Breaking from the past

By Caleb Atemi & Martin Adhola

Ghosts from the past have returned to haunt the Bomas conference as it enters its last moments.
They came in the name of atrocities committed by the colonial and African regimes against the earth
and soul of Kenya — land. Kenyans in their millions are still crying for land which once belonged to them individually or
collectively.

Now the 629 delegates must address the pain and anger, the sorrow and fear, the death and violence, meted out to the Kenyan people over
land.

As the debate on land kicked off, layers of skin, real and artificial that covered all communal and
ethnic wounds began to peel off. The pain inflicted on communities by the colonial and the successive
governments, spewed from the floor and flowed at press briefings.

The Maasai shed their tears. The Pokot opened their hearts. The Somali cried out to the world.
Women screamed their suffering.

Dr Willy Mutunga, the executive director of Kenya Human Rights Commission, says these
pains must be addressed with care and tenderness.

He argues that land injustices in Kenya must be enjoined in the African reparation campaigns so that
former colonialists are forced to compensate the Africans.

Eminent African scholars and leaders, such as
Prof Ali Mazrui, Mrs Graca Machel, Gen Olesegun Obasanjo, Mr Nelson Mandela and Ms Miriam
Maekha should lead the reparation demand, he suggests.

The reparation call is directed at the former colonial governments to compensate against slavery,
exploitation of the mineral resources and the neo-colonialism.

“Kenyans should enjoin their names and issues that need reparation to this team that is spearheading the call so Africa can be heard
collectively as a continent,” he says.

In Kenya the thousands of families displaced and impoverished by the ethnic cleansing must be
resettled or compensated, he says.

The Mpeketoni MP Mwangi Mghanga says Kenyans must recognise and appreciate the land
related injustices before the healing process commences. A few Kenyans, he says, acquired huge
portions of land legally but unjustly. Others did so fraudulently.

For the country to embark on a new road and for the new laws to be enacted, Kenyans must
address these atrocities.

Mr Mwadwanzo calls for the establishment of a commission to address the injustices and look for
possible remedies before the land laws are enacted.

Another MP, Mr Samuel Poghisio, told a Press briefing that the failure by past regimes to correct the
misdeeds on land issues had resulted in the current time bomb. “We, the Pokot, lost our land
when the colonialist moved us from Trans Nzoia. We have been agitating for the return of our land for
close to a hundred years. That is a long time and if anybody was listening we would have been given
something at least,” he said.

Lancaster veteran, Mr Dennis Akumu, told the Bomas Agender that Kenyans had been betrayed by
anybody was listening we would have been given
something at least,” he said.

Lancaster veteran, Mr Dennis Akumu, told the Bomas Agender that Kenyans had been betrayed by
their leaders. “The Giriama through Mekitilili fought
“An expert knows and understands
the slow pace of the debate in the plenary.
But he has consistently defended the
debates, saying it is healthy for the
delegates to talk and thrash out thorny
issues as this enhances consensus
building. He is confident that the issue of
a time frame will emerge with the
delegates before the end of the conference.
On the other hand, Mr Lee Muthoga,
who is participating at the conference as an
observer, believes the presence of
experts will enable delegates to assess
whether or not the spirit of the meeting is
accurately captured.

“An expert knows and understands the
passion with which the words were
spoken, and the mood of the debaters,
because this conference is very much like
the plenary debates be incorporated into
the various committees.
But how do you encapsulate the vivid
passions, reflections and emotions of 629
people into a document for 29 million
Kenyans? This is the central piece to the
performance of the experts who will steer
the 12 technical committees of the
national constitutional conference.
According to Ms Martha Koome, who
was appointed convenor of the
Technical Committee on Citizenship and
the Bill of Rights, her team will focus on
solidifying the draft in accordance with the
views expressed on the floor.
“As the convenor, my task is to
ensure meetings take place, that
discussions focus on our mandate and that
deliberations comply with guidelines.”

That is not all. “The actual
implementation is the result of what has
been said and how it benefits our people.
We need to connect the provisions we are
offered with how we shall implement
them to achieve tangible results,” she
says.

As the newly constituted committees
await guidelines and timetables, Ms
Koome acknowledges that time is not on
their side with the impending adjournment
of the conference on June 6. She also
acknowledges that it will be difficult to
work without a time frame.

Constitution of Kenya Review
Commission chair Prof Yash Pal Ghai
admitted on Tuesday that it was unlikely
that the committees would have got down
to serious business before June 6 given
the slow pace of the debate in the plenary.

But he has consistently defended the
debates, saying it is healthy for the
delegates to talk and thrash out thorny
issues as this enhances consensus
building. He is confident that the issue of
a time frame will emerge with the
delegates before the end of the conference.

On the other hand, Mr Lee Muthoga,
who is participating at the conference as an
observer, believes the presence of
experts will enable delegates to assess
whether or not the spirit of the meeting is
accurately captured.

“An expert knows and understands the
passion with which the words were
spoken, and the mood of the debaters,
because this conference is very much like
the slow pace of the debate in the plenary.

But he has consistently defended the
debates, saying it is healthy for the
delegates to talk and thrash out thorny
issues as this enhances consensus
building. He is confident that the issue of
a time frame will emerge with the
delegates before the end of the conference.

On the other hand, Mr Lee Muthoga,
who is participating at the conference as an
observer, believes the presence of
experts will enable delegates to assess
whether or not the spirit of the meeting is
accurately captured.

“An expert knows and understands the
passion with which the words were
spoken, and the mood of the debaters,
because this conference is very much like
the slow pace of the debate in the plenary.

But he has consistently defended the
debates, saying it is healthy for the
delegates to talk and thrash out thorny
issues as this enhances consensus
building. He is confident that the issue of
a time frame will emerge with the
delegates before the end of the conference.
Issues of inheritance of land and property by women, security of tenure and land grabbing are extremely sensitive in post-independence Kenya. Our reporter Arthur Okwemba spoke to the National Coordinator of Kenya Land Alliance, Mr Odenda Lumumba, on how the draft constitution should deal with these burning issues.

Does the draft constitution address the issue of women and inheritance of land and property?

The chapter on land and property in the draft constitution gives us broad principles. But in its entirety, it does not deal with the issue of female gender.

Whereas it has guiding principles on equity and sustainability of land and property, there is nothing specific on land and property succession as relates to women.

This means issues concerning women, like inheritance of land and property, are not tackled in the critical areas of the chapter.

Only when it is talking about the structures, particularly the proposed National Land Commission, does the chapter mention affirmative action.

Women would have to push for inclusion of certain clauses, which can work to their advantage.

The other area to be looked into is the Succession Act and the Matrimonial Laws. These laws are supposed to be repealed two years after the new constitution comes into force. The problem with the Succession Act is that it gives women only user rights to land.

Whereas it has guiding principles on equity and sustainability of land and property issues should be created and the magistrates made to hold mobile courts so as to reach as many people as possible.

If there is speedy resolution of such cases, land can be released for development purposes. And in cases of widows, it would be easier for them to use it as collateral to secure loans or engage it in other income-generating activities.

The issue of land title deeds in pastoralist areas is a very sensitive one. I would be very wary and uncomfortable if the title deeds are given to individuals, since the pastoralists’ lives involves moving from place to place in search of water and grass.

If you individualise land ownership, then you kill them or increase conflicts. They will find themselves unable to move during the dry spells.

But the best option, from the point of the constitution, would be to convert all the trust land on which they reside into community land. Then they can have community title deeds, whose custodians will be committees of elders.

Land under group ranching should also be viewed as community land.

How should the new constitution tackle land-grabbing?

The main problem we have had in this country is the government land being considered the private property of the President, with the Lands Commissioner as his agent.

Hence land is dishoed out to people for political reasons.

Now the draft constitution suggests that all government land should automatically be turned into public land immediately the new constitution comes into effect. It is a proposal we support and which we want reflected in the final document.

Once the land becomes public property, the National Land Commission will have the powers to protect it and decide how it is used.

Also, if the land is classified as public land, people, under the devolved power structure will have the final say on how the land is used. Even the National Land Commission will have to consult them before land in their jurisdiction is put to any use.

I see a situation where we are going to have regional institutions mandated with addressing land issues.

Safeguarding women’s gains in the draft constitution

Voices of the delegates

By Arthur Okwemba

As debate on Land and Property gathered momentum at the conference, the role of the British colonists and the successive governments in land adjudication came into focus.

Some delegates called for compensation for the land they lost to colonists and to other communities. And they want the matter entrenched in the constitution to give it force.

They also want a limit to the amount of land a person can own and propose that land in the names of absentee owners be converted to government land.

Another suggestion is that the new constitution addresses itself to gender issues in access and ownership of property. In these regard, delegates suggested that title deeds of matrimonial land should be co-owned by a man and his wife.

As some women delegates told of their misery after being dispossessed by men, delegates from pastoralist communities recounted the pain of seeing their land snatched away.

Mr William ole Nituma, opened the wounds with strong statements on the plight of the Maasai. “When the colonists came, they said our land had no people and there were no owners. The Maasai lost over 30,000 square miles of land.”

And as successive governments were resettling people after the colonists left, further injustices were done to the Maasai, who got no land, he adds.

“We fought so many wars for injustices meted out to us. Some people label us as aggressors, but I want to tell this congregation this constitution is our last line of defence for realising the justice we have been fighting for,” he says.

Taking the same line of argument, Mr Samuel Poghissio, MP for Kacheliba, says the Pokot’s situation is even worse. They were annexed to Uganda for 40 years from 1931, and this made it hard for them to be recognised in the 1963 Constitution as one of Kenya’s communities. They lost hundreds of acres of land and about 8,000 people in the process.

In 1997, the Pokot wrote a letter to Mr Peter Herman of the British government, seeking compensation for the land lost when the British colonised Kenya.

In his response, Mr Jonathan Bradbury of the then British High Commissioner said: “The British government agreed to provide the new Kenya government with $100 million in grants and loans to enable it to resettle land issues, including the purchase of land farmed by European settlers.”

“It has been the responsibility of the Kenyan government since independence to settle all outstanding land claims with the indigenous tribes in Kenya, and this remains the case,” he said.

This sealed the community’s fate, the conference was told. Both Mr Nituma and Mr Poghissio call for a high profile commission to look into the issue of land compensation.

But Tabitha Sei, while lamenting the land injustices meted out to the Keyo people, warned the delegates to tread carefully on the issue of compensation and how far back in history it should go.

“The issue of how far in history we should go has to be treated carefully. If we do this everybody may start claiming land from where they migrated, yet the tracks are not clear,” she said.

Mary Wambui suggested those people whose land was taken by the government for development purposes or exploitation of minerals should get value for their land and property.

Wambui wants Parliament to come up with a compensation Act to address past, present and future compensations relating to land.

Moses Wakesa, representing political parties, suggested that the property should be valued before the government can determine the compensation amount. Delegates were unanimous that those people whose land has
The key principle of the constitution should be equality of all citizens of Kenya, irrespective of their gender, race, religion or any other dimension. This then should completely eliminate the discrimination as far as women and ownership of land and property is concerned. Women should be able to inherit and own land just like their male counterparts.”

---

**Who should have the right to own land?**

By Rosemary Okello

In his book, *The Africans: A triple heritage*, Prof Ali Mazrui praises the African woman as the mother who tills and feeds the continent from its soil. Yet she remains the most impoverished and downtrodden.

Some delegates strongly feel that anyone owning more than 100 acres should be taxed. But the constitution protects the right to property and it may be difficult to harmonise the diverse stands.

Delegates from Coast Province were categorical that huge tracts of land, which lie idle while thousands of Kenyans are squatters. Some delegates strongly feel that a ceiling should be put on the amount of land a person can own. Others suggested that anyone owning more than 100 acres should be taxed.

**Breaking from the past continued from page 1**

The co-existence of the formal written law and customary systems is what has worked against women because the system seems to have evolved out of the initial superimposition of a settler economy over a territory in which various land laws and tenure systems already existed.

At the women’s tent the debate on land rights moved from the emotional plane to reality. For most women, including ‘*Wanjikis*’, tenure therefore forms the foundation on which any effort to improve living conditions for women should be built.

But the subject is not one that can easily be defined or delivered according to universally agreed norms. This is because tenure has many historical, cultural, legal and economic associations that affect people’s perception and behaviour.

“Women need to fight for the one-third principle to be applied when dealing with the Land Commission,” says Commissioner Mohammad Swazuri. Dr Swazuri, who was explaining the gender dimension of the chapter on land rights, said that even though women are the majority land users, the chapter does not mention them. “Land use affects women most and yet it has not been articulated in the draft document,” he says.

In terms of inheritance, many women are dispossessed twice: where they are born and where they are married. This is because in most families, land is only passed on to male members of the family.

“We are just custodians of land for our children and it is a high time the government recognised that women need to own land too,” says Dr Julia Giambo, a nominated MP.

Often, women find themselves dispossessed when the men, who have full ownership, decide to sell the family land even without as much as informing them.

Ms Mary Wambui challenged the delegates to come up with a mechanism to protect women from such a situation.

Dr Swazuri too challenged women to fight for a provision in the draft constitution that the mortgage law should be looked at so that all titles belong to the family members. In this case, the man will not unilaterally charge the land and put it at risk.

The close relationship between the control of land, political power and ethnic dominance was evident during the debate.

But all that women are lobbying for is a right to own land. “After all, Kenya belongs to all of us,” says Sophia Abdi Noor, a delegate from Garissa.

---

**Land matters for women**

Despite toiling and sweating on the land daily, the African woman is yet to win the right to own land.

While the issue of equal access to and ownership of land is at the nerve centre of Chapter 11 of the draft constitution, women are still wary. “The language is beautiful but the issue on gender and land does not come out clearly,” says Grace Githaiga, a delegate from the civil society.

She says statistics indicate that only five per cent of women in Kenya own land while 75 per cent work on land they do not own.

“Customarily, men inherit land while women have to buy land if they hope to own any. The draft constitution should come out with clear guidelines to address this skewed ownership of land,” she says.

And according to Prof Ruth Oinang’o, a nominated MP, there is need to look at laws which in theory support women’s access to property ownership, yet women are robbed of this right by culture.

Mr Gideon K. Changole, a delegate from Baringo Central, too is concerned that for many years, women in his area have been marginalised by culture and they are equated to children.

Land ownership has been a major issue in Kenya for a long time. According to Saad S. Yahya, the current land tenure system is a combination of English land laws and African customary laws.

The co-existence of the formal written law and customary systems is what has worked against women because the system seems to have evolved out of the initial superimposition of a settler economy over a territory in which various land laws and tenure systems already existed.

At the women’s tent the debate on land rights moved from the emotional plane to reality. For most women, including ‘*Wanjikis*’, tenure therefore forms the foundation on which any effort to improve living conditions for women should be built.

But the subject is not one that can easily be defined or delivered according to universally agreed norms. This is because tenure has many historical, cultural, legal and economic associations that affect people’s perception and behaviour.

“Women need to fight for the one-third principle to be applied when dealing with the Land Commission,” says Commissioner Mohammad Swazuri.

Dr Swazuri, who was explaining the gender dimension of the chapter on land rights, said that even though women are the majority land users, the chapter does not mention them. “Land use affects women most and yet it has not been articulated in the draft document,” he says.

In terms of inheritance, many women are dispossessed twice: where they are born and where they are married. This is because in most families, land is only passed on to male members of the family.

“We are just custodians of land for our children and it is a high time the government recognised that women need to own land too,” says Dr Julia Giambo, a nominated MP.

Often, women find themselves dispossessed when the men, who have full ownership, decide to sell the family land even without as much as informing them.

Ms Mary Wambui challenged the delegates to come up with a mechanism to protect women from such a situation.

Dr Swazuri too challenged women to fight for a provision in the draft constitution that the mortgage law should be looked at so that all titles belong to the family members. In this case, the man will not unilaterally charge the land and put it at risk.

The close relationship between the control of land, political power and ethnic dominance was evident during the debate.

But all that women are lobbying for is a right to own land. “After all, Kenya belongs to all of us,” says Sophia Abdi Noor, a delegate from Garissa.
Caleb Atemi argues that land, being the nerve centre of the Kenyan political anatomy, will require careful treatment by the Bomas delegates.

With the Bible in one hand and a gun in the other, the white man asked his African host to close his eyes in silent prayer. When the black man opened them, his land and all were gone.

Since the colonial times, millions of Africans have died fighting for their right to land. Land is a current, and remains, the most emotional subject on the continent.

It evokes tears. It causes pain. It frightens. It even leads to bloodshed. It kills.

Many are willing to die for the soil they call their own or ancestral. In Africa, land is an economical, a cultural and a spiritual entity. When we till it, we converse with our ancestors. When we harvest, we thank our gods for the soil and all its nutrients. When we inter our dead, we mix them with the spirit and soul of mother earth.

Land has thematically enriched the theatre and movie worlds. Renowned writer Ngugi wa Thiong’o reminds us that religion was actually used to soothe us into slumber as the imperialist West grabbed our land.

The Bomas conference has eventually touched that raw nerve of the Kenyan anatomy — land.

Read this: The British butchered more than 10,000 Kenyans in their desperate attempt to control land and other resources. The Mau Mau, who in the western lingua would qualify for terrorists, fought the war of liberation over land.

Then the Kenyatta government reneged on all its promises and impoverished millions. As ‘Wanjiku’ would say, the regime created millions of dispossessed landless.

The Pokot lost their land — stolen by the white settlers in 1913. They are yet to reclaim it. The Maasai, like the Aborigines of Australia, were hounded from their ancestral grazing land. The white settlers ordered them to kwenda (leave) and they did so in 1913. They are yet to return. Who cries for the Somali, the Borana, the Orma and other communities in the northern frontier who were declared aliens in their own home? Who sheds tears for millions who sweat and toil on huge farms owned by multinational companies while they shelter in dungeons? No one. Definitely not those in power. The people of Kenya were bitterly betrayed by those they called their leaders.

A handful of the ruling elite acquired hundreds of thousands of acres. They strapped naked families in the Rift Valley, western, central highlands, and the coast, leaving them in what Honorare De Balzac in his book The Old Goriot calls threadbare poverty.

Millions became squatters. They now occupy the slums, dehumanising and pathetic eye sores we call slums. They form largest community of Kenyans — the poor, who live in abject poverty…they are Franz Fanon’s Wretched of the Earth.

In fact, Fanon’s broken bones form more than 70 per cent of Nairobi’s three million inhabitants. Like roaches, they crawl into their degrading shelters every day. Yet, we claim, they are the heartbeat of our nation.

Pitiable characters. Men, women and children, who live in sub-human conditions of the underworld. People who use flying toilets, and cannot afford a glass of drinking water.

Then, the Moi regime followed in Kenyatta’s footsteps. Even the public toilet and parks were taken by a few royal families and loyal charlatans.

Who will mourn for the 600,000 families displaced by the 1991/1992 politically instigated killings in Kitu Valley, Western, Nyanza and Coast provinces?

Oh, poor delegates, how will you handle all those emotions and realities? How will you correct all those political and historical atrocities and crimes against injustices. Trace the crimes of the past, then formulate nationalistic answers.

Hubbie Hussein, a delegate from Ijara gives us a simplistic answer. “In Somalia,” she says, “Kenna means ours. When the white man came he asked our people ‘Whose land is this?’ And they said Kenna. We should all live together in peace and seek peaceful solutions, for this land is ours.”

It is my hope and desire that we will all take this simplistic approach because life’s complicated problems require simple solutions.

**Spotlight on role of experts continued from page 1**

...a document in which the letter and its spirit must be communicated,” he says.

The newly appointed convenor of the Judicial and Legal System Committee, Prof Kivutha Kibwana, acknowledges the existence of tension between delegates and experts, which he attributes to a pervasive fear that the latter may try to influence outcomes in order to gain political capital from their positions.

“Here is a golden opportunity to make good a constitution eventually, they will intimidate and marginalise people to the extent that they are unable to lead the process intellectually,” he says.

Kenyans who offered their views freely to the CKRC last year had preceded the work of experts, he argues. Yet this was only possible because another group of experts had carried out civic education work to prepare them for all the stages in constitution making.

“You cannot avoid the technical input of experts,” he concludes. “This calls for various talents, visions, perspectives and participation and I think that eventually, all of us have a stake in this process.”