

The Role of Private Sector in Land Adjudication in Kenya; A Suggested Approach

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Key words: Land Adjudication, Preliminary Index Diagrams (PIDs), Registry Index Maps (RIMs), Trust Lands, Public Private Partnership (PPP)

SUMMARY

Land Adjudication has been defined as the process through which existing rights in a particular parcel of land are finally and authoritatively ascertained. In Kenya this process has been critical in the conversion of land held under customary tenure into individual holdings. While the program has resulted in the registration of millions of land parcels, its potential has not been fully exploited. Large areas of the country remain un-adjudicated due to incomplete land registers, pending adjudication appeals or absence of the land adjudication exercise altogether. In this regard the land adjudication program that was initially planned to take 10 years is yet to be completed 50 years later. This has led to indifference by the intended beneficiaries. In addition, failure to complete the land adjudication program constrains the land administration system owing to the large number of unregistered land transactions resulting into tenure insecurity. It is notable that the land adjudication process has been largely handled by the government. This paper argues that in a changing world where governments are increasingly off loading functions to the private sector, a possibility to institute public private partnerships in land adjudication exists. This paper looks at the land adjudication process in Kenya identifying areas where the private sector can play a role. It explores how the private sector could be empowered thus ensuring a smoother and efficient land adjudication process that would lead to a faster land service delivery.

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1. INTRODUCTION

Land is every nation's most valuable asset as it not only refers to the earth's surface, but indeed the natural resources that grow on it or that exist below, as well as the man-made structures that we build to house our families, factories, businesses, and religious/cultural activities among others. Historically, land has been a major source of contention in Kenya, it was the basis for the fight for independence and continues to feature prominently in the socio-political circles of the country. One issue that has continued to define the politics of the country is land adjudication. Dale and McLaughlin (1988) have defined land adjudication as the process whereby existing rights in a particular parcel of land are finally and authoritatively ascertained. The adjudication of land rights has been identified as one of the key cadastral processes the other being land transfer and mutation (subdivision and consolidation) (UN-FIG, 1996; Williamson, 1997). These are seen as necessary to ensure an efficient, secure and effective land market. The Bogor Declaration (UN-FIG, 1996) further noted that secure tenure in rural areas is important so as to promote increased investment in agriculture; for more effective husbandry of the land, improved sustainable development in support of an increase in the Gross National Product (GNP) through an increase in agricultural productivity and to provide significant social and political benefits leading to a more stable society, especially where land is scarce or under disputed ownership.

Land adjudication in Kenya dates back to the colonial period when the process was formulated to transform land in trust land areas from the customary land tenure to the statutory freehold tenure. This was seen as a strategy of introducing tenure security to lands that were reserved and occupied by the indigenous Africans. Indeed the Africans had agitated for equal land rights similar to the ones the colonialists had been accorded. Conflict over land therefore served as the bane for the struggle of independence leading to the declaration of a state of emergency in 1952 and subsequent granting of independence in 1963. After independence the new Government appointed a mission on Land Consolidation and Registration in Kenya (1965-66) to find ways and means of accelerating land consolidation. The mission recommended that the ascertainment of land rights be carried through the process of land adjudication.

Kenya with a total area of 582,646 Sq. Km and a population of over 31 million is considered a large country. However the fact is that 80% of the land is categorized as arid and semi-arid, 2% is covered by inland water and only 18% is considered to have high or medium agricultural potential. The medium to high potential areas support approximately two-thirds of the country's population and with rising population; conflicts in land are bound to increase unless remedial action is taken to solve them.

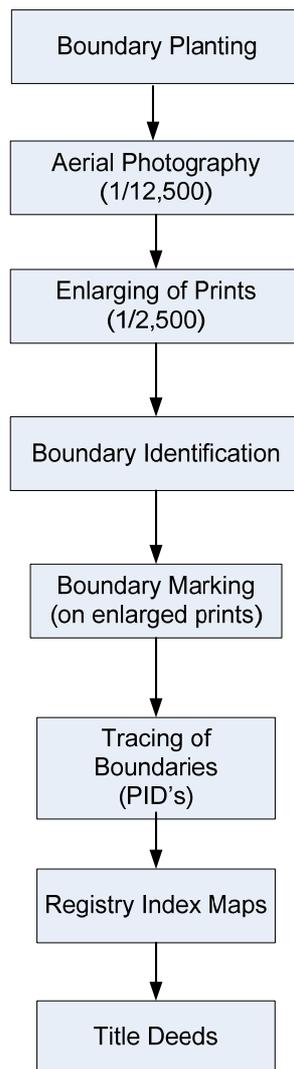
2. LAND ADJUDICATION PROCESS IN KENYA

The basis for Land Adjudication in Kenya is the Land Adjudication Act chapter 284 of the Laws of Kenya. The process is initiated once the Minister of Lands has given a declaration that a Trust Land area be adjudicated. The minister then appoints an adjudication officer who is then expected to steer the process. The Adjudication Officer appoints demarcation officers, survey officers and recording officers to help administer the process. The Adjudication Officer subdivides the land into adjudication sections and in consultation with the District Commissioner of the area appoints an adjudication committee for the section. The Provincial Commissioner appoints a panel of officers from which the adjudication officer can form an arbitration board. The adjudication officer with the help of the committee, the board and other officers' help to formulate the adjudication register, which contains the record of rights and interests to the land in the adjudication section. Anybody having a claim to the land to be adjudicated must be present to show his boundaries to the demarcation officers. Any person who during the adjudication process feels that his rights have not been taken into consideration is required to lodge a complaint to the adjudication committee chaired by the Adjudication Officer. Any complaint on the decision by the Adjudication Officer can further be made to the Land Executive Officer who will submit the complaint to the arbitration board. Any contention on the completeness or correctness of the adjudication register is referred to the Minister of Lands. The Minister makes the final decision on the appeals, but, with orders from the High Court, the Minister's decision may be challenged.

Through the process of land adjudication, the land owners agreed on the positions of their boundaries and marked them by planting hedges. Aerial photography was then obtained once the hedges had grown sufficiently to be air visible. The un-rectified aerial photographs were then enlarged and forwarded to the field where Junior Survey Assistants identified and marked the boundaries of the adjudication parcels on the enlarged photographs. Maps were then produced by making direct tracings of the boundaries as depicted on the enlarged photographs. The boundaries that were not air visible were plotted on the photographs by estimation. Tracings of the boundaries resulted into Preliminary Index Diagrams (PID's) (Mwenda, 2001). Figure 1 shows the process of land adjudication.

Initially the PID's were upgraded by a process, known as *refly*, through which maps were plotted accurately by photogrammetric restitution and ground survey methods (Mwenda, 2001). Such maps were produced for parts of Central and Eastern Provinces and were mostly drawn at scales of 1:2,500 and 1:5,000. However the *refly* exercise was abandoned in 1967 due to shortage of funds and change of priorities. This abandonment has ensured the continued use of PID's as land registration documents. Land whose ownership has been confirmed through the above process is titled through the Registered Land Act, Chapter 300.

Figure 1: The Land Adjudication Process



3. WEAKNESSES IN THE LAND ADJUDICATION APPROACH

The Kenyan land adjudication process has been hailed as a success story. Millions of land parcels have been brought to the land register and an equal number of title deeds have been issued (Mwenda, 2001). However a successful process should have an end. If 40 years after the beginning of the adjudication process, title deeds have not been issued then it clearly shows that there are problems. Njenga (2004) identifies various hurdles with respect to the land adjudication process. These range from inadequate resources to expedite the programmes, out dated survey methods as a result of inappropriate or obsolete survey equipment, poorly trained technical staff and inadequate transport to supervise the adjudication work. This often compromises the quantity and quality of work. Njenga (2004)

goes further to suggest the need for the training of technical staff in modern methods of survey and the recruitment of surveyors to lead technical teams.

Nyadimo (1990) noted that delays in land adjudication occurred as a result of institutional arrangements i.e the Junior Survey Assistants, who carry out the survey work as is required in the adjudication process, are administratively under the Department of Adjudication while their technical duties are supervised by the Department of Survey, which is eventually responsible for the production of the Registry Index Maps. This arrangement he argued, is fraught with coordination problems leading to unnecessary delays in the efficient operation of the adjudication process.

Delays in the completion of the land adjudication process have also been adduced to the protracted adjudication of claims. This occurs in situations in which demarcation and survey have been completed but the field records cannot be processed until pending arbitration board cases and objection cases have been resolved much to the disadvantage of numerous parcel owners. In accordance with the provisions of the Land Adjudication Act, processing of title deeds cannot commence until the Adjudication Register is declared complete and final i.e., upon determination of all Board and Objection Cases. This requirement is certainly not compatible with any meaningful work programme as the determination of the cases largely depends on the convenience and cooperation of the disputing parties.

While the achievements of land adjudication are modest, time is ripe for remedial action. A possibility for public private partnerships exists that would be necessary to steer the process to completion.

4. SUGGESTED APPROACH

Privatization has been identified as the transfer of state tasks to the private sector in its entirety or partly. Land adjudication as a process that defines first land registration is indeed a sensitive issue that should primarily be addressed by the government. As Yavuz and Biyik, (2004) have noted land administration processes namely adjudication, cadastral survey and land transactions have traditionally been the responsibility of the state. In many countries however, there is insufficient capacity in the public sector for the government to undertake all aspects of the creation and maintenance of the land administration system. Modern thinking encourages public private partnerships (PPP) which are deemed as being critical in a changing world. Furthermore it is increasingly the official policy of many governments to encourage greater private sector involvement and there is a general trend towards the outsourcing of work that has traditionally been regarded as the sole responsibility of government. In Kenya, the cadastral survey process has more or less been privatized with the private sector conducting over 95% of the work.

While the Adjudication Act can still provide for the appointment of an Adjudication Officer by the Minister of Lands, the present adjudication committee should be made up of local residents in an adjudication section. Experts from the private sector such as surveyors, lawyers etc. and Local Administration officials should then be invited to the committee and

their expertise used to steer the process. Land adjudication is not purely a technical process, rather it is part of a greater social problem hence the argument for the inclusion of lawyers. The idea here is not for a protracted legal battle in a court of law but for the introduction of a clear arbitration process in settling of disputes emanating from boundary disputes.

High resolution satellite imagery provides an alternative to aerial photography as a means of obtaining base maps for which the land adjudication can be based. A cheaper alternative exists in the form of archived imagery as opposed to new image acquisition. Satellite imagery has additional advantages such as the reduction in time for obtaining the status quo on the ground with respect to the boundaries thus providing a cheaper method to demarcate the land.

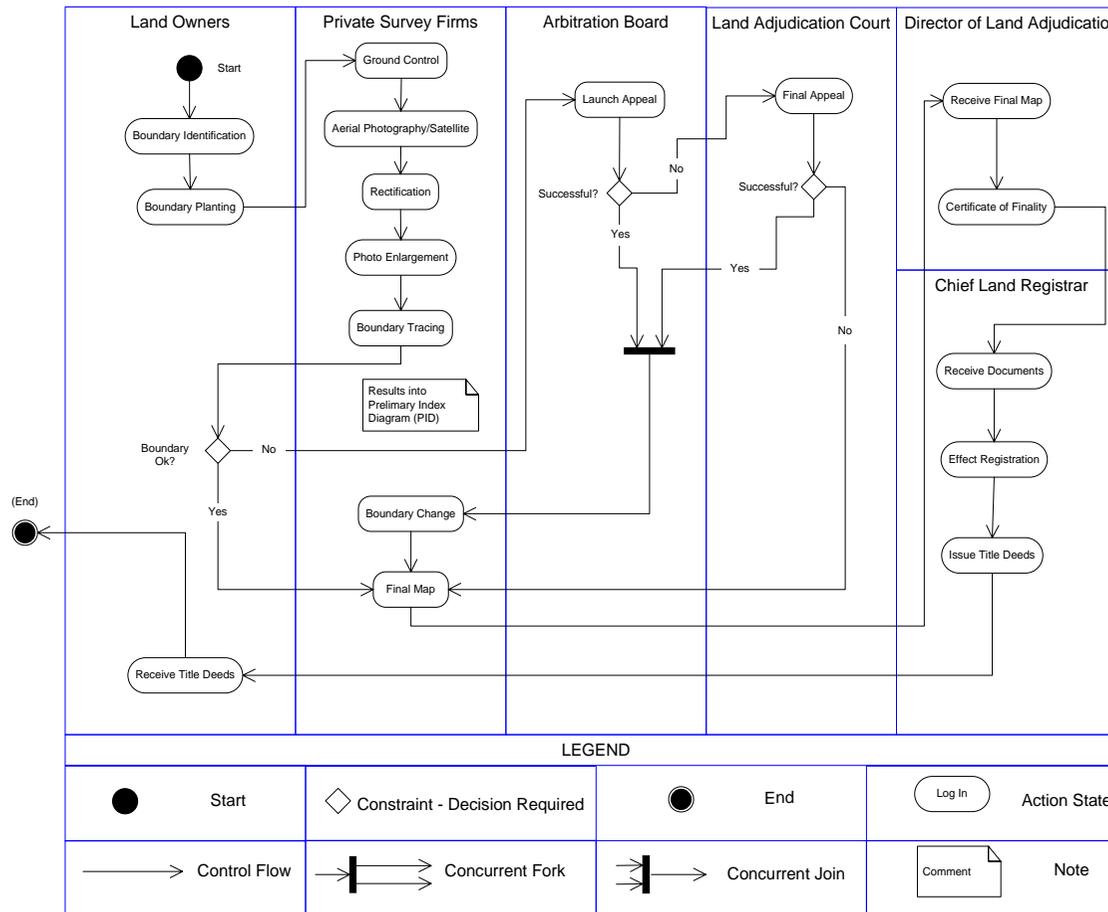
In place of the Minister of Lands as the determinant of final appeals, the land adjudication process should provide for the establishment of a Land Adjudication Court that would then determine appeals from the arbitration board. The private survey firms would replace the junior survey assistants and in the process bring on board their expertise and resources to solve the weaknesses already identified. Land adjudication as discussed involves several components under which different stakeholders can play an active role. Table 1 below identifies the various components and makes suggestions of stakeholders who can be involved.

Table 1: Role of Stakeholders in Land Adjudication Process

Land Adjudication Component	Actors / Stakeholders
The identification of boundaries	Lawyers, Surveyors, Government Officials, community elders, the local community
Aerial photography or satellite imagery	Private survey firms
Processing of maps	Private survey firms
Inspection of maps	Local community. Community elders, government officials
Determination of appeals and arbitration	Lawyers, government officials, community elders, Land Adjudication Court
Rectification of Maps	Private Survey Firms, Government (Ministry of Lands)
Registration & issuance of title deeds	Government – Ministry of Lands

Figure 2 below depicts the process of land adjudication providing for public private partnership. The model provides for appeals in situations where the land owners dispute the boundary positions. The model also provides for changes to be made to the PID's that are used as the basis for land registration. Title deeds are then issued by the Land Registrar.

Figure 2: UML Activity Diagram depicting the current Land Adjudication Process in Kenya (After Nyadimo, 2006)



5. JUSTIFICATION

There has been a considerable amount written on outsourcing and the role of the private sector in developing and operating land administration systems. This is seen in such documents as the Statement of the Cadastre (FIG, 1995), The Bogor Declaration (UN-FIG, 1996), the Land administration guidelines of the UNECE (1996), the Bathurst Declaration (UN-FIG, 1999), Dale and McLaughlin (1999) and Williamson (2001). Indeed Dale (2003) argues that attitudes have changed, the pressure for privatisation has grown in many sectors of the economy and many countries now accept that not only is there much that government agencies can learn from private sector practice but also that public/private partnerships can lead to greater efficiency.

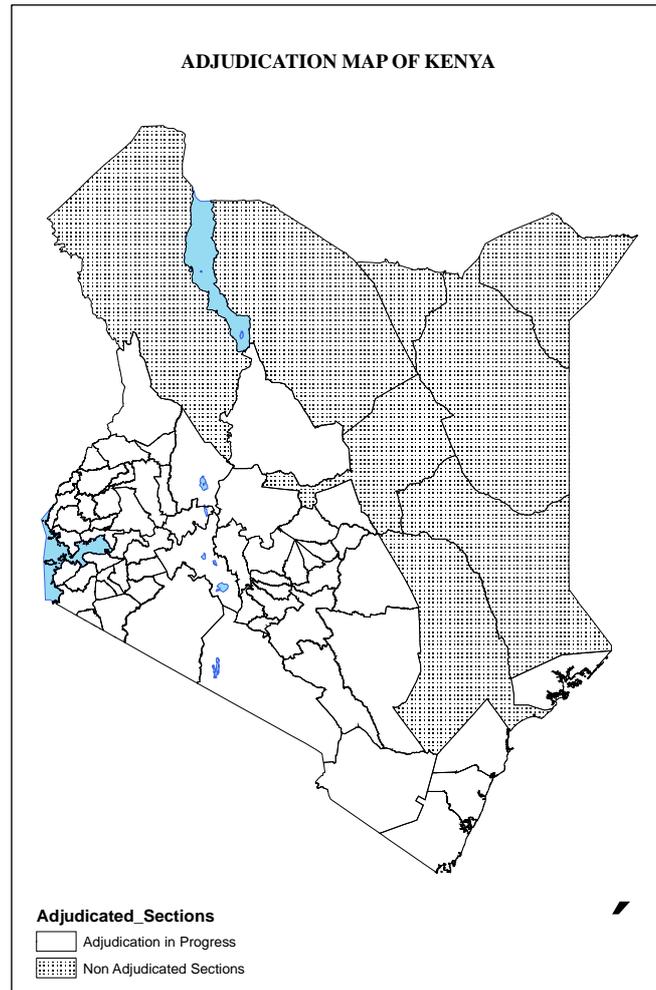
Although the ultimate responsibility for any land administration system lies with the government, in many countries including Kenya the private sector plays a significant role in the day-to-day functioning of the system. As Dale and McLaughlin (1999) pointed out, the technical processes of surveying and mapping and even valuation may be subcontracted to the private sector. This is the case in Kenya where the cadastral surveying process has more or less been privatized. Though this process has been gradual it is notable that even hitherto functions that were considered purely as government functions such as new grant surveys are now undertaken by the private sector.

Success stories of private sector participation is found in some of the Central East European Countries (CEEC) which have since established private land ownership after the fall of communism. An example is Georgia, where the private sector has been crucial in the establishment of a private land ownership system. Closer home, in Rwanda, the private sector has been critical in the establishment of a cadastral system. Whereas in most of these countries the private sector was not well developed, the situation in Kenya is different. In the case of Kenya over 100 surveyors graduate from the universities and other tertiary institutions each year indicating a potential for private sector development..

6. CHALLENGES

According to Njuki (2001) land adjudication has not taken place in nine administrative districts. These districts include: Tana River, Ijara, Garissa, Wajir, Mandera, Isiolo, Marsabit, Moyale and Turkana. This vast area (Figure 3) of 331,370 square kilometres representing 57 % of Kenya's territory is largely arid and semi arid. This area is occupied by pastoralists who are dependant on communal grazing land for their livelihoods. As Wayumba (2005) argued these ASAL present a challenge, land adjudication is not a suitable method and recourse to the group ranch model has not been helpful either. Wayumba (2005) has argued for a holistic approach in the ASAL, taking care of the cultural values of the local community and the ecological effects on the environment. This is seen to be only possible through the development of a comprehensive land policy on the group ranches and applying appropriate modern surveying technologies to document and map the land tenure issues.

Figure 3: Adjudication Map of Kenya (After Njuki, 2001)



It can be argued that private sector is primarily driven by profit; their involvement could thus be seen as leading to a possible increase in the land adjudication costs. However professions such as surveyors and lawyers can be encouraged to provide subsidised services. The argument being that they are the ones who are most likely to benefit from an established and functioning land administration system. It is even possible that the costs of land registration can be factored into the land adjudication process thus negating the need for alternative source of finance. Nyadimo (2006) established that people would be willing to pay for services if they are assured of an efficient and effective land delivery system.

The involvement of people in an area declared as an adjudication section and their education on the values of title deeds and the necessity of boundaries prior to a land adjudication process is critical. As far back as 1976, the Delegate Communiqué of the UN Habitat I

conference, noted that public participation should be an indispensable element in human settlements. This is especially so in planning strategies and in their formulation, implementation and management. Williamson (1997) seems to reinforce this argument when he advises on the desirability that an adjudication office be established in a local village within each project area, thus making use of local staff and working closely with the local political hierarchy. Local perceptions, choices and abilities should therefore be respected and local people should thus be involved in setting goals and strategies. One of the main reasons for arguing for an inclusive process being that the communities often lack an understanding of the land adjudication process. They often imagine that their rights to land would be diminished and they therefore resist. It is important for the community to own the process and their inclusion and hence their participation becomes critical. The challenge is therefore on how the local communities can be directly involved in the land adjudication process unlike the present situation where the provincial administration plays a greater role with land owners sitting in the sidelines (GoK, 2002).

A sustainable land administration adjudication process requires investment in educated and trained personnel to operate the system in both the public and private sectors (Williamson, 1997). In Kenya whereas the training of lawyers and surveyors is up to speed, capacity building may still be required especially within professional bodies such as the Institution of Surveyors of Kenya (ISK) or the Law Society of Kenya (LSK) through avenues such as Continuing Professional Development (CPD). This will be necessary to equip their members with challenges of being involved in a land adjudication process. As Williamson (1997) advised capacity building should be a mainstream component of a project, not an “add-on”

Land adjudication should not be seen just like any other routine land administration task. The people must be shown that it actually pays in this regard the land adjudication program should move away from the narrow point of being a first step of land registration to cover aspects of infrastructure planning and protection of the environment as a way of improving people’s lives and therefore developing support with the locals. This calls for the inclusion of physical planners and environmental experts in the process. Land adjudication should then be seen as providing for a basis for development and borrowing from Agenda 21 where people have to be involved in planning developments for their own communities if such developments are to be sustainable. Key in this strategy would also be poverty alleviation mechanisms.

The *Bogor Declaration* identified that the increasing use of private sector can be shown to be more cost effective and productive (UN-FIG, 1996). Just like in cadastral surveying, private sector participation in land adjudication would need to be subjected to adequate quality control to ensure the integrity of the data. In this respect the burden of proof of land ownership should remain with the government. This in addition means that the Land Adjudication Act would have to be changed to conform to the inclusion of private sector. In addition it should provide for quality assurance and standards. As Nyadimo (1990) proposed changes in the provisions of the Land Adjudication Act are necessary so as to provide for an administrative frame work with a view to allowing for an adjudication section, with isolated

disputes, to be processed for registration while allowing for the Government to impose a 'caveat' on parcels with disputed boundaries pending determination of such disputes.

7. CONCLUSION

This paper has shown that the role of government in the society is changing. Functions that were hitherto deemed as government are increasingly being privatized with the government playing the role of a facilitator. The paper has shown that while first registration i.e. land adjudication is a sensitive issue the involvement of the private sector would ensure that the process proceeds in an effective and efficient manner. The challenge however will be on the private sector to introduce fidelity in the process as the government provides guarantee and ensures reduced costs. In this way Public Private Partnerships (PPP) would strengthen the system in place rather than taking ownership.

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BIOGRAPHICAL NOTES

Eric Nyadimo holds a Bachelors of Science degree in Surveying from the University of Nairobi, Kenya (2001) and a Master of Science degree in Land Management and Land Tenure from the Technische Universität München, Germany (2006). His Masters Thesis focussed on *Cadastral Data and Process Modeling Using the Unified Modeling Language, A case study of Kenya*. He has over 5 years experience in Geographic Information Systems (GIS) including its management, planning, implementation and maintenance. He is currently working as Training & Consultancy Services Manager at Oakar Services Ltd., ESRI's and LGGI's Distributor in Eastern Africa. His research interests are in the areas of GIS and Cadastre.

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