



Proposed new Buxton Point Estate

Housing For Who?

FOREWORD

Every human being wants to live in some degree of comfort, security and privacy. When a family acquires a place that they can call home, their dignity, future and unity is greatly enhanced. The constitution of Kenya puts the onus of provision of affordable and decent housing primarily on the government of the day. The Jubilee government of 2017 promised to build 500,000 units by the year 2022. To date they have completed a mere 20,000.

The county government of Mombasa was not to be left behind with its promises and dreams. Governor Joho committed himself to convert the old housing estate into modern, comfortable and affordable units for 30,000 families. His staff produced glossy, attractive brochures promising dream homes at affordable prices for the former residents and the opportunity for new owners to purchase at lower than market rates.

To date work has started on just one estate – Buxton – and it is the source of this research conducted by the team of Haki Yetu. For the past five years, Haki Yetu has engaged the affected communities, the county government, the general public and the political class. Our twin goal was to ensure that tenders and contracting was done in an open and transparent manner and that many residents of informal settlements might be able to exodus those overcrowded slums and take occupancy of the new units.

We had hoped that public participation would give the citizens of the coastal city an opportunity to share their concerns and hopes and not be a mere rubber stamp exercise that did not meet the threshold of legal requirements. Regrettably, public gatherings became mere public relations exercises and information regards the contract – single sourced to a company belonging to another Mombasa politician – has never been made public, despite our

best efforts in the High Court. Mr. Joho faces arrest for contempt of court regarding his reluctance to release information on the contract, on how public land became privatized overnight and how the evicted residents might ever – probably never – gain ownership of the new units.

The new buildings may look smart and attractive, but amidst the mass of concrete are buried the dreams of the former residents and the secrets of the illegal land transfers and unreleased contracts. It is a public shame and one that will long be associated with Mr. Joho's nine years in office as the city's first governor. The mistakes and the crimes of Buxton should not be repeated in the other estates.

This research aims to reveal the facts about the scheme but also to warn aspiring politicians and tenderpreneurs that the public has woken up and that bogus projects and wasted resources must cease. It is not too late to revisit the larger plan, be transparent and inclusive because the public are watching you. We at Haki Yetu are certainly keeping watch and will remain vigilant in defending the common good.

A special thank you to our Lands and Housing team, Munira Ali Omar and JP Obonyo, who combine community mobilization with quality research to produce a wonderful report that you should read to its very end. A huge thank you to our partners, Misereor, whose generosity and support have made this publication possible.

Fr Gabriel Dolan, March 2022.



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HOUSING FOR WHO?

CHAPTER 1

1.0 INTRODUCTION

1.1 Research Background & Context

The Right to affordable housing in Kenya is enshrined in Article 43(1) (b) of the Constitution which provides that every person ‘has the right to accessible and adequate housing, and to reasonable standards of sanitation’. Kenya is also a signatory to the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹ which requires the government to take steps to fulfill economic and social rights, among them the right to adequate and accessible housing. Kenya also adopted the 17 Sustainable Development Goals (SDGs)² which capture housing and related issues under Goal 11 (sustainable cities and communities). The Housing Pillar in the Big Four Agenda conforms to the third goal of SDG; Sustainable cities and communities-make cities and human settlements Inclusive, Safe, Resilient and Sustainable.

Despite these commitments by nations to facilitate the realization of the right to adequate housing, over one billion people lack access to housing and many end up living in life or health threatening conditions, in overcrowded slums and informal

¹ International Convention on Economic, Social and Cultural Rights (ICESCR) (1966).

² The United Nations Sustainable Development Goals (SDGs). Available at: <https://www.un.org/sustainabledevelopment/cities/> <Accessed on 3rd June, 2019>. The facts highlighted under Goal 11 states that half of the world population (3.5 billion live in cities and by 2030, 5 billion are estimated to live in cities. Further, 70 per cent of the world population is predicted to live in urban settlements by 2050.

settlements.³ Kenya's Kibra is the largest slum in Nairobi and is regarded as the largest urban slum in Africa with an estimated population of 185,777 covering 12 square kilometers as per the 2019 Census report results.⁴ Here in Mombasa, Bangladesh is considered as the largest informal settlement and is located in Mikindani ward with a population of 61,401 covering 5.9 square kilometers.⁵



Informal settlement of Bangladesh

In an attempt to realize Vision 2030, the current administration came up with an economic blueprint dubbed '*The Big Four Agenda*' in order to promote economic development of the country.

³UN-Habitat, The Right to Adequate Housing Fact Sheet No. 21/Rev.1, p. 1. Available at: https://unhabitat.org/sites/default/files/documents/2019-05/fact_sheet_21_adequate_housing_final_2010.pdf (Assessed on 3rd June, 2021>.

⁴ The 2019 Kenya Population and Housing Census.

⁵ Ibid.

It comprises of Food Security, Affordable Housing, Manufacturing and Universal Healthcare. Under the affordable housing pillar, the Jubilee government promised to deliver 500, 000 affordable housing units by 2022⁶, thereby improving the living conditions for Kenyans.

1.2 Objective of the Study

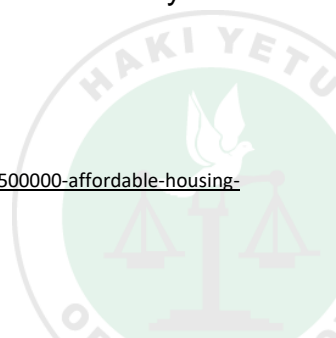
This research is intended to analyse Mombasa County Government's plan and financing of the Mombasa affordable housing projects. The study also aims at deepening understanding and raising awareness of the Public Private Partnership Agreement and to suggest ways in which such a development can be designed to deliver outcomes that are socially, environmentally and financially sustainable. The focus in this study is on DELIVERY at project level, examining one sample of affordable housing, namely BUXTON. In other words, who will benefit from the Mombasa Urban Development Programme or as Haki Yetu keep asking; '**Housing for Who?**'

Overall, it is hoped that the research will determine the role that the government can play in ensuring access to affordable housing for the urban poor living in Kenya's informal urban settlements.

1.3 Scope of the study

This study is limited to the County of Mombasa. The subjects of this study are the middle- and low-income earners. The highest percentage of the population of low-income earners are people living in informal settlements or people's settlements as they are frequently known.

⁶ Information available at <https://www.ahisummit.com/kenya-plans-to-build-500000-affordable-housing-units-by-2022/>. <Assessed on 3rd June, 2021>.



1.4 Literature Review

This research was conducted mostly through desk or literature review on ‘the right to accessible and adequate housing’. The literature draws from government policies and previous studies by government agencies and academia both local, national and international. Field research was undertaken in order to collect primary data that would be used to assess the implementation of the right to adequate housing in Mombasa County. We looked at the terms and conditions of the mortgages and ownership of the proposed units and the viability of ownership among those who would aspire to own the new housing units. Interview with a real estate agency was also conducted to know the estimate value of similar properties in the market. Interviews were also conducted with Buxton estate evictees, potential beneficiaries and other informed members of the public.



CHAPTER 2

Implementation of the Right to Accessible and Adequate Housing in Mombasa County

2.0 Background Information & Demographics of Mombasa County

The County is located in the South Eastern part of the Coastal region of Kenya and borders Kilifi County to the North, Kwale County to the South West, and the Indian Ocean to the East. It is the smallest county in the Country in terms of size and second largest city in Kenya serving as the major logistics center for East and Central Africa due to the Port of Mombasa. The coastline stretches to Somalia including the towns of Lamu and Malindi. The County has an area of 219.9 square kilometers and with a population of 1 208 333.⁷

⁷ N 4 above.



Mombasa County



Map data. Source: google

The distribution of population by land area and population density by Sub-County is as follows:⁸

⁸ N 4 above.



Table 1: Distribution of Population by Land Area and Population Density by Sub-County

Sub County	Population	Land Area (Sq. Km)	Population Density (No. per Sq. Km)
Changamwe	131,882	17.7	7,457
Jomvu	163,415	36.9	4,432
Kisauni	291,930	87.7	3,328
Likoni	250,358	40.5	6,187
Mvita	154,171	14.6	10,543
Nyali	216,577	22.5	9,610

Table 2: Categories of Residential Classes per Density and Income⁹

Categories	Areas
High Density Low Income	Likoni areas of Jamvi Ya Wageni, Vyemani, Shika Adabu, Kwa Waitiki; Kisauni Areas of Kisauni, Bamburi, Bombolulu, VoK, Ziwa La Ngombe ; Nyali Area of Kisumu Ndogo, Kwa Karama, Bombolulu, Kisimani, Mshomoroni; Island areas of Majengo, Mainland West parts

⁹ County Government of Mombasa, Second County Integrated Development Plan (2018-2022). Information available at: <https://cog.go.ke/media-multimedia/reportss/category/106-county-integrated-development-plans-2018-2022?download=304:mombasa-county-integrated-development-plan-2018-2022>. <Assessed on 3rd June, 2021>.

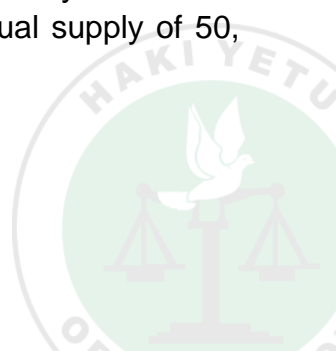
	of Jomvu, Mikindani, Migadini etc
High density medium income	Mkomani, Mikindani, Bombolulu, Bamburi, Shanzu,
High density high income	Mkomani, Bombolulu, Bamburi, Shanzu
Medium Density low income	Mkomani, Bombolulu, Bamburi,
Medium Density medium income	Utange, Bamburi, Shanzu, MtoPanga
Medium Density High income	New Nyali, Bamburi Vescon, Kiembeni, Miritini
Low Density medium income	New Nyali, Shanzu, Kizingo
Low Density high income	Nyali English Point, Shelly Beach, Nyali Reef Area, Nyali Nakumatt, Kizingo

Owing to low cost of housing and easy reach to the town center and other sub-counties, Kisauni Sub-County recorded a population of 291, 930, the highest for a sub-county, representing 20.65 per cent of the County's population in 2019.¹⁰ This is followed by Likoni Sub-County which recorded a population of 250,358. What all this suggests is that housing has to be increased in areas where they are needed the most.

2.1 Housing Deficit in Mombasa County

The Affordable Homes Program estimates Kenya's annual housing demand to be 250,000 against an annual supply of 50,

¹⁰ Ibid.



000.¹¹ The report also states by 2050, Kenya will have a housing demand of almost 300,000 units a year.¹² The deficit continues to rise due to the growth of urbanization; population increase and the lack of affordable housing units on the market.¹³

In the case of *Legal Advice Centre, Haki Yetu & 1 Other -vs- County Government of Mombasa & 4 Others*¹⁴, Mombasa County Government indicated a housing deficit of 21,000 units a year with an annual demand for housing units standing at 25,000 units against a supply of 4,000 houses with the County planning to build 32,000 units in the next two years, through the Urban Renewal and Regeneration project¹⁵ leaving a big shortage in housing supply.

2.2 Informal Settlements in Mombasa County

Over the years, Mombasa has experienced a growth in its population, with a resultant growth of informal settlements that are situated close to the city centre. There are about 70 documented informal settlements in Mombasa¹⁶ attributed to rural urban migration in search of employment. This is largely because Mombasa is an industrial city, a port city and a major gateway to the East and Central African region.

¹¹Information available at https://bomayangu.go.ke/downloads/Affordable_Housing_Program_Presentation.pdf. <Assessed on 16th June, 2021>.

¹² Ibid.

¹³ Affordable Housing in Kenya; *Investment Cases for Developers Building Affordable Homes in Nairobi*. (June 26, 2018). Available at <https://housingfinanceafrica.org/app/uploads/Kenya-Affordable-Housing-Investment-Cases6.pdf> <Assessed on 4th June, 2021>.

¹⁴ [2018] eKLR.

¹⁵ Information available at <https://www.businessdailyafrica.com/bd/news/counties/mombasa-plans-to-launch-sh200bn-housing-project-in-sept-2213174>. <Accessed on 5th June, 2021>. See also: <https://cytonn.com/topicals/mombasa-real-estate-investment-opportunity-august-2018-cytonn-weekly-342018>. (Assessed on 5th June, 2021).

¹⁶ See the County's website at: <https://www.mombasa.go.ke/lands-planning/>. <Assessed on 15th June 2021>.

The failure of County and National government to come up with effective housing policies to adequately cope with growing population and to meet the needs of cities is one of the main factors supporting the development of informal settlements in Mombasa. Lest we forget, affordable or social housing is rarely discussed in relation to informal settlements.¹⁷

City slums of Mishomoroni, Junda in Kisauni Sub-County, Kisumu Ndogo in Nyali Sub-County, Shika-Adabu and Ngomeni in Likoni Sub-County and Bangladesh in Chagamwe Sub-County continue expanding despite efforts being made to regularize the settlements.¹⁸ Government sources indicate that a majority of urban poor live in temporary houses built on land registered to absentee landlords, with limited guarantee of land ownership.¹⁹ The government also observed that by July 2013, only 30% of the residents had title deeds to their land.²⁰

The County government of Mombasa has promised to come up with a comprehensive settlement Master Plan²¹ that will be prepared to formalize the informal settlements. However, it has been observed that many urban plans are never or are only partly completed.²² Besides, how many master plans in the country have been shelved with no reasonable justification given?

¹⁷ N 16 above where the County Government stated that: "it had unveiled an ambitious social housing plan that will put-up low-cost houses by ensuring that rentals are affordable and to move the people from the informal settlements to the new housing units."

¹⁸ N 9 above. According to the Mombasa Second County Integrated Development Plan (2018-2022), highly populated areas are in Majengo, Bamburi, Bangladesh, Mikindani, Jomvu, Miritini, Migadini, Port Reitz, Mishomoroni and Bombolulu among others.

¹⁹ N 9 above.

²⁰ N 9 above.

²¹ N 9 above.

²² Government admits that irrespective of urban plans, there is no conscious attempt to implement plans.

2.3 Definition of Adequate Housing

The United Nations Committee on Economic, Social and Cultural Rights (CESCR) has pointed out that the right to adequate housing entails more than having a roof over one's head.²³ It should also be viewed as the right to live in dignity, peace and security.²⁴ The CESCR also described what amounts to adequacy and that certain aspects of the right must be taken into account in order to know whether the housing is adequate. These include²⁵:

- Legal security of tenure
- Availability of services, materials, facilities and infrastructure
- Affordability
- Habitability
- Accessibility
- Location
- Cultural adequacy

2.4 Meaning of Housing Affordability

In Kenya, 'Access to affordable housing' has become an important topic of discussion and so is the rise of informal settlements and homelessness caused by unlawful evictions that have been witnessed in recent times. Globally, the high housing rates have been rising for years and given that housing is the most household's largest expenditure and a major financial burden for many low-income earners, it has become less affordable across the OECD.²⁶

²³ CESCR General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant).

²⁴ Ibid.

²⁵ Ibid.

²⁶ Marissa Plouin, *Affordable Housing and Homelessness Challenges Across the OECD* (2019). Available at https://www.un.org/development/desa/dspd/wp-content/uploads/sites/22/2019/06/OECD_Affordable-housing-and-homelessness_FINAL.pdf <Accessed on 5th June, 2021>.

Affordability in Kenya is the main urban housing challenge which continues to affect the urban population. As per the Federal Department of Housing and Urban Development (HUD) definition, a house is considered affordable if one is not spending more than 30% of income on housing, mortgage payments and utilities.²⁷ Internationally, this guideline is used when determining affordability of housing and in Kenya, urban dwellers spend more than 40% of their income on rent only.²⁸

The KNBS²⁹ reports that 2.89% earn more than Kshs. 100,000 per month while 63.1% constitute middle-income earners who earn below Kshs. 50,000.³⁰ Nearly 36 % of the 2.6 million salaried workers earn between Kshs. 20, 000 and Ksh. 29, 999 per month. The percentage that can afford a mortgage is only 2.4% of the total population and 11% of the urban population.³¹ According to the banks interviewed, only a person earning a monthly income of Kshs. 100, 000 can qualify for a mortgage loan. This goes to show that middle and low-income earners who happen to be the vast majority of Kenyans cannot own houses.

2.5 Social Housing

There are two types of low-income housing: 'affordable housing' and 'social housing'. Out of the 500,000 units that the current government planned to deliver between 2017-2022, 20% will be social housing while 80.0% will be affordable housing.

²⁷ Mathew Yglesias, *Everything You Need to Know About the Affordable Housing Debate* (2015) <https://www.vox.com/2014/4/10/18076868/affordable-housing-explained>. <Accessed on 5th June, 2021>.

²⁸ The 2012/13 Kenya National Housing Survey.

²⁹ N 4 above.

³⁰ According to KNBS 2019, the number of Kenyans earning Kshs 50,000 and below decreased to 63.1% from 74.5%, indicating the growth of the middle class.

³¹ The Home Ownership Survey, Centre For Research on Financial Markets and Policy (January 2015). Available at: <https://www.kba.co.ke/downloads/Home%20ownership%20survey.pdf>. <Accessed on 5th June, 2021>.

What is not understandable is what the concept of social housing really implies in Kenya.

While there is no universally accepted definition for social housing, John Doling³² argues that in most cases social housing is rental housing. It refers to housing owned by government that the tenants can afford to rent and it is intended for low-income earners who usually struggle to afford rent, often to the point of homelessness. Affordable housing on the other hand is affordable home ownership. The purpose of social housing is to address the housing situation in informal settlement areas. However, the public participation forum discussions that took place at Tononoka Social Hall on the Buxton Project did not consider low-income earners living in slums and informal settlements as the attention and intention of the County government was the redevelopment of old estates and not development of informal settlements.

³² John Doling, *Comparative Housing Policy; Government and Housing in Advanced Industrialized Countries*. (1997).



CHAPTER 3

3.0 Mombasa Urban Renewal and Redevelopment of Old Estates Project

Urban renewal, also referred to as urban regeneration refers to the process of redeveloping urban areas.³³ It solves urban problems such as inadequate infrastructure and services and ageing and decaying buildings. The process of renewal can be achieved either through the refurbishment and renovation of deteriorated buildings and housing or through the demolition of buildings which are replaced by newly constructed ones.³⁴

The County Government of Mombasa through a public-private partnership project dubbed “*Urban Renewal and Redevelopment of Old Estates*” seeks to replace almost 3000 county housing units with 30,000 units as part of its contribution to the Big Four Agenda. The project will involve the construction of 30,000 housing units in old dilapidated estates of Mombasa where ninety percent of the units would go to the investor and the county would retain ten percent that COULD be occupied by the former tenants and if the Buxton tenants go for rentals, they won’t have the option of purchasing the units.

The County’s focus is on redevelopment of 10 old estates namely Khadija Estate, Changamwe Estate, Tudor Estate, Mzizima Estate, Buxton Estate, Likoni Estates, Nyerere Estate, Tom Mboya Estate, Mvita and Kaa Chonjo Estate that will be demolished and

³³ Zheng, H. W., Shen, G. Q., & Wang, H. (2014). *A Review of Recent Studies on Sustainable Urban Renewal*. *Habitat International*, 41, 272-279.

³⁴ Power, A. (2008). *Does Demolition or Refurbishment of Old and Inefficient Homes Help to Increase Our Environmental, Social and Economic Viability?* *Energy Policy*, 36(12), 4487- 4501.

replaced with new ones with the current tenants being given a first option to purchase.

Table 3: Number of Units in the Old Estates³⁵

Estate	Units
Khadija	100
Likoni L	48
Likoni LF	180
Likoni LH	120
Mvita	12
Nyerere	18
Tom Mboya	32
Kaa Chonjo	100
Buxton	520
Mzizima	114
Changamwe	701
Tudor	940
Total	2885

³⁵ S.S Malonza & Co. Advocates (Transactional Lawyer for the Project).



CHAPTER 4

Buxton Point Housing Project

4.0 Background Information of Buxton Estate

Buxton estate is located along the Mombasa-Malindi Road and adjacent to Tom Mboya Road on one side and Ronald Ngala Road on the other side. The area hosts the Mombasa County stadium. Schools, health facilities and shops are within close proximity.



Figure 1: Old Buxton Estate

Buxton estate had 520 housing units and 2 shops prior to demolition where the existing tenants were paying a monthly rent of Kshs. 2,810/=for a one-bedroom house and Kshs 3,662/=for a

two-bedroom house. 176 units were occupied by members of county staff while 344 were rented out to the public.³⁶ Most of the tenants were persons of low income. The average age of the tenants is 54 years with the oldest tenant aged 78 years while the youngest is 26 years.³⁷

4.1 Buxton Point Housing Project

According to the information provided by the government during the public participation forum, the Urban Renewal and Regeneration project cost for Buxton estate is estimated at Kshs. 6 billion on a 14 acres parcel of land while the Environmental Social Impact Assessment Report stated that only 8.45 acres will be required for the project at a cost of Kshs 4.8 billion. Further, we note that the Relocation Action Plan states that the Buxton housing project will be on a 14 acres parcel of land.

The Buxton Point Housing Project is a 2-year project where Phase one of the project will be completed in May 2022. The county offered a 240,000/= relocation package for a period of two years to enable the tenants find alternative accommodation pending completion of the said project and Ksh. 60,000/= as deposit towards purchase of a housing unit. This translates to Kshs. 12,500/= per month. This, according to most Buxton tenants will not be sufficient as the monthly rent in neighboring areas ranges between Kshs. 22,000/= to Kshs. 30,000/= per month for two-bedroom apartments. Majority of the tenants claim that the option

³⁶ Request For Proposal For Urban Renewal And Redevelopment Of Old Estates Within Mombasa County Through Joint Venture Partnership. Lot No. 7 - Buxton Estate Bid No: CGM/PRO/T/002/2019-2020. Available at <https://www.mombasa.go.ke/wp-content/uploads/2019/07/BUXTON-FINAL.docx>. (Assessed on 5th June, 2021).

³⁷ Environment & Social Impact Assessment Study Report for Proposed Buxton Affordable Housing Units on L.R No. Mombasa/XVII/625 & 985 situated at Buxton, Mombasa, December 2020.

is not viable for them because most of them are of old age with children who are not in salaried employment.



Figure 2: Image of New Buxton Affordable Housing Project

The proposed re-development at Buxton is set to construct a minimum of 1850 modern and affordable housing units with the county retaining 185 units as follows:

Table 4: Number of New Modern Units

Typology	No of units	Cost (Kshs)
Bedsitter	328	1.2 M
1 bedroom (34 sqft)	630	2.3 M
2 bedrooms (55 sqft)	715	3.6 M
3 bedrooms (74 sqft)	177	4.7 M
Total	1850	

Interview with Nawal Ahmed Bahannan who works with Ijara Properties Limited Estate Agency revealed that depending on how spacious the apartment is, the average cost of apartments within Mombasa CBD is as follows:

Table 5: Current Market Price of Apartments

Typology	Cost (Kshs)
1 bedroom	3-5M
2 bedrooms	5-8M
3 bedrooms	10-15 M

As shown in tables 4 and 5, one major argument can be made: while it's affordable compared to the current market price, the housing units offered by the joint venture between Buxton Point Apartments Limited and the County Government of Mombasa are cheaper because the land offered by the County is a public land. In addition, affordable is variable, whatever is affordable to person X is not affordable to person Y.

4.2 Public Private Partnership (PPP)

Public Private Partnership is defined as an arrangement between a contracting authority and a private party under which a private party undertakes to perform a public function and benefits through compensation from a public fund; charges or fees collected by the private party from users or consumers of a service provided to them or a combination of such compensation and such charges or fees.³⁸ Under the PPA, the government provides land and the partner provides technical and financial resources into the project.

³⁸ The Public Private Partnerships Act 2013.

In the Buxton case, Buxton Point Apartments Limited was formed as a special purpose vehicle to finance the housing project after Gulf Cap Africa won the bid to redevelop Buxton estate. The project will be implemented as a joint venture with the Mombasa County Government providing the land while Buxton Point Apartment Limited provides technical and financial inputs into the project.

4.3 Guiding Principles of PPPs

All Public-Private Partnerships for housing and urban development should be founded on the following 8 key governing principles³⁹:

- The public interest is paramount.
- Good practices in accountability and transparency measures must be maintained throughout the lifecycle of the project.
- A PPP project needs to be carefully planned, well-defined in scope and fundamentally clear in its objectives.
- The viability of the project needs to be measured against criteria set by the initiating partner to assist it in determining its potential suitability for PPP procurement.
- The selected PPP model must provide value for money in terms of cost and time savings with appropriate consideration of risk transfer.
- The PPP tendering process must be competitive, fair and subject to proper due diligence on the part of the partnership.

³⁹ Public-Private Partnerships in Housing and Urban Development- United Nations Human Settlements Programme Nairobi (2011). Available at <https://unhabitat.org/sites/default/files/download-manager-files/Public-Private%20Partnership%20in%20Housing%20and%20Urban%20Development.pdf>. <Assessed on 19/6/21>.



- An urban sector PPP must reflect the needs of the affected community and must integrate into the project key stakeholder priorities.
- The project must be responsibly managed throughout the term of the agreement, with predictability and priority as determined by the partnership.



Figure 3: Public Participation Forum in Tononoka Social Hall. Photo credit: John Chesoli, The Star Newspaper.

Article 174 of the Constitution states that the public must participate in the making of decisions that affect them. What this means is that when implementing any national or county projects aimed at improving the community's lives, the interests of the community must be taken into account through actual public participation. In the Buxton case, the public participation was intended at sharing decisions already made and not allowing the public to give and confirm their needs, fears preferences, and

concerns. Their views and concerns were never taken into account rendering the public participation ineffective, improper and illegal by definition. It was merely a talk between the government and people thus contravening the constitutional principles of public participation.⁴⁰

To borrow the words of Odunga J in ***Robert N. Gakuru & Others -vs- Governor Kiambu County & 3 Others***⁴¹:

“.....public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates.”

Also, in the case of ***Mui Coal Basin Local Community & 15 Others -vs- Permanent Secretary Ministry of Energy & 17 Others***⁴², the High court while listing 4 practical principles in determining whether a reasonable threshold was met in facilitating public participation observed:

“.... whatever programme of public participation is fashioned, it must include access to and dissemination of relevant information. See Republic -vs- The Attorney General & Another ex parte Hon. Francis Chachu Ganya (JR Misc. App. No. 374 of 2012. In relevant portion, the Court stated: ‘Participation of the people necessarily requires that the information be availed to the members of the public whenever public policy decisions are intended and the public be afforded a forum in which they can adequately ventilate them.’”

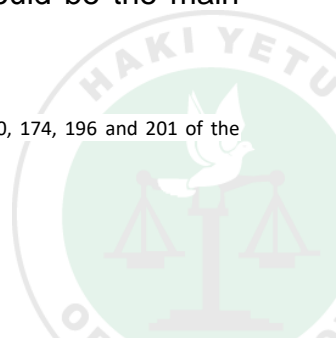
4.4 What of ‘People-First’ PPPs?

People-first Public-Private Partnerships states that ‘people’ before anyone else should be considered first and should be the main

⁴⁰ There was no proper public participation as contemplated under Article 10, 174, 196 and 201 of the Constitution and Section 87 and 115 of the County Government Act, 2012.

⁴¹ [2014] eKLR.

⁴² [2015] eKLR.



beneficiary.⁴³ Bettering the quality of lives of the communities especially those that are fighting poverty should be the main focus. PPP can only amount to People-First PPP if they meet the criteria below:

- Accessibility
- Equity
- Efficiency
- Effectiveness
- Sustainability and
- Replicability

4.5 Affordable Housing or More Informal Settlements?

Despite being termed as the largest affordable housing project in the Country by Housing and Urban Development Principal Secretary Charles Hinga, the Buxton Housing Project will most likely push the former tenants into already overcrowded informal settlements and slums, further increasing the housing deficit.

Principal Secretary, State Department of Housing and Urban Development Charles Hinga also said that the Buxton Housing Project is one of the many projects under the Public-Private Partnership aimed at improving the living standards of residents and boosting the economy of the region. However, instead of alleviating poverty or transforming the social and economic situation of developing countries as envisioned in the Sustainable Development Goals, it has been observed that the track record of PPPs in developing countries has been disappointing.⁴⁴ It is noted

⁴³ *Promoting People first Public Private Partnerships (PPPs) for the UN SDGs*: United Nations Economic Commission for Europe (UNECE). (July 2016). Available at: https://www.un.org/esa/ffd/wp-content/uploads/2016/01/Promoting-People-first-Public-Private-Partnerships-PPPs-for-the-UN-SDGs_UNECE_IATF-Issue-Brief.pdf. <Assessed on 19th June, 2021>.

⁴⁴ Ibid.

that several PPPs are either postponed or terminated especially in developing countries.⁴⁵ Some of the barriers to PPPs' implementation as cited by different authors⁴⁶ are: lack of suitable skills and experience, lengthy bidding and negotiation process, lack of competition, lack of well-established legal framework, inefficient public procurement frameworks, lack of mature financing engineering techniques, public sector related problems (e.g., inexperienced government and lack of understanding of PPPs), private sector related problems (e.g., most people, including investment banks still prefer traditional procurement routes), public opposition and delays because of political debate.

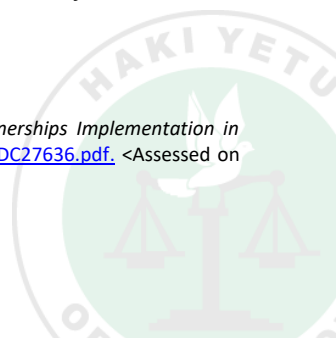
Besides, had the county government intended to provide affordable or social housing for low-income households, then they could have gone for ample unused and unoccupied land like Miritini and Shimo La Tewa Greenfields that could have been developed through PPP.

Additionally, interviews with former Buxton tenants revealed that neither the County Government of Mombasa nor the developer have a legally binding tenancy agreement with former residents of Buxton. It was also established that there was NO competitive bidding to demonstrate transparency of the PPP Agreement which is usually preferred in PPP projects.

Therefore, while the benefits of the project to the government and private investor is very obvious, how the aspiring owners will benefit from the project still remains a mystery to many.

⁴⁵ Olusola S Northumbria B., *Identification of Barriers to Public Private Partnerships Implementation in Developing Countries*. Available at: https://www.irbnet.de/daten/iconda/CIB_DC27636.pdf. <Assessed on 19th June, 2021>.

⁴⁶ Ibid.



CHAPTER 5

5.0 Is the Buxton Housing Programme Viable and Affordable?

Mortgage financing and commercial bank institutions have been on the forefront in the provision of financial services to developers for various types of housing developments. The Housing Finance Corporation of Kenya has been in the public domain in the housing sector in mortgage provision and their offers have been in the market for a considerable period of time. The financial institution is the only one that presented its mortgage plan to the public during the public participation exercise.

The institution offered its fiscal terms at 10% and 20% respectively with an interest rate of 9% which is not fixed and is subject to prevailing market conditions. The initial capping was at 16% and the Central bank forced financial banks to lend at a rate of 13% giving banks the liberty to set the ceilings. They had presented a similar facility in Pangani Nairobi County and sold several units successfully through an arrangement of Housing Finance 60% - and customer 40% for 36 months.

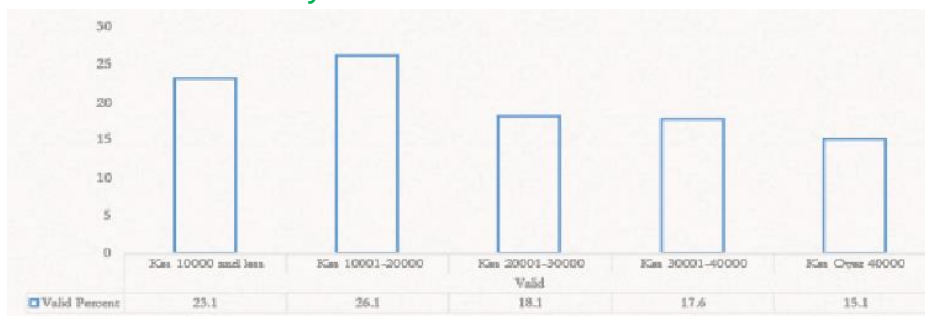
5.1 Mortgage Plan by Housing Finance Corporation of Kenya

			5 years	10 years	15 years	20 years
Housing Price	10% deposit	Mortgage	9%	9%	9%	9%
800,000	80,000	720,000	14,946	9,121	7,303	6,479
1,800,000	180,000	1,620,000	33,630	20,522	16,432	14,576
3,000,000	300,000	2,700,000	56,048	34,203	27,386	24,292
4,200,000	420,000	3,780,000	78,467	47,884	38,340	34,010

			5 years	10 years	15 years	20 years
Housing Price	20% deposit	Mortgage	9%	9%	9%	9%
800,000	160,000	640,000	13,286	8,108	6,492	5,758
1,800,000	360,000	1,440,000	29,893	18,242	14,606	12,956
3,000,000	600,000	2,400,000	49,821	30,403	24,343	21,594
4,200,000	840,000	3,360,000	69,749	42,564	34,080	33,231

Source: Housing Finance Corporation of Kenya

Table 6: Total Monthly Income of the Household



Source: CLNSA Socio-economic study at Buxton and Khadija estates

As indicated in table 6 above, the housing units are not affordable to a majority (26%) of Buxton tenants who earn between Kshs. 10,000/= and Kshs. 20,000/= per month. With little to nothing to save monthly, a person earning Kshs. 10, 000- Kshs. 20,000 per month will not be able to pay for the units neither will they be able to access mortgages. Further, only 15% earn over 40,000 per month and even these cannot afford to get a mortgage. The housing units are also not affordable to 36% of Kenyans who earn between 20,000/= and 29,000/= per month according to the Housing and Census Report, 2019. So the programme does not

target people of low income And very few of the former tenants will be able to return to the new units.

5.2 Mortgages by Other Commercial Banks

During the public participation exercise, only Housing Finance Cooperation of Kenya presented their mortgage plan capped at 9%. However, during the actual implementation, the public were referred to engage the following banks for mortgage plans with the exclusion of housing finance: Kenya Commercial Bank (KCB), Gulf Bank, Absa Bank and Equity Bank who have NO formal agreement with the developers and the County Government of Mombasa.

The current situation is that Cooperative Bank of Kenya is not in the picture despite funding housing cooperative movements in the country.

5.3 Off-plan Purchase

Buying off-plan property means buying property before it has been built. One usually signs a contract and paying a deposit to secure the property. While the initial buying price may be low with developers requiring a ten percent deposit, the risk of buying an off-plan property is that the developer may go out of business before construction of the property is completed and the buyer may be unable to recover the deposit. Also, an off-plan property may not meet the buyer's original expectations for one reason or another.

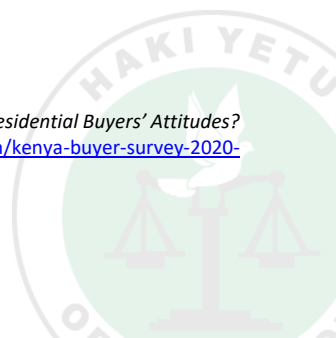
The biggest challenge with mortgages is that no financial institution funds off plan system as it is a risky venture and there's delay in disbursement of funds for housing construction due to very stringent conditions based on risk and regulatory variables.

Usually, financial institutions offer mortgage facilities at an agreed rate where the title is charged as collateral and this is the case across the board. Currently there is no official position since the process is off plan and there is no title to be charged unless it is under the Housing Finance Corporation of Kenya. This is contrary to what the public were informed during the public participation exercise.

Furthermore, an interview with mortgage lenders revealed that for one's mortgage application to be accepted, one needs to show proof of income through provision of a three months' pay slip, bank statements for the last 6 months, a copy of contract for a borrower who has just started a new job and self-employed accounts for the self-employed borrowers.

Increased mortgage defaults have been reported by banks indicating economic hardship that is being experienced in the country and as a result lenders are likely to be more cautious in their approval processes before giving out loans.⁴⁷ The Buxton Housing Project will therefore pose an impossible challenge to people working in the informal sector simply because low- and middle-income families cannot access mortgage facilities that are equal to their affordability level and credit-worthiness. In addition, one risks losing a home for failure in repayment of loan because one of the terms of mortgage agreements is that in the event of defaulting in repayment, the banks can exercise statutory power of sale and sell a mortgaged house in accordance with the provisions of the Land Act.

⁴⁷ Knight Frank, *Kenya Buyer Survey 2020; What Impacts has Covid-19 Had on Residential Buyers' Attitudes?* Available at: <https://content.knightfrank.com/research/2144/documents/en/kenya-buyer-survey-2020-7677.pdf>. <Assessed on 19th June, 2021>.



CHAPTER 6

The Land Question

Buxton Estate was developed on Plot Numbers Block XVII/625 and Block XVII/985. The two plot numbers were the mother plots before illegal mutation⁴⁸ and the creation of new parcels was possibly conducted through the blessings of the defunct Municipal County of Mombasa.⁴⁹

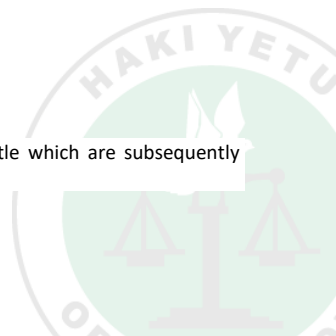
6.0 Plot Number BLOCK XVII/625

A copy of the property rate statement dated 6th August 2021 shows that the owner of Plot No. Mombasa/Block XVII/625 is the Municipal Council of Mombasa. Furthermore, the Certificate of Lease registered on 10/9/2010 evidently indicates that the Lessor of Plot No. Mombasa Block XVII/625 is the Government of Kenya. It plainly shows that the Municipal Board of Mombasa is merely a leasee while the lessor is the Government of Kenya and cannot therefore part with the possession or alienate the property without the lessor's consent.

Plot No. Mombasa Block XVII/625 was hived off and Buxton Estate remained under subdivision number 1444. The illegal subdivisions are:

⁴⁸ Normally, a mutation leads to creation of subdivisions out of the main title which are subsequently registered.

⁴⁹ The Ndungu Report, Annexes Volume I.



(To be completed only when the applicant has paid Sh. 125.

At the date stated on the front hereof, the following entries appeared in the registry relating to the land—

ITION: 2		PART A—PROPERTY SECTION			
ENED: 10/9/10					
REGISTRATION SECTION	PARTICULARS OF LEASE		NATURE OF TITLE		
MOMBASA/BLOCK XVII	LESSOR: THE GOVERNMENT OF KENYA		LEASEHOLD		
PARCEL NUMBER	LESSEE: THE MUNICIPAL BOARD OF MOMBASA				
625	RENT: A. TERM: 99 YRS FROM: 1/7/1949				
APPROXIMATE AREA	PEPPERCORN (IF DEMANDED)				
28 ACRES HECTARES	FOR APPURTENANCES SEE THE REGISTERED LEASE.				
REGISTRY MAP SHEET No.	N.B. WHERE THE LEASE IS OF A PART OF A PARCEL THE				
MOMBASA/BLOCK XVII	PARCEL NUMBER REFERS TO THE NUMBER SHOWN ON THE FILED PLAN				
PART B—PROPRIETORSHIP SECTION					
ENTRY NO.	DATE	NAME OF REGISTERED PROPRIETOR	ADDRESS AND DESCRIPTION OF REGISTERED PROPRIETOR	CONSIDERATIONS AND REMARKS	SIGNATURE OF SELLER
RESTRICTION: NO DISPOSITION BY THE PROPRIETOR SHALL BE REGISTERED WITHOUT THE WRITTEN CONSENT OF THE LESSOR (S. 41)					
1	10/9/10	THE MUNICIPAL BOARD OF MOMBASA	P. O. BOX MOMBASA		
2	10/9/10	CERTIFICATE OF LEASE ISSUED			

- Block XVII/1403
- Block XVII/1443
- Block XVII/1414
- Block XVII/1432
- Block XVII/1465
- Block XVII/1466
- Block XVII/1468
- Block XVII/1442
- Block XVII/1473
- Block XVII/1426
- Block XVII/1376
- Block XVII/1377
- Block XVII/1388



Our efforts to get a certified copy of the green card⁵⁰ and a Certificate of Official Search for Plot No. Mombasa/Block XVII/625 from the Lands registry bore no fruits.

6.1 Plot Number Mombasa/XVII/985

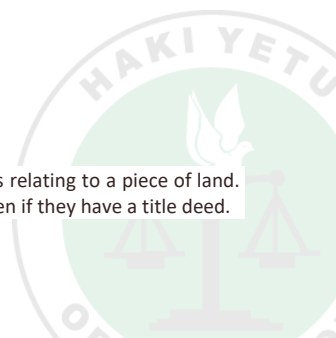
As for Plot No. Mombasa/XVII/985, the Certificate of Official search indicates the owner as the Government of Kenya. Similarly, our quest to get a certified copy of the title deed and a green card from the land registry proved futile. A huge portion of Mombasa/XVII/985 was hived off and Buxton Estate remained under subdivision number 1435. The illegal subdivisions are as follows;

- i. Block XVII/1436
- ii. Block XVII/1418
- iii. Block XVII/1519

It is important to note that some of the aforementioned illegal subdivisions were revoked by Kenya Gazette Number 4671 dated 26th April 2021 as shown hereunder:

- i. Block XVII/1403
- ii. Block XVII/1443
- iii. Block XVII/1468
- iv. Block XVII/1442
- v. Block XVII/1473
- vi. Block XVII/1436
- vii. Block XVII/1418
- viii. Block XVII/1519
- ix. Block XVII/1475

⁵⁰ A green card is a document that holds the original records of all transactions relating to a piece of land. Without a green card, one cannot claim to be the legal owner of a property, even if they have a title deed.



COUNTY GOVERNMENT OF MOMBASA

CANCELLATION OF SUBLEASES WITHIN BUXTON HOUSING ESTATE

PURSUANT to cancellation of the Subleases through the County Formalization and Regularization Development Committee on Urban Public Land. The following subleases are declared invalid and hence being brought to the attention of the public not to have any transactions on them.

<i>Plot Number</i>	<i>Name</i>	<i>Acreage in Ha.</i>
1418/XVII/MI	Moosa Esmail Mussa and Esmail Mussa	0.0831
1436/XVII/MI	Husainiz Investment Limited	0.1087
1442/XVII/MI	Hussein Ibrahim Awale	0.0830
1519/XVII/MI	Biyoto Investment	0.0448
1468/XVII/MI	Biyoto Investment	0.0317
1403/XVII/MI	Edward Kithinji Murania	0.100
1473/XVII/MI	Said Ali Ramadhan and Mutuma Angaine	0.0330
1443/XVII/MI	Jiviben Lalji Shah	0.0351
1475/XVII/MI	Ghaniya Mohamed Bilali	0.0141

Dated the 26th April, 2021.

MR/1721325

JOAB TUMBO,
County Secretary.

As a result of illegal subdivisions, land that is meant for public use have been utilized by politicians for their own personal gains or in other cases they have some vested interests in the illegal subdivisions.

6.2 Where is the Re- Development of Buxton Estate being undertaken?

The Environmental Social Impact Assessment Report clearly indicates that the proposed re-development will be done on Plot No. Mombasa/XVII/625 and Mombasa/XVII/985 while in the case of ***Julius Chai Mbaru & 11 others -vs- Mombasa County Government; National Land Commission & Another***

(Interested Parties)⁵¹, the County Government states that the property offered to the developer for the Joint Venture Agreement is known as MOMBASA /BLOCK XVII/1776 which is said to measure 4.89 hectares (approximately 12 acres). In the same case, the County Government also said that Buxton Estate is not a public land but a private land.

The County did not endeavor to give an explanation as to why it said that it is the owner of land known as MOMBASA/BLOCK XVII/625 while the at the same time it said that the property that is subject matter of the JV Agreement is a different property, namely MOMBASA/BLOCK XVII/1776 measuring 4.849 hectares (approximately 12 acres).

The puzzles and inconsistencies which have caused the former Buxton tenants and the general public concern did not end there. In the termination agreement, the property that was vacated by the former tenants was referred to as MOMBASA/BLOCK XVII/1776.

In addition, copies of the Sale Agreement supplied to would be unit owners at page 2 provided as follows:

“The Vendor is the Registered Proprietor as Lessee from the County Government of Mombasa (hereinafter referred to as “the County Government”) for a term of Ninety Nine (99) Years from the 15th day of January Two Thousand And One (Subject however to such charges Sub-Leases and encumbrances as are notified by the Memorandum endorsed thereon) of ALL THAT piece of Land situated at Mombasa County in the said Republic containing by measurement Four Decimal Nine Zero Five (4.905) Hectares (Approximate) known as Land Title

⁵¹ ELC Petition No. 28 of 2020.

Number MOMBASA/BLOCK XVII/1821, Mombasa Island which said piece of land with the dimensions boundaries and abutments thereof is delineated on the Deed Plan Number MOMBASA/BLOCK XVII/1821 annexed to the Certificate of Title registered in the Land Titles Registry at Mombasa as MOMBASA/BLOCK XVII/1821 TOGETHER with the buildings and improvements erected thereon (hereinafter referred) to as “the Property.”

From the foregoing, it is evident that the title and plot numbers relating to the redevelopment of the Buxton Estate that was shared by the County and the Developer to the tenants, general public and courts have been baffling, confusing and a deliberate attempt to deceive the public. The documents tendered in evidence, were marred with glaring contradictions, inconsistencies and full of inaccuracies. The production of vital information regarding the project is the only way that could have thrown a light on the confusion and therefore unravel the mystery surrounding the project.

6.3 Administration of Public Land

Public trust in respect of public land is conferred to County Governments and the powers to manage and alienate public land is vested on the National Land Commission according to Article 67 (2) (a) of the Constitution of Kenya 2010 and Section 5 (2) (a) of the National Land Commission Act. Therefore, county governments cannot transfer, allocate or lease public land without the approval of the National Lands Commission.

A survey map from the Lands Registry indicates that Buxton Estate stands on a portion of 14 acres of public land and therefore it was not possible for Mombasa County Government to deal with

any part of the said land without the involvement and consent of the National Land Commission.

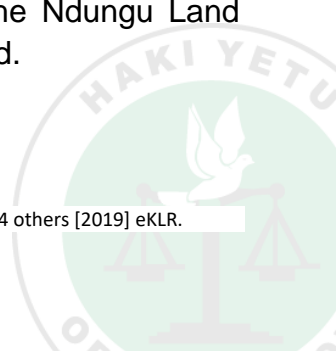
6.4 Of Irregular and Blatant allocation of Public Land

Plot 1444 was hived from Plot Number 625, which belongs to the Government of Kenya and Plot 1435 was hived from Plot Number 985, which belongs to the Government of Kenya. What this means is that the intended re-development is undoubtedly being done on public land more so without the input and/or approval of the National Lands Commission. It goes without saying, the County cannot transfer, allocate or lease public land without the approval of the National Lands Commission. This position remains unchanged after Supreme Court Reference No 2 of 2014 and recently the case of Cordison International (K) Ltd⁵², which decision has not been overturned by the Supreme Court. In this case, the court observed:

“It is obvious to us that the appellant had not taken cognizance of the new land policy that had been ushered by the Constitution of Kenya, 2010 and the Land Act; and as a result, backed the wrong horse. The appellant ought to have engaged the National Land Commission as soon as it came into operation, given its constitutional and statutory role in allocation of public land.”

Also, we understand that the County Government gave notice revoking some subdivisions. Regrettably, we still have plots in former plot 625, which were previously allocated but were not revoked in spite of the recommendations by the Ndungu Land Report on illegal/irregular allocation of public land.

⁵² Cordison International (K) Limited v Chairman National Land Commission & 44 others [2019] eKLR.



This goes to show that the Buxton Housing project is another case of grabbed public land that ought to have been protected by the County Government of Mombasa and NLC. Another case of unjust enrichment by the County Government of Mombasa and a private investor at a heavy cost to the people of Mombasa.

6.5 Irregular Privatization of public land

In the Justus Chai Mbaru case⁵³, the government claimed that Buxton estate is a private land. If the County and the Developer contend that the project shall be done on private land, then the county government should have complied with the Land (Conversion of Land) Rules, 2017.⁵⁴ In fact, a notification to the National Lands Commission should have been furnished by the County government, a base map submitted to the Commission, an approval by the County Assembly regarding the conversion, proof of public consultations under regulation 5 and a register from the Commission confirming the allocation and approval.

In addition, the County and the Developer should have produced a copy of the request for the setting aside of the land to the commission in Form LA 9 as provided in regulation 28 of the Land (Allocation of Public Land) Regulations, 2017, for purposes of ascertaining the correct title of the re-development property and ensuring that there is certainty of title in favour of the evicted tenants or third-party purchasers of the apartment units.

A notice by the National Lands Commission under regulation 28 together with the final recommendation or report by the Commission pursuant to section 12 of the Land Act No 6 of 2012

⁵³ N 51 above. In this case, at paragraph 11 of the Replying Affidavit the County Attorney, Jimmy Waliaula swore that Buxton estate is not a public land.

⁵⁴ Rules to implement provisions of the Land Registration Act by NLC in respect of conversion of public land into private land.

should have also been produced indicating whether the investment benefits the local communities and their economies. The documents would have provided right answers regarding the Buxton Project.

In view of the above, we reiterate that a lot of vital information regarding the urban renewal project has been withheld by the County government of Mombasa and the Developer in order to conceal the act of irregular land allocation by the county government.

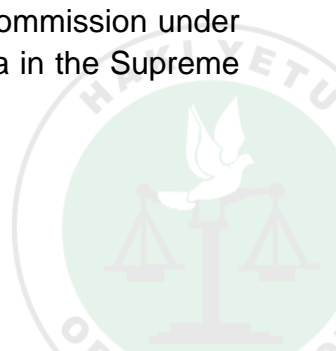
In the absence of the above documents, it can safely be concluded that the County Government of Mombasa did not follow the lawful procedure of allocating land for investment purposes hence the project is unprocedural, illegal and unconstitutional for want of compliance under Article 62 (2) and (4) of the Constitution and other enabling provisions of the law, which is highlighted hereinbelow:

- (a) Section 12 (3) and 12 (4) of the Land Act No 6 of 2012;
- (b) Regulation 28 and 29 of the Land (Allocation of Public Land) Regulations, 2017;
- (c) Regulations 3, 4 and 5 of the Land (Conversion of Land) Rules, 2017;

The position is fortified by the following authorities:

- (a) In Re the Matter of the National Lands Commission under Article 163(6) of the Constitution of Kenya in the Supreme Court of Kenya.⁵⁵

⁵⁵ Reference No 2 of 2014.



(b) Cordison International (K) Limited -vs- Chairman National Land Commission & 44 others.⁵⁶ This case relates to a similar investment project, where public land was irregularly allocated to an investor but the Court of Appeal confirmed that due procedure was not followed. This decision is vital in the protection of public land from wanton disregard of the law by Counties.

6.6 Tenancy-Purchase Scheme

Sometime in 2018, the County government of Mombasa, through a documented interview by the Economic and Social Rights Centre-Hakijamii⁵⁷ stated that the Buxton housing project, among other projects in Mombasa will be geared towards long term purchases by the tenants through a rent to own scheme. Also, in a request for proposal for Urban Renewal and Re-development of old estates within Mombasa County through the Joint Venture Partnership dated June, 2019 (Lot 7), the County set up an evaluation of financial proposal regarding a proposed mortgage facility and tenant purchase scheme.⁵⁸ Similarly, the Environment and Social Impact Assessment Study Report dated December 2020, at page 68, correctly captured that the project should introduce a tenancy purchase scheme. However, in the sale agreement given to the tenants, it was provided that the purchase is on off plan basis whereby the funds are to be utilized for the development of the project.

Page 6 Paragraph 2 of the Sale Agreement provides:

⁵⁶ N 52 above.

⁵⁷ State of Housing Report Hakijamii, VOLUME 2: *Is Government Faltering on its' Big 4 Housing Promises?* (November 2019). Available at: <https://www.hakijamii.com/wpcontent/uploads/2020/01/State-of-Housing-Report-Volume-2.pdf> <Assessed on 1st September, 2021>.

⁵⁸ Information available at: <https://www.mombasa.go.ke/wp-content/uploads/2019/07/BUXTON-FINAL.docx>. <Assessed on 1st September, 2021>.

“The Purchaser hereby acknowledges that this purchase is off plan and the Apartment is yet to be constructed and/or completed. Any money paid to the Vendor’s Advocate (if any) shall promptly be forwarded to the Vendor for utilization in the Development. As such no money paid by the Purchaser shall be held by the Vendor’s Advocate on stakeholder’s basis and the Purchaser hereby releases the Vendor’s Advocate from any liability.”

The County Government and the Developer were not candid by proposing a tenant purchase scheme on one hand and an off-plan purchase on the other hand. In our mind, Buxton tenants were economically disadvantaged at the time of their eviction since their rent amounts did not exceed Kshs 5,000 per month hence unable to raise Kshs 1,200,000/= (exclusive of legal fees and disbursements) for a studio apartment, Kshs 1,800,000/= (exclusive of legal fees and disbursements) for a one bedroom unit, Kshs 3,000,000/= (exclusive of legal fees and disbursements) for a two bedroom unit and Kshs 4,200,000/= (exclusive legal fees and disbursements) for a three bedroom apartment, within 7 days upon the execution of the sale agreement.

Also, the economic effects of the Covid-19 pandemic were dominant at the time of the demolition and issuance of the letter of offer and sale agreements hence many tenants could not have been in a position to take out loans for an off-plan project. In a nutshell, neither the County government nor the Developer has guaranteed that the evicted tenants will be considered as tenants after the re-development of the project.



CHAPTER 7

Secret Agreements and Devious Plans?

Following the persistent refusal by the County government to make public the documents relating to the Buxton housing project contract and in an attempt to stop the demolitions and evictions, the former Buxton tenants presented a petition to the Mombasa County Assembly on 3rd September 2020 for their intervention. Dismayed by the County Assembly's unresponsiveness to the petition, the petitioners moved the Senate to have their concerns addressed. Meaningful remarks⁵⁹ made in the senate in support of the petition by Senators Mutula Kilonzo and Moses Wetang'ula respectively were as follows:

"We must investigate why a court cannot find it warranted to issue an injunction. The court is issuing injunctions over everything.....but they cannot issue injunctions to stop ordinary Kenyans from being evicted."

"The issue of regeneration and redevelopment of old estates is a good one, the problem is that it is the mystery around the redevelopment and the eventual disenfranchising of people and families that have lived in this estate for years that is worrying."

⁵⁹ Parliament of Kenya: The Senate; The Hansard Tuesday, 30th March, 2021. Available at: <http://www.parliament.go.ke/sites/default/files/2021-04/Hansard%20Tuesday%2C%2030th%20March%2C%202021.pdf>. <Assessed on 12th November, 2021>.

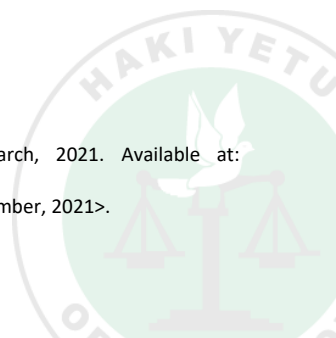




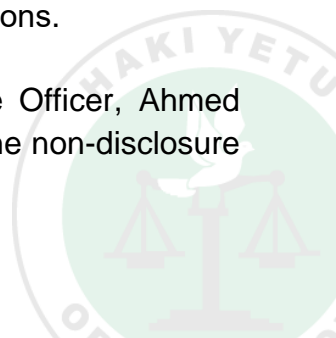
Figure 4: Demolition of Buxton old estate. Photo credit: The Star Newspaper



Figure 5: Former Buxton Residents salvaging their properties during demolitions

The senate Committee on Roads and Transportation was then tasked to investigate the housing project. The governor was invited for a meeting on 29th April, 2021 and further on 7th July to respond to concerns raised in the petition which the governor failed to attend compelling the Committee to come to Mombasa on 19th August 2021. As if being contemptuous of court orders is not enough, the governor, displaying a show of might, arrogance and sheer impunity failed to heed the senate's summons.

On his part, the Buxton Point Chief Executive Officer, Ahmed Badawy argued that the company is bound by the non-disclosure



clause of the contract and therefore could not produce documents concerning the project.

Regardless of the governor's absence, the petitioners through the help of Coast Land Non-State Actors (CLNSA)⁶⁰, presented their petition and the Committee observed that the questions raised by the residents were not immaterial and resolved to suspend the project until the governor appeared in person to produce documents and answer all the questions raised by the petitioners. However, Buxton Point defied the senate's directive as was borne out by the contents of their letter dated 20th August, 2021 arguing that the senate committee does not have the powers to suspend the project.

Extending its summons and invoking Article 35 and 125 (2) (b) of the Constitution⁶¹, the committee ordered the governor and the project developer to appear in person within 14 days to table all the documents relating to the contract. These included:

- The tender advert
- Minutes of the meeting of the tendering committee prior to the developer being awarded the tender
- Resolutions by the tendering committee
- Tender committee report to find out whether the tender was responsive
- The Joint Venture Agreement between the County Government of Mombasa and Buxton Point Apartment Limited

⁶⁰ CLNSA is a CLNSA is a network in the coastal region that began in 2011 and operates with both county and national actors. The main aim of the network is to advocate for land, housing and environment rights.

⁶¹ Article 35 of the constitution guarantees every citizen the right of access to information held by the State; and to information held by "another person" and required for the exercise or protection of any right or fundamental freedom while Article 125 (2) (b) gives power to senate committees to compel the production of documents.

- Plans for Redevelopment
- Relocation Action plan
- Actual status of land and all the current ownership documents of the property and any transactions that it might have started either in transfers, revocations or surrender for entire parcel of land known as Buxton

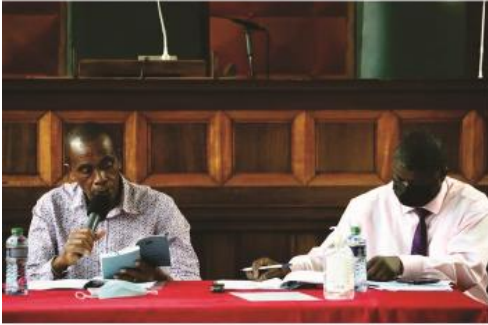
After the senate committee insisted on in person hearing, the governor finally appeared before the committee on 10th September 2021. Our efforts to unearth the truth during the hearing was challenging as the governor attempted to evade most of the committee's questions and he knowingly gave unsatisfactory responses to the concerns raised and failed to justify his so-called noble project.

Senate Hearing at the County of Mombasa



Above: Chair of Buxton Welfare Association and Ms. Ali of Haki Yetu Organisation presenting on the Buxton Housing petition





Left: Senator Kimani Wamatangi making a reference to the Constitution of Kenya to compel the production of contract and tender documents.



Right: The Senate Committee on Roads and Transportation visiting the Buston construction site.



Figure 6: (Above Left) Governor Ali Hassan Joho taking an oath during the senate hearing. Photo credit: Elvis Ogina, Standard Newspaper



Figure 7: (Above Right) Governor Ali Hassan Joho's Hearing at the Parliament Buildings in Nairobi





Figure 8: Buxton Petitioners listening keenly



Figure 9: The Governor of Mombasa answering questions before the Senate Committee on Roads and Transportation. Photo credit: Elvis Ogina, Standard Newspaper.

The governor also tabled the following documents pertaining the Redevelopment of Buxton Estate:

1. The Joint Venture Agreement.
2. Plans for Redevelopment and
3. Relocation plan

He also admitted before the Committee and members of the public that the land which is subject of the JV Agreement is a public land contrary to what was said in court in Justus Chai Mbaru case.⁶² Moreover, the JV Agreement states that MSA BLOCK/XVII/1776 is the property where the redevelopment is being conducted. However, according to our research, we found that MSA BLOCK/XVII/1776 belongs to Seif Said, Leila Mohamed Seif and Seif Bin Salim (as trustees of Seif Bin Salim Trust).

It was further noticed that the Certificate of Lease for BLOCK/XVII/1821 registered on 6th July 2021 shows that the Lessor is the Municipal Council of Mombasa and in the same Certificate of Lease, it is indicated that BLOCK/XVII/1821 was transferred to Buxton Point Apartment Limited.

7.0 Tendering process

With the documents tabled by the Governor, it was established that the tender had only one bidder who is Gulf Cap Limited. The bidder lacked the capacity and experience of carrying a project of a magnitude like the Kshs. 6 billion Buxton Housing project because in his profile he indicated that he had the capacity to carry out the project without giving evidence of the same. The tender involves undertaking of a project using public land and therefore the procuring entity failed to take into consideration relevant

⁶² N 51 above.

factors, in particular that Gulf Cap Limited's tender had failed to provide information on its technical capacity to undertake the project in the subject tender which was a mandatory part of evaluation for all bidders who had submitted their respective bids in response to the subject tender. This contravenes the Constitutional provisions with regard to Public Procurement and all the salient procurement rules of Public Procurement and Asset Disposal Act.⁶³

7.1 Environmental Social Impact Assessment Report

The Environmental Social Impact Assessment Study Report for proposed Buxton affordable housing project clearly indicates that the proposed re-development will be done on Plot No. MOMBASA/XVII/625 and MOMBASA/XVII/985 while in the Julius Chai Mbaru case⁶⁴, the County maintained that the proposed redevelopment will be done on a private land known as Plot No. MOMBASA/BLOCK XVII/1776. Strangely enough, when the governor was queried on the value of the project, he said that the ESIA report dated December 2020 should not be relied on because NEMA did not give a correct figure about the project cost. In a nutshell the governor disowned the report. Section 115 (1) (b) of the County Governments Act No. 17 of 2012 provides as follows:

“Public participation in the county planning processes shall be mandatory and be facilitated through provision to the public of clear and unambiguous information on any matter under consideration in the planning process, including— (i) clear strategic environmental assessments; (ii) **clear environmental impact assessment reports**; (iii) expected development

⁶³ No. 33 of 2015, Laws of Kenya.

⁶⁴ N 51 above.



outcomes; and (iv) development options and their cost implications.”

Again, the county government of Mombasa has shown that it is deceitful as evidenced by contradictory sentiments of the governor. Thus, information provided cannot be relied on because for the public to effectively participate in decision making, they need to have correct information. Absence of reliable information suggest lack of accountability on the part of public institutions. As James Madison once said:

“A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.” ⁶⁵

7.2 Senate Committee's Directives

At the end of the hearing, the committee gave the following directives:

1. The governor should convene a meeting with former Buxton home owners and have an engagement with them to make them understand precisely what he said to the Committee about the affordable housing concept in Buxton and answer **ALL** the questions that have been raised by the petitioners.
2. In the course of the above engagement, the governor should address the possibility of extending the deadline of December 2021 for former Buxton tenants in order to give them more time to purchase the new housing units.

⁶⁵ Available at https://www.loc.gov/resource/mjm.20_0155_0159/?sp=1&st=text. <Accessed on 5th June, 2021>.

3. The governor should consider expanding the retention of the catch of the number of houses the county government will have available to former Buxton tenants. In this case, the Senate Committee's point of view is that the governor should look at the value proposition between the Joint venture of the county government & the developer as partners to see whether they are able to extend the benefits from the side of the county government. The county government should then work out a formula on how the former tenants will own the new houses.
4. The county government should consider what methods they are going to employ to intervene on behalf of former tenants in order to help them benefit from the low-cost housing concept as has been programmed and muted by the National Government including the benefits of long-term repayment periods. The county government should also discuss and assist former Buxton tenants on how they can access facilities from the financial institutions so that they don't abandon them in the middle of the project.
5. The Committee during its discussion will determine whether the tender was responsive.





Figure 10: Ongoing construction of phase 1 New Buxton housing units in Mombasa



CHAPTER 8

Conclusion & Recommendations

8.0 Conclusion

A number of points emerge from this study on the right to housing in Mombasa:

1. There is a housing crisis in Mombasa County and the deficit in adequate and affordable housing continues to increase each year. As a result, more and more people are forced to find refuge in already overcrowded informal settlements where they are without security of tenure.
2. The gap in public housing in Mombasa offers a golden opportunist for a variety of real estate agents, landlords and structure owners to make excessive profits by offering accommodation at prices that are not regulated.
3. By focusing on the renewal of existing estates the County Government has ignored the housing needs and plight of 60% of the population who live in informal settlements. Put another way, the County Government of Mombasa has made no effort to include the poorest of its citizens in the housing programme.



8.1 Recommendations

1. The need for housing in Mombasa is in the affordable rental sector, not in home ownership. The majority of workers in Mombasa consider 'bara" (rural home) as the place they would want to construct their family home. They only require affordable rented accommodation in the city. Selling off 90% of the proposed 30,000 new units to individuals and investors does nothing to respond to the real needs of the public. A mere 3,000 units remaining as public housing is grossly inadequate.
2. The County Government must reconsider as a matter of urgency that the remaining undeveloped and uncontracted estates be set aside as public rented housing.
3. The County Government of Mombasa has denied the public the right to know the details of the contracts with the housing developers. These must be urgently released and include facts on the leases of the houses, the status of the land and the long-term conditions involved in the project.
4. Land governance and urban planning need to be restructured. Mombasa urgently needs a planning unit whereby the public know what are the future needs and plans for the expanding city.
5. If the government wishes to effectively address the housing crisis in cities and all over the Country, it must control borrowing rates from the bank, budget for public housing and lower tax on building materials to facilitate the massive countrywide construction of houses that is required.

6. The housing problem in Mombasa cannot be resolved without addressing the land problem. The Ndungu report on illegally and irregularly allocated land must be urgently implemented in its entirety. Without land justice and reforms, informal settlements can never be developed, upgraded or regularized.
7. When security of tenure is guaranteed – even with community titling – then community housing projects can be initiated whereby the residents establish a cooperative and work as a community with government support to develop their areas.

Housing poverty in cities like Mombasa often manifests itself in the form of squatter settlements, informal settlements, slum dwelling, overcrowded houses, evictions and homelessness. While the Mombasa Urban Development Programme is a good idea to upgrade old estates, it is providing a small, almost negligible houses compared to the housing demand of 25,000 units against a supply of 4,000 houses. It is not a solution for inadequate and unaffordable housing in Mombasa and we need more than just upgrading the estates.

Therefore, this study suggests that in order to address housing problems, the County Government must go back to the drawing board because what they have so far planned and begun implementing will do little to address the real housing needs of the expanding city.







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'... act justly, love tenderly, and walk humbly with thy God.'
Micah 6:8