

# THE LOCAL COMMUNITY VIEWPOINT REGARDING THE REVIEW, PROCEDURE, AND PROCESS OF WRITING THE TANZANIAN NATIONAL LAND POLICY (DECEMBER 2016 DRAFT)



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# I. INTRODUCTION

This article explains the ongoing new land policy formulation in Tanzania as led by the Ministry of Lands. Tanzania's current land policy of 1995 requires urgent review in order to help address current land-related challenges being experienced in the country. This is not to say however that everything in the 1995 National Land Policy is obsolete, as some of the foundational principles of the land policy continue to remain valid: they work well and should be protected and promoted. One of these key principles is the decentralization of land administration to local communities as a means for protecting their land rights. It is important that the new land policy formulation should continue to promote and protect local communities rights to land by maintaining the existing categorization of land, its administration and control between local communities and government.

The process of writing the new National Land Policy of 2016 for Tanzania began officially in August 2016. The exercise was prompted by the fact that the current National Land Policy of 1995 is now outmoded and requires major review in order to respond to the changing socio-economic and environmental circumstances of Tanzania. Critical issues include longstanding and increasing incidences of land conflict between different land users and particularly between farmers and pastoralists, the increasing shortage of fertile land due to the growth in the country's population which has almost doubled since 1990, a need to better address land grabbing, and the need to correct a problematic contradiction in the land laws. It is understood that the aim of the government in its development of the new policy is both to address these issues as well as to strengthen and safeguard the foundations upon which the 1995 National Land Policy was developed and which remain relevant to date.

The fundamental principles of the National Land Policy of 1995 which safeguard the interests of local communities include continuing to support the key features of the Village Land Act 1999 which gives village assemblies (all adults of 18 years of age or older who are members of a village) and village councils<sup>2</sup>.

In Tanzania 70% of the country's land is Village Land, 2% is General Land and 28% is Reserved Land.<sup>i</sup> The administration and management of the latter two categories of land fall under the jurisdiction of different authorities within government. However, the administration and management of Village Land is largely entrusted to village councils which are accountable to their village assemblies. As a result of the provisions set out in the Village Land Act, this arrangement has enabled the majority of local communities to effectively own the land they occupy today, further supported by the Village Land Act's formal recognition of customary land law.

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<sup>2</sup> The 25 elected member of the village council 24 of them are elected while 1 is Village Executive Officer, who is government employee representation government affairs at village level. Members of the village council are elected after every 5 years by members of the village to manage village affairs on their behalf) the power to administer and manage village lands without interference by central government.

## 2. HISTORY OF LAND REFORMS IN TANZANIA

In the 1990s a comprehensive national land reform program was initiated, and a Presidential Commission of Inquiry into Land Matters was convened and led by a locally renowned land expert and professor of law, Issa Shivji. A key recommendation of the Commission was that the government should devolve power to local communities to administer their lands, and that the administration and management of different land categories should be separated in order to strengthen transparency, accountability and good governance in land matters. Prior to this recommendation, all land management and administration powers had been centralized leading to an array of shortcomings in land governance. For example, the double allocation of land was rampant and had resulted in a large number of land disputes and court cases. The Commission further recommended a number of important issues of which the most relevant recommendations of the Commission's 1992 report are: <sup>ii</sup>

- 1) The tenurial status of all lands should be enshrined in the constitution as either national or village lands; in urban areas the present system of land allocation through rights of occupancy should continue;
- 2) National Lands should be vested in a National Land Commission independent of the Executive, accountable to the Legislature and overseen by a reconstructed system of land courts; Village Lands would be vested in village assemblies;
- 3) The country's land-based dispute-settlement machinery would be re-organized by creating Elders' Councils at the village level and Circuit Land Courts at a higher level in which elders would participate; community values would be brought to bear on decision-making by magistrates and judges;
- 4) A limited land market would be created which would guard against land grabbing, illegal tendencies and socially disruptive effects of unregulated land markets by providing for overall control of land dispositions by the community through the village assemblies (in the case of village lands) and elected ward and district committees (in the case of national lands);

The Commission's recommendations were based on a set of underlying principles which still remain strongly relevant to this day. These are, firstly to encourage economic development for smallholders based on a vision of independent national development which is pro-market but guards against the current practice of incautious opening up of the country to unregulated and poorly accountable (?) foreign direct investment, both local and domestic; and secondly, to break up the monopoly of radical title which puts all power and control in the executive arm of the state and to diversify it in a way which would permit control and administration of land at local level to guard against abuses by monopolizing state institutions.

Therefore the basis of these key innovations and foundational principles of land administration in Tanzania was a recognition of the importance of safeguarding the land rights of rural populations. As



importantly this protection is even more important with the escalation of land grabbing in Tanzania, driven by local, national and international interests. Although land grabbing has existed in different forms in the past, both pre- and post-independence, land pressure has arguably intensified over time in relation to an increasing population and concomitant shortages in fertile land and grazing, as well as new pressures from globalization and a changing climate. Tanzania' land policy must thus be able to provide mechanisms to adequately safeguard communities' land rights from these contemporary and intensifying pressures.

### 3. LOCAL COMMUNITY EXPECTATIONS FOR THE NEW NATIONAL LAND POLICY (DECEMBER 2016 DRAFT)

Local communities have expressed a wide range of expectations for the forthcoming new National Land Policy. Based on a decade of experience in supporting communities to secure and equitably administer their land rights, ten key issues are likely to be the most pressing for local communities:

- 1) Local communities expect the new land policy to protect their powers to administer and manage Village Land based on the same principles that the 1995 National Land Policy set out, that is to say, without undue intervention by the government. The key principle in the land policy is that power to manage and control village land is decentralized from central government to village level. This principle must be guaranteed and guarded because it not only enables communities to directly manage and control their lands, but also entrusts communities with the responsibility to protect their lands from powerful interests. In addition, the communities expect that the new land policy will provide clarity on the power of the general assembly and village councils to allocate Village Land to villagers which is currently limited. At present, the National Land Policy of 1995 and the Village Land Act of 1999 restricts the power of the village council and village general assembly to allocate lands to a villager to no more than 50 hectares. Arguably, this poses a serious contradiction given the fact that the same law purports to treat the village general assembly as the institution vested with the authority to manage and administer village lands.
- 2) Local communities expect the new draft National Land Policy to reconcile the confusion between the Land Act 1999 and the Village Land Act 1999 on the status of unused parts of Village Land which the Land Act defines as general Land, but which the Village Land Act regards as Village Land.

The provision of the Land Act 1999 and the Village Land Act 1999 creates confusion on the definition of what is regarded as general land as follows:

## “General land’ means all public land which is not reserved land or village land and includes unoccupied or unused village land”<sup>iii</sup>

This confusion has created a number of challenges and has resulted in local communities losing their lands to state-sponsored biodiversity conservation initiatives, as well as expropriation by agricultural land investments because the Land Act’s definition of Village Land has been espoused by the government to the detriment of rural Tanzanian communities. The so called unused village lands which are often lands not fully developed or occupied without permanent settlements (pastoralist and hunter gatherer lands) have been treated by the Land Act as General Land. The new land policy is expected to clarify this point and remove this apparent confusion in favor of recognizing all ‘unoccupied’ village land as Village Land, not General Land.

- 3) Local communities are looking to the new National Land Policy to fast track the process of issuing Village Land Certificates (village land deeds) and carrying out land use planning in order to strengthen their land tenure security. The provision of Village Land Certificates is important because it should help villages to definitively identify the boundaries of their village lands and also helps ensure that a village has no boundary-related conflicts. Currently out of about 14,000 registered villages<sup>iv</sup> in Tanzania, only about 10% have Village Land Certificates and very few have approved land use plans. Without possession of both a Village Land Certificate and an approved Village Land Use Plan, many local communities will continue to experience land insecurity. However, even if a village has a Village Land Certificate and an approved Land Use Plan, the current land laws give the President radical title over land and he may revoke any title at any time for the public interest. In addition, land use plans may be reviewed anytime for any number of reasons, so in reality nobody’s land is entirely safe. Given the context of a growing national land shortage and competing demands for land, communities will find it even more challenging to safeguard their land and land use practices.<sup>v</sup>
- 4) Local communities would like a clear mechanism that further strengthens the existing form of land title available to them as set out in the Village Land Act 1999 - the Certificate of Customary Right of Occupancy (CCRO). This instrument has been used in a flexible and adaptive manner to secure both individual and collective rural land rights, with the instrument being adapted to create a significant breakthrough for pastoralists and hunter-gatherers to secure their collective land rights. For many years these groups have been disadvantaged by a lack of formal recognition of their communal and mobile land management systems, which have been largely ignored or marginalized by conventional approaches to land tenure and titling. This has resulted in an ongoing loss of their lands. Both pastoralists and hunter-gatherers require an adaptable model that supports their customary systems of land management and governance particularly since these systems remain strongly relevant, meaningful and important to these groups to this day. The protection and flexibility ostensibly offered by CCROs is therefore a significant opportunity that should be built upon and strengthened. A key challenge is the current legal framing and design of the CCRO which is not robust enough to accommodate the increasingly frequent occurrence of villages being sub-divided. Once this happens, a CCRO which spans the newly sub-divided villages may often become defunct. So there is need to develop a strong legal provision which protects the integrity particularly of communal CCROs regardless.

- 5) Local communities expect the new land policy to restrict the accumulation of land for speculation by creating new provisions that stipulate landholding ceilings compliment by requirements for land being developed and/or actively used. Thousands of hectares of land have been grabbed from local communities, often for what ends up as land speculation purposes, exacerbating inequalities in access to fertile and productive land.
- 6) Local communities want the new land policy to promote better models and stronger incentives for more equitable external agricultural and other land-based investments. These models should include the development of mutually beneficial business linkages with smallholder farmers which simultaneously protect their land rights. The relations between smallholder farmers and large-scale investors have often not been good as tensions continue to exist arising from the lack clarity in what constitutes legal and best practice in land acquisition by corporations and other parties. The current legal system lacks appropriate measures to protect small scale famers from exploitation and the land policy does not sufficiently address the relations between smallholder and large scale commercial farmers with regard to protecting the interests of small-scale farmers in land based investment projects.
- 7) Local communities would like the development process for the new land policy to guarantee their full participation in determining the contents of the policy. Local communities perceive the writing of the new policy as an opportunity to air their concerns about the land relations challenges that they face, and as a chance to find workable solutions to these challenges that can be incorporated into the policy.
- 8) Local communities expect the land policy to equally recognize, value and respect all types of land-based livelihoods such as farming, fishing, pastoralism and hunter-gathering. This includes the retraction of what members of the pastoralist community view as negative statements about pastoralism in the National Land Policy of 1995. The National Land policy of 1995 still contains negative statements against pastoralists for instance it prohibits mobility for pastoralists to move from one place to another in search of pasture and water without which pastoralism simply does not work.

**“ Kilimo na Ufugaji wa kuhamahama vitapigwa marufuku”<sup>vi</sup> literally translated to mean, shifting agriculture and livestock-keeping is prohibited.**

- 9) The current National Land Policy of 1995 and the Land Laws of 1999 do not mention or recognize at all the interests of hunter gatherers. Although pastoralists are mentioned, the land policy poorly captures and addresses the land issues faced by both these groups. Also the land rights of fisherfolk are not adequately represented in the land policies and laws as compared to, for example, smallholder farmers. Communities and civil society are looking to the new National Land policy to address these shortcomings.
- 10) Finally, local communities expect the land policy to underpin and promote a rights-based approach to natural resources that empowers local communities to protect, conserve and directly and sustainably benefit from the resources occurring on their land. The current legal regime gives government exclusive rights over utilization and ownership of wildlife, forests, mining and other

precious natural resources thus separating these from rights to land and sidelining communities from benefiting from these resources. The new land policy should be used as an opportunity for harmonizing all policies on natural resources to create a comprehensive and integrated approach for effective rights-based natural resource management that empowers local communities and safeguards their rights.

## 4. WHY THE NEW NATIONAL LAND POLICY MAY NOT SUPPORT LOCAL COMMUNITIES' LAND RIGHTS

As of February 2017, about seven versions of the draft new National Land Policy have been produced, with some versions being publically circulated and others not. While the final version of the new National Land Policy has not yet been publicly released, there is reasonable cause to suspect that the policy may not sufficiently safeguard the land and land administration rights of rural communities. Both the process of developing the new draft National Land Policy as well as its contents have been beset by shortcomings:

- 1) The role of local communities' participation in the development of the new National Land Policy has been minimal from the outset of the process in terms of their inclusion in the formal collection of opinions, and the discussion of draft versions of the policy during public hearings. Few representatives from Tanzania's 14,000 villages were invited to these public hearings in what was a rushed exercise. The policy development team that collected public opinions went to eight zones in the country but the whole exercise took only 30 days.<sup>vii</sup>

On average each zone is comprised of 4 to 6 regions (the largest administrative level). For example, the northern zone consultation targeted 4 regions (Kilimanjaro, Arusha, Tanga and Manyara) with a total population of nearly 5 million people. Despite the zone's large size, the team called a one-day meeting at which less than 200 people attended; 80% of the participants were high ranking government officials from all four regions.<sup>3</sup> Even if the remaining 10% of the meeting's participants had been representatives from local communities, this meeting would have hardly constituted an enabling and non-intimidating environment for these representatives to participate in a free, wide ranging and detailed consultation. This meeting was not unique and similar sessions were conducted

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<sup>3</sup> Those who attended include the regional commissioner, who officiated, all District Commissioners, all District Executive Officers, Land Officers and other senior civil servants from other government agencies).

across the country by the team led by the Minister. Clearly, participation by local communities was woefully inadequate throughout the consultation process, and their views and concerns cannot have been adequately captured.

- 2) The policy statements and objectives of the new draft National Land Policy introduce the idea of (re)centralizing control over land administration by extending the powers of the Commissioner of Lands to directly manage and administer village lands and by making the office of the Commissioner of Lands the sole authority in the administration and management of land matters in Tanzania. This is a serious departure from the foundational principles established by the land reforms of the 1990s which decentralized powers to local communities to administer their land. The principle of devolution is internationally accepted as a key pillar of good governance and land administration, but sadly the new Tanzanian National Land Policy takes a different view.<sup>viii</sup>
- 3) The new land policy still fails to expressly recognize and respect the different farming, herding, fishing and hunter-gathering livelihoods of local communities in a manner that equally values and supports their land tenure and administration needs. In an earlier draft of the policy<sup>ix</sup>, the policy contained statements that did address this issue following the intervention of Tanzanian civil society, but these statements were subsequently and rather inexplicably removed.
- 4) The new draft land policy introduces what is likely to be an alarming development for communities in relation to the nature of the land tenure status of Wildlife Management Areas (WMAs). WMAs have a checkered history, but were ostensibly created to enable communities to set aside, manage and benefit from wildlife on their lands. To date 38 WMAs are in varying states of development, although many largely exist on paper only. The new draft land policy seems to redefine WMAs as no longer being part of village lands. This presents a dilemma for communities in that if this is the intention of the policy, it will mean that the remaining support by communities for community-based wildlife management will quickly and understandably wane, and communities will face the clear and present danger of having their wild lands and wildlife expropriated by the state. This will be a major loss for communities who will lose access to what was formerly their land. It is also likely that biodiversity will suffer too, as these wild lands stand to effectively become open access areas with the government struggling to adequately manage these wildlands because of inadequate resources and capacity.<sup>x</sup>
- 5) The new policy seems to put more emphasis on setting aside more land for commercial investors through the proposed establishment of a 'landbank'. In reality this land bank has long existed and been de facto policy, with local governments instructed to identify and set aside areas of land agro-ecologically suitable for commercial agriculture. In reality, little land in Tanzania is unoccupied contrary to what the new policy document purports, which is no different to what is often believed by central government. Local government has often struggled to identify suitable areas of land for the land bank because there is simply little land in Tanzania that is not claimed, used or occupied in some way. Given this, the concept of a land bank in the new draft policy suggests that at some point local communities may be evicted from their lands in order for the government to set aside land for the national land bank. Should this happen, it will instill significant and real fear that any community could lose their land through what would amount to an exercise of eminent domain, causing significant land insecurity.<sup>xi</sup>
- 6) The new land policy introduces a concept of freehold<sup>xii</sup>, a form of land tenure that was abolished in Tanzania in the 1960s during the country's experiment with African socialism. During the

negotiation of the East African Community Treaty, 80% of Tanzanians then did not want Tanzania's land to be included as part of the treaty due to the existence of freehold in other EAC member states. The institution of freehold in Tanzania as set out in the draft National Land Policy stands to have substantial implications for Tanzania's current approach towards its land administration which still has substantial leanings towards social democracy. There is a substantial danger, if appropriate safeguards are not put in place, that freehold could have a detrimental impact on community-based communal resource tenure – particularly for pastoralists and hunter gatherers. A precedent for this concern is that freehold communal 'group ranches' were set up in Kenya in the 1970s under a freehold system. However, for a variety of reasons they were subsequently subdivided leading to large-scale land fragmentation which often had detrimental impacts on the socio-economic status and ecological sustainability of Maasai pastoralist livelihood systems. While the freehold system works more for communities where individual (families) own land privately - such as farmers. it seems likely to work less well for groups such as pastoralists and hunter gatherers whose land is collectively owned.

- 7) The new land policy seems to impose a new restriction on CCROs by limiting the validity of a CCRO to a 99-year term. One of the fundamental principles of a CCRO under the current land policy and land laws is the fact that it is issued without a time limit - which has worked perfectly well for the majority of local communities in rural areas to date. With this new imposition which propose to put a term limit the CCRO will then no longer be exceptional.
- 8) Lastly the new land policy lacks a comprehensive strategy to address the increasing incidence of land-based conflicts between different land users. Conflicts between farmers and pastoralists in particular have become ever more frequent and escalating in their intensity in recent years. The new land policy does not provide a clear solution to this challenge. In addition, settlement programs for rural people – who are considered by government to be landless or land deficient – are increasingly causing problems as immigrant farmers and agro-pastoralists are resettled, sometimes creating new conflicts between incoming and long-resident communities forced to receive them.

## 5. CONCLUSION

In conclusion, all the stakeholders and land actors are argued to be keen in closely monitoring the development of the National Land Policy in order to assess, examine, and seek to improve the Policy inline of the aforementioned factors. The effects of the new policy will bring if passed, are enormous and may impact negatively on local communities land rights especially the most venerable groups such as farmers, pastoralists and hunter gatherers. The writing of the new policy is an important process which ultimately call for change or amendments of the current land laws. The village Land Act 1999 is an important law and if changed communities stand to suffer exponentially.

All land actors and interested partners are therefore reminded to closely monitor the new land development processes with a view to effectively participate in the process to the end. The New Land Policy suggests to amend the following a number of laws related to land including the land Act 1999 and the Village Land Act 1999 <sup>xiii</sup> something which presents another opportunity for land actors to engage effectively in this subsequent in the process.

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<sup>i</sup> The National Land Policy, 2016 (6<sup>th</sup> Draft): Minister of Lands, Housing and Human Settlements Development issued December 2016

<sup>ii</sup>REPORT OF THE PRESIDENTIAL COMMISSION OF INQUIRY INTO LAND MATTERS. Volume 1. Land Policy and Land Tenure. Scandinavian Institute of African Studies. Uppsala. Sweden.

<sup>iii</sup> Section 2 of The Land Act NO.4 1999 at 36

<sup>iv</sup> The National Land Policy, 2016 (6<sup>th</sup> Draft): Minister of Lands, Housing and Human Settlements Development issued December 2016.

<sup>v</sup> The National Land Policy, 2016 (6<sup>th</sup> Draft): Minister of Lands, Housing and Human Settlements Development issued December 2016 at page 12 “ Mpaka mwaka 2016 ni asilimia 13.1 pekee ya vijiji vina mipango ya matumizi ya ardhi na asilimia 26 ya wilaya zina miongozo ya mipango ya matumizi ya ardhi”.

<sup>vi</sup> The National Land Policy 1995 at page

<sup>vii</sup>The National Land Policy, 2016 (5<sup>th</sup> Draft): Minister of Lands, Housing and Human Settlements Development issued November 2016 at page 6.

<sup>viii</sup> The National Land Policy, 2016 (5<sup>th</sup> Draft): Minister of Lands, Housing and Human Settlements Development issued November 2016.

<sup>ix</sup>The National Land Policy, 2016 (4<sup>th</sup>Draft): Minister of Lands, Housing and Human Settlements Development issued October 2016.

<sup>x</sup> The National Land Policy, 2016 (5<sup>th</sup> Draft): Minister of Lands, Housing and Human Settlements Development issued December 2016 at page xiii.

<sup>xi</sup> The National Land Policy, 2016 (6<sup>th</sup> Draft): Minister of Lands, Housing and Human Settlements Development issued December 2016.

<sup>xii</sup> The National Land Policy, 2016 (5<sup>th</sup>Draft): Minister of Lands, Housing and Human Settlements Development issued November 2016 at ( item xi) at page 35.

<sup>xiii</sup> The National Land Policy, 2016 (5<sup>th</sup> Draft): Minister of Lands, Housing and Human Settlements Development issued November 2016 at page 63.