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Draft law a threat to land reforms

Several provisions of the recently gazetted Land Laws (Amendment) Bill 2015, known in legal circles as the omnibus land laws, are in contravention of the Constitution.

If enacted without amendments, the proposed law may plunge land reforms into chaos. The bill has condensed historical Land Injustices Bill, Matrimonial and Minimum Acreage Bill and the Eviction and Resettlement Bill into one law.

According to the Economic and Social Rights Centre (Haki Jamii), the omnibus bill is an opportunity to sneak in amendments that would extend or negate the need to enact laws within the constitutional deadline.

The main objective of the amendments, according to Majority Leader Aden Duale, the mover of the bill, is to clarify the roles and mandates of the Ministry of Lands and the National Land Commission (NLC).

DANGER

However, Pauline Vata, an advocate of the High Court, says that several amendments in the proposed bill would plunge the land sector into chaos. "The NLC commissioners have been reduced to civil servants as opposed to an independent constitutional commission," Pauline says.

It has been proposed that the Public Service Commission (PSC) appoints members of the NLC, a case where a commission would be appointing a commission. A constitutional func-

tion of the Commission on Alternative Dispute Resolution has also been deleted from the land laws. The County Land Management Boards have been abolished in the Amendment Bill without a replacement.

"It means that a citizen in Marsabit who is seeking the services of the NLC must travel to Nairobi," Pauline says.

The Land Settlement Fund, which is under the NLC and is a powerful fund to hold monies for compensation and resettlement, has been delegated to four Cabinet secretaries.

SPOUSAL CONSENT

Overriding interests such as spousal consent in regard to transaction of registered matrimonial property has also been abolished. It takes us back to pre-2010 where a woman had to prove her "wifely duties" in a court of law for the judge to decide whether or not they were entitled to any matrimonial property.

Customary trusts have also been abolished. The proposed law also classifies as 'controlled land' first and second-row beach plots along the Indian Ocean. Before 2012, transactions on beach plots required presidential consent through provincial commissioners, a decree that started under the late Mzee Jomo Kenyatta.

The decree was successfully challenged in court in 2012 for being unconstitutional.

Interestingly, the bill has cleverly sneaked back the decree and the big question is who will be giving consent



President Uhuru Kenyatta addresses NLC Chairman Muhammad Swazuri as National Assembly Majority Leader Aden Duale and suspended Lands Cabinet Secretary Charity Ngilu look on in this file photo. The new bill, moved by Duale, waters down NLC powers. (PHOTO: FILE / STANDARD)

over ownership of beach plots.

According to legal experts, forced evictions, especially on community land, would worsen, if the omnibus laws are enacted. In 2012, then Lands Minister James Orengo constituted a task force to draft both the Eviction and Resettlement Bill and the Community Land Bill.

The Evictions Bill 2013 was borrowed from the International Covenant on Economic and Social Cultural Rights (ICESR) under General Comment No. Four, which Kenya ratified in accordance with Article 2 of the Constitution.

It states that evictions should only be carried out after a court order, should not be carried out at night, and in bad weather and special attention must be given to women and children.

However, the Amendment Bill gives power to the owner or person in charge of private land, and the county executive member in charge of land,

the mandate to evict without a court order as long as a three-month eviction notice is given.

EVICCTIONS

It also gives evictees seven days to collect their property after evictions or it will be auctioned. There is also no provision for resettlement or compensation to evictees, which may raise a storm in the wake of mega infrastructural projects like construction of the standard gauge railway.

"If evictions were to happen for the sake of acquiring land for infrastructural development, there would be no compensation or resettlement, compulsory acquisition notwithstanding."

In regard to the Community Land Bill, communities will be registered as a society, a provision that may lead to disputes and even deaths like has happened in the cases of Mbo-I-Kamiti and Kihui Mwiri in Murang'a.

The amended Community Land Bill does not establish elaborate community institutions or structures, thus spaces for participation are not clearly defined. Community land has also been classified as "controlled land" where the Government, through the county executive for land, has powers to authorise transactions on unregistered community land.

According to Pauline, rushing to amend laws haphazardly to punish one institution, NLC, will not bring about the much-needed land reforms.

"Adequate resource allocation to the sector, transparency, accountability and strengthening of the already existing institutions will be a major step forward," she says.

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