made using the Checklist. The reason for this conclusion was also recorded to aid in the verification process (for example, the land in question may have been set aside for a public purpose hence not available

for allocation; or the person or institution that made the allocation had no legal authority to allocate the land, or the legal procedures for allocating the said land were not followed, etc). The information would then be subjected to a verification process at the Lands registry in the manner already described.

(f) Information from Official Reports

As mentioned earlier some important information was derived from various sources. A number of official reports proved to be a critical source of information and the Commission was mandated to consult such reports during its inquiry. Two of these Reports require special mention. The first one was the Report of a Committee which had been appointed by the Minister for Roads, Public Works and Housing to investigate illegal allocations of Government houses, road reserves, work camps and materials depots. The Commission found the Report very useful to the inquiry and indeed adopted some of its recommendations particularly with regard to the illegal allocation of Government houses. The other important Report was presented to the Commission by the Ministry of Lands and Settlement. The Ministry had set up committees in early 2003 to *inter alia* prepare an Inventory of public utility lands countrywide and to determine the status of such lands.

The Reports were also synthesized with a view to abstracting the main and relevant findings which had been arrived at after systematic investigations and inquiries into allocations of public land by earlier committees, task forces and commissions. The Commission has incorporated these findings in this report after some cross referencing with records at the registries and being satisfied that they are credible. These Reports will no doubt form an important source of reference during the implementation of this Commission's Recommendations.

(g) Information Received from Members of the Public through Letters and Memoranda in Response to the Public Notice

The Commission received a substantial amount of information from the public alleging various irregularities and illegalities in the allocation of public land. The Commission had given the public a period of two (2) months within which to submit complaints. This time limit could however

not be adhered to since letters and petitions kept streaming in long after the time had expired. The Commission decided to continue receiving and accepting such petitions and memoranda. This decision was arrived at given the importance of such information and the fact that the Government would use recorded information long after the Commission had ceased to exist. The petitions and letters from the public were therefore received by the Commission throughout its tenure (even during the preparation of this Report).

Once a Complaint was received, it would be classified, stored and subjected to analysis. This entailed an elimination exercise to determine what was relevant for the purposes of the Commission in the context of the Terms of Reference. Letters were consequently written to the complainants informing them of the status of their complaints. Those cases that were determined to be relevant were subjected to an abstracting process. The Research Assistants attached to the Commission prepared Abstracts of each case under the guidance of the Commission. Tentative conclusions about an illegality or irregularity were made on the basis of the abstracts. The information was then keyed into the computer by the Data Analyst attached to the Commission. The data was then subjected to the verification process adopted for other types of information. It must be pointed out at this stage that while all the complaints received went through the initial process of analysis and abstracting, many could not be verified due to the constraints highlighted below.

All the public complaints which have been received by the Commission have been compiled into an annex which will form the basis for action as recommended in this Report. The complaints whose details have been verified will be acted upon in the same manner as all other public land parcels which have been determined by the Commission as having been illegally or irregularly allocated. The complainants may be required to supply better particulars by the implementing authority where it is considered necessary. This digest of public complaints is to continuously serve as a reference point for those who would like to provide details or add to it.

(h) Information from Volunteers and Professional Bodies

Apart from information sent in from Official sources in response to the Summons for production of Records, the Commission also received

information from past and present Officials of the Ministry of Lands and Settlement and also local authorities such as the Nairobi City Council. The information was received either on a voluntary basis or following private interviews of some officials pursuant to a Summons to that effect. This type of information provided the Commission with an insight into the political, social, economic and administrative environment that fuelled the practice of illegal and irregular allocations of public land. This insight was not just of theoretical or academic value; the Commission relied on it in making legal and administrative recommendations for the prevention of land grabbing impunities in future.

Closely related to the above, was information received from volunteer members of the public. Such information came from public spirited individuals or crusaders for justice. The secondary records provided by the volunteers were more detailed than the complaints received from the public in response to the Public Notice. This information disclosed extensive illegalities and irregularities in the allocation of land reserved for research institutions and also in settlement schemes. Some of the information was confirmed by official records.

Information and contributions by professional bodies and non governmental organizations was considered important in clarifying the Commission's mandate and anticipating conceptual and practical difficulties that could be generated by some of the recommendations to be made by the Commission. In this regard, the Commission received memoranda and/or held working sessions with the following:

1. The Institution of Surveyors of Kenya
2. The Kenya Bankers Association
3. The Kenya Institute of Planners
4. The Kenya Forestry Working Group
5. The Justice and Peace Commission of Kenya, Kitale Catholic Diocese

4. MEETINGS

The Commission initially held weekly plenary meetings every Monday during the entire period of the inquiry. The meetings provided a forum at which the Commissioners ventilated their thoughts on various aspects of the inquiry. As it is to be expected, many issues revolving around the problem of illegal or irregular allocations of public land did not have ready answers. Thus, every aspect of the inquiry process had to be discussed, and debated fully before conclusions could be arrived at.

It was during these weekly meetings that the Commission was able to review and take stock of the various aspects of its work. Strategic adjustments and modifications of the work programme were made at the meetings. The Commission was able to devise appropriate responses to some of the challenges to its work as discussed in the section dealing with “**Constraints**” below. In between the weekly meetings, the working groups or land working teams met on a daily basis. During the last two months of its tenure, the Commission held daily meetings including Saturdays and Sundays. This was necessitated by the mass of information which had come into the Commission’s possession from diverse sources. The information had to be sifted and analyzed. Complaints and Petitions from the public came in varying degrees of detail, relevance, clarity and complexity. This meant the Commission had to read and classify the information for purposes of deriving a matrix for future action.

5. MONTHLY PROGRESS REPORTS

The Commission prepared and submitted monthly progress reports about the inquiry to the Minister of Lands and Settlement. This was in conformity with term of reference (h) of the Gazette Notice appointing the Commission. The progress reports not only kept the Minister abreast of the inquiry, but provided an opportunity for both the Commission and Government to continually appraise the magnitude of the problem.

6. FIELD VISITS

One of the terms of reference required the Commission to prepare a list of all lands unlawfully or irregularly allocated, specifying particulars of the lands and of persons to whom they were allocated, the date of allocation,

particulars of all subsequent dealings in the lands concerned and **their current ownership and development status**. This particular requirement meant that the Commission had to conduct site visits to verify the situation on the ground as compared to that on paper. For example, a particular parcel of land would be represented on the land maps as a forest, while on the ground it had changed into a settlement scheme or farmland. It was therefore important that the Commission appraises itself of the correct position regarding the land.

Site visits were also important in enabling the Commission determine the extent to which lands set aside for public purposes (such as road reserves, school playgrounds, stadia, e.t.c) had been grabbed and later developed. The records at the Ministry of Lands and Settlement did not have all the particulars regarding the allocation of public lands within municipalities and townships out of Nairobi. This meant that the Commission had to visit district land registries in order to obtain and verify information relating to lands which had been illegally and irregularly allocated. However, the district land registries did not also have all the relevant information.

7. CONSULTATIVE WORKSHOP WITH OFFICIALS FROM MINISTRIES

In December 2003, the Commission organized a consultative workshop at which key officials from various ministries were invited to make presentations on a number of issues. The following ministries were invited to participate:

1. Ministry of Lands and Settlement
2. Ministry of Roads, Public Works and Housing
3. Ministry of Water Resources Management and Development
4. Ministry of Environment, Natural Resources and Wildlife
5. Office of the Vice President and Ministry of Home Affairs
6. Ministry of Livestock and Fisheries Development
7. Ministry of Local Government
8. Ministry of Agriculture
9. Office of the President

The criteria for identification of the ministries were based on a number of factors. These included such factors as the legal and administrative

jurisdiction that the specific ministry has over public land, the amount of public land held by a ministry for its purposes, the type and amount of public land managed by a specific ministry. It was also considered if from the available records, a specific ministry had apparently lost large chunks of its land through illegal and irregular allocations and whether a ministry would be a key player in the implementation of some of the recommendations that the Commission was bound to make.

The main objective of the workshop was to give the Commission a forum to understand and appreciate some of the administrative and operational environments under which ministries lost their land through illegal and irregular allocations. Secondly, the Commission intended to give the specified ministries an opportunity to make suggestions on the way to prevent land grabbing in the future. This was considered necessary so as to make the ministries be part of the overall solution to the problem under inquiry. In this regard, the ministries were requested to give their views on the following:

- Legal, administrative and policy measures that should be taken for the restoration of illegally and irregularly acquired public lands to their proper title
- Legal, administrative policy measures that should be taken in cases where such lands cannot be restored to their proper purpose and;
- Measures to prevent such illegal and irregular allocations of public land in future

At the end of the workshop, the Commission was able to determine the extent to which some of the recommendations it was in the process of making were in accord with the official thinking or not. It was also able to determine whether the government fully appreciated what in the Commission's opinion were the causes of illegal and irregular allocations of public land.

8. THE COMMISSION'S CONTACT WITH THE PUBLIC

Although the Commission's inquiry entailed mainly the examination of records and documents, the importance of maintaining contact with the public was considered necessary at the outset. The nature of the subject matter of the inquiry was such that constant communication with the public

had to be maintained. The most immediate way of maintaining this contact was through the publication of relevant notices in the print and electronic media. The notices to the public took the form of a call for information or a caution to the public. The cautions were aimed at alerting the public about certain facts regarding public land. This strategy was considered appropriate given the fact that unscrupulous beneficiaries of illegal and irregular allocations of public land would anticipate the outcome of the Commission's work and seek to defeat the same at the expense of the public. (*See Appendix 8*).

(a) Public Hearings

In addition to the use of public notices through the media, the Commission scheduled a number of public hearings. These hearings were to take two forms namely, *Forums* and *Thematic Hearings*. Public forums were to be held at provincial level. The main objective of these forums was to introduce the Commission to the public. This would provide a forum for the Commission to explain and clarify its' mandate (as contained in the terms of reference) to the people. The forums would also enable the Commission to gauge the intensity of public feeling about the problem of land grabbing and the peoples' prescriptions on how to solve and prevent the problem. The Commission would also be able to place its Inquiry within the context of the wider national anti- corruption strategy that the Government had embarked on. Lastly, these forums would enable the Commission to de-politicize its Inquiry.

(b) Thematic Hearings

As their title suggests, these hearings were designed to conform to certain themes on illegal and irregular allocation of public land. The hearings would be based on specific cases identified by the working teams. They would conform to the various categories of public land identified by the Commission. Hence, specific hearings would be held on forests, urban land, land held by State Corporations, trust land, settlement schemes and land reserved or dedicated for a public purpose. These hearings would be educative as well as investigative. They would assist the public to understand some of legal and social complexities regarding the illegal allocation of public land.

The hearings would be designed in such a way as to enable the Commission cover significant historical epochs when such allocations took place. The first thematic hearing would be held in Nairobi followed by seven others at provincial level. No generalized testimonies about the land problem would be entertained. The Commission would as far as possible restrict itself to allocations of "public land" as defined. The hearings would complement the Commission's overall methodology of information gathering, and analysis. A hearing schedule would be published in good time for the public to prepare.

9. CONSTRAINTS AND CHALLENGES FACED BY THE COMMISSION

As it is to be expected in an Inquiry of this kind and magnitude, the Commission faced a number of constraints and challenges in the process of its work. Some of the problems were resolved after some time while others continued to adversely affect the Commission throughout its tenure. These problems affected the work of the commission in varying degrees.

(a) The Time Period

One of the most intractable problems that faced the Commission throughout its tenure was the limited time within which it was to conduct and complete its inquiry. The Commission was directed to report its findings and any such recommendations within a period of one hundred and eighty (180) days from the date of gazettelement. The limitation of time by the appointing instrument had a lot of merit in that it emphasized the need to deal with the problem at hand expeditiously. It also forced the Commission to be focused from the very beginning of its Inquiry. Lastly, the time limit meant that the Commission would conclude its work without exerting too much cost on the Exchequer.

These advantages were however diminished by the fact that the magnitude and extent of illegal and irregular allocations of public land had been grossly underestimated. No sooner had information started streaming into the Commission's secretariat, than it was realized that the problem was so *extensive* and *complex* that it would not be possible to unravel it within a period of one hundred and eighty (180) days. Initial evidence received indicated that land grabbing was a country wide problem. It had occurred

at different periods in the Country's history and had taken many forms. It would not be possible to deal with every aspect of the Inquiry within the wording of the terms of reference.

The Commission would require a time period far longer than that assigned by the appointing Authority.

Another time related factor that had not been adequately appreciated was the period it would take for the Commission's Secretariat to be established in terms of office space, equipment and personnel. It took at least two months before the Commission was fully established to systematically embark upon its work. This meant that the Commission was only able to commence the substantive inquiry sometime in early September 2003.

The time related constraints affected the Commission in a number of ways forcing it to adjust its work plan and aspects of its methodology:

- Firstly and foremost, the Commission could not manage to report after one hundred and eighty (180) days. Its tenure had to be extended for an extra ninety (90) days to enable it finalize its report.
- Secondly, the Commission had to cut down on some of its planned activities. In this regard, it was only able to conduct limited site visits to determine the status of development of identified public land. While many visits to provincial registries were conducted for verification purposes, not all registries could be visited. The Commission was only able to verify a limited number of public complaints received in response to the notice for information.
- Thirdly, only one public forum could be held and that in Nairobi.
- Fourthly, the Commission had to abandon some of its planned activities altogether. It was not possible to mount the planned thematic hearings at all.

(b) Missing, Inaccurate, and Incomplete Records

The bulk of the Commission's work entailed the examination of records at the Ministry of Lands and Settlement. It was envisaged that most of the

information regarding the illegal and irregular allocations of public land would be found by perusing the relevant files. This was necessary to establish the history of allocations and transactions relating to a given parcel of land to ensure accuracy. Unfortunately, throughout its tenure, the Commission would be inhibited by the problem of missing, inaccurate and incomplete records at the Ministry. High profile cases of land grabbing (such as the Karura, Ngong, Mau and other Forests, the Northern and Southern Nairobi By passes, town and municipal stadia etc) could not be verified easily because relevant files had gone missing. In the view of the Commission, this was no accident and no reflection on the general competence and accuracy of the Records Department. It seemed to be deliberate.

In certain instances, the available records were either inaccurate or incomplete in material particulars. The overall effect was that the Commission could not prepare all the lists of allocations on the basis of these records. This problem meant that the Commission spent a lot of time updating the lists of allocations with a limited degree of success in certain cases. Some of the lists prepared for this report therefore remain incomplete. (*See Vol. I and II of the Annexes*).

(c) Inadequate and Irrelevant Information Received in Response to Summons

As indicated earlier, the Commission issued a Summons for the production of records and information to ministries, departments, local authorities, state corporations and other government institutions. The information required was specified in the summons. A prescribed form was enclosed in the summons to guide the respondents in answering to the summons. Through this summons, the Commission hoped to obtain information regarding the following:

1. The amount of public land held by the institution since 1962
2. The amount of land acquired by the institution since its inception and the price paid
3. The list and particulars of public land allocated or sold by the institution to individuals and corporations during this period and the price obtained

4. The list and particulars of land so allocated which may have been allocated illegally or irregularly

Once it received such information, the Commission would cross reference the same with the records at the Ministry of Lands for purposes of verification and compilation. Unfortunately, the returns from these official sources were highly inadequate. Some institutions sent in massive volumes of information which however were largely or totally irrelevant. Some information so sent in was found to be inadequate for the purposes of the Commission. Some ministries, state corporations and local authorities did not send in the required information at all either out of negligence or intentionally.

To deal with this, the Commission had to re-issue the Summons to those who had not complied. This took a lot of the Commission's time. It later transpired that some of the institutions sent in irrelevant information. The Commission had to redesign the Form so as to elicit relevant information. The Commission however cannot rule out sabotage of its work by individual officers given the fact that the reluctance to provide information persisted to the very end. Returns from County and Municipal Councils were the worst in this regard. The Commission was unable to get the necessary cooperation from the Nairobi City Council and other local authorities despite intervention by the Permanent Secretary for Local Government. The Commission was therefore unable to establish the full extent of land grabbing in areas administered by local authorities.

(d) The Diversity of Public Complaints

As already indicated, one of the main sources of information to the Commission were the Complaints from members of the public. The Complaints came in by way of written letters, memoranda and petitions. The complaints were in varying degrees of clarity, relevance, detail and complexity. The Commission had to examine all these to determine whether a specific complaint fell within its mandate. It had also to notify the complainants about the status of their complaint. To deal with these complaints, the Commission had to verify the information at the Ministry of Lands.

Unfortunately, the majority of the complaints referred to parcels of land in general terms which could not enable a conclusive search to be conducted. Where such particulars as the Land Reference number were provided, the

problem of missing files would return to haunt the Commission. These problems notwithstanding, the Commission found this information from the public to be most useful. It was able to appreciate the nature and extent of land grabbing in the country. The Digest of Public Complaints which appears as one of the Annexes to this Report will form a sound base of investigation and enforcement of the recommendations appearing in the Report. All those cases received and listed in this Annex have to be addressed on the basis of the Recommendations.

(e) Missing Company Records at the Registry of Companies

The Commission discovered quite early in its work that many illegal allocations of public land were made not to individuals but companies. These companies were ostensibly registered at the Registry of Companies in conformity with the requirements of the Companies Act, Cap 486 of the Laws of Kenya. The Commission would not have fulfilled one of its Terms of Reference if it did not disclose the names of the people (either directors or share holders) behind these companies. This meant that in many instances, a single title of land required a double search at the Ministry of Lands and at the Registry of Companies.

Yet the problem of missing records was just as pronounced at the latter registry as the former. The Commission received full cooperation from the Registrar of Companies Office (just as it did from the Ministry of Lands and Settlement) but the problem of missing records could not just go away. It is now a real possibility that some of these companies to which public land was allocated did not actually exist in law. Individuals are said to have acquired blank Certificate of Incorporation Forms either from the companies' registry or elsewhere which they then used to be allocated public land. Some companies were allocated land before they had been incorporated under the law. Some other companies were specifically formed and incorporated for the purpose of acquiring public land. In yet other instances, some companies had mere nominee directors while details of the real shareholders were not disclosed. Thus the line of illegality is long. **For a list of companies that were allocated land and whose particulars were yet to be found at the time of writing this Report, (see Annexes 1 and 2 in Volume I of the Annexes).**

(f) Operating Social and Political Environment

The land question forms an integral part of Kenya's social, economic and political history. Long before and after independence, it remains the most

debated and highly emotive issue in the Country's political discourse and development agenda. It is therefore not surprising that the appointment of this Commission to look into one aspect of the land problem i.e. public land grabbing was bound to set in motion a series of events and occurrences that would pose a challenge to the Inquiry.

Public reaction to the Commission was threefold. A large majority of the public welcomed the Inquiry with the expectation that the problem of land grabbing would be solved once and for all. They looked forward to the immediate repossession and restoration of public land. Some expected the immediate prosecution of the culprits. Another section of the public received the news of the Commission's appointment with fear and trepidation. This group comprised of those who were beneficiaries of illegal and irregular allocations of public land. This category set out to frustrate the work of the Commission from the beginning by either rushing to develop their land (in the belief that once developed, the land could not be repossessed) or to dispose of it. The last group sought to politicize and ethnicize the work of the Commission by misinforming communities to the effect that they were targets of victimization.

Thus throughout the Inquiry, the Commission had to tread the delicate route of heightened (and in some instances unrealistic) expectations by the public, misinformation and misrepresentation of its work.

(g) Addressing the Constraints and Challenges

There is no doubt that these constraints affected the inquiry in one way or another. But as already indicated, the Commission had to keep devising ways to surmount the problems posed. While the Commission did not succeed in preparing a list of every conceivable illegal or irregular allocation of public land in the country, it managed to identify many such allocations which are highlighted in the annexes to this report. In the same vein, while it was not possible for the Commission to verify all the information it had received from members of the public, it managed to compile a comprehensive digest of suspected illegal and irregular allocations based on public complaints, which must be investigated in the near future so as to decisively deal with the problem of land grabbing. **Most importantly, the Commission got adequate information on which it has based its findings and recommendations which should be used to**

rectify the problem now and in the future. The Recommendations made by this Commission are not only applicable to the titles listed, but to all illegal titles. The illegal or irregular allocations listed in this Report may very well just be the tip of the iceberg.

PART THREE

**THE LAW RELATING TO THE ALLOCATION OF
PUBLIC LAND IN KENYA**

1. Introduction

In this chapter, we briefly address the relevant legal provisions which set out the manner in which public land may be allocated. We also discuss the ways in which these laws have been disregarded thus leading to the illegal allocation of public land, hence this Inquiry. But first the definitions of public land and critical terms which are used throughout this Report are highlighted below.

2. The Legal Meaning of Land in Kenya

LAND, in Kenya means the soil and everything above and below it. It includes any estate or interest in the land plus all permanent fixtures, and buildings, together with all paths, passages, ways, waters, watercourses, liberties, privileges, easements, plantations and gardens thereon or thereunder. However, certain items are specifically excluded by legislation such that even if an individual were to acquire title to land, such items would remain vested in the Government. (an example is where minerals are discovered.)

It should also be noted that, while included in Kenya Laws, this is the English definition of land. It was inherited like many other legal concepts, from colonial England. The definition largely applies to registered land as opposed to land held under customary law. Land under customary law refers mainly to the soil. There is therefore, under this latter body of law a clear distinction between land and the things that are affixed upon it such as vegetation, trees and buildings. Also at the Coast mainly, there is the legal definition of land under Islamic laws and practices.

3. Categories of Land in Kenya

In Kenya, land is divided into three different legal categories. These are:

- Government Land
- Trust Land
- Private Land.

Government land is the land that was vested in the Government of Kenya by Sections 204 and 205 of the Constitution that was contained in Schedule 2 to the Kenya Independence Order in Council 1963 and Sections 21, 22, 25 and 26 of the Constitution of Kenya (Amendment) Act 1964. Government land in turn comprises of two sub-categories i.e. *un-alienated Government Land* and *Alienated Government Land*.

Un-alienated Government Land is defined by the Government Lands Act as meaning Government land which is not for the time being leased to any other person or in respect of which the Commissioner has not issued any letter of allotment. As is explained elsewhere in this Report, un-alienated Government lands are those lands vested in the Government and over which no private title has been created. They do not belong to individuals or bodies corporate in their private capacities; hence they are not *private lands*. The defining element of such lands is that they have not been alienated, meaning given away or ceded by the Government to another person or entity. Un-alienated Government land is not *Trust Land* in that it is not vested in local communities and held on trust for them by a County Council.

Alienated Government land on the other hand is land which the Government has leased to a private individual or body corporate, or which has been reserved for the use of a Government Ministry, Department, State Corporation or other public institution, or land which has been set aside by way of planning, for a public purpose (this latter category is usually referred to as public utility land). The defining element of alienated Government land is that it has been reserved for the use of a Government institution or it has been set aside for the use of the public or it has been leased to an individual.

Trust land is the land that is declared to be Trust Land and defined in Section 114 of the Constitution of Kenya. Under both the Constitution and the Trust Land Act, (Chapter 288 of the Laws of Kenya) **trust lands are neither owned by the Government nor by the County Council**. The County Councils simply hold lands on behalf of the local inhabitants of the area. For as long as trust land remains un-adjudicated and un-registered, it belongs to the local communities, groups, families and individuals in the area in accordance with the applicable African Customary Law. Once registered under any of the land registration statutes, trust land is

transformed into private land. It then becomes the sole property of the individual or group in favour of whom it is registered

Private land is land, the title to which is registered in accordance with any of the laws that provide for registration of title. Land may be registered in the name of an individual or company. Private land may be created from either Government land or Trust land through registration after all the other legal procedures have been strictly followed. As will soon become evident, any attempt to create private title to public land without following the legal procedures, results in an illegal title.

Public land

Having discussed the different categories of land in Kenya, it is important to immediately come to terms with what constitutes *Public Land*. This Commission of Inquiry was appointed to inquire into all cases of illegal and irregular allocation of *Public Land*.

Generally speaking, public land is all that land which is vested in the public or held under public tenure. It means all the land in which every Kenyan has an interest by virtue of being a member of the public. Thus, a citizen who comes from or resides in one part of the country has an interest in public land which is located in another part of the country. For example, a resident of Manderu has an interest in what happens to Kakamega and Karura forests. Similarly, a resident of Busia has an interest in what happens to the ocean at the Kenyan Coast. Every citizen has an interest in what happens to the country's road reserves, public playgrounds, game parks, rivers etc. Throughout the inquiry, the Commission was concerned with the illegal allocation of these types of land.

Public land includes a wide variety of different kinds of land that is administered by the Central Government and also by the Local Authorities. Below are some of the more common types of PUBLIC LAND:

All un-alienated Government land as defined above is Public land, in that it is vested in the Government of Kenya. The Government belongs to the people of Kenya. Therefore, the Government holds or administers such land in trust for the people of Kenya. Such land remains public land until it is *legally privatized*.

All alienated Government land as defined above is public land, in that it has been set aside for a public purpose or reserved for the use of a ministry, department, State Corporation or other Government institution. All these are funded by tax payers' money. They belong to the public and they must protect land which is reserved for them in the interest of the public.

Trust Land is not strictly speaking public land. The explanation for this position is given in detail in Part Four of this Report. In this section it is important to state that in the course of its inquiry, this Commission came across incidents where Trust Land had been illegally allocated contrary to the provisions of the law. In other words, even Trust land had been targeted by land grabbers. The Commission made a decision to regard all those Trust lands that had been illegally allocated to individuals and companies in total disregard of the interests of local communities, as *Public land*. The Commission concluded that the interests of local communities in their Trust land were sufficient enough to be regarded as "public interest" in the context of this inquiry.

Other Public Lands

Land purchased by the *Settlement Fund Trustees* for the purpose of settlement of landless people is public land.

Government Land or Trust Land held on leasehold tenure is public land to the extent that the reversion of the lease should be administered for the benefit of the public.

Some areas of private land may have been compulsorily acquired under the provisions of the Land Acquisition Act (Cap. 295) or an area of trust land may have been set apart under s.117 of the Constitution in which case the land can only be used for the specific purpose for which it was acquired or set apart. The passage of time before the land is so used has no effect on the restriction affecting the use of the land. Land which has been so compulsorily acquired is Public Land.

All Public Land should be administered either by the Government or by the Local Authority for the benefit of the public; that is to say the people of Kenya. Trust Land is specifically held by the Local Authority with jurisdiction over the area where it is situated to be used for the benefit of the persons normally resident in that area. The Local Authority shall give

effect to rights, interests and other benefits in respect of the land as may under African customary law for the time being be in force in that area. (Section 115 (2) of Constitution of Kenya). There is no such constitutional provision in respect of Government Land but legally it is clear that the government should not treat Government Land as its private property to be dealt with as it pleases. Government land should be administered in the same way a prudent trustee administers the assets of a trust. Public Land must be administered and allocated *in the public interest only*.

4. Some Common Terms and Phrases used in this Report

Throughout this Report the Commission has used a number of terms and phrases which it considers important to provide some working definition of. These are as follows:

Allocation

ALLOCATION is the process of selection of the person to whom an area of land is to be allocated or allotted for the specific purpose of development for a particular and identified use. The Government Lands Act (Cap. 280) establishes the legal authority for allocation in Parts III and IV. While modified over the years, the current legal method of allocation includes advertising the availability of the land and the intention of the administering authority to offer the land for sale and the conditions of the offer including the tenure and permitted use of the land. Before it is advertised, such land must be planned, surveyed and provided with the necessary infrastructure namely roads, water, etc.

The law is silent on precisely who makes the selection of the person to whom Government land should be allocated. But the law is quite clear (Section 3 GLA) that only "the President may make grants or dispositions of any estates, interests or rights in or over un-alienated Government land". While the President can and has delegated some of his powers under the GLA, he can only delegate very limited powers under Section 3 to the Commissioner of Lands.

Any attempt by the Commissioner of Lands to exceed these delegated powers under Section 3 will result in an abuse of his office and he may have committed an act of forgery resulting in an illegal title.

Illegal Allocations

There are many ways in which a title to land may be illegal. Besides the allocation of land that is not available for allocation as described above, a title that has been created directly as a result of one or more illegal acts is also an illegal title.

Letters of Allotment.

In the process of allocation, once the approved candidate for the land has been selected, a formal offer is made to such person by the Commissioner of Lands. This offer is called a **LETTER OF ALLOTMENT**. This is **NOT a statutory legal requirement. However, it is a practice that has the force of law. (In the law of contract).**

A **Letter of Allotment is only an offer** made to the person to whom it is addressed – and no one else - on the **conditions** contained in the Letter. One of the conditions in the Letter states that the offer is valid for a period of 30 days only after which it lapses and is of no further effect. During that period of 30 days, the Letter of Allotment is **of limited value only to the person to whom it is addressed. It is of absolutely no value to anyone else.** After the period of 30 days has elapsed, the Letter of Allotment is of no value to anyone at all.

Being an offer to a named person, a Letter of Allotment **cannot validly be “sold”** to some other person. Any person other than the person to whom the Letter is addressed cannot legally use the Letter of Allotment for any purpose at all.

Letters of Allotment also contain as part of the offer the conditions affecting the land that will be included in the title when it is issued. One of these conditions states that the land shall not be sold or dealt with in any manner without first obtaining the prior consent of the Commissioner of Lands and, further, that the Commissioner is forbidden from considering a request for his consent until the land has been developed in accordance with the development condition contained in the title. If the Commissioner of Lands, in breach of his powers, attempts to consent to such a sale of an accepted Letter of Allotment, his consent may amount to an abuse of office.

Irregular Allocations

An **irregular allocation** is an allocation of land that is available for allocation but in circumstances where the standard operating or administrative procedures have not been observed. The title created out of such an irregular allocation will not be void or illegal if all the other legal formalities have been complied with. It will be an irregular title capable of rectification where necessary. Such titles are particularly common in settlement schemes.

The Public Interest

The phrase “public interest” is used throughout this Report as the doctrinal basis for legally faulting allocations of Public Land. It is a widely used doctrine by jurists and political scientists to describe the corporate interest of a society. Although the doctrine does not lend itself to very precise definition, it is generally applied to refer to interests that are inherent in members of the public as such. These interests cut across the socio, political and economic landscape of a nation. The doctrine is not specifically defined in the Constitution but its salient elements for the purposes of this inquiry are captured in section 75.

5. THE APPLICABLE LAW

The categories of public land highlighted above are subject to various laws which prescribe the legal procedures to be followed if they are to be allocated to private individuals or companies. There are several laws the provisions of which must be followed by the Government to create private title to public land. The main laws in this regard are:

- The Constitution
- The Government Lands Act, (Cap 280)
- The Registration of Titles Act, (Cap 281)
- The Trust Land Act, (Cap 288)
- The Land Adjudication Act, (Cap 284)
- The Registered Land Act, (Cap 300)
- The Sectional Properties Act, 1987
- The Forests Act, (Cap 385)
- The Physical Planning Act, 1996
- The Wildlife Management and Conservation Act, (Cap 376)
- The Survey Act, (Cap 299)

- The Land Consolidation Act, (Cap 283)
- The Environmental Management and Coordination Act, 1999

These laws contain provisions which must be strictly adhered to before public land can be said to have been legally allocated. In other words, the Government cannot validly create private title to public land without following the requirements as stipulated in the laws. This is because the lands in question belong to the people of Kenya and cannot be disposed of to private interests without due diligence and care to the public interest. Below we state in simple terms, the steps that must be followed in the allocation process of public land.

Who may allocate Public land?

Un-alienated Government Land

Section 3 of the Government lands Act provides that the President may subject to any written law, make grants of any estates, interest or rights in or over "*un-alienated Government Land*". The power to allocate un-alienated Government land vests only in the President and no other person. The President may delegate such powers to make direct grants of un-alienated Government Land to the Commissioner of Lands only in specified limited circumstances as itemized in PART ONE of this Report. In no other circumstances can the President legally delegate his powers to the Commissioner of Lands.

But even the President cannot exercise his powers without paying regard to the public interest. This argument has already been advanced in detail in PART ONE of this Report.

Section 9 of the Government Lands Act provides that the Commissioner of Lands may cause any portion of a Township Plot *which is not required for public purposes* to be divided into plots suitable for the erection of buildings for business or residential purposes. Section 12 of the Act provides that such plots shall be sold *by auction unless the President orders otherwise*. Similar provisions are contained in sections 19 and 20 of the same Act with regard to Agricultural land. This means that the Commissioner of lands can only cause the subdivision of township plots which are not required for public purposes. Such plots can only be sold by auction unless the President gives a written exemption.

The lands in question must be *planned* and *surveyed* under the various Planning legislations such as the Physical Planning Act and the Survey Act before being allocated.

Alienated Government Lands

Neither the President, nor the Commissioner of Lands, or any other person or authority has powers to allocate public lands which have been set aside for a public purpose. Thus, all public utility lands and protected lands cannot be legally allocated to an individual or company by the President or the Commissioner of Lands. Lands such as road reserves, by-passes, play grounds, forests, protected areas etc cannot be legally allocated. Before such lands are allocated, they must be made available for allocation.

Before **Public utility lands** can be allocated for any other purpose; they must be subjected to the legal processes of user change contained in the relevant statutes and then replanned in accordance with the areas' Master Plan making them available for allocation. Once that is done, such lands can only be allocated strictly in accordance with the provisions of the GLA. Haphazard re-planning through Part Development Plans does not suffice to change land from alienated to un-alienated Government land, hence available for allocation.

Similarly, lands which are already committed to the use of Government Ministries, Departments or State Corporations cannot be legally allocated since they are not un-alienated Government lands. Such lands would have to be formally surrendered to the Commissioner of Lands into the pool of un-alienated Government land before they can be allocated. But even then, they would have to be allocated strictly in conformity with the provisions of the Government Lands Act and other Planning legislation cited above.

Protected lands are those which are specially protected under specific legislation such as Gazetted Forests, National Parks and Reserves, Security Areas, Wetlands etc, such lands would have to be legally removed from the specific legislations under which they are protected before they can legally be allocated. Thus, Forests would have to be removed from the Forests Act through degazettement before they can be allocated. National Parks would have to be removed from the Wildlife Conservation and Management Act. The Protected Areas would have to be removed from the Protected Areas

Act. Again, even after these actions have been taken by the Minister for the time being in charge of the protected areas, the provisions of the Government Lands Act and other Planning and Environmental Legislation would have to be strictly followed before such lands can be legally allocated.

Trust land

We have already indicated that Trust lands have been abused by those who are charged with the duty of protecting them under the law.

The only ways in which trust land can be legally removed from the communal ownership of the people is through *adjudication and registration or Setting Apart*. Adjudication and registration removes the particular lands from the purview of community ownership and places them under individual ownership. Setting apart removes the trust lands from the dominion of community ownership and places them under the dominion of public ownership.

The Constitution makes it clear that Trust lands belong to the people who are ordinarily resident in the area in which they are situated. Therefore any allocation of Trust land can only be made to the local people of the area. The area must be declared an *Adjudication Area under the Adjudication Act*. The local people must be given ample notice and opportunity to make claims of ownership to the land in accordance with their Customary Law. Their rights must be recorded on the Adjudication Register by the Adjudication officer. After every body is satisfied with the Adjudication Process, then each person whose name is on the Adjudication Register is registered as a proprietor of his/ her particular piece of land under the Registered Land Act.

Trust land cannot be legally allocated unless the above procedure is strictly followed.

6. THE ABUSE OF CURRENT LAWS LEADING TO ILLEGAL ALLOCATION OF PUBLIC LAND

(a) Substantive Abuses

The laws as stated above have been variously abused by Government officials in collaboration with professionals and other individuals. These abuses have resulted in the creation of thousands of illegal titles to public

land hence this Commission of Inquiry. The abuses lie in the fact that public land has been allocated contrary to the substantive and procedural provisions of the relevant laws as outlined above. We here below re-state the main abuses of law which lead to the creation of illegal titles to land.

1. Where the Commissioner of Lands *without the written instructions of the President* purports to directly allocate un-alienated Government land to an individual or company under section 3 of the Government Lands Act in circumstances other than in exercise of delegated authority.
2. Where the President allocates un-alienated Government land to an individual or company contrary to the provisions of the Government Lands Act and any other applicable laws and in circumstances that show a total disregard of the Public interest.
3. Where the President or Commissioner of Lands allocates already alienated land or land which is designated for a public utility/purpose to an individual or company. (Alienation includes a letter of reservation)
4. Where the Commissioner of Lands allocates a township plot to an individual or company without auction or other recognized form of public sale in circumstances where the President has not given a written exemption.
5. Where the Commissioner of Lands allocates land which is suitable for agricultural purposes to an individual or company without auction in circumstances where the President has not given a written exemption.
6. Where the President or Commissioner of Lands allocates land which is classified as a protected area under a specific statute.
7. Where the President, Commissioner of Lands or county council allocates Trust land to people in a manner which does not conform to the Constitution, the Trust Land Act, and the Land Adjudication Act.
8. Where a County Council or any other local authority, allocates land which is within its jurisdiction but which is set aside for public purposes; unless the allocation is a sub lease for the same public purpose.

All these amount to abuses of substantive provisions of the law which render the allocation of public land illegal. All titles issued by the Commissioner of Lands subsequent to such illegal allocations are also

illegal. In such cases, the Commissioner of Lands or officers of the Local Authority concerned may be guilty of abuse of office.

(b) Procedural Abuses

Apart from the abuses of substantive provisions of the law, there are other transgressions of procedural requirements which also render the resultant titles to public land illegal.

It is in the **allocation process** that most of the corruption and fraudulent practices relating to land have occurred. As mentioned above, Section 3 of the GLA is the law that authorises the President to make a grant [of title] or the disposition of any estate or interest in or over **unalienated Government** land. The word "**unalienated**" means just what it says. With reference to a plot of land it means that the particular plot has not already been made the subject of a grant or other disposition by the only lawful authority, the President.

It also means that the particular plot has not been lawfully reserved for a particular use or protected by law from being disposed of without some other step first being taken lawfully to make the land available for alienation. Thus, for example, land that is being and has been used for a school including a playground cannot lawfully be allocated until and unless the procedure for obtaining a change of use under the Physical Planning Act 1996 has been strictly complied with and all appeals heard and determined. An area of forest cannot be allocated until it has ceased to be "forest" and under the Forests Act, that means formal degazettement and the settling of all objections.

Any attempt to allocate land that is not available for allocation is of no legal effect and any title issued in such cases is **illegal**.

Trust Land is administered by the Local Authority having jurisdiction over the area where the land is situated. When such land is to be allocated, it must be subjected to all the stipulated procedures under the Land Adjudication Act. Any attempt to allocate Trust land contrary to the procedures under this Act renders the resultant title illegal.

The entire policy of the Government relating to the administration of land must be based on planning the use of that land. There are overall Master

Plans for all or most townships and other urban areas in the country. Individual developments should fit into the master plan and any variation should receive the formal approval of planning authorities in accordance with the current law.

Frequently, this has not happened at all. In many other cases, a Part Development Plan (PDP), which is the formal document required before a Survey is carried out, is prepared in the office of a Planner who does not even visit the site to ascertain the current development or whether the proposed development is a practical use of the land. Sometimes such Plans are prepared in total disregard of the legal status of the land. Thus, it is not unusual to see a part development plan of a residential house being prepared for land that is reserved for a road! All these procedural abuses render the resultant titles to such land illegal.

This Commission therefore based its Inquiry on the definition of public land, and the law relating to such land as stated in this Chapter. During the process of the inquiry however, the Commission had to grapple with a number of difficult questions and legal intricacies. Some of these questions are addressed below.

7. THE PROBLEM OF THIRD PARTY INTERESTS

One of the main terms of reference for this Commission is to recommend legal and administrative measures for the restoration of public lands to their proper title or purpose, having due regard to the rights of *any private person having any bona fide entitlement to or a claim of right over the lands concerned*. Such rights are referred to in this section as third party interests. For the avoidance of doubt, in the context of this Inquiry, **third parties are those people who have subsequent to an illegal or irregular allocation of public land to the original allottee, "acquired an interest" in such land**. Such interest may be acquired pursuant to the following:

1. By way of an *inter vivos transfer* through purchase or lease from the original allottee to the third party.
2. By way of a *mortgage* or a *charge* of the land by the original allottee to the third party (usually a bank or other chargee).
3. By way of a *transmission* of the original allottee's title to his successor or assign (heir through intestacy or will).

4. By way of transfer through a *gift* by the original allottee to the third party.

It should be noted that third parties can and do also create interests similar to those acquired by them in favour of subsequent parties. The third party need not therefore be the immediate one.

Those parties who acquire interests in the land in the manner specified in 1, 3, and 4 above would claim to have obtained an estate similar and equal in terms of quantum to that held by the original allottee. Those who acquire interests in the land in the manner specified in 2 above do not obtain a similar or equal estate. They however acquire substantial rights over the mortgaged or charged land in that in the event of the mortgagor or chargor failing to repay the loan, they can exercise powers over the land aimed at enabling them realize their security. These powers include but are not limited to the right of sale. Thus, to the extent that the loan remains unpaid, the original allottee's title is to that extent encumbered. After all, the purpose of a mortgage or charge is to enable the lender hold title to the land as security for the repayment of the loan.

(a) The Problem

The main question which this Commission had to answer from the very beginning was; what should happen to all these people who have acquired interests in illegally allocated land from the original allottees? Several questions arise from this scenario:

1. Is such a third party title/interest legal or valid in any sense? If so on what basis or ground?
2. Is such a third party title/interest illegal from the very beginning?
3. If the answer to question 1 above is in the affirmative, what effect would such a conclusion have on the recommendation to revoke all illegal allocations?
4. If the answer to question 2 above is in the affirmative, what effect would such a conclusion have on the third party title/ interest?
5. Assuming that the third party has developed the land at a considerable cost, would such a factor have any bearing on the recommendation to revoke and restore such title?

6. If the third party is a mortgagee/ chargee, would the fact that it has advanced considerable amounts of money on the security of such title have any bearing on the recommendation to revoke and restore such title?
7. Is there any legal basis for treating third party interests/ titles differently from all the other illegally acquired titles?
8. If the answer to question 7 above is in the negative, what are the options available to provide a legal basis if any for maintaining such interest?

(b) Illegality From the Very Beginning (*void ab initio*)

One of the fundamental principles of law in land transactions is that a person (interest holder) cannot transfer a greater or better interest to another than he himself holds. This means for example that a person having a leasehold interest cannot purport to transfer a freehold interest to another in the same parcel of land as the latter is greater than the leasehold. This also means that the holder of an illegal title cannot transfer and pass on a legal title to another person in the same parcel of land. The situation would be different where the title in question is an irregular one as opposed to being outrightly illegal, as the former can be validated through rectification of title.

If this principle is to be applied to third parties who acquired illegally allocated public land from the original allottees, it means those titles are illegal without exception. Nor would the manner of acquisition make any difference (purchase, gift, transmission or mortgage). The ultimate consequence of this conclusion is that a decision to revoke would, if implemented, extinguish all such interests since they never existed in the eyes of law in the first place.

Arguments in favour of such third party interests are bound to be based on the Constitution. In this respect, opinions (hitherto unchallenged) have been expressed to the effect that the Constitution protects private property; land included. Being the supreme law of the land, it supercedes all policies and laws in respect of private property. The often quoted section in support of this reasoning is section 75 of the Constitution. A close reading of that section however reveals that it is meant to protect legitimate holders of property from compulsory acquisition of their property *without just cause*

and *without full compensation* by the Government. Property in this sense is not confined to land. The Constitution in this regard only seeks to protect legally acquired property and not otherwise. The supreme law of the land cannot by any stretch of imagination purport to protect stolen property (in this instance, public land acquired contrary to law). **It is the considered opinion of this Commission that illegally acquired land is not property falling under the category that is protected by Section 75 of the Constitution against state expropriation without compensation.**

By revoking all illegally acquired titles to land, the government would simply be officially declaring that such titles were never titles *ab initio* (from the beginning) and cannot enjoy protection by the law. By restoring them to their original title or purpose, the Government would simply be applying the doctrine of **restitution** which courts of law do habitually apply with respect to stolen property in the criminal justice system. Thus, compulsory acquisition is the exercise of **Eminent Domain** powers of the state by Government in respect of justly, and legally held private land.

However, a number of provisions in the Registered Land Act, Cap 300 raise some legal difficulties which must be surmounted to facilitate revocation of illegal titles to land. Of these, the most formidable is section 143 (1) and (2). Sub section 1 provides as follows:

Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.

While sub section (2) provides as follows:

The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.

In interpreting these provisions, the Courts have ruled that they are effectively prevented from revoking a first registration even when it is clear that such registration has been obtained fraudulently. To our

knowledge, there has not been any case brought before the Courts where they have ruled that they are unable to rectify a subsequent registration.

Section 14 of the RLA clearly states that the date of a first registration under the Act is the date on which the land first came onto the register (14(d) or, where the title has been converted from the Registration of Titles Act, the date on which the RLA was applied to the land concerned [14(a)]. This Section taken together with Section 12(a) and (b) shows conclusively that the Registrar shall register the Government as the proprietor of all Government land in the area and shall register the appropriate County Council as the proprietor of all Trust Land in the area unless the Land Adjudication Act or the Land Consolidation Act had already been applied to that area.

Thus in the case of any land that has been registered under the RLA since 1963, the first registered proprietor of that land will be either the Government or the appropriate County Council, whether the register shows such registration or not.

Where however the title in question satisfies all the legal requirements of a first registration, then constitutional arguments can be raised against section 143(1) pending its repeal by Parliament. A law that seeks to protect fraud or any other form of illegality would be unconstitutional and therefore void. A constitutional challenge to section 143(1) would be a necessary response to all those who will seek to challenge revocations of their illegal titles on the basis of this section. Fraud is one of the worst forms of illegality and a law which legalizes fraud through the backdoor should be struck off from the statute books.

With regard to section 143(2), similar constitutional arguments can be raised. But other solid legal arguments can also be raised based on the Registered Land Act itself. For example, section 4 of this Act provides as follows:

Except as otherwise provided in this Act, no other written law and no practice or procedure relating to land shall apply to land registered under this Act so far as it is inconsistent with this Act: *provided that*, except where a contrary intention appears, nothing contained in this Act shall be construed as permitting any dealing which is forbidden by the express provisions of any other written law, or as overriding any provision of any other written law requiring the consent or approval of any authority to any dealing.

It is clear from the above *Proviso* that the Registered Land Act was never meant to supercede all other written laws which regulate dealings in land. This means that valid title to land cannot be created under the Registered Land Act, for example contrary to the provisions of the Forests Act if the land in question is a Gazetted Forest, or the provisions of the Government Lands Act if the land in question is Government land, or the provisions of the Land Control Act if the land in question is agricultural land, or the provisions of the Trust Land Act or the Land Adjudication Act if the land in question is Trust Land and so on. An invalid title under the Registered Land Act cannot enjoy the protection of that Act.

(c) The Guarantee of Title by Government

Arguments are bound to be advanced to the effect that titles acquired pursuant to the registration of a person under either the Registered Land Act or the Registration of Titles Act are guaranteed by the Government hence unchallengeable in courts of law. While it is legally correct to assert that such titles are guaranteed by the Government, it would be a misstatement of the law to argue that the titles are therefore unchallengeable in law.

The guarantee of title which is a feature of the TORRENS SYSTEM of registration⁶ simply means that the Government guarantees the correctness of all the entries in the register with regard to a specific title. It seeks to make the search of information beyond what is noted on the register superfluous. Any person who suffers loss as a result of the incorrectness of the register has to be compensated by the Government which has guaranteed the correctness of the register. Guarantee of title is against loss and not an assurance of all time legality of title. That is why both the Registered Land Act and the Registration of Titles Act provide for rectification of title by the Registrar and the Court.⁷

⁶ For a detailed discussion of systems of land registration in general and the TORRENS SYSTEM in particular, see SIMPSON S.R. *Land Law and Registration*, Book 1, Cambridge University Press from p 14.

⁷ The Registered Land Act provides for rectification of the Register in sections 142-144. Section 144(2) provides that no indemnity shall be payable under the Act to any person who has himself caused or substantially contributed to the damage by his fraud or negligence, or who derives Title (otherwise than under a registered disposition made *bona fide* for valuable consideration) from a person who so caused or substantially contributed to the damage. The Registration of Titles Act provides for rectification of the register in sections 59-64.

(d) The Bona Fide Purchaser for Value Without Notice

In the course of this inquiry, arguments have been advanced to the effect that a person who acquires an illegal title from an original allottee without notice of such illegality is an innocent purchaser for value who should be protected by law. The doctrine of *Bona Fide purchaser for value without Notice* has its roots in the branch of law called *Equity*. It specifically relates to the institution of a *Trust* in English law. A trust is essentially an *equitable interest* as opposed to a *legal interest*. Trusts were not enforceable at common law but they were only in Equity. If land was conveyed to A in trust for B, the common law courts regarded A as the absolute owner and would not recognize any rights in B. But Equity would enforce such a trust, as a matter of conscience and compel A to hold the land on B's behalf and to allow B to enjoy it. In such a case, A is the "legal owner", while B is the "equitable owner".

Legal ownership confers rights *in rem*, i.e. rights of property in the land itself, which can be enforced against anyone. Equitable ownership conferred at first only a right *in personam*, a right to compel the trustee personally to perform his trust. But later, equity extended the category of persons against whom the performance of the trust would be held. The extensions became very wide with time. By the 15th century, a rule was laid down to the effect that a trust would be enforced against anyone who took a conveyance of the land *with notice of the trust*. This rule extended to include the trustee's heirs and anyone to whom the land had been conveyed as a gift. Even creditors of the trustee would be bound. These developments led to the emergence of two equitable principles which can be summarized below thus:

1. A person who takes the land without giving value in exchange (such as an heir, executor or donee) must take it with all its burdens, equitable as well as legal
2. Even a person who has given value will be bound if before he obtained the land, he knew of the trust: trusts bind those who take with notice

The two principles are in turn summarized in the cardinal maxim to the effect that *legal rights are good against all the world; equitable rights are good against all persons except a bona fide purchaser of a legal estate for value without notice, and those claiming under the purchaser.*⁸

⁸ For a detailed discussion of this doctrine, see MEGARRY *Ibid* at pp 138 - 150

It is therefore clear that the doctrine of a bona fide purchaser for value without notice is only applicable in the situations described above. It applies to equitable interests in land such as trusts which are purchased by third parties without notice of them and who therefore acquire legal title to the land. The doctrine does not apply to an illegal title to public land which is purchased by a third party. The doctrine only protects the purchaser against claims by those having an *equitable interest* in the land in question. The bona fide purchaser must have purchased a *legal estate*. It must be emphasised that *Equity follows the Law*.

(e) The Legal Position Versus the Reality

The above analysis indicates that this Commission would be on legally sound grounds to conclude that all interests in land which were acquired from illegally allocated public land are illegal. They stand in the same position as the titles of the original allottees. This also means that they should be treated in the same manner as the latter. The main recommendations made by the Commission arising out of the inquiry entail **revocation or restoration and rectification of titles**. However, there are a number of difficult questions regarding third parties which the Commission had to resolve. The Commission was alive to the fact that *law does not exist in a vacuum*. The questions which must be answered are:

1. What should happen where the land in question has been purchased by a third party who has extensively developed the land? (For example where he has constructed a residential or commercial building, or a housing estate, units of which have been bought by individuals either out rightly or on mortgage).
2. What should happen where the third party is in fact a State Corporation which was pressurized to buy the land from the original allottee at a considerable cost?
3. What should happen where the third party is a bank or other mortgagee/chargee to which the land has been mortgaged in return for millions of Kenya shillings?

The Appointing Authority appears to have had these questions in mind when issuing this Commission. The questions pose some difficulties when it comes to restoring such lands to their original purpose. This is especially

so in number 1 above since the physical character of the lands is bound to have significantly changed. Question number 2 poses a problem because the monies used to purchase the land belong to the tax payer. Question number 3 is also problematic because the banks have lent a lot of money the realistic recovery of which depends on exercising their statutory power of sale. These problems cannot be satisfactorily resolved by a blanket decision to revoke the titles and restore the land to its proper purpose. This is the reason one of the terms of reference requires the Commission to recommend *legal and administrative measures to be taken in the event that such lands are for any reason unable to be restored to their proper title or purpose.* (Term of Reference (f) (ii)).

8. POSSIBLE SOLUTIONS

(a) Where land has been developed

The general recommendation with regard to all illegally allocated public lands which have passed to third parties and which have not been developed is that all such titles should be revoked and restored to their proper public purpose.

Where land has however been developed, consideration should be given to a number of factors: for example, the cost of development, the number of persons involved financially or otherwise in the said development, the economic value to the country of such development, the disruption to the public that the demolition of such development would occasion, etc. If at the end, it is shown that the public interest would not be served by revocation of title; it could then be argued that the third party should be made to pay to the government the market value of the land. The third party should have the right to sue the immediate party who passed the illegal title to him. The suit would then trigger a chain reaction of suits up to the original allottee. The suit would be based on the argument that the original allottee purported to sell what he did not have, hence occasioning the third party loss.

Some where along the line, the original allottee in collusion with some public officials, is likely to have committed an offence under the country's laws. The original allottee will also have been unjustly enriched by selling public land for large amounts of money. It is therefore necessary that the Government initiates action to recover the money and also punish the

offenders in accordance with the law and leave the third party to seek compensation.

The problem however with the first suggestion is how to establish the legal basis for such a refund to the Government. If it has been concluded that the title in question was illegal, then how can the Government derive recompense from such a title? Would the acceptance of the market value of the land constitute a validation of the illegal title? Isn't an illegal title *illegal for all purposes*? Would a Tribunal have power in law to validate illegal titles? One way of going around this problem would be to enact a law or an appropriate amendment to specific statutes providing for such a payment in situations where public land has passed to a third party who has in turn developed it. Another option could be to revoke the title, let the Government repossess the land and then offer the same to the third party at the market price as suggested above. The Government would have to follow the provisions of all relevant laws to avoid subsequent illegality. In this way, the Government could be acknowledging the fact that the land cannot be restored to its proper title and purpose. This would qualify such land as being available for allocation.

From the foregoing discussion, and taking all the legal complexities into account, the Commission came to the conclusion that each case must be dealt with on its own merit. Where a title is tainted with illegality, then it should be revoked. But given the fact that certain titles cannot be restored to their original purpose, the Government should consider issuing new titles upon new and reasonable terms and conditions. The revocation is meant to cure such titles of their inherent illegalities.

(b) Where the Third Party is a State Corporation

The Commission has already established the fact that a number of State Corporations were politically pressurized to purchase illegally allocated public land at millions of shillings (tax payers' money). It is already concluded that such titles are just as illegal as all the others and should be revoked. What this means is that where such land had been reserved for a public purpose, hence not capable of allocation, it should revert back to the Government for the use it had been set aside for. If the state corporation has developed the land in question, a legal basis would have to be established to enable the corporation retain title to such land for the purposes of its own financial future and in the public interest. The public

interest would be considered to have replaced the earlier one for which the land had been set aside. But possible legal avenues of recovering the money from the original allottee must also be explored.

Where the land remains vacant, the title to such land should be revoked so that it reverts to its proper purpose. Again this should only happen if the land in question had been set aside for a public purpose. In this situation, the corporation should be able to sue the original allottee for the purchase price it paid. This recommendation is important because it would run across the board.

(c) Where the Third Party is a Bank or Chargee

Banks, financial institutions and other chargees have over the years lent money upon the security of lands whose titles may turn out to be illegal or irregular within the context of the findings of this Inquiry. Such titles are supposed to be revoked as suggested in the foregoing analysis. In the memorandum presented to the Commission by the Kenya Bankers Association, concern was expressed to the effect that the blanket revocation of such titles would have far reaching negative consequences on the financial system and the macro economy as a whole. In many cases, the lands in question have been developed as huge investments based on the loans received from the banks. In others, the lands had been sold to "bona fide purchasers for value without notice" of any illegality. If the titles are revoked, huge outstanding loans may not be repaid thus causing serious ripples in the business and banking sector. The Association therefore suggested that revocation of titles in such circumstances must be approached carefully and be done on a case by case basis. In particular, the Association suggested the following:

1. Where lands had been sold to innocent people, nullification must be avoided.
2. Where purchasers of the lands had invested in the properties by developing them, etc, nullification should be avoided.
3. Only where the land in question is clearly public land, e.g. road reserves, utility land, etc, then the issue should be considered further. Even then, only the initial allottee of the land who acted

fraudulently should be investigated, and subsequent bona fide purchasers should not. However, they may voluntarily give the land back to the Government.

While the Commission is not bound by the recommendations of the Kenya Bankers Association, the nature of the problem of blanket revocation of such titles is such that the views expressed in the memorandum cannot be totally ignored. In this regard, the Commission must first restate the legal position to the effect that if the titles in question were issued irregularly as opposed to illegally, then such titles should be validated. However, where the titles are illegal in the sense that the lands in question were not available for allocation, then they are illegal from the very beginning and cannot be cured through validation. The only recourse banks and other financial institutions have is to sue the borrowers on their personal covenant to repay or on other legal grounds. The doctrine of bona fide purchaser for value without notice does not apply.

This approach would not solve the dilemma of the banks due to the fact that the borrowers may for one reason or another be unable to repay. The problem would be further compounded by the factors already raised by the Association. (For example where the loan has been used to develop the land or for other investment purposes; or, where the land has been bought at an auction by another person).

The suggestions made to the Commission by the Bankers Association seem to suggest that no title should be revoked as long as it is held by a bank as security for the repayment of a loan. The Association goes on to suggest that even where the land in question is a public utility plot such as a road reserve, the so called bona fide purchaser should be left untouched. In other words, he should be left to hold the road reserve in total disregard of the public interest in the land. This in our opinion is an extreme view of the quality of title. It suggests that banks and other financial institutions have not contributed in any way to the problem of illegal allocation of public land or land grabbing.

Yet during the course of this inquiry, the Commission came across cases where banks lent money in a most unprofessional manner. They had all the reasons to believe that the land upon which they were lending money was public land which must have been illegally acquired. How else does one explain a situation where a bank lends money upon the security of land upon which the High Court of Kenya, or Military Barracks stand? In other

situations, the banks lent money upon the security of undeveloped leasehold land but did not care to inquire whether the loan they were advancing was meant to develop the land.

If the Commission were to accept the position taken by the banks notwithstanding these glaring illegalities, then the whole purpose of this inquiry i.e. restoring illegally acquired public land would be defeated. Taking into account the financial reasons advanced and the needs of the economy; and also taking into account the need to protect public land, and the applicable law, the Commission is of the opinion that:

1. Where the land is an undeveloped public utility plot, and although title thereto is held by a bank as security, the title should be revoked as in earlier cases discussed above. The Bank would have to explore other avenues of recovering its loan.
2. Where the land has been **substantially** developed, using the loan received from the bank or other lender, and the land is no longer required for the original public purpose, the title thereto should still be revoked, given its inherent illegality. The Government may consider, in principle, the issue of a new title to the borrower, subject to the Bank Charge, on condition that the borrower pays the full net unimproved site value of the land to the Government.

The recommendations made at the end of this Report were influenced by these and other relevant legal considerations.

9. THE ESTABLISHMENT OF A LAND TITLES TRIBUNAL

The foregoing discussions indicate the possibility of a massive title revocation and rectification process as an end product of this inquiry. Yet current law and procedure of rectification and revocation of titles to land does not facilitate an expeditious undertaking of such a gigantic exercise.

As a result of serious abuses and criminal acts within the Ministry of Lands and Settlement and other Government Ministries and Departments over the past two or three decades, a very large number of illegal and irregular titles to land have been created throughout Kenya. There are perhaps more than 200,000 such titles – many in the more recently developed settlement

schemes and forest excisions - and to review them all under the present law and practice would take many, many years. Most of these invalid titles have been created in the past 12-15 years. These invalid titles exist on Government Land, Trust Land; private land (including substantial areas of land owned by State Corporations) and land adjudicated under the Land Adjudication Act, Settlement Schemes, Land within Municipalities, Land in the rural areas, Pastoral Land, Forest Land, Water Catchments, Riparian Land, indeed everywhere in Kenya.

Many of these invalid titles have been traded and sold and many have been charged as collateral by banks to secure the repayment of substantial loan finance.

The present law on the rectification of invalid titles obtained fraudulently or by criminal acts or by mistake can only be implemented by the High Court. This makes rectification difficult, time consuming and very expensive for the ordinary man to pursue to obtain justice. Further, the officials in the Lands Department whose duty it is to seek rectification of titles that have been improperly created are often the same officials - or their close associates - as those who were involved in the creation and registration of the improper titles in the first place.

Actions before the High Court are prone to delays, postponements, obscure legal argument and all manner of procedures that are incomprehensible to the non-professional and even to many professionals.

What is needed is a simple, readily accessible forum that can dispense with some of the more arcane rules of evidence and reach a decision within a matter of days or less.

Provided that the forum is working full time on the one subject of rectification of titles, the huge number of titles to be checked could be dealt with in a reasonably short time frame.

It is essential that any person with an interest in a title however remote could apply to have the title investigated and rectified, revoked or confirmed as valid.

The following proposal for the establishment of a Tribunal of experts to provide a first step in the revocation and rectification process prior to any reference to the High Court could solve this problem and could also provide a method whereby interested members of the public including financial institutions could for a small fee establish the validity of any particular title or titles. Furthermore, such a Tribunal could also investigate improper allocations or sales of government, local authority or State Corporation land before any title came on the register – something the High Court cannot do without some kind of prerogative writ being issued.

It is proposed that by amending the Government Lands Act, a Tribunal is established that will have several separate divisions each of which will constitute a sitting Tribunal with power to declare any registered title to land either valid, illegal or irregular. Such Tribunals will also have power to rectify any title on conditions it may impose to ensure the State in its role as trustee for the people of Kenya receives the full benefit of any disposition of any of its land. Such conditions would also enable the Tribunal in appropriate cases to protect any bona fide purchaser or chargee of such title from the loss of his investment.

It would be a condition of the establishment of the Tribunal that while appeals to the High Court against its decisions would be available to any aggrieved party, the High Court would not be a court of first instance in any question on the validity of any registered title. This would be the sole preserve of the Tribunal.

The Chairman and his Deputy and all support staff of the Tribunal would be employed on a full time basis. The Chairman would be responsible for establishing "sitting Tribunals" from among the membership which would meet full time and would be based in different parts of Kenya. Each sitting Tribunal would have its own chairman who would need to be legally qualified.

The sitting Tribunals would be responsible for the actual decisions of the Tribunal and their decisions should be consistent. It would be the responsibility of the Chairman and his staff to ensure this consistency. The Chairman would also be responsible for training members of sitting tribunals and monitoring their performance.

The Land Registry staff would have to be increased to cope with additional work and the Ministry correspondence files and all other records would have to be made available if needed by the Tribunal.

It would be the intention to make the Tribunal a temporary expedient to be replaced by a formal "Rectification Court" established along the lines of the Industrial Court. However, by creating a Tribunal and making the consequential amendments to existing legislation, the urgent need to begin to rectify the tens of thousands of illegal and irregular titles could begin forthwith.

PART FOUR

FINDINGS AND RECOMMENDATIONS

1. INTRODUCTION

In this Part, we embark upon a situational analysis of the circumstances under which public land has been illegally allocated over the years. We highlight the main Findings of our inquiry. The Commission had to deal with the various categories of public land which were subject to illegal or irregular allocations. While the broad categories of public land remain as discussed in Part Three of this Report, the Commission has used certain typologies in this part which were found necessary for clear analysis. In this regard, the following broad categorization of public land has been adopted:

- Urban, State Corporations and Ministries Lands
- Settlement Schemes and Trust Land
- Forestlands, National Parks, Game Reserves, Wetlands, Riparian Reserves/ Sites, Protected Areas, Museums and Historical Monuments

2. URBAN, STATE CORPORATIONS AND MINISTRIES' LANDS

(a) Urban Lands

The phrase "Urban Lands" is used in this Report to denote all those lands situated in Cities, Municipalities and Townships. These lands include "unalienated Government Lands", "alienated Government Lands", or "Lands in former trust land areas which have been set apart for a public purpose in municipalities or townships". The term "Urban" is therefore generic in the sense that it refers to areas that are mapped to encompass all urban development activities; presently and in the future. There are 44 municipal councils and 1 city council in Kenya. The councils were required to submit information to the Commission upon Summons. They were to submit comprehensive lists of all public utility lands in their jurisdiction. They were then to indicate all allocations of such lands to individuals and companies. While 39 councils responded to the Summons, the information received from these councils was hardly adequate for the purposes of the inquiry.

Un-alienated Government Lands are those lands presently vested in the Government. They do not belong to individuals or companies in their private capacities; hence, they are not *private lands*. They are not *Trust lands* in that they are not held by respective county councils on behalf of specific communities as discussed elsewhere in this Report. They also are not *local authority lands* in that they have not been acquired by specific local authorities either through purchase, allocation by Government or setting apart. This category of Government land is available for allocation to individuals or companies by the President in accordance with the provisions of Section 3 of the Government Lands Act, Cap 280 Laws of Kenya.

Alienated Government lands include those lands that were formerly un-alienated but have since been set aside for a public purpose or lands leased to individuals and companies through the Commissioner of Lands. They also include lands, which were formerly privately owned but have since been compulsorily acquired by the Government for a public purpose under the Land Acquisition Act, Cap 295 of the Laws of Kenya. Finally, alienated lands are also those lands that have been surrendered to a local authority of the area for use as public utility by an individual or company as a condition for consent to subdivide the land. Usually, 10% of the total acreage is surrendered for public purposes in such circumstances.

All lands which have been set aside for a public purpose or compulsorily acquired for a public purpose (public utility), or surrendered for public purposes as a condition for subdivision; are not available for allocation to individuals or companies unless the public purpose is no longer required and the necessary change of use has been formally approved under planning and environment legislation. All lands which have been leased by the Government to individuals and companies may not be transferred if they are undeveloped and without permission for change of user by the Commissioner of Lands.

Lands set aside for a public purpose in municipalities and townships are those lands which may have been allocated by the Government to such local authorities for a specific public purpose; or former trust lands which were set apart for a public purpose. These are also not available for allocation, except as mentioned above.

(i) *Urban Lands as Public Land*

It is immediately evident that these lands are public lands in the classical sense used in this Report. Whether alienated or un-alienated, the lands in question are meant to serve and enhance the public interest. They constitute what is usually referred to as "Public Tenure". The entire physical development of the country depends on these lands. Thus, facilities such as public roads and highways, recreational parks, playgrounds, stadia, public schools, hospitals, markets, fire stations, police stations, toilets, cemeteries, theatres, monuments, historical sites, social halls, housing estates, research institutions, and many other public utilities are excised and developed out of these lands.

No country can develop without a carefully planned public tenure system. Lands must be set aside for present and future development. The public interest in these lands is therefore not only inherent, but always pronounced. This is why the law regulates the manner in which such lands are to be transferred to individuals (if at all) or to be used. All authorities and institutions having jurisdiction over these lands are supposed to hold them in trust for the public. Thus, the President, Commissioner of Lands, and the respective Local Authorities must exercise whatever powers they have under the law in respect of public land in the interest of the public.

(ii) *Findings*

The Commission found that many methods were used to grab public land. A few are summarized here below:

1. Direct allocations by the President and/or the Commissioner of Lands contrary to the law
2. Illegal Surrenders of Ministries and State Corporation land and subsequent illegal allocations
3. Invasion of Government and Trust lands and subsequent acquisition of title thereto contrary to the law
4. Allocations of land reserved for the use of State Corporations or Ministries
5. Allocation of Trust land contrary to the Constitution and related laws
6. Allocation of lands reserved for public purposes

7. Allocation of riparian reserves and sites
8. Allocation of land compulsorily acquired by Government for a public purpose to individuals and companies
9. Alteration and destruction of records at the Ministry of Lands and Settlement to facilitate double allocations.

With regard to urban lands, the Commission made the following specific findings:

Abuse of Presidential Discretion in the allocation of un-alienated Government land

The Commission found that while the President has powers to make grants of freehold and leasehold of un-alienated Government land to individuals and companies, these powers were exercised contrary to the relevant laws and the public interest in a manner amounting to abuse of discretion. The President made grants of land to individuals without any consideration as to whether such allocations would further the public interest. The Commission concluded that many of these presidential allocations were illegal since they were made for political patronage. But more critically, the Commission found that many presidential allocations of public land were illegal on two additional grounds: i.e.

1. In many instances where the President allocated Government land pursuant to the exercise of powers conferred upon him by the Government Lands Act, the legal procedures necessary for completing such allocations were never followed through by the Commissioner of Lands. A grant of title was issued to the allottee sometimes without question on the basis of a letter from the President. In many instances, consent of the President for a grant of public land was not conveyed in the form of a letter but in the form of an endorsement on the Application for allocation by the Applicant. Thus a mere signature following the words "approved" by the President was enough for the Commissioner of Lands to make an allocation of public land.
2. The second scenario involved instances where the President purported to exercise powers to allocate Government land when in fact; he did not have such powers. For example, under the

Government Lands Act, the President can only allocate "un-alienated Government land" and cannot allocate government land which is "already alienated". Thus, the President cannot legally allocate land reserved or set aside for a public purpose such as a Gazetted national forest or a road reserve.

Usurpation of Presidential Powers by the Commissioner of Lands

Often the Commissioner of Lands on his own initiative made direct grants of un-alienated Government land to individuals and companies without any kind of written authority from the President. In making these allocations, the Commissioner purported to be exercising powers delegated to him by the President. The Commission found that the direct allocations of Government land in this manner were illegal since under the Government Lands Act, the Commissioner of Lands can only make grants of un-alienated Government land in those limited circumstances where the President has delegated powers to him under section 3 of the Act as itemized in Part One of this Report. Other instances where the Commissioner can make grants of un-alienated Government land are highlighted in Part three of this Report. On numerous occasions the Commissioner exceeded his powers.

Use of forged letters and documents as authority to allocate Government Land

It was found by the Commission that in many instances, presidential authority to make dispositions of Government land and effect conveyances of direct allocations was communicated to the Commissioner of Lands through forged letters or other documents. The resultant allocations of Government land were therefore illegal. The incidences of forgery extended beyond letters of allotment. They even went to the destruction, and backdating of records at the Ministry of Lands and Settlement by unscrupulous officials and their accomplices. The crudest forms involved the printing and issuance of fake title deeds to allottees of public land. Other forms involved the presentation of fake presidential approvals by the Applicants to the Commissioner of Lands. The consequence is that there are many forged titles in private hands.

Illegal transfers of undeveloped leasehold land

All leases of Government land are made upon certain development conditions which the grantee must always comply with. Most of these conditions are standard and are contained in the Letter of Allotment and Grant of Title (lease). One such condition is that a grantee must develop the land within twenty four months following the grant. Failure to develop the land within the specified period entitles the Commissioner of Lands to re-enter the premises and take possession. Moreover, a grantee is not allowed to transfer his undeveloped leasehold land without written consent by the Commissioner of Lands. The Commissioner of Lands in turn has no powers to give blanket consents to proposed transfers of undeveloped land. The Commissioner may for example, give consent to charge the land so as to raise money for its development.

It was however found that transfers of undeveloped leasehold land were made on a routine basis. The practice of transferring undeveloped leaseholds contrary to the law was most prevalent between 1988 and 2002. These transfers were not mere aberrations of procedure; they were a deliberate mechanism of facilitating the illegal and irregular allocation of public land. Many of the transfers were illegal in themselves since the Commissioner not infrequently gave illegal consents to transfer the land. An individual would be allocated land on leasehold, often in circumstances that were highly dubious, and then proceed to obtain consent to transfer the same from the Commissioner of Lands in a couple of months, weeks or even days. Through these malpractices, many illegal titles to public land were transferred to third parties, often State Corporations, at colossal sums of money.

Illegal allocation of land compulsorily acquired for public purposes

The Commission found that one of the most brazen forms of illegal allocations of public land in this category affected lands which had been compulsorily acquired for the purpose of constructing road by passes. The government applied the Land Acquisition Act, Cap 295 of the laws of Kenya, to various swathes of land in Nairobi, Mombasa and other towns for the purpose of constructing road by-passes so as to ease the traffic congestion on the main roads. The people whose land had been compulsorily acquired were fully compensated by the Government in

accordance with the Constitution and the Land Acquisition Act. Later, some of the same land was allocated to individuals and companies notwithstanding the fact that such lands were not available for allocation. The allottees then sold the land to third parties some of whom proceeded to construct buildings on the same. These illegal allocations were made on lands acquired for the construction of by-passes in Nairobi and other towns. **For a list of the allocations of by-pass land made to individuals or companies in Nairobi see Annex 3 in Vol. I of the Annexes.**

Illegal Allocation of land reserved for public purposes by the Commissioner of Lands

Another related finding was to the effect that lands which had been reserved for public purposes such as schools, playgrounds, hospitals, sewage etc were later allocated to individuals and companies in total disregard of the law and the public interest for which they had been reserved. These lands were allocated following the submission of Part Development Plans (PDPs) to the Commissioner of lands who indiscriminately issued consents for change of user. These lands were also in many instances sold by the original allottees to third parties. The most prominent category of lands that were illegally allocated in this manner was Roads and Road Reserves throughout the Country. The City Council approved development plans for areas that were clearly set aside for construction of roads. Similarly, officials in the Ministry of Roads, Public Works and Housing and the Nairobi City Council wrote letters of no objection to the proposed developments. Neither the approvals nor the no objection letters constituted a change of user. They could therefore not make these allocations or acquisitions legal. **For a list of some of the Road Reserves that have been encroached upon see Annex 4 in Vol. I of the Annexes.**

For a list of allocations of lands reserved for Roads and other public purposes, see Annexes 5-18 in Vol. I of the Annexes.

Illegal Allocation of lands reserved for public purposes by local authorities

The Commission found that local authorities also allocated lands falling within their jurisdictions and which had been reserved for public purposes to individuals and companies in total disregard of law and procedures. In this regard, county, town, and municipal councils indiscriminately

allocated public utility lands within their jurisdictions. The allocations were at times made following council meetings while at other times the allocations were made without any approvals by the full council or specific plot allocation committees. Minutes of some of the council meetings indicate that the allocations of public utility lands were made to the then serving councilors, chief officers, the provincial administration, politicians from the area, and other "politically correct" personalities and companies. In fact, some council minutes indicate that meetings would be convened for the sole purpose of allocating public utility lands to the councillors. This rampant allocation of lands reserved for public purposes took place in almost all local authorities in the country. Some of the plots have since been sold off to third parties while others have been developed.

The City Council and other various local authorities lost property such as council houses to grabbers in this manner. For example, public utility land within WOODLEY ESTATE IN NAIROBI was illegally allocated in this manner. The estate was planned and developed as a housing facility complete with a primary school, playing grounds, public gardens and shopping centre. In September 1992, the then Director of City Planning, KURIA WA GATHONI prepared a Part Development Plan changing the user of the open public spaces into residential and other private purposes of a commercial nature. The Part Development Plan was approved by the Commissioner of Lands, WILSON GACHANJA. Title deeds for each sub plot were issued in the name of the Nairobi City Council in 1993. In 1994, the then Town Clerk Mrs. ZIPPORAH WANDERA prepared and signed documents transferring some of these public plots to KURIA WA GATHONI and companies and individuals related to him. **For a detailed list of such allocations, see Annexes 5-18 in Vol. I of the Annexes.**

Illegal Allocation of private lands surrendered to Government and Local Authorities

The Commission also found that lands which had been surrendered to the Government or local authorities especially the Nairobi City Council by private owners as a condition for subdivision and/ or development were later illegally allocated to individuals or companies who in turn sold them off to third parties.

The pattern of allocation was the same as above. For example, a housing or home development company would propose to develop its land to the city

council. The council would require that the company surrenders 10% of the land to be developed for public purposes as a condition for the grant of permission. The company would then duly surrender the acreage of land to the Government to hold on trust for public purposes. Once surrendered, the plot would not be used for the purpose for which it had been surrendered. Instead, certain individuals or companies would immediately apply to the Commissioner of Lands to be allocated the surrendered land!

A Part Development Plan would be prepared in respect of the land and submitted to the Commissioner of Lands for approval. The approval would be granted almost as a matter of course. A Letter of Allotment would then be issued to the applicant(s), upon payment or promise to pay a token sum as Stand Premium. The letter of allotment would be informally used to transfer the unsurveyed plot to a third party for millions of shillings by the allottee. The plot(s) would be subsequently surveyed and a Grant of Lease made to the third party. The entire process, from the surrender of the plot to the grant of lease over the plot to the third party, would take a few months, and at times a number of days.

Many complaints received by the Commission from estate residents through their Resident Associations revealed that many lands which had been reserved as open spaces for public utility in the estates have been illegally allocated. In many urban centres, the concept of "Open Space" for the public no longer exists. In Nairobi, there is hardly any open space. Such space is automatically regarded as property for allocation to individuals. The Master Plan for the City of Nairobi was completely ignored in the preparation of Part Development Plans so as to facilitate the illegal allocation of land reserved for public utility. For example, land surrendered by the developers of LAKE VIEW ESTATE in Nairobi was illegally allocated to four individuals in this manner. The original title L.R 2951/80 was held by New Homes Development Ltd. The company applied to the City Council for consent to develop an Estate. Consent was granted but on condition that the company surrenders a percentage of the land to the Government to be used as public utility. Consequently, the company surrendered plot L.R2951/89 to be used as public open space. In 1992, Messrs. J.K CHEPKWONY, GEOFFREY KOSKEY, PETER KOSKEY and J. CHERUIYOT of P.O BOX 47419 Nairobi applied to the Commissioner of Lands to be allocated this plot which had been surrendered for public purposes. A Part Development Plan was subsequently prepared and the land in question subdivided into three plots

A,B,C. Letters of Allotment were issued to the applicants who paid a Stand Premium of 97, 470 shillings for each plot. The allottees then transferred the unsurveyed plots to JITESH SHAH and HIGHLAND TEXTILE LIMITED as co-owners for 1.7 million shillings each. Titles were subsequently issued to the purchaser.

For a list of suspect allocations of public utility land as prepared from the complaints received from the public, see Annex 19 in Vol. II of the Annexes.

Double allocations of public land under different statutes

The Commission found that as part of an elaborate scheme of land grabbing and given the multiplicity of land registration laws, different titles would be issued to the same piece of land. Thus one title to land would be issued under the Registration of Titles Act, while another title to the same piece of land would be issued under the Registered Land Act. The double issuance of titles was meant to facilitate the illegal allocation of public land. The Commission found that surveyors at the Ministry of Lands and Settlement would conduct surveys from their desks without visiting the site. Two Survey Plans would then be produced for the same parcel of land leading to the issuance of two different titles.

Conclusions

From the foregoing, the Commission arrived at the following Conclusions:

Abuse of Powers

The powers vested in the President to make grants of freehold or leasehold on un-alienated government land have been grossly abused over the years both by the President and successive Commissioners of Lands and their deputies. Due to such abuse of discretion, a substantial amount of public land (un-alienated Government Land) has been unjustly allocated to individuals and companies. This practice has in turn cost the country dearly in economic, social and political terms. The abuse of discretion in this regard occurred during both the regimes of former Presidents Kenyatta and Moi. Most of the illegal and irregular allocations of public land took place during the tenure of Messrs. WILSON GACHANJA AND SAMMY SILAS KOMEN MWAITA as Commissioners of Lands, while Mr.

JOSIAH SANG served as the Permanent Secretary of the Ministry of Lands and Settlement, and seemingly interfered with the duties of the Commissioner of Lands.

Illegal allocation of land reserved for public purposes

While it can be argued both in law and logic, that the allocations of unalienated Government land in the exercise of powers conferred upon the President by Section 3 of the Government Lands Act was done in a manner that constituted many irregularities as opposed to illegalities; allocation of lands reserved for public purposes by the President, Commissioners of Lands, Local authorities, and others constituted outright illegalities which are incurable in law.

Breach of Public Trust by Local Authorities

In the face of unbridled plunder of public land by unscrupulous individuals and officials, it would have been expected that various local authorities in whose jurisdiction this land was located would have stood up in defence of the same. Yet through the activities and omissions of their organs, councilors and chief officers; they actively participated in the illegal allocation of public land. This was a dismal failure on the part of local authorities. They acted in total breach of trust as custodians of land on behalf of the local residents. The Nairobi City Council/Commission in particular and other major councils in Mombasa, Nakuru, Kisumu and Eldoret were seriously culpable in this respect. For example, certified copies of the Minutes of the 462nd budget meeting of the Mombasa Municipal Council indicate that one of the main items of the agenda was the allocation of public utility plots to councilors and civil servants. Large sections of Shimanzi Road were allocated following this meeting. Mama Ngina Drive Block 26 which was a public utility land was allocated to individuals and companies in this manner.

Complicity of Professionals in the illegal allocations

Individuals and firms from various professions actively participated in and facilitated the illegal allocations of public land. The practice of illegal allocations would not have been perfected without the complicity of professionals in the land and property market. Worthy of mention in this

regard are lawyers, surveyors, valuers, physical planners, engineers, architects, land registrars, estate agents and bankers. These professionals rendered services which made the practice of illegal allocations of public land lucrative and from which they benefited.

The use of Letters of Allotment and Part Development Plans

It was found that the illegal and irregular allocations of public land were actualized through the use of letters of allotment and part development plans. While letters of allotment are written contractual offers of unalienated Government land upon certain conditions stated therein, they were recognized and used as if they were interests in land or titles to land. Thus the people to whom they were addressed transferred them to third parties or used them as a basis for informal transfers of public land. The use of such letters was not just illegal but criminal especially in cases where the letters had expired or were backdated. Letters of Allotment are offers and not interests in or titles to land. Where letters of allotment have expired, they are nothing other than pieces of paper in the eyes of the law. Backdating a Letter of Allotment renders the resultant title to the land revocable on grounds of fraud under the Registration of Titles Act and the Registered Land Act (taking into account the Provisions of section 143).

Part Development Plans were on the other hand prepared by the departments of physical planning at the Ministry or City Council to re-plan lands that had been reserved for public purposes. Specific physical planners were used to prepare these part development plans. The plans so prepared opened the door for the Commissioner of Lands to allocate public land illegally, or to grant consents for the transfer of undeveloped leasehold land contrary to the provisions of the Physical Planning Act 1996 and the Government Lands Act, Cap 280 of the Laws of Kenya.

Coincidence of Illegal Allocations of Public Land with General Elections

Records examined by the Commission reveal that most illegal allocations of public land took place just before or soon after the multiparty general elections of 1992, 1997 and 2002. Some high profile allocations of public land took place during this time. Most of the lists of illegal allocations of public land annexed to this Report point the fact that allocations coincided with the General elections. One such allocation was made to S.K MACHARIA and JOSEPH GILBERT KIBE. The third allottee was

NGENGI MUIGAI. However, the first two almost immediately sold the land in question, namely, L.R NO.216/8 KARURA for 550 million shillings to the KENYA RE-INSURANCE CORPORATION. The sale was effected notwithstanding the fact that NGENGI MUIGAI had placed a CAVEAT against the title seeking to protect his part of the booty in the land. It should be noted that Messrs. Macharia and Kibe were part of what was known at the time as Central Province Development Co-ordinating Group. This coincidence of allocations of public land with the general elections reinforced the Commission's conclusion to the effect that public land was allocated as political reward or patronage.

The use of Companies as conduits for Illegal Allocations of Public Land

Records reveal that some of the most high profile allocations of public land were made to companies incorporated apparently for that purpose. The Commission had to conduct searches at the Registrar of Companies in order to establish the identity of the shareholders and directors of the companies to which public land had been illegally allocated. As already stated in PART TWO of this Report, the company searches were time consuming due to the fact the details sought were not readily available. At the end of its Inquiry, the Commission had not succeeded in establishing the identities of some of the directors and shareholders behind these companies. Notwithstanding the full cooperation extended to the Commission by the Registrar of Companies, the particulars of these companies could not be located. The inquiry established the possibility that individuals could have been obtaining blank Certificates of Incorporation from the Company Registry which they would then fill and use to illegally acquire public land. Some of these certificates were obtained from other non official sources. The Commission concluded that some of these companies to which public land was illegally allocated could very well have been non-existent. **For a detailed list and particulars of the companies to which land was allocated, see Annex 1 in Vol. I of the Annexes.**

(iii) Recommendations

The Commission hereby makes the following recommendations:

1. All allocations of public utility land are illegal and should be nullified. Such lands should be repossessed and restored to the purpose for which they had been reserved.

2. Where the land in question is a road reserve; the consequences in 1 above should ensue notwithstanding the fact that the land has been developed. Any building or other construction erected on the said land should be demolished without exception.
3. Where the land in question was reserved for a public purpose other than a road reserve, and has since been **substantially** developed whether by the original allottee or a third party; and if after consultation with the local community of the area, it is established that the area is no longer required for the purpose for which it had been reserved, the title should nonetheless be revoked (given its inherent illegality). The Government may however issue a new title to the current registered proprietor upon new terms and conditions. Such terms shall include the requirement to the effect that the current registered proprietor pays to the Government the net unimproved site value of the land. Provided that in issuing a new title, all requirements of Planning and Environmental Legislation shall be strictly complied with.
4. All current Letters of Allotment which have been issued as a consequence of an illegal allocation of public land should be revoked. In cases where the letters have expired, they should stand expired and therefore not capable of being used as a basis for any transaction in land.
5. In future, Letters of Allotment should strictly operate as originally intended i.e. as offers for the purchase of un-alienated Government land and nothing more. The letters should expire exactly after the prescribed period stated therein. A Letter of Allotment should neither be transferable nor be used as a basis for the informal transfer of an interest in land.
6. Where land has been reserved for a public purpose, no consent to an application for change of user with respect to that land shall be granted by the Commissioner of Lands unless the proposed change of user is in the public interest.
7. All public officials who facilitated or participated in the illegal allocation of public land should be investigated and prosecuted in

accordance with the applicable penal law such as the Anti-Corruption and Economic Crimes Act and the Penal Code. Such officials may also be considered for retirement in the public interest.

8. All persons who not being public officials participated in or facilitated the illegal allocation of public land (in whatever capacity, whether as professionals, original allottees, brokers or speculators), should be investigated and prosecuted in accordance with the applicable penal law.
9. All professionals who participated in the illegal allocation of public land in addition to being investigated as in 8 above, should be investigated by the police in the first instance and thereafter, by their professional bodies with a view to being disciplined in accordance with their Codes of Conduct and punished in accordance with the applicable penal law.
10. All monies and other proceeds unjustly acquired as a result of the illegal allocation and sale of public land (whether by the original allottees, brokers, speculators or professionals), should be recovered by the Government in accordance with the law.
11. Given the fact that companies have been used as the main vehicles for illegal allocations of public land, such companies as were allocated public land illegally, should be investigated.

(b) State Corporations Land

(i) Background

State Corporations are also referred to in Kenya as Parastatals. They are established under specific Acts of Parliament. Some of their activities are also regulated by the State Corporations Act unless exempted by legislation establishing a specific Corporation. These Corporations are in essence public companies or enterprises. They became a feature of the management of public affairs in Kenya in the early days of independence. However, the establishment of state corporations as institutions for the management of public resources picked up in the late 1970's and early 1980's. This was the period when Governments was heavily involved in the fields of agriculture, industrialization and commerce.

The preference of corporations to ministries as organs of management by the Government stemmed from the fact that certain matters were so complex or specialized that they required bodies which were professionally organized to manage them. It was expected that such bodies would recruit and appropriately remunerate skilled personnel who would use their expertise to help the Government address specific development issues in their areas of competence. However, since such corporations were established by the Government, they were only semi-independent. The Government retained a heavy presence in the administrative and financial structure of the corporations. Each state corporation falls under a specific ministry while the Government retains the authority to appoint members of the management boards and the chief executives of respective corporations.

Being bodies corporate, the state corporations have powers under the law to acquire and dispose of both movable and immovable property (land). For the corporations to operate, they require land for specific purposes. Some corporations may only require land for purposes of physical infrastructure such as offices and housing for their staff. Other corporations require a substantial amount of land given the nature of their mandate and activities. In fact, some corporations (such as agricultural institutions, research institutions, communication institutions etc.) depend on land for their operations. Because of this, the Government allocates land to corporations in different proportions to enable them commence and at times continue operations. In certain situations, the Government allocates funds from the exchequer to corporations so that they may purchase land. This is why state corporations hold and manage a lot of land.

(ii) State Corporations Land as Public Land

The Government allocates land to state corporations to enable them carry out their mandate. This land may be excised out of un-alienated Government Land, or be set apart from trust land. The Government may also compulsorily acquire land for the purpose of a state corporation. Finally, the Government can and does allocate funds from the exchequer to corporations so that they may purchase land among other purposes. It is therefore quite clear that all land held or owned by a state corporation is public land in the sense that it was either excised off Government or Trust land, or the funds used to purchase such land were tax payers' money.

The corporation therefore holds the land on trust for the people of Kenya. Where the corporation land was acquired in the manner aforesaid, it cannot legally be allocated to an individual or company; because it is reserved for the use of the corporation. Where a corporation no longer needs the land earlier allocated to it, the ideal situation would be for it to surrender the land back to the Government which should hold it for future public uses. The land should not be surrendered to be allocated to an individual or company. Where the corporation acquired land through purchase, not from public exchequer funds, but from funds generated as profit from its business, it can sell, exchange or dispose of such land to an individual or company at market value. It can also use such profit to purchase land. But even in this instance, the corporation must exercise due diligence and care. The sale, exchange, disposition or purchase of land must always be for the good of the corporation, hence the public.

An important point worthy of note for the purposes of this Report is the fact that each state corporation is set up for a specific purpose. A corporation has its core business as stated in the legislation under which it is established. Its functions will have been set out in law and other policy documents. It is not the business of state corporations to buy and sell land, let alone speculate in land. *State corporations are not land buying companies.* The purchase and disposition of land by a state corporation is simply incidental to its core business. Yet many state corporations have acted as if they were set up to deal in land. It is as a result of this that state corporations have been used as conduits for land grabbing schemes through which the public has lost colossal amounts of money.

The directors of state corporations are bound by the general law that governs directors of other companies; even if not in every material particular. In this regard, the directors of state corporations have duties and responsibilities which they owe to the public. They have a duty of care in that they must always act in the best interests of the corporation. They must not put themselves in a position where their interests conflict with those of the corporation. They are under a duty to protect company property. They must not use their positions as directors to make private profit or financial gain over and above that which they are paid for performing their duties. If directors take decisions in a reckless and imprudent manner such as to cost the corporation money, they can be called upon to account under the law. The directors can also be held personally liable in criminal law for abuse of office.

(iii) Findings

There are over one hundred and forty (140) state corporations (this figure includes institutions such as universities, pension schemes and the Central Bank of Kenya). In addition, there are one hundred and thirteen (113) public companies in which the Government had shares but which have been sold through pre-emptive rights offer. Summons for the production of records and information were dispatched to all the state corporations. Summons was also sent to the Investment Secretary to provide details of information relating to the lands held by the Government in companies in which it had shares.

Only ninety-five (95) state corporations sent in the information as per the summons. Many however either sent incomplete or irrelevant information. The Returns submitted exclude crucial information relating to lands that had been illegally allocated or irregularly purchased by the corporations.

For a list of state corporations which furnished information to the Commission and those which did not. Please see Annexes 19 and 20 in Vol. I of the Annexes.

Information received from the Investment Secretary also had key gaps in the areas that were of interest to this Commission. While it is a fact that these companies held large portions of land as part of Government shares, yet this land element did not come out of the Records provided to the

Commission. The Investment Secretary however informed the Commission that the records available at the ministry did not have some of the details required by the Commission. It was however noted that most of the companies in this category were sold through pre-emptive rights or divestiture. This means that the offers were not available to the public. In fact, some of these companies were bought by politically influential and **powerful personalities at the time.**

For a list of all the companies in which the Government previously held shares, but which it has since sold. Please see Annex 21 in Vol. I of the Annexes.

Notwithstanding the difficulties cited above, the Commission was able to analyze the information received and make the following findings.

Illegal Allocations of lands reserved for use of State Corporations.

As already indicated in the foregoing remarks, the Government through the Commissioner of Lands periodically reserves or sets aside un-alienated Government land for the use of State Corporations. Some state corporations are allocated a lot of land due to the nature of their core functions. Once land has been allocated to or reserved for the use of a state corporation, it becomes "*alienated Government land*".

The Commission found that state corporations land was illegally allocated to individuals or companies in total disregard of the law and public interest. The allocation of corporation land was made in favour of "politically correct" individuals in the former regimes. No justification for the allocation of land reserved for the use of state corporations is available from the records so far examined by the Commission. The lands so allocated were then sold by the allottees to other state corporations for colossal amounts of money far in excess of the prevailing market value of the land. The manner and speed with which the transactions were effected leave no doubt that the allocation of land was aimed at enabling the allottee to speculate with corporation land. This way, many individuals were unjustly enriched at great expense of the people of Kenya. The development objectives for which the state corporation had been established were severely compromised thus costing the taxpayer dearly.

On most occasions, the loss of corporation land was triggered by the actions of the Commissioner of Lands without involving the corporation

management. After specially designed correspondences, a letter of allotment would be issued by the Commissioner of Lands to an individual or company for land belonging to the corporation. A grant of title would subsequently be made to the same individual or to a third party to whom the land would have been sold through an informal transfer of a letter of allotment. The corporation management would wake up to a rude fact that their land had been acquired and title issued thereto without their knowledge.

At other times, the illegal allocation of state corporations land was usually triggered by irregular surrenders of corporation land. A letter of surrender would be written by either the corporation board of management or the chief executive of the corporation (managing director, managing trustee, director etc). The letter would be addressed to the Commissioner of Lands stating that the corporation no longer needed a specified parcel of land. Almost immediately, an individual or company would apply to be allocated the land in question. The Commissioner of Lands would then make an allocation of the land to the applicant by issuing a respective letter of allotment. If the land was large in size, the allottee would apply for consent to subdivide the same into different units. The Commissioner would again grant the consent to subdivide the land.

Next, the allottees would sell the land so illegally acquired to one or different purchasers for millions of shillings! Thus in a space of say three months, a civil servant, a politician, a political operative, etc would transform from an ordinary Kenyan, financially struggling like many others into a multi- millionaire. Thanks to the rampant illegal allocation and sale of state corporation land.

The state corporations that lost lands allocated to them in this manner were usually strategic enterprises which required huge chunks of lands to be able to carry out their mandate. Thus, state corporations such as Kenya Railways Corporation, Kenya Agricultural Research Institute (KARI), Kenya Power & Lighting Company Ltd, various Development Authorities, Kenya Airports Authority, Kenya Industrial Estates Ltd, etc, lost huge chunks of their land in these circumstances.

The Commission also found that other state corporations would be mismanaged and end up in receivership or liquidation, following which the corporations' assets , including land, would be sold at throw away prices,

or the land would simply be allocated by the Commissioner of Lands to favoured individuals. One such case is that of the **Kenya Food and Chemical Corporation Limited** of Kisumu, commonly known as the "Molasses Project". This energy saving project was conceived by the Government in the 1970's and was intended to manufacture gasohol from sugar cane molasses which was produced by the sugar factories in Nyanza and Western Provinces. Land for the project was compulsorily acquired by the Government in 1976 at 4 million shillings.

Although hundreds of millions of tax payers' funds were invested in the project, it stalled in the 1980's and the Company was put under receivership and remains as such to this day. Land for the project was offered to the company by a letter of allotment but this was never formally accepted or paid for and no title was issued. However, in 2001 the Commissioner of Lands S. S. K. Mwaita, allocated the land to a company known as **Spectre International Limited** for 3.7 million shillings or KShs. 33,000 per hectare. The land measures approximately 112 hectares and comprises of seven blocks the particulars of which are as follows:

1. L.R No. 26453, area 26.10 ha, user, horticultural
2. L.R No. 26454, area 39.00 ha, user, industrial
3. L.R No. 26455, area 13.40 ha, user, residential
4. L.R No. 26456, area 21.23 ha, user, residential
5. L.R No. 26457, area 3.50 ha, user, recreational
6. L.R No. 26458, area 2.20 ha, user, health clinic
7. L.R No. 26459, area 6.50 ha, user, educational

The direct allocation of alienated Government land to the company by the Commissioner of Lands was illegal. It was not clear how the Government then intended, if at all, to revive or sell the project having already allocated the seven blocks of land to Spectre* International Limited, a private company.

The Commission further found that the Government would incorporate a company ostensibly for noble development purposes and proceed to allocate it public land. Instead of carrying out the objects for which it had been incorporated, the company would concentrate on selling the land allocated to it to other state corporations. A classic example is the case of the **Numerical Machining Complex Limited** which was incorporated on 4th January 1994 to take over the whole or part of the undertaking and the business, property and liabilities of the **Nyayo Motor Corporation**.

There are only two shareholders of this company, the Kenya Railways Corporation and the University of Nairobi both of whom own the entire authorized and issued share capital of KSh. 750 million but who have not paid for any of the shares.

On 24th June 1994, the company was allocated 839.7 Hectares of land in Mavoko Municipality which was part of the Kenya Meat Commission **holding ground. The company was allocated this land for "industrial research purposes"**. Within a few weeks, the then Head of Public Service and Secretary to the Cabinet **Professor Philip Mbithi** who was an *ex officio* Director of the company, wrote to **Samuel Muindi** the then Managing Trustee of the NSSF informing him that the President had suggested that the NSSF be "requested" to purchase land at market value from the **Numerical Machining Complex Limited**, so as to assist in the national project. In February 1995, NSSF bought 136.07 Hectares of the land from the company at a cost of **268 million shillings** which is 8.5 times more than the professionally assessed value. To date, the land bought by NSSF remains mostly undeveloped, while the **Numerical Machining Complex** has wholly failed to develop the remainder of the land.

While **Kenya Airports Authority** claim to have lost a lot of land, the loss could have been engineered from within. The matter requires thorough investigation. In addition, all Airport land across the country should be the subject matter of serious investigations. To start with, all allocations of airport land and land along flight paths should be revoked particularly at JKIA, Moi International Airport (Mombasa), Malindi Airport, Ukunda, Lamu Airstrip, Lokichogio, Kisumu, Eldoret and Garissa.

For a detailed list of the state corporations that lost their lands through such illegal allocations, and the particulars thereto, see Annexes 22-37 in Vol. I of the Annexes.

Purchases of Illegally acquired Public Lands by State Corporations

State Corporations did not just lose land entrusted to them through illegal allocations of the same; they were also pressurized to purchase illegally acquired public land. They became captive buyers of land from politically connected allottees. An individual would be allocated public land illegally, obtain consent from the Commissioner of Lands, and then proceed to sell the land to a specific state corporation for millions of shillings. Corporations such as the NSSF, Kenya Ports Authority, Kenya Pipeline Corporation, Kenya Reinsurance Corporation etc were forced to purchase

such land at exorbitant prices. Within the relatively short period of some five years, from 1990 to 1995, the NSSF in particular spent up to thirty billion (30 Billion) shillings on purchasing both developed and undeveloped plots in various major urban centres throughout the country. In many cases, the Fund purchased either illegally allocated public land such as plots in Karura and Ngong Forests, or lands which were of little or no value at exorbitant prices. No prudent management principles were applied by the Trustees in making these purchases. (See Numerical Machining Complex above).

In 2001, land which was part of Ngong Forest was illegally excised, subdivided into thirty two (32) plots, and allocated to thirteen (13) companies. Between 28th and 29th August 2001, the thirteen companies sold the plots to KENYA PIPELINE COMPANY for KShs 262,388,478.00. Below is a Table showing details of the transactions:

Vendor	Company Directors	L.R. No Location	Date of sale	Size (Ha)	Price
1.Redate Investment Limited	1.David Kutwa 2.Daniel Karoki	22473 Ngong Road	29th August 2001	1.0	5,683,000.00
		22474 Ngong Road	29th August 2001	1.0	5,683,000.00
		22481 Ngong Road	29th August 2001	1.0	5,683,000.00
		22499	29th August 2001	1.290	7,240,000.00
		22503 22502	29th August 2001	1.0	5,683,000.00
2.Tairo Investment Ltd	1.Dan Wekesa 2.Peter Wafula	22449 22500 22455	28 th August 2001	1.0	5,683,000.00
		22450	28 th August 2001	1.0	5,683,000.00
		22452	28 th August 2001	1.0	5,683,000.00
		22453	29 th August 2001	1.0	5,683,000.00
3.Velvet Safaris Limited	1.Gordon Okumu Wayumba 2.Alice Achieng Okumu	9778	29 th August 2001	0.5683	3,229,648.00
		9826	29 th August 2001		4,599,820.00

Vendor	Company Directors	L.R. No Location	Date of sale	Size (Ha)	Price
4.Celtic Multisystems Ltd	1.Catherine Chepchumba 2.Silas Simatwo	9779		0.5914	3,360,926.00
5.Somog Limited	Records Missing	9823			
6.Linto Limited	1.Patrick Mungasia 2.Jane Nduku	22509	29 th August 2001	2.00	11,366,000.00
		22504	29 th August 2001	1.0	5,683,000.00
		22505	29 th August 2001	2.09	11,877,470.00
		22508 22506 22509	29 th August 2001	2.0	11,366,000.00
		22510	29 th August 2001	1.14	6,472,937.00
		22511	29 th August 2001	2.870	14,491,650.00
7.Tanabell Ent. Co. Ltd	File Missing	22451	28 th August 2001	1.0	5,683,000.00
		22480	29 th August 2001	1.0	5,683,000.00
8.Roseco Investment Ltd	1.Fredrick Onyango 2.William Mtinda	22498	29 th August 2001	1.350	7,978,932.00
		22501	29 th August 2001	1.0	5,683,000.00
9.Berke Commercial Agencies	1.William Ruto 2.David Kemej Kibet 3.Willy Bett Kipkorir 4.James Bett Kiprop	9826 9824	29 th August 2001	1.745	9,916,855.00
10.Grevsoil Investments Ltd		9926		3.426	19,400,000.00
11.Priority Ltd	1.Paul Chirchir 2.Matthew Otieno	25525	29 th August 2001	5.086	28,903,738.00
12.Rama Limited		25526		4.0	22,732,000.00
13.Makori Investments Ltd		22512	29 th August 2001	2.341	13,303,903.00

Kenya Ports Authority is yet another example of the many state corporations which bought land from politically connected individuals and companies for millions of shillings. The following few examples will suffice:

1. Undeveloped plot L.R No. 9093, Malindi-Kilifi (7.0 Ha) bought from HARRY MUTUMA KATHURIMA for 12 million shillings
2. Undeveloped plot L.R 16121 Shimoni, Kwale (2.516 Ha) bought from ALI KORANE (former D.C in the KANU Government and later Permanent Secretary in the NARC Government) through Rahole Enterprises in 1992 for 8 million shillings
3. Title No. Mombasa/Block I/ 1682, Main land South, Mtongwe creek (2.78 Ha) undeveloped. Bought from SHARIFF NASSIR (former Minister) for 10 million shillings. Also bought from the same politician was Title No. Mombasa/Block V/1614, Mainland North Kimbarani, for 6 million shillings.
4. Title No. Mombasa/Block 111/528 Mainland North Kilifi/Takaungu (173.6 Ha) undeveloped land bought from Winworld Ltd (company records could not be traced) for 150 million shillings.
5. Undeveloped plot L.R No. 209/10212, Bellevue, Nairobi (1.6 Ha) bought from MICAH CHESEREM, JOSHUA KULEI and DAVID KOMEN 2.6 million in 1985.
6. Title No. Mombasa/Block 1/46, Mainland South (11.4 Ha) bought from KAYUMALI ABBASHIS ANJARWALLA for 9 million shillings
7. Mombasa/Block V/1683 Mainland North, undeveloped plot bought from ERASTUS MUTHAMIA KIARA for 1.2 million.

National Social Security Fund (N.S.S.F.)

The most abused State Corporation by way of buying either illegally allocated public land or purchasing land from individuals at exorbitant prices far beyond the market value was the NSSF, a corporation charged with the duty of mobilizing, and safeguarding the savings by the toiling workers of Kenya. The Corporation's Board of Trustees are supposed to manage the contributions to and payments of benefits out of the Fund. The NSSF Act stipulates that all moneys in the Fund which are not required to be applied for purposes of the Fund must be invested in such investments

in which any trust fund (or part thereof) is permitted by the Trustee Act to be invested, as may be determined by the Board of Trustees with the approval of the Minister and the Minister for the time being responsible for matters relating to finance. There is no doubt that a heavy responsibility is placed upon the Board of Trustees.

Yet the Commission's interview with the current Managing Trustee, Mr. N. Mogere, established that the Fund had between 1990 and 1995, spent up to **30 Billion Shillings** buying both developed and undeveloped plots throughout the country. The Trustees' main preoccupation was to purchase land in highly suspect circumstances. Some of the lands were purchased as follows:

Item	LR.NO	Size (Ha)	Location	Purchase Price (Kshs)	Date Purchased	Vendor/Previous Owner
1	NRB 97/(409) plots	40.05	Tassia Estate, Embakasi off Outering Road	159,275,000.00	30/08/95	Tassia Coffee Estates Ltd
2	NBI 97/(902)	91.02		975,275,000.00	30/08/95	Nokin Holdings Ltd
3	209/12340 209/12341 209/12500	2.988 19.36 0.8095	New Likoni Road, Nairobi	22,812,500.00 60,500,000.00 6,250,858.00	25/5/95 25/5/95 25/5/95	Sharjah Trading Co. Ltd
4	Block 10/167	12.63	Eldoret	22,500,000.00	Jun-95	Soyonin Farm
5	209/11642	0.21	Municipality Community Area - Nairobi	20,307,750	23/03/95	Lekuna Ltd
6	209/10666	0.3204	Ngong Road, Opp. National Library, Nairobi	32,080,386.45	7/6/1989	Siwaka Enterprises
7	209/11305	0.3054	Elgon Road, Nairobi	50,101,250.00	14/02/1991	Kingorani Investment Ltd.
8	209/11331	0.12	Kenyatta Avenue, Nairobi	69,911,875.00	30/12/93	Fedha Investment Ltd
9	18486	6.031	Ngong Road, Nairobi	70,000,000.00	16/5/94	Ankhan Holdings Ltd.
10	209/9727	8.2	Langata Road Nairobi	382,385,133.35	8/8/1994	Gamu Ltd
11	209/11314	4.582	Outering Road/Jogod Road, Nairobi	126,949,750.00	25/01/95	Multi Purpose Co-op Development Centre Ltd

Item	LR.NO	Size (Ha)	Location	Purchase Price (Kshs)	Date Purchased	Vendor/Previous Owner
12	12715/430	2.021				
13	12715/431	2.021				
14	12715/432	2.021				
15	12715/545	2.664	All in Mavoko Municipality Athi River	320,000,000.00	25/01/95	
16	12715/407	2,028				
17	12715/408	4.049				
18	12715/26	2.024				
19	12715/530	2.023				
20	12715/529	2.023				
21	12715/579	2.023				
22	13302/5	2.021				
23	18064	30				
24	17645	2.389				Kingorani Investment Ltd.
25	209/11463	0.2056	Upper Hill, Nairobi	22,277,246.50	Oct.1995	Sumein Ltd
26	209/11881	1.383	South 'B' Nairobi	32,814,735.00	24/5/95	Hamco Kenya Ltd
27	209/297	0.8066	Bishops Road, Nairobi	225,518,937.50	25/5/95	Newman Investment Ltd
28	21189	16.21	Embakasi, Nairobi	752,000,000.00	16/10/95	North Field International Ltd
29	21190	59.87	Embakasi, Nairobi			
30	20840	3.893	Forest Edge, Langata, Nairobi	40,568,800.00	5/12/1995	Kerio Farms Ltd
31	20841	3.969	Forest Edge, Langata, Nairobi			
32	2535/I/MN	2.695		43,290,000.00		
33	2537/I/MN	0.4002	Bamburi Mombasa, Mainland North	6,500,000.00	29/03/95	
34	2538/I/MN	0.4		6,500,000.00		
35	2539/I/MN	0.4		6,500,000.00		Topaz Properties Ltd
36	2540/I/MN	0.3997		6,500,000.00		
37	982/I/MN	1.538	Near Bamburi Beach Hotel, Mombasa	79,000,000.00	29/03/95	Mandarin Beach Hotel Ltd

Item	LR.NO	Size (Ha)	Location	Purchase Price (Kshs)	Date Purchased	Vendor/Previous Owner
38	4981/I/MN	20.02	Nyali, Mombasa	125,743,329.00	14/12/93	Turnkey Projects Ltd
39	1088/III/MN	8.758	Mtwapa, Mombasa	229,248,176.00	16/05/94	Sun Trap Beach Hotel Ltd
40	1075/III/MN	8.169	Mtwapa, Mombasa	101,986,606.00	16/5/94	Jimbim Investment Ltd
41	1089/III/MN	8.754	Mtwapa, Mombasa	219,444,836.00	18/05/94	Sea View Investment Ltd
42	Kajiado/Kaputei North/3005	21.23	Kitengela opp. EPZ	107,084,931.00	16/05/94	Soito Investments Ltd
43	Kajiado/Kaputei North/3006	12.7	Kitengela opp. EPZ			
44	Kajiado/Kaputei North/1372	46.69	Kitengela opp. EPZ			
45	Eld. Municipality					
46	Block 10/176	10				Michael Terrik
47	Block 10/177	10	Eldoret Municipality	50,906,036.00	27/05/94	Manjan Holdings Ltd
48	Block 10/178	10				Benjamin Kipchirchir
49	Block 10/179	10				Wilson Maina
50	KTL Municipality	Unsurveyed	Kitale Municipality	GK Allocation	1995	
51	11895/19	136	Mavoko Municipality	272,909,235.00	14/02/95	Numerical Machining Ltd
52	209/10662	1.071	Hospital Hill Road, Nairobi	32,080,386.45	1989	Raju Investment Ltd
53	209/11412	0.432	Kenyatta Avenue, Nairobi	126,038,628.20	12/4/1991	KCB Ltd
54	209/12219	0.0799	Kenyatta Avenue, Nairobi	75,000,000.00	18/08/94	Jackie's Travel Centre Inter Africa Trading Co.Ltd
55	209/12220	0.0868	Kenyatta Avenue, Nairobi	82,000,000.00		
56	209/12287	1.197	Kenyatta Avenue, Nairobi	543,492,466.55	7/6/1980	Corum Ltd
57	209/11609/2-17(15 No. plots)	1/2 ac plot	Kileleshwa, Nairobi	42,250,005.00	11/8/1994	Akamba Investments Ltd

Item	LR.NO	Size (Ha)	Location	Purchase Price (Kshs)	Date Purchased	Vendor/Previous Owner
58	209/12274	18.41	Muthaiga/Spring Valley, Nairobi	296,550,687.50	28/09/95	Kitisuru Limited
59	20589	49.86	Machakos Town	50,517,055.00	22/03/95	A.I.C Machakos
60	20587	20.5	Karen, Nairobi	202,268,759.80	26/04/95	David Cyril Bowden
61	NBI/BLK.98/73	6.07	Bellevue, Nairobi	150,000,000.00	1994	Reality Brokers Ltd
62	19187	5				Kagika Limited
63	19188	10				Gemwi Ltd
64	20305	3.991	Mavoko Municipality	223,000,000.00	1995	Tetete Company
65	20355	58.73	Athi River			Changa Ltd
66	337/1921	4				Japhet Okidor
67	20181	4				Boaz Keino
68	20183	4				Johnstone Makau
69	20184	4				Muska Holdings Ltd
70	20185	4				Margaret Mutinda
71	20199	4				Antony Ndilinge
72	20200	4				Milka Kithiga
73	20201	4				Grace Nthamba
74	20204	4				Isaac Muoki
75	20205	4	Mavoko Municipality	91,410,000.00	1995	Winfred Nyiva
76	20206	4	Athi River			Mutinda Ndambuki
77	20207	4				Peter Kavisi
78	20208	4				Richard Kiluta
79	20219	4				George Nduta
80	20432	30				Gideon Mutiso
81	20315	4				
82	20316	4				
83	20324	4				
84	20325	4				
85	20326	4				Mulimo Enterprises
86	20327	4				
87	30328	4				
88	20329	4				
89	20330	4	Mavoko Municipality	61,396,962.25	1995	
90	20334	4	Athi River	Athi River		

Item	LR.NO	Size (Ha)	Location	Purchase Price (Kshs)	Date Purchased	Vendor/Previous Owner
91	24574	20				
92	20577	15.97				
93	20578	233	Mavoko Municipality			
94	26472	20	Athi River	576,028,000.00	1995	Kenya Cargo Handling Services Ltd (Trustees)
95	20579	60.6				

Other examples where state corporations bought public land which had been acquired illegally and which land was of no or little value to them are:

- Central Bank of Kenya which purchased a plot reserved as a public parking off Haile Selassie Avenue from a company associated with an MP in the former KANU regime and an Assistant Minister in the current NARC Government for **300 million shillings**.
- Kenya Power and Lighting Company/ Retirement Benefits Scheme which purchased marsh land in Loresho (L.R 21080, 6.837 Ha) at **78 million shillings** from LIBRA SETTING LIMITED in 1999.
- Kenya Power and Lighting/ Retirement Benefit Scheme which bought a 58 Acre plot from RAPSEL LTD at **250 million shillings** and many others.

In many instances, there was agreement between the prime movers of these transactions as to change of user to facilitate quick sales of land at public expense. No objections were raised at the Ministry of Lands and Settlement to applications for change of user despite the glaring irregularities in many of the proposed sales and purchases. These activities included illegal surrenders of state corporation land to the Commissioner of Lands by the respective directors in collusion with ministry officials in breach of the directors' mandate.

The Commission also found that in quite a number of instances, a particular parcel of land would be grabbed from a state corporation and almost immediately sold to another state corporation for millions of shillings. These activities cost the public colossal amounts of money because the loss in such a situation was double; affecting two or even more state corporations.

Kenya Veterinary Vaccines Production Institute (KEVEVAPI)

Sometime in the early 1990's sixty-three out of ninety-three hectares of land belonging to the Kenya Veterinary Vaccines Production Institute (KEVEVAPI) in Industrial Area Nairobi was systematically subdivided and illegally allocated to a number of companies. One such company namely, SHARJAH TRADING COMPANY was allocated two plots hived from KEVEVAPI in January 1995. The company then sold those two plots to the NSSF for **500 million shillings** in May 1995. Below is a table showing an example of these transactions:

	Land Ref. No./Title No.	Reserved/Intended Use	Current Use / Land Category	Area in (Ha)	Original Allottee and Date of Allocation	Allocating Authority	Current Owner & Address
	1	2	3		5	6	
1	LR. 209/1233 9, IR. 64874	Research	Residential	2.988	Sharjah trading Co.Ltd., P. o. Box 94118, Nairobi, 1/9/95. Premium Ksh. 1.6m	Commissioner of Lands	NSSF Board of Trustees Price Ksh. 225m. 26/5/95.
2	LR. 209/1234 0, IR. 161980	Research	Residential	2.988	Sharjah trading Co.Ltd., P. o. Box 94118, Nairobi 1/9/95. Premium Ksh. 1.6m	Commissioner of Lands	NSSF Board of Trustees Price Ksh. 225m. 26/5/95.
3	LR. 209/1234 2, IR. 64873	Research	Residential	2.988	Sharjah trading Co.Ltd., P. o. Box 94118, Nairobi, 1/9/95. Premium Ksh. 1.6m	Commissioner of Lands	NSSF Board of Trustees Price Ksh. 225m. 26/5/95.
4	LR. 209/1234 4 IR. 73692	Research	Light Industrial	0.4069	Rielco Co.Ltd., P. o. Box 25932, Nairobi 1/8/95. Premium Ksh. 1.6m	Commissioner of Lands	Jaspar Singh Birdi, P. O. Box 44893, Nairobi.
5	LR. 209/1250 1; IR. 67266	Research	Light Industrial	0.4069	Rielco Co.Ltd., P. o. Box 25932, Nairobi 1/8/95. Premium Ksh. 1.6m	Commissioner of Lands	

	Land Ref. No./Title No.	Reserved/Intended Use	Current Use / Land Category	Area in (Ha)	Original Allottee and Date of Allocation	Allocating Authority	Current Owner & Address
6	LR. 209/13294	Research	Light Industrial	2.024	Rielco Co.Ltd.& A. Mbugua, P. o. Box 25932, Nairobi 1/11/1996	Commissioner of Lands	Rielco Co.Ltd., P. o. Box 1494, Kericho
7	LR. 209 /13295	Research	Light Industrial	6.07	Samu Ltd., P. O. Box 80326, Mombasa. 1/11/96	Commissioner of Lands	Samu Ltd., P. O. Box 80326, Mombasa. 1/11/96

Fraudulent Exchanges

In yet other instances, a state corporation would be forced to exchange land belonging to it with non-existent land in favour of an individual or company for speculative purposes by the latter. Such exchanges were made and even facilitated by the personal intervention of the Commissioner of Lands.

Sales of State Corporation Land to individuals and companies at throw away prices

The Commission found that state corporations sold some of their prime land to individuals and companies at scandalously low prices. The “purchasers” of such lands ended up selling the same parcels at very high prices to other state corporations. For example, the Kenya Railways Corporation sold its prime plot on Ojijo Road (L.R No. 209/6439 on 31st January 1996 to Guardian International Ltd for **77 million shillings**. A few days later on 8th February, Guardian International sold the plot to **NSSF for 178 million shillings**. The Kenya Power & Lighting Company is one other such state corporation that sold a number of its prime properties at throw away prices only for the purchasers to make super profits the “next day”. If the intention was not to defraud the country of taxpayers’ money, why did the directors of respective corporations not buy and sell land from their corporations directly instead of going through individuals who had acquired these lands illegally? **Kenya Railways Corporation** is supposed to have surrendered land to the Government and yet the same land ended up in private hands and was later sold to other state corporations. Thorough

investigations into the corporation's affairs relating to land are necessary. **For a detailed list and particulars of Railway's land that was sold off in this manner, see Annex 24 in Vol. I of the Annexes.**

The Use of Brokers

The Commission found that the management of State Corporations made no attempt to apply for allocation of land to the respective corporations directly to the Commissioner of Lands. In most cases, corporations purchased land through brokers. This practice augmented the Commission's conclusion to the effect that State Corporations were looted through suspect and illegal land transactions.

Lack of knowledge of the extent of specific state corporation land

During interviews with the Commission, some chief executives of state corporations confessed ignorance of the extent of land owned or held by the state corporation under their management. This lack of knowledge on the part of corporation officials paved the way for "surveys" allegedly authorized from above. State Corporations lost land following such surveys which under-estimated the acreage of land reserved for a specific corporation.

Loss of corporation land during legal splits of the same

During the legal split of some state corporations in different entities, some land which would have been transferred to the new entities was illegally allocated to individuals or companies. For example when the giant Kenya Posts and Telecommunication Corporation KP&TC was split into three independent entities, some assets including houses were vested in the TelePosta Pension Scheme through Legal Notices Numbers 154 of 5th November, 1999, and 131 of 14th September 2001. Some of these properties had not been transferred to the Pension Scheme at the time of writing this Report. The Pension Scheme provided the Commission with a list of properties that were illegally allocated to individuals. **(See table below)**

**PROPERTIES FOR WHICH TELPOSTA PENSION SCHEME TRUSTEES FACE
DIFFICULTIES IN TITLE ACQUISITION**

S/ No	LR No.	Location	Plot (Acres)	General Description	Valuation at Vesting (Kshs)	Remarks
1	KSM MUN/ BLOCK 12137	Milmani Estate off Awuor Otieno Road. Kisumu	1.276	Condemned old residential house redevelopment site)	3,800,000	
2	KSMUN/ BLOCK 121153	Milmani Estate off Awuor Otieno Road, Kisumu	0.570	Vacant site	1,800,000	
3	209/3154	Mwingi Road Upper Kileleshwa Nairobi	0.484	Bungalow with four bedrooms attached staff quarters and double garage Main House - 1678 sq ft Verandah. 118sqft Staff quarters - 330 sq ft Garage - 170 sq ft	9,500,000	
4	209 XXII/2 New LR. BLK 11/373	On Mohammed Ali Road. Off Konza Road, Eastleigh area, Machakos town.	0.115	Two bedroomed bungalow with a staff quarters. Built up area 936 so.ft	1,400,000	Occupied by TelKom Kenya Ltd Staff
5	(909/258) Machakos Municipality Block 1/127	In Muthini estate off Konza road, Machakos Town.	0.064	Three bedroomed bungalow. Built-up area - 604 sq..	800,000	Occupied by TelKom Kenya Ltd Staff
6	Kikuyu Staff Quarters, Kikuyu- Township/229	Kikuyu Township		One residential block with 2 units each with 2 rooms & a kitchen served by 2 shower- rooms & 2 pit latrines Main block - 700 sq ft WC Block, 52sq ft	2,100,000	Occupied by Postal Corp of Kenya Staff

S/ No	LR No.	Location	Plot (Acres)	General Description	Valuation at Vesting (Kshs)	Remarks
7	Thika Staff Houses BLK 9/301,9/302, 9/303,9/304	Lagos Road Thika Municipality	0.500	Two residential blocks each with (2) units of 2 bedrooms and outbuildings 4 units-2904 sq. ft 4 S/Q-582 sq. ft Ablutions, 271 sq. ft.	4,000,000	Occupied by TelKom Kenya Ltd Staff
8	209/2397	Mucai Drive off Ngong Road, Nairobi	1.930	Two compounds each with a double storey four bedroom house and outbuildings 2 main Houses - 4739 sq ft verandahs. 700 sq ft 2 s/Q-1239sqft	40,000,000	Occupied by Staff of Telkom Kenya Ltd & C.C.K.
9	MSA/XXV1/210	Kizingo Marsabit Road, Mombasa	0.565	Double storey residential house with three bedrooms living room, dining recess bathroom, W.C., lock up garage & staff quarters Mainbuilding-1891sqft Staff Quarters - 344 so ft	9,300 000	Occupied by TelKom Kenya Ltd Staff
10	MSA/XXV1/211	Kizingo Marsabit Road, Mombasa	0.717	Double storey residential house with three bedrooms living room, dining recess bathroom, W.C., lock up garage & staff quarters Mainbuilding-1891 sq ft Staff quarters - 344 sq ft	11,300,000	Occupied by TelKom Kenya Ltd Staff

S/ No	LR No.	Location	Plot (Acres)	General Description	Valuation at Vesting (Kshs)	Remarks
11	209/12531	Matumbato Close Nairobi	0.764	A three bedroomed bungalow with outbuildings Main house - 1472 sq ft Porch -160 sq ft Staff Quarters – 269 sq ft Garage- 200 sq ft	13,700,000	Occupied by TelKom Kenya Ltd Staff
12	209/12532	Matumbato Close Nairobi	0.580	A four bedroomed bungalow with outbuildings Main house – 1764 sq ft Staff Quarters 244 sq ft Garage 163sqft	11,400,000	Occupied by TelKom Kenya lid Staff
13	209/12533	Matumbato Close Nairobi	0.753	A three bedroomed bungalow with outbuildings Main House 1644 sq It Staff Quarters – 328 sq ft Garage .196sq ft	13,800,000	Occupied by TelKom Kenya lid Staff
14	Nyeri town Block 1/219.	Nyeri-Othaya road junction, Nyeri.	2.000	Vacant plot	2,000,000	
15	209/3335	Mandera Road Kileleshwa Nairobi	0.944	Three bedroomed bungalow (master en-suite) & outbuildings Main house- 1677 sq It Staff Quarters- 261sqft	16,200,000	
16	Unsurveyed plo Londiani senior staff house	Londiani town opposite Post Office	Not Surveyed	Developments comprise a condemned semi-permanent	75,000	

S/ No	LR No.	Location	Plot (Acres)	General Description	Valuation at Vesting (Kshs)	Remarks
				building		
17	KSMUN/ BLOCK 121/48	Milimani Estate off Awuor Otieno Road, Kisumu	0.479	Vacant site	1,800,000	
18	KSMUN/ BLOCK 121/49	Milimani Estate off Awuor Otieno Road, Kisumu	0.493	Vacant site	1,800,000	
19	KSMUN/ BLOCK 121/45	Milimani Estate off Awuor Otieno Road, Kisumu	0.509	Vacant site	1,800,000	
20	Muranga staff quarters	Muranga	0.500	Single storey block of two one bedroomed units. Further similar block but due to condition is disregarded.	570,000 25,500,000	Occupied by TelKom Kenya lid & Postal Corp. of Kenya Staff
21	MSA/XXVI/20 I MSA/XXVI/666	Kizingo Area David Kayanda Road. Mombasa	1.435	Six identical maisonettes each with two bedrooms living room. Kitchen, store, ballroom & separate w.e.f. Staff quarters & garage Maisonettes - 8328 sq. ft Staff quarters - 3108 sq li		
22	Unsurveyed plot Narok Staff Houses	In Narok District Hospital Compound on Narok-Mau Narok Road	Details n availabl e	Developments comprise HouseNo. 1 - 530 sq. ft. House No.2 - 602 sq ft	650,000	
23	209/870/9	Ring Road City Park West lands Nairobi	0.935	Seven three- bedroomed maisonettes in two blocks of 3&4 and a Staff quarter block7	35,000,000	Occupied by TelKom Kenya lid & Postal

S/ No	LR No.	Location	Plot (Acres)	General Description	Valuation at Vesting (Kshs)	Remarks
				Maisonettes – 0027 sq.ft.S/Qtr block – 881 sq. ft.		Corp. of Kenya Staff
24	330/124	Kingara Road Lavington Nairobi	1.32t	Eight (8) three bedroomed maisonettes with outbuildings Each unit measures: - Mainhouse- 1400sq ft. Staff-quarters – 280 5<1 it	38,500,000	Occupied by TelKom Kenya lid & Postal Corp. of Kenya Staff

Invasion of State Corporation Land by Private Cartels

In the course of its inquiry, the Commission found that a number of state corporations lost their land to private individuals and companies through the activities of private cartels. These cartels have established an illicit land market in the country. In some of the most **bizarre** abuses of state corporation lands by private persons, individuals would form companies and fence off any open space claiming it as their legally owned land. They would then subdivide the fenced land into many units. Next, they would advertise the plots for sale. Unsuspecting members of the public would purchase the plots and acquire titles to them. The cartels managed to get the plots surveyed and consent to subdivide granted by the Commissioner of Lands. In certain instances, the cartels used forged documents to transact business. Land belonging to NSSF, UCHUMI SUPERMARKETS AND KENYA AIRPORTS AUTHORITY in Embakasi was lost in this manner.

These illegal invasions of corporation land have led to informal and unplanned settlements in many parts in the City of Nairobi. They have also resulted in unplanned urban satellites. The loss of Kenya Airports Authority Land has meant that structures have been erected on Flight Paths thus endangering aircraft, passengers and residents in the area.

Conclusions

From the foregoing analysis and findings, the Commission has drawn the following conclusions: Before addressing specific conclusions, it is worth noting that almost all state corporations presented scanty information to the Commission and further investigations will be necessary to establish an accurate picture.

Plunder of State Corporation Lands and Properties

State corporations have been prime victims/ targets of the illegal allocation of public land. Many of the corporations have lost prime lands and properties to unscrupulous individuals through the connivance and active participation of successive Commissioners of Lands, Ministry of Lands Officials, and other Government officers. Currently, there is no central authority charged with the duty of ensuring the prudent management of state corporations.

Imprudent Management of State Corporations

The state corporations' management (Directors and Trustees) either abdicated or outrightly abused their responsibilities as custodians and trustees of public land under their control and management. The imprudent management of state corporation affairs as epitomized by the illegal dealings in land reflects the general failure of directors of state corporations to abide by the laws under which they were established. The directors have almost invariably acted in breach of their duties as spelt out in an earlier section of this part.

Unjust enrichment of individuals

The illegal allocation of public lands has served as an avenue for the unjust enrichment of individuals at the expense of the people of Kenya. In this way, individuals and companies have made millions from public land without performing any public duty or paying any taxes to the Exchequer.

(iv) **Recommendations**

1. All state corporations lands which have been illegally allocated should be repossessed by the Government. All titles acquired as a result of the illegal allocation should be revoked.
2. Where the lands in 1 above have been **substantially** developed, the titles thereto should nonetheless be revoked (given their inherent illegality). The Government may however issue new titles to the current registered proprietor upon new terms and conditions. Provided that before a new title is issued, the requirements of the applicable Planning and Environmental Legislation should be strictly complied with.
3. All public utility lands which were illegally acquired and later purchased by state corporations should be repossessed by the Government and restored to their proper purpose. Titles to such lands held by the state corporations should be revoked.
4. Where the lands in 3 above have been **substantially** developed by the state corporations, the titles thereto should still be revoked (given their inherent illegality). The Government should however issue new title provided that the requirements of Planning and Environmental legislation are strictly complied with.
5. Where a state corporation has sold land at below market value, the prime movers of such sale (be they the directors of the corporation, original allottees, other public officials, or brokers and professionals) should be investigated and prosecuted.
6. Where a state corporation has purchased land at an exorbitant price, or has purchased public land which had been illegally acquired, the prime movers of such transaction as in 5 above should be investigated and prosecuted. The money lost by the state

corporation as a result of such purchase should be recovered from those who were unjustly enriched by the purchase.

(c) Lands Reserved for the use of Ministries and Departments

(i) Background

Ministries are the main administrative organs through which the Government executes its policies and implements laws on a day to day basis. Ministries are therefore the basic institutional form of government. Ministries hold and manage a substantial amount of land to enable them carry out their mandate. For the purposes of this Inquiry, the following ministries were considered relevant to the Commission's investigations because they control and manage substantial public land.

1. Ministry of Lands and Settlement: which is in charge of all land administration and management in the country
2. Ministry of Roads, Public Works and Housing:
3. Ministry of Local Government under which fall all local authorities that, administer large chunks of land in the public interest including trust land.
4. Ministry of Home Affairs,
5. Ministry of Agriculture
6. Ministry of Livestock Development and Fisheries
7. Ministry of Environment, Natural Resources and Wildlife
8. Office of the President.

Apart from the above mentioned, the Commission also inquired into the land related affairs of other ministries.

Most of the Ministries which responded provided what can be termed as a "clean return of findings", meaning that as far as they were concerned, they had not lost any of their lands to illegal or irregular allocations. Some

ministries which are reputed to hold a lot of land did not send in details of any lands they may have lost through illegal allocations.

For example, the Ministry of Livestock and Fisheries Development sent in Returns showing that it had lost small fisheries land while information from the public indicated that the Ministry had lost large tracts of its livestock holding grounds to grabbers. Another example is the National Youth Service which sent in Returns indicating that all its land was intact. Yet, the Commission received complaints from members of the Public to the effect that land belonging to the Service had been illegally allocated to prominent politicians. The Service was said to have lost thousands of Acres of its land in Yatta Machakos, Naivasha, Mombasa and Mathare valley.

Kenyatta International Conference Centre

The return which was sent by the Ministry of Tourism and Information did not include the Kenyatta International Conference Centre (KICC) which is registered as LR. No. 209/11157. The Commission, nevertheless proceeded to investigate it following allegations that it had been grabbed by KANU.

The Commission examined the relevant records and found that even though an offer of the plot was made on 6th May, 1969 to Kenya African National Union Investment Trust Co. Ltd., it was not accepted within 30 days. The time for acceptance was extended to 31st July, 1969 and again it was not accepted and it lapsed.

The KICC was then built by Government in two phases between 1967/68 and 1973/4 financial years and cost KSh. 79,747,000 to the taxpayer. The funds were provided in the Ministry of Roads and Public Works budgetary vote. The centre was subsequently managed by Ministry of Tourism.

KANU only returned on the scene in 1985 and arranged for a new offer of the land to be made to it, disregarding the development. A new Letter of Allotment was prepared offering a Term of 99 years w.e.f. from 1st December, 1989 at a peppercorn rent (if demanded). KANU, through David Pius Mugambi, accepted the offer and paid KSh. 1,680 which was demanded by the Commissioner of Lands. A title was then prepared in favour of Daniel Toroitich arap Moi and Peter Oloo Aringo for 99 years from 1st December, 1969. Since the grant was at peppercorn rent, no arrears in annual rent was recovered from KANU.

In 1991 the issue of the development on the land came up and the Ministry of Tourism sought to know what was the current value of the land and also the Government buildings on LR. No. 209/11157. This was because the Financial Regulations required that if the value of the buildings was more than KSh. 200,000, a Sessional Paper had to be prepared for Parliament to sanction the transfer to KANU. There is no evidence that the valuation was even done or that a Sessional Paper was ever presented to Parliament. In the meantime, KANU entered the Centre, assumed the role of Landlord by collecting rents until February, 2003 when the new NARC administration took over the KICC on behalf of the Government.

The Commission appreciates that it cannot make a firm recommendation on the ownership of KICC, since there is an existing court case between KANU and the Government. However, because of the high profile nature of this property, the Commission considered it necessary to include this information relating to the property in this Report.

Other Ministries, Departments and public institutions which sent in Returns indicating that their lands were intact are:

1. Ministry of Planning and National Development
2. Ministry of Labour and Human Resource Development
3. Public Service Commission
4. Department of Police
5. The National Assembly

From the information received by way of public memoranda the Commission has reason to believe that some of the ministries mentioned above lost large tracts of both rural and urban land which had been reserved for their use.

It should also be noted that although many ministries sent in Returns indicating that their lands were intact, they did not take into account the fact that many of the state corporations which lost their lands through illegal and irregular allocations fell under some of those ministries. The permanent secretaries of respective ministries sit on the Boards of Management of these state corporations. In this regard, the individual ministers and permanent secretaries in charge of such ministries at the time the state corporations lost their lands are culpable to a degree.

(ii) *Ministries' Land as Public Land*

All land which is set aside for the use of any Government Ministry is "alienated government land" it is therefore not available for allocation. Just as in the case of state corporations, the ministries hold such land for the purpose of carrying out their mandate. They hold the land on behalf of and in trust for the public. The people expect that such land will be used for the public interest. They would not expect that land set aside for the use of a Government Ministry or Department can be allocated to an individual for any other reason than the said individual's enrichment. Since ministries are the basic institutional forms of government, any property that belongs to them is automatically the people's property both in perception and reality.

(iii) *Findings*

The Commission made the following findings:

Illegal allocation of Ministries' Land through surrenders

The Commission found that a number of Government Ministries lost their land through illegal and irregular allocations of the same. The consultative workshop held between the Commission and the officials of key ministries revealed that the grabbing of ministry land was usually triggered by a letter written by an official of the target ministry and addressed to the Commissioner of Lands. In the letter, the writer would inform the Commissioner that the ministry no longer required a specified piece of land and would have no objection if the land was allocated for other "development purposes". Part Development Plans would be approved by the relevant departments in the Ministry of Lands and Settlement and City Council or other local authority as the case may be. An individual or company would simultaneously apply to the Commissioner of Lands for the allocation of the land. The Commissioner would then allocate the land to the applicant through a Letter of Allotment in excess of his authority. Soon, the allottee would transfer the land to a third party or even state corporation for millions of shillings. The third party would proceed to develop such land as if it never belonged to the public.

Interviews of some past and present officials of the Ministry of Lands indicated that this is what happened in the case of land which had been

compulsorily acquired by the Government for the building of the Nairobi by-passes. The Ministry of Roads, Public Works and Housing was said to have written to the Commissioner of Lands advising that the Government no longer intended to construct the by-passes. Officials at the City Council were prime movers of the illegal allocation of land reserved for the by-passes. The procedures for change of user were not followed. Other lands reserved for roads and other uses country wide are reported to have been illegally allocated in this manner.

Illegal allocation of Government land without reference to the respective Ministries

It was also found by the Commission that land belonging to specific ministries would be allocated by the Commissioner of Lands to individuals or companies at the behest of the applicants without reference to the ministries concerned. However, the main officials in the ministries knew what was happening. The Prisons Department of the Ministry of Home Affairs and the Ministry of Agriculture for example, lost large tracts of their land to individuals and companies in this manner. The Judiciary also lost its land including law courts in this manner. For example, the Eldoret Law Courts were allocated to LIMA LIMITED in this manner. Similarly, ARDHI HOUSE in Mombasa was also allocated in this manner. The allottees either sold the land to third parties or charged it to Banks for colossal amounts of money. **For a detailed list and particulars of lands reserved for ministries and other departments and lost in this manner, see Annexes 38-49 in Vol. I of the Annexes.**

Illegal allocation of Government Houses and Properties

On the basis of a Report submitted to the Commission by the Ministry of Roads, Public Works and Housing to investigate the allocation of Government houses and properties; and on the basis of its own further investigations, the Commission found that thousands of Government houses were illegally allocated to individuals and companies. The allocations were either made by way of gifts or as "un-alienated government land". Some of the allottees then sold the houses to state corporations. Many other houses belonging to local authorities were also allocated to individuals. The Commission could however not make specific

findings on local authority houses due to the inadequate information sent in by respective councils.

There are Rules and Regulations for the allocation of Government Houses either through sale or other disposition to individuals or companies. According to the Government Financial Regulations and Board of Survey Procedures, the Government may only offer a gift of government property if the value of such property is 200,000 shillings or less. If the value is more than 200,000 shillings, then prior approval by the Treasury and Parliament through a Sessional Paper is required. Government houses fall in the category of land which is already alienated. Such houses cannot be categorized as *un-alienated Government Land*. They cannot therefore be allocated to individuals since they are not available for allocation. If they are however to be sold off to individuals or companies due to the dictates of the economy or any other exigency, the proper procedure is for the Government to seek the authority of parliament through a Sessional Paper. Once parliament approves the sale, the houses should then be advertised in accordance with the provisions of the Government Lands Act. This procedure was never followed. **For a detailed list and particulars of the illegal allocations of Government houses, see Annexes 50 and 51 in Vol. I of the Annexes.**

Irregular Purchase of Continental House by the National Assembly

The Commission found that the National Assembly purchased CONTINENTAL HOUSE, L.R NO 209/9677, in a highly suspect manner, which cost the Exchequer hundreds of millions of shillings. The property was advertised for sale by the Official Receiver from the Attorney General's Chambers on 31st March 1995 in the KENYA TIMES. We understand one of the bidders was the National Assembly. However, the building was sold to one of the bidders, ARCHWAYS HOLDINGS LTD for **225 million shillings** on 19th June 1996. On 12th September 1996 (barely three months after the purchase), ARCHWAYS HOLDINGS received a letter from the Attorney General's Chambers inquiring if the property was up for sale and if so, at what price! The letter further stated that the "The Speakers Committee of the National Assembly had requested the Attorney General to initiate negotiations for the acquisition of the said house by Parliament which was in dire need of additional space" ARCHWAYS HOLDINGS responded to the letter on the same day indicating that it was willing to sell the house for **580 million shillings**.

After a series of correspondences, the National Assembly, eventually bought CONTINENTAL HOUSE from ARCHWAY HOLDINGS LTD for **465 million shillings** on 8th October 1997. The facts indicate serious irregularities. The Commission was unable to find out why the National Assembly did not buy the property directly from the official receiver.

Conclusions

The Commission arrived at the following conclusions:

Abuse of Office by Government Officials

A lot of Ministries' lands were illegally allocated through the activities of Government officials which amounted to abuse of office. The re-introduction of multiparty politics in 1992 fuelled the land grabbing mania on the part of the ruling elite. The scramble for land became one of the main preoccupations of political operatives seeking favours. This period also witnessed the emergence of many centres of power regarding land allocations. This was during the tenures of Messrs WILSON GACHANJA and SAMMY MWAITA as Commissioners of Lands.

(iv) Recommendations

The Commission makes the following recommendations:

1. All lands reserved for the use or purposes of a Ministry, Department, or any other Government Institutions which have since been illegally allocated to individuals or companies; should be repossessed and restored to their original purpose by the Government. Titles acquired pursuant to the illegal allocations should be revoked.
2. All allocations of Government and local authority houses to individuals and companies should be revoked.
3. Where the lands in 1 and 2 above have been substantially developed, titles thereto should still be revoked (given their inherent illegality). However, the Government may issue new titles

to the current registered proprietors on new terms and conditions including the requirement that they pay the market value of the land. In addition, all requirements of Planning and Environmental legislation must be strictly complied with.

4. All public officials and others (brokers, professionals, allottees, etc) who participated in the illegal allocations of land should be investigated with a view to being prosecuted, and/or retired from the Public Service in the public interest.
5. The Government should institute measures to recover unjustly acquired monies from the illegal allocation and sale of Ministries, and Government Department land.

(d) The Impact of Illegal Allocations of Urban, Ministries and State Corporations Land

(i) Urban Lands

The Disappearance of Urban Planning and Administration

The illegal and irregular allocation of lands in the urban areas has led to the loss of many public utility lands to private interests. Lands meant for public development have been lost in this manner. Instead of being the basis for development, land has been the subject of speculation. By far the most negative consequence of the wanton illegal allocation of public land is the disappearance of *Planning and Administration* in the country's municipalities and would-be cities. Public land has been allocated to individuals and companies in total disregard of planning legislation especially the Physical Planning Act 1996. The abandonment of planning has occasioned a crisis in Kenya's public tenure system.

In many major towns, buildings and other constructions have been erected haphazardly without attention to future development or expansion. Thus for example, residential estates have been put up in the middle of industrial areas. The result is the uneasy if not conflictual coexistence between manufacturing concerns and the dictates of urban or residential dwelling. In the same vein, residential houses are springing up within the vicinity of Military Barracks and installations. The dangers posed to urban residents

in such circumstances cannot be underestimated. The reality of a “disaster waiting to happen” continues to haunt the Kenyan public. The aesthetic and other benefits of Town Planning have all but disappeared in this country. Areas which were originally planned for residential estates have been allocated and put to other uses such as office blocks without a concomitant change in other facilities such roads, sewage systems, water supply and other services. Nairobi which was once hailed as the “**Green City in the Sun**” is increasingly becoming one big jungle of concrete.

The Disappearance of Public Tenure

With the intensification of illegal allocations of public land, the problem of public tenure has moved from “crisis proportions” to the “extinction” of such tenure altogether. The grabbing of public utility lands has occasioned the disappearance of important public amenities and facilities. School playgrounds have been allocated to individuals and companies in complete disregard to the playing needs of children. The majority of school children either don't play or play under dangerous environments (for example, under electric lines, or even on public highways such as roads and railway lines). Public parking, public toilets, public playgrounds, public cemeteries, road reserves, social halls, and other open spaces have all but disappeared. A major casualty of this phenomenon is the public transport system which has witnessed debilitating traffic congestion with the attendant effects to the economy as a whole.

The Rise of Informal Settlements

Another negative effect occasioned by the illegal allocation of public land is the spread of informal settlements in most municipalities, towns and the Nairobi City. Many allottees of public land either reallocate them to members of the public or “develop” them for onward renting to urban dwellers. The so called slums and kiosks have sprung up in most parts of Nairobi and other towns in this manner. It is a fact that most, if not all of the inhabitants in the slums and the proprietors of the kiosks actually pay rent to some landlord. The real beneficiaries of these informal settlements are the grabbers and not the dwellers. If the responsibility of establishing settlement areas were to be left to the Government and local authorities, the slums and kiosks phenomena would be better handled. It must be emphasized that such settlements and commercial enterprises must be planned.

Kenyans live in these informal settlements in squalid conditions due to congestion and lack of basic amenities. This in turn leads to a culture of existential struggle which negates human decency and solidarity. The spiraling crime in many urban centres is one of the negative consequences of these developments.

General Environmental Degradation

The illegal allocation of public health facilities and sanitary areas has grossly interfered with any efforts of maintaining a public health system. Both solid and other waste disposal processes by members of the public have been seriously undermined. The situation has been further compounded by the encroachment upon or allocation of riparian areas within municipalities, townships and Nairobi. Rivers and other Wetland areas have been turned into sewage disposal and dumping sites causing serious environmental pollution. Huge commercial and religious or community centres like Nakumatt Ukay, and the Visa Oshwal Centre off Ring Road, Westlands are constructed on river and wetland systems without any regard to the consequences.

General Moral Decay

The illegal allocation and grabbing of public land is symptomatic of the general moral decay in our society. When land that belongs to the public is allocated so as to satisfy private interests at the expense of the majority, then public morality suffers. Public interest disappears altogether and the syndrome of "every one for himself and God for us all" takes root. This is what has happened in Kenya.

(ii) State Corporations and Ministries Land

The loss of land by state corporations and ministries through illegal allocations not only affects the operations of such institutions, but the country's economy as a whole. State corporations in particular suffer huge financial losses through land related scams. When a state corporation loses land, it means it has to make financial adjustments in its budget to acquire other land. This costs the exchequer money and increases the tax burden on the public. On the other hand, when a state corporation purchases illegally acquired land, it means it has spent money on land which it cannot own in

law. Such expenditure leads to the de-capitalization of the corporation. Such transactions have a negative effect on the economy because they distort market fundamentals and weaken the country's currency.

3. SETTLEMENT SCHEMES AND TRUST LANDS

(a) *Background*

Settlement Schemes have been an integral part of Kenya's land tenure system. At independence, one of the main preoccupations of the Government was to settle the citizens who had been displaced from their lands through the discriminatory colonial policies of land alienation. Indeed the struggle for independence had been fuelled by widespread discontent among the people about the colonial occupation of their land and their displacement from the same. Matters had not been helped by the fact the African reserves to which the "natives" had been consigned could not sustain their ways of life.

Both the colonial authorities and the independence Government had realized that the large agricultural farms in the so called white highlands could not coexist alongside overcrowded reserves. The peoples' hunger for their land had to be addressed as a matter of urgency.

The issue of resettlement however, became even more pertinent given the fact that the economic blueprint for the newly independent nation had identified agriculture as the basis of the economy. It was therefore important that the larger majority of the population be allocated plots of land which could support agricultural production. This meant that the "white highlands" would be the most natural target for such a programme.

The Government had two options in trying to resettle the displaced people. It could simply have retaken all the land for the resettlement of the landless on the basis of the doctrine of state sovereignty. The other option was for the Government to tread the path of a market based land redistribution strategy. The political realities surrounding the negotiations for independence at the Lancaster House Conferences favoured the second option. This could address the resettlement question peacefully without radically interfering with the "rights of the settler community over their farmlands". Herein lies the genesis of the policy and national programme of settlement schemes in Kenya.

The Government gave priority to a policy which would enable the African farmers to purchase European owned land. Towards this end, agreement was reached between the Kenya and British Governments whereby the latter agreed to finance through loans and grants the purchase of 1 million acres of European Settler farms adjacent to densely populated African areas. These lands were to be then subdivided into what were considered economic units and allocated to African farmers.

Parallel with smallholder settlements in the former scheduled areas, several other programmes to assist Africans take over large scale European farms in their original state were initiated. These takeovers were financed by loans from the British Government, the World Bank, and other Agencies. As at 31st December 1965, approximately 550, 000 acres in the former scheduled areas had come into African ownership under these programmes. A total of 24,000 smallholders and 750 large scale farmers had acquired land either as individuals or collectives such as companies, partnerships or cooperatives.

The loans and grants received for this purpose by the Government were credited by Parliament to an agricultural Fund managed by Settlement Fund Trustees (SFT). The Trustees were established under the Agriculture Act, cap 318, Laws of Kenya mandated to manage the Fund and to purchase any land for resale purposes. The Settlement Fund Trustees was therefore the statutory organ established for the purpose of executing the settlement programme. The arrangement between the Fund and the people to be settled, was something akin to a "land purchase on mortgage", whereby the farmers were regarded to have bought the land from the Fund through monies loaned to them by the Fund. The farmers were supposed to make periodic repayments of the loan to the Fund until the whole purchase price had been paid. Only then would they discharge their obligations and acquire title to the land.⁹

Through these programmes, the Government was able to establish a number of settlement schemes; a process which has continued to this day. Schemes such as the 1 Million Acre, the Shirika and Haraka programmes

⁹ See the SECOND DEVELOPMENT PLAN-1970-1974

were designed along the objectives discussed above. Due to the continuing pressure for land after independence the Government was forced to start creating settlement schemes in areas which were not necessarily of high agricultural potential. Land has remained the main source of economic activity and hence a means of survival for the majority. Consequently finding land to settle the landless has been a major preoccupation of successive post independence Governments. Settlement schemes have had to be carved out of both unalienated and alienated Government land (such as Gazetted National Forests) and Trust land to settle the "landless".

The creation of latter day settlement schemes has been operationalised through the Ministry of Lands and Settlement. Although the S.F.T. remains technically responsible for such schemes, the Provincial Administration has also had a hand in the actual identification of the people to be settled and the acreages to be allotted to each individual. This has been occasioned by the fact that the District is the focal point of the implementation of Government policies. Thus, where land is identified for settlement, it is almost automatic that a district based plot allocation committee will be charged with the responsibility of settling the people. The committee is chaired by the District Commissioner of the area.

(i) Settlement Schemes as Public Land

The history, rationale and policies regarding settlement schemes leave no doubt that such lands are "public lands" within the meaning and context of this inquiry. Although the Government long adopted the free market system of development, it pursued a deliberate policy of maintaining some form of public control of the process of settling people either to stimulate agricultural production or to establish human settlements so as to constantly address the problem of landlessness. Settlement schemes were considered appropriate forms of public tenure to deal with these twin objectives. The schemes were created through loans to the Government which would have to be repaid by a charge on the Exchequer. The more recent schemes were created from lands that were either unalienated Government land or Trust land.

The public interest in these schemes therefore remains paramount. In particular, members of the public would be justified to expect and demand

that the settlement scheme lands are allocated in a manner that conforms to the purpose for which they were established. These purposes are to stimulate agricultural production or to settle the landless. They would not expect that such schemes are used to allocate land to people who are neither landless or don't deserve to be allocated such lands for one reason or another. They would not expect such schemes to provide a mechanism and an opportunity for land grabbing and speculation as has happened in many areas. They would expect that all the institutions and public officers would deal with such lands on trust for the people of Kenya. That is why it was no accident that the statutory organ charged with the funding and management of these schemes *was* called the *Settlement Fund Trustees*.

Yet in the course of this inquiry, the Commission found that the manner in which settlement schemes have been established and allocated falls far below the public trust interest inherent in them. Settlement schemes have repeatedly been used as conduits for land grabbing.

(ii) Findings

General Deviation from Original Intent

The Commission found that while the establishment of settlement schemes and their subsequent allocation in the early years of independence generally conformed to the original objectives, there has been a general deviation from these objectives in the years after. Land in the areas set aside or acquired by the Government as settlement schemes has been allocated for purposes other than settlement or agricultural production. Extraneous or irrelevant factors have been taken into account by those in charge of allocating lands in settlement schemes. The irregularities that have characterized the land allocation process in newly created settlement schemes country wide have elicited widespread outcry and protest from would be beneficiaries. Written memoranda received by the Commission from members of the public and official records at the Ministry of Lands and Settlement reveal many malpractices, irregularities and even illegalities in the establishment and creation of settlement schemes.

In total, there are four hundred and eighteen (418) settlement schemes in Kenya. This number comprises of high potential and low potential areas. (*See Annex 52 in Vol. I of the Annexes*). The establishment of these

schemes has been a continuous one since the early days of independence. While the S.F.T. was in total control of the allocation and management of the schemes in the immediate post independence period, its role has been diversified among the Ministry and provincial administration over the years. The current practice is such that once the Government has set apart land for settlement; the land technically falls under the administrative jurisdiction of the Settlement Fund Trustees while the actual implementation of the settlement programme is taken up by a District Plot Allocation Committee. The Committee comprises of six persons, namely, the District Commissioner as chairman, the District Settlement Officer as secretary, the area Member of Parliament (MP), the District Agricultural Officer, the Chairman of the County Council of the area and the Clerk to Council. This Committee wields enormous powers in the land allocation process. The Settlement Fund Trustees does not appear to have any supervisory powers over these committees. This absence of accountability on the part of district plot allocation committees has occasioned the abuses recounted below.

Allocation of Land in Settlement Schemes to Undeserving People

The most glaring finding by the Commission with regard to settlement schemes is that land was allocated to personalities who were entirely undeserving. This was due to the fact that the allottees were neither "landless" nor in possession of any unique skills and facilities to be able to use the land in an agriculturally productive manner for the benefit of the country's economy.

Interviews of ministry officials revealed that according to the official policy of land allocation in settlement schemes, the plot allocation committees are supposed to reserve 60% of the land for local residents of the area and 40% for deserving people from other parts of the country. The intention was to give priority to the landless from the region in which the settlement scheme had been established while at the same time not excluding the landless from other parts of the Republic. This would attain the twin objectives of settlement and national integration.

Many schemes however show that this policy was blatantly ignored by the committees. District officials, their relatives, members of parliament,

councilors and prominent politicians from the area, Ministry of Lands and Settlement officials, other civil servants and the so called “politically correct” individuals in the former government were allocated lands in settlement schemes at the expense of the deserving poor from the respective areas.

The KINALE SETTLEMENT SCHEME in KIAMBU is an illustration of some of these misdeeds. A Report by an Inter-Ministerial Task Force appointed to inquire into the goings on in the Scheme established that the original list of allottees showed the total number of plots to have been 1427 while a second list had the total number of plots as 1526. The total number of plots which had been created at the time of the Task Force was 3,503. These discrepancies could not be explained. The problem was further compounded by the fact that the original list of genuine allottees mysteriously disappeared from the records at the office of the District Commissioner- Kiambu. The Task Force concluded that many undeserving people were allocated plots in the settlement scheme while the genuine landless were struck off from the list.

The Commission also established that the Ministry of Lands also made direct allocations of land in settlement schemes to certain applicants. There was no clear policy or criterion for direct allocations of settlement scheme land to selected applicants by the Ministry officials. Large acreages of land were allocated in this manner.

As a direct consequence of the above malpractices, many people who would otherwise have been entitled to lands for settlement and subsistence purposes were left out. Others who applied for allocation were short listed and even paid the requisite fees; but when the actual allocations were effected, their names and other particulars were omitted from the list of allottees altogether. Their complaints and protestations were not addressed by the relevant authorities. Written memoranda from members of the public indicate that those who protested have variously been subjected to harassment by the Provincial Administration while others have been charged in courts of law with trumped up charges. This situation was still persisting in many settlement schemes at the time of writing this Report.

Allocation of Above Average Acreages of Land to Undeserving People

Closely related to the malpractice of allocating land to people who did not deserve was the deliberate practice of making allocations of land in

proportions that went far beyond the average acreages recommended. Examples abound where the majority of the allottees got land in the area of between 2 and 5 acres while some individuals got land between 10 and over 100 acres in the same scheme! No reasons or justification for this kind of disparity is available. The Commission concluded that the difference can only be explained as a furtherance of the malpractices already alluded to since those who received the above average allocations were not entitled to any allocation in the first place. **For an illustration of allocations to undeserving people and above average allocations See Annex 53 in Vol. I of the Annexes.**

No Standard Criterion for Reserving Public Utility Plots

Another finding by the Commission was that decisions on what ratio of scheme land to reserve as public utility plots were left to Planners without any guiding or set criteria. The percentages to be reserved varied enormously. In a few schemes, no land was reserved for public purposes, while in others; there was a variance of between 2 and 5%. There was hardly any uniform standard. Because of these anomalies, plots which had been reserved for public purposes in a number of settlement schemes ended up being allocated to individuals. The Kinale Settlement Scheme is again an illustration of this kind of illegality. Many public utility lands and marshy areas which should have been conserved were allocated to individuals on orders of the Provincial Commissioners in Central Province between 1992 and 1996. **Below is a list and particulars of public utility lands in the scheme allocated to individuals.**

LAND RESERVED FOR PUBLIC UTILITIES BUT HAS BEEN SUBDIVIDED AND ALLOCATED

No.	Plot No.	From	To	Date of Transfer
1.	1468	Government	Maria Wangari Wangombe	14/10/96
2.	1503	"	Lucy Wanjiru Wainaina	20/6/2000
3.	1504	"	Jeremiah Kihara Mihari	17/3/97
4.	1506	"	James Mugane	24/2/97
5.	1518	"	Samuel Ababu Angote	11/6/92
6.	1521	"	Eunice Wanjiku Mungai	11/6/92
7.	1522	"	Peter Njoroge Ndungu	3/4/92
8.	1507	"	George Kiiru Kamau	
9.	1523	"	Mburu Njoroge	5/2/98
10.	1525	"	Joseph Karanja Kibe	27/10/97

No.	Plot No.	From	To	Date of Transfer
11.	1643	"	Rose Kaari	18/3/93
12.	1683	"	Michael Maina Ndirangu	21/12/92
13.	1683	Michael Maina Ndirangu	Esther Wanjiru Gitahi	27/10/97
14.	1688	Government	Catherine Njeri	21/12/92
15.	1689	Government	Geneover Wairimu Mwangi	21/12/92
16.	1687	"	David Wayui Mwangi	21/12/92
17.	1698	"	Thuku Ikigu	21/12/92
18.	16990	"	Jedida Martha	21/12/92
19.	1691	"	Kiambaa Kawaida Co. Ltd.	21/12/92
20.	1692-1697	"	Kiambaa Kawaida Co. Ltd.	21/12/92
21.	1703-1707	"	Kiambaa Kawaida Co. Ltd.	21/12/92
22.	1699	"	Samuel Muriithi Muthinga	21/12/92
23.	1700	"	Ndumberi General Mechants	21/12/92
24.	1708	"	Timothy Kiega Mwihia	21/12/92
25.	1709	"	Patricia Wawire	21/12/92
26.	1710	"	Salome Njeri Ng'ang'a David Njogu Mwai	21/12/92
27.	1703-1707	"	Kiambaa Kawaida Co. Ltd.	21/12/92
28.	1715	"	Kiambaa Kawaida Co. Ltd.	21/12/92
29.	1718	"	Peter Mururi Kagecha	21/12/92
30.	1719	"	Timothy Kiega Mwihia	21/12/92
31.	1702	"	Sebastian Njiraini Mwangi	21/12/92
32.	1722	"	Jeremiah Kahara Mihari and Mary W. Irungu	21/12/92
33.	1723	"	Elizabeth Wanjiru Njoroge	21/12/92
34.	1724	"	Dunk Investment Ltd.	21/12/92
35.	1725	"	Elizabeth Wairimu	21/12/92
36.	1726	"	Margaret Muthoni Kanake	20/8/96
37.	1740	"	Margaret Wanjiru and George Njuguna Ngugi	19/9/2000
38.	1721	"	Damaris W. Ng'ang'a and James Mwangi	
39.	1727	"	John Gikonyo Gitahi	21/12/92
40.	1728	"	Augustine Mughcuru	21/12/92
41.	1741	"	Geoffrey Lukuudi	21/12/92
42.	1742	"	Mary Jutaa To Fredrick Antony Nderu	21/12/92
43.	1743	"	Jackson Kariuki Ndegwa nd	21/12/92

No.	Plot No.	From	To	Date of Transfer
			Stephen Wainaina Ndegwa	
44.	1744	Government	David K. Kihui	21/12/92
45.	1745	"	Attamay Nyanjuga	21/12/92
46.	1746	"	Samuel Mwangi Ngoima	21/12/92
47.	1747	"	Njenga Kimiti	21/12/92
48.	1748	"	Njenga Kimiti	21/12/92
49.	1749	"	Evanson Kimanga Mungai	21/12/92
50.	1750	"	Ndumberi Merchants Ltd.	21/12/92
51.	1751	"	Ndumberi Merchants Ltd.	21/12/92
52.	1720	"	Franial nyambura Chege George Ng'ang'a Njoroge	21/12/92
53.	1752	"	Peterson Muriuki	21/12/92
54.	1753	"	Joseph Boinet	21/12/92
55.	1754	"	Esther Njeri Muluto	21/12/92
56.	1755	"	Leah Menia and Asaph Njoroge Ngigi (Double)	21/12/92
57.	1756	"	Jacob Ngigi Kanini	21/12/92
58.	1757	"	Rebecca Muthuri	21/12/92
59.	1758	"	Wilson M. Kamau and Cyrus Ng'ang'a	21/12/92
60.	1759	"	S. Muthiora	21/12/92
61.	1760	"	Mwaura Kamau	21/12/92
62.	1761	"	Samuel Maingi Ngugi	21/12/92
63.	1763	"	Ndumberi General Merchants	21/12/92
64.	1764	"	Hannah Wanjiru Ndung'u	21/12/192
65.	1729	"	Nahashon Mwaura Njuguna	21/6/92
66.	1730	"	John K. Karuga	21/12/92
67.	1730	"	Zaverio Kinyua Gitonga	21/12/92
68.	1731	"	P. M. G. Kamau To Geoffrey Gakure Mwangi on 14/3/97	21/12/92
69.	1734	"	John Njoroge Karuga	21/12/92
70.	1735	"	Fredrick Munyua Kariuki	21/12/92
71.	1736	"	Peter Ngigi Karanja	21/12/92
72.	1737	"	Stephen Gitau Waira David Chege Thiga (on 26/9/96) and Njoroge Ngwaro (on 2/8/99)	21/6/92
73.	1738	"	Loice Nyokabi Karuga	21/12/92
74.	1738	"	John Njoroge Karuga	21/12/92
75.	1422	"	John Ndungu Njoroge	20/8/96
76.	1432	"	Lydia Murugi	27/10/96
77.	1468	"	Maria Wangari Wangombe	24/2/97
78.		"	Maria Wangari Wangombe	24/2/97

No.	Plot No.	From	To	Date of Transfer
			To Perer Muchai Njihia	
79.	1472	Government	James K. Kamaru	24/2/93
80.	1429	"	John Njoroge Matanga	16/2/93
81.	1516	"	Francis Wainaina Nyanjui	17/12/97
82.	1710	"	Salome Njeri Ng'ang'a	20/8/96
83.	1711	"	Kiambaa Kawaida Co. Ltd.	21/12/92
84.	1712	"	Thaiya Obadiah	21/12/92
85.	1713	"	Wairimu Ngugi and George M. Kagiri	21/12/92
86.	1714	"	Margaret Wambui	21/12/92
87.	1844	"	James Njoroge Kimani	20/8/96
88.	2348	"	Alex Muteti	2/10/93
89.	2349	"	Michael M. Munene	2/10/93
90.	2350	"	Susan Wanjiru	1/12/95
91.	2351	"	Solomon Muriithi	
92.	2352	"	Jeniffer Ngengo	1/12/95
93.	2353	"	Winiie Ngendo Kangethe	2/10/93
94.	2354	"	Stephen Ayoo	2/10/93
95.	2346	"	Damaris Wangari and Peter Mwangi	
96.	2463	"	Yusuf Kimutai	2/7/96
97.	2464	"	John Njoroge Karuga	23/4/96
98.	2465	"	Joseph Mburu Karanja	
99.	2466	"	Yusuf Kimutai	10/3/96
100.	2467	"	Milton Njoroge and Paul Kariuki	10/3/96
101.	2468	"	Yusuf Kimutai	23/4/96
102.	2468	"	Yusuf Kimutai	23/4/96
103.	2469	"	Silas Kiptui Kipchilat	23/4/96
104.	2565	"	Mary Wanjiru Mwangi	
105.	2566	"	Peter Mbuthia	20/8/96
106.	2567	"	Jane Susy Njue	10/8/97
107.	2568	"	Joyce Wambui Njenga	20/8/96
108.	2570	"	Samuel Mwaura Njihia	20/8/96
109.	2571	"	Elizabeth Wairimu Chege	20/8/96
110.	2572	"	Margaret Wangui Jason	27/8/96
111.	2573	"	Josphat Mwaura	27/8/96
112.	2574	"	Naftali Kahunyuro	27/8/96
113.	1702	"	Sebastian Njiraini Mwangi	24/2/92
114.	1642	"	James Ngungu Mburu Johnson Kibe Mbugwa	11/8/97

No.	Plot No.	From	To	Date of Transfer
115.	406	"	David Muiruri Kiarie	1/3/96
116.	1718	"	Peter Wamuhuri Kagecha	21/12/92
117.	1719	"	Timothy Kiega Mwhia (Loans Shs. I million)	21/12/92

Settlement Schemes established and Administered by the Office of the President

The Commission found that the Office of the President had established settlement schemes outside the framework of established procedures. This was done through the personal initiative of the past two Presidents. The mechanism used was a presidential directive to the provincial administration to settle specific groups of people in designated areas. The Commission's efforts to get full and accurate information regarding this category of schemes were not successful. No official records detailing the goings on in these schemes were kept and if they were, the Commission simply could not access them. However, the Commission was able to establish that twenty two (22) of these schemes were established in forest areas before degazettement. **For a list of schemes established in this manner, see Annex 54 in Vol. I of the Annexes.**

Full details and legal status of these schemes are to be found in the section dealing with Forestlands.

Illegal establishment of Settlement Schemes in farms owned by the Agricultural Development Corporation (ADC)

The Agricultural Development Corporation was established under the Agricultural Development Corporation Act, cap 444 of the Laws, of Kenya in 1965. The Corporation was meant to provide an important link to the agricultural industry through specialized services and activities. Its main objective was to promote the production of the Country's "essential agricultural inputs". In particular, the Corporation was established:

- To produce seeds and pedigree and high grade livestock including hybrid maize seed, cereal seed, potato seed, pasture seed, pedigree and grade cattle, sheep, goats, pigs, poultry and bees

- To undertake such activities as the Corporation may decide from time to time for the purpose of developing agricultural production in specific areas or specific fields of production; and
- To participate in activities in agricultural production which are the primary and secondary functions of the Corporation and which in the view of the Corporation are commercially viable.
- To provide and finance by means of loans, share capital or otherwise approved agricultural undertakings.
- To borrow money on such terms and for such purposes as may be approved by the Minister for Finance
- To purchase, lease, acquire or dispose of any movable and immovable property of all kinds and
- Do all such things whether agricultural or of other nature which may be conducive to the proper discharge of functions of the Corporation.

The primary and core function of the Corporation was therefore to undertake and sustain the production of a variety of high quality agricultural *inputs* and *produce* so as to help the Country attain self sufficiency in food and effectively compete on the export market. The Corporation discharged these functions for nearly twenty six (26) years; helping the Country to feed its rising population and economically participate in trade in an ever increasingly competitive international market. The Government set aside and allocated land to the Corporation to discharge these essential functions. The supervisory authority over the Corporation was vested in the Ministry of Agriculture. However, later in the 1980's, the supervisory authority was taken over by the Office of the President which office was increasingly taking over all strategic state corporations.

With the passage of time, the need for the Corporation's services intensified. It would have been expected that the Government would have increased its fiscal and logistical support to the Corporation. On its part, the Corporation was expected to double or even triple its efforts in rendering scientific and productive support to the industry that had long been recognized as Kenya's economic backbone. Rather than dispose of its land, the Corporation was expected to acquire more land for its activities. At any rate, it had no authority to dispose of Government land.

Yet against all these rational expectations, the Agricultural Development Corporation fell victim to the public land grabbing mania that had afflicted many other sectors in the Country. For reasons which were not clearly spelt out or discussed publicly, the ADC Act was amended in 1991 changing the specific mandates of the Corporation to something more general. In this regard, a new section 12 was inserted to read as follows:

“The functions of the Corporation shall be to promote and execute schemes for agricultural development and reconstruction in Kenya by the initiation, assistance or expansion of agricultural undertakings or enterprises.”

This must have been a prelude to the Order issued in 1994 directing the allocation of eight (8) ADC farms to individuals under the guise of settlement schemes to be later financed by the Settlement Fund Trustees. The Corporation's land was then illegally allocated to individuals and companies as political reward or patronage. In addition, a number of ADC farms were irregularly sold to some favoured individuals. Below is a table of the irregular sales:

ADC FARMS SOLD IRREGULARLY					
Farm Name	Sold To	Acreage	Locality/Area	LR.No.	Sale Price, KSh.
ASTRA ADC Farm	Prof. Mbithi	5518	Machakos	9917/9	3,310,920
ASTRA ADC Farm	Charles Mbindyo	5516	Machakos	9917/9	3,309,720
ASTRA ADC Farm	AIC Church	3851	Machakos	9917/8	Nil
Edge	Mwisho	2490	Trans Nzoia	7581.1/2	286,000
Edge	Karuna Units	893	Uasin Gishu	8466	240,000
Edge	SummerHills	2315	Nakuru	8324/3	526,290
Lusiru	Ndeffo	2820	Nakuru	9955	405,000
Lusiru	Kimoso P.G. Mogero	1000	Uasin Gishu		324,400
Waterfalls	V. arap Too	795	Trans Nzoia	4486	96,000
S&B	Nyakiambi	961	Nakuru		290,770
S&B	Arnagherry	1756	Trans Nzoia	6136, 5712	620800
Quintin	Abdul Aziz Kanji	787	Trans Nzoia	7076/1/2	866,800
Quintin	Ndoinet	1127	Nakuru	8323	248,683
Avondale	Subukia	3712	Nakuru	10480	2,655,320

ADC FARMS SOLD IRREGULARLY					
Farm Name	Sold To	Acreage	Locality/Area	LR.No.	Sale Price, KSh.
Avondale	Njenga Karume	149.33	Nakuru	9069, 9062	397,000
Fensbo	Baringo Farmers	1221	Nakuru	10006, 9635/3	401,841
Tarkwet	G.K Kariithi	1238	Nakuru	10372, 11286, 9370, 8543/1	1,700,000
Kiboko	Kimiti Farmers	800	Nakuru	9674	188,680
Lelechwet	Haraka Farmers	1895	Nakuru	8020	516,286
Pele	Elijah Minot	358	Nakuru	7606	125,000
Murten	Bridge	242	Nakuru	9242	142,000
High Over	Belsoi E.K	741	Nakuru	11369	500,000
Garbutt	Njenga	737	Nakuru	10829	310,000
Baraka	Catholic Church	1040	Nakuru	9867	13,000
Broatich	B.N Hinga	1112	Nakuru	9216, 11420	640,000
Broatich	Ngao	6899	Trans Nzoia	6991, 6992/1	340,000
Broatich	Boma	1380	Trans Nzoia	5558/2	310,000
Kibomet	Naisabu & Kibomet	5053	Trans Nzoia	1839, 3709	2,451,000
Kaboywa	Gitwamba	1235	Trans Nzoia	6439/4	327,000
Kaboywa	Mutwot	1031	Uasin Gishu	8409/2	300,000

An examination of the records by the Commission revealed that the allocations were made to the then “politically correct” persons in the former regime along similar lines as the allocation of other public land and settlement scheme land. The intrusions by the executive into the mandate and operations of the ADC were a subject of examination by the Parliamentary Investment Committee following the audit of its annual accounts for the year ending 30th June 1997. The findings of this Committee were published in its Eleventh Report of 2001. In the Report, the Committee heavily criticized the allocation of the ADC farms to individuals. This criticism was very well founded in our view. Just as the Committee observed, this Commission is of the opinion that the allocation of ADC land is not intended to be used either for settling the landless or for distribution among the better-off. **For a list of some of the high profile allocations of the ADC Farms, see Annex 55 in Vol. I of the Annexes.**

Conclusions

- The establishment of Settlement Schemes and subsequent allocation of land for the said purpose has been operationalized in an environment lacking a clear legal, policy, and regulatory framework. This scenario has provided opportunities for civil servants, politicians, and other individuals to acquire public land illegally and irregularly in these areas.
- All the malpractices in the allocation of settlement scheme lands as highlighted above constitute illegal or irregular allocations in favour of the individuals and companies to whom they were made.
- The allocation of ADC farms to individuals and companies under the guise of settlement schemes was outrightly illegal as it was done contrary to the Agricultural Development Corporation Act and other relevant laws notwithstanding the amendment of 1991. This amendment may have been a prelude to what happened to the Corporation in 1994 when it was compelled to allocate its land to individuals. However, the amendment does not in our view provide the legal basis for the allocations of the Corporation land to individuals. The legislature could not have intended to amend the Act so as to facilitate the allocation of public assets to individuals.

(iii) Recommendations

1. All land allocations in Settlement Schemes which were made to people who were at the time public officers, members of parliament, area councilors, political operatives, and other undeserving people, at the expense of the landless and contrary to established policy and procedures: should be revoked. The lands in question should be repossessed and allocated to the landless on the basis of 60% in favour of local inhabitants and 40% in favour of the landless from other parts of the Country.
2. All land in Settlement Schemes which was allocated to individuals and companies substantially in excess of the recommended economic unit should be repossessed by the Government. The excess allocations so repossessed should be reallocated to the landless on the basis of the formula suggested in 1 above (These reallocations

should however only be made where the land in question is not forest land or other ecologically fragile area).

3. All public officials especially those in the Department of Settlement, who facilitated the illegal allocations in settlement schemes, should be investigated and prosecuted where offences may have been committed by them in the process of such allocations.
4. To the extent that the objectives for which the Agricultural Development Corporation was established are still valid today as they were in 1965; all allocations/sales of Agricultural Development Corporation (ADC) lands to individuals throughout the Country should be revoked. All such lands and farms should revert to the Corporation. The Corporation may in cases where it is proved that certain of its lands have been occupied by the genuinely landless, formalize such settlements in consultation with the Settlement Fund Trustees. New titles should be issued to the landless allottees.
5. Land that was reserved as a public utility in a settlement scheme (including conservation areas) and later irregularly allocated should be repossessed. The land so repossessed should revert back to the original purpose for which it was reserved.
6. The Government should prepare a Sessional Paper setting out the objectives and policy guidelines for the establishment, allocation and management of Settlement Schemes in the Country. A comprehensive law governing the establishment, allocation and management of Settlement Schemes based on the Sessional Paper should be enacted by Parliament. All proposed settlement schemes should reserve a percentage of land for public purposes.

(b) Trust Lands

(i) *Background*

The meaning of Trust land has already been discussed in the definition section of Part Three of this Report. Here, we discuss briefly, the origin of Trust lands as a form of land tenure in this Country. Trust lands were a creation of the dual policy of land ownership and tenure which was

introduced in the country by the colonial authorities. The Crown Lands Ordinance of 1915 declared all land in Kenya to be "Crown Land" meaning that all land was now the property of the British monarchy (or Crown). The land was to be held and administered by the colonial Governor on behalf of the Crown. This Ordinance and the earlier one of 1902 empowered the Governor to make grants of freehold and leasehold to individuals and companies. The individuals in question were the white settlers while the companies were British and South African Syndicates.

The grants of freehold and leasehold made to the settlers were situated in areas which came to be known as "the white highlands". This phrase denoted the climatic and agricultural suitability of the lands to the needs of the settlers. As for the Africans, since they were considered incapable of "owning land" within the meaning of English law, land had to be reserved for them in specially designated areas away from the white highlands called the "Native Reserves", "Special Reserves" or "African Reserves". These reserves were then held on trust for the Africans by the Native Lands Trust Board. The white highlands had a separate administration from that of the reserves. The law applicable to the reserves was African customary law, while that applicable to the white highlands was English land law.

The effect of these discriminatory colonial land policies was soon to be felt in the reserves. The lands set aside for the use of the Africans could not sustain their communal lifestyles and culture. This led to political agitation by the African peoples for the recovery of their lands of which they had been dispossessed. The response of the colonial government was to appoint a Commission to look into the problems in the reserves and advise the government on the way forward. Consequently, it was argued that the best way to address the discontent of the Africans was to radically change their land tenure from communal to individual tenure. This would involve three stages that is; consolidation, adjudication and registration. At the end of the exercise, the Africans would own land individually and would have title deeds to their parcels of land.

The process of individualization of tenure in the reserves started in earnest in the 1950's through the enactment and passage of various Ordinances and Rules. By 1963 however, it was obvious that the process could not be completed as large areas in the reserves remained un- adjudicated. All

those areas in the reserves that were un-adjudicated at independence became known as *Trust lands*. Before independence, these lands (then called Native reserves or lands) were held by the Native Land Trust Board. Under the Constitution the title to Trust lands is vested in the County Councils of the area in which they are situated. The county councils hold the land on trust and for the benefit of the people ordinarily resident on the land in the area. The local residents derive their rights, interests and benefits in respect of trust land under the applicable African Customary law.

(ii) Trust Lands as Public Land

Trust lands are not strictly speaking “public lands” because as can be seen from the foregoing discussion, they are vested in the local communities of the areas in which they are situated. Ideally, they should be referred to as “Community Lands”. Under both the Constitution and the Trust Lands Act, **trust lands are neither owned by the Government nor by the County Council.** The county councils simply hold the title to such lands on behalf of the local inhabitants of the area. For as long as trust land remains un-adjudicated and un-registered, it belongs to the local tribes, groups, families and individuals in the area in accordance with the applicable African Customary Law. Once registered, trust land is transformed into private land. It then becomes the sole property of the individual or group (not more than five people) in favour of whom it is registered.

The only ways in which trust land can be legally removed from the communal ownership of the people is through *adjudication and registration or Setting Apart*. Adjudication and registration removes the particular lands from the purview of community ownership and places them under individual ownership. Setting apart removes the trust lands from the dominion of community ownership and places them under the dominion of public ownership.

In the course of its inquiry however, this Commission encountered allegations from public memoranda to the effect that, trust lands in some areas had been allocated to individuals contrary to the provisions of the *Constitution*, the *Trust land Act* and the *Land Adjudication Act*. In other words, even trust lands had been targeted for land grabbing through these

illegal and irregular allocations. To be able to extend its inquiry and dragnet to these lands, the Commission made a decision to regard all those trust lands that had been allocated to individuals and companies contrary to the provisions of law and in total disregard of the interests of local communities; as public land. The Commission concluded that the interests of local communities in their trust lands were sufficient enough to be regarded as a “public interest” within the context of this inquiry.

(iii) Findings

Allocations of Trust land contrary to the Constitution and the Land Adjudication Act

The Commission found that in County Councils where trust land still exists, (i.e. where the adjudication process has yet to take place or where as was usually the case, local communities contributed some land for public purposes to the Council which then was to hold them on trust for the community), illegal allocations of the same were made to individuals and companies through the connivance of either the county councils or the Commissioner of Lands.

In this regard, land which had neither been adjudicated nor set apart was allocated to individuals. Letters of Allotment or Grants of Title were made to the individuals and companies concerned. Councillors were the main beneficiaries of the illegal allocations of Trust land. Minutes of Council meetings indicate that at times, the only item on the agenda was allocation of land to the Councillors.

Trust lands which had been set apart for a public purpose or for use as public utilities were later allocated to individuals and companies through the county councils. The local authorities failed in their responsibility of holding land within their jurisdiction on trust for the people of the area. There were cases of double allocation of land to some people. (Details of this category of allocations are found in *Annex 56 in Vol. I of the Annexes*.)

The Commission was however hampered in its efforts to establish the particulars of these allocations due to the fact that the affected county councils either failed or refused to submit relevant information in this regard to the Commission. In other instances, the Commission found that certain allocations had already been challenged in courts of law and could

not therefore investigate them. Although the Commission had no time to investigate these complaints, the facts reveal serious breaches of the law relating to Trust land.

Some of the most glaring allocations of Trust land in a manner that goes against the intent and spirit of the Constitution, Trust Land Act and the Land Adjudication Act are as follows:

- Iloodo-Ariak and Mosiro Adjudication Sections
- Kiamura "A" Adjudication Section
- Fourteen Falls Integrated Programme, Thika
- Hill Farm Kamwenja, Mathari, Nyeri

ILOODO-ARIAK AND MOSIRO ADJUDICATION SECTIONS

The two Adjudication Sections are situated in Kajiado District, and are good examples of the abuse of the adjudication processes by ignoring the rights of the local people under customary law. The Iloodo-Ariak land is situated south-west of Nairobi in Kajiado District. It is occupied by over 6,000 indigenous Maasai Kenyans. The land was by all accounts, **Trust land**. It belongs to the local residents of the area. By virtue of section 114 of the Constitution of Kenya, the land was vested in the Olkajuado County Council to hold in trust for the Ilkeekonyokie clan of the Maasai community. In or about 1979, the Iloodo- Ariak area was declared an Adjudication Section within the meaning of section 5 of the Land Adjudication Act. Subsequently, the Adjudication officials were appointed and posted to the area. The process of adjudication was completed in 1989. The Adjudication Register was published for inspection and objections invited within sixty (60) days.

After investigations and interviews with the local community, the Commission found that the adjudication process was fraudulent. The names of many Government officials including those of their relatives and friends were entered on the register as owners of land. A total of 362 persons who were not local residents of the area were recorded as owners of land and issued with title deeds. Many rightful inhabitants of the area were omitted from the register and disinherited from their ancestral land. This process violated the Constitution of the Republic. Attempts by the affected inhabitants to seek legal redress were frustrated by the barriers

erected by section 143(1) of the Registered Land Act, Cap 300. It is the Commission's argument that where this section violates the Constitution, the latter should prevail. Trust land belongs to the people ordinarily resident in the area in which it is situated. The local people own that land in accordance with the applicable customary law. The rights of the local people should not be defeated.

The Commission also found that similar frauds were perpetrated by the government officials during the adjudication in **MOSIRO** also in Kajiado District. This faulty adjudication excluded over 1000 people who are the rightful owners of the land in the area.

KIMURI "A" ADJUDICATION SECTION, MERU

The Commission also received a complaint from members of the Kagwanja Clan about the **KIAMURI "A" ADJUDICATION SECTION**. The Complainants argue that the adjudication of this area was not carried out in accordance with the requirements of the Land Adjudication Act. The land adjudication officials in charge of the area are said to have allocated land to themselves and their friends and relatives. Furthermore, members of the clan who are entitled to the land were denied their rights in favour of outsiders.

FOURTEEN FALLS LAND, THIKA

Another report was received from the Trustees of the Fourteen Falls Integrated Programme in Thika. They sought assistance to regain L.R NO. 22425 measuring 11.6 Hectares. The land which is in Thika County Council forms part of the Ol Donyo Sabuk Wetland Ecosystem. It has however been allocated to individuals despite the fact that it is Trust land.

Similar illegalities and irregularities are to be found in other adjudication areas in Makueni, Narok, Homa Bay, Machakos, Lamu, etc.

HILL FARM KAMWENJA MATHARI IN NYERI DISTRICT

The Commission received a complaint from the area residents to the effect that their ancestral land in Mathari Sub location had been grabbed by the Catholic Church- Consolata Mission. They acknowledged that the Church purchased 1,054 Acres of land from their ancestors in 1912. The residents

have no quarrel with this particular purchase. But they complained that the Church went ahead to acquire a 2,577 more acres from them. The Church acquired part of this land during the emergency period when the residents had been moved to emergency villages in 1955. This parcel is now registered as L.R. No. 9464 and comprises 1089 Acres. The rest of the land was obtained by the Church in 1965 and registered as two titles namely L.R. No. 1356 comprising 584 Acres and L.R. No. 4166 comprising 904 Acres. All this land (Being Trust Land), belonged to the residents and their ancestors before the Emergency. They requested the Commission to recommend that the three parcels with a total of 2,577 Acres be restored to them by carrying Land Adjudication in the area.

HOLDING GROUNDS AND LIVESTOCK ROUTES IN NAROK, KAJIADO AND LAIKIPIA DISTRICTS

The Commission established that large chunks of Trust land in Narok, Kajiado and Laikipia Districts which had been set apart as holding grounds and livestock routes for the use of local communities were illegally allocated to individuals by the county councils of the areas. No de-gazettment or adjudication took place. For example, a Complaint was received by the Commission to the effect that the BISSIL LIVESTOCK HOLDING GROUND in Kajiado was allocated to some powerful individuals in the area. The complainants requested the Commission to recommend that the allocations are revoked so that the land could revert to the Group Ranch which provided it in the first place. The Commission noted that thousands of Acres of Trust land which had been designated as holding grounds in Narok were also allocated to a few individuals. Below is a Table showing the list and particulars of these allocations.

COUNTY COUNCIL OF NAROK							
Land Ref. No. File No. Location	Reserved/Intended Use	Current Use /Land Category	Area	Original Allottee and Date of Allocation	Allocating Authority/ Legal /Gazette Notice	Current Owner and Address	Remarks
Narok Nkorkori	Holding Ground	Trustland	300 Acres	Amos Ntimama. 26/11/1980	County Council Narok	Not Indicated	
Narok Nkorkori	Holding Ground	Trustland	200 Acres	Ole Saitotok. 26/11/1980	County Council Narok	Not Indicated	
Narok Nkorkori	Holding Ground	Trustland	300 Acres	Amos Ntimama. 26/11/1980	County Council Narok	Not Indicated	
Narok Nkorkori	Holding Ground	Trustland	300 Acres	Ole Nampaso. 26/11/1980	County Council Narok	Not Indicated	
Narok Ololulunga Nkorkori	Holding Ground	Trustland	300 Acres	Ole Karia. 26/11/1980	County Council Narok	Not Indicated	
Narok Nkorkori	Holding Ground	Trustland	100 Acres	Ole Kimursoi. 26/11/1980	County Council Narok	Not Indicated	
Narok Nkorkori	Holding Ground	Trustland	300 Acres	Ole Nalku. 26/11/1980	County Council Narok	Not Indicated	
Narok Nkorkori	Holding Ground	Trustland	300 Acres	Ole Nampaso. 26/11/1980	County Council Narok	Not Indicated	
Narok Nkorkori	Holding Ground	Trustland	300 Acres	Raen Olooihero. 26/11/1980	County Council Narok	Not Indicated	

Other Officially Sanctioned Breaches of Trust

MAZRUI TRUST LAND, TAKAUNGU, KILIFI

Breaches of trust were not restricted only to trust land within the meaning of the Trust Land Act. There have occurred similar abuses affecting land owners by private trusts and wakfs, which are Islamic trusts. One such case is the Mazrui wakf land at Takaungu. The trust was established under the Wakf Commissioners Act Cap. 109 of the Laws of Kenya. The land is registered as title No. 409 under the Land Titles Act and measures 2,741 acres. The wakf was established for the benefit of certain known beneficiaries. In 1989, Parliament enacted the Mazrui Trust Repeal Act, which purported to convert the land into either Government or trust land.

The area was subsequently declared an adjudication area. The adjudication was illegal since the wakf was private land. The beneficiaries of the Mazrui wakf urged the Commission to recommend that this matter be resolved urgently. They are prepared to cede up to 500 acres to the squatters or to sell part of the land Government, if it so requires.

(iv) Recommendations

1. All allocations of Trust lands to individuals and companies contrary to the provisions of the Constitution, Trust land Act and the Land Adjudication Act should be revoked. In particular, the cases highlighted in the foregoing section (to the extent to which they are no longer pending in courts) should be revisited by the Ministry of Lands and Settlement with a view to being nullified.
2. All allocations of trust lands set apart under Section 117 of the Constitution for public purposes to private individuals and companies should be revoked. The lands in question should revert to their original purpose.
3. The Ministries of Lands and Settlement and Local Government should compile a complete and comprehensive Register of Trust Lands that have been set apart for public purposes.
4. The entire management structure of Trust land should be re-examined and reformed. The Ministry of Local Government should be more vigilant in the supervision and monitoring of Trust Land.

(c) The Impact of Illegal Allocations of Settlement Scheme Land and Trust Land

(i) Settlement Schemes

The Agrarian "Revolution"

The principle objective of Settlement Schemes was to re-distribute land that had been alienated by the colonial government to the hitherto disinherited landless peasants. The settlement programme and the creation of ADC was also meant to enable the Africans take over the large scale

white settler farms and continue with agricultural production. The settlement scheme programme was therefore not just a political expedient. It was meant to stimulate an Agrarian Revolution which alone could guarantee economic prosperity for the majority.

Originally, the schemes were planned in such a manner as to be self sufficient in terms of infrastructure and basic social amenities. Agricultural Extension Services and other farm inputs were made available to the settled populations at affordable prices. These interventions, coupled with a vibrant Cooperative Movement aimed at providing market avenues for agricultural produce and harnessing savings, account for the agricultural success story in the early years of independence. It was around the mid-eighties that the scenario began to degenerate.

General Decline in Agriculture: Failure of the Revolution

Events on the international market began to have a negative impact on the country's agricultural industry. But the situation was compounded by the policies of Government which had a very adverse impact on agricultural production. The official disorientation of the settlement schemes recounted above detracted from the original objectives of the settlement programmes. By moving away from the redistributive and productive strategies of settlement schemes, and replacing them with land accumulation through illegal allocations of land, it did not take long before agriculture began to decline.

Land was no longer available for those who needed it most, instead it was allocated to those who had no immediate use for it. The emergence of "absentee landlords" on the one hand and "squatters" on the other hand, is partly if not largely attributable to the land grabbing policies within settlement schemes. The illegal allocation of ADC Farms to individuals and companies at the expense of the landless and the dictates of sound agricultural husbandry meant that land was no longer a factor of *production* but of *speculation*.

Artificial Landlessness, General Poverty and Environmental Degradation

The illegal and irregular allocations in the schemes have led to a serious decline in agriculture and an artificial state of landlessness in the country. These have in turn led to informal settlements and low productivity among

the peasant population. The overall consequence is escalating poverty in the country. Also worthy of note is the general environmental degradation resultant from settlements created in fragile ecosystems.

(ii) *Trust Lands*

The illegal allocations of Trust lands have had a similar effect to the economy as the one discussed above. These lands are meant for the use and benefit of the local communities who have resided there for generations. In these areas are to be found some of the Country's most treasured biodiversity. These lands are not to be allocated to individuals without reference to the interests of the local community and the country at large. The use and management of these lands should contribute to the local economies as well as the national wealth.

Breach of Trust and Failure of Governance on the Part of Local Authorities

The illegal allocation of Trust land and other lands reserved for the use of communities is a sad testimony of the dismal failure of local authorities in terms of governance. Instead of playing their role as custodians of local resources including land, county and municipal councils have posed the greatest danger to these resources. Records reveal that most illegal allocations of lands within their jurisdictions were sanctioned by the councils. In fact, the most pronounced land grabbers in these areas were the Councillors themselves.

Corruption at the Grassroots

Land grabbing is one of the most common forms of corruption in Kenyan society. It epitomizes the plunder of public property by individuals out to enrich themselves at the expense of the innocent majority. The corruption within central government has been replicated at the local level through the activities and omissions of county and municipal councils. The human conflicts within local communities over resources are a reflection of this failure of local government.

4. FORESTLANDS, NATIONAL PARKS, GAME RESERVES, WETLANDS, RIPARIAN RESERVES AND PROTECTED AREAS

(a) Background

The category of lands in this section are those described in PART ONE of this REPORT as those lands which, given their ecological integrity, cultural relevance and strategic location, cannot be allocated to private individuals unless the public interest so dictates. These lands are regulated by specific legislation which sets out the procedures to be followed should an allocation, subdivision or even change of user be contemplated.

The Commission analysed these lands through examining data from Government departments and agencies' scanty records, and Civil Society Organizations' records. Of particular importance were data sets from the Report of the Inter-ministerial Committee on Forest Excisions of April, 2001; Records and Information on National Museums of Kenya lands prepared and submitted to the Commission and on November 3, 2003; Republic of Kenya 2nd Sessional Paper on National Wetlands Conservation and Management of February 2002, Kenya Wildlife Service Report on KWS Land Assets presented to the Commission undated; the Ramsar Convention on Wetlands extract material, the Department of Forest Submissions to the Commission.

(b) Forestlands

The Commission concluded that the legal and administrative procedures for alteration of the forestland boundaries and/or cessation of forestland areas are very clear and precise. That is according to Section 4(1) of the Forests Act Cap 385 of the Laws of Kenya, the Minister in charge of forests is empowered to alter forest boundaries to exclude portions of the forest or declare cessation of a forest area by publishing the intention to do so in the Kenya Gazette.

Consequently, before making the declaration the Minister under Section 4(2) gives 28 days notice of the intention through the Kenya Gazette. The law also provides that before the area(s) intended for excision is excised it must be surveyed and a boundary plan drawn and approved by the Chief

Conservator of Forests. Finally the forestland is deemed excised after the expiry of the 28 days notice, through issuance of a Legal Notice by the Minister as an official Government directive or certification that the forestland area has been excluded from the remaining forest area and is officially and legally excised.

Therefore, any allocation of forestland area before all these steps are undertaken constitutes an illegal allocation of public land or land dedicated or reserved for public purposes. Accordingly, the Minister for the time being in charge of forests is bound to issue both the Gazette Notice (as an official instrument of declaration of intention to alter or to cease to be of a forest) and a Legal Notice (as an official instrument of finalizing the process of excision or alteration of a forest). Therefore no other organ, Ministry, Department or Agency of Government can proceed to allocate forestland before the outlined legal and administrative procedures are adhered to. The procedure of degazettement presents the only opportunity to members of the public to challenge the proposals and prevent forest destruction. This is not a mere formality. It is a most important step in the process of altering the forests in Kenya.

The power granted to the Minister to declare the cessation of a forest area is not absolute. The power must be exercised in the public interest. Even where the procedure in the Forests Act is followed, other procedures in the Government Lands Act and other Planning and Environment Legislation must be followed.

(c) Wetlands

The Commission defined wetlands as those areas where water is the primary factor controlling the environment and the associated plant and animal life. Wetlands are found where the water table is at or near the surface of the land, or where the land is covered by shallow water. Under our terms of reference the Commission adopted the Ramsar Convention definition of wetlands as "*areas of marsh, fen, peatland or water, whether natural or artificial, permanent or temporary, with water that is static or flowing, fresh, brakish water or salt, including areas of marine water the depth of which at low tide does not exceed six metres*".

This definition is broad enough as to incorporate riparian and coastal zones adjacent to the wetlands, and islands or bodies of marine water deeper than

six meters at low tide lying within the wetlands. Under this broad approach our wetlands include land lying alongside rivers and lakes, coastal lagoons, mangroves, peatlands and even coral reefs.

(d) National Parks and Game Reserves

These are areas which are set aside or reserved as Wild life habitats. Wild life is an integral part of Kenya's ecosystem. The country boasts a number of wildlife species which are a big tourist attraction and therefore a major foreign exchange earner and contributor to employment. The interaction between human beings and wildlife has potential for conflict which if not carefully managed can result in injury and extinction of the latter. Wildlife management and protection has been operationalized by the Government through the creation of protected areas called "National Parks or Game Reserves". The former fall under the jurisdiction of the central Government while the latter fall under the jurisdiction of the respective local authorities. The applicable law to these habitats is the Wildlife (Conservation and Management) Act. Within the general area covered by reserves, are designated livestock holding grounds and movement corridors.

(e) Forests, National Parks, etc. as Public Land

Thus, the Commission is of the firm view that all lands set apart for the above outlined purposes are ideally suited to the precautionary principle exercised under the public trust doctrine. The precautionary principle simply means that a country's public policy must be aimed at avoiding irreparable damage to its natural resources. The public trust doctrine asserts that government has an inalienable duty (a duty that cannot be denied or given away) to protect the common wealth i.e. air, water, wildlife, public health, our genetic heritage, and more, which we all inherit and own together and none of us own individually. The guiding factor when dealing with these resources is the need to ensure both inter-generational and intra- generational equity.

The Commission's informed position holds that the public trust doctrine provides a legal and philosophical foundation for government to steadfastly resist the destruction of public lands under this category. The public trust doctrine casts government in a heroic role as guardian of the

public trust – a trust created by ancient laws, requiring the sovereign to protect the common assets that we own together. As a trustee, government must protect the trust assets (nature has bequeathed us) for the trust beneficiaries (present and future generations). Government even has a duty to protect the trust assets against harmful actions by the beneficiaries themselves, and so from time to time government must limit some of the prerogatives of private property in order to protect the common wealth for the present and future generations.

From information analyzed, it is generally acknowledged that the importance of these lands as provision of environmental utility space, national security, utility products, support pillars of water sources, conservation of biological diversity, carbon dioxide sequestration and major habitat for wildlife has been compromised.

(f) Findings

The Commission's findings are summarized below in the various land blocks singularly as follows:

(i) FORESTLANDS

Progressive Reduction of Forest Cover

An analysis of forestland since 1962 to date reveals that the country had 3% of the total territorial landmass of 582,646 square kilometers under closed canopy gazetted forests at independence. This has progressively reduced to about 1.7% presently and this has been mainly due to illegal and irregular excisions. This disturbing scenario compares unfavourably to the internationally recommended minimum of 10%. Below is a summary in tabular form of forest excisions from 1963 to the present.

Category of Excision	Area (Ha)
Excisions done after Boundary Plans, Gazette Notices and Legal Notices	141,703.6
Excisions done by way of Exchanges	911.4
Excisions done before finalizing the de-gazettement process	76,612.2
Proposed Excisions that have been challenged in Court	67,724.6

Proposed Excisions that have been challenged in Court	67,724.6
Excisions done to create Nyayo Tea Zones	11,000
Excisions from Ngong and Karura Forests	1,125.5
TOTAL	299,077.5

For a brief historical background of the Country's major forests, and some of the excisions done over the years, see the BOXES appearing in *Appendix 9. See also Annex 1 and 2 in Vol. II of the Annexes.*

Excisions carried out without any Scientific Considerations

The over-arching finding of the Commission is that most excisions of forestland were done without technical consideration of the social, economic and ecological implications. In a number of cases, Boundary Plans were not prepared and Gazette and Legal Notices were not issued as is required by law. Excisions continued even without application of the precautionary principle that requires the government to fulfil its responsibility to protect the public trust, to anticipate and avoid harm, and to foresee and forestall any catastrophic destruction. The precautionary principle states that, when there is reasonable suspicion of harm and there is scientific uncertainty, then we all have a duty to take action to prevent harm.

The nearest the Government can be said to have evoked this precautionary principle is when the President issued a ban on allocation of public land that was imposed in 1999. But that notwithstanding, excisions went on even after enactment of the Environmental Management and Coordination Act (EMCA) of 1999 that subjects any proposed major changes in land use to Environmental Impact Assessment (EIA). In other cases, the Commissioner of Lands facilitated the issuance of title deeds that left some forest areas outside the title. A case in point is forest areas left out of the titles issued in regard to Karura forest and Ngong Road forest amounting to 1, 125.5 HA. The areas were later allocated to the so called "private developers" illegally. **For a detailed illustration of the illegalities perpetrated with regard to allocations of land in the Ngong and Karura Forests, see Box (a) and (b) in Appendix 9. See also Annexes 3 and 4 in Vol. II of the Annexes.**

Excisions carried out under the guise of Settlement Schemes

Another notable finding is that a lot of forestland has been excised for settlement schemes in circumstances that constitute illegal allocations. It is an acknowledged fact that forestland excisions are not a new phenomenon because at the time of declaration of the present day Kenya as a British Protectorate in 1895, forestland stood at 30% to the total landmass. At independence the forestland had been reduced to 3% of the total landmass. Records analyzed by the Commission indicate that forestland has always been excised and allocated for settlement and other public purposes such as extension of towns, research, development of public institutions and infrastructure¹⁰. Whereas it is appreciated that settlement schemes were started way back in 1961 to facilitate land redistribution programmes to resettle indigenous or native Kenyans whose land had been alienated by the colonial government, the latter day wanton destruction of forests and illegal allocation of the same to undeserving individuals has thrown the whole exercise into serious doubt.

The existing law anticipated alteration of forestland boundary either in form of expansion or excision on prudent basis. Our analysis however, reveals that a lot of excisions have not only been carried out irrationally but to a great measure, illegally. For instance a lot of land exchanges are deemed to have taken place between the forest department and individuals when indeed there was no rationale of exchanging huge forestlands for far much less land which finally the forest department never got.

The major anomaly found in the received information is that most of the settlement schemes in forests were established while the same were still gazetted as forest areas, which amounts to an outright illegality. **For a detailed case by case discussion and illustration of settlement schemes established in forestlands before their de-gazettement, see Annexes 5-15 in Vol. II of the Annexes.**

Illegal Excisions of Forests during the Adjudication Process

The Commission also found that a lot of forestland in environmentally sensitive ecosystems was excised during the adjudication of Trust land in many parts of the country. Thus, water catchment areas, steep slopes, hills and marshes which were not in the original adjudication section, were hived off and allocated to individuals. According to the Report of the Inter-Ministerial Committee on Forest Excisions, 16% of the total acreage

¹⁰ See appendix one: Document prepared by the Chief Conservator of Forests.

of forestland in an Adjudication Section should be reserved for forest purposes. If this had been followed to the letter, then this percentage would have yielded a total of 119, 493 Ha of extra gazetted forest area since 1963.

Disinheritance and Displacement of Forest Dependent Minorities

The Commission also established that settlement schemes were established in forest areas ostensibly to resettle indigenous minorities whose lifestyles depend on forest habitats. Such minorities have been systematically displaced from their ancestral lands by the government through protectionist policies that do not recognize the historical claims of the people to the forest areas. A leading example of the displaced minorities is the OGIEK PEOPLE. The Ogiek have struggled and continue to struggle to make successive governments recognize their way of life as a forest dwelling community.

Thus, sometime in 1997, the Government decided to establish a settlement scheme in the NAKURU/OLENGURUONE/ KIPTAGICH EXTENSION forest area, to resettle the OGIEK. A total of 1, 812 HA of forest land was ~~set aside for~~ this purpose. The requisite de-gazettement was not carried out by the Minister. (However, interviews with the former Commissioner of Lands by the Commission revealed that the real reason for hiving off this land from the forest was to establish an out-grower TEA ZONE for the Kiptagich Tea Estates Limited which stands on an area measuring 937.7 Ha within Transmara Forest Reserve and which is owned by former President Moi.) The area was duly surveyed, subdivided and allocated to prominent individuals and companies in the former President Moi's Government. Only a small number of the OGIEK people was allocated land in the area. The allottees have since been issued with title deeds. The forest was surveyed and subdivided and allocated contrary to the provisions of the Forests Act.

From the list of the beneficiaries of this illegal allocation, the Commission concluded that the real intention of excising this forest was definitely not to resettle the Ogiek community. The objective was to allocate forestland as political reward to influential personalities in the former KANU regime. The listed allottees can neither be described as *Ogiek* or *Landless*. Many of these allottees got land far in excess of what would be recommended for an ordinary settlement scheme. **For a detailed list and particulars of the people to whom this NAKURU/OLENGURUONE/KIPTAGICH (EXTENSION) was allocated, See Annex 15 in Vol. II of the Annexes.**

Also see the annexed MAP showing the areas and acreages of land allocated to the individuals in the OLENGURUONE FOREST.

Other Forest lands awaiting Excision

Another important finding is that there are a number of proposed excisions that are contested and not finalized due to court cases challenging their legality and regularity. These involve the Gazette Notices and Legal Notices to excise a total of 67, 784.5 HA for settlement purposes affecting the following forests:

- South Western Mau Forest measuring 83, 395.5HA – the Gazette Notice proposes the excision of 24, 109 HA to establish Saino, Ndoinet, Tinnet and Kiptagich Settlement Schemes. Although the area is proposed for settling the landless, it is already taken up by wealthy individuals such as the former Permanent Secretary in charge of Internal Security, Mr. ZAKAYOS CHERUIYOT who has constructed a palatial home on part of the land.
- Eastern Mau Forest measuring 64,970HA- the Gazette Notice proposes the excision of 35,301 HA to establish Sururu/Likia Settlement Scheme. The area appears to have been settled by the local community around Njoro and Mau Narok. The average acreage allocated to each individual is 2.02 HA.
- Likia Forest measuring 2, 290HA – the area is already settled by people to whom titles have already been issued notwithstanding the fact that the matter is still pending in Court, and that the forest is yet to be de-gazetted. There is evidence of double or even triple allocation of the same parcel of land to different people thus raising potential for conflict. One allottee, a Mr. KIPRONO KERICH, ID NO. 38442220 of P.O BOX 40530 Nairobi was allocated 12.14 HA as opposed to the average acreage of 2.02 HA. Another interesting finding with regard to this proposed settlement is that most allottees share the same postal addresses in Nairobi, Kabarnet, Burnt Forest, Eldama Ravine, Marigat and Njoro.
- Tenet Forest measuring 2117HA – which has already been fully surveyed and titles issued to the allottees. The average allocation is 2.02 HA.

- Sigotik Forest measuring 1, 812HA – which is not yet surveyed. The Commission did not find a list of allottees.
- Nessuit Forest measuring 4, 730HA – the Scheme has benefited 1500 individuals who have already been issued with title deeds.
- Mariòshoni Forest measuring 8,300HA – whose settlement process has been highly contested by the would-be beneficiaries from the Ogiek community under the auspices of the OGIEK WELFARE COUNCIL. The area is yet to be surveyed and titles issued. A few parcels have however been surveyed and titles issued to individuals from Nakuru. This was established as a settlement scheme to compensate victims of clashes from Chepakundi- Molo South.
- Kapsita Forest measuring 3,300HA – which is duly surveyed, registered and titles to the same issued.
- Bararget Forest (Elburgon) measuring 2800HA- was excised purportedly to compensate victims of clashes from Lari. The excision was partially -halted because the government was belatedly prevailed upon to recognize its importance as the only water catchment area in the region.
- Kapsita Forest (Molo) measuring 901.6HA which was surveyed and allocated to individuals before de-gazettement. Titles have already been issued to the allottees. The average acreage to each allottee is 0.01 and 0.9 HA
- Londiani Forest measuring 29, 682.4HA – the Gazette Notice proposes the excision of 124.9 HA for the establishment of a settlement scheme to resettle people displaced by the expansion of Mary Mount School in Kibunja Trading Centre.
- Mt. Kenya Forest measuring 200,074HA – the Gazette Notices propose the excision of 1,825.15 HA for the establishment of Ndathi, Magutu and Sagana (Extension Hombe) settlement schemes.

For the particulars of allocation which have been challenged in court and excisions that are considered regular although the process is not finalized *see Annexes 16 and 17 in Vol. II of the Annexes.*

Other proposed Excisions

- Marmanet Forest measuring 24,455.5HA (proposed excision of 2,837 HA)
- Kapsaret Forest measuring 1,194HA (proposed excision of the whole area)
- Western Mau Forest measuring 22,885.3HA (proposed excision of 323.7 HA)
- Nabkoi Forest measuring 3,015HA (proposed excision of 74.11 HA)
- Nakuru-Menengai Forest measuring 618.9HA (proposed excision of 270.5 HA)
- Tinderet Forest measuring 27,869.9HA (proposed excision of 788.3 HA)
- South Nandi Forest measuring 17,960.5HA (proposed excision of 34.59 HA)

Other key findings are as follows:

1. Most illegal or irregular allocations were made to individuals, schools, Agricultural Society of Kenya (ASK) and Nyayo Tea Zones Development Corporation (NTZDC) for a variety of purposes.
2. Most of the excisions of forestland were processed without technical considerations for the social, economic and ecological implications in addition to being in total violation of the legal provisions demanding the preparation of Boundary Plans, Gazette and Legal Notices as the procedural means of excising forestlands. Since 1962, 54,000 hectares of proposed excisions had no Legal Notices issued and out of that total area only 6,800 hectares have Boundary Plans implying that the Boundary Plan survey drawing for 47,200 hectares has not been done.
3. The belated issuance of selective title deeds to Karura and Ngong Road Forests deliberately excluded a total area of 1,125.5 Ha from the titled areas, which subsequently were illegally and irregularly allocated to the so called private developers.
4. In summary the following are the major beneficiaries of illegal and irregular allocations of forestlands.

- (a) Schools – forestland was allocated to schools ostensibly for the latter’s expansion only to end up in the hands of politically favoured individuals and companies. Kaptagat Forest is one such forest, part of which was ostensibly excised for the construction of a public school only to be allocated to a private trust known as MARIA SOTI MEMORIAL TRUST the trustees of which are HON. NICHOLAS BIWOTT AND MANU P. CHANDARIA. **For a detailed discussion of the irregularities in the allocation of this part of the forest, see Box (c) in Appendix 9.**
- (b) In many instances, Forestland was excised and allocated to individuals for farming and residential purposes.
- (c) Government institutions such as Prisons, Kenya Broadcasting Corporation, Meteorological Department and Kenya Science Teachers College were allocated land from forests. The land was later illegally allocated to individuals and companies.
- (d) Agricultural Society of Kenya requested variously for relocation of its show grounds from its original locations. The society was consequently allocated forestlands in Nairobi, Kakamega, Nyeri, Meru and Embu. More forestland than was required for a showground was allocated to the ASK. The excess land was later illegally allocated to individuals and companies while the original show ground was similarly allocated.
- (e) The Forest Department lost a lot of forestland through exchanges with private land owners.
- (f) Individuals and companies were illegally allocated forestland in prime areas in total disregard of the law. The illegally allocated land was almost immediately sold to state corporations and other buyers for colossal sums of money. Illegal titles were consequently passed to the purchasers, while the allottees were unjustly enriched.
- (g) Nyayo Tea Zones – were another conduit through which forestland was illegally allocated. While the Zones were

meant to extend up to 100 meter strip of Tea belt around forests in the tea growing areas, extra acreages were hived from forests under the guise of Tea Zones and later allocated to individuals.

- (h) Trustland forests have equally been allocated illegally contrary to the laid down procedures in the Trust Land Act, the Land Adjudication Act and the Local Government Act. Examples of the illegal allocations of Trust land forests which were presented to the Commission are:
 - (i) Enkaroni Group Ranch registered as Narok/Cis-Mara/Ololulunga/ 118 the initial size of which was 1,597.5 HA and whose current size is estimated at approximately over 9,000 HA;
 - (j) Enaikishomi Group Ranch registered as Narok/Cis-Mara/Ololulunga/ 115 the initial size of which was 844.5 HA and is estimated at over 9,000 HA and
 - (k) Sisiyian Farm, owned by CHIEF OLE SANKEI and registered as Narok/Cis-Mara/Ilmotik /375 whose initial size was 300 HA and whose current size is estimated at approximately 2,700 HA.

The excess acreage of land in these group ranches was illegally hived from Trust land forests.

For a detailed list and particulars of forest excisions considered to be illegal *see Annex 18 in Vol. II of the Annexes.*

(ii) WETLANDS , RIPARIAN RESERVES AND SITES

The Commission was not able to establish how much of Kenya's landmass is presently composed of wetlands. But it did establish that KWS is the designate national governmental agency responsible over riparian sites under the Ramsar Convention. The KWS administrative authority mandates it to take charge of wetland conservation within Kenya, and of individual wetlands (riparian sites) of international importance. In essence

KWS is in charge of riparian lands around protected areas (National Parks, National Reserves and Sanctuaries), riparian lands around Ramsar Sites (since KWS is the custodian of Ramsar Convention such as lake Naivaisha, Lake Nakuru, Lake Baringo, and Lake Bogoria. It is also in charge of riparian lands around proposed Ramsar Sites such as Lake Olbollosat, Tana Delta, Lake Victoria and Lake Elementaita and riparian land around areas of important biodiversity.

The Commission's further observation is that whereas KWS is the lead agency under Ramsar Convention on conservation and wise use of wetlands on behalf of the government, there are numerous wetlands in the country, which are utilized by private sector, public parastatals and even communities, which are not strictly committed to the protection and conservation of wetlands under KWS mandate. There is no national wetlands inventory anywhere despite the fact that these lands are **public lands**. On the whole, the Commission concluded that there is a lot of encroachment on wetlands throughout the country

Illegal Allocation of Riparian Reserves and Sites

The Commission found from records and information made available to it that there are a number of illegal allocations of land around riparian sites. The land affected by these allocations is around rivers, lakes and the ocean. In Kwale District a chain of islands off Shimoni Marine Park, which are under the mandate of KWS were illegally allocated to individuals despite Restrictions by the Chief Land Registrar on those lands on 31st March 1999: **See the Table below for the a list and particulars of these allocations.**

Serial No.	Parcel/Title No.	Name of Current Owner	Remarks
1	Kwale/Shimoni/479	Nassor Juma Mwadzi Kombo	Restriction by Chief Land Registrar Vide C/Gen/A/Ty/37 of 31 st March, 1999
2	Kwale/Shimoni/480	Nassor Juma Mwadzi Kombo	-do-
3	Kwale/Shimoni/481	Nassor Juma Mwadzi Kombo	-do-
4	Kwale/Shimoni/482	Nassor Juma Mwadzi Kombo	-do-

Serial No.	Parcel/Title No.	Name of Current Owner	Remarks
5	Kwale/Shimoni/488	Nassor Juma Mwadzi Kombo	-do-
6	Kwale/Shimoni/483	Asia Hassan Bwin	-do-
7	Kwale/Shimoni/484	Mwanawasha Abdallah Mambo	-do-
8	Kwale/Shimoni/485	Mohammed Mshee Mwinyiamri	-do-
9	Kwale/Shimoni/486	Mwanashiti Mohamed Nchamamba	-do-
10	Kwale/Shimoni/493	Mwanashiti Mohamed Nchamamba	-do-
11	Kwale/Shimoni/487	Humphrey Kilei	-do-
12	Kwale/Shimoni/489	Kassim Bakari Mwamzandi	-do-
13	Kwale/Shimoni/495	Kassim Bakari Mwamzandi	-do-
14	Kwale/Shimoni/490	Mwinyi Ali Mshindo	-do-
15	Kwale/Shimoni/491	Christine Mambori	-do-
16	Kwale/Shimoni/492	Josan-jeis Ltd	-do-
17	Kwale/Shimoni/494	Boy Juma Boy	-do-
18	Kwale/Shimoni/496	Sophia Rahim	-do-
19	Kwale/Shimoni/497	David Mwiti	-do-
20	Title Nos. not available	Issac Gathungu Wanjohi	-do-
21	-do-	Issac Gathungu Wanjohi	-do-
22	-do-	Issac Gathungu Wanjohi	-do-
23	-do-	Isaiah Kirindi Wambugu Mutonyi	-do-
24	-do-	Isaiah Kirindi Wambugu Mutonyi	-do-
25	-do-	Isaiah Kirindi Wambugu Mutonyi	-do-

Serial No.	Parcel/Title No.	Name of Current Owner	Remarks
26	Title Nos. not available	Isaiah Kirindi Wambugu Mutonyi	Restriction by Chief Land Registrar Vide C/Gen/A/Ty/37 of 31 st March, 1999
27	-do-	Isaiah Kirindi Wambugu Mutonyi	-do-
28	-do-	Issac Gathungu Wanjohi	-do-
29	-do-	George Ngure Kariuki	-do-
30	-do-	Pwani Holding Resort Ltd	-do-
31	-do-	Bantus Investment Ltd	-do-
32	-do-	Serious Holding Ltd	-do-
33	-do-	Pangos Limited	-do-
34	-do-	Andrew Thiane Imwaiti	-do-

Lake Naivasha, which is an important national water body and a Wetland of International Importance under the Ramsar Convention, was not spared the illegal allocations. Large areas around the lake which fall within the riparian reserve boundary were illegally allocated to individuals and companies and titles thereto issued. The Commission also found that Public Access Corridors and Livestock Easements to the lake were illegally allocated while others have been encroached upon and consequently blocked. The uses to which the allottees have put the lands in question have adversely affected the entire lake ecosystem. **Below is a Table showing the particulars of these illegal allocations.**

**ANNEX 1.7 ILLEGAL ALLOCATION OF RIPARIAN SITES
UNDER THE CONTROL OF KWS**

Lake Naivasha Riparian Land Allocations				
	Year	LR No.	Allottee	Area
1	1995	7426/5	La Pieve Ltd	
2		7426/4	Kongoni Farm	
3	1998	9352/3	Sher Agencies	
4			Pelican Farm	
5			Kihoto Farm	
6		22957/1		
7		22957/3		
8		22957/4		
9	Corridor between	12079 and 13202	Allocated-Name not available	
10		22967/3	Lawrence Tony Kuria	6.07 Ha
11		22967/1	Duncan Kabethi Wachira	8.094Ha
		22967/2	Margaret Wambui Kagwe	2.023 Ha
12		22967/4	Geoffrey Muhoro	24.61 Ha
13		22967/4		
14	The Riparian Reserve, such as the Ablution Block of Safariland Club.			

In Malindi Robinson Island off Gongoni, which is recognized as one of the few remaining Turtle Nesting Sites in the country and a Corridor for Migratory Water Fowl, and also for its Fish Nurseries and Mangrove Forests, has been seriously encroached upon by individuals and companies. Their activities threaten this important coastal ecosystem. For example, in February 1996, 22 Hectares of the Island were allocated to SULEIMAN RASHID SHAKOMBO for a Stand Premium of 1 million shillings. The allocation was made on behalf of the Malindi County Council by the Commissioner of Lands. The Letter of Allotment was signed by a Mr. G.O.

OCHIENG on behalf of the Commissioner of Lands. The purported creation of a 99 year lease on Trust land and marine reserve was outrightly illegal.

(iii) GAME RESERVES AND NATIONAL PARKS

The Commission established that approximately 8% of the total landmass of Kenya is managed as 26 National Parks and 30 National Reserves under the mandate of Kenya Wildlife Service. The KWS central role is to conserve, protect and sustainably manage Kenya's biological resources for the Kenyan public and as a world heritage. Apart from National Parks and National Reserves the Commission found out that there are over 100 parcels of land outside protected areas designated as Game Stations. These are for the purposes of problematic animal controls so as to solve human wildlife conflicts.

The National Parks, National Reserves and Sanctuaries are conserved and managed under the Wildlife (Conservation and Management) Act, which clearly spells out the procedure for cessation of the same. Under Section 7 (2) subsection 1(a) and (b) the procedure, which starts with the Minister in charge is finalized by the National Assembly resolution. This process has not been easy to circumvent as in the case of forestlands.

ILLEGAL ALLOCATIONS WITHIN KWS PROTECTED AREAS (NATIONAL PARKS, GAME RESERVES AND SANCTUARIES)

	Asset Description	Area (km2)	Legal Notice No.	Beneficiary	Area (.Km2) Affected	Allocation Authority	Remarks /Comments
1	Hell's Gate National Park	68	13 of 2/2/84	Kep-Gen, or Power 4	6.98 0.6	Government	Revoke and issue new titles
2	Kiunga Marine National Reserve	250	291 of 26/10/79	Kasim Shahare Ali And others	0.0182		Revoke
3	Kisite Mpunguti National Park	28	92 of 9/6/78	Title No. Kwale/ Shimoni/ 496 1. Sophia Rahim 2. Sophia Nzunguka Kilei	0.008		Revoke

	Asset Description	Area (km2)	Legal Notice No.	Beneficiary	Area (.Km2) Affected	Allocation Authority	Remarks /Comments
4	Mpunguti Marine, National Reserve	11	91 of 9/6/78	Title/Kwale/Shimon U/493 1. Mwanasiti Mohamed Chabamba 2. Christina M. Mwakudu 3. Sally Florence Title No. Kwale/Shimoni/494 1. Boy Juma Boy 2. Shee Hamisi Mwawidi 3. Bakari Ali Kasiri Title No. Kwale/Shimoni/495 1. Mwamzadi K.B. 2. Mohamed Mzee Mwinyamiri 3. Nasoro Juma	0.05 0.037 0.121		Revoke Illegal allocations
5	Naivasha W.T.F.I.	6.473	Reserved by Commissioner of lands Vide 85948/11/67 of Jan 1977	Naivasha Kanu Youth Quarry	0.697		Subject to Court ruling, revoke. Nairobi High Court Misc. Civil Application No. 231 of 2002
6	Ras Tenewi	406	Proposed National Park	1. Nairobi ranch 2. Eco Marine(K) Ltd	0.5	Government	Revoke
7	Malind Marine	6	98 of 26/3/68	Franci Limited, P.O. Box 56 Malindi	0.1667 Ha	Government	Revoke
8	Watamu Marine	10	98 of 26/3/68				Require further investigation
9	Ngai ndethya National Reserve	212	9 of 9/1/76	Settlement Scheme	212 Kilo- metres	Government	Revoke
10	Malindi Watamu Marine	213	99 of 26/3/68	Encroachments By Owners of Plots Bordering the High Water Mark			Revoke

Besides, most of the allottees of National Parks and National Reserves land have not been allowed by the KWS to take possession of the same. However, the KWS Game station plots are vulnerable to grabbing since they are not protected areas. Some have in fact been allocated to land speculators as shown below.

Several KWS houses located outside the protected areas have similarly been illegally allocated as shown in the Table below:

**ILLEGAL ALLOCATION OF KWS LANDS OUTSIDE PROTECTED AREAS
(STATION PLOTS)**

	Asset Description	Area (HA)	Letter of Allotment	Illegal Beneficiaries	Area (Ha) Affected	Allocation Authority	Remarks
1	Embu Warden's House			Eustace M. Njiru, P.O. Box 54637 Nairobi	0.07486		Revoke Illegal allocation
2	Garissa Station	7		Mohamed Y. Abdi P.O. BOX 563, Garissa	0.239		Case still in Court – Subject to the court decision Revoke
3	Ivory Room	0.42		Josgid Ltd Box 51990, Nairobi	0.042		Revoke
4	Kakamega Proposed Park Hqs						Revoke
5	Kericho Staff Quarters	1.151		A. Jiwa Shamji Ltd P.o. Box 916, Sotik	0.0464		Revoke
6	Limuru			Hon. Simon K. Kanyingi			Revoke
7	Malindi Former Game Department (KWS)	3		1. Mwalimu K.Ngandu Box371 Malindi 2. Benjamin Rondo Box 371 Malindi 3. Z.A. Mabea Box 30089 4. Amani SN Box 371 Malindi 5. Josphine Wanjiku Kariuki 6. Salem Investment 7. Francis Maritim Box 30089 Nairobi 8. Martin Saro Box 371 Malindi 9. Francis B. Diwani box 5184 Malindi 10. Bahati Temo Box 371 Malindi 11. Esther W. Maina	0.2 ha Each	TP 47/X111/75 TP 47/X111/74 TP 47/X111/72 TP47/X111/70 TP47/XIII/ TP47/XIII/76 TPXIII/79 TP47/XIII/78 TP47X111/68 TP47/XIII/77 TP47/XIII/	Revoke

	Asset Description	Area (HA)	Letter of Allotment	Illegal Beneficiaries	Area (Ha) Affected	Allocation Authority	Remarks
				BOX 30089. 12. Godfrey Mjomba Box 371 Malindi 13. John Thoya Box 371 Malindi			
8	Malindi staff hqs			M/s Match Designers Ltd Box 61060 Nairobi			Revoke
9	Mandera Asst. warden House			Occupied By Forest Dept.			KWS address the Irregularity
10.	Mkokoni Plot, Hola	8.609	202021/11	1. Mohamed Aboud Badi Box 41 Hola 2. Bwana Tora Box 41 Hola	3 3	88405/118 of 15/4/94	Revoke Revoke
11	Mombasa Provincial office			Sajad Ahmed			Revoke
12	Naivasha Wildlife Annex	52.2		Hosea Kiplagat	26.77		Revoke
13	Nanyuki Station			1. C.M. Murlgo P.O. Box 1356 Nairobi, 2. D. Gitau, P.O. Box 420 Nanyuki, 3. D.N. Gethi, P.O. Box 420 Nanyuki, 4. James Gichui W Achira, P.O. Box, 331, Nanyuki	0.1 0.1 0.1	2585/9 XX111 of 28 /11/95	Revoke
14	Moyale Sub-Station						Revoke
15	Narok Station			Ministry of Lands to Provide Details			Revoke

National Reserves Under Local Authorities

The Commission also learnt that there are several National Reserves which fall under the jurisdiction of local authorities. None of the local authorities provided information regarding the status of these Reserves. The Commission recommends that further investigations be carried out to establish status of these reserves. Below is a Table showing the Reserves:

S/ No.	Name of Reserve	Area, Sq. Km	PDP/ B. Plan	Legal Notice
1	Lake Bogoria	107	216/26	
2	Shaba	239	216/25	268 of 12/10/1974
3	Masai Mara	1510	216/50	271 of 1/11/1974
4	Arawale	533	216/23	272 of 1/11/1974
5	Mwea	68	216/29	6 of 9/1/1976
6	Rahole	1270	216/727	5 of 9/1/1976
7	Tana River Prim.	169	216/28	4 of 9/1976
8	Boni	1339	216/31	7 of 9/1/1976
9	Losai,	1806	216/30	8 of 9/1/1976
10	Dodori	877	216/33	75 of 14/5/1978
11	Nyambene	640.6		
12	South Kitui	1133	216/41	186 of 7/9/1979
13	North Kitui	745	216/40	187 of 7/8/1979
14	Bisanadi	808	216/42	261 of 28/9/1979
15	South Turkana	1019	216/44	290 of 26/10/1979
16	Chepkitale	178		
17	Nasolot	194	216/43	300 of 2/11/1979
18	Kerio Valley	66	216/46	13 of 26/1/1983
19	Kamnarok'	87.7	216/47	101 of 14/6/1983
20	Samburu	165	216/38	188 of 23/8/1985
21	Buffalo Springs	131	216/53	189 of 23/8/1985
22	Maralal Sanct	5	216/51	564 of 2/12/1988
23	Laikipia. Kirimon	165	216/57	526 of 16/10/1991
24	Ngai Ndethya	212	216/32	9 of 9/1/1976
25	Lake Simbi Sanct,	0.417		
26	Ondago Swamp Sanct,	0.248		

(iv) NATIONAL MUSEUMS AND HISTORICAL MONUMENTS

The Commission found that of the list of lands under National Museums the following parcels of land had been allocated illegally as tabulated below:

Name	Plot/LR No	Date of Allocation	Location	Reserved/ Intended use	Gazette Date	Comment
1. Ras Bofu	Parcel 1589	12/10/1976	Mombasa	National Museums		Allocated but not yet developed
Fort St. Joseph	P.D.P 12.2.CT 9.93		Mombasa	National Museums		Access Allocated to Kamlesh Pandya & Hites Pandya
Kongo Mosque	13445		Kwale	National Museum	1986	Allocated to former President Moi
Eldoret	F.R. 306/165	29/9/1995	Eldoret	Museum Developed		Allocated to Boaz Kaino
Kitale Museum	KTL/BLO CK V/11358		Kitale	Museum Developed		
Hyrax Hill Site ¹¹			Nakuru	National Monument		Allocated to Raju Shah
Mama Ngina Drive	P.D.P 12.2. CT.107 A.96		Mombasa	National Monument	1997	Portion Grabbed
Redoubt	P.D.P 12.2.CT .29.93		Mombasa	National Monument		Access Grabbed

¹¹ By Gazette Notice No 2018 of April, 13, 1995 Hyrax Hill Site was declared under 'The Antiquities and Monument Act as National Monument (or site of historical interest measuring approx. 27 HA, including the whole of LR. 4720/50 and portion of LR 11264, situated within Nakuru Municipality, Nakuru District.

(v) PROTECTED AREAS FOR NATIONAL SECURITY REASONS

These are public land areas, which for interests of public security and public order are Gazetted as protected. The Protected Areas Act, Cap 204, establishes these protected areas. The protected areas include and are not limited to State Houses and State Lodges grounds throughout the Republic, Military barracks, camps, Army Ammunition Depots, Air Force Aerodromes all of which are bounded by fences; Kenya Navy facilities i.e. bases and jetty areas, all of which are bounded on all sides by high post and chain-linked fence.

Others are National Youth Service camps all bounded by fences; Police facility grounds such as office areas, Dog Sections, Police depots, Police Driving Schools, the Police Signals, Stores, Workshops and the Armouries, Police Airwings hangars, Police Training Centres, Police Anti- Stock Theft Unit Camps, Wireless Repeater Stations on various hills, Police General Service Unit Training Centres, Camps and Presidential Escort Section Camps, all of which are bounded by fences.

All these public lands cannot be allocated to private individuals or companies. Any purported allocations of such lands are illegal. Even where such lands are excised for alienation for private use, certain special procedures must be followed over and above those provided for in the Government Lands Act or the trust Lands Act. These areas or category of lands are considered so strategically important that they must remain in the public domain. The Government and its agents undertake to protect such lands from alienation or allocation or improper use by individuals and corporate bodies. This explains why Parliament has enacted specific laws meant to protect the above outlined lands.

Illegal allocation of Protected Areas

The Commission found that a number of these lands have been illegally allocated to individuals and companies. The Commission however experienced great difficulty in accessing information from official sources which would have enabled it to identify the persons and companies that the allocations were made to. From the incomplete records made available, the

Commission found that lands belonging to the military as highlighted below were illegally allocated.

Coast Region

1. Kenya Navy Mtongwe – where two parcels of land were illegally allocated to a private developer inside the Mtongwe Base. The allottee having been denied access now claims compensation of Kshs. 8.5 millions from the Department of Defence. Name of allottee was not disclosed to the Commission despite efforts to get it.
2. Diani Maritime Surveillance Radar (Masura) is reported to have been allocated to Mr. Maina Rwingo and Mr. Mutua both of whom being registered public surveyors, are claiming ownership of the land.
3. Canon Point (Masura) whose title is currently being held by a bank.
4. Malindi (Masura) – the land was allocated to DOD in 1988 later allocated to Mr. Darman who purportedly sold it to Mr. Mohamed.
5. Forward Operation Base (FOB) – is land measuring 50 acres located at sea front at the Port Reitz Harbour, three quarters of which was excised and illegally allocated to private developers.

Nairobi Region

1. Moi Air Base (MAB) – The land measuring 10 acres was irregularly left out of the protected area space at the time of fencing and to date it is occupied by dwellers as a slum area.
2. Embakasi Garrison –NOON WORKS AND SUPPLIES LTD were illegally allocated the Garrison's main gate. Titles to the gate have been issued despite lack of access to the same.
3. Embakasi Area – DOD lost 400ha to Sololo Outlets and 87ha to Torino Company Limited.
4. Headquarters Kenya Army Land (Karen) – the original protected area measuring 75.38HA part of which has systematically been illegally allocated.
5. Roysambu – the area in question is a subject of a court case.

6. Air House – on Riara Road on land measuring 2.9 acres officially meant for Air Force Commander and last occupied by the former Chief of General Staff, GEN. TONJE in 1997 was illegally allocated to BRIGADIER (RTD) SITIENEI who is believed to have sold it to a third party.
7. Gatharani Ammunition Sub-Depot – measuring 673.5 acres was in the process of allocation for purpose of Ammunition Depot and rifle shooting range but in the process the DOD only got 533.9 acres and lost 139.6 acres.
8. Thika Garrison – was on land measuring 987ha, however, out of that reserved portion 350ha has been demarcated and illegally allocated to private developers.

Rift Valley Region

1. Lion Hill Range – the range covers 10.26ha but the adjacent land was allocated to individuals. The land has since been developed thus exposing the residents to flying bullets and other safety risks.
2. Moi Barracks (Eldoret) – land measuring 16, 277 acres was compulsorily acquired from a number of local farmers who were duly compensated. Currently there is massive encroachment on over 10,000 acres by squatters.

Central Province Region

1. Gathiuru Ammunition Sub-Depot (ASD) – The area surrounding the depot has been illegally allocated to private developers, but given the highly explosive ordinances stores at the depot there is imminent danger to allottees around there.

Nanyuki/Isiolo Region

1. Nanyuki Barracks – Kwambuzi area is disputed between DOD and the area County Council which in 1998 gazetted the area as Trust Land *vide* Gazette Notice No. 2143 of April 30, 1998 and proceeded to sub-divide and allocate it to a number of individuals who dangerously settled in the protected area. Also contrary to the

site plan the area next to 43 ordinance camp Coy (OCC) is developed by private developers.

2. Laikipia Air Base (LAB) – the area surrounding a watering point was illegally excised out and allocated to a private developer out of Air Force land.

North Eastern Province Region

1. Garissa Barracks – the Barracks is co-located with Garissa Airstrip, but the Air area, which was part of the barracks, was illegally allocated to a private developer, who has constructed houses.

The little information received from DOD points to massive illegal allocations of protected areas. This calls for urgent investigation, with a view to revoking all illegal titles.

State Houses and Lodges

The Commission also found that some land belonging to the country's State Houses and Lodges may have been illegally allocated. Most State Houses and Lodges are not surveyed. Part Development Plans and area Maps had to be used to identify the sites. Information made available to the Commission indicates that land reserved for State Houses and Lodges has been illegally allocated in the following areas:

- State House, Nairobi originally had an area of 100.66 hectares. Over the years a number of excisions have taken place with the result that the current area is approximately 91.55 hectares. The Commission was unable to obtain details of the allottees, and recommends the matter be investigated further and the illegal titles revoked.
- Malindi State Lodge, with an area of approximately 6 acres was illegally allocated to Yusuf Haji, former Provincial Commissioner and current M.P. for Ijara.
- Rumuruti State Lodge – although acquisition of the land for this Lodge and the actual construction was financed using public funds, title to the land is reportedly in the name of an individual. The

- Commission was unable to get particulars on the individual concerned.
- Ex-Duke of Manchester Land, Kitale – during the creation of Milimani Settlement Scheme, an area of 297 hectares was reserved for State House. However in the course of surveying the land, the area was reduced to 143.45 hectares. Investigations should be undertaken to establish what happened to the balance of the land. The allocation of such land should be revoked.

(g) **Conclusions**

The Commission concluded that in allocating military and related lands, the concerned public officials completely ignored the public interest inherent in the protection of these areas and instead gave in to interests of private individuals whose only motive was to make profit. In so doing, they not only endangered the lives and security of the citizens, they also compromised the country's sovereignty. The Government, in condoning such illegal allocations of protected land, failed in its supreme duty of guaranteeing the security of its citizens.

(h) **Recommendations**

Forest Lands

1. All excisions of forestland which were made contrary to the provisions of the Forests Act and the Government Lands Act should be cancelled. All titles which were acquired consequent upon the illegal excisions and allocations of forestland should be revoked. The forestlands affected should be repossessed and restored to their original purpose.
2. Where the Forestlands have been **substantially developed** whether by the original allottee or third party, such that they cannot be restored to their original purpose, titles thereto should nonetheless be revoked (given their inherent illegality). The Government may however issue new titles to the current registered proprietors upon new terms and conditions. Provided that where the Government decides to issue new titles, all requirements of Planning and Environmental Legislation must be strictly complied with.

3. Where Forest land was excised for the purpose of establishing a settlement scheme for the landless without complying with the requirements of the Forests Act, and the land has since been settled by the landless, titles thereto should nonetheless be revoked (given their inherent illegality) however the Government should comply with the Forests Act other Environmental Legislation and issue new titles **to the landless settlers only**.
4. Where the land in question is a water catchment area or a fragile ecosystem, the Government should urgently settle the landless on alternative and appropriate land.
5. All forest excisions (however regular), and consequent allocations to individuals for their personal gain should be revoked.
6. The Government should withdraw all 2001 Gazette and Legal Notices of intention to excise forest land which notices have been challenged in court so as to facilitate the withdrawal of pending cases and the eventual rationalization of settlements in accordance with the law and conservation priorities.
7. All Exchanges of forest land with private landowners in which the Government was defrauded of land should be cancelled and any titles thereto revoked.
8. All Nyayo Tea Zones should be abolished and the lands thereof revert to forest land. Any titles to Nyayo Tea Zone land which have been acquired by private individuals pursuant to the allocation or purchase of such land should be revoked.
9. All illegal allocations of land around indigenous close canopy forests should be cancelled and titles thereto revoked.
10. All allocations of forestland to the Agricultural Society of Kenya should be cancelled and the land repossessed by the Government.
11. All Gazetted forest boundaries should be resurveyed for validation and rectification in accordance with the latest Inventory compiled by the Forest Department.

12. The Government should urgently table the Forests Bill before parliament for enactment.

Wetlands

1. All allocations of land within and around Riparian areas and Sites and other Wetlands in the country should be cancelled and titles thereto revoked without exception.
2. All allocations of Public Access Corridors and other Easements to Lakes, Rivers, etc and the Indian Ocean should be cancelled and titles thereto revoked.
3. All allocations of islands and marine parks in the country should be cancelled and titles thereto revoked without exception.
4. The Government should develop a comprehensive Wetlands Management Policy and Plan for the country.
5. The Government should promote international cooperation in regard to trans-boundary wetlands, and other shared water systems etc.
6. All public officers, individuals, professionals and companies that participated in the illegal allocation and sale of forest land should be investigated with a view to being prosecuted where they may have committed offences.
7. The Government should institute legal measures of recovering money that was gotten from the illegal allocation and sale of wetlands.
8. The Government should undertake the survey and protection of riparian sites and other wetlands. Consequently, it should stop the current human activity encroaching the following wetland/riparian areas – Lake Naivasha, Lake Olbollosat, Lake Victoria, Indian Ocean coastline 100 ft from high water mark inland, Lake Elementaita, Omo Delta on Lake Turkana and Tana Delta.

9. The Government through KWS and the National Environment Management Authority, should undertake to develop a national inventory of wetlands in the country as a basis for ensuring their sustainable use.

Protected Areas (For National Security Reasons)

All allocations of lands classified as security areas should be cancelled and titles thereto revoked without exception. The lands in question should revert to their original purpose.

(i) Impact of Forest Excisions on the Environment and Economy

Introduction

Forest ecosystems present a complex economic natural resource. This is because they provide environmental goods and services. Forests provide goods to the local economy through provision of timber and non-timber products. It also provides environmental services given its capacity to manage and regulate water flow, soil erosion and nutrient recycling. Forests are an important source of food (plant and animal), employment, medicine and many other non-wood forest products. Forests are valued for their cultural and religious values. They are both home to and part and parcel of biodiversity. Given these facts, forests should not be allocated to individuals recklessly. Yet this is what has happened in the country over the years, with devastating effects.

Impact of Forest Excisions on the Environment

Impacts of forest excisions and illegal settlements are now being felt. The negative environmental impacts include reduction in forest cover, depletion of biodiversity and damage to water (catchment areas) and soil resources. Excisions have also caused stress on wildlife habitats resulting in serious human wildlife conflicts in Districts neighbouring major National Game Parks and National Game Reserves. Some of the **examples** of the negative effects are:

Reduction in Forestland Area and Cover

Excision of a total of over 297, 000 hectares of forestland has reduced the total forestland area from 1.7 million hectares to 1.4 million hectares which is 2.5 % of the total land area, but it is only 1.7% which is closed canopy forest.

According to international standards any country with less than 10% of closed canopy forest cover of its land area is considered to be environmentally unstable. The excision has reduced both the forestland area and forest cover.

Water Catchment

Kenya has five main water catchment towers, which include Mt. Kenya, The Mau Complex, Mt. Elgon, Cherengani, and the Aberdares. Some of these important water catchments have been severely affected through forest excisions. Some examples are:

- The settlement on 34,273.4 ha of indigenous forests in Eastern and South Western Mau Forest Reserve has destroyed critical water catchment for Lakes Nakuru, Naivasha, Elementaita, and Victoria. In addition water catchments for rivers such the Mara, Molo, Rongai and Njoro/Bagaria have been affected. As a result water shortages in Nakuru, Kericho and Eldama Ravine, towns have started being experienced. The effect on river Mara is so drastic that Hippos and other wildlife have nowhere to inhabit because of low water levels and their survival is highly threatened. Even livestock is threatened.
- In the agricultural areas, cultivation along riverbanks, steep slopes and hills has not only reduced water flow down streams but also caused siltation of the major hydroelectric dams, lakes and coral reefs along our ocean shore. Soil erosion has reduced agricultural production capacity and increased the cost of food production due to loss of soil nutrients carried away during run-offs. A classic example is Chepyuk settlement in Mt. Elgon where settlement was done on very steep terrain covering 8,700Ha. This particular illegal excision is a recipe for environmental disasters such as landslides.
- Settlement of people in an area of about 531Ha. at Kapolet forest and illegal settlement in about 11,000 Ha of Embobuti in Marakwet District has adversely affected the integrity of Cherengani water catchment area. This has had the consequence of perennial flooding of river Nzoia causing havoc in the lower regions such as Budalangi, and compromising water supply to Eldoret town.

- Clearing of vegetation in new settlement areas has had the consequence of lowering water tables. This has led to drying up of water springs and boreholes. For instance a borehole at Njoro campus of Egerton University has dried up because of the clearing of the vegetation in the Eastern Mau excision.

Reduction of Wildlife Habitat

In Laikipia District, settlement on 10,270.49 ha of indigenous forests has destroyed wildlife habitat and elephant migratory corridors resulting to serious human/wildlife conflict. The wildlife is not only disturbing those settled in the forest but also those in the old settlements outside the forest. Destruction of food crops, deaths and injuries, involving domestic animals and people were few before the settlement in the forest excision areas.

Loss of Forest Biodiversity

Whenever there is land use change from forest to other uses there is overall effect on forest biodiversity. Clearing of forest results in the destruction of various micro and macro ecosystems found therein. This results in loss of species of flora and fauna that are adapted to live in such ecosystems. In some cases species become extinct especially, endemic ones in certain forest areas. This in turn affects genetic variation of both plants and animals. It must be emphasized that biodiversity, once lost is not easily recoverable through afforestation/reforestation programmes.

Economic Impact of Forest Excisions

Besides direct revenue generated by the forests to the Government, there are many other economic contributions by the forestry sector, which are affected by excision. The impact has been felt through:

- ***Collapse of Wood and Non –Wood Based Industries***

Settlements, which have taken place in forest areas, have resulted in clearing of Industrial plantations en-mass. This has led to scarcity of raw materials for wood based industries. A good example is in the Eastern and southwestern Mau where more than 22,000ha of industrial plantations were cleared to create room for settlement. Many saw mills have closed down

in these areas and as a consequence many people have been rendered jobless and job opportunities lost. The forests were established through a World Bank loan which must be repaid and yet the trees were given to individuals free of charge.

- ***Degeneration of Forest Towns***

Illegal excisions have led to the unsustainable use of forests through such negative activities as clear felling of trees in an unplanned and unsustainable manner. The consequence has been the collapse of such towns as Elburgon and loss of employment.

- ***Reduction of Tourist Attraction Sites***

Tourism has been adversely affected by excisions. An example is Lake Nakuru, the second most visited National Park in Kenya. This lake is threatened by siltation and drying of rivers due to Forest clearance in Eastern Mau forest reserve. Recreation sites especially in Karura and Ngong forest reserves have also been adversely affected.

- ***Depletion of Foreign Exchange***

Following excisions the country is no longer self sufficient in timber production. Scarce foreign exchange is now being used to import timber, which would otherwise be produced locally. A lot of timber is now coming from DRC-Congo, Tanzania and Uganda.

- ***Contravention of International Conventions and Instruments***

Illegal allocations of forestland and the resultant negative activities which constitute a contravention of Environmental Agreements to which Kenya is a party such as:

- The Convention of Biological Diversity
- The Framework Convention on Climate Change
- The Ramsar Convention and many others.

5. GENERAL FINDINGS

The Commission has made specific Findings and Recommendations with regard to each type of public land whose illegal acquisition it inquired into. However, some of the information obtained by the Commission generated findings and recommendations of a general nature which are applicable to the entire problem of illegal allocation of public land. These are highlighted in this section. Some of the issues addressed in this section arose out of the Commission's interviews with public officials while others came to light from public memoranda to the Commission.

Interviews with Public Officials

As indicated in PART TWO of this Report, the Commission interviewed key players in the allocation process of public land. Initially, it was apparent that many senior officials in the Ministry of Lands and Settlement and also in a number of local authorities had made the grabbing of public land a routine method of rapid but unjust enrichment. It was therefore arranged to meet and interview some public officials. These included past Commissioners of Land, physical planners, surveyors and former city council officials. Two past Commissioners of Land, namely, WILSON GACHANJA and SAMMY MWAITA, two Directors of Survey, namely ALEXANDRINO KIAMATI NJUKI and HAGGAI NYAPOLA, three Directors of Physical Planning namely, RENSON MBWAGWA, JOHN OHAS and TIMOTHY MAKUNDA, two Directors of City Planning and Architecture in the Nairobi City Council, KURIA WA GATHONI and PETER MBURU KIBINDA and a former Town Clerk of the Nairobi City Council MRS ZIPPORAH MBESA WANDERA were interviewed.

The main objective of these interviews was to enable the Commission gain an insight into the political and social environment in which illegal allocations of public land were made. The Commission also wanted to establish the extent of involvement by these public officials in the illegal allocations of public land. The Commission also wanted to find out whether these officials had personally benefited from the illegal allocations. From these interviews, the Commission arrived at the following conclusions:

Abuse of Office

Key public officers abused their offices in the allocation of public land. They mostly acted in total disregard of the substantive and procedural law relating to the allocation of public land. Some of the officials did not see anything legally or morally wrong with allocating public land to individuals or companies. Land grabbing was something normal to them. They did not view their offices as positions of public trust meant to safeguard public land for present and future generations and the general economic welfare of the country. Some of the activities of the officials indicate that criminal offences may have been committed warranting further investigations into their activities. At various times, there were many centres of power which were responsible for the allocation of public land. Ministers, state house officials, and all levels of provincial administration became involved in the illegal allocations of Public land. Some officers junior to the Commissioner of Lands became more powerful than the Commissioner and influenced many illegal allocations of land.

A number of the officials interviewed directly benefited from the illegal allocations of public land. Some officials in the ministry of lands and city council of Nairobi would always be privy to a political decision to allocate land. They would then position themselves to benefit from such allocations. While not all the officials interviewed appeared to have benefited personally from the land grabbing mania, the answers to the questions they were asked and their general attitude towards the Commission indicated that further investigations would be necessary in the future to establish the entire picture of their involvement.

Many illegal allocations of public land were politically motivated. On many occasions a Commissioner of Lands would receive instructions from the President to allocate land. He would then proceed to allocate such land not withstanding the fact that the allocation was illegal. Many allocations of city council land were made pursuant to instructions from the Minister of Local Government.

Religious Bodies

The moral decadence epitomized by the grabbing of public land did not spare religious institutions of all faiths. Thus churches, mosques, temples and other faith institutions directly participated in the illegal allocation of

public land. The most reprehensible conduct by the religious institutions in this regard was their grabbing of public utility plots and school play grounds. Some of the religious institutions were allocated public land as an inducement or reward for mobilizing political support for the former ruling party, (Kanu). In many instances, the religious institutions obtained public land without paying any money for it. At times they obtained large tracts of public land for very little money. **Below is a list and particulars of the Religious Institutions that acquired illegally allocated public land. This list is just an illustrative sample 1. For details see the General Annexes.**

Serial No.	Parcel/Title No.	Reserved/Intended User	Current User	Area
1	Milimani Primary School, Nairobi	Public School	International Bible Students Association	7.831 Acres
2	Land for Riruta Satellite Primary - Nairobi	Public School	Gospel Revival Centre	1 Ha
3	Block 60/463	Open space/playground Otiende Estate	Residential Catholic Archdiocese of Nairobi	
4	Block 60/466	Open space/playground Otiende Estate	Residential Catholic Archdiocese of Nairobi	0.5933 Ha
5	Block 60/484	Open space	Church of Jesus Christ	Block 60/463
6	LR. No. Kabete/Kabete 124-128	Schools and Prison Ext. Programme	PCEA and Christian Community Service	
7	LR. No. 209/5391	Lady Northey Trust (Medical)	AIC	2.41 Ha
8	Gacharage Primary - Maragua	Public School	AIPCA	12 Acres
9	Kariko Primary - Maragua	Public School	AIPCA Kariko Church	
10	Gachwe Primary - Nyandarua	Public School	Church Commission for Kenya	5 Acres

Serial No.	Parcel/Title No.	Reserved/Intended User	Current User	Area
11	Star of the Sea Primary – Mombasa	Public School	Full Gospel Churches of Kenya	
12	Tulima Primary – Machakos	Public School	AIC Church	1 Acre
13	Mugumone Primary – Meru Central	Public School	AIPCA Church	2 Acres
14	Omoya Primary School	Public school	Full Gospel Churches of Kenya	5 Acres
15	Kirimose Primary – Bureti	Public School	Catholic Church	1 Acre
16	Arap Moi Primary – Kajiado	Public School	PCEA Foundation	9 Acres
17	Kasoas Primary School – Nandi	Public School	ACK Church	3 Acres
18	Kapkiptui Primary School – Nandi	Public School	Seventh Day Adventist Church (East Africa)	3 Acres
19	Milimani Primary – Butere Mumias	Public School	St Paul's Musanda Luo ACK Church	2 Acres
20	Lumakanda – Lugali	Public School	Baptist Church	1 Acre
21	Kiamwangi Secondary – Thika	Public School	AIC	1 Acre
22	Block 5/551 Kisumu	Public Utility	Provincial Synod of A.C.P.K.	0.2469 Ha
23	Block 6/261 Kisumu	Government Housing	Aga Khan Karim Shah and Aga Khan Foundation	0.5451 Ha

Serial No.	Parcel/Title No.	Reserved/Intended User	Current User	Area
24	Lunyu Mixed School – Kakamega	Public School	PAG Church	2 Acre
25	LR 9917/8	ADC Astra Farm, Machakos	AIC	3851.71 Acres
26	LR 16672/37	ADC Farm	AIC	30 Acres
27	LR 9867	ADC, Baraka, Nakuru	Catholic Church	1040 Acres
28	LR 209/11969 Nairobi	Kevevapi	Catholic Church	6.0 Acres
29	Block 32/210	Public Utility	SDA (EA) Church	0.5112 Ha
30	LR 11239 Kibera	Public Utility	Presbyterian Foundation	1.1488 Ha
31		Nursery School	SDA Church	
32	Kiyonga Crescent Maringo Estate	Children Playground	ACK St. Mary Magdalene	
33	LR 209/12596	Parking Space	Siri Ramgarhia	0.2018 Ha
34	Block 60/494	Road Reserve	SDA Church	0.4414 Ha
35	HG 255	Government House – Kileleshwa	Catholic Church	
36	HG 256	Government House-Kileleshwa	Holy Trinity	
37	LR 209/3861/1 (HG 131)	Government House – State House Avenue	ACK Church	
38	LR 209/3858	Government House – Sanford Flats State House 15 Flats	AIC Church	
39	LR 209/12240 (HG 96)	Government House – Swami Bapa Road	Shree House	
40	LR 209/12241 (HG 97)	Government House – Swami Bapa Road Parklands	Sthankvasi Jain Sangh Temple	
41	MOW Camp Kirigiti	Road Camp	PCEA Church	2 Acres
42	MG 39	Government House – Kiambu	Redeemed Gospel Church	
43	MG 11	Hospital Land – Bungoma	ACK Church	
44	Block 1/1051 Nyeri	Government Housing	Outreach Gospel Church	0.0998 Ha

Serial No.	Parcel/Title No.	Reserved/Intended User	Current User	Area
45	Block 6/700 Nyahururu	Government Housing	Church Commisioner of Kenya as trustees for ACK, Mothers Union	0.0612 Ha
46	102/XI/MI Mombasa	Dickson Gardens Recreition	Catholic Diocese of Mombasa	
47	LG 79 A & B, Bungoma	Government House	ACK(St. Crispins)	
48	LG 80 A & Bungoma	Government House	Word of Faith	
49	LG 24 A & B, Bungoma	Government House	Pedesta Church	
50	LG 25 A,B,C & D, Bungoma	Government House	Pedesta Church	
51	Community Centre Free Area Nakuru	Open space	Catholic Diocese of Nakuru	0.55 Ha
52	Block 4/592 Eldoret Mun. Est.	Open space	Jehovah's Witnesses	0.2984 Ha
53		Saniak Primary School	AIC Academy	6 Plots
54	406 Laboret Trading Centre	Hospital	ACK	
55		School – Kapsabet Municipality	AIC	6 Acres
54				
55				

Memoranda from the Public

As indicated earlier in this Report, the Commission received hundreds of written memoranda pointing at various cases of illegal allocation of public land. The Commission gained a lot of insight from these public complaints. It was able to establish the trends and patterns of land grabbing. From the tone of their letters, the Commission concluded that the members who sent in these memoranda were public spirited Kenyans. They expect nothing

short of the revocation of illegal titles and restoration of public land to its proper use.

The Commission would have liked to visit all the areas said to have been grabbed so as to verify their development status. The Commission would also have liked to verify all the complaints at the Ministry of Lands and Settlement. But it was not possible to undertake all these tasks due to constraints of time and the massive amounts of information the Commission had to deal with. However, a comprehensive Digest of these complaints has been prepared. *See Annex 19 in Vol. II of the Annexes.*

All recommendations which the Commission has given in this Report regarding the revocation of illegal titles to public land are also applicable to all the cases reported to the Commission by members of the public once they are verified.

The Commission could not however deal with certain complaints since they were pending in courts of law. The Commission nevertheless noted with dismay the fact that many such cases had been pending in courts for many years without final resolution (some had been pending for as long as 20 years)

Foreign Diplomatic Missions

The Commission also came across certain cases where illegally allocated public land had been acquired by diplomatic missions. Given the restrictions by the Vienna Convention on Diplomatic and Consular Relations, regarding personnel and property of such missions, the Commission has not made any specific recommendation regarding such titles. The Commission however urges the Government to get in touch with such Missions so as to find a solution in conformity with diplomatic etiquette.

Currently, there appears to be no Government Policy on the siting or location of foreign diplomatic missions in the City. Consequently, some of the Chanceries are situated in the most inappropriate places. The logic of urban planning was not applied while locating these missions. The Government and the City Council should urgently consider a plan for creating zones for Diplomatic Missions and encourage as many missions as possible to relocate to such zones.

6. SOME ADDITIONAL RECOMMENDATIONS

As already explained in the foregoing section, the Commission has made specific recommendations regarding each type of public land. There are however a number of recommendations which apply to all types of public land that the Commission hereby makes in addition to the specific ones highlighted above. These recommendations are meant to help the Government redress the harm done in the past and also prevent illegal and irregular allocations of public land in the future.

Establishment of a Land Titles Tribunal

Given the fact that each case of a suspected illegal or irregular allocation of public land must be dealt with on its own merits, it is recommended that a Land Titles Tribunal be immediately established to embark upon the process of revocation and rectification of titles in the country. The detailed rationale for the establishment of the Tribunal is discussed in Part Three of this Report. For the Draft Bill proposing the establishment of the Tribunal, *see Appendix 10*.

Computerization of Land Records

One of the main problems which has fuelled the illegal allocation of public land is the poor and chaotic record keeping system in the Ministry of Lands and Settlement and in the district registries. Because of poor records, it has not been always easy for members of the public to trace and keep track of the history transactions relating to particular titles of land. Quite often, records have been falsified or even hidden so as to conceal illegal allocations of land.

It is therefore recommended that all land records in the Ministry of Lands and Settlement should be computerized and digitalized. All facts relating to the history of each parcel of land should be securely stored. An appropriate legal framework for the computerization of land records should be urgently devised. All land records should be made available for inspection to the public

Insurance of Land Titles

Members of the public should be able to rely on a title deed as a secure document in which to transact either as buyers or sellers of land. If land is to be freely transferable on the market, then a secure system of titling must be devised. While the title deed in Kenya has largely been reliable, the problem of illegal allocation of public land has seriously thrown into question the degree to which members of the public can rely on it as a valid legal document. This uncertainty has the potential of disrupting the land market and jeopardizing the general development of the country.

It is therefore recommended that a comprehensive Land Title Insurance Scheme should be established for the country. A consortium of Insurance companies should be encouraged and licensed to offer insurance services in this regard. This will eliminate risk and uncertainty of dealing with forged titles.

Establishment of a Land Commission

At present, the country lacks a comprehensive land policy which can guide all matters relating to the administration, ownership and use of land. In addition, the powers to administer public land are largely vested in the President and in certain instances, the Commissioner of Lands. Some ministers have administrative powers over certain protected areas while county councils hold Trust land on behalf of the local communities. The absence of a centralized and professional body charged with the duty of land administration has facilitated the illegal allocation of land.

It is consequently recommended that a National Land Commission be established to deal with all land matters in the country. The Commission should be vested with powers of allocating public land and supervising the management and allocation of Trust land. In this regard, section 3 and all other sections in the Government Lands Act which empower the President or the Commissioner of Lands to make grants of un-alienated Government Land should be repealed.

Enhancing the Capacity of Institutions

The technical and personnel capacities in the Ministry of Lands and Settlement, the Judiciary and the Attorney General's Chambers should be

enhanced so as to competently and efficiently deal with land matters. All ministries and local authorities dealing with the administration of public land should have properly trained legal personnel to advise them and to ensure reliable representation in courts of law.

Government Policy on Development of Public Land

By offering allocations of undeveloped public land at a discount of 20% of its market value and then by failing to enforce the development conditions contained in the lease or grant of title of such land, the Government has perhaps unwittingly encouraged the abuse of the law in this respect. The benefit of the offer of undeveloped land at a discount includes a number of implied obligations to be observed by both the allottee of the land and also by the Government. The allottee is obliged to observe strictly the development conditions contained in the title. The Government for its part is obliged to provide the infrastructure to enable the allottee to carry out his development obligations. The Government is also obliged to protect the public interest by enforcing the development conditions strictly and by refusing to consent to any dealing with the land until such conditions have been complied with.

Allocations of developed public land e.g. Government houses, should generally be made at market value.

Inventory of All Public Land

There appears to be no complete record or register of public land in the country. Some Ministries, State Corporations and Departments cannot give a comprehensive account of what public land they hold.

It is therefore recommended that all Ministries, Local Authorities, and State Corporations should maintain registers of all assets they hold. These registers should be updated annually.

The Government should prepare an inventory of all public land in the country.

Harmonization of Land Legislation

Land law is one of the most complex branches of law in Kenya. At present, there are more than 40 different statutes dealing with aspects of land administration, ownership and use. The situation is exacerbated by the fact

that the applicable substantive land law is also not easily understandable by many.

The Government should harmonize land legislation to prevent the double issuance of land titles and other abuses. It was intended that the Registered Land Act would replace the Registration of Titles Act and in many other cases the Government Lands Act. But this has not been done as originally contemplated. The RLA should be applied to large areas in a systematic manner. The process should be rationalized in such a way as to prevent double issuance of titles as is currently the case.

Restitution

The Government should embark upon the legal recovery of all monies that were unjustly gotten through the illegal allocation and sale of Public Land. The recovery should be extended to original allottees, professionals, brokers, etc.

Prosecution

All public officials, private individuals, companies and professionals who participated in the illegal allocation of public land in ways that disclose the commission of crimes should be investigated, prosecuted and/or retired from public service in the public interest.

Upgrading Informal Settlements

The Commission concluded that illegal allocations of public land have greatly contributed to the spread of Informal Settlements in the main urban centres in the country. The Government should initiate programmes to address the problem of such settlements. In this regard, part of the recovered public land should be utilized to establish decent and affordable housing schemes for urban population that now lives in conditions of squalor. Such informal settlements that cannot be upgraded should be relocated to other areas where public land will have been recovered.

Establishment of a Land Division of the High Court

Given the backlog of land related disputes in the courts, the Government should urgently consider establishing a Division in the High Court which will exclusively deal with land cases.

7. CONCLUSION

The process and findings of this Inquiry have disclosed the fact that the illegal allocation of public land is one of the most pronounced manifestations of corruption and moral decadence in our society. It has demonstrated the loss of public responsibility for present and future generations by those entrusted with power. The memoranda received from the people by this Commission leave no doubt that they expect nothing short of the restoration of their land. Political statements made against this Commission during the Inquiry on the other hand demonstrate the lack of shame on the part of those who may have benefited from the plunder of public resources. Such people would go to any lengths to protect their ill-gotten property. At the end of the day, the challenge lies with the Government to summon all its political will and might so as to implement the recommendations made in this Report. Only that way, will impunity be stamped out of our society.

PART FIVE

PROPOSALS ON IMPLEMENTATION OF THE COMMISSION'S REPORT

ACTION FOR CHANGE: HOW TO DO IT?

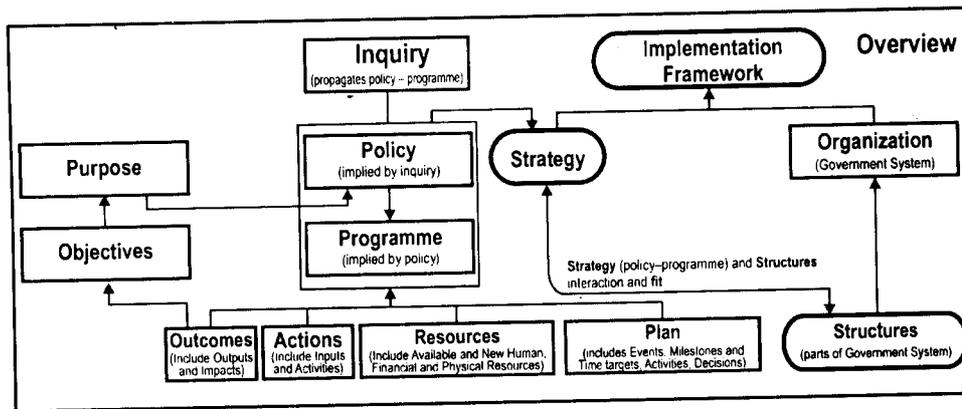
(a) Background

"Land crimes" are as much a part of Kenya's past wrongdoings, as economic crimes and human rights crimes. Together, they constitute the country's transitional justice agenda. The challenge to the government is to rise to the occasion and deal comprehensively with the corrupt and fraudulent practices, which have bedeviled Kenya's public land allocation and administration for several decades. It will take a herculean effort to rectify all that has gone wrong. Therefore, government must involve the people, as what is at stake is the national interest. This ought to be the concern of every citizen. Effort and support should be broadened and the positive role that civil society and the media could play should be recognized and encouraged.

(b) Framework

This part of the report is the summary of the Appendix on Implementation, which forms an analysis of the implementation of the outcome of the inquiry. It integrates the retrospective (findings) and prospective (recommendations) parts of the report. The former dealt with the questions "what happened with public land, how and why? And what have been the impacts?" The latter appraised the question "what should be done?" The integration of the parts leads to the question "how to do it?"

An "implementation framework" is employed to conceptualize and analyze the strategy implied by the inquiry and the organization, that is, the parts of the government system that would implement it. The strategy component is split into the implied policy and the programme. Policy comprises purpose and objectives and programme includes the elements of outcomes, actions, resources and plan. The organisation component, that is, the government system reveals the set of implementers of the strategy. The set consists of the existing structures of government, and the new structures that would be required, to execute, oversee and steer the strategy. The pictorial display of the overview of the framework follows.



(c) Strategy

Policy: kind, purpose and objectives

The kind of policy implied by the inquiry can be described as a “redress policy” to ameliorate the grave situation and the severity of crisis, resulting from the illegal allocation of public land, particularly public utility land. It falls into the realm of “transitional justice”. The implementation of the implied policy must take into account its complex, unique and historical nature and character. The purpose and objectives of the policy are both, retrospective or backward-looking, as they correct past wrongdoings, and also prospective or forward-looking, as they prevent future repetition and recurrence, while nurturing hope and amelioration. The purpose or the strategic intent could be formulated as “*the redress of the past wrongdoings by government, individuals, both public and private, with respect to the illegal allocation and development of public land*”.

The recommendations of the Inquiry imply policy objectives in such areas as: *legislation enactment*—to provide a forum to enable the revocation and rectification process to become practicable and to modify any existing obstructive laws. This can be achieved by the enactment of an amendment to the Government Lands Act (GLA), to establish and operate the Land Titles Tribunal, and consequential amendments to other legislation; *revocation and rectification and the validation*—of registered titles to land, restitution of land and property from revoked titles, and restitution from the unjustly enriched; *prosecution*—to investigate with a view to the prosecution of criminal offenders and offences suspected or disclosed in the illegal allocation of land, and to obtain restitution of land under the relevant laws; *lustration*—to prohibit wrongdoers from holding public

office and to invoke disciplinary action against errant professionals (illustration derived from Latin, *lustrare*, "to shed light"); *monitoring*—to establish systems and produce relevant information for multiple purposes, which include audits; and *divestment*—to reconstitute land intended for the landless but diverted to ineligible persons, as it is the case in settlement schemes.

Constraints

The types of limitations and obstacles, including the risks that may stand in the way of redress of the past wrongdoings and achieving the objectives are political, legal, organisational, and budgetary. *Political*, as the individuals, public officials, even elected representatives or bodies, whose stakes—the ill-gotten land and property, would be threatened by the strategy, may erect barriers everywhere and impose limitations on the acceptance and execution of the strategy. *Legal*, in terms of the laws and rules, the due process and litigations that may limit attempts to achieve objectives. The likely risk would be that the strategy is subverted by its opponents through overt and covert politics.

Organisational, as the structures that would implement the policy and programme may limit efforts to achieve the objectives due to their past involvement in corrupt and fraudulent practices, or inherited incompetence and dysfunctional systems. The possible risk would be that the strategy is inhibited rather than enabled to succeed. *Budgetary*, as the government funds being limited may require that the effort to achieve the objectives of the strategy be considered in light of the scarcity of resources. It is important to take into account the budgetary implications of the uncertainty concerning the turnaround time or the life cycle of the strategy. The risk would be that a poor fit of resources/budget and the strategy might weaken its effect.

(d) Programme

The programme consists of the set of elements, encountered in programming that fulfill purpose and objectives, such as: outcomes (outputs and impacts), actions (activities and inputs), resources and plan. They are interrelated in a hierarchy such that the attainment of the lower ones enhances the attainment of the higher ones. A tool is devised, which structures the monitoring and the evaluation elements (intents and measures matrix) of the programme.

Actions

The actions are of two types: the set of activities to accomplish the outcomes—outputs and impacts; and the allocation of resources or the inputs to achieve the activities efficiently, effectively and adequately and on time. Activities and inputs comprise the process that shapes the outputs. The programme activities correspond one-to-one with the objectives like: legislation enactment activity, revocation and rectification activity, prevention activity, prosecution activity, lustration activity, monitoring activity and divestment activity.

Outcomes

The tangible outputs expected are of such types as: restituted land and property—from revoked titles, from unjustly enriched, from crimes under penal code, anti-corruption and other laws. Audits—of State Corporations concerning past illegal land transactions, all past illegal allocations of public land, settlement schemes lands diverted to ineligible persons. Systems—better and preventive land administration and information systems and operating procedures. Services—examination and verification of registered titles to land for a fee. Products—land titles insurance products from insurance companies; Register of public lands of the Republic of Kenya, which comprise—urban lands (cities, municipalities, townships), lands of ministries and departments, state corporations lands, trust lands, settlement schemes lands, forest lands, wetlands, riparian lands, the foreshores, game reserves and national parks lands, and national museums and protected areas lands; Lustration—public officials removed and prohibited from holding public office; and errant professionals disciplined by their respective bodies. Justice (retributive)—convictions under penal code, anti-corruption and other laws; Justice (distributive)—distribution of land divested from the settlement schemes to beneficiaries, intended by the original policy.

Resources and Costs

Tools are devised which structure the resources element (resources and activities matrix) the cost element (cost and activities matrix) of the programme and cursory indication is given of the new and available human, financial and physical resources required; and the primary costs (one-time fixed, capital, recurring) and secondary cost implications of the programme.

Plan

The plan element of the programme structures the process sequence. It begins with the concluding event of the inquiry phase, that is, the submission by the Commission of Inquiry, of its report to the President.

How long will the process take from beginning to the end? The answer to the question is constrained by the uncertainty concerning the turnaround time or the life cycle of the programme that would be implemented. It is dealt with further on.

The concluding event of the inquiry phase initiates the adoption phase of the process, or *milestone 1*. The fixing of the time target of the milestone is at the discretion of the Executive. Responsiveness is very desirable and the phase should be concluded, as soon as practicable. It includes the execution of an activity and the making of a decision by the Executive. The outcome expected from the phase is: the establishment and operation of the Task Force, recommended by the Commission, to advise and assist the Ministry of Land and Settlements on immediate actions in several areas, until such time as The Land Titles Tribunal is established and operated; and the decision of the Executive on the preferred policy and programme to implement, to redress the past wrongdoings and the prevention in the future.

The conclusion of the adoption phase initiates the implementation phase of the process, or *milestone 2*. The fixing of the time target of the milestone is also at the discretion of the Executive. The phase includes two sets of activities and a decision of the Executive. The first set of *activities* is to do with: the enactment of a new section into the Government Lands Act (GLA)—to establish the Tribunal, including consequential amendments to other legislation; the establishment and commencement of operation of the Tribunal, after preparation and training lasting three months; and the establishment and operation of the steering system and the strategic unit for the oversight and the steering of the programme. The second set of *activities* is to do with execution of the respective substantive activities of the programme, including oversight and steering. The *decision* of the Executive is on when and how to conclude the programme.

The expected outcomes of the phase are the outputs of the activities, illustrated under *outcomes*. The question of how long the process will take to achieve the outcome can be addressed by conducting an assessment of

the programme at an appropriate time, which the Commission recommends should be twenty-four months after the commencement of implementation. The assessment, which ought to be conducted by the strategic unit, should shed light on the uncertainty, and arrive at a real estimation of the turnaround time or life cycle of the programme. This would permit the Executive to reach an informed decision and consensus on when and how to conclude the programme.

The conclusion of the implementation phase initiates the evaluation phase of the process or *milestone 3*. The time target of the milestone is fixed by the Steering System. The Strategic Unit administers the evaluative activity. The outcome of the phase is the assessment of the ultimate outcome, that is, the outputs and the impacts of the policy and the programme or the strategy. The conclusion of the evaluation phase ends the programme, as required by the decision of the Executive.

(e) Organisation

The organisation component, that is, the government system reveals the set of implementers of the strategy. The set consists of the existing structures of government, and the new structures that would be required, to execute, oversee and steer the strategy. The challenge is to achieve a good fit between the strategy, and such other elements of organisations as: structures, systems, staff, skills and core competence, style and culture or shared values.

Constraints

There are severe organizational pathologies originating from the past era, which afflicted and degenerated these elements, especially the culture or shared values of the civil service. Norms were corrupted. The pressures to commit immoral, illegal and criminal acts mounted. Consequently, the rise of 'kleptocracy'—government by theft, and the culture of impunity, which perpetrated the plunder of public land and money besides abuse of human rights. This systemic crisis is being ameliorated by the governance and ethics reforms that are underway.

The degenerate culture of the civil service, that is, its collective attitude, character and the reputation would impose limitations and obstacles that

may stand in the way of achieving the strategy. The decision process of the civil service was characterized by 'orders from above' dictum, which propagated the abuse of power—authorized or not and the abuse of office, by the senior and subordinate staff at the centre and periphery of the administration. The orders were also obeyed for fear of being sacked. The administrative style of subservience and unquestioned conformity to the dictates of the political patron led to the systemic crisis of accountability, transparency and integrity. The aftermath would also inhibit the implementation of the strategy.

There would be risk of covert politics and resistance to the strategy, by those inside the bureaucracy and their allies outside, whose stakes – the ill-gotten land and property, would be threatened by it. Therefore, the implementers of the strategy should be appropriately and adequately prepared to confront this challenge. The top civil servants and policymakers should move from the inherited dictatorial and autocratic style, to a participative style of administration. They should internalize NARC's electoral promise to the citizens regarding the realization of "good governance and participatory democracy".

(f) Structures

The new structures that would be established and operated, as recommended by the Commission, include The Land Titles Tribunal, the Task Force to advise and assist the Ministry of Land and Settlements, and the Steering System and the Strategic Unit. These new structures and the existing structures that would be involved constitute the set of implementers of such programme activities as: revocation and rectification, prosecution, prevention, lustration, monitoring and divestment.

The Land Titles Tribunal

The Tribunal would be established and operated by the enactment of an amendment—a new Section 147(A), to the Government Lands Act (GLA). The Tribunal shall consist of a Chairperson, a Deputy Chairperson and nine members, appointed by the Minister, with specified qualifications and credentials. The Tribunal is a quasi-judicial body. It would have the same jurisdiction and powers as conferred upon the High Court in Civil matters.

Task Force

A Task Force to advise and assist the Ministry of Land and Settlements is recommended by the Commission. It should be established and operated under the Executive power of government, under Section 23 of the Constitution. It would consist of specialists in the area of land law and land administration from outside Government and Permanent Secretary of Ministry of Land and Settlements, Permanent Secretary of Ministry of Local Government, Permanent Secretary of Ministry of Environment, Natural Resources and Wildlife, Director of Kenya Anti-corruption Commission and Director of Criminal Investigations Department. The Task Force would advise and assist the Ministry on: revocation of illegal registered titles; repossession of land; measures to be taken regarding claims filed in the courts; information retrieval systems for multiple purposes; and verification of the validity of registered titles to land. It would assist CID on investigating and prosecuting criminal offenders under the Penal Code in the area of illegal allocation of land in the past decade or so.

Steering System and Strategic Unit

The role of these structures in a real world situation is to think ahead and adapt en route the implementation of the strategy, as the circumstances demand. A triad comprising a *helmsman*, a *captain* and a *navigator* constitute a good analogy of the steering system. The implementers of the activities are the *helmsmen* of the programme—the drivers of change. The Steering System should have the representation of the Anti-Corruption Strategy Steering Committee, which as the policy-maker is the *captain*, the one who makes changes in the destination or policy. The Strategic Unit is the *navigator*, who charts the course, ensures that the programme is on the right path and changes course only as the circumstances demand.

An important task would be to monitor policy *slippages* and *drifts* in the course of implementation. Slippages are associated with distortions of policy intentions and drifts occur when the original policy intentions are fundamentally altered. The Strategic Unit is responsible for seeing that the strategy is put into effect. It performs the planning, coordinating, communicating, monitoring and evaluating functions. Therefore, the unit should be endowed with appropriate and adequate human resources and the support services.

(g) Implementers

The implementers and those who would be collaborators, include: the Ministry of Land and Settlements which is the focal point of implementation; the Land Titles Tribunal; Office of the President—Governance and Ethics, Kenya Police (CID), Inspectorate of State Corporations; Kenya Anti-Corruption Authority (KACA); the Ministry of Justice and Constitutional Affairs; Judiciary; and the Ministries of Local Government; Roads, Public Works and Housing; and Environment, Natural Resources and Wildlife. They would execute the respective programme activities. The oversight and steering activity would be the responsibility of the Steering System and the Strategic Unit.

An 'implementer and measures matrix' could be devised for rapid assessment of any implementer, around such criteria as: responsiveness, adequacy, appropriateness, effectiveness and efficiency, with respect to structure, staff, systems, skills, style and most importantly, culture or shared values. *For detailed proposals on the implementation process see Annex 20 in Vol. II of the Annexes.*

APPENDICES

THE KENYA GAZETTE

GAZETTE NOTICE NO. 4559

4TH July, 2003

THE COMMISSIONS OF INQUIRY ACT

(Cap. 102)

COMMISSION OF INQUIRY

WHEREAS it appears that lands vested in the Republic or dedicated or reserved for public purposes may have been allocated, by corrupt or fraudulent practices or other unlawful or irregular means, to private persons, and that such lands continue to be occupied contrary to the good title of the Republic or in a manner inconsistent with the purposes for which such lands were respectively dedicated or reserved.

NOW THEREFORE, in exercise of the powers conferred on the President by section 3 of the Commissions of Inquiry Act, I, Mwai Kibaki, President and Commander-in-Chief of the Armed Forces of the Republic of Kenya, being of the opinion that it is the public interest to do so, appoint a Commission of Inquiry to be held forthwith in Nairobi by the following persons who shall be the commissioners-

Paul Njoroge Ndungu, who shall be the Chairman of the Commission; and

Michael Aronson, who shall be the Vice-Chairman; and
Abdallah Ahmed Abdallah;

Davinder Lamba;

Ann Kirima (Ms.);

Ishan Kapila;

Odenda Lumumba;

Winston O. Ayoki;

Nancy Wanjiru Mukunya (Ms.);

Peter Koech;

Permanent Secretary in the Office of the President responsible for Governance and Ethics or his designated representative; Permanent Secretary, Ministry of Lands and Settlement or his designated representative;

Permanent Secretary, Ministry of Environment, Natural Resources and Wildlife or his designated representative;

Permanent Secretary, Ministry of Roads, Public Works and Housing or his designated representative;

Permanent Secretary, Ministry of Local Government or his designated representative; and

Thuita Mwangi and Smokin Wanjala, who shall be the joint secretaries of the Commission; and

Raychelle Awour Omamo; and

Wanyiri Kihoro,

who shall be counsel to assist the Commission.

AND I SPECIFY, as terms of reference for the inquiry, the following-

(a) to inquire generally into the allocation of lands, and in particular-

(i) to inquire into the allocation, to private individuals or corporation, of public lands or lands dedicated or reserved for a public purpose;

(ii) to collect and collate all evidence and information available, whether from ministry-based committees or from any other source, relating to the nature and extent of unlawful or irregular allocations of such lands; and

(iii) to prepare a list of all lands unlawfully or irregularly allocated, specifying particulars of the lands and of the persons to whom they were allocated, the date of allocation, particulars of all subsequent dealings in the lands concerned and their current ownership and development status;

(b) to inquire into and ascertain-

(i) the identity of any persons, whether individuals or bodies corporate, to whom any such lands were allocated by unlawful or irregular means; and

(ii) the identity of any public officials involved in such allocations;

- (c) to carry out such other investigations into any matters incidental to the foregoing as, in the opinion of the commissioners, will be beneficial to a better and fuller discharge of their commission;
- (d) to carry out such other investigations as may be directed by the President or the Minister for Lands and Settlement;
- (e) to recommend-
 - (i) legal and administrative measures for the restoration of such lands to their proper title or purpose, having the regard to the rights of any private person having any *bona fide* entitlement to or claim of right over the lands concerned;
 - (ii) legal and administrative measures to be taken in the event that such lands are for any reason unable to be restored to their proper title or purpose;
 - (iii) criminal investigation or prosecution of, and any other measures to be taken against, persons involved in the unlawful or irregular allocation of such lands; and
 - (iv) legal and administrative measures for the prevention of unlawful or irregular allocations of such land in the future; and
- (f) to report, in accordance with section 7 of the said Act, their findings and any such recommendations within a period of one hundred and eighty (180) days commencing on the day next following the day on which the last of the commissioners to take his oath of office, in accordance with section 5 of the said Act, shall have done so; and
- (g) to make monthly progress reports to the Ministry for Lands and Settlement.

AND I DIRECT the commissioners, in the execution of the commission given and issued, to conform with the following instructions (except in so far as the commissioners consider it essential, for ascertaining the truth of any matter into which they are commissioned to inquire, to depart from them)-

- (i) that evidence adversely affecting the regulation of any person, or tending to reflect in any way upon the character or conduct any

- (ii) person, shall not be received unless the commissioners are satisfied it is relevant to the inquiry, and that all reasonable efforts have been made to give that person prior warning of the general nature of the evidence, and that, where no such warning has been given, the general nature of the evidence has been communicated to the person;
 - (iii) that the person shall be given such opportunity as is reasonable and practicable to be present, either in person or by his advocate, at the hearing of the evidence, to cross-examine any witness testifying thereto, and to adduce without unreasonable delay material evidence, in his own behalf in refutation or otherwise in relation to the evidence;
 - (iv) that hearsay evidence which adversely affects the reputation of any person or tends to reflect in any way upon the character or conduct of any person, shall not be received.
- AND I FURTHER DIRECT the Commissioners that, in the event of any departure from the foregoing instructions, they shall record their reasons therefore in the record of the inquiry, and shall report thereon, with their reasons therefore, in their report of the inquiry.

Dated the 30th June, 2003.

MWAI KIBAKI,
President.

THE KENYA GAZETTE

14th July, 2003

THE COMMISSIONS OF INQUIRY ACT

(Cap. 102)

CORRIGENDUM

IN Gazette Notice No. 4559 of 2003, *amend* the the name o the Chairman of the Commission to *read* "Paul Ndiritu Ndung'u" *instead* of "Paul Njoroge Ndungu."

THE KENYA GAZETTE

GAZETTE NOTICE NO. 6724

THE COMMISSIONS OF INQUIRY ACT

(Cap. 102)

**THE COMMISSION OF INQUIRY INTO ILLEGAL/IRREGULAR
ALLOCATION OF PUBLIC LAND**

APPOINTMENT OF JOINT SECRETARY

IN EXERCISE of the powers conferred by section 6 of the Commissions of Inquiry Act, I, Mwai Kibaki, President and Commander-in-Chief of the Armed Forces of the Republic of Kenya, appoint-

VICTORIA KATTAMBO (MRS.)

to be a joint secretary to the commission appointed by me through Gazette Notice No. 4559 of 2003, with effect from 22nd September, 2003, and revoke the appointment of Thuita Mwangi.

Dated the 22nd September, 2003.

MWAI KIBAKI,
President.

GAZETTE NOTICE No. 711

THE COMMISSIONS OF INQUIRY ACT

(Cap. 102)

**JUDICIAL COMMISSION OF INQUIRY INTO THE ILLEGAL
AND IRREGULAR ALLOCATION OF PUBLIC LAND**

EXTENSION OF PERIOD

IN EXERCISE of the powers conferred by section 4 of the Commissions of Inquiry Act, I, Mwai Kibaki, President and Commander-in-Chief of the Armed Forces of the Republic of Kenya, extend the period within which the Commission of Inquiry appointed by me through Gazette Notice No. 4559 of 2003 should report on its findings and recommendations, by a period of ninety (90) days with effect from the 24th January, 2004.

Dated the 3rd February, 2004.

MWAI KIBAKI,
President.

COMMISSIONS OF INQUIRY ACT
(CAP 102)

COMMISSION OF INQUIRY INTO THE ALLOCATION OF
PUBLIC LAND

(a) SUMMONS FOR THE PRODUCTION OF RECORDS AND
INFORMATION

(Section 10 (1) of the Commissions of Inquiry Act)

To:

By Gazette Notice No. 4559, published on the 4th day of July, 2003, the President of the Republic of Kenya convened this Commission of Inquiry under the Commissions of Inquiry Act to assist the Government determine the extent to which lands dedicated or reserved for a public purpose have been irregularly or illegally allocated to private individuals, corporations or other institutions.

Pursuant to the powers vested in this Commission by virtue of Section 10(1) of the Commissions of Inquiry Act, you are **hereby** required to produce for the examination of the Commission the documents/information listed below within **Fourteen (14) days** of the date of this summons.

1. A list and particulars of **ALL LANDS** held, used or administered by your Council whether under freehold or leasehold title or under licence as at the **year 1962** or as at the date of the establishment of your Council, if this occurred after the year 1962.
2. A list and particulars of **ALL LANDS** previously held, used or administered by your Council which have since the year 1962, been allocated, sold or otherwise disposed of, leased, or licensed to a private individual, corporation or any other Council. Please do supply precise details of the recipients of such lands.
3. A list and particulars of **ALL LANDS** which since the year 1962 have been acquired by your Council through allocation, purchase, surrender, exchange or other manner. Please do supply precise details of the private individual, corporation, institution or other person from whom the said lands were acquired.

4. A list and particulars of **ALL LANDS** so acquired by your Council which have since been disposed of to a private individual, corporation or other institutions.
5. A list and particulars of **such lands** as have already been allocated or in any other manner **disposed** of and whether they had been dedicated or reserved for a **public purpose** e.g. hospitals, public utilities, parks, dispensaries, road reserves, etc.
6. A list of status of development or partial development of **ALL LANDS** currently held by your Council.
7. A list of **ALL LANDS** leased from private individuals, corporations or other institutions.

TAKE NOTICE THAT:

- (a) The information required should as far as possible be produced to the Commission in the prescribed form attached hereto.
- (b) All information supplied must be accurate and truthful.
- (c) All information supplied shall be subject to verification by the Commission through cross-referencing with other official records, and information derived from the public and other sources.

TAKE FURTHER NOTICE: THAT FAILURE TO PRODUCE THE INFORMATION REQUIRED TO THE COMMISSION SHALL AMOUNT TO CONTEMPT OF THE COMMISSION AND MAY GIVE RISE TO SERIOUS LEGAL CONSEQUENCES.

DATED AT NAIROBI DAY OF 2003

Smokin Wanjala
JOINT SECRETARY

Victoria Kattambo
JOINT SECRETARY



**COMMISSION OF INQUIRY
INTO
ILLEGAL/IRREGULAR ALLOCATION OF PUBLIC LAND**

Tel: 2731319/2731308/2731321-2
Mobile : 0721-724838, 0734-750323
Fax : 2722815
E-mail : landcommission@nbnet.co.ke

NSSF Complex, Block A,
Eastern Wing, 11th Floor
P. O. Box 6450-00100
NAIROBI

NOTICE TO THE PUBLIC

This Commission of Inquiry as appointed by the President on 4th July 2003 under the Commissions of Inquiry Act (Cap 102) of the Laws of Kenya. The Commission is to assist the Government determine the extent to which Lands dedicated or reserved for a public purpose have been irregularly or unlawfully allocated to Private Individuals, Corporations and other Institutions. The Commission is required specifically;

1. To inquire into the allocation, to private individuals or corporations, of public lands or lands dedicated or reserved for a public purpose;
2. To collect and collate all evidence and information available whether from ministry based committees or from any other source, relating to the nature and extent of unlawful or irregular allocations of such lands; and
3. To prepare a list of an lands unlawfully or irregularly allocated, specifying particulars of the lands and of the persons to whom they were allocated, the date of allocation, particulars of all subsequent dealings in the lands concerned and their current ownership and development status;

4. To ascertain the identities of any persons, whether individuals or bodies corporate to whom any such lands were allocated by unlawful or irregular means;
5. To ascertain the identities of any public officials who may have been involved in such allocations;
6. To carry out such other investigations as may be directed by the President or Minister for Lands and Settlement

The Commission is then required to recommend—

1. legal and administrative measures for the recovery and restoration of such land to their proper title or purpose, having due regard to the rights of any private person having any bona fide entitlement to or claim of right over the lands concerned;
2. legal and administrative measures to be taken in case such land cannot be recovered;
3. any criminal prosecution against any persons involved in such allocations;
4. legal and administrative measures for the prevention of such illegal or irregular allocations in the future.

For the Commission to accomplish this important task, it will need maximum cooperation from members of the public. It is absolutely critical to the Commission's work that anyone who may have evidence regarding an illegal or irregular allocation of public land avails the same to the Commission. It is everyone's civic responsibility to provide information which will help in the recovery of public land so that the same may be reserved for use by present and future generations.

Consequently, the Commission wishes to invite any member of the public, who has information regarding an unlawful or irregular allocation of public land (Developed or Undeveloped) to submit the same to the Commission's Secretariat, at the Address shown above.

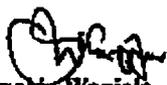
The information received shall be treated in strict confidence and shall be used only for the purposes for which the Commission was appointed.

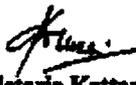
The lands with respect to which this information is required are:

- Government land located within Urban areas and Townships

- Local authority land located within Urban areas and Townships
- Trust land
- National Forests
- National Parks and Reserves
- Local Government Forests
- Local Government Parks and Reserves
- Settlement Schemes
- Land held by State Corporations and Ministries
- Lands set aside and held by Research Institutions for research and extension work
- Wakf Lands
- Wetlands (river beds, swamps etc)
- Any other lands that may have been dedicated or reserved for a public purpose such as hospitals, schools road reserves, beaches, historical sites and monuments

Those who provide, information may be required by the Commission to give further evidence or particulars through written memoranda or oral testimony. The information sought covers the period from 1962 to the PRESENT. Given the importance and urgency of the matter under inquiry, members of the public are required to submit information within a period of TWO MONTHS from the date of this NOTICE. The COMMISSION will soon commence public hearings to verify and receive further information as circumstances may dictate. Details of such hearings will be published soon.


Smokha Wanjala
JOINT SECRETARY


Victoria Kattambo
JOINT SECRETARY

JAMHURI YA KENYA

TUME YA UCHUNGUZI KATIKA

UTOAJI WA VIPANDE VYA ARDHI VYA UMMA KIHOLELA/KINYUME CHA SHERIA.

Simu: 2731319/2731308/2731321-2 Barua pepe: 2722815

Rununu: 0721-724838,0734-750323

NSSF Complex, Block A, Eastern Wing, 11th flr, S.L.P 6450,00100- Nairobi.

Pepesi:

landcommission@nbnet.co.ke

TANGAZO KWA UMMA

Tume hii ya Uchunguzi ilituliwa na mstahiki Rais tarehe 4, mwezi Julai, 2003 chini ya kifungu cha sheria ya Tume ya Uchunguzi (sehemu ya 102) ya sheria ya Kenya. Wajibu wa Tume hii ni kuisaidia serikali kubainisha na kuvithibiti vipande vya ardhi vilivyotengewa umma ama kwa matumizi ya umma na hatimaye kutumiwa kiholelaholela au kupewa watu binafsi, mashirika na asasi nyingine.

Kwa hakika Tume hii inahitajika:

1. Kuchunguza ugawanyaji hila, kwa watu binafsi, mashirika, ya ardhi ya umma ama ardhi iliyotengwa au kuhifadhiwa kwa matumizi ya umma;
2. Kukusanya na kudhihirisha wazi ushahidi na habari zilizopo ima kutoka kwa kamati ya wizara husika au kwa njia nyingine, inayohusiana na kiwango cha uharamia huo ama ugawanyaji kiholela wa vipande vya ardhi kama hivyo; na
3. Kutayarisha orodha ya majina ya vipande vya ardhi vilivyotolewa kiholela, pawe na maelezo ya kina kuhusu ardhi zenyewe na wale waliopewa ardhi hizo, siku iliyotolewa, maelezo ya wahusika wengine wa ardhi hiyo na umiliki wao wa sasa na maendeleo ambayo tayari wameshafanyia ardhi hizo;

4. Kuelezea majina ya wamiliki, watu binafsi au mashirika ambayo vipande vya ardhi kama hivyo vilitolewa kiharamu ama kinyume cha sheria;
5. Kuelezea majina ya wamiliki ambao ni wahusika wa serikali waliohusika katika ugawanyaji huo
6. Kufanya uchunguzi mwingine wa aina hiyo kufuatia maagizo kutoka kwa Rais ama Waziri wa Ardhi na Makao

Hatimaye, Tume hupaswa kupendekeza kwamba

1. Taratibu za usimamizi wa kisheria kwa minajili ya kurudisha na kuhifadhi ardhi kama hizo kwa wanaofaa kupewa ama matumizi yake halisi, kwa kulingania haki na usawa wa mtu yeyote aliyeachiwa ama atakayedai kukimiliki kipande hicho cha ardhi
2. Taratibu za usimamizi wa kisheria zichukuliwe iwapo ardhi kama hizo haziwezi kurudishwa
3. Madai yoyote ya mauaji dhidi ya mtu yeyote aliyehusika
4. Taratibu za usimamizi wa kisheria kwa kuzuia utoaji huo wa ardhi kiholela na kinyume cha sheria baadae

Iii Tume hii ikamilishe zoezi hili muhimu, itahitaji ushirikiano mkubwa wa umma. Ni suala nyeti mno nalamanufaa kwa kazi ya Tume hii kwamba kila mtu mwenye ushahidi unaohusiana na ugawanyaji wa ardhi ya umma kinyume cha sheria ama kiholela aufikishe katika afisi za Tume. Ni jukumu kubwa la kila mmoja kutoa habari ili kurudisha ardhi hizo za umma, kwani ardhi hiyo hiyo itahifadhiwa kwa matumizi ya kizazi kilichopo na kile kijacho.

Hata hivyo, Tume hii ingependa kumualika mwananchi yeyote mwenye taarifa kuhusu ugawanyaji wa ardhi ya umma kinyume cha sheria ama kiholela (isiyotumiwa ama isiyotumiwa) kufikisha ujumbe huo kwa afisi kuu za Tume, kupitia anuwani zilizotajwa awali.

Taarifa itakayotolewa itafanywa kuwa siri kubwa na itatumiwa tu kuambatana na vigezo na sera za Tume.

Ardhi ambazo zina ambatana na maagizo yalitajwa ni pamoja na:

1. Ardhi ya serikali zilizopo katika maeneo ya miji na wilaya.

2. Ardhi za serikali za wilaya zilizo kwenye maeneo ya miji na wilaya.
3. Ardhi za muamana
4. Misitu ya Kitaifa
5. Mbuga na maeneo ya kitaifa ya wanyamapori
6. Misitu ya serikali za Wilaya
7. Mbuga na maeneo ya wanyamapori ya serikali za wilaya
8. Miradi ya makazi ya mitaa
9. Ardhi ya mashirika ya serikali na wizara
10. Ardhi iliyotengwa na kumilikiwa na taasisi za utafiti kwa shughuli za utafitina shughuli nyingine
11. Ardhi ya Wake
12. Maeneo ua usumbi/ tepwetepwe (viuno vya mito, vitivo n.k)
13. Ardhi yeyote nyingine ambayo pengine ilikuwa imetengwa ama kuhifadhiwa kwa ajili ya matumizi ya umma kama vile hospitali, shule, hifadhi za barabara, fuo za bahari (bichi), ngome za kihistoria na sehemu za kuashiria fahari ya nchi.

Wale watakaotoa taarifa zozote watahitajika na Tume kutoa ushahidi ama maelezo kamili kupitia kwa maandiko ya memoranda ama kwa maelezo. Taarifa hiyo inayohitajika itahusisha masuala ya ardhi ya tokea miaka ya 1962 mpaka sasa. Kuambatana na dharura na umuhimu uliopo wa Tume hii ya Uchunguzi, wananchi wanahitajika kufikisha taarifa zao kwa kipindi cha MIEZI MIWILI kutoka siku ya ILANI hii.

Hivi karibuni TUME HII YA UCHUNGUZI itanza kusikiza taarifa kwa umma ili kubainisha na kupata habari zaidi kuhusiana na halihalisi ya mambo. Maelezo zaidi kuhusiana na masuala hayo yatachapishwa hivi karibuni.

**SUMMONS FOR THE PRODUCTION OF DOCUMENTS FOR
EXAMINATION**

(Section 10(1) of the Commissions of Inquiry Act)

To:

WHEREAS by Gazette Notice 4559, published on the 4th day of July, 2003 the President of the Republic of Kenya convened this Commission of Inquiry under the Commissions of Inquiry Act to assist the Government determine the extent to which lands dedicated or reserved for a public purpose have been irregularly or illegally allocated to private individuals or corporations.

PURSUANT to the powers vested in this Commission by virtue of Section 10(1) and Section 13(1), (2) of the Commissions of Inquiry Act (Cap. 102) you are hereby required to produce the documents specified below for the examination of the Commission or its authorized representatives, at the Commission's premises situated at the **11th Floor, NSSF Complex, Eastern Wing, Nairobi:-**

PARTICULARS REQUIRED *(as per the attached Annex)*

You are to appear on the **O'clock.**

TAKE NOTICE that if you fail to comply with this order without lawful excuse, you will be subject to the consequences as laid down in Section 121 of the penal Code Cap. 63 and Sections 145, 146 and 149 of the Criminal Procedure Code Cap. 75.

DATED AT NAIROBIday of 2003

COMMISSIONER

COMMISSIONER



**COMMISSION OF INQUIRY
INTO
ILLEGAL/IRREGULAR ALLOCATION OF PUBLIC LAND**

Tel: 2731319/2731308/2731321-2
Mobile : 0721-724838, 0734-750323
Fax : 2722815
E-mail : landcommission@nbnet.co.ke

NSSF Complex, Block A,
Eastern Wing, 11th Floor
P. O. Box 6450-00100
NAIROBI

**COMMISSION OF INQUIRY ACT
(CAP. 102)**

PUBLIC NOTICE

By Gazette Notice No. 4559, published on the 4th day of July, 2003, the President of the Republic of Kenya appointed this Commission of Inquiry under the Commissions of Inquiry Act to assist the Government determine the extent to which lands dedicated or reserved for a public purpose have been irregularly or illegally allocate to private individuals or corporations and to make recommendations as to the legal and administrative measures for the restoration of such lands and in respect of such criminal investigation for prosecution of, and any other measures to be taken against persons involved in the unlawful or irregular allocation of such lands:

Pursuant to the said mandate the Commission has commenced its investigations into the matter stated above and will submit its findings and recommendation to the President of the Republic of Kenya.

Accordingly, members of the Public are **HEREBY CAUTIONED** against acquiring, developing, disposing of, or otherwise encumbering and alienating any land which has been dedicated or reserved for a public

purpose, or which has or appears to have been irregularly or illegally allocated to any person without verifying the authenticity of the title.

Dated at Nairobi 12th day of September, 2003.

Smokin Wanjala
JOINT SECRETARY

Victoria Kattambo
JOINT SECRETARY

ILLUSTRATIONS ON FOREST EXCISIONS

(a)

NGONG ROAD FOREST

Ngong Road Forest was gazetted as forest reserve as per proclamation No. 44 of 1932 and covered an area of 2,926.6 hectares. It was declared as a central forest under Legal Notice No. 174 of 20th May 1964. Various excisions have taken place over the years for public and private development. Some of the beneficiaries include Lenana School, Extelcoms, St. Francis Anglican Church, P.C.E.A. Mugumoini Church, Langata Cemetery, the War Cemetery, Kenya Science Teachers College, Meteorological Department and the ASK Showground. By 1978 the forest covered an area of 1,328.2 ha.

In 1996 a title deed: Grant no. I.R. 70244 (signed by Mr. W. Gacanja) was issued to the Permanent Secretary Treasury to hold in trust for the Permanent Secretary MENR. This left out an area covering 339.8 hectares from the original forest area of 1,328.8 hectares. In 1999, the title was surrendered to the Commissioner of Lands and a leasehold title deed: Grant no. I.R. 81938 (signed by Mr. W. Gacanja) for an area of 538.2 hectares issued to the Permanent Secretary Treasury to hold in trust for Ngong Road Sanctuary. This again left out an area of 450 hectares from the title issued in 1996. In total, an area of 789.8 hectares was left outside the boundaries of the Ngong Road Forest. The land excluded from the title was allocated to private developers some of who have since transferred it to other third parties.

Some of the illegally allocated land parcels include:

- ♣ 8.8 hectares that was allocated for expansion of Langata women's prison but later a big portion of this land was allocated to private developers who have already constructed residential houses. A small portion of this area has been developed by the Commissioner of Prisons.
- ♣ 15.09 hectares that was authorized as per CCF's letter Ref. No. FOR 68/7/3/VOL.1V/211 of 15/1/85 in exchange with a prime plot in Industrial Area belonging to the Department of Prisons, which was later, allocated to private developers. Since 1996, the land has been transferred to others and presently on the land stands a modern hospital, a residential Complex owned by the Kenya Medical Resuscitation Centre and other residential houses owned by illegal allottees. Presently construction is going on. The land in question is still part of the gazetted forest.

- ♣ 53.68 ha allocated to a private developer by legal notice No. 44 of 1998 – The forest has been cleared but not structures erected. Unconfirmed information indicates that some of this land has been sold to some parastatals.
- ♣ 82 ha were excised as per legal notice No.79 of 1997. This Legal Notice was signed by Mr. John Sambu the Minister for MENR one year earlier on the 13th June 1996. Boundary plan No. 175/364 delineating the area to be excised was not found in Ardhi House nor in Forest Department and neither was a gazette notice published and thus, making this excision irregular.

(b)

KARURA FOREST

Karura forest was gazetted as a forest reserve as per proclamation No. 44 of 1932 and covered an area of 1,062.7 hectares. The forest was declared a central forest under Legal Notice No. 174 of 20th May 1964. Various excisions have taken place over time for public and private development.

Out of the 8.1 ha set aside for Diplomats, 3.0 ha were granted to ICRAF as per letter Ref. 119134/39 of 11/3/94 from the Commissioner of Lands and letter Ref. No. B5.04/VOL.111/6 of 11/7/94 from the Permanent Secretary MENR. The balance of 5.1 Ha was allocated to other parties. A Gazette Notice No. 5677 of 15/12/89 was published to declare intention to alter forest boundaries to exclude 8.1 ha. In 2003 an American developer who had purchased the balance of 5.1 hectares attempted to put up a five star hotel but his efforts were thwarted since this area is not degazetted.

In 1980, land covering 26.251 Ha was allocated to Tumaini School vide the Chief Conservator's letter Ref. No. FOR 68/7/9/73 of 12/8/80. The Commissioner of Lands issued a leasehold title Grant No. I.R. 37653, for a period of 99 years with effect from 1/11/82. A Gazette Notice No. 1802 of 2/5/82 was also published. However no legal notice has been published. To date no development has been done on this land.

In the 1990s, private developers requested the Commissioner of Lands to allocate them an area measuring approximately 1.838 hectares that was sandwiched between old and new Kiambu Road at the precincts of River Rui-Ruaka, which was left out during relocation of the road in the 1960s. The road corridor was allocated to Messrs. Hezekiah Karanja Kogo (0.756 Ha), Samson Muriithi Nduhiu (0.2179 Ha) and Sardu Singh Virdi and Gusharan Kaur (0.8651 Ha) without consulting the Forest Department. Leasehold titles for 99 years were issued with effect from 1/7/92 as Grant Nos. I.R. 623173, 57926 and 73513 for L.R. Nos. 19090/1- 4, 17942 and 22733. Two of the beneficiaries have since transferred the land to Messrs Johnson Githii Karanja (0.3774 Ha), Waweru Mungai (0.1899 Ha), Famwell Promotions Limited (0.1887 Ha) and Peter Kamau (0.8651 Ha) who have all taken possession on the ground except Farmwell Promotion Ltd.

In 1989, an area covering 2.668 Ha was allocated to Hon. J.J Kamotho in exchange for his land that was purportedly allocated to Kenya Technical Teachers College. Gazette Notice No. 2019 of 28/4/89 was published. In 1994 an area covering 18.41 ha was allocated to Pelican Engineering and Construction as per Permanent Secretary's letter Ref. No. Z.85.VOL.111/195 of 28/7/94. Gazette Notice No. 4818 of 19/8/94 was published but it was contested. The area is still forestland but the National Social Security Fund claims to have bought it from Pelican Engineering in year 2001.

On 21st August 1996, a freehold title covering 564.1 hectares was issued. This left out an area of 477 hectares from the original area of 1,041.1 hectares by 1996. In 1997, a Legal Notice no. 97 dated 16th June 1997 was published excising an area of 85.0 hectares out of Karura forest, but no Gazette Notice had been published as required by the Forests Act. This Legal Notice was signed on the 16th of June 1996, which was one year earlier. The forestland area affected by this illegal and irregular move was subsequently illegally and irregularly allocated to a group of companies shortlisted in a matrix on Karura herein attached detailing the particulars of the beneficiaries.

(c)

KAPTAGAT FOREST

Kaptagat forest was originally gazetted as forest as per proclamation No 57 of 18th June 1941. It covered an area of approximately 13,894.37 ha. Various alterations to excise this forestland for various public and private uses have been made over the years. In all the areas earmarked for public amenities, there are no letters of authorization. In total 4,100 hectares were proposed for development without authority.

Eleven (11) schools have been constructed illegally in an area covering approximately 132 hectares and they are fully operational. On average, each of the secondary schools occupies 20 hectares while primary schools occupy 12 hectares. Another 486 hectares are reserved for public amenities which include health centres, shopping centres, a divisional headquarter and a youth centre. In addition, seven (7) settlement schemes with a reservation of 3,472 hectares have been proposed. The seven settlements include Mosop/Kaptarakwa, Marichor, Sabor, Mosop and Kaptilos.

In 1994, an area measuring approximately 161.5 ha as per Legal Notice No 384 of 1994 was excised and allocated to Hon. Kipyator Nicholas Kiprono Biwott of Post office Box 40084, Nairobi and Manu Chandaria of Post office Box 50820, Nairobi as trustees of "MARIA SOTI MEMORIAL TRUST. The area is known as LR. NO. 19054 and registered as title I.R.6700/1.

Another irregular allocation from Kaptagat forest was to LT. GEN. SAWE, who was allocated 56.54HA on a lease of three years upon its expiry subject to the land being developed to the satisfaction of the District Agriculture Officer, the allottee would be granted a conditional agricultural freehold upon payment of purchase price of 485,000. However, the said conditional freehold was issued in contravention of the special conditions of allotment.

Comments:

Sometime in November 1990, part of Kaptagat forest was proposed to be excised for the purpose of establishing a secondary school. The area earmarked for this purpose was approximately 100 acres or 40 hectares. The then Permanent Secretary, Ministry of Environment and Natural Resources wrote to the District Forest Officer, Elgeyo Marakwet vide his letter Ref. No.Z.85 VOL. 11 TY/ 51 dated October 15th 1993 directing him to hasten the degazettement of the forest. However, while issuing this directive, the Permanent Secretary increased the area to be degazetted from the original 40 hectares to 140 hectares. The purpose of the excision also changed from that of establishing a secondary school to using the land for settlement.

The District Commissioner of the area was requested to use the services of the Local District Surveyor instead of the Forest Department Surveyor under the technical appraisal and direction of the Chief Conservator of Forests. The District Surveyor went ahead to survey an area measuring 161.5 hectares (21.5 hectares more than the area proposed in the Permanent Secretaries letter). A Boundary Plan No.175/341 was consequently prepared and forwarded to the Department of Forestry. The excision was carried out through Gazette Notice No. 3807 of June 23rd 1994 and Legal Notice No. 384 of October 5th 1994.

This area was then registered as L.R NO19054 and allocated to **Maria Soti Education Trust, whose Trustees are Mr. Nicholas Biwott and Mr. Manu Chandaria** and registered as freehold title NO. L.R 679001/1. The Trust was registered under the Perpetual Succession Act, Cap 164 on June 13th 1990. This excision was therefore carried out to benefit individuals and not to establish a school as had originally been claimed.

(d)

MAU FOREST COMPLEX

At the time of the original gazettelement in 1932, the total area under the Mau forest complex was **189,178.07 ha**. The complex consists of three forest Blocks, namely: Eastern Mau (65,942.94 Ha), South Western Mau (95,357.345 Ha) and Western Mau (27,877.78 Ha).

EASTERN MAU FOREST

Eastern Mau, which covers an area of 65,942.94 hectares, was originally gazetted as forest reserve as per proclamation No 56 of 18/6/41. Over the years various alterations of its boundary have taken place reducing the forest area in year 2001 to 29,669.7 hectares. In 1995, the District Forest Officer Nakuru made a report vide his letter Ref. No. **CONF/GEN/21/14** dated 18th September 1995 to the Director of Forestry that an area of 51,829.13 hectares had been earmarked for settlement.

In his letter Ref. No. **CONF/FOR/EXC/1/13/Vol.VI/116** of 19th November 1999, the Provincial Forest Officer Rift Valley reported that over 36,825 ha had been demarcated and settled in the forest estate. The Permanent Secretary, Ministry of Lands and Settlement vide his letter No. **CON/211/A11/11/94** of 4th November 1999 gave information on plots/parcels of the area settled as follows: Sururu (7,284 ha), Likia (2,833 ha), Nessuit (7,284 ha), Teret (2,428 ha), Ngongongeri (3,642 ha), Sigotik (1,214 ha), Mariashoni (7,284 ha), Ndoinet (6,070.42 ha) and Kiptagich (809.39ha).

The Permanent Secretary, Ministry of Lands and Settlement in his letter **CON/211/A/11/11/94** of 4th November 1999 reported that since 1993 the Government has been resettling the Okiek communities in Eastern and South Western Mau forest within 14 schemes covering an area of approximately 32,376 ha. As per **Legal Notice no.142** of 19th October 2001, a total of 35,301 hectares of forestland were excised in Eastern Mau in 2001 leaving a balance of 29,669.7 hectares. Although over 70% of the excised area is occupied, the excision has been contested in court.

(e)

MT. ELGON FOREST RESERVE

Mt. Elgon was gazetted as a forest reserve as per proclamation no. 44 of 30th April 1932 and initially covered an area of 91,890 hectares. Over the years, various alterations of its boundary have been made to excise parts of the forest and add some areas to it. In 1968, an area of 16,916 hectares was excised under Legal Notice No. 112 of 5th April 1968 and gazetted as Mt. Elgon National Park. In 2000, an area of 17,200 hectares was gazetted as per Legal Notice No. 88 of June 2000 and gazetted as Chepkitala National Reserve.

In 1974, an area covering 3,686 hectares in Chepyuk was excised under Legal Notice no. 51 of 22nd January 1974 to settle members of the Saboat community. However a bigger area was demarcated for settlement and to date, the area settled is approximately 8,700 hectares. To formalize the illegally settled area, the Permanent Secretary MENR authorized 3,568 hectares to be excised as per his letter Ref. No. MENR/041A/8/(145) of 26/9/2000. Later in 2001 another area of 496 hectares was authorized for excision for the purpose of accommodating people who were settled between River Malakisi and one of its tributaries. In total 4,064 hectares were authorized for excision and this whole area is settled.

In 1978, an area covering 1,981.8 hectares was added to the forest reserve and gazetted under Legal Notice No. 22 of 13th October 1978. The Government bought the land from white settlers for pulpwood development. In 1986, another area covering 372.3 hectares was added to the forest reserve and gazetted under legal notice no. 359 of 19th December 1986. This was in exchange with 501.9 hectares in Kitalale forest station, which was allocated to the late Major General Kipsaita.

In mid 1990's, Saboat leaders met the former head of state and requested for land to settle squatters. Later they were advised to form Cooperative Societies for ease of land acquisition. In the process a number of groups were formed, the most prominent being Kokwo Multipurpose Cooperative Society, Kony Multipurpose Cooperative Society and Kaitaboss Youth Group. The Commissioner of Lands went ahead and issued allotment letters to the groups and thereafter collected the required land premiums for LR. Nos. 6442, 6443/2, 6469, 6950/3 and 7404, which were all part of Mt. Elgon Forest Reserve.

Kokwo Multi Purpose Co operative Company Limited is claiming Forestland registered as L.R.. No.6950/3 which came to our possession through a legal land exchange transaction between the Late Major General Kipsaita and the Forest Department. The forest Department parted with its land registered as L.R.Nos.5523/2 and 19091 amounting to approximately 501.9 hectares in Kitalale Forest. These lands were degazetted as per Legal Notice Nos.360 of 1986 and 292 of 1994. Major General Kipsaita released to the Forest Department L.R. Nos. 6950/3 measuring approximately 372.3 hectares. Another parcel of Land Known as L.R.6992/2 measuring approximately 252.53 was purchase by Ministry of Environment and Natural Resources from Mr.K,L, Sorensen in 1975 for pulpwood development). However, this

property had a standing charge inhibiting its transfer of ownership to the Forest Department until the charge is settled. Presently this property has been irregularly allocated to Kokwo Multipurpose Co-operative Company Ltd. From the forgoing, Kabeywan Block L.R.Nos.6950/3 and 6992/2 all amounting to 2606.1 hectares are owned and managed by the Forest Department and it is apparent that the Commissioner of lands erred in allocating forestland for settlement without following the laid down procedures and consultative process.

(f)

KIAMBU FOREST

Kiambu Forest covering approximately 133.95 hectares was gazetted as forest as per proclamation No. 44 of 1932 and by legal notice No. 174 of 20th May 1964 it was declared a central forest. Over the years various land transactions have taken place in Kiambu Forest as tabulated here below.

An area measuring approximately 29.68 was authorized for excision for Pelican engineering and construction Company Ltd. as per Permanent Secretary's letter Ref. No. B14.21 VOL.1/34 dated 21/12/94 . Gazette Notice No. 1091 of 1/2/95 declaring the Minister's intention to alter boundaries of Kiambu Forest to exclude 29.68 hectares was published. This prompted a stiff challenge to be instituted in the High Court by seven Kiambu farmers vide MISC CIVIL APPL. NO. 350 of 1995. The case was heard and determined and subsequently Legal Notice No. 260 of 21/7/95 was published and thus finalizing this excision. However, as per Permanent Secretary's letter Ref. No. Z.85 VOL.1V/34 of 21/12/94 a title deed was issued to this company in 1991, before degazettement process. Another area measuring approximately 25.00 hectares for the general development of Wibeso Investment was authorized for excision as per PS' letter Ref.No.Z85 Vol.VII/28 of 23/6/95. Gazette Notice No.5846 of 23/10/98 was published and subsequently legal notice No.56 of 8/6/1999 to finalize the degazettement was published. Prior to degazettement a title deed "Grant No. I.R.67273 of 24th October 1995 and backdated to 1st April 1991 was issued. It was to hold for 99 years.

An area measuring approximately 39.82 ha was authorized for excision for Kiambu Women Group as per Chief Conservator's letter Ref. No. FOR: 68/7/62 of 12/7/84. The area has not been degazetted but it is already cleared. In the same locality an area of approximately 24.00 ha was allocated to Tugirane Project and registered under Kama Agencies owned by Hon. Kuria Kanyingi. Flower farming is being undertaken although the area is illegally acquired.

(g)

KAMITI FOREST

Kamiti Forest covering approximately 169.57 hectares was originally gazetted as forest as per proclamation No.14 of 1933. In 1964 as per legal notice No.174 of 20th May Kamiti was declared a Central Forest. However, the Provincial Commissioner, Central Province as per his letter Ref.No.D374/1/4/173 dated 5/12/94 stated that our Minister in his letter dated 1/12/94 authorized an excision of 300 acres (121.2 ha). The area was demarcated into plots for settlement and currently, the whole forest has been converted into Ting'ang'a Annex 11 Settlement Scheme. However, a check on the ground reveals erection of a few temporary structures. Vacation notices were issued last year, as the area has not been degazetted.

(h)

MOUNT KENYA FOREST

Mount Kenya Forest was originally gazetted as per proclamation No 48 of 1943. It covered an area of 277,236 hectares. Over the years various alterations to its boundary has been made mainly for settlement. In 1968, 10,522 hectares were excised for Mt. Kenya National Park and further subsequent excision have since followed as herein:

A total area of 930.3 hectares was excised in Ontulili Bock of Mt. Kenya Forest for a former Minister of Lands and Settlement the late Mr. H. Angaine. The lands are registered as L.R. Nos.13269 and 12234. The area was degazetted as per Legal Notice Nos. 68 and 107 of 1975 and 1977

Gathiuru Settlement: An area measuring approximately 658.2 Ha was authorized as per Minister and Permanent Secretary's letters Ref. No. B9.07 VOL.1/3 dated 26/7/93 and Ref: No.Z.85 VOL.1V/133 of 22/6/95. A survey of the area was carried out and an area measuring 744 hectares was carved out from Mt. Kenya Forest for the purpose of settlement. A Boundary Plan No 175/392 was drawn and authenticated by the Director of Surveys/and gazettelement documents sent to the Permanent secretary MENR as per the letter Ref.No.FD/SS 146 Vol.II/340 of 30/1/2001.

Meru Sirmon Settlement: An area measuring approximately 796.04 hectares was authorized for settlement of Ngusichi squatters as per PS letter Ref. No.Z85 VOL.V/157 of 13/12/95. The area was eventually degazetted as per Legal Notice No.29 of 2001. A big portion of this area is occupied.

Ndathi Settlement Scheme: An area measuring approximately 912.1 Ha. was authorized as per Permanent Secretary's letter Ref. No.B9.07 VOL.1/ 4 dated 4/8/93 to be degazetted for settlement. A Gazette Notice No. 897 of 16/2/2001 was published. Objections were raised in court of law and a ruling was given in favour of the Government in one case among many others, which were not consolidated and are still running in High Court, Nairobi, but nonetheless Legal Notice no. 149 of 19/10/2001 purporting to finalize this excision was published. Later, in 2002 this excision amongst others was contested in the High Court. The matter is still pending. However this area is settled and settlers issued with titles.

Sagana Extension Settlement Scheme: An area measuring approximately 717.0 Ha. was authorized as per PS and Ministers' letters Ref. No. Z.85 VOL.V11/70 & 163 of 1/1/97 and 26/7/98 letter Ref. No. Z85 VOL.V111/127 of 23/7/99. A Gazette Notice no. 896 of 16/2/2001 was published. Objections were raised in court of law in one of the cases and a ruling was given in favour of the Government and a Legal Notice no. 147 of 19/10/2001 purporting to finalize this excision was published. Later, in 2002 this excision amongst others was contested in the High Court. The matter is still pending. The area is not settled.

Magutu Settlement Scheme: An area measuring approximately 196.05 hectares was authorized by the Chief Conservator of Forests vide letter Ref. No. FD/Z/68/59 of

5/10/79 and the Permanent Secretary's letter Ref. No. B9.07/VOL I/4/8/93. This was for an exchange with the gazetted Lusoi forest measuring approximately 295.5 hectares. This area was earmarked for settling people displaced by Karatina Nyayo Wards. A Gazette Notice No. 894 of 16/2/2001 was published. Objections were raised in court of, which in one of the cases the government got a favorable ruling and through a Legal Notice No. 150 of 19/10/2001 purportedly finalized this excision. Later in 2002 this excision amongst others was contested in High Court and the matter is still pending. The area is 60% settled.

THE LAND TITLES TRIBUNAL

The Government Lands Act is amended by the creation of the following new section to be numbered **147 A.** that will be inserted immediately after the present Section 147.

147 A.

1. (i) *Reference to Tribunal.* Notwithstanding the provisions of this Act and of any other written law, where it appears to the Commissioner or it is provided by this Act or other written law that any action suit or proceedings shall be commenced, prosecuted and carried on in relation to Government land or any other category of land or in relation to the validity of a title, lease, sub-lease or licence issued by the Commissioner or other competent authority in respect of such Government land or other category of land, such action, suit or proceedings shall in the first instance be referred to the Land Titles Tribunal hereinafter established.

(ii) Notwithstanding the provisions of this Act and of any other written law, where it appears to the Registrar, the Principal Registrar of Titles appointed under the Registration of Titles Act, the Chief Land Registrar appointed under the Registered Land Act or any interested party that any action, suit or proceeding should be commenced, prosecuted and carried on in relation to the validity of a title, lease, sub-lease or licence issued or about to be issued by the Commissioner or other competent authority in respect of Government land or any other category of land, such action, suit or proceeding shall in the first instance be referred to the Land Titles Tribunal hereinafter established.

2. *Establishment and membership of Tribunal.* There shall be established a Tribunal to be known as **THE LAND TITLES TRIBUNAL (hereinafter referred to as "the Tribunal")** which shall consist of:-

a) a Chairman, a Deputy Chairman appointed by the Minister each of whom shall at the date of their appointment have been

Advocates of High Court of Kenya of not less than twenty years standing or shall hold and have held for a period or periods amounting in the aggregate to not less than twenty years, one or other of the qualifications specified in section 13 of the Advocates Act; and

b). three members appointed by the Minister each of whom shall be an Advocate of the High Court of Kenya of not less than twenty years standing; and

c). six members being persons of known integrity and respectability appointed by the Minister all of whom shall have competence and experience in land administration;

d). such additional members as may from time to time, be appointed by the Minister on the advice of the Tribunal.

3. For purposes of hearing and determining the action, suit or proceedings referred to in subsection (1) hereof any three members of the Tribunal duly authorised in writing by the Chairman shall constitute a Tribunal.

4. The members of the Tribunal shall not be personally liable for any act or default of the Tribunal done or committed in good faith in the course of exercising the powers conferred by this Act.

5. Where a reference to the Tribunal falls within the provisions of section 75(2) of the Constitution, the party dissatisfied with the decision of the Tribunal may appeal to the High Court in the manner prescribed in the Constitution on any of the grounds of the reference to the Tribunal and on any of the following grounds namely:-

(a) that the decision of the Tribunal was contrary to law or to some usage having the force of law; or

(b) that the decision failed to determine some material issue of law or usage having the force of law; or

(c) that a substantial error or defect in the procedure provided by or under this Act has produced an error or defect in the decision of the case upon its merits.

6. A copy of the determination, ruling or order of the Tribunal certified by the Chairman or by such member as may be nominated in writing by the Chairman for the purpose to be a true copy may be filed in the High Court and thereafter if notice in writing has been given to any party affected by it, the determination, ruling or order may be enforced as a decree of the High Court.
7. Any party to a reference to the Tribunal aggrieved by any determination, ruling or order of the Tribunal may within thirty days after the date of such determination or order appeal on a question of law to the High Court.
8. In the exercise of the powers conferred upon it by this Act, a Tribunal shall have the same jurisdiction and powers as are conferred upon the High Court in civil matters and in particular (but without prejudice to the generality of the foregoing) shall have power:-
 - (a) To administer oaths and to order persons to attend and give evidence or to produce and give discovery and inspection of documents in the same manner as in proceedings in the High Court and for that purpose to authorise the Chairman to issue summonses to compel the attendance of persons before it; and
 - (b) Upon the determination of any application or other proceeding, in its discretion, to order any party thereto to pay the whole or any part of the costs thereof, and either itself to fix the amount of those costs or to direct taxation thereof by the taxing officer of the High Court on either the High Court scale or the subordinate court scale.
9. The Civil Procedure Act and Rules shall not apply to the proceedings of the Tribunal.
10. (1) The Minister may make regulations for the better carrying out of the provisions of this Act and for the procedures and duties of

the Tribunal and without prejudice to the generality of the foregoing such regulations may prescribe:-

- (a) the manner in which the Tribunal shall conduct its business;
- (b) the procedure in connection with any reference to the Tribunal, or the determination of any matter by the Tribunal;
- (c) the matters which the Tribunal shall take into account in exercising its powers under this Act;
- (d) the fees which shall be payable in respect of any matter or thing to be done under this Act;
- (e) the scale and taxation of costs and expenses of witnesses in proceedings before the tribunal.
- (f) That the Tribunal may in appropriate cases recommend criminal investigations.

(2) The Chief Justice may make rules prescribing any procedure, fees or costs in any proceedings in the High Court or any other court under this Act.

CONSEQUENTIAL AMENDMENTS TO OTHER LEGISLATION.

1. AMENDMENTS TO THE REGISTRATION OF TITLES ACT (cap. 281).

- a) Section 2 of the Registration of Titles Act is amended by including in the interpretation of the word “court” the following words:-

“and shall include the Tribunal established by Section 147 A of the Government Lands Act (Cap 280)” after the words “High Court”.

b). Section 2 shall be further amended by including in the appropriate order the following words:-

“Tribunal” means the Tribunal established by Section 147 A of the Government Lands Act (Cap 280).

c) Section 59 (1) should be amended so that it reads as follows:-

59 (1) In the case of a non-existent or fictitious person being named as proprietor in the register or in any Grant, Certificate of Title or other instrument, the name shall be cancelled by order of the Registrar and if as a result of such cancellation there shall remain no name of a legal person the Registrar shall cancel the registration of the Grant Certificate of Title or other instrument.

2. AMENDMENTS TO THE REGISTERED LAND ACT.

a). Section 3 shall be amended by adding in the appropriate order the words

“the Tribunal means the Tribunal having jurisdiction by virtue of Section 159 (2);”

b). Section 126 (1) be amended by deleting the word “may” and replacing it with the word “shall” and by deleting the words “but the Registrar shall not enter” and “in the register” and replacing them with the words “together with”.

c). Section 126 (3) be amended by deleting the words “but for the purpose of any registered dealings he shall be deemed to be the absolute proprietor thereof and no person dealing with the land, a lease or a charge so registered shall be deemed to have notice of the trust nor shall any breach of the trust create any right to indemnity under this Act”.

d). Section 142 (1) of the RLA should be amended by adding a new sub-section as follows:-

“(d). In the case of a non-existent or fictitious person being named as proprietor in the register or in any Title Deed, Certificate of Lease or other instrument, the name shall be cancelled by order of the Registrar and if as a result of such cancellation there shall remain no name of a real person the Registrar shall cancel the registration of the Title, or Lease and/or other instrument.”

e). Section 143 (1) shall be amended by deleting the words “(other than a first registration)”;

f). There should be a new subsection to be numbered 143(3) as follows:

143(3) The Tribunal may by order direct the Registrar to cancel, correct, substitute or issue any entry in the register, or otherwise to do such acts or make such entries as may be necessary to give effect to the decision or order of the Tribunal; and

g). Section 159 be amended by renumbering the present section as Section 159 (1) and by inserting the following words at the beginning of the subsection

“Subject to subsection(2)”.

h). Section 159 be further amended by adding the following subsection:-

“(2) A reference by the Registrar for the purpose of establishing the validity of any title or for the revocation or rectification of any title shall, in the first instance, be made to the Tribunal established by Section 147 A of the Government Lands Act (Cap 280).

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36. Pauline W. Waweru	-	Subordinate Staff
37. Serah N. Nzube	-	Subordinate Staff
38. Esther M. Mbisi	-	Subordinate Staff

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6. The Land Consolidation Act (Cap. 283).
7. The Trust Lands Act (Cap. 288).
8. The Registered Land Act (Cap. 300).
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