

Defining and assessing standards for community-smart consultation and consent in the context of land return

A case study from Tanzania

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ABSTRACT

Context and background

A global land rush – driven by a variety of factors—is driving transformative change in African rural communities that depend on land for their livelihoods. This increased demand has resulted in the acquisition of large areas of land on the continent. While the pace and scale of land acquisition may be levelling off,¹ in many cases, some or all of the land acquired by investors stands idle.²

Land return – in which a private company legally transfers all or part of its land holdings back to a community or government – is an emerging phenomenon that may be on the rise as companies seek to limit their exposure to risk, governments redesignate lands and communities push for the return of their land. Land return holds promise as a way to correct for overzealous and misguided land acquisition and historical injustices amidst a growing understanding of the value of land to communities.

Goal and Objective

Yet land return presents challenges, many of which may be unexpected. Though existing frameworks and guidelines regarding responsible investments require effective community consultation, there is less clarity and limited guidance on what risks, mitigation strategies, and tools are needed to safeguard the rights of communities in the context of land return.

Methodology

This paper brings forward experience from a recent land return process in Tanzania in which Landesa and its partners worked to identify and put into practice standards and approaches that protect community rights while supporting a company’s efforts to comply with best practices, national and international requirements and expectations for responsible corporate practice. The tools and processes tested and shared through this project align with efforts to support implementation of the Acceleration of the African Continental Free Trade Areas (AfCFTA) and achieve the aspiration of the Africa We Want (Agenda 2063).

Results:

This paper highlights the importance of inclusive and transparent land governance practices by presenting a case study of Landesa’s experience working with a forestry company to engage with communities and local land administration to understand needs and expectations around the company’s intention to return approximately 14,000 hectares of land. The case study will highlight land return-related risks, present a model for community benefit sharing arrangements, and will share lessons learned, highlighting potential best practices that companies holding idle land might consider and employ to reallocate to land-scarce communities.

Keywords:

Africa, Tanzania, Land, Business, Community, consultation, consent, responsible investment, FPIC, tenure security, land return, policy

1. OVERVIEW OF LAND RETURN

Land return, also referred to as land divestment, is a process in which a private company legally transfers all or part of its land holdings back to a community or government. While the precise scale of the phenomenon is not known, recent cases suggest that land return may be on the rise globally, as companies, communities, and governments reevaluate land requirements following the surging large-scale land acquisitions by foreign investors in the mid-2000s. The global land rush – driven by a variety of factors including increased demand for food and biofuels, carbon markets, and speculation—resulted in large areas of land being acquired by companies, often for lease terms of 30 years or more. While the pace and scale of land acquisition may be levelling off,¹ in many cases, some or all of the land acquired by investors stands idle. According to a report by the World Bank, of the 45 million hectares of land under negotiation in 2009, 70% percent was in Africa (Hall, 2011), much of which was community land already occupied and used by local people (Cotula L, 2009).

The scale and pace of the global land rush focused attention on foreign investment in Africa, and exposed fractures and competing visions for growth and investment between citizens and states (Hall, 2011), with some viewing land acquisition by investors as a threat to the livelihood of farming households. Land investments have also aggravated existing, conflicts over land and related natural resources, particularly when communities are not effectively consulted and do not give their free and informed consent to a land transaction.

As populations continue to increase alongside ever-greater demands for land for agriculture, carbon capture, natural resources development, and human settlements, land return holds promise as a way to correct for overallocation of land, and to address historical injustices amidst a growing understanding of the value of land to communities as an economic and cultural asset necessary for resilience and sustainable growth.

1.1 Drivers of Land Return.

A number of factors could contribute to a company's decision to return land. First, a company that has acquired land may determine that some or all of the land acquired is not suitable for the originally intended purpose. In some cases, the business purpose or crop may no longer be workable or profitable. For instance, the jatropha rush of the early 2000s drove investors to acquire huge concessions, with more than 2.2 million acres being planted globally by 2008 (Mowbray, 2008). The majority of these investments failed due to low yields and an economic downturn that led investors to back out of jatropha plantations.

Indeed, failed land investments could be a significant source of future land returns. According to Land Matrix, 73% of the 30 million ha of land acquired by investors since 2012 has not yet been developed for the intended commercial use.² In most cases, failed land deals have not resulted in land being returned to the communities.

Community demand for land return.

For different reasons, including land scarcity due to increasing population, climate change and expansions of different land uses that increases pressure on land use, communities are push back land deals entered whether legal or in violation of proper procedures, and demand back their acquired land. In Kilwa District of Tanzania for example, communities from four villages whose land was acquired for jatropha production, their land was return by the commissioner for land due to irregularities in the process which involved ineffective community consultation (Luhula, M and Schwartz, B, 2020).

Response to growing demand for socially responsible investment.

Most investors hold big chunks of idle land which stay for years without being developed. For transnational corporations for example, international standards bind them to the extent that, implications of their business are high if the standards are breached. This puts pressure to business to find way to ensure that land acquired are utilized for the benefit also of the surrounding community. This call for return of some unused land for community use either partially/in a short term or complete return.

1.2 Community Land Return Potentials.

Land return to community from business or government may be prompted by different factors including:

Correction for over-allocation.

More than 90% of Africa's rural land which mostly targeted for land-based investment acquisition is undocumented (WB 2012). For this and many others, communities make uninformed decisions which in turn realizes that land allocated for investment is over and beyond village limit. In Tanzania for example, only 20% of village land is documented by having village land use plans which lasts for 10 years before their reviewed.

Reduce or remedy conflicts.

Communities in conflict of any form either with investors or with other land users have direct impact to prosperity of an investment. It is therefore advised that, it is essential for investors and implementers of investments in agriculture to identify, assess and attempt to address community land conflicts because, if left unaddressed, they can undermine the success of the project and generate negative impacts for local communities, including human rights violations (Karol Boudreaux et al 2017). In one way or the other, a company can use land return a way to reduce or avoid land use conflicts at community level.

Limit company risk exposure.

Land return to community strengthens community- investor relationship and support business social license to operate. In doing so, communities are also sensitized of respecting and protecting the neighboring investment. Lack of proper information limits communities understanding to legal

implication of their decision to allocate land to the investor. In a scenario where community starts struggling for land to till or use, their minds go back to the acquired land. It is advised that, any responsible investment should make sure that, Communities have timely and reliable information about land-based investments and be made aware of their rights and responsibilities in land-based investments issues (Luhula, M et al, 2019).

1.3 Challenges of Land Return.

Legal structure and its facilitation.

In most of the practices land is acquired for a long-term lease where community's access to land limited for the benefit of the business or state interests and in those cases, there are no clear set rules for community land return. In Tanzania for example the Village land Act, No.5 and Land Act No. 4 both of 1999 provides for procedures of land acquisition and transfer of land from village land to general land or reserved land and vice versa. There is no specific legal procedure for an acquired land by the investor/company that gives prescribed rules to follow for the Company to return land to the community. In the circumstances where there is no one piece of legal instrument providing for community land return, different views emerge as to whether the process is legal and does not compromise power relations among land governance systems. In this case, the negotiation process does not guarantee success and in the midst promises hijack of the process by the dominant authorities which in land related matters it always the state. To navigate through this exchange of possible legal procedures to legalize the process, the land return process requires cross-references of different local jurisprudence and international standards while putting interest of the community at the center.

Redistribution system and community designed inequalities.

It requires in-depth community needs assessment to determine who should benefit from the process and how. But also, the existing land governance gap to curb possibilities of benefiting a wrong community group or facilitates continuous inequality that is socially and, in some instances, legally constructed. In this case, elites who are likely to be politicians, well-off people or of any form are likely to benefit than poor community members who actually should be the primary target group. Equally, women and youth are also mostly victims of these inequality if the process are not properly undertaken and monitored.

2. TANZANIA CASE STUDY

2.1 Background.

In a process of embracing global standards for responsible land-based investment and working to establish and maintain positive relations with communities where in this case, a forestry company, GRL Tanzania operating in Tanzania for more than 20 year and holding more than 60000 hectares of land located in the Southern highlands of Tanzania.

In 2022, the company undertook an assessment of its land holdings to better understand the community-land dynamics around its farms, and to identify any potential risks and mitigation options, including identifying land that could be returned to communities. Through this assessment, the forestry Company identified approximately 14,900 hectares of unutilized land for return back to community members in the Mufindi and Kilombero Districts of Iringa and Morogoro regions, respectively.

To ensure that the land return process complies with Tanzanian laws and regulations and also well-aligned with best practices for community consultation, participatory decision making around land, and responsible private sector land-based investment, GRL Tanzania sought out support from Landesa, a global organization working to secure land rights, and Haki Ardhi, a Tanzanian civil society organization whose mission is to promote land rights for rural communities. Landesa and its partner, employed an approach that centered on consultation and engagement with different stakeholders that included village leaders and community members for purposes of understanding and balancing evolving community priorities and land needs with dynamic commercial context.

To understand the law applicable, stakeholders to be engaged and how to engage, Landesa and Hakiardhi conducted a critical analysis of the law and practice which yielded to a strategy that informed status of the lands intended for return, its procedure for return, stakeholders' engagement, risks, and mitigation measures.

2.2 Land Return Process.

The analysis conducted discovered that the land in question is village land. Village land is managed by the village authorities which include village Council and village Assembly. Since villages are found in their respective Districts, the District Council stands as an advisory body on land matters for the villages. The following steps of land return entails process on village land in the context of Tanzania.

Initial Village meetings and consultations.

Irrespective of the land return driver, a conceived land return idea must be presented to the respective village. A letter of intended, written or oral presentation to the village of an intention to return land should be presented. These initial meetings are critical to help understand community needs and interest in the land but also facilitate inclusivity of all community groups which may have different interests. Landesa and Hakiardhi two rounds of community consultations bringing in different groups both collectively and by groups. The consultations involved women, youth, elders, people with disabilities, village committees, village land council, and village leaders. Following community consultations, a village Council and Village Assembly meetings were convened to validate information collected in separate meetings and discuss issues arising out of the land return process.

Site visit and boundary verification.

The acquired land, which is the subject of return, the next step involves verification to determine whether there are encroachments or any encumbrances. Maps interpretations and boundary

demarcation is important to inform beneficiaries of the land to clearly understand the boundaries of the land for an informed decision.

Mitigation Actions.

In the process of community consultations and village level meetings, different issues are raised which require mitigation. This may include unfulfilled commitments entered during land acquisition, pending and or emerging interest on land. At this stage, parties to the process negotiate on best ways to address issues arising out of the land return process. In the case of GRL Tanzania and the three communities for example, there were pending projects agreed to be implemented which required separate agreement. The Company agreed to provide annual contribution to the villages in a community development fund to be established.

Meeting with the District Councils.

As pointed above, District Council are established as advisory bodies for the villages among other functions. Districts also hold interests in village land and therefore it is important to be engaged at a better stage before completion of the process. In this process, it was discovered that one among the District Councils held a different opinion towards land return to communities. In its view, the right process would be proceeding with transfer and not return it to remain village land while compensation was paid. By paying compensation, this was technically a compulsory acquisition by the government. This promoted a series of engagement meetings and exchange of information before it was anonymously agreed to proceed with land return to communities.

Development and signing of land return agreements.

To signify land return, communities and the Company entered in land return agreement which enumerated rights and obligations of both parties and also putting in principle continuous relationship between the two parties. This process involves drafting of the contracts, review, and confirmation of the contracts by the village council and approval of the public signification of the contracts by the village Assembly.

2.3 Land Return and Promotion of Free, Prior, and Informed Consent (FPIC).

For a successful and sustainable land return to community, FPIC is inevitable. Its realization is neither an event nor a fortune, rather a process that requires an inclusive engagement strategy that facilitates effective consultation of stakeholders while in the process sharing right and timely information of the process is central. A people centered, transparent and adoptive process also forms part to enhancing FPIC. Landesa and Hakiardhi, developed a living strategy and adopted series of community and other stakeholders' consultative meetings that helped mitigate risks of a top-down land return or process dominated by power imbalance.

2.4 Current Status of the Returned Land.

The land return process gave powers of land management to the respective village council while decisions left to the people through village Assembly meetings. Communities have full powers to make decisions on the returned land for their use. However, community consultations, it's as discovered that, communities and local authorities have limited capacity to administer land. This poses risk of land mismanagement and therefore, Landesa and Hakiardhi are in the process of building capacity of communities to be able to understand their powers and limitations in land administration. Equality in enjoying rights to land also required improvement and thus trainings on land rights, land administrations, climate change, environmental conservation are among the topics communities and village leaders are trained.

During land acquisition also, villages conducted land use plans which demarcated the returned land as investment land, despite the fact that land use plans are no longer active since they are beyond ten years of life which is a legal requirement, the maps and land uses are still active to the extent of the previous designated land use. Finding this importance, Landesa and Hakiardhi, are currently supporting review of land use plans to give opportunity for communities to determine land uses according to current needs and demands. This also will help them put in place bylaws for protection of the land from loss or encroachment for the concept that the company no longer protects it.

3. DISCUSSION/FINDINGS

Land return by a business company is not a common experience at least in Tanzania. This case presents a unique opportunity for learning and improving the law and practice for an informed future endeavor. In undertaking this process, the following were the findings for discussion.

3.1 Tanzanian legal system does not have clear legal framework on land return.

As pointed above, the Land Act, and the Village Land Act Number 4 and 5 respectively both of 1999 do not clearly state what should be the procedure for a company that acquired land, and it intends to return to the community before the land is transferred to general land. The Land Act and Village Land Act give power to the president to transfer any land in Tanzania from one category to the other as provided under section 4 of the Land Act and Village and Act for public interest. Therefore, Companies/investors can acquire village land for investment and request for transfer from Village Land to general land before they are issued with granted rights of occupancy (ies). An investor can make a direct application to a Village or through a broker where it identifies land potential for investment (Sulle E. 2017). A village determined the application and decided through village council and village assembly meetings (Ibid). In practice, when Village land is acquired for investment, it is transferred to general land. A general land with granted titled its return is done by surrender of title to the Commissioner for lands when an investor wishes or when the title is revoked for breach of condition (Section 42 and 49 of the Land Act, 1999). Unlike certainty on return of granted title, a village land under the process of transfer, it returns is not provided by the law. However, as much land is not transferred, it is still village land under the control of the village Council as provided by section 8 of the Village Land Act. So, every person working on village land is responsible to the village Council and the Village Assembly hence this land return. As said above, this inference holds different interpretation. In 2016, the Ministry responsible for lands initiated a process of Policy reform. It is

therefore in the interest of safeguarding rights of people and cultivating a culture of land return practice by business Company. The law should be specific on what are standard procedures for land return to community by a Company.

3.2 Community land Return and reduction of community's pressure on land.

In Africa, people below the age of 35 constitute about 65 percent of the population, and nearly 50 percent are under the age of 19.5 (Mrisho, H. 2020). Tanzania's population like other African countries, its population is growing fast and most it is rural based where its primary employment is agriculture. Agriculture employs more than 65% of the population in Tanzania (Ibid). The growing population coupled with land degradation due to overuse increases pressure on land and in some cases cause land conflicts. Land conflicts are a threat to successful investment and therefore an investor has a role to ensure there are no potential elements of land use conflicts. In the areas where GRL Tanzania returned land, there were also growing pressure towards demands for land. This is a risk for an investment if pressure gets high to prompt land use conflicts. Community land return especially for unused land by the Company reduces that pressure. The return of more than 14000 hectares of land promises a reduction of shortage of land if properly managed by the community. Building capacity of communities and supporting land use planning will facilitate sustainable land management as an important component to mitigate land mismanagement.

3.3 Community land return and approaches in achieving responsible investment.

It is a common practice for investments to exchange hands among business or use acquired land for securing loans from banks for commercial benefits. Many Companies, owns big chunks of land, majority of which are unused, and communities suffer to find a space to till. This has been inbuilt in the minds of the community and other stakeholders that no company will dare wish to return back land to community where it was acquired. In many cases, when the company fails to develop, it will either sale, lease or wait until the government revokes its right to use so it can institute a suit against the government. In the consultation meetings, communities in these areas could not believe that the company would return the land until contracts were signed in public. This practice sets a best practice towards achieving responsible investment.

3.4 Inseparability of Free, Prior and Informed Consent (FPIC) and effective land return.

FPIC is derived from the right to self-determination. This right is enshrined in the international instruments is a critical component on engaging communities on matters affecting them. Article 1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) states that "all people have right to self-determination. Land return to community requires community's self-determination where community members understand their needs, capacity to administer land, potential risks of loss of land, inequality, and injustice. To understand and mitigate these risks, FPIC is inevitable. Landesa and Hakiardhi developed strategies shaped by the community themselves. This helped engage different groups of the respective community. Effective community engagement by employing community tailored strategies on FPIC helped smooth land return process and community land protection.

3.5 The inclusive process of developing and testing field tailored tools is critical to effective land and natural resource governance.

One of the pressing questions which was answered by the field experience concerned what signifies land return. There existed no land related contracts between the Company and communities except for a community development projects contract and village meeting minutes to justify land allocation for investment. The field experience discovered that it is possible to have a land return contract, and these were developed in a simple language that communities can understand before they signed as a sign of land return.

4. CONCLUSIONS

Landesa and Hakiardhi spent almost a year working with different stakeholders to complete land return. This process has left behind lessons for future upscale and improvements. This includes:

4.1 The Land return process in Tanzania is a combination of law and practice. The land laws and field practice offer five main procedures for community land return by an investor. This is specific for village land acquired for investment or any other use but has not been transferred to general or reserved land. The procedures include, Initial Village meetings and consultations, Site visit and boundary verification, Mitigation Actions, Meeting with the District Councils and Development and signing of land return agreements.

4.2 Community Capacity building and land use plans are important to ensure sustainability of community returned land. Building the capacity of community members through land rights and administration training helps communities understand their stance and mitigate land capture by elites and other powerful groups in the community. On the other hand, land use plans strengthen communities' ability to protect their land through clear land use plans and strong bylaws.

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4.4 Legal reforms are inevitable to facilitate smooth land return in Tanzania. Unclear legal provisions on community land return poses difference in legal interpretations and increases uncertainty in the land return process. The Tanzania's legal framework especially Village Land Act and Land Act need to be amended to accommodate land return experience.

4.5 Community Land return by an investor is a new phenomenon the Tanzania experience. Landesa's experience on community land return by an investor is a new experience in Tanzania. Therefore, this presents an experience for future reference as it is an undertaking of its own.

5 ACKNOWLEDGEMENT

6 FUNDING

The findings for this paper are funded through the Community-Smart Consultation and Consent (CSCC) project.

7 AUTHORS' CONTRIBUTIONS

5. REFERENCES

- Boudreaux, K.; Vhugen D.; Walter, N. (2017). Community Land Conflicts: How Local Land Disputes Affect Private Sector Investments and Development Projects. Retrieved from <https://land.igad.int/index.php/documents-1/countries/kenya/investment-3/628-community-land-conflicts-how-local-land-disputes-affect-private-sector-investments-and-development-projects-1/file>
- Cotula, L.; Vermeulen, S.; Leonard, R.; Keely, J. (2009). Land Grab or development opportunity? Agricultural investment and international land deals in Africa. London International Institute for Environment and Development
- Luhula, M.; Massay, G.; Shadrack, N.; Faustin, Z.; Masuka, S.; Sulle, E. (2019). Making land-based investments work for communities in Tanzania. The Tanzania Natural Resource Forum (TNRF). Retrieved from https://www.tnrf.org/files/pubs/policy_brief.pdf
- Luhula, M & Shwartz, B. (2020). What happens when the landgrabbers leave? An account from Kilwa, Tanzania. London. International Institute for Environment and Development. Retrieved from <https://www.iied.org/what-happens-when-landgrabbers-leave-account-kilwa-tanzania>
- McKenzie, C. (2006). Forest governance in Zambezia, Mozambique: Chinese takeaway! Final Report for FONGZA
- Mowbray, S. (2023). Jatropha: The biofuel that bombed seeks a path to redemption. Mongabay. Retrieved from <https://news.mongabay.com/2023/04/jatropha-the-biofuel-that-bombed-seeks-a-path-to-redemption/>.
- Mrisho, H. (2020). Tanzania Youth Land Rights Assessment; Landesa. Retrieved from <https://cdn.landesa.org/wp-content/uploads/Tanzania-Youth-Land-Rights-Assessment-FINAL-081920.pdf>
- Sulle E. (2017). Local People and Investors: The Dynamics of Land Rights Configuration in Tanzania. Danish Institute for International Studies Working Paper 2017: 10. Retrieved from https://pure.diis.dk/ws/files/1220266/DIIS_WP_2017_10.pdf
- World Bank. (2013). Securing Africa's land for shared prosperity: a program to scale up reforms and investments. Retrieved from <https://documents.worldbank.org/en/publication/documents-reports/documentdetail/732661468191967924/securing-africas-land-for-shared-prosperity-a-program-to-scale-up-reforms-and-investments>

World Wide Fund for Nature. (2021). The State of Indigenous Peoples' and Local Communities' Lands and Territories: A technical review of the state of Indigenous Peoples' and Local Communities' lands, their contributions to global biodiversity conservation and ecosystem services, the pressures they face, and recommendations for actions. Retrieved from https://wwflac.awsassets.panda.org/downloads/report_the_state_of_the_indigenous_peoples_and_local_communities_lands_and_territories_1.pdf. Retrieved September 19, 2023.

NATIONAL LEGAL INSTRUMENTS

The Land Act, No. 4 of 1999

The Land Use Planning Act, No. 6 of 2007

The Village Land Act, No. of 1999