



8 June 2017

## Memorandum on Extension and Renewal of Leases

To:

Task Force on Extension and Renewal of Leases  
Ministry of Lands and Physical Planning,  
Ardhi House, 12th Floor.  
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### About TISA

The Institute for Social Accountability (TISA) is a civil society organization committed towards the achievement of sound policy and good governance in local development, to uplift livelihoods of, especially, the poor and marginalized in Kenya.

### Introduction

The process of extension and renewal of leases in Kenya has been subject to fraud and corruption. This is mainly because of the lack of a comprehensive legislative structure resulting to fraudulent lease renewals and extensions. Lack of information on the imminent expiry of lease by lessee has resulted in loss of prime properties in the most unjustifiable circumstances.<sup>1</sup>In December 16, 2016, the Cabinet Secretary for Lands directed the Ministry of Lands to stop the processing applications for renewal of leases until the system was streamlined because of increase in fraudulent renewals.<sup>2</sup>The ban on renewal of leases was lifted in June 2017. There have been wrangles between the National Land Commission and the Ministry of Land over the mandate of the National Land Commission. The Supreme Court in *Re the National Land Commission Advisory Opinion No 2 of 2014 [2015] eKLR*, held that the mandate of the Ministry of Lands and the National Land Commission is that of interdependence and cooperation. It stated that a Commission acting in isolation has no capacity to discharge its mandate and has to consult with other State organs in co-operation and harmony.

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<sup>1</sup><http://allafrica.com/stories/201611060024.html>

<sup>2</sup><https://www.standardmedia.co.ke/business/article/2001242337/ministry-lifts-ban-on-renewal-of-land-leases>

The Court identified the mandate of extending leases as belonging to the National Land Commission under Section 13 of the National Land Commission Act, 2012 as read together with Section 18 of the same Act, which established the County Land Management Board. However, the Land laws Amendment Act 2016 repealed section 18 making the County Land Management Board defunct.

## **Legal Framework and Institutional Framework for Lease Renewal and Extension**

### **1. Constitution**

- i) **The National Land Commission** is established under Article 67 of the Constitution to manage public land on behalf of the national and county government. The government through the National Land Commission (NLC) grants a lease extension when the lessee applies for an extension of term before the existing term has expired. A lessee who applies for an extension may be granted additional years from the date of approval. The advantage for the lessee in this case is that extension is granted while the land still belongs to him/her.  
If a lessee applies for an extension after lease expires, the lessee may be granted a renewal of lease through re-allocation. An allotment letter is then issued granting the person the land with conditions. In renewal of the lease, since the lease term has expired the land reverts to the lessor who could be either the national or the county government. The lessor consequently will re-allocate to the lessee if they meet all the conditions of the previous lease and the land is not required for a public purpose. The new term is given with effect from the date of expiry of the old term.  
The National Land Commission is a constitutional commission and is obligated to uphold the national values and principles of governance set out under Article 10 of the Constitution particularly public participation, transparency and accountability that are binding on all State organs and officers when making and implementing public policy decisions.<sup>3</sup>
- ii) **Protection of Citizens' Right to Property:** The Constitution Article 40 protects citizen's rights to property. It provides that the State shall not deprive a person of property of any interest unless the deprivation results in a conversion of an interest in land according to Chapter 5 of the Constitution. This section protects citizens' right to hold interest in land including lease extension and renewal which right should only be limited according to the law.
- iii) **Public land includes land transferred to the State by way of reversion and shall vest in the County Government to hold in trust for the people** (Article 62(1)(c))  
Reversion arises where a term-absolute of a lease expires by effluxion of time.

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<sup>3</sup><http://www.landcommission.go.ke/article/faqs>

Consequently, the parcel of land reverts to the State upon expiry of the lease period. Upon such reversion, the land is to be held by the county government in trust for the county residents.<sup>4</sup> This section can be interpreted to mean that private land that reverts to government on expiry of lease should be held in trust by the government for the public.

## 2. Land Act

### i) Conversion of Private land to public land by reversion of leasehold interest to government after the expiry of a lease

Land in Kenya is classified as public land, private land or public land under section 61(2) of the Constitution. The Law allows for conversion of land from one category to another according to the law (Land Act s 9). Private land may be converted to public land by reversion of leasehold interest to government after the expiry of a lease (Land Act s 9 (2)(c)). The Land Act (Land Act Section 9(5)) states that the National Land Commission may make rules for conversion of land<sup>5</sup>

### ii) Renewal of Expired Leasehold Tenure - Lessee pre-emptive rights to allocation

Leasehold interest in land is for a specific period.<sup>6</sup> Leases are granted by the government for public land.<sup>7</sup> Where land reverts to the national or county government after expiry of the leasehold tenure, the National Land Commission shall offer to the immediate past holder of the leasehold interest pre-emptive rights to allocation of the land, provided that such lessee is a Kenyan citizen and that the land is not required by the national or the county government for public purposes.

Section 13 of the Land Act was amended in 2016 setting timelines in respect of the renewal of an expired leasehold tenure. It states that the National Land Commission is required to notify the lessee of the pre-emption rights of allocation within five years before the expiry of a leasehold tenure. Thereafter, the lessee has a period of one year from the notification to respond to it. If lessee does not respond to the notification within 1 year, the national land commission shall publish the notification in one newspaper of nationwide circulation.

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<sup>4</sup><http://kenyalaw.org/caselaw/cases/view/119199/>

<sup>5</sup>(a) prescribing substantial transactions requiring approval of the National Assembly or the County Assembly as the case may be;

(b) prescribing anything required to be prescribed under this section;

(c) regulating and controlling the conversion of land from one category to another;

(d) prescribing the factors to be applied or taken into account in determining land that is to be converted of a lease;

<sup>6</sup>Subject to payment of a fee or rent to the grantor. Payment of rates is made to the respective county governments for services rendered. A leaseholder can also apply for a renewal or extension of the lease more particularly if they want to re-develop the property and the lease period is about to expire or the remaining period is not enough to recoup the investments

<sup>7</sup><http://www.landcommission.go.ke/article/faqs>

The amendment however does not provide for a mechanism to challenge the refusal to renew the lease. It only states that where a lease is not granted after an application under subsection (1), the Commission shall give the lessee the reasons for not granting the lease, in writing.<sup>8</sup>

Pre-emptive allocation rights are still reserved only for the Kenyan citizens and only where the national or county government does not require the land for public purposes. At the expiry, termination or extinction of a lease granted to a non-citizen, reversion of interests or rights in and over the land shall vest in the national or county government as the case may be. The Constitution 2010 limits freehold interest in land to Kenyans only and non citizens cannot acquire freehold interests in land. Consequently, all freehold land owned by a non-Kenyan were converted to 99 year leasehold interest upon the enactment of the Constitution on 27<sup>th</sup> August 2010. Additionally, all leasehold interest with no expiry term for more than 99 years were converted to 99 year leasehold interest upon enactment of the Constitution in 2010. However, there are no guidelines for conversion of freehold title to leasehold.

#### **Process of Renewal/ Extension of Term**

- i) Application made at the relevant County Government office where the land is located. The application is considered by the sections dealing with public health, roads, rates, water and sewerage among others before approval.
- ii) The departments of Survey and Physical Planning in the National government are also consulted before the approval is granted. Section 42 of the Physical Planning Act provides that subject to any other written law relating to the administration of land, no subdivision, consolidation, lease or renewal of lease of an unalienated Government Land or Trust Land or of a private land shall be effected without due regard being had to the requirements of the relevant physical development plan.
- iii) The National Land Commission then implements the approval by preparing a new lease for the lessee. The new lease will bear the new extended term and an enhanced annual rent after re-valuation by a government valuer. Approval fees for renewal/extension of lease is Kshs 5000/= paid by the lessee.

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<sup>8</sup> Land Act Section 13. Lessee pre-emptive rights to allocation

(1) Before the expiry of the leasehold tenure, the Commission shall –

(a) within five years, notify the lessee, by registered mail, of the date of expiry of the lease and inform the lessee of his or her pre-emptive right to allocation of the land upon application, provided that such lessee is a Kenyan citizen and that the land is not required by the national or county government for public purposes; and

(b) If within one year the lessee shall not have responded to the notification, publish the notification in one newspaper of nationwide circulation.

(1A) Where a lease is not granted after an application under subsection (1), the Commission shall give the lessee the reasons for not granting the lease, in writing.

(2) The Commission may make rules for the better carrying out the provisions of this section, and without prejudice to the generality of the foregoing, the rules may provide for the following –

(a) prescribing the procedures for applying for extension of leases before their expiry;

(b) prescribing the factors to be considered by the Commission in determining whether to extend the tenure of the lease or re-allocate the land to the lessee;

(c) the stand premium and or the annual rent to be paid by the lessee in consideration of extension of the lease or re-allocation of the land;

(d) other covenants and conditions to be observed by the lessee

- iv) In cases of extension of lease the lessee surrenders the existing title and on payment of the required legal fees a new lease/title will be prepared in his/her favour. In cases of renewal of lease a letter of allotment is issued and on payment of the legal fees stipulated in the letter a new lease/title is prepared for the lessee.
- v) The new lease is then registered by the relevant Land Registry under the Ministry of Land, Housing and Urban Development.

The process as it is does not allow for public participation in the process of lease renewal and extension for them to give their views.

### **Recommendations**

- i) Enactment of the Land Regulations 2017<sup>9</sup> which addresses the gaps identified above:
  - a) National Land Commission to maintain a database of all public land including land under leasehold tenure. This database should be accessible to the public(section 48)
  - b) The regulations gives an exception for lease renewal and extension for non-citizens if it is beneficial to the economy, the country and the national development goals and objectives.(section 50(3)(b)
  - c) Where national or county government need land for public purpose it shall notify National Land Commission who will notify the lessee of intention not to extend lease and lessee has a right for compensation of developments on land. (section 50(3)
  - d) The national and county government to seek representation from County Executive Member of Land, County Surveyor, County Physical Planner, Land Administration Officer before approval of extension of lease. However, this provision should include the public because the national values and principles of good governance under the Constitution Article 10 include public participation binding on all State organs and officers. (section 50(4)
  - e) Section 50(8) provides that where the national or county government the National Land Commission declines the extension of the lease shall refer the matter to an independent appeals committee established by the commission.
  - f) Where term of lease has expired without prior notice to lessee as required by Land Act, the commission will require lessee to apply for renewal of lease.
- ii) Public participation in the process of lease renewal and extension is vital and the National Land Commission must sought the views of the public before renewal or extension of leases. The National Land Commission is a constitutional commission and must uphold national principles and values of governance including public participation, transparency and accountability.

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<sup>9</sup><http://www.ardhi.go.ke/wp-content/uploads/2017/04/DRAFT-LAND-REGULATIONS-final-Draft-on-18.04.017.pdf>

- iii) The National Land Commission should disclose all leasehold tenure-pending expiry since the year 2010.
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