



Warning sign on water use at a new settlement in the Olkaria Area of Kenya. © Jeanette Schade, 2015

## Land matters:

# The role of land policies and laws for environmental migration in Kenya

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### Linkages between environmental migration and land

Matters of environmental migration are frequently looked at from a humanitarian perspective.<sup>1</sup> This policy brief will instead look at it with a lens focusing on land issues. The question of environmental migration is inevitably linked to the question of land for several reasons. First, climate

<sup>1</sup> For useful analysis of Kenya's legal framework to protect internally displaced persons (IDPs), see IDMC, 2015.

and environmental change trigger and accelerate the loss of land due to sea-level rise, coastal erosion, landslides and other forms of land degradation. The loss of land in quantity and quality impacts either upon the livelihoods of people, particularly if these have a natural-resource base, or it may directly threaten and destroy their homesteads. Both types of impact are known to trigger environmental migration and displacement. Second, accelerated environmental migration as an individual or household response to such environmental stressors again creates pressure on land at the places of



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destination. Equally, planned relocation as both a State-sponsored response to displacement and preventive measure to the risk thereof creates demand for land and land-use changes. Third, both autonomous and State-led responses are in stiff competition with land-use changes for other purposes, such as development investments or creation of protected areas. Some of these activities might even be directly linked to climate policies, such as exploration of geothermal sources or forest conservation under REDD+. Both development investments and conservation activities frequently deprive people from their livelihood sources and even displace them, thus potentially increasing their proclivity to migrate and adding to the numbers of environmental migrants. Finally, it has to be taken into account that land ownership and security of tenure are important factors in determining potential migrants' decisions on whether or not to opt for migration as a response strategy. For the places of origin, there is evidence that people who own land are less likely to migrate and instead tend to adapt in-situ, whereas people who experience landlessness or acute tenure insecurity are more likely to leave. Inversely, the prospects to achieve land ownership in the course of a planned relocation scheme, particularly if land insecurity is a major problem, can work as a key incentive for the affected population to accept such measure.

## Environmental change and migration in Kenya<sup>2</sup>

According to the Emergency Events Database (EM-DAT), looking back as far as 1968, Kenya suffered a total of 98 natural disasters (droughts, floods and related epidemics), of which the great majority (69 events) occurred since the turn of the millennium (CRED, 2015).

The fact that consecutive droughts from 2008 to 2011 affected an average of 4 million people (CRED, 2015) – and that in 2013 alone, about 170,000 people were displaced due to floods (IDMC, 2014) – may serve to highlight the humanitarian challenge associated with weather extremes in Kenya. Moreover, the latter contributes to desertification and other forms of land loss such as landslides (Rop, 2010), which in the future might be compounded by sea-level rise along the coast that may affect major destination areas of migrants, particularly Mombasa city (Mahongo, 2009; Government of Kenya, 2010:10). The impact of those natural environmental changes on migration is not always clear. However, a 2009 survey carried out in Nairobi among migrants in various slum areas revealed that 44 per cent of the respondents considered environmental change as a

major reason for their move to the city (Kinuthia-Njenga and Blanco, 2009).<sup>3</sup> Environmental migration thus feeds into another major demographic phenomenon – the rapid urbanization in Kenya. One phenomenon important to mention in this context is the pastoralist “drop-out” in the course of droughts that triggers sedentarization and urban migration.<sup>4</sup> Pastoralists who manage to keep their livestock may instead cover longer distances and move more frequently than before (IOM, 2010:9f.). However, environmental stress as a trigger for changing mobility patterns typically interacts with other stressors, such as changing land ownership and use, conflicts and the breakdown of customary land management (Greiner et al., 2013:1478). In Turkana, for instance, 63 per cent of the land area is earmarked for resource exploitation since the discovery of oil and gas in early 2010 (Schrepfer and Caterina, 2014:27). Further, one of the resort cities along the Lamu Port Southern Sudan-Ethiopia Transport Corridor will be built in the midst of a drought fallback zone of pastoralists.<sup>5</sup>



Steep valleys and soil erosion at the new settlement.

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<sup>2</sup> This section is based on the publication by Nyaoro, Schade and Schmidt (forthcoming).

<sup>3</sup> Of the respondents, 26 per cent arrived before 1990 and 74 per cent after 1990.

<sup>4</sup> Pastoralists who lose all livestock “drop-out” of the pastoralist society. Schrepfer and Caterina label the increasing drop-out due to natural disasters as “pastoralist displacement” (2014:17).

<sup>5</sup> This is based on consultations during the IOM Kenya Policymaker Capacity Building Workshop on Migration, Environment, Climate Change (10–12 August 2015).

## Environmental migration and land reforms in Kenya

It is obvious that these dynamics – pastoralist drop-out, occasional or permanent inundation of settlements, landslides and rapid population growth and urbanization – create major policy challenges. The National Climate Change Action Plan (NCCAP) of Kenya explicitly sets forth a two-pronged agenda on migration and climate change: (a) research into migration as an adaptation strategy; and (b) identification of in-situ alternatives to prevent migration (Government of Kenya, 2013:38). This brief focuses on both the importance of land legislation for successful and durable (re)settlement of (potentially) displaced persons and migrants as a form of adaptation, as well as the possibility to mitigate pressures to migrate for environmental reasons by a land legislation that avoids doing harm to people’s natural resource base and habitats. Several pieces of recently adopted and pending legislation are relevant in this regard, most prominently the new Constitution of 2010, Land Act of 2012, Act on the Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities of 2012 (IDP Act), Land Laws Amendment Bill, Community Land Bill, and Natural Resource (Benefit-Sharing) Bill.

### Prospects and pitfalls: Kenya’s move towards equitable, secure and sustainable land policies

Land legislation has been a core reason in Kenya for displacement and landlessness, settlement in high-risk zones and encroachment into protected areas. Post-independence land regulations gave only little power to the constituency, and even less power to minorities, which led to irregular and illegal allocation of land and subsequent eviction of its occupants (Government of Kenya, 2009: para. 46).

At the turn of the millennium, a political process was set into motion that aimed to highlight and resolve injustices related to land issues by putting into place commissions, such as the Committee on Land Clashes (1999), Constitution of Kenya Review Commission (2000), Njonjo Commission of Inquiry into the Land Law System of Kenya (1999), Commission of Inquiry into the Illegal/Irregular Allocation of Public Land (2003), and the creation of the Truth, Justice and Reconciliation Commission (2008). Also, the Commission on Inquiry on Post-Election Violence (2008), following the December 2007 General Elections, had a strong focus on land injustice, which was perceived as a main trigger for the conflicts that displaced about 650,000 people. A national land policy formulation process started in 2004 and resulted in the consolidation of the recommendations of many of the aforementioned commissions into Sessional

Paper No. 3 of 2009 on National Land Policy (NLP) (Government of Kenya, 2009). The new Constitution of 2010 then included a chapter on Land and Environment (Chap. V), which, to a large extent, reflects the spirit of the NLP. The Constitution bases future Kenyan land policy on seven principles (Art. 60):

- (a) Equitable access to land;
- (b) Security of land rights;
- (c) Sustainable and productive management of land resources;
- (d) Transparent and cost-effective administration of land;
- (e) Sound conservation and protection of ecologically sensitive areas;
- (f) Elimination of gender discrimination in law, customs and practices related to land and property in land; and
- (g) Encouragement of communities to settle land disputes through recognized local community initiatives consistent with this Constitution.

The Constitution stipulated major reforms of the Kenyan land legislation. It replaced the previous categories of government, trust and private land by the new classifications as public, community or private land (Art. 61(2)). Of the requested core land-related laws, the Land Act (CAP 280), Land Registration Act (CAP 300) and National Land Commission Act (CAP 5D) had been adopted in 2012, and repealed, inter alia, the Government Lands Act and the Land Acquisition Act, which had been major causes for land injustice. However, the process of developing the new legislation has been criticized by experts and civil society organizations for having been hasty, lacking adequate parliamentary and public discussion, and leading to inconsistencies (Manji, 2012:120). One major discrepancy is that the NLP postulated to have one framework legislation for all new categories of land, whereas the Constitution stipulated a separate one for community land, which still lacks enactment despite the constitutional deadline having been passed. Community land thereby constitutes the majority of Kenyan land mass. The pending legislation created a legal limbo and perpetuates the conversion of community land into other types of land tenure (Musembi and Kameri-Mbote, 2013:23). Further, the bill’s provisions on benefit-sharing are equally pending as it is the case with the Natural Resource (Benefit-Sharing) Bill. Enacting both is important to implement Article 69 of the Constitution, which stipulates that the State shall “ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits” (Art. 69(1)(a); similarly, paras. 97–100 of the NLP). The following will discuss the prospects and pitfalls of the reforms (or the lack thereof) for dealing with matters of environmental migration.

## Land laws and (re)settlement policies

Existing land legislation is relevant to address both: (a) the emergence of new and growing – and often informal – settlements as a consequence of autonomous migration, including environmentally induced migration; and (b) planned relocation as a State-sponsored response to displacement by natural hazards and the threat thereof.

Article 67 of the Constitution established the National Land Commission (NLC), which, inter alia, is endowed with the tasks to manage public land, monitor land-use planning (including exploitation of natural resources) and investigate into present and historical land injustice (Art. 67(2)). Further, the NLC holds the mandate to the following: (a) alienate public land on behalf of national and county governments; (b) assess all rights and interests in such land; (c) manage and administer all unregistered trust and community land (NLC Act, Art. 5(2)); and (d) register such land (Ibid., Art. 5(3)).

This is relevant to the topic for two reasons. First, if public land is vacated for public purposes, such as for large-scale investments into mitigation and adaptation measures, the NLC has a key role in determining compensation entitlements (Land Act, Art. 112). This includes assessing eligibility to compensation of people who occupy land without title deeds (Ibid. 155(4)). Adequate compensation is one crucial factor determining evictees' success in reestablishing their livelihoods. Second, it is relevant to (re)settlement policies as the Land Act of 2012 defines “public purpose” to encompass, inter alia, the settlement of squatters and IDPs (Art. 2), which is crucial to end repeated displacement. The NLC is mandated to provide “access to land for shelter and livelihood” for such purposes (Ibid., Art. 134), as well as exercise power over the regularization of existing informal settlements erected on public and community land (Ibid., Art. 160). This is also meant to facilitate investment into upgrading and developing such settlements funded by the stipulated Land Settlement Fund, which also applies to fund land for resettlement of people displaced by development and conservation projects (Ibid., Art. 135(3)).

These provisions of the Land Act are particularly relevant to urban settings, where the majority of poor and vulnerable people live.<sup>6</sup> To this extent, the Land Act is to be complimented by the Draft National Urban Development Policy of 2012 (Government of Kenya, 2012a) which, however, still remains as a draft. The draft addresses many environmental challenges mentioned above, such as degradation and resource depletion,

and seeks to improve environmental conditions and social services in informal settlements to make their occupants less vulnerable. It even allows for relocation of households from hazard-prone areas “such as flood plains, steep slopes, and fault lines, thereby exposing residents to various risks”, as well as for relocation from other environmentally sensitive areas (Government of Kenya, 2012a:46).

So far, however, there is no guidance on procedures for evictions and resettlement. Actually, the process to develop such legal framework was already initiated by the NLP in 2009, and respective bills have been introduced in Parliament in 2012 and 2013. Finally, the Eviction and Resettlement Procedures Bill (ERP Bill; Government of Kenya, 2012b) did not come as a stand-alone bill but instead was reduced to address eviction procedures only and took the form of an amendment to sec. 152 of the Land Act included in the omnibus Land Laws Amendment Bill, 2015 (sec. 105). The amendment aims to strengthen authorities in carrying out evictions smoothly instead of providing a legal framework for compensation and relocation. Planned relocation has partly been addressed by the IDP Act of 2012. It sets out a rights-based and participatory approach (Part II, paras. 4 and 8(3)), and in paras. 8 and 9, focuses on durable solutions that encompass return, local integration and resettlement elsewhere.

However, the IDP Act is much less specific on compensation and other procedural issues than the ERP Bill in its attempt to end the threat of repeated evictions by offering adequate compensation and seeking tenure security for people without proper title deeds.

In sum, important reforms have been made in Kenyan land regulation, which would comfort policies that could adequately address challenges associated with environmental migration, such as reducing vulnerability of slum-dwellers and other habitants of other risk-prone settlements. However, as regards planned relocation – though provided for by legislation including funding – adequate and comprehensive procedures that protect affected people are lacking.

## Pending land and land-related laws suitable to mitigate vulnerability to environmental stressors and pressure to migrate

The legal recognition of community land is an important avenue to protect the livelihood resources of rural communities from land alienation by authorities and investors, and thus potentially contributes to their improved resilience. However, the State always maintains the power to “regulate the use of any land [...] in the

6 The highest concentration of poor people is found in the major urban areas of Nairobi, Kisumu and Mombasa (Wolfgang and Kiringai, 2013).

interest of [...] public safety [...] public health, or land use planning” (Art. 66) and if needed, may it be owned privately or collectively. This particularly affects so called “unregistered land held in trust” for communities by county governments – 67 per cent of the Kenyan land mass (Waricha, 2015) – because the Trust Land Act of 1970 that regulates the powers of the counties and the national government over such land is still in force and thus continues to be a major source of conversion of community land into privately owned parcels and its alienation for real and alleged public purposes (Musembi and Kameri-Mbote, 2013:11).

The question of benefit-sharing and means for participation becomes even more urgent and relevant since the discovery of oil and the exploitation of other natural resources, including renewable energy resources. Benefit-sharing with communities can be an important precondition to economic survival and for improving living conditions despite having been deprived of community resources. There are currently two bills addressing this – the Community Land Bill and the Natural Resource (Benefit-Sharing) Bill.

The Community Land Bill 2015 provides for participatory decision mechanisms and benefit-sharing for communities affected by development projects that takes place on community land (Sec. 37). It could prevent such harmful interventions as it stipulates benefit-sharing agreements with communities made on the basis of a “free, open consultative process”. Such agreements are supposed to specify provisions for “consultation and involvement”, “continuous monitoring and evaluation of the impact” and “payment of compensation and royalties” (Art. 37). However, it is strongly contested by vested interests and threatened to be cut down.

Another piece of legislation currently drafted with the aim to mitigate the negative impacts of natural resource exploitation is the Natural Resource (Benefit-Sharing) Bill of 2014. The Bill stipulates procedures and institutions for benefit-sharing from natural resource exploitation with its high potential for infringement of the human well-being of local populations. It seeks to establish a Benefit-Sharing Authority that, inter alia, determines payable royalties and monitors the implementation of such agreements (Sec. 1). It is even more important as the transaction of concessions for the exploitation of natural resources, though subject to parliamentary approval (Art. 71(1)), does not require parliamentary involvement in negotiations with investors, a fact that is strongly criticized by a legal review published by the World Bank (Bochway and Rukuba-Ngaiza, 2015:160).

As the Community Land Act is still pending, the powers of the State and the counties to alienate such land stay

unmitigated by the envisioned provisions for participatory decision-making and benefit-sharing in there. Equally, the lacking enactment of the Natural Resource (Benefit-Sharing) Bill deprives communities affected by resource exploitation to secure their livelihoods, frequently already infringed by other environmental changes, by means of participating in monetary and other benefits of such projects. Losing these acts and their provisions would be a lost opportunity to foster communities’ resilience against curtailed access to livelihood resources, as well as against natural environmental changes. On the contrary, these regulatory gaps will foreseeably contribute to the numbers of environmental migrants.

## Recommendations

In sum, there is already a legal framework that addresses certain core issues related to land and the challenges of environmental migration. This is particularly the case with matters related to destinations to the extent that planned relocation and land regularization of (and thus service to) informal settlements are concerned. Policy coherence, however, may become a major problem due to the weak referencing between the respective laws. The IDP Act does not elaborate on compensation, nor does it refer to the Land Act sec. 155(4) for such matters. Reversely, the Land Act does not detail on guidelines for planned relocation or forced resettlement, but is more focused on formalizing and upgrading existing settlements on the one hand, and vacating public land required for public purposes on the other. Though the IDP Act sets some frame, it is evident that the enactment of detailed and comprehensive procedures for eviction and relocation in line with the ERP Bill is missing. Further, need for streamlining funds and institutional responsibilities might emerge. For the management of the Land Settlement Fund, the institution in charge is the NLC (Land Act, sec. 134), whereas the Humanitarian Fund of the IDP Act is managed under the supervision of the National Consultative Coordination Committee on Internally Displaced Persons, including the NLC (Part III, sec. 12 and 16). Though the IDP Act has a stronger focus on emergencies and the Land Act’s (re)settlement policy may have a stronger connotation on settling long-standing settlement issues, both have great overlaps with respect to the following: (a) (re)settlement as a durable solution; and (b) eviction and resettlement in the context of vacating land for public purposes, such as development and conservation projects. Each act should be amended with references to respective sections of the other one to harmonize legislation and both should be complemented by joint guidance for procedures that mirror the spirit of the NLP and the Constitution.

Pending land legislation also feeds into the challenge of building resilience to environmental stress and avoiding

or minimizing displacement and forced migration in such context. The Community Land Bill and the Natural Resource (Benefit-Sharing) Bill, more specifically the sections of the bills on benefit-sharing and participation, have the potential to make people, including pastoralists, less vulnerable to development-related environmental changes by providing them with alternative livelihood resources, and in the case of community land, even with a voice in decision-making. Such do-no-harm approach in matters of development would help maintain their resilience towards natural environmental changes as well. It would comfort the NCCAP which sets forth, that the pressure to migrate should be mitigated by strengthening the resilience of groups vulnerable to environmental and climate change, and would complement existing measures, such as the Arid Lands Resource Management Project, the Kenya Adaptation to Climate Change in Arid and Semi-Arid Lands project, the Security in Mobility Initiative of IOM, the Office for the Coordination of Humanitarian Affairs, United Nations Environmental Programme and Institute for Security Studies, and lastly Sessional Paper No. 8, the National Policy for the Sustainable Development of Northern Kenya and other Arid Lands (Government of Kenya, 2012c). Passing them would also enforce constitutional provisions to encourage “public participation in the management of the environment” to “utilize the environment and natural resources for the benefit of the people of Kenya” (Art. 42), and ensure benefit-sharing in such matters (Art. 69(1)).

## Outlook

Achieving policy coherence in such complex matters as increasing resilience of vulnerable people, preventing displacement, accommodating migrants and IDPs and creating resilience of existing and emerging settlements by means of settlement upgrading and planned relocation is challenging, particularly if the underlying land issues are not solved. Regulatory gaps regarding land are thereby not only a matter of technicalities. One serious shortcoming of the new, already enacted land legislation is that the NLC’s role and powers in relation to the Ministry of Lands (since 2013, previously Ministry of Land, Housing and Urban Development) have not been sufficiently clarified (Manji, 2014:121). This triggers stiff competition between these two key players on powers over land. In fact, the current government seeks to curtail NLC mandate by means of the Land Laws (Amendment) Bill (2015) in a way that comes close to its abolishment (see the bill’s Memorandum of Objectives and Reasons) and instead transfers many of its powers to the Cabinet level. Similarly, certain sections of the 2015 version of the Community Land Bill effectively empower the Ministry to the disadvantage of the NLC. This has provoked critiques that the current government

seeks, preventing the registration of all unregistered land to maintain its power over such land, eviction and resettlement procedures, becoming a “mere task” of the Cabinet Secretary and “undermining reforms in the land sector” (Dolan, 2015; Jemimah, 2015).

A holistic approach to environmental migration, such as an approach that considers both resilience to prevent forced migration and accommodate those who have to move elsewhere or opted to do so, requires taking duly into account the complexity of landlessness in Kenya, as well as careful coordination between emerging humanitarian law and land-related (re)settlement law in Kenya. The NLC has a crucial role in this and is constitutionally mandated to deal with settlement of the landless, upgrade informal settlements, draft detailed legislation for planned relocation, and determine compensation for vacating public lands or from lands for public purposes. Shifting such powers to the Ministry would move such tasks from an institution with a land-justice mandate to one whose current primary objective is the unhindered modernization of Kenya. As shown, such move may threaten to impair the potential of land legislation and policies to prevent and address environmental migration effectively as envisioned in Kenyan climate change action planning.

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